



THE HONORABLE SOCIETY OF KINGS INNS

ENTRANCE EXAMINATION

AUGUST 2016

Examination:	Irish Constitutional Law
Date:	Thursday 18 August 2016
Time:	10.00 a.m. – 1.00 p.m.
Internal Examiner:	Mr T John O'Dowd
External Examiner:	The Hon Mr Justice Gerard Hogan

Instructions

Candidates *must answer Question 1*

AND any other TWO of the remaining questions.

Question 1 carries 50 marks. All other questions carry 25 marks each.

A copy of the Constitution of Ireland, 1937 is supplied.

This paper contains 5 pages.

1. (An answer to this question is compulsory)

Peter, a registered sex offender, recently completed a four-year sentence for attempting to abduct an eight-year-old girl. He has also been cautioned several times for possessing small amounts of cannabis. When *Sally*, a ten-year-old neighbour of *Peter*'s, disappeared on Christmas Eve, Garda suspicions soon turned to him, as she closely matches the specific type of child he had abused in the past. *Peter* was arrested and detained in a local Garda station. His solicitor was present at all his interviews with the Gardaí, during which *Peter* initially admitted nothing. Early on Christmas morning, a Garda superintendent issued a warrant under section 26 of the Misuse of Drugs Act, 1977 (as amended by section 8 of the Criminal Justice (Drug Trafficking) Act, 1996) for a search of *Peter*'s house, stating in writing that he was satisfied that it was reasonable to suspect that a controlled drug was present there and that a warrant was needed to investigate a drug trafficking offence properly and was immediately and urgently required, in circumstances making it impracticable to apply for it in the normal manner. During this search, clothes *Sally* was wearing when she disappeared were found behind a wardrobe, as well as traces of her blood in the bathroom, but no other sign of her (or of any drugs) was found. It was obvious that, if still alive, *Sally* was in immediate and deadly peril, so the superintendent heading the investigation decided to employ extreme measures. While *Peter* was waiting in his cell for his next interview, six Gardaí, wearing pig masks and brandishing cricket bats and hurleys, came in and wordlessly threatened him with a severe beating. In his next interview, *Peter* spontaneously began to confess to abducting *Sally* in order to rape and kill her. When his solicitor sought to suspend the interview, to consult her client about his sudden change of attitude, she was removed because of her "obstruction" of the investigation. *Peter* then disclosed *Sally*'s location. Acting on this information, Gardaí found her tied-up in an outhouse, in an advanced stage of hypothermia; she would have died, if not found so quickly. *Sally* has fully recovered, but she was drugged throughout and cannot identify *Peter* as her abductor. *Peter* was charged with abducting *Sally*, but counsel subsequently advised the Director of Public Prosecutions that this prosecution had no reasonable chance of success because so much of the evidence against him was clearly inadmissible. The Director thus declined to prosecute. Following this, someone leaked a copy of the video recording of *Peter*'s confession to *Sally*'s family, making the case a major news story in Irish print and broadcast media for several weeks. Although the media have merely summarised the video's contents, not broadcast or distributed it, it can easily be found by an internet search and is downloadable from servers outside the State. Two teenage girls have independently come forward, each telling the Gardaí that, upon seeing this video, *Peter*'s distinctive *modus operandi* enabled her to identify him for the first time as someone who had sexually assaulted her. Forensic evidence confirms some form of sexual contact between *Peter* and both these girls. Advise *Peter*: might he successfully rely on the Constitution to prevent or defeat any criminal prosecution in relation to *Sally* or the other girls? (50 marks)

2. *Ballymagash* is “a strategic regional town” under the national planning framework, meaning that 5000 housing units should be built in its vicinity before 2030. The relevant county council’s development plan (including the council’s housing strategy) reflects this national goal. *Fintan* owns a large tract of farmland on the outskirts of *Ballymagash*. A catastrophic flood severely damaged this land, contaminating it with toxic chemicals. *Fintan* cannot currently make the major investment needed to restore it to agricultural use even in the medium-term. To the council, this is a perfect opportunity, given the location and extent of the land, to create a land bank for future housing (to be built by the council or by developers to whom the land is sold) as foreseen locally and nationally. Under the powers given by section 213 of the Planning and Development Act, 2000, the council aims to make a compulsory purchase order in relation to *Fintan*’s land. It may acquire by compulsion even land “not immediately required for a particular purpose if, in the opinion of the local authority, the land will be required by the authority for that purpose in the future” (s 213(3)(a))—here, to give effect to and facilitate the implementation of its development plan and housing strategy. Nothing can be built on the land until new flood defences are in place, which will not happen before 2025. Until then, the council plans for it to be a managed wetland. *Fintan* is very aggrieved that the council is, as he sees it, opportunistically swooping down, when the market value of his property is abnormally low and the council has no need of it for years or even decades to come. Advise *Fintan*: is there any constitutional basis for resisting the council’s plans for his land? **(25 marks)**

3. *Cóir na mBan*—*Women’s Justice Party* is a registered political party. As feminists, their top priority is increasing women’s political representation and influence as rapidly and radically as they can. To that end, although men may join the party and be active at most levels, all national leadership roles are reserved for women and all the party’s election candidates must be women—in both cases, until such time as forty per cent or more of the members of Dáil Éireann are women. Another party principle is not to enter or support any government unless at least forty per cent of the ministers are women. The party was formed after the last general election, but has run candidates at two bye-elections; one got 1.5% and the other 2.5% of the first preference votes. In three opinion polls, between 0.2% and 0.5% of respondents have stated their intention to give *Cóir na mBan* candidates a first preference vote at the next general election. Digging deeper into these responses, between 3% and 5% said there was at least a slight chance they might vote for it. *Cóir na mBan* is worried that, by continuing to select women only as candidates (until there is a gender-balanced Dáil) it will lose half the public funding it could otherwise claim, if the vote for the party’s candidates at the next general election crosses the relevant threshold. Advise *Cóir na mBan*: would it, as things now stand, be allowed to challenge the validity of the relevant provisions of the Electoral (Amendment) (Political Funding) Act 2012 and would this challenge be likely to succeed? **(25 marks)**

4. Born a man, *Susan* completed a *de facto* transition to being a woman in 2010. Before gender reassignment surgery removed her testes *Susan* had some of her sperm frozen, so she could become a biological parent at some future point. In October 2015, *Susan* obtained a gender recognition certificate under the Gender Recognition Act 2015; in law, she has been a woman from that point onward. A month later, *Susan* married her civil partner, *Amy*; the next day *Amy* was artificially inseminated with *Susan*'s sperm, leading to her falling pregnant and giving birth to triplets. *Susan* and *Amy* tried to register *Susan* as the second parent of these children but the Registrar General responded that there is no legal basis for this, because they were not born as a result of 'donor-assisted human reproduction.' The Registrar General says that *Susan* was not a 'donor' as envisaged by the Children and Family Relationships Act 2015—that is, someone who provides sperm to a regulated clinic, without claiming any parental tie to a child conceived by a stranger. Moreover, *Susan* cannot be these children's 'father' because, since her gender recognition certificate was issued, she has been a woman for all legal purposes—although she remains the father of any of her children born *before* then. (Gender Recognition Act 2015 s 19) Not being the triplets' 'father' *Susan* cannot be their parent or guardian on that ground. As their mother's spouse, she could apply for a court order making her their guardian, but only after sharing responsibility for their day-to-day care for at least 2 years and only if a judge finds this step to be in the children's best interests. The only way *Susan* could fully become their parent would be if *Amy* and she, as a couple, adopted them under the Adoption Acts 2010 to 2015. Advise *Susan* and *Amy* as to whether such a view of *Susan*'s current legal tie (or lack of any tie) to the triplets would, if upheld by the courts, violate the constitutional rights of any of the five people involved. **(25 marks)**

5. Answer **either** (a) **or** (b) **or** (c) below, **but not more than one of them.**

(a) "While there have been some interesting jurisprudential developments in recent years, it is nevertheless fair to say that the courts have on the whole failed to give effect to the spirit and object of Article 40.1."

Discuss. **(25 marks)**

or

(b) "[*A v Governor of Arbour Hill Prison*] was received with surprise in some quarters and indeed was the subject of some vigorous criticism. ... On the other hand it has been quoted with approval in other jurisdictions. ... In general, those who have criticised the approach in *A* have not quarrelled with the rejection by the Supreme Court of the notion of blanket retrospectivity which would have permitted anyone convicted of the

offence since 1935 to reopen the matter and perhaps, to bring an action claiming damages for false imprisonment, but they say that retrospectivity is not what is in issue when someone is actually detained on an ongoing basis at the time of the application and where it is intended to continue to detain that individual into the future. This they say is inconsistent with the emphatic direction in the Constitution that no person shall be deprived of liberty save in accordance with law and is in contravention of the age old maxim *nulla poena sine lege*. However, be that as it may, it undoubtedly represents an authoritative statement of Irish law, which is binding on this Court ... ” *Murphy v Governor of Mountjoy (The Training Unit)* [2015] IECA 259 (16 November) para 34.

In your opinion, have developments since 2006 confirmed or belied the wisdom of the approach taken in *A* to the temporal effects of a declaration of invalidity? (**N.B.** It is not essential for students to be familiar with the reasoning of the Court of Appeal in *Murphy v Governor of Mountjoy (The Training Unit)* in order to answer this question.) **(25 marks)**

or

- (b) Has the development of the unenumerated rights doctrine first identified by Kenny J in *Ryan v Attorney General* [1965] IR 294 distorted our understanding of the Constitution by allowing the courts to invent new rights not mentioned in the text of the document itself, while at the same time ignoring rights expressly mentioned in the text of the Constitution? **(25 marks)**