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IRISH ASSOCIATION  
*of*  
LAW TEACHERS

Dear delegate,

Welcome to the 2013 Annual Conference of the Irish Association of Law Teachers at the Stormont Hotel, Belfast. It has been many years since the IALT's annual conference has been held in Northern Ireland and we are delighted to return once again to Belfast this year. Our conference takes place at the end of another busy and successful year for the Association.

The IALT Spring Seminar took place on Friday 24 May 2013 at the Honorable Society of King's Inns, Dublin. The Rt. Hon the Baroness Hale of Richmond, Professor Colin Scott, University College Dublin and Dr Bláthna Ruane SC, addressed the audience on the role of the judiciary in contemporary society.

The Association has awarded two Postgraduate Student Scholarships to enable two students to attend and present at this year's conference. This is the third 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 Osayomwanbor Enofe and Christina Götzelmann both of University 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.

The social outing on Saturday afternoon is being hosted by Professor Bill Rolston of the University of Ulster and will feature a bus tour of Belfast's famous wall murals. Places on the tour are limited to 25 so please register your interest at the registration desk as soon as possible.

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 Imelda Maher, Raymond Friel and John O'Dowd for their individual and collective contribution to the conference.

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

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

Best wishes,

*Noel McGrath*

**President of the Irish Association of Law Teachers 2012-2013**



## **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 Níamh Howlin of UCD).

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

**IALT COUNCIL 2012-2013**

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

Deirdre Ahern, Trinity College Dublin  
Brenda Daly, Dublin City University  
Eimear Spain, University of Limerick  
Michael Doherty, NUI Maynooth  
Mary Faulkner, King's Inns  
Allison Kenneally, Institute of Technology Carlow  
Tanya Ní Mhuirthile

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 2013-2014 will be elected at the AGM which takes place on Sunday at 2pm in Confex 2.



IRISH ASSOCIATION  
*of*  
LAW TEACHERS

**2013 ANNUAL CONFERENCE PROGRAMME**  
**“Changing Times for the Legal Professions – Re-evaluating the Role of the Law Teacher”**

**22-24 November 2013**  
**Stormont Hotel,**  
**Belfast, Co. Antrim**

**Friday 22 November 2013**

- 5.30pm**                    **Registration opens**  
Venue: **Confex 2**
- 6.30pm**                    Welcome Reception sponsored by Queen’s University  
Belfast
- Venue: **Knockdene Suite**
- 19.30pm**                    Buffet Dinner  
Venue: **Knockdene Suite**

**Saturday 23 November 2013**

- 9.00am**                    **Registration opens**  
**Confex 2**
- 9.30-11.00am:**            **Parallel Sessions I\***
- Session A – Corporate Governance
- Session B – Legal Education
- Session C – Criminal Law and Criminology

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\* Details and locations of Parallel Session below.

**11.00-11.30am:**                   **Coffee**

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

Session D – Immigration and Human Rights

Session E – Competition Law

Session F – Family and Migration Law

**1.00-1.45pm:**                   **Lunch – Knockdene Suite**  
*Sponsored by*



**1.45-3.45pm:**                   **Conference Plenary Session**  
Venue: **Confex 2& 3**

Chair: Noel McGrath, President, IALT 2012-2013

*Plenary Speakers:*

Professor Imelda Maher, University College Dublin

John O'Dowd, University College Dublin

Raymond Friel, University of Limerick

**4.00pm:**                    *Social Outing*  
(book in for this on registration)  
Congregate in Lobby at **4pm sharp**  
Transport provided.

*Committee of the Heads of Irish University Law  
Schools*

Confex 2

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\* Details and locations of Parallel Sessions below,

**7.30pm:** Conference pre-dinner reception and Gala Dinner  
Venue: **Knockdene Suite**

*Announcement of Conference Postgraduate Scholarship Winners*

<b>Sunday 24 November 2013</b>
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**10.00-11.30am** **Parallel Sessions III\***

Session G – Graduate Research Show Case

Session H – Tort and Medical Law Regulatory

Session I – Legal Education (2)

**11.30-11.45am:** **Coffee**

**11.45.-1.15pm:** **Parallel Sessions IV\***

Session J – Juries

Session K – Public and Comparative Law

Session L – Legal History

**1.15-2.00pm:** Lunch  
Venue: **Knockdene Suite**

**2.00-3.00pm:** *Annual General Meeting of the IALT*

Report on activities of the IALT in 2013, approval of accounts and election of Council members for the coming year.

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

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\* Details and locations of Parallel Session below.

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## **PARALLEL SESSIONS**

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

#### **SESSION A – CORPORATE GOVERNANCE**

Venue: Confex 2

**Chair: Professor Sally Wheeler, Queen’s University Belfast**

1. Dr Ciaran O’Kelly, Queen’s University Belfast, **“Corporate Governance as a Tool of Public Policy”**
2. Dr Deirdre Ahern, Trinity College Dublin, **“Diversity Reporting: The Value of a Structured Protocol to Manage Annual Report Disclosures”**
3. Professor Irene Lynch Fannon, University College Cork, **“The End of the Celtic Tiger – The Property Bubble, Corporate Governance and Failure”**

#### **SESSION B – LEGAL EDUCATION (1)**

Venue: Confex 3

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

1. Connie Healy, NUI Galway, **“Law or Conflict Resolution: What is the law teacher’s role?”**
2. Dr John Stannard, Queen’s University Belfast, **“Putting the Criminal Law Course Right”**
3. Dr Ciara Hackett, Queen’s University Belfast, **“The Law Teacher’s Responsibility to Teach Responsibility (CSR)”**

#### **SESSION C – CRIMINAL LAW AND CRIMINOLOGY**

Venue: Confex 4

**Chair: Dr Tanya Ní Mhuirthile, Griffith College Dublin**

1. Jennifer Schweppe, University of Limerick, **“Punishing Hate: Is Motive Really Irrelevant?”**
2. Dr Claire Hamilton, Dublin Institute of Technology, **“Cross-disciplinary Perspectives on Penal Policy: Some Thoughts from a Lawyer turned Social Scientist”**
3. Tom O’Malley, NUI Galway, **“Criminology in the Courtroom”**

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

### **SESSION D - IMMIGRATION AND HUMAN RIGHTS**

Venue: Confex 2

**Chair: Dr Eimear Spain, University of Limerick**

1. Professor Rory O'Connell, University of Ulster, "**Freedom of Expression in a democratic society; but what sort of democracy?**"
2. Dr Tanya Ní Mhurirthile, Griffith College Dublin, "**Legislating for Gender Recognition**"
3. Dr Liam Thornton, University College Dublin, "**Socio-Economic Rights Law in Ireland: Utilising the Potential of the ECHR ACT 2003**"
4. Dr Cliodhna Murphy, Dublin City University, "**Restricting Access to Labour Markets and to Employment Standards for Migrant Workers: the consequences of constructing 'illegality'**"

### **SESSION E – COMPETITION LAW**

Venue: Confex 3

**Chair: Mary Dobbs, Queen's University Belfast**

1. Dr Marek Martyniszyn, Queen's University Belfast, "**European Commission v. Gazprom: Markets and Geo-politics**"
2. Anna Louise Hinds, NUI Galway, "**The Changing Significance of Human Rights Protection in EU Competition Law Enforcement**"
3. Úna Woods, University of Limerick, "**In Defence of Bad Faith Adverse Possession: An Irish Perspective**"

### **SESSION F – FAMILY AND MIGRATION LAW**

Venue: Confex 4

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

1. Dr Lucy Ann Buckley, NUI Galway, "**Accessing Company Assets on Marital Breakdown in Ireland**"
2. Christina Götelzmann, University College Dublin, "**Irish Immigration Law and the Concept of Family**"
3. Eddie Keane, University of Limerick, "**Reforming the Contractual Status of Intermittent Workers**"
4. Dr Ronagh McQuigg, Queen's University Belfast, "**The European Court of Human Rights and Domestic Violence: *Valiuliene v Lithuania***"

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

### **SESSION G – GRADUATE RESEARCH SHOW CASE**

Venue: Confex 2

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

1. Katie Boyle, University of Limerick, **“How can human rights be better protected in Northern Ireland? - Examining the Option of Legitimate and Viable Mechanisms for ESC Justiciability”**
2. Anna Marie Brennan, University College Cork, **“The Application of the Principle of Individual Criminal Responsibility to Members of Transnational Armed Groups: A Critique of The Control-Theory of Co-Perpetration under Article 25 of the Rome Statute”**
3. Maeve Hosier, NUI Galway, **“The Potential Effect of The Legal Services Regulation Bill 2011 upon Law Teaching in Ireland”**
4. Sarah Fullham-McQuillan, Trinity College Dublin, **“Plugging the Gaps in Tort Law with Constitutional Rights: Loss of a Chance in Medical Negligence, featuring the ‘Right to Person’”**
5. Johnathan McCarthy, University College Cork, **“Competing Visions and Unsecured Creditors in Irish Corporate Insolvency Law”**

### **SESSION H – TORT & MEDICAL LAW**

Venue: Confex 3

**Chair: Dr Níamh Howlin, University College Dublin**

1. Professor Jack Anderson, Queen’s University Belfast **“Recent Developments in the Law of Torts in Northern Ireland”**
2. Professor Frank McManus, Edinburgh Napier University, **“Whither Nuisance”**
3. Dr Brenda Daly, Dublin City University, **“Examining the Impact of International and Regional Law on the Right of Access to Healthcare in Ireland”**

## **SESSION I – LEGAL EDUCATION (2)**

Venue: Confex 4

**Chair: Professor Michael Doherty, NUI Maynooth**

1. Anna Louise Hinds & Padraic Durkan, NUI Galway, **“Re-evaluating the Role of the Law Teacher in Continuous and Alternative Assessment: Motivations, Objectives, Experiences and Outcomes from a Dual Perspective”**
2. Stephen Wood and Julian Creasey, Edinburgh Napier University, **“The challenges of delivering a module, International Trade Law, and course in Vietnam.”**
3. Professor Steve Hedley, Leeds Metropolitan University, **“Litigation Between Students and Their Colleges”**

## **Sunday 11.45-1.15: Parallel Session IV**

### **SESSION J - JURIES**

Venue: Confex 2

**Chair: Professor Michael Doherty, NUI Maynooth**

1. Dr Mark Coen, Durham University, **“Whatever happened to the jury rider?”**
2. Dr Niamh Howlin, University College Dublin, **“Should Juries Be Allowed to Ask Questions?”**
3. Charles O’Mahony, NUI Galway, **“The Eligibility of Persons with Disabilities for Jury Service: Non-Discrimination and Reasonable Accommodation”**

### **SESSION K – PUBLIC & COMPARATIVE LAW**

Venue: Confex 3

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

1. Dr Oran Doyle, Trinity College Dublin, **“Vagueness and the Rule of Law”**
2. Dr Eoin Daly, University College Dublin, **“”**
3. Osayomwanbor Enofe, University College Dublin, **“Conducting Critical and Socio-Contextual Sociological Inquiries: Principled Arguments for a Greater Inclusiveness of the Scope of Comparative Law”**

**SESSION L – LEGAL HISTORY**

Venue: Confex 4

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

1. Deirdre McGowan, NUI Maynooth, **“Irish Marriage Law - A History of the Present”**
2. Dr Thomas Mohr, University College Dublin, **“Irish Currency Law 1922-2002”**
3. John Owen, Bangor University, **“Aspects of the legal history of the Griffiths of Penrhyn 1376-1505–A Conveyancing History of English and Welsh Law”**

## **Abstracts for Parallel Sessions**

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

#### **SESSION A – CORPORATE GOVERNANCE**

Venue: Confex 2

**Chair: Professor Sally Wheeler, Queen’s University Belfast**

1. Dr Ciaran O’Kelly, Queen’s University Belfast, **“Corporate Governance as a Tool of Public Policy”**

This paper examines the use of the corporate form, specifically in reforms to the English NHS. The NHS’s regulatory regime has been reconfigured through a process of ‘juridification,’ with law expanding to replace political fiat as the primary force in healthcare provision. The corporate form lies at the heart of this reconfiguration, with both Foundation Trusts and Clinical Commissioning Groups incorporated through powers granted and extended in English Health and Social Care Acts. I focus on Foundation Trusts for the purpose of this paper.

These iterations of the corporate form are held to promise various forms of ‘accountability’: local and organisational democracy, increased clinical independence, transparency and expanded patient choice.

My argument in this paper is that these promises are founded on a misunderstanding of the relationship between legal forms and emergent organisational *norms*, such as democracy, efficiency etc. While such norms might drive the adoption of particular legal forms ‘in the wild,’ the use of law to impose formal arrangements onto already-existing public organisations will not lead to the emergence of the desired norms.

On a wider level, I argue that students of company law must remain aware of the relationship between various corporate forms and the ‘economies’ that they serve, and of the (weak) relationship between the corporate forms made available through law and the moral economies underpinning emergent forms of social coordination.

2. Dr Deirdre Ahern, Trinity College Dublin, **“Diversity Reporting: The Value of a Structured Protocol to Manage Annual Report Disclosures”**

It is now common for listed companies to engage with the diversity agenda in their annual report. However, reference will be made to empirical work undertaken indicates that there is a danger that companies may engage in impression management within the annual report in order to attempt to create a favourable impression in the mind of investors and other stakeholders regarding how seriously the company takes the diversity issue. The paper will then consider the likely impact of the recent introduction in October 2013 of a requirement in The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013 that UK quoted companies prepare a strategic report

containing gender metrics. In this context a more progressive Australian model will be used as a comparator. The Australian model has required companies to report on their diversity agenda in a structured way within the context of corporate governance disclosures from financial years with a 31 December 2011 year end. It will be contended that adopting a comprehensive structured diversity reporting protocol can facilitate genuine evaluation of companies' engagement with diversity and the comparison of companies in a meaningful manner and thus guard against false impressions on engagement with diversity in companies' annual reports.

3. Professor Irene Lynch Fannon, University College Cork, **“The End of the Celtic Tiger – The Property Bubble, Corporate Governance and Failure”**

This paper considers a particular phenomenon occurring in the Irish economy towards the end of the Celtic Tiger era, (mid 1990s to 2008), namely the growth and collapse of the property bubble. The paper focuses on the governance of the privately held property developing company as borrower and the multinational stock exchange listed Irish banks as lender. Although describing particular events through the eyes of a corporate governance scholar, the paper will identify some key aspects of the failure of legal principle and regulation, which can only be entirely understood with reference to 'non legal norm' scholarship.<sup>1</sup> In doing so it seeks to place in a corporate law and governance context phenomena which are of continuing interest in terms of exploring human, and in particular, Irish identity and motivation.

**SESSION B – LEGAL EDUCATION (1)**

Venue: Confex 3

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

1. Connie Healy, NUI Galway, **“Law or Conflict Resolution: What is the law teacher's role?”**

Gillers notes that for the legal profession 'financial reward is rarely, if ever, cited as the reason to oppose a rule. A proxy must be found, based in the interests of clients or the true ends of justice.'<sup>2</sup> This paper examines the role of the legal profession and their uneasy relationship with alternative methods of dispute resolution. It questions whether such uneasiness is motivated by their genuine concern for the well-being of their clients in allowing them engage in processes that, arguably, are less structured, whether it is concern motivated by the fact that lawyers do not want to lose clients to any other process in these recessionary times, or whether it is a more deep-seated mistrust of any process

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<sup>1</sup> *Norms and Corporate Law Symposium 149 University of Pennsylvania Law Review (2001).*

<sup>2</sup> Stephen Gillers, 'How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession' (2013) 40 *Pepperdine Law Review* 365.

that means a move for lawyers outside of the comfort-zone of the court process where they have support of counsel and the judge as final arbiter.

In examining this issue, this paper will rely on data gathered as part of my Ph.d research outlining the views of solicitors, barristers and judges on the mediation process and on collaborative law. It will question whether this resistance to change is something that develops over time or whether it is directly related to the way that law is taught in law schools. What, if anything, can law teachers do to help future lawyers have a more broad based approach that may benefit their potential clients in changing times?

2. Dr John Stannard, Queen's University Belfast, **"Putting the Criminal Law Course Right"**

The traditional Criminal Law course has frequently been criticised over the years for its excessive focus on black letter doctrine and its failure to engage with the broader context in which criminal law operates. In 2007, following a redesign of the syllabus by the School of Law at the Queen's University of Belfast, an attempt was made to address some of these concerns by introducing a new course called 'Crime and the Criminal Process'.

This course, which was taught by both doctrinal criminal lawyers and criminologists, was intended to give students an overview of the criminal justice system as a whole before they embarked on study of traditional subjects such as substantive criminal law and evidence. The aim of the course was threefold: (1) to clear away some common misconceptions; (2) to introduce students to some of the factors affecting the notion of 'crime' and the responses to it; and (3) to give students a broad overview of the criminal process of Northern Ireland, the general idea being to enable students to see the wood before beginning to look at the trees. The course has run very successfully over a number of years, and has been much valued by the students, but has recently been abandoned by the School in order to make way for a further revision of the syllabus. However, this account of the course is offered in the hope that others may be able to take up where we had to leave off.

3. Dr Ciara Hackett, Queen's University Belfast, **"The Law Teacher's Responsibility to Teach Responsibility (CSR)"**

Corporate Social Responsibility (CSR) is no longer solely the remit of an MBA programme. The idea of CSR is increasingly afforded a broader appeal and is now found in a number of different schools including; Business, Accounting, Management and Law. Similarly, and in keeping with the broad theme of this conference, there is now a greater recognition within law schools that a career in the professions is no longer the sole aim for its annual intake of students. Instead, students are increasingly using the skills acquired within a law degree to branch into "alternative" legal careers, including, but not limited to, tax, auditing, business, compliance etc. With this departure for both the delivery of CSR



content and the broadening of the law student's horizon, a question needs to be asked: Is there a responsibility for law schools to teach responsibility (CSR)?

This paper proceeds by looking at the arguments for and against incorporating CSR training (of sorts) within the undergraduate teaching syllabus. Situating the paper broadly within a theoretical framework of obligations versus responsibilities, the paper concludes that in rethinking the purpose of a legal education, and strengthening our links with industry beyond the professions, we need to broaden the scope of the transferrable skills afforded to our students, whilst ensuring that those who do wish to proceed down the traditional professions route are not compromised in any way. The responsibility therefore to provide responsible leaders (and graduates) of tomorrow may well fall within the law teacher's remit.

### **SESSION C – CRIMINAL LAW AND CRIMINOLOGY**

Venue: Confex 4

**Chair: Dr Tanya Ní Mhuirthile, Griffith College Dublin**

1. Jennifer Schweppe, University of Limerick, **"Punishing Hate: Is Motive Really Irrelevant?"**

The presence of hate crime legislation in the criminal law has become somewhat unexceptional: indeed, Ireland is somewhat unusual in not punishing crimes committed with a hate motivation more harshly than those committed in other circumstances. However, while such crimes are generally referred to as 'hate' crimes, they generally punish hostility, bigotry, prejudice or malice. This paper will seek to examine the punishment of "hate" from the perspective of the field of law and emotions, drawing on suggestions by Maroney in her proposal for a taxonomy for the field:<sup>1</sup>

"... most of the extensive literature on hate crime has little to do with how the emotion of hate is experienced and expressed by the subject or object, focusing instead on the First Amendment, the right to a jury trial on sentencing-enhancing factors, and cultural factors shaping approaches to this area of law. Only that subset of work analysing the distinctively emotional components of the 'hate' in 'hate crime' is usefully conceptualised as part of the field."

It seeks to understand what, if any, emotion is punished by hate crime legislation, and contextualise this within the broader field of the criminal law.

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<sup>1</sup> Terry Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 *Law and Human Behaviour* 119

2. Dr Claire Hamilton, Dublin Institute of Technology, **“Cross-disciplinary Perspectives on Penal Policy: Some Thoughts from a Lawyer turned Social Scientist”**

The relationship of law with criminology has been the subject of some debate for several decades now. In 1961, for instance, Leon Radzinowicz (1961: 181) stated that criminal law must ‘resolve its relationship with criminology’, yet this process would still appear to be underway. Reviewing the state of opinion on this issue, Murphy and Whitty (2013) observe a ‘stark polarity within contemporary criminology’, veering from impatience with academic criminology’s still reluctant relationship with the legal field (Zedner, 2010) to calls for the criminological gaze to be directed *away* from the legal and the normative (Loader and Sparks, 2010). Whatever the proper role of legal norms within the broader criminological academy, it is difficult to deny the ways in which law frames the discipline of criminology and thus too, questions of ‘penalty’ or punishment. This paper seeks to argue that ‘legal’ criteria for testing punitiveness advocated by Gordon (1989), Whitman (2003) and Kutateladze (2009) add important depth to the concept of ‘punitiveness’ or ‘penalty’ through reinforcing the importance of a *systems* approach. It calls for criminological studies aiming at a comprehensive assessment of cross-national punitiveness to better engage with the legal field, in order to adequately analyse and understand the punitive turn.

3. Tom O’Malley, NUI Galway, **“Criminology in the Courtroom”**

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

### **SESSION D - IMMIGRATION AND HUMAN RIGHTS**

Venue: Confex 2

**Chair: Dr Eimear Spain, University of Limerick**

1. Professor Rory O'Connell, University of Ulster, **"Freedom of Expression in a Democratic Society: But What Sort of Democracy?"**

Freedom of expression is one of the hallmarks of a democratic society, as frequently affirmed by the European Court of Human Rights (ECtHR). But democracy is itself a much contested term and is open to varying interpretations. The case law of the ECtHR seems to affirm a specifically liberal representative conception of democracy based on values of pluralism, tolerance and broad-mindedness, but there are also other trends in the case law which are compatible with a less liberal and more substantive conception of democracy based on communitarian (and not necessarily liberal) values. This paper will analyse these differing conceptions but also highlight a third conception, that of a deliberative democracy. Is there specifically deliberative conception of free expression and if so to what extent does the case law of the ECtHR support such a conception?

2. Dr Tanya Ní Mhurirhile, Griffith College Dublin, **"Legislating for Gender Recognition"**

This paper will critically consider the proposals by the Irish Government to introduce Gender Recognition Legislation to Ireland. It will comparatively analyse the proposed Heads of Bill in conjunction with both the UK's Gender Recognition Act 2004 and the Argentinian Gender Identity Act 2012. It will also examine whether the proposed legislative scheme, introduced as a result of a High Court declaration of Incompatibility with Ireland's human rights obligations under Article 8 ECHR in *Foy No 2*, is consistent with international human rights norms.

3. Dr Liam Thornton, University College Dublin, **"Socio-Economic Rights Law in Ireland: Utilising the Potential of the ECHR ACT 2003"**

In courts in England and Wales, there has been extensive reliance on their Human Rights Act 1998 in seeking to advance the socio-economic rights of vulnerable groups (asylum seekers, disabled, welfare recipients). While Ireland has seen the ECHR Act 2003 utilised somewhat, in the O'Donnell cases', Doherty case and most recently the direct provision case, this is still minimal. This paper argues that the ECHR Act 2003 provides lawyers and advocates opportunities to further protect the social and economic rights of vulnerable groups in Ireland. While attempts to further key socio-economic rights on a constitutional level has failed, the impact of the ECHR Act 2003 in this area has yet to be fully explored by the Irish courts.

4. Dr Cliodhna Murphy, Dublin City University, **“Restricting Access to Labour Markets and to Employment Standards for Migrant Workers: the consequences of constructing ‘illegality’”**

This paper explores a key issue at the intersection of migration and employment law: the application and enforcement of employment standards to undocumented migrant workers. This is a vexed issue in Ireland and the UK, where the courts have found that as such workers are employed under an ‘illegal’ contract of employment, they are not entitled to the protection of the applicable employment legislation, especially where the worker was aware of and ‘took an active part in’ the illegality. The paper argues that a complete absence of employment protections for undocumented workers constitutes a violation of states’ positive obligations under Article 4 of the European Convention on Human Rights to protect individuals against slavery, servitude and forced labour. These positive obligations have been developed in a series of recent cases before the Strasbourg court involving migrant domestic workers.

### **SESSION E – COMPETITION LAW**

Venue: Confex 3

**Chair: Mary Dobbs, Queen’s University Belfast**

1. Dr Marek Martyniszyn, Queen’s University Belfast, **“European Commission v. Gazprom: Markets and Geo-politics”**

In 2012 the European Commission opened a formal investigation of Gazprom’s business practices in Central and Eastern European Member States on the upstream natural gas supply markets in light of EU Competition Law. Although allegations of prohibited anticompetitive conduct underlie it, the value of the commerce involved and the geo-political context make the case highly important.

This presentation identifies and substantiates three political arguments why the Commission should not stop short of addressing any uncovered antitrust violations:

(1) a pro-integrationist argument: this investigation is likely to change the gas market in the EU, leaving Union both economically and politically stronger;

(2) a trust and unity argument: any half-hearted enforcement will damage the faith of the New Member States in the Union, it will allow Russia to continue using energy exports as a foreign policy tool also in relation to the EU;

(3) international cooperation argument: in past the Commission imposed gigantic fines on US firms for antitrust violations—if it was to allow any illegal Gazprom’s practices to continue, one should anticipate negative spillover effects in Union’s foreign and trade relations.

The discussions about the EU-Russia relationship often understate the importance of co-dependence. This presentation starts by outlining its complex and, importantly, its two-way nature; offering a snapshot of where we are. Then

it places the issue of co-dependence in the broader context of the on-going changes and technological revolutions (such as the growing trade in liquefied natural gas, development of nonconventional gas exploitation) to show that the dependence pendulum is shifting in the EU's favour. This factor, albeit officially unstated, is likely to play an important role in this case development and its timing.

Regardless of its material outcome, the Gazprom case will prove an indicator of (1) the state of the EU integration, (2) the nature of the East-West intra-EU relationship, and (3) the nature of the EU-Russia relations. It will be closely followed not only by policy-makers and commentators in the EU and Russia, but—due to its importance—also by the international community at large.

2. Anna Louise Hinds, NUI Galway, **“The Changing Significance of Human Rights Protection in EU Competition Law Enforcement”**

Any contemporary discussion of effectiveness of enforcement and legal protection takes us quickly from the broader ocean of competition policy into deeper and deeper waters of regulatory enforcement which need to be navigated by criminal lawyers and human rights lawyers as much as competition lawyers.’ - Christopher Harding

The rule of law in the form of procedural rights serves to act as a constraint on the European Commission in its enforcement of competition law. In conventional enforcement proceedings, applicable fundamental human rights include *inter alia* the right to be heard, the right to equality of arms, the right against self-incrimination, the right to legal professional privilege and the right to judicial review. In spite of these rights, the Commission has been criticised as ‘judge in its own cause’, acting as investigator, prosecutor and judge in the enforcement process, and is perceived as being unfair and harsh in dealing with infringers. Indeed, infringement decisions are frequently appealed on procedural grounds. More recently, the landscape of enforcement is changing, with the Commission frequently pursuing alternative enforcement routes in the form of commitment decisions or cartel settlement. Both routes circumvent various procedural rights, facilitating their voluntary waiver by those subject to proceedings in return for a negotiated solution with no infringement finding in the case of commitment decisions and in return for reduced fines in the case of cartel settlement. Notwithstanding the circumvention of procedural rights, it seems that the Commission is perceived as fairer and more facilitative when it opts for these alternative enforcement routes. This paper adopts a regulatory enforcement lens in seeking to reconcile the changing landscape of competition law enforcement and the circumvention of human rights protection with the altering perception of the Commission and the impact on effectiveness of enforcement.

3. Úna Woods, University of Limerick, **“In Defence of Bad Faith Adverse Possession: An Irish Perspective”**

It could easily be assumed that bad faith squatters (ie those who know that the property does not belong to them) are universally viewed as morally reprehensible and undeserving of the benefits of the doctrine of adverse possession. This paper critiques Professor Lee Anne Fennell’s article ‘Efficient Trespass: The Case for “Bad Faith” Adverse Possession’ 100(2006) *Nw UL Rev* 1037 which puts forward a defence for such adverse possessors and assesses the relevance of her arguments from an Irish perspective.

Professor Fennell argues that only the bad faith adverse possessor should be permitted to succeed under the doctrine of adverse possession as other more suitable remedies or doctrines are available to protect a good faith adverse possessor. She claims that adverse possession should only operate when market forces break down to ensure that land can move into the hands of the person who values it most. She also argues that the adverse possessor’s knowledge of his encroachment should usually be documented (eg by means of a purchase offer to the owner) before the limitation period can begin to run in his favour. This requirement would perform a dual role of evidencing the state of mind of the adverse possessor and providing the owner with notice of the adverse possession.

This paper submits that Fennell’s case for the introduction of a mandatory bad faith requirement and her insistence that other more suitable remedies adequately protect the good faith adverse possessor do not hold water in the Irish context where the doctrine continues to play a vital role outside the narrow context of abandoned land which seems to be Fennell’s primary concern. The requirement for documented knowledge as a technique for putting the owner on notice of the adverse possession appears cumbersome and unnecessary when considered next to the veto or early warning system of adverse possession introduced in England and Wales. While this new adverse possession regime deals with the problem of abandoned land, it also preserves the doctrine’s important role in resolving certain other matters.

## **SESSION F – FAMILY AND MIGRATION LAW**

Venue: Confex 4

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

1. Lucy Ann Buckley, NUI Galway, **“Accessing company assets on marital breakdown in Ireland”**

Irish family lawyers have commonly assumed that assets held by family companies may be used to make financial provision for the family on marital breakdown. This assumption is particularly appealing where a corporate structure has been used to frustrate family law obligations, or where one spouse was the guiding force of the company. However, looking behind corporate structures contravenes established commercial law principles and may impact significantly on company creditors. The Irish courts have not yet specifically addressed this issue, though a re-assessment now seems likely, following the recent decision of the UK Supreme Court in *Prest v. Petrodel Resources* [2013] UKSC 34. The UK Supreme Court repudiated the general practice of “piercing the corporate veil” in the family law context and adopted a restrictive doctrinal approach to the piercing of the corporate veil in general. The decision seems likely to have a serious impact on financial orders in the divorce context in England and Wales. This paper addresses the questions of whether the Irish courts are likely to follow the UK approach on this issue, and whether they should do so. It concludes that although the decision in *Prest* creates serious difficulties in the family law context, these difficulties are not insurmountable. Even if the decision is followed in Ireland, the ruling leaves open several possible avenues whereby some level of access to company-held resources may still be obtained.

2. Christina Gotelzmann, University College Dublin, **“Irish Immigration Law and the Concept of Family”**

The paper seeks to answer the question to what extent does Irish Immigration law correspond with the 'general' concept of family prevalent in Ireland? This question is based upon the logic that the circle of persons eligible for residence rights on the basis of family ties should be based on the concept of family employed in the respective jurisdiction or legal system. To answer this question, the general concept of family prevalent in Irish law is derived, which can best be summarised as a 'hierarchy of family members', encompassing the nuclear family, 'newer' forms of family (in particular civil partners) and extended family members (albeit to a lesser extent). Secondly, the concept of family in Irish Immigration law is explored. Also under Irish immigration law, the concept of family can best be described as a 'hierarchy of family members'. A comparison of the two concepts reveals that, while the two concepts are similar with regards to the most favoured category of family members, the (immigration) specific concept of family does not fully correspond with the general concept of family prevalent in Irish law.

3. Eddie Keane, University of Limerick, **“Reforming the Contractual Status of Intermittent Workers”**

The paper proposes to examine the contractual status of intermittent workers. In the promotion of a flexible workforce there is an inherent recognition that intermittent workers will form an integral part of the labour market of the future. Being the type of workers who are hired only when required, intermittent workers have had significant problems having their work relationships described as contracts for employment and availing of the protections consequential to such a contract. The central problem faced by intermittent workers is the requirement for mutuality of obligation throughout the entire working relationship. Therefore this paper proposes an alternative means of identifying mutuality of obligation in intermittent work relationships.

In order to contextualise this proposal, the paper will begin by outlining the origins of the mutuality of obligation requirement; before examining the merits of, and problems with, the proposals of Freedland and Davies, who propose differing methods of dealing with this issue.

The paper will conclude by proposing that mutuality of obligation can be found where both parties share a mutual expectation of working together in the future, and will suggest some limitations which would serve to protect the distinction between intermittent employees and full time continuous employees.

4. Dr Ronagh McQuigg, Queen’s University Belfast, **“The European Court of Human Rights and Domestic Violence: Valiuliene v Lithuania”**

In the last six years the issue of domestic violence has been addressed at regular intervals by the European Court of Human Rights in cases such as *Kontrova v Slovakia*,<sup>1</sup> *Bevacqua and S v Bulgaria*,<sup>2</sup> *Opuz v Turkey*;<sup>3</sup> *E.S. and Others v Slovakia*,<sup>4</sup> *A v Croatia*<sup>5</sup> and *Kaluczka v Hungary*.<sup>6</sup> Whilst this consideration of domestic violence by the European Court is certainly to be welcomed, it seems nevertheless that the Court’s jurisprudence in this area is somewhat incoherent. In such cases, applicants usually seek to make arguments based upon articles 3 and 8 and also, in some instances, articles 2, 13 and 14 of the Convention. However, the question of on which articles the Court bases its findings of

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<sup>1</sup> Application no. 7510/04, 24 September 2007.

<sup>2</sup> Application no. 71127/01, 12 September 2008.

<sup>3</sup> Application no. 33401/02, 9 September 2009.

<sup>4</sup> Application no. 8227/04, 15 December 2009.

<sup>5</sup> Application no. 55164/08, 14 October 2010.

<sup>6</sup> Application no. 57693/10, 24 April 2012.



violations tends to be somewhat inconsistent, particularly as regards the use of Articles 3 and 8.

With the recent case of *Valiuliene v Lithuania*, the Court was provided with an ideal opportunity to clarify its approach to the issue of domestic violence. However, this paper will argue that the Court did not fully take advantage of this opportunity. The paper will examine the facts of *Valiuliene* and will analyse the judgment of the European Court in this case, in the context of the Court's previous case law on domestic violence. In addition, the even more recent case of *Eremia and Others v the Republic of Moldova*,<sup>1</sup> which also involved domestic violence, will be discussed.

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<sup>1</sup> Application no. 3564/11, 28 May 2013.

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

### **SESSION G – GRADUATE RESEARCH SHOW CASE**

Venue: Confex 2

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

1. **Katie Boyle, University of Limerick, “How can human rights be better protected in Northern Ireland? - Examining the Option of Legitimate and Viable Mechanisms for ESC Justiciability”**

This paper proposes legitimate and viable justiciability mechanisms for economic, social and cultural (ESC) rights in Northern Ireland. In February 2013 Professor Brice Dickson and Professor Colin Harvey asked “what do you think is the way forward for human rights in Northern Ireland?”<sup>1</sup> This paper proposes an option to contribute to the discussion on answering this question. The research builds on an examination of the particular circumstance of Northern Ireland: a transitional ‘conflicted democracy’ within a wider liberal state, which is a member of the EU and Council of Europe, committed to the operation of international human rights law. As part of the ongoing international obligations emanating from international human rights law (ECHR and beyond), the peace agreement and treaty surrounding the peace process in Northern Ireland and the Bill of Rights forum, there is a strong legal mandate for the substantive protection of ESC rights. In particular, the transitional justice literature demonstrates that the most vulnerable and marginalised in society, especially during times of conflict, are often exposed to ESC rights violation on a number of indicators. Transitional justice mechanisms do not necessarily account for ESC violations, concentrating on dealing with the past through addressing civil and political human rights violations. A transitional state can remain in a state of limbo if the ‘war - peace’ antinomy is not fully addressed. It has been argued that Northern Ireland falls within such an antinomy. It is submitted that ESC justiciability mechanisms can contribute to a more peaceful and democratic future for Northern Ireland by providing an effective remedy for a violation of ESC rights in accordance with international law. It is proposed that this can be achieved without usurping the rule of law at the domestic level. This paper is intended to facilitate crucial discussions in Northern Ireland by outlining ESC justiciability mechanisms already available and what mechanisms might be developed in the future. In so doing, it is intended to contribute to an informed debate on the best way forward for human rights protection in Northern Ireland and beyond.

2. **Anna Marie Brennan, University College Cork, “The Application of the Principle of Individual Criminal Responsibility to Members of**

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<sup>1</sup> Dickson, Brice and Harvey, Colin, *What do \*you\* think is the way forward for human rights in Northern Ireland?*, UK Human Rights Blog, 22 February 2013, <http://ukhumanrightsblog.com/2013/02/22/what-do-you-think-is-the-way-forward-for-human-rights-in-northern-ireland/#more-17350>

## **Transnational Armed Groups: A Critique of The Control-Theory of Co-Perpetration under Article 25 of the Rome Statute”**

### **3. Maeve Hosier, NUI Galway, “The Potential Effect of The Legal Services Regulation Bill 2011 upon Law Teaching in Ireland”**

This paper explores the potential impact of the Legal Services Regulation Bill (LSRB) 2011 on the teaching of law in Ireland. Its enactment promises to revolutionise the regulation of the legal profession in Ireland and may also radically alter requirements for the education of legal practitioners. The most significant aspect of the LSRB for the purposes of legal education is section 30. This provides for the preparation of reports by the Legal Services Regulatory Authority for the Minister of Justice in relation to the following:

- the education and training of legal practitioners
- the possible unification of both branches of the profession
- the creation of a new profession of conveyancer

I will commence with an overview of the current system of academic, vocational and practical education for Irish legal practitioners. I will then identify the main provisions of the LSRB, and explore the potential impact of section 30 upon the present legal educational regime, with particular emphasis upon the opportunities and challenges which may arise for University Law Schools. The merits or otherwise of these changes will be considered, especially in relation to the role of the Honorable Society of Kings Inns in the present educational system. To conclude, I will argue for reform of section 30, proposing that the provisions of Article 11 of the UN Basic Principles on the Role of Lawyers should be proactively addressed in the course of any changes to the current educational regime for lawyers. This states that educational institutions should take special measures to ensure that candidates from groups whose legal needs have not been met should have the opportunity to enter the legal profession.

### **4. Sarah Fullham-McQuillan, Trinity College Dublin, “Plugging the Gaps in Tort Law with Constitutional Rights: Loss of a Chance in Medical Negligence, featuring the ‘Right to Person’”**

A gap in tort law exists. The rights of plaintiffs who have an existing illness, who have initial chances of recovery below 50 per cent, and whose chances of recovery diminish because of medical negligence, are not protected at law. This paper offers a solution. Constitutional rights are used to plug the gap in protection.

A distinctive feature of Irish constitutional law is the doctrine of horizontal effect. As well as the more common vertical effect whereby the State can be sued for infringements of constitutional rights, horizontal effect permits similar liability in respect of private actors. Horizontal effect can further be split into two

categories. Direct horizontal effect permits individual actors to be sued for infringement of a constitutional right, and damages ensue. Indirect horizontal effect uses the constitutional right as a backdrop to interpret and modify the existing private law action in question. The court seeks to ensure that the private law action, at common law or statute, adequately reflects and protects the constitutional right once modified. This ability to sue another individual for infringement of a constitutional right, and to recover damages for that breach, is an under-utilised doctrine. Crucially, the courts are not modifying common law to ensure full protection of constitutional rights. Calls from academics to develop the doctrine of horizontal indirect effect are at odds with the preference in practice to apply the constitutional right directly, and award damages to the plaintiff. McMahon and Binchy have argued that the courts “have sought to mitigate its [the *Meskill v CIE* principle of horizontality] practical effects by looking to the pre-existing law as the medium through which the constitutional remedy should be channelled in most cases.” They point to the result of this being “that all the conceptual difficulties relating to the principle are left unanswered (though their range of application has been reduced), whilst new difficulties arise on such issues as when a particular tort ‘is basically ineffective’”.

Analysis of the intersection between public and private law is a current trend in academia. Ireland has the added advantage of a society-specific Constitution from which to draw on in developing private law. This is in contrast to the UK. Yet, it is arguable that the UK is more willing to develop common law, and uses the backdrop of the European Convention on Human Rights to so do. Ireland is lagging behind in ensuring that common law offers proper protection of human rights.

An argument is made in this paper for plaintiffs to recover for loss of a chance. The plaintiff can invoke constitutional rights to recover for the diminished chance of recovery. This is a novel argument in Ireland, and in England. A good deal of academic literature has centred on the intersection between private law and public law in general. Some even on the development of negligence in particular with regards to human rights law. However, this has largely been conducted in relation to the Human Rights Act in England, concerning rights contained in the ECHR. In Ireland, comparatively little has been written on the development of private law with regards to the Constitution. Whilst the law of defamation and the right to privacy has benefitted from a wealth of analysis, the law of negligence has not. Loss of a chance in particular has not attracted any human rights arguments in Ireland, and little if any, in England.

5. Johnathan McCarthy, University College Cork, **“Competing Visions and Unsecured Creditors in Irish Corporate Insolvency Law”**

The aim of this paper is to examine the extent to which seemingly contrasting principles should impact upon the order of priority of creditors’ claims under Irish corporate insolvency law.

Academic analyses to date of this area have generated a debate that has largely been drawn along normative lines, especially so in the United States. Concerns of

efficiency, freedom of contract and property rights as articulated by Law and Economics scholars have been balanced against arguments for distributive justice in the allocation of the limited sums available following the winding-up of a company. The paper evaluates various theoretical stances in terms of current commercial realities for Irish small and medium enterprises. Such SMEs are typically unsecured creditors and tend to recover little or nothing of what they are owed upon debtor insolvency.

With regard to Law and Economics perspectives, the paper focuses specifically on the classic 'bargain' theory of secured credit by highlighting its merits and shortcomings in addition to acknowledging the most recent refinements to the concept. From a viewpoint of distributive justice, an assessment is proffered of policy justifications for reforms which may benefit unsecured interests including SMEs. However, the paper questions the feasibility of making potentially contentious decisions as to which particular classes of creditors are more 'deserving' than others of greater legal protection.

Although different visions of the law's role are of undoubted relevance, the paper emphasises that the somewhat simplistic divide as formed by existing literature may not prove constructive in an Irish context. The introduction of measures of reform to priority rules may be complicated by the continued importance of floating charges as sources of finance to SMEs. It is therefore argued that further empirical research will be necessary to support any principled approach.

## **SESSION H – TORT & MEDICAL LAW**

Venue: Confex 3

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

1. Professor Jack Anderson, Queen's University Belfast **"Recent Developments in the Law of Torts in Northern Ireland"**

This paper reviews decisions from the Northern Ireland and E&W High Courts and Courts of Appeal as well as the UK Supreme Court relating to tort and principally to the tort of negligence.

In structure, the paper will be presented in four parts. First, three preliminary points relating to contemporary features of the NI civil courts: personal litigants – *Devine v McAteer* [2012] NICA 30 (7 September 2012); pre-action protocols – *Monaghan v Graham* [2013] NIQB 53 (3 May 2013); and the rise of alternative dispute resolution. On the last named issue, the recent decision of *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288 (23 October 2013) on unreasonable refusal to mediate, will be discussed.

Second, I will focus on negligence generally and case law from the NI High Court reiterating Lord Hoffmann's view in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 that no duty of care arises from obvious risks of injury. In this, reference will be made to the application of the Hoffmann principle in *West Sussex County Council v Pierce* [2013] EWCA Civ 1230 (16 October 2013), which concerned an accident sustained by child at school. Shortly thereafter, a similar

set of facts was presented recently to the UK Supreme Court in *Woodland v Essex County Council* [2013] UKSC 66 (23 October 2013). The decision there, on non-delegable duties of care, will have a significant impact for schools in the provision of extracurricular activities.

Third, I will examine a series of cases on employer liability and including issues such as the duty of care towards the volunteer worker; tort and safety at work principles generally; and, more specifically, the duty of care of the employer towards an employee who suffers psychiatric illness as a result of stress and/or harassment at work. On issue of workplace stress, the NI courts have made extensive reference to the Hale LJ principles found in the Court of Appeal decision of *Hatton v Sutherland* [2002] 1 All ER 1 and applied to those who suffered trauma in reporting on or policing “the troubles” in Northern Ireland. On the issue of statutory harassment at work, the paper will also mention the UK Supreme Court’s decision in *Hayes v Willoughby* [2013] UKSC 17 (20 March 2013).

Fourth, I will highlight two recent case of interest on quantum and costs in civil actions in the NI High Court with reference to “special causes” cases discussed by the NI Court of Appeal in the privacy-based proceedings of *King v Sunday Newspapers* [2012] NICA 24.

Finally, all of the above will be assessed against the backcloth of the proposed cuts to the civil legal aid bill in N. Ireland. In recent years, that civil legal aid bill has totalled £50m annually. This year, the NI Justice Minister announced plans to cut it by £20m per year.

## 2. Professor Frank McManus, Edinburgh Napier University, “**Whither Nuisance**”

In *Barr v Biffa Waste Ltd* the English Court of Appeal was asked to decide whether the fact that the defendant company (which operated a landfill site which was allegedly causing a nuisance to residents in the locality) could claim, by way of defence in a nuisance action, that by simple dint of the fact that the defendant had meticulously complied with the conditions of its permit which had been granted by the Environment Agency, Biffa’s use of the site was not unreasonable and, therefore, did not rank as a nuisance. At first instance, the trial judge, in accepting Biffa’s argument, expressed the view that the common law should march, ‘in step’ with the relevant regulatory regime, and went on to hold that since the defendant had complied with the terms of its permit, the adverse state of affairs which was complained of could not rank as a nuisance in law. However, the Court of Appeal allowed the claimant’s appeal. In the view of the court, there was no authority for the proposition that the common law should, in effect, be ‘in sync’ with the relevant statutory regime. The mere fact that Biffa complied with the conditions of its permit did not, therefore, mean that its use of the site was reasonable. Therefore, the odour which emanated from the site ranked as a nuisance in law.

However, *Barr* leaves open the important question as to whether the law of nuisance, which has often been castigated as being rooted in its Victorian past, is sufficiently dynamic and flexible to face the challenges which may be posed by the 21<sup>st</sup> century. One such challenge takes the form of the presence of windfarms which are proliferating in Scotland at present. Whereas some residents who live in the vicinity of windfarms, claim that they are affected by noise from the turbines, the majority are more concerned about the visual impact of the turbines. The paper considers whether the common law could and, indeed, should, provide residents a remedy. Is the law of nuisance simply geared towards protecting the pursuer against the more traditional forms of pollution such as fumes etc or is the ambit of the law of nuisance wider?

3. Dr Brenda Daly, Dublin City University, **“Examining the Impact of International and Regional Law on the Right of Access to Healthcare in Ireland”**

The right to health is referred to in a number of international and regional legal instruments.<sup>1</sup> The first international human rights document to refer to a right to health was the Constitution of the World Health Organisation signed by 61 States, including Ireland, in 1946.<sup>2</sup> Similarly, the UN Universal Declaration of Human Rights 1948 contains affirmations of a human right to health.<sup>3</sup> Article 35 of the EU Charter of Fundamental Rights (2000) specifically provides for a right to health protection as the “right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”. Through its incorporation of the respective international and regional legal instruments that provide for the right to health into the domestic legal framework,<sup>4</sup> Ireland has signalled its commitment to the spirit of these concerning the right of access to healthcare.

However, it has become apparent in recent years that Ireland is failing to ensure equal right of access to healthcare. Ireland has been criticised by the UN Economic and Social Council for failing to ensure that the National Health Strategy includes a human rights framework in relation to non-discrimination and equal access to health services and facilities. The Committee on the Elimination of Discrimination against Women in 2005 also brought attention to Ireland’s failure to address women’s right to reproductive healthcare services. Ireland’s participation in the Universal Periodic Review process flagged access to women’s right to reproductive healthcare as a matter of serious concern. The Irish Government announcement in 2012 that it would sign Optional Protocol to

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<sup>1</sup> Madden (2011) *Medicine, Ethics and the Law*. 2<sup>nd</sup> ed. Dublin: Bloomsbury Publishing. p.14

<sup>2</sup> Da Costa Leite Borges, D. (2011) “Making sense of human rights in the context of European Union health-care policy: individualist and communitarian views.” *International Journal of Law in Context*. Vol.7, No.3, pp.335-356 at p. 337.

<sup>3</sup> UN Universal Declaration of Human Rights, G.A. Res. 217A (III), Art.13.1, U.N. GAOR, 3d Sess., at 71, 74, U.N. Doc. A/810 (1948)

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950), the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations 1965), the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987).

the International Covenant on Economic, Social and Cultural Rights<sup>1</sup> casts a spotlight on the potential impact that such international and regional legal instruments could have on the right to access healthcare in Ireland.

This paper commences with an examination of the provision for a right to health and the right to access healthcare within the existing international and regional legal instruments. Following from this, the paper will consider how the extent to which the respective rules of international and regional health law impact on the right to access healthcare in Ireland, focusing in particular on the implementation of Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 12 of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the European Convention on Human Rights in respect of women's right to access healthcare services in Ireland.

## **SESSION I – LEGAL EDUCATION (2)**

Venue: Confex 4

**Chair: Professor Michael Doherty, NUI Maynooth**

1. Anna Louise Hinds & Padraic Durkan, NUI Galway, **“Re-evaluating the Role of the Law Teacher in Continuous and Alternative Assessment: Motivations, Objectives, Experiences and Outcomes from a Dual Perspective”**

With an increased emphasis on alternative assessment methods and equipping students with a transferable skill set for their future legal careers, this presentation explores an experiment in reassigning responsibility for assessment and grade allocation to students from a dual perspective. The experiment was conducted in a semester module in Comparative Competition Law in NUI Galway. The traditional exam-based assessment method was abandoned in favour of continuous and alternative assessment techniques, incorporating various self- and peer-assessment elements, thereby displacing responsibility for grading and evaluating from the lecturer to the student, and also encouraging students to take greater control over their own research and learning.

The first assessment was premised on improving students' research and writing skills and on them internalising grading and academic standards, with students self-assessing their own research papers based on a marking scheme established by the lecturer. The second assessment, a take-home problem question, combining research and problem-solving skills, was peer assessed. This built on the internalisation of assessment evaluation standards, allowing students not only to assess their peers but to benchmark their own performance. The final assessment, a group presentation, accompanied by a written case note, was designed to develop group work and communication skills, as well as peer-

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<sup>1</sup> To date Ireland has not ratified the Optional Protocol to



learning. Students established their own marking criteria and scheme, and were given responsibility for grading each other's group presentations and team effort. There were two control mechanisms to ensure against excessively generous or harsh marking by students: 1) a 5% differential rule, comparing the lecturer's grades with student assessor grades; and 2) specific grades awarded by the lecturer for the self- and peer assessment exercise by students.

This presentation evaluates the experiment from a dual perspective – that of the lecturer, Anna-Louise Hinds, and that of partaking students, as represented by Pádraic Durkan, one of the students in the module.

2. **Stephen Wood and Julian Creasey, Edinburgh Napier University, “The challenges of delivering a module, International Trade Law, and course in Vietnam.”**

Vietnam has recently become a member of the WTO and is now a member of ASEAN. National students studying in Vietnam, particularly those from a financial and economic background struggle in understanding legal process and reading case law. The module uses the EU as an example of Regional Trade Association. This session does not focus on just the module but the challenges of delivering a programme in Asia.

3. **Professor Steve Hedley, Leeds Metropolitan University, “Litigation Between Students and Their Colleges”**

While accurate figures are hard to come by, it is clear that litigation between third-level colleges and their students has increased markedly over recent decades. Sometimes it is initiated by the colleges themselves (to recover unpaid fees) and sometimes by the students, or by potential students who claim that their rejection was unjust. To many minds, fear of such litigation is bound up with a fear of commercialisation of academia, with the implication that students are somehow stepping out of their traditional role (however that was seen) and are now becoming consumers or customers of their colleges – and are demanding their consumer rights accordingly. But is the legal basis of their relationship with their colleges still based on public law, as it traditionally has been, or is it becoming more contractual? This paper reviews recent cases to answer these issues, focussing on the public/private question, as exemplified by the recent case of *Zhang v. Athlone IT* [2013] IEHC 390.

## **Sunday 11.45-1.15: Parallel Session IV**

### **SESSION J - JURIES**

Venue: Confex 2

**Chair: Professor Michael Doherty, NUI Maynooth**

1. Dr Mark Coen, Durham University, **“Whatever happened to the jury rider?”**

This paper will discuss the practice of trial juries appending riders to their verdicts. It will focus in particular on Ireland and England and Wales in the twentieth century, highlighting the role of riders and charting their decline. Examples of situations in which juries had recourse to riders, and rationales for their use generally, will be considered. It will be argued that the subject of riders is one of historical interest but also of contemporary importance in the context of the debate about whether juries should provide reasons for their verdicts.

2. Dr Niamh Howlin, University College Dublin, **“Should jurors be allowed to ask questions?”**

This paper explores the theme of juror interaction from a historical perspective. It is well-known that the jury in its earliest incarnation bore a closer resemblance to witnesses than to the jury as we now know it. Early juries were free to conduct their own investigation and interrogation of witnesses, and played an active role in proceedings. What is less clear, however, is when juries ceased to be active participants in trials and evolved into the passive observers we know today. Previous work suggested that jurors were silenced by the mid-eighteenth century, but, as this paper illustrates, juries in Ireland continued to be active until the end of the nineteenth century. They frequently questioned witnesses, berated counsel, interrupted judges, demanded better treatment and added their own observations to the proceedings. This raises the question of whether it is desirable for twenty-first century juries to emulate their earlier counterparts in playing a more active role in criminal proceedings.

3. Charles O’Mahony, NUI Galway, **“The Eligibility of Persons with Disabilities for Jury Service: Non-Discrimination and Reasonable Accommodation”**

This paper critically examines the exclusion of persons with disabilities from jury service. The arguments for the ineligibility of deaf and hearing impaired persons for jury service will be considered from the perspective of the UN Convention on the Rights of Persons with Disabilities (CRPD). The majority of the rights in the CRPD are contained in Articles 9-30, and can be divided into the following broad categories: (i) rights that protect the person; (ii) rights that restore autonomy, choice and independence; (iii) rights of access and participation; (iv) liberty rights; (v) economic, social and cultural rights. This paper will consider eligibility for jury service under heading (iii) with discussion

also of the right to equal recognition under the law (Article 12). The paper will also outline current law reform trends and the relevant case law on the eligibility of persons with disabilities for jury service.

## **SESSION K – PUBLIC & COMPARATIVE LAW**

Venue: Confex 3

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

1. Dr Oran Doyle, Trinity College Dublin, **“Vagueness and the Rule of Law”**

The rule of law is an ideal of political morality that can be more or less instantiated in legal systems. One aspect of the rule of law is that laws be comprehensible: they cannot be vague. The Irish courts have interpreted into the Constitution a requirement that criminal offences cannot be vague: see *King v Attorney General*, *Dokie v Attorney General*, *Douglas v Ireland*. However, a full instantiation of this aspect of the rule of law would also require a principle that assignments of administrative power cannot be vague. In a number of cases, the courts have hinted that such a principle might exist: *re Article 26 and the Health (Amendment) (No 2) Bill 2004*, *Dellway Ltd v NAMA*, *Sivsivadze v Minister for Justice and Equality*. However, the courts have held that any requirement of non-vagueness in this context is easily satisfied. Considerable doctrinal confusion has been caused by the mistaken belief of some judges that such a doctrine flows from Article 15.2 of the Constitution. In this paper, I argue that it would be a reasonable exercise of judicial power for the courts to constitutionalise this aspect of the rule of law. Such a requirement is best understood as a free-standing requirement of a constitutional order with controlled powers. Moreover, it should be enforced more strictly than has heretofore been the case.

2. Dr Eoin Daly, University College Dublin, **“”**

Rousseau’s constitutional writings place a seemingly eccentric emphasis on public ceremony, festival and pageantry as integral aspects of statecraft. The obvious function of such republican rituals is to promote the participative civic dispositions which provide stability for a deliberative politics based on common goods. In some accounts, therefore, Rousseau’s ritualistic constitutionalism has parallels in the mild ceremonial practices of contemporary liberal states. I argue, however, that Rousseau envisages a much broader purpose for republican ritual: not merely to supplement, but to substitute the complex symbolic rituals of liberal society and thus to supplant the need for private sources of aesthetic and symbolic distinction. Accordingly I argue that his politics of “transparency” is informed by an understanding of social practice which, in some respects, closely resembles Pierre Bourdieu’s account of habitus and symbolic power.

3. Osayomwanbor Enofe, University College Dublin, **“Conducting Critical and Socio-Contextual Sociological Inquiries: Principled Arguments for a Greater Inclusiveness of the Scope of Comparative Law”**

In an era where the traditional orthodoxy of legal disciplines is increasingly being 'threatened' by a rising wave of 'dilution' or 'hybridisation', arguments for an increased inclusiveness of the (sociological) scope of any legal discipline would certainly require rigorous justification.<sup>1</sup> The case of Comparative law presents a good example.

Traditionally speaking the orthodox scope of comparative law has always been asserted as limited to the study of similarities and differences existing among 'laws' of different countries- the word 'law' being used here in a highly normative sense.<sup>2</sup> Arguments therefore that comparative law can effectively be applied in aid of a law reformer to determine the *transplantability* or otherwise of a particular law from one society to another, and by extension the desirableness of a particular process of legal transplantation (what inherently would be a highly sociological activity),<sup>3</sup> would immediately raise various serious theoretical issues; a number of which border on the nature and scope of comparative law itself.

In this paper I advance two principled arguments: firstly that, comparative law can be effectively adopted for critical hermeneutic purposes- in this case determining the transplantability or otherwise of (a) law, and by extension what would be the desirableness or otherwise of a particular process of legal transplantation- and secondly, that such an activity-carried out through extensive and critical sociological investigations- would not constitute an abuse, misuse or unjustifiable extension of the scope of comparative law.

## **SESSION L – LEGAL HISTORY**

Venue: Confex 4

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

1. Deirdre McGowan, NUI Maynooth, **"Irish Marriage Law - A History of the Present"**

The Constitutional Convention has recommended that a referendum be held on the question of same-sex marriage. Their recommendation reflects recent international developments in marriage law and demonstrates an acceptance of equality and non-discrimination arguments put forward by human rights advocates. In this paper I briefly review the process of marriage law reform in Ireland since the 1970s identifying the political arguments that led to major reforms of marriage law in the past. The purpose of this review is to call into

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<sup>1</sup> It would seem that most of the arguments against law or legal disciplines encompassing a wider sociological sense of interpretation stem from a perceived need to prevent a 'hegemonic capture' of the integrity (or pride) of the legal discipline (both as an academic and a professional enterprise) by other disciplines, or the need to prevent a dilution of law's integrity (producing 'a hybrid monstrosity' which is neither law nor social science). This concern it has been mentioned becomes somewhat particularly crucial in an era where the scope of integration between law and other disciplines such as economics, history, philosophy etc. is increasingly being noted- See David Nelken, 'Blinding Insights? The Limits Of A Reflexive Sociology of Law', (1998) *Journal of Law And Society* 407, 408.

<sup>2</sup> As Rodolfo Sacco puts it: 'if one asks what students of comparative law compare, the most obvious answer would be, "the rules of different legal systems"'. See Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39 *American Journal of Comparative Law*, 1, 21. See also Esin Orucu, *The Enigma Of Comparative Law: Variations On A Theme For The Twenty- First Century*, (The Netherlands, Koninklijke Brill NV, 2004) pg. 47

<sup>3</sup> For what is generally accepted as a classic statement of this argument see Otto Kahn-Freund, 'On Uses and Misuses Of Comparative Law' (1974) 37 *Mod. L. Rev* 1

question the usefulness of marriage law in solving the social problems of the past in order to promote greater reflection on its ability to address inequality and discrimination in the present.

2. Dr Thomas Mohr, University College Dublin, **“Irish Currency Law 1922-2002”**

This paper will provide an overview of the legal, political and economic considerations that underpinned currency law in the self-governing Irish state from 1922 to 2002. These include the legal issues surrounding the decision to create new Irish currency units under the Coinage Act, 1926 and the Currency Act, 1927. These decisions raised legal issues connected to the 1921 Anglo Irish Treaty and had a direct impact on relations between the Irish Free State and the United Kingdom. The paper will analyse a serious legal dispute over the future of large quantities of British currency that remained in circulation in the Irish Free State. It will also examine legal disputes concerning currency during the “Economic War” of the 1930s.

The paper will include analysis of the legislation that resulted from the decisions to create an Irish Central Bank in 1942, the decision to break the link with sterling in 1974 and the decision to join the Euro. The conclusion will examine the extent to which the law in this area has been influenced by economic and non-economic factors. In particular, it will examine the extent to which the political history of the self-governing Irish state is reflected in this area of law. It will also consider future developments in currency law relevant to Ireland.

3. John Owen, Bangor University, **“Aspects of the legal history of the Griffiths of Penrhyn 1376-1505–A Conveyancing History of English and Welsh Law”**

Prior to the Acts of Union 1536-43 Welsh Land Law was different from English Land Law. The property portfolios of landowners in Wales, therefore, often included land which was regulated by just the Welsh Law and land regulated solely by the English Law. When dealing with the history of Land Law in England and Wales before the Law of Property Act 1925 there is a general lack of awareness of the concepts of native Welsh title and of the fact that medieval lawyers in Wales had to be versed in two different systems of law. The twin objective of the paper will be first of all to attempt to redress this deficit by examining certain deeds and documents relating to land held by the Griffiths of Penrhyn between 1376 and 1505. The history of English and Welsh Land Law and the development of the use, the precursor of the modern trust, between these dates will be analysed by reference primarily (but not exclusively) to deeds and documents in relation to the township of Cororion in the old commote of Arllechwedd Uchaf in Gwynedd, at the very heart of the Penryhn estate. The documents themselves will show the interplay between the English and Welsh systems. Since the beginning of the thirteenth century antiquarianism had been prevalent in Wales and during the period under discussion certain of the manuscripts detailing the native Welsh laws were written. Next, the paper will

attempt to bring concepts of legal history to life by explaining how, in practical terms, the historical principles explained in modern textbooks were actually implemented by reference to one of the most important estates in North Wales.