NUI MAYNOOTH
Ollscoil na hÉireann Má Nuad

The Golden Thread

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A Note From the Editor

Peter O'Loughlin

Transition. It's the word that springs to mind at the end of this year. NUIM Law will have a new Head of Department this September. With the Law School now ranked third in the country in terms of CAO entry points, the progression since the law school's inception four years ago is there for everybody to see. And what better way to round up 2012/13 with an issue of the Golden Thread. Eimear Bourke provides a thought provoking analysis of the lack of legislation on assisted reproductive technology (ART) and in vitro fertilisation (IVF). Mark Harkin adopts an interesting approach to detailing the legal history of why the Republic of Ireland is so called. And Hannah Walsh, coming to the end of her first year in law school, gives her perspectives on life as first year NUIM law student. Don't worry, the old favourites are still there: discursive articles on Property Law, Constitutional Law, Evidence, and Criminal Law all inside this issue.

So, what's next for NUIM Law? The Law School has one of the most diverse faculties in the country; many of our lecturers hail from across the Atlantic in the States. Furthermore, we are now the only law school with lecturers who are alumni of Harvard, Stanford, Columbia, and Oxford. Opportunity. It's the word that springs to mind when we look to the future.

Precarious Status of Assisted Reproduction in Ireland

Eimear Bourke

There has been much discussion over the status of the "unborn" in Ireland of late. The tragic death of Savita Halappanavar has led to mounting pressure on the Irish government to legislate on abortion and implement clear laws in this controversial area. While the area of abortion undoubtedly deserves attention and debate, it can become all-encompassing and other related issues are often too easily overshadowed in its midst. This article wishes to discuss the status of a different type of "unborn", the embryo. While Ireland strives for clarification with regard to abortion, I would urge that alongside this we fight for legislation in the areas of assisted reproductive technology (ART) and in vitro fertilisation (IVF). Clear structure and guidelines are needed as the repercussions of a lack of regulation stretch wider than medical uncertainty and familial problems, if left unaddressed ART in Ireland may become an unfettered environment for controversial practices.

Although there have been calls to regulate Ireland's IVF industry since 2005, when the Commission on Assisted Human Reproduction published a report of recommendations, very little has been done. What is an even greater cause of concern, however, is the continued lack of progress. An article in the Irish Times dated, 21 November 2011, suggested that due to a lack of funds within the Irish Government legislation will only be introduced on either ART or abortion. Considering events that have taken place since that article with regard to abortion, it is clear which topic the government would legislate on if forced to choose. While arguments could be made in favour of abortion being the more

pressing issue, I would argue that we should not have to choose between one and the other. The area of assisted reproduction is far too vast to remain ambiguous.

The legal vacuum that exists in the area of supernumerary (non-transferred) embryos leads to many complex issues. Ownership of these embryos is uncertain, which leads to problems regarding consent, custody and usage of the embryos. It is also unclear what fate befalls these embryos should a couple divorce or separate. These issues came to light in 2009 when the Supreme Court, in the case of *Roche v Roche*, refused to release frozen embryos to a woman for implantation due to her estranged husband withholding consent. When passing his judgment Justice Fennelly remarked that it was 'disturbing' that four years after the Report of the Commission on Assisted Human Reproduction had been published, legislative proposal had yet to be articulated. However, prospective parents are not the sole victims of this equivocality, children born by these methods are also affected.

An estimated 3,000 children are born in Ireland each year as a result of assisted reproduction. The lack of any law governing how these children are conceived leads to their legal status in this country being less certain than their peers and could be argued to be discriminatory. This was seen in a recent case before the High Court, which dealt with twins born to a surrogate mother. The genetic mother had been omitted from the birth certificate due to the Chief Registrar of the Office of the Registrar General's insistence that "the person who gives birth is the mother". This was the approach the State took in court, arguing that Article 40.3.3 defines motherhood as the birth mother only. The exclusion of the genetic mother would invariably have led to issues in the twins' later life as regards parental consent, schooling and inheritance.

Counsel for the state in this case pledged that the government plans to begin preparing legislation dealing with ART and surrogacy later this year. It was submitted that a Bill entitled, Family Relationships and Children, would be published by the Minister for Justice. However, this Bill was included in the 2012 Plan for Government, and was unfortunately not published as planned, so the remarks made by the state are not wholly convincing. On Tuesday, 5 March 2012, Justice Abbott reached the landmark decision that the genetic mother's name should be placed on the birth certificate. The ruling is unique to this case however and until legislation is provided, genetic mothers will still have to go to court on a case-by-case basis to be named as legal parents. The Irish Times interviewed one such mother, on 8 March 2013, who was quoted as saying, "I can't sign any official forms for him (her son from a surrogacy). I worry about something terrible happening to my husband. What would happen then? Going to court is now an option, but I think the Government needs to deal with this area urgently."

The fact that this case has received a good deal of media exposure might lead one to believe that legislation will now be dealt with, however as seen with *Roche*, issues brought to light are often forgotten all too soon once out of the media. It must be ensured that a pattern of inaction does not continue.

The area of ART is a booming industry that generates millions of euro each year. It is a costly process that can cost from €3,800 to €7,000 upwards for a standard treatment alone. There are legitimate fears that in order to ensure value for money eugenic screening of embryos may begin to be offered by fertility clinics, as the absence of law in this field means that there is no express prohibition on such practices. For the past year pre-implantation genetic diagnosis (PGD) has been offered by many fertility clinics in Ireland. This entails testing embryos for conditions such as cystic fibrosis, Down's syndrome and Huntington's disease. Should the embryo be found to be a carrier of such a genetic disease the couple are given the option to decline implantation. The lack of regulation in the area of scientific research permitted on these rejected embryos means that they are simply destroyed. If laws were introduced, experimentation in this field would ensure that the embryos could potentially be used for medical research purposes, which may assist in achieving scientific developments. While PGD no doubt has its benefits, if left unrestrained the process may lead to enhancement PGD that selects not just clinically healthy embryos but also 'socially' healthy embryos. That is to say that a 'slippery slope' where embryos are declined for minor deficiencies or even preconception sex selection purposes is conceivable. This would serve to treat human life as a disposable commodity and is yet another reason why legislation on assisted reproduction should continue to remain an urgent aim of government.

The scope of this brief article has shown how ART raises complex legal issues in a variety of contexts, from family and constitutional law to human rights and property law. It is baffling when one stops to consider how such a wide-ranging and potentially

dangerous area has been left completely unbound, despite calls for action, for nearly a decade. The reasons for legislation are compelling in both preventative and enabling terms. If the government develops a statutory framework for this area it will ensure that custody issues are not forced to go to court and that bioethics are not completely disregarded, it may also allow for innovative research with the potential to save lives.

What's your Name? I'm Called the Republic of Ireland now!

Mark Harkin

I used to be called "*The Irish Free State*", until the new 1937 Constitution changed my name to "*Éire*". However, I've been known as the "Republic of Ireland" since 1948.

Did you ever wonder why and how my name changed?

To begin to understand, we must go back to our history books. Let's begin with the Norman invasion of Ireland in 1169-1171, when Ireland was last thought to be fully liberated from foreign rule. In 1169, Strongbow and his Norman Knights arrived in Ireland to assist Dermot MacMurrough, The Irish King of Leinster, to regain his Kingdom. Noting the frailty of the Irish Kings, Henry II, The King of England, arrived in 1171 and created the Lordship of Ireland, and what followed was centuries of British rule.

The status quo remained until Wolfe Tone's Rebellion of 1798, when the prominent barrister, inspired by the French Revolution, sought to break the connection between Britain and Ireland. Wolfe Tone's efforts were unsuccessful on this occasion; however, it gave rise to a new desire for Irish independence, which inspired another prominent barrister, Padraig Pearse along with James Connolly to initiate the 1916 Easter Rising, in the hope of achieving what Wolfe Tone could not. The Rising was a success, in the fact that it once again high-lighted the desire for an independent Ireland, free from foreign rule, and in 1918 the Sinn Féin party was elected to the British Parliament on that manifesto. 1919 saw the establishment of the first Dáil by Sinn Féin, along with the declaration of independence and the establishment of the Irish Republic. However, these were not recognised by the British Government. This gave rise to the 1919-1921 Irish War of Independence, which ended in a ceasefire between the parties and the establishment of the Anglo-Irish Treaty. This Treaty was negotiated by Michael Collins, Arthur Griffiths, and the British Privy Council and brought an end to British rule in twenty-six of the thirty-two counties of Ireland.

In 1922 the Irish Free State (*Saorstát Éireann*) 1922-1937 was established as a self-governing dominion of the British Commonwealth and the 1922 Free State Constitution was enacted. The 1922 Free State Constitution did not achieve its objective, as Arthur Griffith's original draft of the 1922 Free State Constitution was changed by the British government to include such wording that would subordinate it to the Anglo-Irish Treaty, leaving Ireland still subject to British rule. The most important omission which occurs in the final 1922 Irish Free State Constitution is the Preamble, declaring the 'sovereign right' of the Irish nation as a free people, with unrestricted control over its own destiny and declaring Ireland as a democratic State.

This gave rise to the anti-treaty movement, led by Éamon de Valera and the Civil War of 1922-1923. De Valera's forces were eventually defeated by the pro-treaty forces after they came under heavy shelling at their base in The Four Courts.

However, Éamon de Valera, still driven by his desire for Irish independence, founded his new party "Fianna Fáil" in March 192. He resolved that when he came to power he would remove these external limitations on national sovereignty. The Fianna Fáil party was elected to government in 1932, on the manifesto that they would abolish the oath of allegiance, which they did. Fianna Fáil then spent the next five years in negotiations with the British Privy Council, seeking to remove articles from the 1922 Free State Constitution which were dictated by England. In 1937, De Valera noted that there were at lease 83 clauses that would need to be addressed or removed from the 1922 Constitution, and that this suggested it was no longer fit for purpose. He also noted that the Free State Constitution could never escape its basis in British law.

December 29, 1937 saw Éamon de Valera enact Bunreacht na hÉIREANN, or the Constitution of Ireland. This new Constitution addressed the issues of British interference with the Constitution and gave us our name, under Article 4.

Article 4, [t]he name of the State is *Éire*, or, in the English language, *Ireland*.

In 1948, we saw Ireland formally leave the British Commonwealth and adopt the title of "Republic", under, The Republic of Ireland Act, 1948.

The Republic of Ireland Act, 1948

1. The Executive Authority (External Relations) Act, 1936 (No. 58 of 1936), is hereby repealed.
2. It is hereby declared that the description of the State shall be the Republic of Ireland.
3. The President, on the authority and on the advice of the Government, may exercise the executive power or any executive function of the State in or in connection with its external relations.
4. This Act shall come into operation on such day as the Government may by order appoint.
5. This Act may be cited as The Republic of Ireland Act, 1948 .

So what's your name?

My friends call me the "Republic of Ireland".

Witness Intimidation and the Witness Protection System

Nicole Duffy

Under section 41 (1) of the Criminal Justice Act 1999, the intimidation of witnesses in Ireland is considered a statutory offence, carrying a maximum sentence of ten years imprisonment. However, in recent times, a growing number of witnesses in Irish courts seem to be effected by "collective amnesia". In fact, it is estimated that approximately ten percent of criminal cases taken to court by the Garda Siochana collapse due to witness intimidation. Furthermore, a significant amount of Ireland's criminal activity goes unreported for the same reason. This article aims to analyse the Irish Witness Protection Programm – one of the measures put in place by the government to deal with witness intimidation in Ireland.

The Irish Witness Protection Programme was created in 1997, shortly after the murder of Veronica Guerin, a famous Irish journalist. The programme shelters endangered witnesses by allowing them to start afresh in a foreign country, leaving everything behind them, including their identities. Any information regarding the exact areas of relocation of the witnesses is not disclosed to the Irish public. However, due to language considerations, it is assumed that the scheme expands mainly to areas such as America, Australia, Britain and mainland Europe. The Irish examiner recently reported that the programme cost the Irish state approximately €80,000 in 2009 and €700,000 in both 2010 an 2011. Journalist, Noel Baker, stated that this "reflects the small number of people in the scheme, possibly fewer than 10". Does the low participation of witnesses in the programme reflect major flaws in the scheme itself? Are possible witnesses sufficiently satisfied that their safety will be protected? And if not, how can the State work to reform the system?

In order to judge the success rate of the Irish Witness Protection Programme, we must examine some of the stories of those who have entered the scheme since it was established. It is accepted that "in most cases, those in the programme have emerged from criminality itself". Take the first witness accepted into the programme, Charles Bowden. Mr. Bowden, a well known criminal and former member of the so-called 'Gilligan gang', turned 'supergrass' after the murder of Veronica Guerin. As a former member of the Irish Army with expertise in firearms, Bowden was the gang's quartermaster. Bowden admitted that he "cleaned and loaded the Magnum used to kill Veronica Guerin but he always claimed he never knew she was going to be murdered. He said that he believed she was going to be threatened, shot at and not shot". Mr. Bowden was granted immunity and accepted into the Witness Protection Programme in return for his testimony against gang members: Patrick Eugene Holland, Paul Ward, Brian Meehan and John Gilligan. The question which arises here is whether or not the testimony of a 'supergrass' is reliable? In the case of Bowden, an analysis of his statements and court evidence has revealed a growing series of flaws and contradictions about key events and his own part in the affair. Furthermore, in the case of *DPP v. Ward*, the judge stated that "the Court readily accepts that Charles Bowden would lie without hesitation and regardless of the consequences for others if he perceived it to be in his own interest to do so". Criminals who give evidence against their associates in court often gain immunity from prosecution and in some cases, large sums of money. Do such rewards encourage these criminals to protect themselves and lie in court?

Former Minister for Justice, Mr John O'Donoghue, stated that the Witness Protection Programme "was recognition that Irish society was as amenable to the threat of organised crime as any other society". However, it is fair to say that the Irish Witness Protection programme seems quite underdeveloped, when compared to similar programmes in foreign nations such as the UK or the USA. In the UK, approximately £19 million per year is spent on witness protection measures, with approximately three thousand people under the State's protection. This is significantly larger than the estimated ten people under the protection of the Irish Witness Protection Programme. Home Office in the UK has based their witness protection scheme on the level and degree of intimidation which witnesses have been subjected to, by creating a layered scheme.

Former Minister, Michael McDowell, once said that "although criminal activity is generally well covered by the existing extensive criminal law, due to the nature and inventiveness of criminals and the changing pattern in crime in society, it is necessary to constantly review criminal law". This is especially true in the case of witness intimidation and witness protection. So, what can the government do to increase the effectiveness of the Witness Protection Programme and decrease the level of witness intimidation in Ireland?

First, I would suggest that the Garda Siochana's powers of search, detention and arrest be increased. Although this must be balanced fairly with the liberty of citizens, the expansion of Garda power would have a large impact in inspiring public confidence in the system. The Garda Siochana are the State's protectors and the main organisers of the Witness Protection programme. Therefore, it is reasonable to believe that if witnesses were to have more faith in the Garda Siochana's ability to protect them, they would be less like to succumb to harassment and intimidation.

It is clear that Ireland's Witness Protection Programme is in need of reform. It has been suggested by previous Ministers for Justice that the programme should be expanded. However, I think that the basis of the scheme should be examined and reformed before the programme is expanded to cater to the growing number of endangered witnesses in Ireland. In order to reform the system, Ireland could look to other jurisdictions and learn lessons from their witness protection schemes. I think that the State should look more closely to a scheme such as that of Australia's, which aims to balance the battle for justice with the rights of the witness. In Australia, the witness protection scheme revolves around the emotional and social needs of the witness. If Ireland were to take a similar approach, perhaps the public's confidence in the scheme would increase and more people would become willing to give evidence against criminal activity.

Finally, an area which must be considered while attempting to reform and strengthen the Irish Witness Protection Programme is that of media and technology. According to Gabriel Falcon of CNN, "Today's witness protection program faces the added burdens of the digital age. Facebook, Google, texting and the instant access to information via the Internet and smartphones provide new challenges to keep the identities of witnesses a secret". The guarding of any information regarding the area of the relocation of witnesses is vital for the success of the programme and extra resources should be allocated to protecting this element of witness protection in order for it to remain effective.

From the above analysis, it is clear that the issue of witness intimidation and harassment is becoming a problem in Irish society. In order to deal with this, the Irish Witness Protection Programme should be of the highest standard.

Presence at the Scene of a Crime and a Legal Duty to Intervene

Leah Holmes

As the law stands in Ireland, a person may be present at the scene of a crime or be present where illegal activities are being conducted and remain free from any form of liability. In light of the ever-increasing amount of organised crime in the State and the emergence of gang-culture, it seems imperative that the law in this area is clarified and expanded so as to ensure those involved in illegal conduct of any kind are culpable.

The law of the State has not been expanded to encompass those merely present at the scene of a crime. Under the Criminal Law Act 1997, "any person who aids, abets, counsels or procures the commission of an offence shall be liable to be indicted, tried and punished as a principal offender". To establish participation, a test has been set forth which provides the necessity to prove the accused actively participated in the offence committed. Liability with respect to complicity arises by way of offering aid or assistance in the commission of a crime. Under the 1997 Act, a person may be deemed as participating in the crime for providing encouraging actions during the commission of an offence. If the main offender or principal is knowledgeable that the accused assents to the offence then a degree of encouragement may be inferred. An example of this would be that of gang-rape. If a person encounters gang-rape and does nothing except watch, then although they are acting reprehensively, they are not participating. On the other hand, if the person was to shout encouragement or act in any manner that can be viewed as encouraging then they are willfully participating in the crime. The important element is intent to encourage. This therefore suggests that a person's presence at the scene of a crime could amount to participation if his/her assent was manifested in external action and in a manner

which would promote or encourage the commission of an offence. One must ask the question of why a person may be allowed to be a spectator to such an event and not be culpable for watching or for failing to intervene.

Case law in the area of criminal participation can be described as somewhat inconsistent. In *R v Coney*, a case which involved a crowd watching an illegal prize fight, it was held that there must be active, not mere passive, encouragement. In *People (DPP) v Rose* it was ruled that a spectator could not be convicted of anything for 'mere callousness'. There was no criminal liability for being a mere spectator even if the individual in question "did not express any words or take any steps to prevent what was happening". However, the more recent case of *People (DPP) v Jordan and Deegan* the accused were convicted of an offence of cruelty to animals for their presence at a remote farm where illegal dog fighting was taking place; suggesting that being present at the scene of an illegal/criminal event gives rise to automatic liability. It must be argued that, if such illegal events would not take place due to a lack of spectators, then such spectators must have an active involvement in the illegal event. If there was active involvement then such involvement should therefore suffice for the purposes of criminal liability; inferring criminal liability for the presence at the scene of a crime.

The most important case in this area is *Clarkson*. This involved British soldiers who were convicted for being present at the gang-rape of a girl in an army barracks in Germany, despite the fact that they had not physically acted or uttered any words of encouragement. Their convictions were quashed on appeal on the grounds that there was no evidence of encouragement of the rape of the girl. Unlike Jordan, the accused were not convicted for their presence at the scene of a crime. There was no evidence that the defendants had touched the girl, helped hold her down or prevented any other person from assisting the girl. Nonetheless, they made no conscious efforts to help the victim. It is conceded that spectators at such an event would only further the principal offenders in their endeavours. By a sheer lack of objections made by the accused and the fact that they remained at the scene, regardless of any spoken words or communicated actions, it would be inferred that the principal offenders had the assent of the accused.

The idea of 'spectator crime' is quite controversial in nature, and law in this area is accepted in many civil states (i.e. France) as an appropriate form of punishment where the so-called audience motivate the crime. Such laws require some form of guilty mindset. In the case of *People v. Nelson*, a woman named Swank, who encouraged a group of gang-rapists and yelled profanities during the rape, was complicit in the victim's rape and murder. However, an involved man named Wirick, who watched and video-taped the event, walked free. Making the conscious decision to watch such a heinous crime is an obvious choice of involvement and presence of a guilty mindset which should be punished accordingly, especially when one had the opportunity to offer assistance.

Under Irish law, failing to act when you have a legal duty to intervene would give rise to criminal liability but this relies solely on the existing relationship of dependency. There is no provision for a legal duty to intervene in any other circumstances. The French stance on criminal participation is somewhat strict and was established through what is called the "Good Samaritan law". The French penal code has imposed an obligation on each person on French soil to rescue an individual in peril if it can be done without danger to his own person or others. This prevents a person who is in a position to help or provide assistance choosing not to do so. The aim of law governing criminal participation is wholly intertwined with the punishment and deterrence principles of criminal law. The law in Ireland does not punish individuals for seemingly 'insubstantial' complicity in a crime, establishing the aim as unachieved. If we are to dissuade members of the public from being associated with criminal behaviour then it is necessary to implement laws that prevent this in its entirety. The existing law has many loopholes whereby an individual can be complicit in the crime i.e. spectator to the event and remain free from liability. If we cannot impose liability on a person for their mere presence at the scene of the crime then we should have the ability to impose a duty on the ordinary citizen to help, just like the French position. Amending Irish law to provide for a need to intervene in such circumstances would provide greater protection to the citizens of Ireland and would act as a further deterrent. Creating such a statute would make the Irish State a safer one and punish those who involve themselves in crime.

A Squatter-Friend or Foe?

Gráinne O'Callaghan

On the 1 September 2012, England and Wales passed legislation criminalising all acts of squatting – subjecting squatters to arrest, fine and imprisonment. Will Ireland follow in this direction?

At first glance, it seems that there is no rationale behind the law of adverse possession and that squatter's rights fly in the face of common sense, depriving the ordinary citizen of his right to peaceful enjoyment of his property and granting the squatter an undeserved benefit. The potential abuse of this right is that which motivated the change of legislation in the UK. However, the position of the Irish courts is to look more closely at the competing interests with squatter and landowner, and analyse this conflict within a rural Irish setting. It appears that within this setting, adverse possession does in fact indirectly benefit the community in which the squatter resides.

Nevertheless, it is accepted that rights of adverse possession are open to abuse. In attempting to mitigate the potential abuse, the law provides that a squatter must be in uninterrupted possession of private property for a minimum of twelve years before ownership rights can be claimed. The law also recognises all acts of interruption by or on behalf of the owner, no matter how slight, as sufficient cause to start the twelve year clock again as against the squatter. Examples of interruption include painting doors and fences, entering with a key, and gardening. In this regard, only property which has been completely abandoned for twelve years can be claimed adversely. The question may be asked, after 12 years of complete desertion, is it acceptable to grant possession rights to a squatter? By contrast to the UK, Ireland considers that it is. Irish courts maintain that a balance must be struck between the protection of the owner's rights and the grounds in favour of the squatter's rights.

The first ground refers to the maintenance of value in property. Property left abandoned for substantial periods of time is liable to be inhabited by drug dealers and anti-social youths, attracting acts of vandalism and violence to the community as a whole. It is accepted that the antisocial use of property reduces the value of all other property within the area and thus, if a squatter invests money in the upkeep and the productive use of property, that use is warranted and justified.

The second ground refers to the strengthening of legal title. Squatters rights reduce the risk of previous owners claiming possession by extinguishing all prior claims to that property. It ensures that when a property is purchased, its title is good, it has marketability and can be sold again.

The third ground refers to the benefits that are to be reaped from active and productive use of land. This rationale is particularly relevant to rural Ireland. Farmers that tend to herd sheep across narrow strips of neighbouring land in order to reach their own property are deemed to have a legal right of way over that land after twelve years. The benefit that is reaped from the productive use of the land is viewed as that which outweighs the owner's right to its use. Many cases of adverse possession relate to neighbours unknowingly encroaching on a neighbour's land due to map ambiguity.

The fourth rationale refers to squatter's rights as rights which assist in the transfer of unregistered land from parent to child. This policy is particularly relevant to rural Ireland as much of the land remains unregistered and thus, passes through squatter's rights. It seems that families are either deliberately deciding to save money and not apply to have their property registered or are ignorant to the legal formalities. In any event, the child remains as a squatter in possession of his parent's property up until the twelve year period has expired, at which point he can claim full ownership.

It seems, therefore, that squatter's rights do serve a positive purpose to society and are deceptively accommodating, particularly in rural Ireland. It is the family scenario and the right of way scenario that are most common in Ireland. Instances which involve serial squatting as a means of earning a living are not actually that common. Perhaps it is for this reason that the Irish courts are reluctant to change the laws.

However, who is to say that these benefits of adverse possession should outweigh the true owner's right to peaceful enjoyment of his property? Furthermore, as I have shown, many of the benefits of adverse possession in Ireland hinge on our country's rural nature. In a world that is ever advancing, it could be argued that this rural way of life will soon cease to exist. This could be a compelling factor in deciding to criminalise adverse possession.

On the 1 September 2012, England and Wales passed legislation criminalising all acts of squatting, subjecting squatters to arrest, fine and imprisonment. Will Ireland follow in this direction? Only time will tell.

Due Process Rights in Ireland

Paul Brady

This article identifies the main issues surrounding the erosion of due process rights in Ireland. Due process rights are frequently described as a 'golden thread' running through the legal system. These rights are often the first that people think of when discussing jurisprudence. The right to silence, access to legal representation, the right to a fair trial, and the presumption of innocence are but some of these rights. Violation of due process rights is viewed as unconscionable.

In the case of *The Minister for Justice and Equality v Tomasz Juszynski*, the Court was confronted with the violation of the respondent's due process rights. Counsel for the respondent characterised such rights "as a fundamental [part] in the system of criminal justice" and urged the Court that "in circumstances where it cannot be satisfied that the respondent's due process rights, and in particular his right to be legal aid, were respected within the trial process leading to his conviction and sentence this Court should refuse to surrender him." Despite the wishes of the State, the court decided to withhold surrendering the respondent, for fear his rights had been violated.

The State, in its laws, recognises the right of access to legal aid for all. For those who cannot readily afford representation, the government enacted the Civil Legal Aid Regulations, which states:

"*17. (1) If the applicant's disposable income is €11,500 per annum or less, the maximum income contribution which he or she will be required to pay shall be*

if legal advice only was obtained, €10,

if legal aid was obtained, €50."

This statutory instrument facilitates those who would not otherwise have the means, to have equal access to vital legal aid and demonstrates the importance of such access in Ireland.

In America, under their constitution, they take due process rights very seriously – arguably even more seriously than in Ireland. They view any violation of their rights as encroachment – usually by the government – on their individual freedom. In the U.S. Supreme Court Case of *Re Gault*, the judge said, in dicta, "Due process requires, in such proceedings, that adequate written notice be afforded the [parties]. Such notice must inform them "of the specific issues that they must meet," and must be given "at the earliest practicable time, and, in any event, sufficiently in advance of the hearing to permit preparation.'" In this case, the violation of these requirements resulted in the defendant being acquitted.

In Ireland, however, "[t]he right to silence is [no longer] absolute and may be abridged by legislation, provided such limitation is proportionate." This is not a view which would appear to hold due process rights as paramount, rather the 'golden thread' in Ireland, seems to be unravelling. "Yet, in a legal system which now accommodates preventive detention, the use of silence as evidence against an accused and significantly increased police powers among other developments, the reality of the presumption [of innocence] is increasingly placed in question." Some, with a cynical view of the legal system, might argue that these rights are being stripped away and may soon be a faint memory. However, such persons may take solace from a 2012 Supreme Court case which "recognised that there is a general, well recognised and well established, right to silence, and the principles surrounding the privilege against self incrimination are equally well established."

All is not perfect in 'the land of the free' either. While the Constitution is held in high esteem in America, their rights, too, seem to be eroding away at times. One newspaper article, commenting on due process rights in America, states: "Paired with cynical euphemisms ("extraordinary rendition" rather than kidnapping, "enhanced interrogation" rather than torture) and disingenuous rhetoric on the part of the President, the context for the NDAA has become an Orwellian milieu where abuses are "justice" and "American liberty" is secured by taking our rights away." Perhaps it is merely the evolution of our common law system; however, it would appear that we are going backwards. What would the patriots who gave their lives for our shared ideals and rights, (Thomas Jefferson, Abraham Lincoln, Micheal Collins, and James Connolly) say if they saw the current state of due process rights? However, even during the time when George Washington and others were drafting The Bill of Rights, they were "genuinely taken by surprise at the scale of hostility to their work when it was submitted to the peoples of the state for ratification." Perhaps there has always been, and will always be, those who oppose due process rights. However, consider the downsides of not having the luxury of due process rights. Imagine being presumed guilty before trial. Imagine not being granted access to legal representation. Or, worse still, imagine being put to a 'drumhead' trial, where your rights are non-existent and inferences of guilt are drawn from your silence.

Luckily, in Ireland at least, we are far removed from such a totalitarian legal system; but let us not become complacent. It may be appropriate here to quote Martin Niemöller, who once said; "First they came for the Socialists, and I did not speak out – because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out – because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out – because I was not a Jew. Then they came for me – and there was no one left to speak for me." I do not wish to trivialise these words, nor am I comparing Ireland, today, to any of the tragedies to which Mr. Niemöller was referring. However, the sentiment is relevant – if we allow due process rights to fall away, thinking that it does not directly affect us, are we not tacitly consenting to our own rights eventually disappearing? Who will be there, if and when the time comes, to demand that you get the rights you are entitled to?

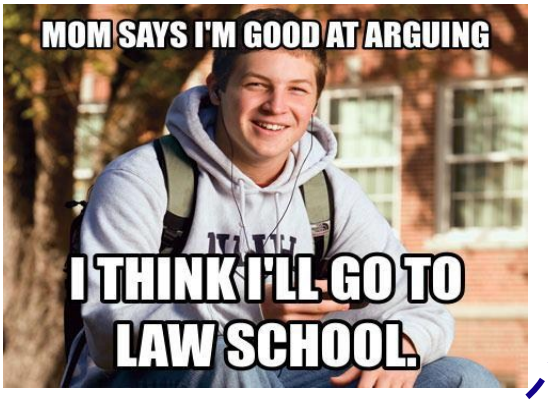
Life as a First Year Law Student

Hannah Walsh

To begin, Maynooth Law School was not my first choice on my C.A.O, simply because it was too close to home. Therefore, when I first came here I was both apprehensive and to be honest not entirely excited. However, as I look back in hindsight, I am without a doubt ecstatically grateful that Law within Maynooth has become a second home. I think the main point I am trying to preach is that what I thought law at Maynooth would be like, was much different to what it has become.

The first thing I was struck by in orientation week was the diversity of legal courses that Maynooth offered. All students have an option to try their hand at law. Not many other universities offer this opportunity.

My first lecture was Contracts with Professor Gopolan. Professor Gopolan's contract lectures are something I will never forget. His Socratic lecturing method is a far cry from the rigid teaching criteria within second level education and was undoubtedly a fright to the whole lecture room. Professor Gopalan prompted the class to answer individually the question, "what is law"? Many were shy to begin, but eventually a mild debate arose among the class. Mid-lecture, I attempted to challenge the Professor's unanswered question; however, I was quickly shot down and led to question my entire intelligence.



Although many of us brave souls who attempted to speak out felt embarrassed and dumbfounded towards the Professor's question, Gopolan had set the foundations for the forthcoming four-year degree; a degree that would entail an atmosphere of challenge, determination, and question. For some of us bright sparks coming from the Leaving Certificate, this was a shock to the system. We quickly learned that we were now in the world of law, which would strip back and re-shape our previous knowledge so as to conform to an entire new way of thought and process.

During my first week, I was introduced to modules such as moot court, legal writing, tort law, and criminal law. Immediately, I became to realise the progressive nature that the Law Department in Maynooth attained. For the first month, the Department bombarded us with announcements regarding guest speakers, ELSA, FLAC, Law Society, internships, and extra-curricular law related activities. At that moment I had realised how determined Maynooth was to consolidate its spot on the map of legal education within Ireland. Its determination was contagious, to the extent that I found myself asking friends at other law schools about their experience as a first year law student. I quickly came to learn that here at Maynooth we are extremely fortunate. These other students felt uninvolved, out-numbered, and overwhelmed within their law degrees. Although I had received a plethora of assignments by mid-semester, which has made the year difficult, my ability to comprehend and write persuasively has greatly improved. Whereas, in these other law schools, the issuing of assignments and exams did not exist and thus the students felt dissatisfied. In summary, it was at this point I felt honoured to be part of the expansion of legal education within the University.

As my first year ends, my experience has been nothing but positive. From harrowing moot court presentations to punctuation and grammar exams, the year has been challenging, but exciting. I have encountered a completely new world that has become somewhat less daunting simply because of the fact that I have the opportunity to study law at Maynooth.

How Far can the Courts go to Protect the Family Home

Francis Colgan

A recent report in the *Irish Times* indicated that the Irish fascination with home ownership could be waning. This information is hardly surprising when we consider the impact of the downturn on Ireland's economic fortunes over the last five years. Statistics from the Central Bank reveal that through the months of April and June of 2012, the number of homeowners in mortgage arrears grew from 10.2% to 10.9%. In fact, a total of 83,251 mortgages were in arrears over 90 days by the end of June, up from 77,630 at the end of March. What is most surprising about the Central bank report though, is how few of those distressed properties have actually been repossessed. The figures reveal that that the number of homes repossessed for the second quarter of 2012 was only 146.

These figures raise an interesting question of financial institutions and the cones on upside down mortgages through legal standing to repossess properties for would seem unassailable. The Irish courts nuanced position and have thus far thread family home and enforcing the banks

tion when one considers the legal positractual rights they retain to recover lossrepossession. On the face of it, the banks which mortgage payments have ceased however, appear to have adopted a more a very fine line between protecting the contractual rights.

The changing property landscape in Ireland has presented the Irish courts with a conundrum – more moral than legal – but observers are now asking what protection does the Irish legal system afford to distressed homes? On its face the law would seem clear – failure to service and maintain a mortgage will lead to forfeiture of the mortgaged property. On that basis one would expect the figures for repossession of properties to be much higher – what then accounts for the disparity? One possible answer for this may lie in the protections the Irish constitution affords to the Family, and the high regard it has for that social institution. Article 41.1 begins by pointing out the "State recognises the Family as the natural and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, *antecedent and superior to all positive law*". Moreover, Article 41.2 continues that the state "guarantees to protect the Family…as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." Such protections are not insignificant. While the Constitution is largely silent on the role of the state in protecting the home, particularly distressed homes, it does not require enormous imagination to extend the special

protection the State affords to the Family, or the premium it places on that institution.

The decision in *Duff* was not surprising, given the earlier decision by Justice Laffoy in *Stepstone Mortgage v Fitzell*. In *Stepstone*, the issues concerned the granting of a repossession order for a primary residence, and Justice Laffoy stated that, "given the serious consequences which flow from the repossession of a primary residence the lender must show that it complied with the code in order for her to exercise her discretion to grant an order for possession". Although Justice Laffoy pointed to the same FRCA as Justice Horgan had in *Duff*, the court here seemed more concerned with the "serious consequences" of repossessing a family home. Telling perhaps, the courts appear unwilling to extend the protection of the FRCA to commercial property.

The judgments in *Duff and Stepstone* suggest a willingness by the High Court to inhibit bank's ability to repossess family homes. By giving broad interpretation to the FRCA, the Court has signalled to financial institutions that their actions will be subjected to heightened scrutiny when they are seeking repossession of a family home. In doing so they have made it clear that if banks fail to act within the constraints of the FRCA, the courts will be unwilling to accept their claims for repossession. In *Duff* the court took pains to note that there were other options available to ILP to realise it security, and the message seems to be that banks must make every reasonable effort in exploring those options before seeking a repossession order. The reluctance to issue repossession orders was particularly evident in *Fitzell* where the court referred to "its discretion" to grant a repossession order given the "serious consequences" that flow from such action. The Courts unspoken concern for family was clearly at the heart of the opinion. Despite the activist posture that Irish courts appear to have adopted on this issue, it is increasingly evident that the Irish legislature must act if we are to properly balance the needs of the family, with the rights of the banks. The constitutional mandate that establishes the family "as the necessary basis of social order and as indispensable to the welfare of the Nation and the State" requires nothing less.

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Send in your letters, articles, jokes-anything you want for the next issue to goldenthread@nuimsu.com.

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