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**Editor’s Note**

It has been a pleasure to work on the 7th edition of *the Golden Thread*. Since it’s launch in early 2010, *the Golden Thread* has provided students with a platform to publish views and opinions on contemporary legal issues.

This *Golden Thread*  features interesting perspectives on many issues, not only plaguing the Irish jurisdiction but also the International community. Contributions made to this edition of *the Golden Thread* have not only been thought-provoking but have also highlighted inconsistencies with the law.

This edition of *the Golden Thread* covers the controversial Special Criminal Courts and the processes in which terrorists are tried in Israel, the evolution of Article 8, jurisprudence of the European Court of Human Rights in the context of gender identity, whether nature should have the same rights as that of a natural person, an evaluation of S117 of the Succession Act 1965 and a brief analysis of factors that have contributed to violence in Ireland.

I hope you enjoy reading the contribution made to this edition of *the Golden Thread*.

Barakat Gbadamosi,

Editor-in-chief.

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**Ireland, Israel & the Trial of Terrorists**

*- by Daniel Mannion & Daniel O’Dowd*

1. **Introduction:**

In Ireland, the Special Criminal Court was instituted under the Offences Against the State Act[[1]](#footnote-1) and was afforded constitutional authority under Article 38 of Bunreacht na hÉireann.[[2]](#footnote-2) This was in response to the escalating level of terrorist-related offences committed by the IRA. Subsequently, the remit of the Court was expanded to encompass cases involving organised crime.[[3]](#footnote-3) This has proven necessary to combat instances of jury intimidation and address concerns about the ability of civilian courts to administer justice.[[4]](#footnote-4) The *Hederman* committee articulated these fears when it noted that Irish society was particularly prone to jury intimidation, attributable to our population being ‘small and dispersed,’[[5]](#footnote-5) making these measures necessary in comparison to other common law jurisdictions. The establishment of the Court has drawn the ire of the UN Human Rights Council[[6]](#footnote-6) who contends that it is a violation of one’s right to a fair trial.[[7]](#footnote-7) Alternatively in Israel, the Government’s primary function is to secure the safety of its citizens[[8]](#footnote-8) and finds itself in the unique situation of having been in a state of emergency since its inception as a state in 1948.[[9]](#footnote-9) This has led to the idiosyncratic structure of the Israeli Courts; civilian courts sit without a jury and instead utilise a panel of one to three judges.[[10]](#footnote-10) For bye, separate military courts have been constituted to address terrorist threats in the occupied areas of Gaza and the West Bank[[11]](#footnote-11) and administrative detention has been resorted to by Israeli Defence Forces in processing terrorist suspects. These draconian measures are somewhat justified by the inordinate levels of terrorist attacks in Israel. Since September 2015 alone, 42 people have been killed and over 577 injured by terrorist attacks.[[12]](#footnote-12) Albeit, Ireland and Israel are wholly incomparable in this regard; the respective governments of these nations have deemed these non-jury courts necessary to combat terrorism which we shall analyse over the following paragraphs.

1. **Ireland:**

The Special Criminal Court was convened to be a court of first instance for ‘scheduled offences’ deemed by the Attorney-General to be unsuitable for the ordinary courts; the Attorney-General must apply to the District Court judge for the case to be transferred to the Special Criminal Court due to concerns over the administration of justice.[[13]](#footnote-13) As mentioned before, the Court was constituted to quash dissident republican activity; the Court was revived by the Government to successfully prosecute members of the IRA and other militant groups.[[14]](#footnote-14) Members would be prosecuted in the Special Criminal Court for being a member of an ‘unlawful organisation’ as defined under Section 18 of the 1939 Act.[[15]](#footnote-15) A person may be convicted on the basis of incriminating evidence[[16]](#footnote-16) and also testimony from a Garda chief superintendent that he/she believes that the accused was a member of an ‘unlawful organisation.’[[17]](#footnote-17) The added weight afforded to Garda testimony bears a resemblance to the detention of ‘unlawful combatants’ on the basis of reasonable belief by the Chief of General Staff of the IDF[[18]](#footnote-18) which has been a pivotal element of the Israeli approach to the trial of terrorists. The belief of the Chief of General Staff would be subject to judicial review[[19]](#footnote-19) and an opportunity would be afforded to the accused to contest the allegations entered into evidence.[[20]](#footnote-20) In the Irish context, the constitutionality of such proceedings was contested in *O’Leary v AG*,[[21]](#footnote-21) but ultimately Justice Costello held that the act merely enabled Garda testimony to be admitted and that the presumption of innocence was still a salient element of terrorist trials.[[22]](#footnote-22) Withal, per *The State (Littlejohn) v Governor of Mountjoy Prison*[[23]](#footnote-23) the majority decision acts as the decision for the court as a whole. This is replicated in Israeli Courts as shown in *Anonymous v Governor of the IDF forces in Judea and Samaria* with only President Barak filing an opinion.[[24]](#footnote-24) Similarly, per *The People v McKevitt*[[25]](#footnote-25) transcripts of evidence from proceedings in Court are not reported unless the ruling is appealed; this exhibits the premium placed on security in these cases and the genre of cases that appear before the Court. The Special Criminal Court has proven effective in prosecuting and convicting key terrorist leaders such as Michael McKevitt and Colm Murphy[[26]](#footnote-26) and helping to counteract the tide of terrorism that arose during the Troubles. Yet ultimately, “[t]he Special Criminal Court was created as an extraordinary court in extraordinary times; however, no reasonable person could today claim that there is a public emergency threatening the life of the nation.”[[27]](#footnote-27) The Court is a ‘necessary evil’ to preserve the state in times of strife but those times are no longer with the *Hederman* Committee indeed advocating for a return to trial by jury with no justification for the continued existence of the Special Criminal Court being provided.[[28]](#footnote-28)

1. **Israel:**

Interestingly, there are two separate processes for the trials of terrorists in Israel. Israeli citizens are tried for terrorism exclusively through the civilian courts whereas non-Israeli citizens and those in the occupied territories are generally tried through IDF military courts.[[29]](#footnote-29) In comparison to Ireland – where the Attorney-General must request for a case to be transferred to the Special Criminal Court – the Israelis are more expedient in their trial of terrorist non-citizens; it is left to the IDF to determine whether a non-citizen is to be tried in a civilian or military court.[[30]](#footnote-30) This has effectively led to a twofold legal system for citizens and non-citizens.[[31]](#footnote-31) The foremost reason for this has been the IDF policy that a plot originating in the occupied territories should fall under the jurisdiction of the Military Courts[[32]](#footnote-32) and the general policy that Israeli citizens shall not be subject to the jurisdiction of Military Courts.[[33]](#footnote-33)

Generally, where circumstances allow, the IDF opt for the prosecution of terrorists in civilian courts to guarantee the defendant’s basic legal rights but this decision may be subject to intelligence concerns.[[34]](#footnote-34) In the case of *Israel v Barghouti*,[[35]](#footnote-35) the State opted to prosecute the defendant in public, due to considerable public interest in the trial due to the accused being second-in-command to Yasser Arafat who was at the time the leader of the ‘Tanzim’ terrorist organization. Despite Barghouti refusing to co-operate with legal proceedings,[[36]](#footnote-36) the Court still found him guilty of participation in several acts of terrorism.[[37]](#footnote-37) Similarly, in the trial of *Bishara*[[38]](#footnote-38) the State opted to prosecute the defendant in the civilian courts on two counts of speeches inciting violence against Israel due to the defendant’s public profile as a former member of the Knesset. This allowed the Court to vindicate the defendant’s right to parliamentary privilege extending to political speeches and terminate proceedings against Bishara. Additionally, there are added safeguards against unfair trial that a conviction cannot be obtained solely on the basis of a confession[[39]](#footnote-39) and that certain interrogation techniques have been outlawed.[[40]](#footnote-40)

However, Israel is different to Ireland in that the State does resort to more extreme options than a non-jury trial when the circumstances require. In cases of threats to National Security, the IDF may detain suspected terrorists in ‘administrative detention’ for a period of up to six months;[[41]](#footnote-41) the detention of suspects may be extended on appeal to the Supreme Court where controversially classified evidence may be submitted to the Court but the defendant’s lawyers denied access to it.[[42]](#footnote-42) There are also the Military Courts instituted by IDF forces in the occupied territories which are panelled by Senior IDF officers.[[43]](#footnote-43) Thus, we might conclude that Ireland and Israel have instituted measures deemed proportionate to the threat at hand, albeit the national security landscape is vastly different in both jurisdictions.

1. **Conclusion:**

President Barak of the Israeli Supreme Court summarised the position of a democracy prosecuting terrorists perfectly when he said “[a]t times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitutes an important component of her security stance.”[[44]](#footnote-44) Indeed neither Ireland nor Israel may abandon the rule of law in their prosecution of terrorists. A plethora of arguments have been made for the temporary encroachment upon our most fundamental rights – such as the right to a jury trial – on the premise that it is necessary for the preservation of the public safety. However, this argument can only last for so long. Indeed, the *Hederman* Committee were “of the view that the case in favour of the continued existence of the Special Criminal Court has not been made out”[[45]](#footnote-45) when they reviewed the Court in 2002. It was noted that the workload of the Court had indeed waned since the 1970’s attributable in part to the conclusion of the Good Friday Agreement.[[46]](#footnote-46) Even in Israel, which still remains in a state of emergency, there has been a shift away from trials of terrorists in military courts and a curtailment of the powers afforded to states to successfully prosecute terrorists. Perhaps both Ireland and Israel were justified in their original enactment of special measures to try terrorists, but that justification has now been eroded and the rule of law must be restored else the legitimacy of the democracies they claim to protect is undermined.

**The Evolution of Article 8 of the ECHR in the context of gender identity**

*-by John O’Neill*

**Introduction**

From *Corbett v Corbett*[[47]](#footnote-47) in the 1970’s to *Goodwin v the United Kingdom*[[48]](#footnote-48) in the early part of this century, the European Court of Human Rights (hereafter ECtHR) has examined the issue of transgender identity in relation to Article 8 of the European Convention of Human Rights (hereafter ECHR), and its interpretation of Article 8 has evolved over this period. To understand why this happened, it is important in terms of clarification, that, this evolution be examined and commented on, regarding the cases that came before the ECtHR during the intervening years, and will, this author hopes, illustrate how the ECtHR applied an evolutive interpretive process to definitively express that the ECHR is a living instrument.

It is submitted, that this evolution was possible because of the volume of cases coming before the ECtHR each year and though this piece is about the interpretive processes used with Article 8 cases on transgender identity, the evolutive interpretive process was influenced by cases not related to transgender identity but with the impact of national legislation on the rights of the individual. Three such cases were *Tyrer v. United Kingdom, [[49]](#footnote-49) Marckx v Belgium,[[50]](#footnote-50)* and *Dudgeon v United Kingdom,[[51]](#footnote-51)* all of which comment exclusively on the ECHR as being a living instrument.

The following cases emphasised the margin of appreciation given to member states when it came to interpreting the ECHR, *Rees v United Kingdom*,[[52]](#footnote-52) *Cossey v United Kingdom*,[[53]](#footnote-53) and *Sheffield and Horsham v UK*.[[54]](#footnote-54) The margin of appreciation enabled the ECtHR to allow states the autonomy to apply the ECHR in a manner that best suited them at that time; the emphasis was that each state knew better how to apply the ECHR in their respective jurisdictions having a better knowledge of the customs and beliefs of its citizens than the ECtHR.

**Corbett in context**

Ormrod J observed in *Corbett v Corbett* [[55]](#footnote-55) ‘because marriage is essentially a union between a man and a woman, the relationship depended on sex, and not on gender. The law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person’s sex for the purpose of marriage. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. The marriage was void *ab initio*.’

The above judgment given in 1970, reflected the limited understanding society, and indeed, the law had when it came to the issues of transgender people; nearly 40 years later we have moved on, and, although our understanding of people needing to transform their gender to have a fulfilling life has evolved, we still need a little push.

There is much in the judgment above that many who want to transition would fear, such as the reference to the operative intervention[[56]](#footnote-56) being ignored, and the biological sexual constitution of an individual being fixed at birth,[[57]](#footnote-57) which cannot be changed by either the natural growth of sexual organs or by surgical means.[[58]](#footnote-58) It is evident that the ruling from the court in Corbett v Corbett*[[59]](#footnote-59)* shows that the court applied a literal interpretation when deciding that the marriage was void ab initio, and that gender reassignment surgery cannot change the historical gender of the patient. This literalist interpretation Letsas [[60]](#footnote-60) calls originalism or textualism. He says further [[61]](#footnote-61) ‘Strasbourg’s interpretive ethic is fully justified, by offering an account of the nature of treaty interpretation in general. It argues that treaty interpretation is intrinsically an evaluative task in identifying the moral values which normatively constrain the projects that states pursue on the international plane. Treaty interpretation is only derivatively an exercise in discovering drafters’ intentions and in determining the meaning of treaty provisions. Which interpretive methods an adjudicative body should use depends on the nature of the treaty in question and the moral value in play’.

The rigidity when it came to the rights claimed by transsexuals in subsequent cases shows that the ECtHR allowed each state the margin of appreciation to address these issues in any manner they saw fit at that time and this will be shown in the judgments below.

**Rees in context**

In *Rees v United Kingdom[[62]](#footnote-62)* the applicant had been born and registered as a female and later decided to transition to male and had the appropriate treatment. After this he sought to change his birth certificate and the respondent refused to change it stating it was an historical document and as such could not be altered. Rees took the case to the ECtHR claiming a breach of his Article 8 and 12 rights. The Grand Chamber determined in its ruling that there had been no breach of either right. In its judgment the Court went on to determine, that the failure to confer a transsexual a right to amend their birth certificate was not a breach of Article 8 but that it could give rise to a positive obligation but failed to do so in this particular case.[[63]](#footnote-63) The court further determined that the application of the criteria set down in *Corbett v Corbett[[64]](#footnote-64)*did not constitute a violation of his Article 8 right to privacy or his Article 12 right to marry, and that the fair balance had to be struck between the general interest of the community and the interest of the individual which would vary and would impose on the state an impossible or disproportionate burden.[[65]](#footnote-65) The court did acknowledge however that in any future case it had to mindful of any legal, scientific and societal developments with regard to transsexuals.[[66]](#footnote-66)

There is a shift here in the courts stance and it is a subtle one, in *Corbett* the court stated categorically that the gender of a person was decided by their birth and that no subsequent alterations would change that, in *Rees* the court acknowledges that in future cases they needed to be mindful of any legal, scientific and societal developments[[67]](#footnote-67) with regards to transsexuals, this addition of societal developments indicates that with a change of attitude within society in the future the court might be more considerate of the needs of transsexuals.

**Cossey in context**

In *Cossey v United Kingdom[[68]](#footnote-68)* the ECtHR held that there had been no violation of the applicants Article 8 (right to respect for private and family life) or Article 12 (right to marry) of the ECHR. It stated that gender reassignment surgery could not result in the acquisition of all the biological characteristics of the other sex (§ 40 of the judgment). The court also determined that amending a birth certificate to a newly assigned gender following surgery would not be an appropriate solution. The rationale was that the *Corbett* application was the appropriate one whereby the traditional concept of marriage ‘provided sufficient reason for the continued adoption of biological criteria for determining a person’s for the purpose of marriage’.[[69]](#footnote-69) The court concluded that it was for the individual states to regulate by its National law the exercise of the right to marry.

This appears to be a step back to the *Corbett* application and the courts unwillingness to acknowledge that surgical intervention in gender reassignment cases altered the gender of transsexuals and that ultimately the gender they were born with was their actual gender. The margin of appreciation given to the states in cases relating transsexuals and their Article 8 and Article 12 rights over rides the personal rights of the individual in such cases.

**Sheffield and Horsham in context**

In the case of *Sheffield and Horsham v UK[[70]](#footnote-70)* the court surmised that with no scientific or legal developments in the area of transsexualism since the Cossey ruling, it could not be persuaded to depart from the decisions reached in the previous cases, and that the respondent state was entitled to rely on a margin of appreciation to defend its refusal to recognise in law post- operative transsexual’s sexual identity for court.

The court further opined that the issue with transsexualism raises complex, scientific, legal, moral and social issues in respect of which there is generally no consensus among contracting states. Significantly the court also determined that the detriment suffered by applicants through being obliged to disclose pre-operative gender in certain contexts was not of sufficient seriousness as to override the respondent State’s margin of appreciation and situations which applicants relied on to show the ruling was to their detriment were infrequent and where they were asked to disclose their pre-operative gender, that these situations were justified.[[71]](#footnote-71) The authorities had sought to minimise intrusive inquiries as to the applicants’ pre-operative status and there was no disproportionate interference with the applicants’ right to respect for their private lives. Finally, the court found that the respondent state had taken no steps to review the appropriate legal measures despite the rulings in *Rees* and *Cossey* where it was determined that such reviews were necessary.[[72]](#footnote-72)

What is significant about this ruling is that the ECtHR referred to consensus between the states and that any lack of consensus would allow the respondent state to apply a margin of appreciation which would override the rights of the individual in such instances. The court also referred in its judgment to the infrequency of such cases and that the intrusive nature of having to disclose pre-operative gender was appropriate in certain circumstances.

It is submitted that this acknowledgement by the ECtHR that the lack of consensus and the infrequency of cases of this type hindered transsexuals’ rights and that the ECtHR had difficulty addressing these cases because individual member states had not really begun to address transsexual rights within their own national legislation, which would indicate that society had not reached a stage where it was ready or willing to address the issue of transsexualism. It is also submitted that the evolutive interpretive element required to determine that the ECHR was a living document was not capable of being applied in transsexual cases at this juncture and it could only be applied by determinations reached in other Article 8 cases. The following cases allowed for the evolutive interpretation that the ECHR was living document were *Tyrer v. United Kingdom[[73]](#footnote-73), Marckx v Belgium[[74]](#footnote-74)*and *Dudgeon v United Kingdom.[[75]](#footnote-75)*

In Tyrer v United Kingdom[[76]](#footnote-76) the court stated that ‘The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. Corporal Punishment was as the court stated ‘it is an institutionalised assault on a person’s dignity and physical integrity, which is precisely what article 3 of the Convention aims to protect’.[[77]](#footnote-77) The reference to the ECHR being a living instrument is the first application of the evolutive interpretive element used by the ECtHR to allow the court to as it put it ‘allow the court to interpret legislation in light of present day conditions.’ [[78]](#footnote-78) This method would allow the ECtHR to address transsexual issues in the future.

In *Marckx v Belgium [[79]](#footnote-79)*the ECtHR determined that Belgium Law would only allow maternal affiliation between children born out of wedlock (illegitimate children) and their mother where there was voluntary recognition or by a court declaration. The ECHR makes no distinction between legitimate and illegitimate children and that consequently this discrimination puts the illegitimate family under unfavourable and discriminatory conditions. The ECtHR also referred to the fact that laws within member states are evolving and continuing to evolve and that it must be allowed to interpret that evolution.[[80]](#footnote-80)

In *Dudgeon v United Kingdom[[81]](#footnote-81)* the ECtHR stated that ‘As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied.’ It stated further that,[[82]](#footnote-82) ‘though a legitimate concern, the moral climate in Northern Ireland did not amount to a pressing social need, capable of outweighing the negative effect that the prohibition had on the life of homosexuals.’ It found a violation of article 8 of the Convention.

These three cases showed that the ECtHR was prepared to apply interpretive methods to apply the ECHR, and that over time the member states by their actions or their failure to act had allowed the court to determine that the action or inaction had directly affected the individuals involved, as Letsas states [[83]](#footnote-83) ‘Some believe that courts should show deference to the elected branch of government when it comes to morally controversial human rights issues. Others believe that courts have a duty to uphold fundamental rights of the individual, even when doing so goes against the will of the elected branch, because rights are inherently anti-majoritarian.’ This view that ‘rights are inherently anti-majoritarian’[[84]](#footnote-84) would allow the ECtHR the flexibility to defend the rights of the individual from being trampled on by member states by allowing the court to interpret the ECHR as a living document. It basically allowed the ECtHR the use this interpretive method in cases for transsexual rights in the future.

The ECtHR first applied the evolutive interpretive method in *B v France[[85]](#footnote-85)*where a transsexual male to female was refused permission to change their first name on their identity card, the refusal was as the ECtHR determined a breach of *B’s* Article 8 rights and was allowed because the law in France was that each person must produce their identity card when requested, and this place *B* in a vulnerable position.

In *Goodwin and I v United Kingdom[[86]](#footnote-86)* the ECtHR determined that having regard to the changing conditions within the respondent state and within contracting states generally and to respond to any evolving convergence as to standards to be achieved, a failure of the respondent court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. The ECtHR pointed to the clear and uncontested evidence of continuing international trend in favour not only of increased social acceptance of transsexuals, but of legal recognition of the new sexual identity of post-operative transsexuals. It stated also that it was unlikely to have any detrimental effect to the general public interest and that society would be able to endure certain inconvenience to enable individuals to live with dignity and worth in accordance with sexual identity chosen by them at great personal cost, ultimately that the individual interest asserted by recognising transsexual rights did not impose an excessive burden on the community as a whole.

**Conclusion**

It is submitted that the evolutive interpretive process used to allow the ECtHR to apply the ECHR has evolved to a point where the court is willing to limit the margin of appreciation shown to member states in the past. This interpretive process stemmed from cases brought before the ECtHR over a lengthy period and covered many of the Articles with the ECHR. This process was painfully slow and reflected a view of society at that time. In *Corbett v Corbett[[87]](#footnote-87)*we were shown how the court limited the rights of transsexuals by declaring that their gender was based on their historical gender and could not be altered through surgical intervention. In the preceding cases of *Rees[[88]](#footnote-88)Cossey [[89]](#footnote-89)*and *Sheffield and Horsham [[90]](#footnote-90)*we witnessed the large margin of appreciation given to respondent states but noted that the ECtHR had declared that ‘in any future case it had to mindful of any legal, scientific and societal developments with regard to transsexuals.’

**Is it about time we afforded Nature the same Rights as a Natural Person?**

*-by Patrick Carty*

As Human beings, we assume rights and freedoms, which we consider fundamental to our very existence. These entitlements range from the most basic, that of food, shelter and protection to those that we strive to facilitate, the right to a fair income, equality before the law and free assembly. As an intelligent and conscientious species, we can comprehend the importance of providing such insurances to protect our interests and ultimate survival. The fortunate reality is that mankind is not under any immediate threat, but the world we share is. Our efforts to tackle climate change, deforestation, faunal and floral extinction and pollution are testing. Our environmental laws lack robustness and our shortcomings are generating fresh problems every day. So, is it about time we reconsider our approach to protecting the environment and its dependents? Perhaps now we must embrace the unorthodox idea of granting nature equal rights to that of a natural person.

It is without doubt that the condition of nature and the environment is deteriorating at an alarming rate. This is not speculation, it is fact. The consistent rise in global temperatures is expected to result in an increase in sea levels by up to five feet before 2100.[[91]](#footnote-91) Extinction rates at the present are calculated to be one thousand times more than in any other period in recorded history.[[92]](#footnote-92) Additionally, the mass deforestation of our rainforests and our increased appetite for dwindling resources are deconstructing ecosystems which have taken aeons to become established. These problems are of planetary proportions and affect all of Earth’s inhabitants. In an effort to understand what we are doing wrong, we must look to our current regulatory schemes and laws concerning the environment.

In the least condemnatory fashion, current legal protections of the environment and nature are more inward-looking than altruistic. We have undertaken some effective measures to combat pollution, resource depletion and the disappearance of endangered species, and these actions must be commended. However, these pursuits, while well-intentioned, inadvertently protect the interests of mankind, their governments and at times, capitalist agendas. The contemporary approach to drafting legislation to protect the environment is shaped by human interests. We don’t perceive ourselves as a constituent of nature, or even that we are just another species among others, but rather that we are detached from it.[[93]](#footnote-93) Environmental laws are then rather egocentric or anthropocentric, in that the only reason to enact such legislation is for the furtherance of our interests and welfare and not that of nature. Dr Peter Burdon, a senior lecturer in Environmental Law at the University of Adelaide supports this perspective stating that, “the only things that environmental regulations regulate are environmentalists.”[[94]](#footnote-94) Current laws are strained by boundaries and restrictions and can often be manipulated by those with more important interests. As Burdon explains, in cases of environmental lawsuits, large corporations and multinationals will often have extensive capital set aside to fight such actions against them.[[95]](#footnote-95)

Our understanding of how best to safeguard the environment has progressed from conservation to preservation and now to protection. These projects while theoretically different are nevertheless identical in practise. They are all designed to treat the environment in the context of what it can give to us, rather than what the environment needs from us.[[96]](#footnote-96) A radical step which may reverse our anthropocentric attitude towards the environment is the concept known as the “rights of nature”. This concept, as described by the Global Alliance for the Rights of Nature, alters the traditional perception of nature as property under the law.[[97]](#footnote-97) Instead, the law must recognize the environment as having the right to “exist, persist, maintain and regenerate its vital cycles.”[[98]](#footnote-98)

While it might seem unconventional and even slightly bizarre, the “rights of nature” theory is far from novel and has been contemplated in the past. In the Medieval Ages, it has been documented that occasionally animals that had attacked and killed their owners would appear before the court in an equal fashion to that of humans.[[99]](#footnote-99) Two centuries later the renowned philosophers, Thomas Hobbes and John Locke, often advocated the granting of human rights to nature. The Scientific Revolution of the 17th Century had challenged the teachings of the Book of Genesis and the Christian churches resulting in a view that instead of being the master of nature, humanity was rather a member of the natural community.[[100]](#footnote-100) However it was Christopher Stone’s studies into the “rights of nature” during the 1970s that sparked worldwide interest in the belief. His book, “*Do Trees Have Standing?*” which was praised in the landmark decision in *Sierra Club v. Morton[[101]](#footnote-101),* fortified this equality of rights between humans and nature. To be recognized as a legal entity, Stone argued that the rights afforded to nature must be subject to redress by a public body and have the ability to be represented and institute legal proceedings under the guardianship of a third party.[[102]](#footnote-102)

Rarely has environmental law treated any element of nature as a legal entity with substantive rights[[103]](#footnote-103), similar to that described by Stone. This changed however in 2008 when Ecuador became the first country to constitutionally recognize the rights of nature. Similar to the model upheld by the Global Alliance for the Rights of Nature, the Ecuadorian Constitution states that nature has the right “for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”[[104]](#footnote-104) and the “right to be restored.”[[105]](#footnote-105) The provision was tested in 2011 when local citizens sued on behalf of the Vilcabamba River which had been threatened by roadworks. Their case was successful in compelling the municipal government to carry out restoration on the river. This movement which some environmental theorists have termed “ecocentric environmental ethics”[[106]](#footnote-106) has similarly been adopted in Bolivia. The country proposed the Universal Declaration of Rights of Mother Earth in 2010 which unlike its UN counterpart, aims to protect the natural world “from the excesses of the state and of humans generally.”[[107]](#footnote-107) New Zealand has recently become the latest country to adopt laws which reflect the “rights of nature” concept. The Te Urewera Act which was passed in 2014 granted an 821-square mile forest the legal status of a person. The area is considered as sacred by the local Maori who treat it as a living and breathing entity.[[108]](#footnote-108) The Act empowers a board of guardians to protect and represent the forest while still allowing public access to those who wish to fish, hunt or farm.

The affording of rights to nature is proving successful internationally in the fight against environmental disasters and destruction. Environmental law in Ireland stems largely from European Union directives which have influenced such legislation as the Protection of the Environment Act 2003, the Waste Management Act 1996 to 2011 and the Air Pollution Acts 1987 and 2011. Their existence however has not provided the desired effects in every area. An assessment of Ireland’s environment carried out by the Environmental Protection Agency last year concluded that biodiversity loss remains a substantial risk with only nine per cent of our habitats managing to secure a favourable status.[[109]](#footnote-109) The non-governmental organization, An Taisce, has also expressed concern agreeing with the EPA in that a “transformational change is needed”[[110]](#footnote-110) in respect of our current approach. Ireland’s peatland habitats have suffered the most in the past few decades. These ecosystems which host a diverse population of faunal and floral species have suffered almost a fifty per cent reduction in their habitats, a result of over-exploitation, burning and afforestation.[[111]](#footnote-111) Rather than protecting the peatland bogs for our own interests, perhaps it is necessary we look to granting these unique environments a legal voice and a special guardianship.

This environmental dilemma we are now faced with can only be tackled once we reconsider our relationship with nature. If we are to benefit from nature, nature must benefit from us. This is a partnership of equals, one of symbiosis and respect. We must as the dominant species on this planet, understand the importance of a thriving natural environment and establish laws which not only protect it but nurture it. As the “Earth scholar” Thomas Berry remarked, “Rights come with existence. That which confers existence confers rights.”[[112]](#footnote-112)

**“Letting the train run away with the engine” – A comparative analysis of S117**

*-by Conor Duff*

Speaking in 1957 John Costello[[113]](#footnote-113), the then Taoiseach in his address to Dáil Éireann exclaimed that “the man making a will should be able to understand the claims of his wife and children upon him, to know the contents of his will and to appreciate the extent of his property.”[[114]](#footnote-114) He furthered this, stating that the “parliament or anybody else has no right to interfere with the rights of an individual unless there is a demand or need for it.” He was fearful that “we [Dáil Éireann] were letting the train run away with the engine.”[[115]](#footnote-115) Property law and succession law to a large extent governs the particulars one must consider in relation to leases, wills and drafting documents. Succession law prescribes us to consider the prerequisite beneficiaries to one’s will, the requirements to make *that* a valid will, and to whom we must make allowances for in our will. This paper will examine the extent of that power prescribed and will consider whether our ideological understanding of dispositional freedom has become jaundiced due to legislative power or whether the legislature’s rationale is a precautionary, progressive step, realigning the testator’s moral compass.

Historically speaking, freedom of testation was asserted in the case of real property in order to evade the control of the feudal lords. Lyall[[116]](#footnote-116) argues that this was a progressive step as its attainment was part of the historical process of replacing feudal forms of property with individual property. Absolute testamentary freedom existed in the UK between 1891 and 1938. Throughout this period of unbridled freedom the provision only applied to men. Women did not gain absolute testamentary freedom until 1863[[117]](#footnote-117). In Ireland, The Succession Act[[118]](#footnote-118) does not provide a set percentage of the estate of a deceased for children. Rather, S117 allows a child to make an application to the court of adjustment of their parent’s estate on the basis that the deceased parent has failed in his/ her moral duty to make proper provision for the applicant’s child, either during his or her lifetime or on his/ her death. A claim under S117 can be taken by children of all ages. However, the court acknowledged that adult children may have a more arduous standard to meet than an infant child.[[119]](#footnote-119) Society has greatly progressed and evolved since the enactment of S117. Many critics, namely Siobhan Wills argues[[120]](#footnote-120) that property law once reflected a “static economic structure” one where the wealth is passed from generation to generation through lineal descent. Today neither the economy nor social structures are static. The economic and societal developments, which occurred, has rendered S117, which was once an “innovative and controversial” provision- “inadequate.”[[121]](#footnote-121)

The rationale behind S117 was originally founded to promote a normative moral duty on the testator to protect family members from disinheritance. The act[[122]](#footnote-122) contains ambiguous terms such as “moral duty” and “proper provision.” The courts have tried in various attempts to provide a definition of these terms. S117[[123]](#footnote-123) provides:

1. Where, an application by or on behalf of a child of a testator, the court is of the opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.
2. The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children…[[124]](#footnote-124)

A claim under S117 must be taken within six months of taking out the grant of representation. The time limitation period for the application is arguably limited. In other common law jurisdictions, such as Australia the time limit for an application taken by a spouse or child is twelve months after the extraction of the grant of representation. In Australia, the time period is twelve months; Queensland Law Reform Commission have recommended that the court have “unfettered discretion”[[125]](#footnote-125) to extend the time restriction as it currently is too narrow. Internationally speaking Ireland is unique in respect of the short limitation period; arguably it is an infringement of our constitutionally guaranteed access to the courts provision.[[126]](#footnote-126) The per rep who is the executrix of the will is under no statutory obligation to inform the children about an application under S117. However, under the Act the executor of the will is given statutory power to compromise proceedings on behalf of the estate. The Act provides that “the personal representatives of a deceased person may… compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, dispute, claim or other matter relating to the estate of the deceased.” The ability for the personal representative to settle a claim pursuant to S117 was brought before the High Court *In the Matter of the Estate of MK (Deceased[[127]](#footnote-127)).* The dispute involved a beneficiary who contested on the basis that the personal representatives did not have the jurisdiction to settle the plaintiff’s S117 claim to the detriment and contrary wishes of an objecting beneficiary[[128]](#footnote-128). Ms Justice Laffoy acknowledged that it was not the court’s function to mediate a settlement between the parties – and that the application raised a fundamental issue to the powers of personal representatives to settle a claim pursuant to S117. The court held that the power vests with the court to settle a s117 application and that the “personal representative has no jurisdiction to compromise the claim.”[[129]](#footnote-129)

Given the short limitation period and the absence of a duty to inform the children of this provision, the courts are heavily restricting the amount of potential litigation on the matter. Although there is a general overarching principle to law that *Ignorantia juris non excusa.[[130]](#footnote-130)* The per rep should have the responsibility to inform the children of this provision, if s/he feels that the child has not been provided for. The legislation[[131]](#footnote-131) is quite ambiguous as to the meaning of “proper provision.” However, the courts have acknowledged that proper provision is determinable by the means of the testator and should include provision for “not only the house, but to clothe, maintain, feed and educate them [the children] and endure that medical, dental, and chemists’ bills are provided for until they finish their education and are launched into the world but should also include provision by way of advancement for them for life.”[[132]](#footnote-132)

The vast majority of common law countries[[133]](#footnote-133) restrict testamentary freedom in favour of policies protecting family and other dependants of the testator.[[134]](#footnote-134)The moral duty owed by a parent to his/ her child is quite ambiguous. As an objective reasonable prudent person standard, it is challenging for the courts to assess whether the testator has fulfilled this duty. Cronin[[135]](#footnote-135) argues that the parent’s moral duty to make proper provision for a dependent child is not completely open-ended as it depends on the individual circumstances of the testator. The Supreme Court of Canada recently affirmed in the case of *Tataryn v Tataryn Estate[[136]](#footnote-136)* that the moral obligation owed to a testator’s child is viewed in the “light of current social norms”. Esson J.A. (dissenting) divided these social norms; the first being a “legal obligation” which the law would impose on a person during his/ her lifetime. The second being “society’s reasonable expectations of what a judicious person would do in the circumstances.” This is assessed by a comparison to community standards. *Tataryn[[137]](#footnote-137)* concerned a testator who stated in his will:

“I have purposely excluded my son, John Alexander Tataryn, from any share of my Estate and purposely provided for my wife by the trust as set out above for the following reason: My wife Mary and my older son John have acted in various ways to disrupt my attempts to establish harmony in the family. Since John was 12 years old he has been a difficult child for me to raise. He has turned against me and totally ignored me for the past 15 years of his life. He has been abusive to the point of profanity…”[[138]](#footnote-138)

The court disregarded this direction from the testator and redistributed the estate to his wife. Upon death of his wife the estate would be distributed equally between his two sons. This case is a clear example of how the courts will completely disregard the wishes of the testator to as Leslie argues, “manipulate”[[139]](#footnote-139) the wishes of the testator in order to fit into judicially viewed societal norm.

It is a preconceived notion that one has the capacity to distribute property upon death solely according to their own desires and wishes, “unfettered by the constraints of society’s moral code”[[140]](#footnote-140) or the assertions of others. However, the courts often rewrite the entire premise of a will. The courts in some instances places itself in the position of the testator and considers “what ought to have been done in the circumstances.”[[141]](#footnote-141) S117 can be viewed as an attempt by the court to interfere with testamentary freedom and the ability to disinherit a child. Complex situations came before the Irish courts in relation to the allowances that should be made in the instance of adopted children. The case of *FAM v Tan*[[142]](#footnote-142) concerned the deceased who with his wife, had adopted the applicant but had never treated him as his own son. Counsel adduced evidence which illustrated that the deceased had adopted the applicant in order to make his wife happy, and the wife had provided for the son by way of education, clothing etc. The deceased made no provision for the son neither in his lifetime nor in his will and the son, now a married man with a wife and children of his own, claimed that he had a moral duty owed to him. The court found in favour of the adopted son.[[143]](#footnote-143) Parents may not only wish to disinherit their child arbitrarily or by dis-connect but the rationale adopted by some parents may be to not provide for their children in instances such as an alcohol, drug or gambling addiction. The seminal case of *B v S & McC*[[144]](#footnote-144) where the Supreme Court upheld the testator’s substantial residuary bequest to various charities[[145]](#footnote-145) while declining to make provision for his son. His son was an unemployed father of three, a recovering alcoholic and a drug user.

In Australia, the courts have developed an objective standard of a “wise and just”[[146]](#footnote-146) testator who acts in accordance with generally accepted community standards in assessing the moral standard of the testator. In New Zealand, family provision legislation existed since 1900 and is still in place in some Australian jurisdictions[[147]](#footnote-147). Victoria recently enacted the family protection legislation which enables the court to order provision for the “proper maintenance and support of a person for whom the deceased had a responsibility to make provision.”[[148]](#footnote-148) The High Court in Australia*[[149]](#footnote-149)* has established a two-point test in order to establish whether an applicant can pursue a claim under the Family Provision Act[[150]](#footnote-150). The first question is, whether the provision (if any) made for the applicant 'inadequate for [his or her] proper maintenance, education and advancement in life.’[[151]](#footnote-151) The second question is an assessment conducted by the court in assessing whether an order should be made in favour of the Plaintiff. The second condition is determinable by the assets left by the testator. The case of *Leeder v Ellis[[152]](#footnote-152)***,** there were no assets from which an order could reasonably be made and making an order could disturb the testator's arrangements to pay creditors." The two-point test has been widely accepted by the Australian Courts.[[153]](#footnote-153)

Although this provision can be seen as a mechanism for the courts and the legislature to impose by forced *majeure* a scheme[[154]](#footnote-154) to provide for one’s offspring irrespective of the testator’s wishes. Alternatively, it may be argued that the legislature is attempting to disregard ill will towards a child and seeking to promote a normative moral duty, re aligning the testator’s moral compass. While the legislation is somewhat vague in relation to the interpretation of the act[[155]](#footnote-155), perhaps due to the nature of this legislation there is a rationale for this vagueness. It may be the intention of the legislature that s117 should be evaluated subjectively, on a case-by-case basis, with all adjudicatory power vested in the judge. This paper has evaluated the extent of the power prescribed by the legislature and has questioned whether Ireland is unique in adopting a provision scheme on an International perspective. This paper has further questioned the development of the scheme, what once was a scheme in order to protect children has slowly metamorphosed into a welter of litigation with respect to circumstances arising with adopted children[[156]](#footnote-156), children with special needs[[157]](#footnote-157) and in fact unknown children[[158]](#footnote-158). So, the question may be asked whether Mr Costello prophetically predicted a flood of litigation and if we as a society in fact let the “train run away with the engine.[[159]](#footnote-159)”

**Factors that contribute to trends in violence in Ireland since the Twentieth Century**

*-by Barakat Gbadamosi*

**Alcohol Consumption**

Ireland has had a relatively low level of alcohol consumption for most of the twentieth century.[[160]](#footnote-160) O’Donnell suggests that this may have played a vital role in restraining violent crime in the state.[[161]](#footnote-161)

Between the 1940 to early 1990s, the consumption levels of alcohol in Ireland was one of the lowest in Europe. Even though the average alcohol consumption per head of the population had doubled to 9.2 litres, compared to the 4.8 litres from the 1960s. However, Ireland remained close to the bottom in Europe in terms of alcohol consumption, with each adult consuming on average over one third of what was consumed in Portugal and France.[[162]](#footnote-162)

The surge of alcohol consumption began between 1989 and 1999, when the rise in per capita was 41%, the highest in the EU.[[163]](#footnote-163) Around that period, 10 countries had showed a decrease, while three a moderate increase.[[164]](#footnote-164) The Strategic Task Force on Alcohol described the change since 1995 as a “dramatic increase in consumption”.[[165]](#footnote-165) O’Donnell concludes that drinking patterns are relevant in assessing why consumption levels have risen so rapidly. He explains that bingeing is now the norm in society and that high level of consumption are concentrated in late evenings, primarily during weekends and usually unaccompanied by food.[[166]](#footnote-166)

According to international data, the Irish population consumed 11.9 litres of alcohol per head in 2010, which was surprisingly higher than the UK’s 10.2.[[167]](#footnote-167) Luxembourg reported the highest volume of consumption, however, this is primarily due to the high volume of alcohol-related purchases made by non-residents in the country; and with Austria, France, Latvia, Lithuania and Romania following with the highest consumption of alcohol, with 12 litres or more per adult in 2010.[[168]](#footnote-168) Mainly southern European countries had considerably low levels of alcohol consumption, in the range of 7-8 litres of alcohol per adult.[[169]](#footnote-169)

Alcohol Action Ireland has found that alcohol does play a role in crimes such as public order offences, assault, murder, rape and sexual assault, in addition to alcohol-related offences such as drink-driving. The organisation established that links between alcohol and crime have been well establish, with intoxication of both perpetrator and victims been recorded in a high percentage of in cases of homicide and sexual assault. Alcohol has also been shown to be a contributory factor in 97% of public order offences recorded under the Garda PULSE system. Their findings have also shown that almost half of the perpetrators of homicide were under the influence of alcohol when the crime was committed.[[170]](#footnote-170)

These findings are a clear indication that alcohol is a large contributor to crimes in Ireland. In December 2015, the Gardaí stated that the month of December especially sees assaults rise by almost a third more than in January or February and that there is a clear correlation between assaults and incidents of excessive alcohol consumption.[[171]](#footnote-171)

In 2009, Rape and Justice in Ireland (RAJI) revealed that 70% of rape victims and 84% of those accused of rape had been drinking at the time the offence was committed.[[172]](#footnote-172)

Since the 1990s, studies have shown that the role of alcohol, especially binge drinking, in sexual violence has gained greater recognition.[[173]](#footnote-173) Reviews of national studies have found that in a majority of cases, the perpetrator had been drinking and so had the victim and that on average, and in par with other violent crimes, approximately 50% of sexual assaults involved the use of alcohol.[[174]](#footnote-174)

In a national survey conducted in 2011 by Behaviour and Attitudes, it found that one in 11 (9%) of people said that they or a member of their family had been assaulted over the past year by someone under the influence of alcohol; while half said that they had not reported the incident to the Gardaí. 45% of people also said they had to avoid drunk people or areas where drinkers are known to hang out.

The Institute of Alcohol Studies in the UK, found that public concern about ‘alcohol related crime’ often relates public order offences involving young males; typically, between the ages of 18 and 30, but increasingly also young females; with these incidents occurring in the entertainment areas of towns and city centres.[[175]](#footnote-175) Statistics from 2009/10, found that alcohol contributed 53% to major causes of crime, while contributing 9% of the main cause of crime, which is relatively low; while drugs contributed to 26% of the main cause of crime.[[176]](#footnote-176)

**Drugs**

The economic boom from the beginning of this decade up until 2009 had seen many unforeseen consequences for Ireland. One of these was the increase in the supply of, and demand for, recreational drugs, such as heroin, marijuana and cocaine.[[177]](#footnote-177) Accordingly, drug crime became the focus of political, media, and public concern.[[178]](#footnote-178)

It is generally accepted that Ireland’s serious drug problem emerged in the late 1970s and early 1980s, when heroin demand and supply first arose. This problem was concentrated in economically deprived areas of Dublin’s inner city initially but eventually spread throughout the city and over the next few decades, throughout the country. [[179]](#footnote-179) Ireland, in relation to homicide rates, did not have a surge in killings with the arrival of heroin.[[180]](#footnote-180) When the Misuse of Drugs Act 1977 was being introduced, the drug problem was not particularly seen as significant.[[181]](#footnote-181) Relatively minimal approaches to the drug law enforcement were seen.[[182]](#footnote-182)

The 1980s experienced slightly more murder and manslaughter than previous years when opiate addiction stated becoming a problem.[[183]](#footnote-183) Crime peaks in 1983 and 1995 have shown to coincide with two waves of the heroin epidemic in Dublin.[[184]](#footnote-184) A study conducted by the Garda Research Unit found that just under half of those arrested in Dublin in 1996 were known drug users and were to blame for a disproportionate amount of property crime, but not violence. [[185]](#footnote-185) The end of the 1990s showed a reduction in the number of crimes committed by individual addicts, likely due to improved economic opportunities.[[186]](#footnote-186) A survey found that 55% of opiate users known to the police were unemployed in 2000/2001 compared to the 84% in 1996.[[187]](#footnote-187) This decline could also be associated with the substantial improvement in availability of methadone treatment for addicts.

However, as stated by O’Donnell, “competition between drug distribution gangs remained fierce, with predictably vicious consequences”.[[188]](#footnote-188) Little information is given about the causes and consequences of homicide apart from what the media reports, however it seems that most of the ‘gangland’ killings are related to the drug trade industry.[[189]](#footnote-189) The year 1995, is often regarded as a watershed in terms of the state’s response to drug issues.[[190]](#footnote-190) The assassination of investigative journalist, Veronica Guerin, by people involved in the drugs trade led a concerted and firmer state response.[[191]](#footnote-191) A series of criminal justice measures were introduced to target drug supply, the enhancement of law enforcement and also the development of policies around demand reduction.[[192]](#footnote-192)

**The impact of Migration during the *‘Celtic Tiger’***

Until the mid-1990s boom, Ireland has had a long history of large-scale emigration, interrupted by a few short breaks where some members of former emigrants and descendants of emigrants returned to live in Ireland.[[193]](#footnote-193) Once the economy began to grow at a rapid rate from the mid-1990, it became apparent that the Irish abroad may not return in large numbers to meet the demands met with the Celtic Tiger labour market.[[194]](#footnote-194) This in turn, enacted pro-active attempts by the Government to encourage the return-migration of the 1980s generation of well-educated and highly skilled emigrants.[[195]](#footnote-195)

The 1970s and the 1990s were both decades of net inward migration as well as when the number of homicides in the county had risen sharply.[[196]](#footnote-196) O’Donnell contends that there is a relationship between the improved economic situation and surges in population growth as well as the consumption and spending of alcohol.[[197]](#footnote-197) He delves into the pressures that were created by the rapid increase in numbers of people, paired with behavioural changes, especially in relation to heavy drinking, had created circumstances for violence.[[198]](#footnote-198) The census conducted in 2002 had shown that the national population was higher than at any time since 1871. He notes that more homicides would have expected as the number of potential victims and perpetrators increases.

When the EU enlargement came about in 2004, Ireland decided to allow migrants from the ten new Eastern European member states to live and work in the country without visas and in doing this immediately hastened the pace of immigration.

Judge David Riordan of the Circuit Court, compares the recent Polish crime figures which have shown a significant drop in crime, while the crime rates in Ireland, Britain and Europe have fallen recently. He argues that the reason for this, citing Poland’s Chief Prosecutor, is that the falling population, partly caused by emigration, is not the cause but the type of people who are emigrating.[[199]](#footnote-199) In Lithuania, the Centre for Crime Prevention reported that first year of membership in the EU revealed a 2.5% drop in the crime rate, while the following showed an 8.8% increase in crime.[[200]](#footnote-200) He questions whether Ireland could possibly be experiencing the effects of the same migration pattern in the 1950s but only this time in reverse.[[201]](#footnote-201)

He states further that there may be a connection between crime rates and immigrant communities and that in some communities, more than other have gone up considerably.[[202]](#footnote-202)

His observation, he affirms, is based on the proportion of foreign offenders that are appearing before the criminal courts each day, which, at his personal estimate, may be on average in the 15-20 % range.[[203]](#footnote-203) However, the fall in crime in Poland may not have been offset by a consequent increase in crime by the same offenders in the two jurisdictions. Examining the Irish pattern to Britain in the 1950s showed that Irish emigrants to Britain displayed a tendency to commit offence once they migrated to that jurisdiction.[[204]](#footnote-204)

**Conclusion**

It is quite clear that trends of crimes in Ireland have changed over time. Alcohol consumption, especially has played a role in crimes such as homicide, assault and sexual violence. Although there is a relationship between alcohol and violent crimes, one cannot say that alcohol causes violent crimes. Ireland’s history of binge drinking is significant as it shows a correlation between the age and gender of the perpetrator and victim. Research shows that a greater proportion of males engage in harmful drinking and those aged between 18 and 24 are affected.[[205]](#footnote-205)

Migration as well as the economic boom has influenced crime trends in Ireland. Statistics have shown that 2006, 2007 and 2008 had the biggest population of non-nationals living in Ireland; 2007 having the biggest overall with 151,100 non-nationals living in the country.[[206]](#footnote-206) Immigrants have since reduced in numbers, perhaps with the economic recession taking form in late 2008, but recent statistics have shown an increase from 2016.[[207]](#footnote-207) It is uncertainty whether migration substantially effects crime rates, however, out of the 29 homicides that took place during 2002 , 8 victims were non-nationals. The report of the Irish Prison service also revealed that in 2003, one in four of all committals to prison involved non-nationals from 115 countries.[[208]](#footnote-208)

1. Section 35(2), Offences Against the State Act (1939) (Establishing jurisdiction of the Special Criminal Court over ‘scheduled offences’): “If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.” [↑](#footnote-ref-1)
2. Article 38(3)(1), Bunreacht na hÉireann (1937): “Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.” *See also*: Article 38(5): “Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.” [↑](#footnote-ref-2)
3. *Kavanagh v Government of Ireland* [1996] 1 IR 321, 364 per Keane J (Jurisdiction of Special Criminal Court to hear cases involving organised crime): “…there is nothing to prevent the Government from bringing Part V into force where it is satisfied, for the reasons mentioned in the subsection, that the Director of Public Prosecutions should have power to require the trial before a special criminal court rather than by a jury of persons engaged in non-subversive crime, e.g. where there appeared to be a significant risk that those engaged in organised crime would resort to the intimidation or corruption of juries.” [↑](#footnote-ref-3)
4. *DPP v Kelly* [2006] 3 IR 115, per Geoghan J: “The Special Court itself was established to avoid the mischief of juror coercion and intimidation.” [↑](#footnote-ref-4)
5. Department of Justice, Equality and Law Reform, *Report of the Committee to review the Offences Against the State Act (1939-1998) and Related Matters* (2002): “Unlike a vast country with a huge population such as the United States, the small and dispersed nature of Irish society means that the risk of jury-tampering and intimidation will remain a significant one. This seems to be especially true of paramilitary groups…” [↑](#footnote-ref-5)
6. UN Human Rights Committee, ‘Human Rights Committee Concludes Sixty-Ninth Session’ (Geneva, 28 July 2000) <<http://www.un.org/press/en/2000/20000728.hrct587.doc.html>> accessed 22 November 2016: “The Committee recommended, among other things… that steps should be taken to end the jurisdiction of the Special Criminal Court…” [↑](#footnote-ref-6)
7. N.2, Article 38(1): “No person shall be tried on any criminal charge save in due course of law.” *See also*: N.5, p226: “…the arguments adduced in support of the very existence of the court do not stand up to scrutiny in the light of constitutional values and human rights norms.” [↑](#footnote-ref-7)
8. Asa Kasher & Amos Yadlin, ‘Military Ethics of Fighting Terror: An Israeli Perspective’ [2005] 4 Journal of Military Ethics 3, 8 (Principle A.1, The Principle of Self-Defence Duty): “(1) It is the prime duty of a democratic state to effectively defend its citizens against any danger posed to their lives and well-being by acts or activities of terror, both in the short run and in the long run.” [↑](#footnote-ref-8)
9. Sudha Setty, ‘Comparative Perspectives on Specialized Trials for Terrorism” [2010] 63 Maine Law Review 132, 158: “Israel has a relatively long history of using specialized courts for terrorism trials.” [↑](#footnote-ref-9)
10. Israeli Ministry for Foreign Affairs, The Judiciary: The Court System (*mfa.gov.il*, 1 Nov 2016) <<http://tinyurl.com/nvl47xr>> accessed 22 Nov 2016. [↑](#footnote-ref-10)
11. *See*: Article 66, Convention (IV) (Geneva), ‘Relative to the Protection of Civilian Persons in Time of War’ Penal Legislation III. Competent Courts (Affords jurisdiction to Israeli Military Courts in occupied territories): “In case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.” *See also*: Section 86, Military Order No. 1651 (2009) (Codifying orders regarding the conduct of the military courts in occupied territories): “Concerning the laws of evidence, the military court will act in accordance with the obligatory rules in criminal matters in courts within the State of Israel.” [↑](#footnote-ref-11)
12. N.10 <<http://tinyurl.com/oztrnrl>> accessed 22 Nov 2016 [↑](#footnote-ref-12)
13. N.1, Section 45(1) (Proceedings *vis-á-vis* ‘scheduled offences’): *See also*: Section 46(1) (Proceedings *vis-á-vis* ‘non-scheduled offences) [↑](#footnote-ref-13)
14. N.1, Section 21(1): “It shall not be lawful for any person to be a member of an unlawful organisation.” [↑](#footnote-ref-14)
15. N.1, Section 18 (Stipulates the five different unlawful organisations under statute) [↑](#footnote-ref-15)
16. Section 3(1), Offences Against the State (Amendment) Act (1972) (Evidence of membership of an ‘unlawful organisation’) [↑](#footnote-ref-16)
17. N.12, Section 3(2): “here an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.” [↑](#footnote-ref-17)
18. Section 3(a), Incarceration of Unlawful Combatants Law (2002): “Where the Chief of General Staff has reasonable cause to believe that a person being held by the State authorities is an unlawful combatant and that his release will harm State security, he may issue an order under his hand, directing that such person be incarcerated at a place to be determined (hereinafter referred to as “an incarceration order”); an incarceration order shall include the grounds for incarceration, without prejudicing State security requirements.” [↑](#footnote-ref-18)
19. *Anonymous v Commander of IDF Forces in Judea & Samaria* [2005] HCJ 11026/05, per President Barak (That administrative detention and other such actions deemed necessary by IDF commanders are subject to judicial review): “The discretion given to the military commander is subject to judicial review.” [↑](#footnote-ref-19)
20. N.15, Section 5(a): “A prisoner shall be brought before a judge of the District Court no later than fourteen days after the date of granting the incarceration order; where the judge of the District Court finds that the conditions prescribed in section 3(a) have not been fulfilled he shall quash the incarceration order.” [↑](#footnote-ref-20)
21. [1993] 1 IR 1 [1995] 1 IR 258 [↑](#footnote-ref-21)
22. N.17, per Costello J:

    “That, upon proper interpretation, s. 3, sub-s. 2 of the Act of 1972 merely rendered in certain trials statements of belief admissible in evidence which would otherwise be inadmissible, but did not determine the weight to be given to it, still less that the court of trial was obliged to convict the accused in the absence of exculpatory evidence, and that in the absence of any evidence on the part of the accused, if the court of trial did not hold that all the evidence established beyond a reasonable doubt that the accused was a member of an unlawful organisation, then it was obliged to acquit.” [↑](#footnote-ref-22)
23. (Unreported, Supreme Court, 18 March 1976) [↑](#footnote-ref-23)
24. N.19 [↑](#footnote-ref-24)
25. *The People (DPP) v McKevitt, Campbell, Murphy & Daly* [2005] 2 JIC 0701, per Reporter BDD (Quoting Hamilton J on the 25/09/1986): “No report (transcript) is prepared by the official stenographer unless the accused person appeals against his conviction and/or sentence. Transcripts of evidence prepared for the Court of Criminal Appeal cannot be used or made available for any other purpose as to do so, could cause injustice to an accused person who has been dealt with by the courts if the facts in his case were to be reviewed or dealt with in any way by any other body. His constitutional right is to have his case heard and determined by the courts in accordance with law.” [↑](#footnote-ref-25)
26. *The People (DPP) v Colm Murphy* [2005] 1 JIC 2101 [2007] IEHC 12 [↑](#footnote-ref-26)
27. Colm Keena, ‘Special Criminal Court’s focus is on organised crime’ *The Irish Times* (Dublin, 8 Feb 2016) < <http://www.irishtimes.com/news/crime-and-law/special-criminal-court-s-focus-is-on-organised-crime-1.2526152>> accessed 23 November 2016. [↑](#footnote-ref-27)
28. N.5, p226 per Hederman J, Professor Binchy & Professor Walsh (Of the view that there is no reason for ‘continued existence’ of court and the salience of jury trials in a democracy):

    “Trial by jury is a cornerstone of the criminal law system. It ensures that the innocence or guilt of a person charged with an offence is determined by twelve randomly chosen members of the community, each of whom brings to the process the benefit of his or her life-experience and individual perspective. Lord Devlin used somewhat colourful language when he observed that trial by jury is “the lamp which shows that freedom lives”. His insight is, however, important in emphasising the liberal democratic basis of jury trial.” [↑](#footnote-ref-28)
29. Amos N Guiora, ‘Where Are Terrorist to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists’ (2007) 56 Catholic University Law Review 805, 820 (“Trials of Detainees: The trials can take place in either of two different venues: civilian courts or IDF military courts”). [↑](#footnote-ref-29)
30. Larkin Kittel, ‘Trying Terrorists: The Case for Expanding the Jurisdiction of Military Commissions to U.S. Citizens’ (2013) 44 Georgetown Journal of International Law 784, 801 (“…the Israel Defence Forces have “complete discretion” to determine whether an offense is an “offense against the security of the state.”) [↑](#footnote-ref-30)
31. N.30, 801 [↑](#footnote-ref-31)
32. N.30, 801 (“It may also be against Israeli policy to try Israeli citizens outside of the civilian court system.”) [↑](#footnote-ref-32)
33. N.29, 820 [↑](#footnote-ref-33)
34. N.29, 823: “In determining which track to apply, the criminal law process is legally preferable as the defendant's basic rights are guaranteed though operational and intelligence considerations may conceivably outweigh legal considerations.” [↑](#footnote-ref-34)
35. *State of Israel v Marwan Barghouti* [2004] (Tel Aviv District Court - 1158/02) [↑](#footnote-ref-35)
36. Leora Bilsky, ‘Strangers Within: The Barghouti and the Bishara Criminal Trials’ in Austin Sarat, Lawrence Douglas and Martha M Umphrey (eds.) *Law and the Stranger* (Stanford University Press, 2010) [↑](#footnote-ref-36)
37. N.8, 13 (Defining the general degrees of involvement the IDF consider when dealing with terrorists and subsequently prosecute under) (“Military acts and activities…should take into account, to the greatest possible extent, the distinctions between different types of direct involvement in terror.”) [↑](#footnote-ref-37)
38. *State of Israel v Bishara* [2003] (Nazareth District Court - 1087/02) (The accused was charged with two breaches of Article 4 of the Prevention of Terrorism Ordinance when delivering speeches in the territories and Syria in the presence of Hezbollah leaders). [↑](#footnote-ref-38)
39. Bureau of Democracy, Human Rights and Labour–US Department of State, *Country Reports on Human Rights for 2011* (2011) p6 <<http://www.state.gov/documents/organization/190656.pdf>> accessed 26 Nov 2016. [↑](#footnote-ref-39)
40. *The Public Committee against Torture in Israel v The State of Israel* [2005] HCJ 5100/94 [2005] 53(4) PD 817, 845 per President Barak: “That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open.” [↑](#footnote-ref-40)
41. Section 2(a), The Emergency Powers Law (5739-1979) < <http://tinyurl.com/j2b7cos>> accessed 26 Nov 2016. [↑](#footnote-ref-41)
42. N.39, *see also*: *Ajuri v IDF Commander in the West Bank* [2002] 56(4) PD 861; *Marab v The Commander of IDF Forces in the West Bank* [2002] 57(2) PD 349 [↑](#footnote-ref-42)
43. N.9, 159 [↑](#footnote-ref-43)
44. N.40, 845 per President Barak [↑](#footnote-ref-44)
45. N.5, p226 (9.89) [↑](#footnote-ref-45)
46. N.5, p208 (9.29) [↑](#footnote-ref-46)
47. [1970] 2 All ER 33. [↑](#footnote-ref-47)
48. [2002] ECHR 588. [↑](#footnote-ref-48)
49. (1979-80) EHRR 1. [↑](#footnote-ref-49)
50. #### (1979) 2 EHRR 330.

    [↑](#footnote-ref-50)
51. #### [1983] ECHR A 59.

    [↑](#footnote-ref-51)
52. [1986] ECHR 9532/81. [↑](#footnote-ref-52)
53. #### [1991] 2 FLR 492.

    [↑](#footnote-ref-53)
54. [1998] 2 FLR 928. [↑](#footnote-ref-54)
55. [1970] 2 All ER 33. [↑](#footnote-ref-55)
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57. [1970] 2 All ER 33. [↑](#footnote-ref-57)
58. Ibid. [↑](#footnote-ref-58)
59. [1970] 2 All ER 33. [↑](#footnote-ref-59)
60. George Letsas, *Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer.* The European Journal of International Law Vol. 21 no. 3. [↑](#footnote-ref-60)
61. Ibid. [↑](#footnote-ref-61)
62. [1986] ECHR 9532/81. [↑](#footnote-ref-62)
63. *Rees v United Kingdom* [1986] ECHR 9532/81. [↑](#footnote-ref-63)
64. [1970] 2 All ER 33. [↑](#footnote-ref-64)
65. *Rees v United Kingdom,* [1986] ECHR 9532/81. [↑](#footnote-ref-65)
66. Ibid. [↑](#footnote-ref-66)
67. Ibid. [↑](#footnote-ref-67)
68. [1991] 2 FLR 492***.*** [↑](#footnote-ref-68)
69. *Cossey v United Kingdom* [1991] 2 FLR 492***.*** [↑](#footnote-ref-69)
70. [1998] 2 FLR 928. [↑](#footnote-ref-70)
71. *Sheffield and Horsham v United Kingdom* [1998] 2 FLR 928. [↑](#footnote-ref-71)
72. Ibid. [↑](#footnote-ref-72)
73. (1979-80) EHRR 1. [↑](#footnote-ref-73)
74. (1979) 2 EHRR 330. [↑](#footnote-ref-74)
75. [1983] ECHR A 59. [↑](#footnote-ref-75)
76. *Tyrer v United Kingdom* (1979-80) EHRR 1. [↑](#footnote-ref-76)
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78. Ibid. [↑](#footnote-ref-78)
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81. [1983] ECHR A 59. [↑](#footnote-ref-81)
82. Ibid. [↑](#footnote-ref-82)
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85. [1992] 2 FLR 249. [↑](#footnote-ref-85)
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87. *Corbett v Corbett* [1970] 2 All ER 33. [↑](#footnote-ref-87)
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90. *Sheffield and Horsham v United Kingdom* [1998] 2 FLR 928. [↑](#footnote-ref-90)
91. Linda Sheehan, ‘Implementing Rights of Nature through Sustainability Bills of Rights’ (2015) 13(1) NZJPIL 89, 90. [↑](#footnote-ref-91)
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133. Common law jurisdictions such as New Zealand, England, the states of Australia and most of the Canadian provinces. [↑](#footnote-ref-133)
134. Melanie B. Leslie, ‘The Myth of Testamentary Freedom’ (1996) *Arizona Law Review* 235. [↑](#footnote-ref-134)
135. Maureen Cronin, ‘Mean dispositions’, *Law Society Gazette* (Dublin, July 1998). [↑](#footnote-ref-135)
136. [1994] 116 D.L.R. 4th 193, 201. [↑](#footnote-ref-136)
137. *Tataryn v Tataryn Estate* [1994] 116 D.L.R. 4th 193, 201. [↑](#footnote-ref-137)
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140. ibid. [↑](#footnote-ref-140)
141. *Bosch v Perpetual Trustee Co (Ltd)* [1938] AC 463. [↑](#footnote-ref-141)
142. [1969] 106 ILTR 82. [↑](#footnote-ref-142)
143. Kenny J outlined that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend on:  
     (a) The amount left to the surviving spouse or the value of the legal right if the survivor elects to take this.  
     (b) The number of the testator’s children, their ages and positions in life at the date of the testator’s death.  
     (c) The means of the testator.  
     (d) The age of the child whose case is being considered and his or her financial position and prospects in life.  
     (e) Whether the testator has already in his life made provision for the child. [↑](#footnote-ref-143)
144. SC (delivered 10th February 1998). [↑](#footnote-ref-144)
145. Maureen Cronin, ‘Mean dispositions’, *Law Society Gazette* (Dublin, July 1998). [↑](#footnote-ref-145)
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147. Family Protection Act 1955 (NZ); Family Provision Act 1982 (NSW); Administration and Probate Act 1958 (Vic) Pt IV. [↑](#footnote-ref-147)
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154. Succession Act 1965, s117. [↑](#footnote-ref-154)
155. ibid. [↑](#footnote-ref-155)
156. See: *FAM v Tan* [1969] 106 ILTR 82. [↑](#footnote-ref-156)
157. See: *S(D) v M(K)* [2003] IHC 120. [↑](#footnote-ref-157)
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160. Ian O’Donnell, ‘Violence and Social Change in the Republic of Ireland’ International Journal of the Sociology of Law (2005) vol.33, no.2, p. 101-17. [↑](#footnote-ref-160)
161. *Ibid.* [↑](#footnote-ref-161)
162. *Ibid.* [↑](#footnote-ref-162)
163. *Ibid.* [↑](#footnote-ref-163)
164. *Ibid.* [↑](#footnote-ref-164)
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166. Ian O’Donnell, ‘Violence and Social Change in the Republic of Ireland’ International Journal of the Sociology of Law (2005) vol.33, no.2, p. 101-17. [↑](#footnote-ref-166)
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178. *Ibid.*  [↑](#footnote-ref-178)
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