SAME-SEX MARRIAGE IN THE IRISH CONSTITUTION

"Marriage may be contracted in accordance with law by two persons *without distinction as to their sex.*"

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ABSTRACT

"Don't ever take a fence down until you know why it was put up."

— G.K. Chesterton

The Marriage Referendum has all the hallmarks of a needless and reckless social experiment, driven by an irrational ideology.

It involves a radical change in a tried and tested social institution of such importance to the fabric of society and to the rights of children and adults that it demands a thorough examination and impact assessment before it can responsibly be put to a vote.

The proposition is based on a spurious claim of equality, which simply does not stand up to scrutiny.

The real victims in this debate are the children who, in order to satisfy adult emotional demands, will be deprived of all contact with their natural parents and siblings and be brought up without any idea as to their true origin or identity.

Enshrining this gender-neutral ideology in the Constitution will contribute to the exploitation of women by the highly lucrative surrogacy and genetic donor industry.

The proposed gender-neutral marriage contract would mean that a woman might marry a man who then—without her consent and without affecting the status of the marriage—could decide to become a woman, or vice versa.

Civil and religious marriage ceremonies will have to be separated, and the validity of existing marriages put in doubt, because the respective marriage declarations will no longer agree on the essentials of marriage.

The freedom to hold to and teach the traditional understanding of marriage and family would be curtailed, as the new dogma is promulgated with zeal and intolerance by the organs of the State.

KEY POINTS

The Equality Argument

- Considered as an individual person before the law, a homosexual currently has exactly the same right to marry as a heterosexual, because neither has the right to marry another person of the same sex. The present claim, therefore, is not to an *equal* right to marry but to an entirely *new* right to acquire the constitutional status of "marriage" with a person of the same sex and, in consequence to claim the title of "family", based on that marriage. The fundamental problem is that this new right would change the nature of "marriage" so radically—for everyone—that only the name would remain.
- It is often objected that not all marriages produce children but they are nevertheless valid, and that same-sex marriages are no different in that respect. That is a fallacy. Lack of offspring does not invalidate the marriage because the validity of the marriage depends on the presumed capacity of the spouses *at the time the marriage took place,* not on the fecundity of the relationship. A marriage would be voidable, however, if impotence or incapacity at the time of marriage were later established.
- This rule of law is directly comparable to the same-sex impediment, except that a same-sex "marriage" would be self-evidently void *ab initio* and not just voidable at the suit of one of the spouses. There is no essential difference or inequality in treatment between one situation and the other.
- Homosexual unions and heterosexual unions are not equivalent social entities for the purposes of society and the State. There are at least three relevant differences—from the point of view of the constitutional interest of society in the family based on marriage—between a committed heterosexual couple **'A'** and an equally committed homosexual couple **'B'**:

  I. **'A'** has *within itself* a capacity for procreation and thus for the growth and development of the family unit; **'B'** does not.

  II. **'B'** *cannot* of itself satisfy the natural right of a child to the stable society of its natural father, mother and siblings in family life; **'A'** *can* and normally does.

  III. **'A'** has natural ancestors and descendents, the potential to renew and extend the family bond through many generations and thus to build up and strengthen society; **'B'** has no natural antecedents or descendents, it can exist only for itself as a dependent relationship in society.

- These differences concern one form of *institution* when compared with another, not one *person* when compared with another on the basis of sexual orientation, as is often alleged. They are not accidental but essential—they go to the heart of the constitutional definition of the family and the protection of *the natural and imprescriptible rights* of the child. They fully justify and indeed necessitate the heterosexual requirement in marriage.

The Rights of Children

- The proposal would authorize and promote—not just tolerate—diverse circumstances (e.g. surrogacy, with all of its known and anticipated problems) in which children would be deprived of the company of one or both of their natural parents and of their siblings.

- The disquiet expressed by fashion designers and same-sex partners Dolce & Gabanna on this development is shared by a great many people: *"I am gay. I cannot have a child. … You are born from a father and a mother. Or at least that is how it should be. For this reason I am not convinced by what I call children of chemistry, or synthetic children. Uteruses for rent, sperm chosen from a catalogue."*
- The growing commercial market for surrogacy (and the inevitable exploitation of women which it entails) depends on a loosening of traditional family structures. At an average fee of $100,000 per child in the US, the pressure to facilitate this trafficking in human life can only increase. Indeed, if the referendum is approved, it is difficult to see on what basis there could be any legal objection to such developments taking place in Ireland.
- The European Court of Human Rights recently decided that the denial of the rights of children to legal recognition of their relationship with their fathers was contrary to the Convention. *"Given the importance of biological parentage as a component of each individual's identity, it could not be said to be in the best interests of the child to deprive him or her of a legal tie of this nature when the biological reality of that tie was established and the child and the parent concerned sought its full recognition."*
- In a family based on same-sex marriage, one or both legal parents of a child would lack a genetic relationship with the child (and hence a natural guardianship interest), while one or more parties outside the marriage might retain such an interest.
- Several persons might have concurrent claims to access and guardianship of the same child and those claims would vary with the circumstances. This would expose many more children to parental disputes and litigation about guardianship and access.
- The extended family—in particular, the vital role of grandparents in supporting the natural parents—would be completely undermined. Since marriage would no longer be linked to procreation and blood relationship, the whole structure and tradition of the extended family relationship would gradually disappear.
- This would be contrary to the duty of the State—recently confirmed by the people in a referendum—to protect and vindicate the natural and imprescriptible rights and to promote the best interests of the child. This is the real human rights issue in this debate.

Gender-Neutral Marriage

- The proposed Article 41.4 of the Constitution would become the definitive textual source and reference point for a new right to marry. Marriage would thenceforth be something which *"may be contracted in accordance with law by two persons without distinction as to their sex"*, but which may not be contracted otherwise. The Irish text is even more emphatic as to the gender-neutral requirement in a marriage contract. It translates, *"Two may, regardless of their sex, make a contract of marriage in accordance with law."*

- The new measure does not simply add the possibility of same-sex marriage to the existing legal order of opposite-sex marriage. It reconfigures marriage, reducing the concept to whatever same-sex and opposite-sex couples might have in common and allows for every possible variant or transition of gender in the parties. It would therefore render obsolete many aspects of the previous understanding of the constitutional right to marry.

- At the core of this re-definition is a global ideology of gender-neutrality, the (irrational) belief that the biological sex of a human person is always subject to the will of the individual

and, as such, is not a fixed component of that person's social dimension or interaction with others in society. Recently, after being told by users that its existing 58 gender options are not inclusive enough, the social network Facebook has given its US members the option to fill in their own gender as they wish.

Solemnizing Marriage

- An tArd-Chláraitheoir (Chief Registrar) cannot lawfully approve a marriage ceremony unless it "includes and is in no way inconsistent with the declarations" specified in Section 51(4) of the Civil Registration Act and is compatible with the constitutional definition of marriage. A marriage ceremony which denies the premise on which gender-neutral marriage is based would evidently be incompatible with the amended Constitution and be "inconsistent with the declarations" specified.
- Since most religious marriage declarations (and perhaps others) are explicitly and exclusively between a man and a woman, the validity of such declarations in civil law, if the referendum were approved, would be difficult to sustain. It is strongly arguable that An tArd-Chláraitheoir would be prohibited from approving any such ceremony for the purposes of the Act. The status of all religious marriage ceremonies celebrated after the passing of the referendum would therefore be in doubt and open to constitutional challenge in the context of divorce, nullity or other legal actions.

Marriage Law

- There is a certain natural 'ecology' about marriage and family; a basic human culture and value system which precedes society itself and holds it together. The institution of marriage is the most fundamental social and legal construct in this ecology. It is something which this present generation has inherited, as a sacred trust, from the countless generations which have gone before. It cannot be arrogantly reinvented or emptied of its essential meaning without undermining the whole natural eco-system on which society is based.
- The legal effects of the amendment would be radical and irrevocable. The core meaning of marriage would change—sexual complementarity would become an optional rather than an essential feature—and as a consequence much of the current corpus of marriage law, which is based on sexual complementarity, would be undermined.
- Asserting a principle of marriage equality in the Constitution would imply that whatever is permitted in one case must be permitted in the other also.
- At a minimum, much of the received law of marriage would have to be revised and re-enacted—and much of the family case law abandoned—to take account of the new concept of marriage invented by the proposed amendment.
- The law of nullity would change for all marriages, in that impotence or incapacity could no longer establish a ground for voiding any marriage.
- The law of judicial separation would also change in that the ground of adultery would no longer be sustainable.

Blood Relationships

- To prevent consanguineous same-sex marriages—and to maintain the appearance of an equality of treatment—the Marriage Bill 2015 proposes, at Head 6 that *"Any prohibition on marriage between persons of the opposite sex based on the degree of consanguinity or*

affinity between them contained in any provision of law shall, with the necessary changes, be construed as applying to marriage between persons of the same sex within the equivalent degree of consanguinity or, as the case may be, affinity."

- The question would then arise whether such imprecise and widely drawn legislative restrictions on the newly formulated constitutional right to marry—which in the case of same-sex couples would lack any compelling basis in the common good—could withstand a legal challenge. The right to marry *in accordance with law* (and, in consequence, to found a family) in the Constitution could only be restricted for essential reasons of public policy. Even before the proposed amendment, the prohibition on the right to marry the sibling of a divorced spouse was held to be unconstitutional in the High Court in 2007 as being in breach of the unenumerated personal right to marry.
- The inherent gender-neutral logic of the new marriage regime in the Constitution would then seem to put in doubt the legality of the traditional heterosexual consanguinity impediments. The law might thus be obliged to allow a man to marry any relative that a woman could marry, and vice versa, without regard to potential offspring, since procreation would be formally dissociated from the new constitutional notion of marriage.
- The awful 'logic' of this argument would be supported by the fact that there is no restriction in the Children & Family Relationships Bill to prevent incestuous donor-assisted human reproduction, whether deliberate or accidental. Why prevent two siblings from marrying if the law allows them to conceive children by gamete donation?
- Some proponents of same-sex marriage now acknowledge and even advocate, as an inherent consequence, that consanguinity can have no place in a gender-neutral marriage regime, since the presumptive link between marriage and procreation would be completely sundered.

A Trojan Horse in the Constitution

- The referendum proposal would expand the meaning and constitutional protection of *marriage* to encompass every variety of homosexual, transsexual, intersexual and bisexual union and to establish this new gender-blind institution in the Constitution as the foundation of the *family*. This principle would engender new constitutional rights and would impede legislative restrictions on assisted human reproduction and surrogacy.
- The proposed redefinition of marriage would forfeit the vital interests of society, and the natural rights of children to the company of their parents and siblings, in favour of the private interests of a few adults. These adults would only acquire the status of *marriage,* however, at the cost of abolishing the very institution which they seek to adapt to their own desires.
- The deeper *rationale* for this proposal can be found in a radical ideology—codified in *The Yogyakarta Principles*—which rejects the natural distinction between male and female, promotes a subjective approach to 'gender identity' and separates sexual activity entirely from any responsibility for procreation.

Education & Conscience

- Although the entire corpus of literary and artistic culture witnesses to the contrary, if *marriage* no longer implies a man and woman and *family* a mother and father, then the revised Constitution would authorize the State to engage in a programme of 'positive discrimination' in schools and elsewhere, to inculcate an acceptance of the *new reality* of gender-neutral marriage in children and young adults, even against the wishes of parents.

INTRODUCTION

The Convention on the Constitution recommended that "*The Constitution should be amended to allow for same-sex marriage (and this amendment should be 'directive').*"[1] The Government accepted this recommendation and announced that a referendum to this effect will take place in May 2015. The *Marriage Equality Bill*[2] was published in January 2015. The proposed Article 41.4 of the Constitution would state —

> Marriage may be contracted in accordance with law by two persons without distinction as to their sex.

The Constitution would thus revoke and disallow any impediment to marriage based on the sexual identity of the persons concerned. The Explanatory Memorandum[3] states that *"If the amendment is approved at a Referendum of the people, same-sex couples will have the right to marry."* This would involve *a radical and irrevocable change* in the most fundamental institution of society. It would entail a wide range of consequences, many of them difficult to foresee.

Fundamentally, it would mean that *marriage* itself—now to become a constitutional construct rather than a natural moral institution—would no longer imply a procreative (man-woman) relationship. It would formally enshrine the ideology of "gender blindness" in the concept of marriage and family in the Constitution and establish the legal fiction of a family based on a marriage that cannot produce children. It would therefore authorize, in addition to adoption, any and every means by which science might facilitate the acquisition of children by such a married couple. It would abolish several grounds for nullity of marriage such as impotence and incapacity, and for judicial separation, such as adultery. Difficulties must also arise in the area of consanguinity, since the traditional impediments are, of their nature, gender-specific.

The Convention was informed that the research evidence concerning the psychological effects of same-sex marriage on children is *uncertain and insufficient* to justify any firm conclusions.[4] The constitutional amendment would require major changes in legislation in the areas of parentage, surrogacy,[5] guardianship,[6] custody, access, maintenance, tax and inheritance.[7] There is no European or international consensus as to how these matters can be resolved.[8] No impact assessment been published.[9]

Given the enormity of the implications, one may ask *why the sudden haste?* Rushed law is invariably bad law, as the flawed Irish text (identified in an earlier draft of this Paper) has already demonstrated. It would be astonishingly negligent on the part of Government to continue to push through this Referendum Bill without first subjecting the proposal to a Green Paper and the scrutiny of an inquiry or public hearing, in which the various social, psychological, moral, legal and technical repercussions of the proposal could be teased out.

The responsibility to justify the change is on those who propose it. They must show—by calm and reasoned argument—the precise nature of the inequality they allege and how their proposed solution would affect existing constitutional rights and marriage law. They must then allow their proposals to be scrutinized and tested by others against reasoned objections, in a respectful and honest debate. Such examination should not be taken as a personal attack on those advocating change, but as an essential stage in the responsible exercise by the people of its legislative role in a referendum.

The following sections indicate some areas of legitimate concern.

THE EQUALITY ARGUMENT

> *"Men are beginning to revolt, we are told, against the old tribal custom of desiring fatherhood. The male is casting off the shackles of being a creator and a man. When all are sexless, there will be equality. There will be no women and no men. There will be but a fraternity, free and equal. The only consoling thought is that it will last but for one generation."*[10]

Equality before the law is a constitutional imperative.[11] The primary argument in favour of the current proposal—and its primary appeal to the sense of fairness of the electorate—is that homosexual couples should have the same right to marry as heterosexual couples.

The Bill is named and the proposal is being promoted under the title "Marriage Equality".[12] Questioning that 'self-evident' claim is often taken to be motivated by an irrational prejudice against persons with a homosexual tendency.[13] This widespread uncritical attitude seriously misunderstands the constitutional notion of equality and even its commonsense usage.

The equality argument was proposed as follows by counsel for the plaintiff in the *Zappone* case:[14] *"It was contended that two categories of persons have been created, which two categories are distinguished on the basis of either sexual orientation or gender, namely, a category of persons who are heterosexual and can marry the person they love and a category of persons who are homosexual who cannot marry the person they love. The difference between the two categories is based on sexual orientation. It was also argued that the creation of these two categories constituted a gender based discrimination. Counsel illustrated this by pointing out that 'If John wants to marry Mary, he can do so. If John wants to marry Fred, he cannot do so.' Accordingly the distinction between the two categories is also a gender based distinction."*

In her summary of the defence submissions, which she accepted, Dunne J. noted that counsel *"pointed out that the Constitution has made it clear that the institution of marriage is not simply about the private relationship between two people. It relates to the role of marriage in society and its relationship to the family and the family's relationship to the social order posited by the Constitution. … Insofar as a distinction is made between married couples on the one hand and all other forms of relationships, the distinction is not made on the grounds of sexual orientation or indeed gender. He made the point that insofar such a distinction exists it is a distinction that does not offend Article 40.1 because it is a constitutional distinction, that is to say a distinction made by the Constitution itself."*

The Explanatory Memorandum[15] states that *"the purpose of the … Marriage Equality Bill … is to amend the Constitution so as to provide that persons may marry without distinction as to their sex."* It is already the case, however, that *persons may marry without distinction as to their sex.* The confusion may arise from the fact that, while the terms "homosexual" and "heterosexual" are used colloquially to describe individual persons, they do so only in their *orientation towards* a person of the same or opposite sex. No one is defined in law as a "homosexual" or "heterosexual". Constitutional rights are tied to the status of *human person* or citizen, thus: "All citizens shall, *as human persons*, be held equal before the law."[16]

Considered as an individual person before the law, a homosexual person currently has *exactly the same right to marry* as a heterosexual, because neither has the right to marry another person of

the same sex. The Title of the *Marriage Equality Bill* is misleading in this regard. The present claim is not to an *equal* right to marry but to an entirely *new* right to acquire the constitutional status of "marriage" with a person of the same sex and, in consequence to claim the title of "family", based on that marriage. The fundamental problem is that this new right would change the nature of "marriage" so radically—for everyone—that only the name would remain.

Equality depends on the context or purpose for which the comparison is being made. An equality argument involves the proposition that like subjects should be treated alike. Any assertion of *inequality* involves identifying a subject who is like another *in a relevant sense*, but who has been treated differently without a proportionate justification.[17]

Thus, a citizen aged 70 is alike to one aged 50 *for the purposes of* voting, but is unalike *for the purposes of* retirement and may be treated differently. It is not discriminatory to deny a state pension to a 62-year-old person while granting it to a 68-year-old. The Constitution expressly *requires* this form of rational distinction: "*This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function*."[18]

The Constitution likewise confers the status of citizenship (with all of the attendant advantages and rights) by birth, natural parentage and legislation.[19] Many immigrants are denied citizenship because they have not lived in Ireland for the requisite number of years, but they cannot satisfy that requirement either, because the legislation denies them the necessary visa permission to remain. They clearly suffer unequal treatment vis-à-vis other persons, but that does not necessarily constitute unjust discrimination.[20] The State has the right and the duty to regulate access to the status of citizenship, as indispensable to the welfare of the Nation and the State. It is for precisely this reason that the State also has the right and the duty to regulate access to the status of civil marriage.

What then are the relevant points of comparison of heterosexual and homosexual couples *for the purposes of constitutional marriage*? Is it about the persons as such, about their sexual orientation, about their mutual commitments, or about the interests of society in those relationships?

Advocates of same-sex marriage point to a parity of commitment and affection between the parties to the relationship in each case, and claim an equal capacity to adopt and rear children. Supposing that this may be the case, would such parity determine the question? Is marriage essentially a public endorsement of the commitment of mutually enamoured adults? Is there no societal interest? Are there no *differences of capacity, physical and moral, and of social function* which would require the State to treat them differently?

The notions of *marriage* and *family* and the natural rights of the child which are relevant to the comparison in question—and the claim of equality—must be those already expressed in the Constitution, since it is these same constitutional provisions which would be applied to homosexual unions.[21] These concepts are discussed in more detail in the following sections. They demonstrate that the relevant comparison—to evaluate the claim of equality—is *not* between one person and another on the basis of sexual orientation, but between one form of interpersonal union and another, from the point of view of its function in society and the protection of the rights of the child.

Advocates of homosexual marriage point out, quite reasonably, that some families based on heterosexual marriage do not actually produce children. Since that clearly does not invalidate the heterosexual marriage, they argue that an *incapacity to procreate* should not invalidate a homosexual marriage either. The obvious fallacy in this argument is that the validity of a

heterosexual marriage does not depend on the eventual outcome but on the capacity of the spouses for intercourse *at the time the marriage took place*.

A heterosexual marriage would in fact be voidable if impotence or incapacity *at the time of marriage* was later established. This rule of law is directly comparable to the same-sex impediment, except that a same-sex "marriage" would be self-evidently void *ab initio* and not just voidable at the suit of one of the spouses. There is no essential difference or inequality in treatment between one situation and the other.[22]

A natural capacity for the procreation and stable nurturing of children within a family unit is intrinsic to the present constitutional notion of *marriage* and to the ordinary and historical sense of the term. For thousands of years, marriage law has concerned itself with a particular kind of enduring bond between a man and a woman that includes the kind of act that *can* (but does not always) lead to the woman's pregnancy. A homosexual relationship, regardless of how enduring it may be as a bond of inter-personal commitment, does not and *cannot* include an act leading to pregnancy.

If the intrinsic potential for the procreation of children were removed from the constitutional notion of *marriage*, it would be reduced to a formal relationship between two adults. This could include the legal parenting of wholly related, partly related or unrelated children (i.e. procreated by the spouses, with others, or by others), but the constitutional notion of *marriage* as such would be *formally indifferent* to the potential fecundity of the adult relationship and to the relationship of the spouses to any children of which they become guardians.

We can therefore identify at least three relevant differences—for the purposes of the constitutional interest of society in the family based on marriage—between a committed heterosexual couple **'A'** and an equally committed homosexual couple **'B'**:

I. **'A'** has *within itself* a capacity for procreation and thus for the growth of the family unit; **'B'** does not.

II. **'B'** *cannot* of itself satisfy the natural right of a child to the stable society of its natural father, mother and siblings in family life; **'A'** *can* and normally does.

III. **'A'** has natural ancestors and descendents, the potential to renew and extend the family bond through many generations, and thus to build up and strengthen society; **'B'** has no natural ancestors or descendents, it can exist only for itself, as a dependent relationship in society.

These differences are not accidental but essential—they go to the heart of the constitutional definition of the family and the protection of *the natural and imprescriptible rights of the child.* They are differences inherent in one *institution* when compared with another, not between one *person* when compared with another.

There is no injustice involved in treating essentially different relationships unequally—the differences fully justify a distinct constitutional treatment. It follows that the exclusion of homosexual couples from constitutional marriage is not discriminatory, nor is it a denial of any human right.[23]

The equality argument for same-sex marriage does not stand up to scrutiny. It is simply untenable. As no other plausible justification has been advanced for this proposal, the amendment should be rejected for the good of society and the integrity of the Constitution.

THE RIGHTS OF CHILDREN

Separating children from their natural parents and siblings

The constitutional rights of children would be seriously affected by this proposal. In a gender-blind marriage regime, the essential family bond would be based—as a matter of constitutional policy—on legal guardianship (or statutory parenthood) rather than on natural parenthood. The proposal would enshrine a constitutional indifference to the distinctive roles of a natural father and mother in the development and education of their child, contrary to the basic notion of the family which it purports to protect and defend.

The ultimate logic of this approach is that children would, with ever greater frequency, be produced independently of any married relationship. Separating procreation from marriage and family and transferring ultimate responsibility for the care of children to the State—all foreseen in *Brave New World*[24]—would dissolve the natural bonds of human society. Children would be the silent victims of this adult self-absorption. The disquiet expressed by fashion designers and same-sex partners Dolce & Gabanna on this development is shared by a great many people. *"I am gay. I cannot have a child. … You are born from a father and a mother. Or at least that is how it should be. For this reason I am not convinced by what I call children of chemistry, or synthetic children. Uteruses for rent, sperm chosen from a catalogue."*[25]

Leon Kass pointed to human cloning as a natural progression from the decoupling of sex and procreation, begun with in vitro fertilization. With considerable prescience, he wrote in 1998 *"Cloning turns out to be the perfect embodiment of the ruling opinions of our new age. Thanks to the sexual revolution, we are able to deny in practice, and increasingly in thought, the inherent procreative meaning of sexuality itself. But, if sex has no intrinsic connection to generating babies, babies need have no necessary connection to sex … For that new dispensation, the clone is the ideal emblem: the ultimate 'single-parent child.'"*[26] The growing commercial market for surrogacy (and the inevitable exploitation of women which it entails) depends on a loosening of traditional family structures. At an average fee of $100,000 per child in the US, the pressure to facilitate this trafficking in human life can only increase.[27] Indeed, if the referendum is approved, it is difficult to see on what basis there could be any legal objection to such developments taking place in Ireland. Without a strong marriage and family framework recognized by law, many atomized offspring will be lost in an amorphous soup of uncaring humanity, devoid of even the most basic familial relationships.

Children as pawns in disputes between adults

In a family based on a same-sex marriage, one or both legal parents of a child would lack a natural parental relationship with the child (and hence, a natural guardianship interest),[28] while one or more parties outside the marriage might retain such an interest.[29] With the rapid development of genetic science, there may be multiple genetic or gestational links to the same child. Several persons might have parental or guardianship claims in respect of the child and those claims could vary with the circumstances.

The Supreme Court has determined that—under the law as it stands—the natural right of the child to the society of his father and the natural interest of a father in having access to his child[30] cannot be excluded *a priori* by a private agreement.[31] The best interest of the child—on a case by case basis—would have to determine the question.[32] It would seem to follow that such access could not be excluded *a priori* even by legislation.[33]

The European Court of Human Rights adopted a similar reasoning in deciding that the denial of the rights of children to legal recognition of their relationship with their fathers was contrary to the Convention.[34] *"Their right to respect for their private life, which implied that everyone should be able to establish the essence of his or her identity, including his or her parentage, was significantly affected. ... Given the importance of biological parentage as a component of each individual's identity, it could not be said to be in the best interests of the child to deprive him or her of a legal tie of this nature when the biological reality of that tie was established and the child and the parent concerned sought its full recognition. ... In thus preventing the recognition and establishment of the children's legal relationship with their biological father, the French State had overstepped the permissible margin of appreciation. The Court held that the children's right to respect for their private life had been infringed, in breach of Article 8."*[35]

The effect of the amendment may be that, contrary to the best interests of the child, a same-sex partner of one natural parent would acquire a superior constitutional right to guardianship and to the title 'parent'—as a member of a family based on marriage—to that of the other natural or biological parent, for as long as the marriage relationship endures. The Children & Family Relationships Bill, anticipating this, redefines parenthood, excludes any legal right to parentage by the biological donors of gametes or embryos (i.e the biological parents) and gives preference to a birth mother and her partner or spouse. For example, Section 5(7)(b) of the Bill, as passed by the Dail, provides that, in any legislation, "a father or parent of a child shall be construed as not including a man who is the donor of a gamete or embryo that was used in a DAHR procedure that resulted in the birth of the child."

This potential for conflict of interests would expose many more children to parental disputes about guardianship and access. Children would therefore be at a significantly greater risk of disruption in their family life as a consequence of the proposed change. If neither *natural* parent is an Irish national, the citizenship of the child—and the jurisdiction of the Irish Courts to resolve a dispute—might also be in doubt.[36] Marriage breakdown would also have even more serious consequences for children, because of the complexity and multiplicity of legal and natural parental interests.

The extended family—in particular, the vital role of grandparents in supporting the parents—would be completely undermined by the proposal. Since marriage would no longer be linked to procreation and blood relationship, the whole structure and tradition of the extended family relationship would gradually disappear.

The biggest casualties of the proposed change would be the children deprived of the natural institution of the family—and extended family—in which they have a fundamental right to be nurtured and loved. *"Professor Waite's evidence focused on her research on the family structure and the institution of marriage in the context of heterosexual marriage. She concluded that the evidence overwhelmingly supported the conclusion that the social institution of marriage is beneficial for those involved. Equally benefits accrued to children. I accept her evidence in this regard."*[37]

The proposal would establish a family unit which does not require a natural father or mother. It would promote—not just tolerate—diverse circumstances (e.g. surrogacy, with all of its known and anticipated problems) in which children would be deprived of the company of one or both of their natural parents and of their siblings. This would be contrary to the duty of the State—recently confirmed by the people in a referendum—to protect and vindicate *the natural and imprescriptible rights* and to promote the *best interests* of the child.[38]

This is the real human rights issue in this debate.

GENDER-NEUTRAL MARRIAGE

The right to marry is personal

The text of the Constitution does not contain an explicit right to marry, although that right has been acknowledged as an unenumerated personal right.[39] *"The right to marry contained in the Constitution is undoubtedly not an express right but is clearly implicit from the terms of Article 41. It is not a case where the court requires to ascertain a previously unenumerated right as the right to marry falls squarely within the terms of the Constitution."*[40] A definition of constitutional marriage as *the union of one man and one woman to the exclusion of all others* has been settled in a series of judicial decisions.[41] To be of the same sex as the other party has always been an absolute impediment to acquiring this status.[42]

Two persons, as *prospective* parties to a marriage contract, currently have no joint or collective right *as a couple.* Each person has a personal relational right to marry,[43] subject to the established conditions and impediments. It is as *individuals* that they meet—or fail to meet—these requirements. This personal right to marry is subject to, and distinct from, the definition and rights of the institution of marriage itself to which they aspire.[44]

If we were to suppose that a heterosexual couple, as such, is the legal subject of a collective right to marry, it would be precisely insofar as they are of opposite sex—and otherwise individually unimpeded—that they would have such a right. Their collective "right" would thus be anchored in their personal rights and in the meaning and definition of *marriage*, rather than in something that attaches to them as a couple ("two persons"). A homosexual couple *as such* does not constitute a relevant "two persons" for the purposes of marriage—any more than, say, a couple of sisters—precisely because their relationship does not conform to the meaning and definition of the marriage status they seek to acquire.

It makes no sense therefore to compare one *couple* with another—on grounds of equality—in respect of a putative collective right to marry. This is a crucial fallacy in the Minister's equality argument. For same-sex marriage to be legalised, a fundamental redefinition of *marriage* is necessary.[45]

A re-definition of marriage

The proposed Article 41.4 of the Constitution would become the definitive textual source and reference point for a new right to marry. Marriage would thenceforth be something which *"may be contracted in accordance with law by two persons without distinction as to their sex"*,[46] but which may not be contracted otherwise. The Irish text is even more emphatic as to the gender-neutral requirement in a marriage contract. It translates, *"Two may, regardless of their sex, make a contract of marriage in accordance with law."* It is important to note that, whereas every other aspect of marriage may henceforth be regulated by ordinary legislation, the Constitution itself would determine two key points: (a) that all marriage contracts are limited to two persons and (b) that they must exclude any express or implied distinction or condition as to the sex of the parties.

The inclusion of a numerical limitation (which is already part of marriage law) suggests that this provision is intended to be a restatement of the definition of marriage. The requirement of gender-neutrality is a radical departure from the established meaning of the term and must therefore be characterized as a substantial 'redefinition' of marriage.[47]

The redefined "marriage" is clearly intended to be univocal. The new measure does not simply add the possibility of same-sex marriage to the existing legal order of opposite-sex marriage. It reconfigures marriage, reducing the concept to whatever same-sex and opposite-sex couples might have in common and allows for every possible variant or transition of gender in the parties. It would therefore render obsolete many aspects of the previous understanding of the constitutional right.[48] This new definition would also have major implications for the constitutional definition of the *family*—which is explicitly founded on *marriage*—and for the rights of parents and children.[49]

A re-definition of human gender

At the core of this re-definition is a global ideology of gender-neutrality, the (irrational) belief that the biological sex of a human person is always subject to the will of the individual and, as such, is not a fixed component of that person's social dimension or interaction with others in society. Recently, after being told by users that its 58 existing gender options are not inclusive enough, the social network Facebook has given its US members a chance to fill in their own gender as they wish.[50] The radical political agenda driving this ideology is glimpsed in *'Everybody's queer': life on the sexuality spectrum* (Irish Times, Life & Style, March 30th 2015). In an interview, Emer O'Toole (author of *Girls Will Be Girls: Dressing Up, Playing Parts and Daring to Act Differently*) says *"The family is the basic building block of capitalist society. … We're at late-stage capitalism, where we are seeing change and diversification in the nature of the family as we move into a postcapitalist era, and it's happening in such rapid and revealing ways: new ways of conceiving, more families of separation and divorce, gay families, surrogacy."*

The template for much of the local and international campaign to introduce same-sex marriage and other gender-related changes in law appears to be based on a private initiative called *The Yogyakarta Principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity)*, agreed at a meeting of human rights groups and activists in November 2006.[51] Signatories included former President Mary Robinson and Prof Michael O'Flaherty of NUIG, who was also the *rapporteur* responsible for the drafting and development of the Principles adopted at the meeting. This controversial private document, although repeatedly rejected by the UN,[52] is now beginning to inform decisions of the European Court of Human Rights.[53] Yogyakarta Principle 24 states that *"Everyone has the right to found a family, regardless of sexual orientation or gender identity"* and calls on Governments to *"take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity."*[54]

An ideology of gender-neutral legal personhood is promoted in Ireland, inter alia, by the statutory Irish Human Rights and Equality Commission (IHREC).[55] Thus, the IHREC lobbies at public expense to make "legal gender recognition" and reassignment—whether as gay, lesbian, bisexual, transsexual or intersexual—available to everyone, whether single, civil partnered or married. Eliminating any distinction as to the sex of the parties in marriage and providing for every variant of gender in marriage are fundamental to the achievement of this objective. The proposed constitutional formula corresponds precisely to this goal.

Other elements of the legislative programme include the Gender Recognition Bill 2014,[56] the Children and Family Relationships Bill 2015 and the (heads of) Marriage Bill 2015. The 2014 Bill provides that Gender Recognition Certificates will be issued by the Minister, in a simple administrative process, on foot of a statutory declaration that the applicant "has a settled and solemn intention of living in the preferred gender for the rest of his or her life".[57]

SOLEMNIZING MARRIAGE

A divergence of meaning

There can be no dispute that a form of marriage which is perfectly indifferent to the sex of the parties would be a novelty in civil law. It would not correspond to the form of marriage which has been recognised heretofore, from time immemorial, and regulated by law as to its civil effects. If the intrinsic meaning of marriage is thus redefined in the Constitution, it seems inevitable that it will lead to a complete rupture between civil and religious marriage and a breakdown of the present system of solemnising civil marriage by means of a religious ceremony.

The two realities would no longer share any meaningful basis on which to maintain a common declaration of purpose and system of registration. The notion of marriage maintained by the Christian Churches and most other religious bodies would correspond to the former definition and would differ radically from the new constitutional definition of marriage. These bodies would undoubtedly continue to perform opposite-sex marriages according to the former concept, and in general would refuse to solemnize same-sex marriages.

Legislative changes—which would take effect only if the proposed amendment of the Constitution is carried—have been outlined by the Government in a draft General Scheme of Marriage Bill 2015. For the purposes of the present topic, one of these provisions is of particular significance. Head 10 of the Marriage Bill is entitled *"Change of gender of spouse to have no effect on marriage".* This gives clear evidence as to the intended effect of the new marriage contract.

Head 10 of the Marriage Bill provides for various deletions from the Gender Recognition Bill, which would otherwise prohibit a married person from obtaining a Gender Recognition Certificate.[58] The effect of these changes would be to provide that a married person may change his or her legal gender, by means of a statutory declaration, without the consent of the other party and without affecting the validity of their marriage.

This measure could not be sustained unless the new marriage contract itself established that the spouses accept and commit to each other as human persons regardless of their sex, rather than specifically as a man or as a woman. The conclusion is inescapable that the constitutional formula "without distinction as to their sex" is intended to inform and redefine the essence of every marriage contract. It would allow the parties, of their own volition, not only to marry regardless of their sex but also to reassign or transition their gender definition in the course of their married lives.

Religious and civil marriage declarations at variance

A legally binding marriage may be celebrated in Ireland in a civil ceremony, in a secular ceremony or in a religious ceremony which is also recognised by civil law as being a civil contract. Since November 2007, the General Register Office maintains a Register of Solemnisers of Marriage and anyone solemnising a civil, secular or religious marriage must be on the Register.[59]

Every religious marriage in Ireland at present must be solemnised by a Registered Solemniser, with two witnesses, in a form of marriage ceremony approved by An tArd-Chláraitheoir (Chief Registrar), which *"includes and is in no way inconsistent with the declarations"* specified in

Section 51(4) of the Civil Registration Act 2004. These include a declaration that the parties *"accept each other as husband and wife."*

Marriages performed according to the rites and ceremonies of the Christian churches (among others) are currently approved for the purposes of Section 51(4) by the Chief Registrar. A new statutory marriage declaration would be necessary to comply with the proposed constitutional amendment and the corollary changes to the Gender Recognition Bill. Head 5 of the Marriage Bill 2015 states that the revised declaration in the Act would be *"to the effect that they accept each other as husband and wife or spouses of each other."*

While Head 5 might seem at first to simply accommodate opposite-sex and same-sex marriage contracts, its true effect is to provide that *every* marriage contract is gender-neutral (see Head 10: "change of gender of spouse to have no effect on marriage"). The acceptance of the other person in marriage would encompass all of the present or future possibilities implied, i.e. husband/wife, same-sex or inter-sex spouse. Every marriage contract would thenceforth be "without distinction as to their sex".

In keeping with this constitutional gender neutrality, the new Section 51(4) declaration would mean that *every* marriage is open to becoming an opposite-sex or same-sex union at any point in the future. While this would be a rare eventuality in practice,[60] the fact that transsexualism in marriage is to be explicitly provided for by law illustrates the radical nature of the proposed redefinition of marriage and its incompatibility with explicitly man-woman formulations.

The implication of the redefinition of marriage may be compared with the effect of the divorce law (Article 41.3.2°) on marriage in 1996. Both constitutional amendments affect every marriage. The gender-neutral amendment would affect all marriages intrinsically and necessarily, whereas divorce is a contingent possibility affecting some marriages.

Unlike gender-neutral marriage, divorce does not involve an explicit redefinition of the marriage contract. A marriage entered into with the intention that it be indissoluble (e.g. a religious marriage) is not on that account contrary to the Constitution or to the statutory declarations required by the Act.[61] A conflict arises only if a divorce is granted following a formal judicial process and decision. On the other hand, a marriage contract entered into on the explicit basis that it is between a man and a woman as such (and which is not open to a gender change or reassignment in either spouse) would appear to be incompatible *ab initio* with the proposed constitutional definition of marriage.

An tArd-Chláraitheoir cannot lawfully approve a marriage ceremony unless it "includes and is in no way inconsistent with the declarations" specified in Section 51(4) of the Act[62] and is compatible with the constitutional definition of marriage. A marriage ceremony which denies the premise on which gender-neutral marriage is based would evidently be incompatible with the amended Constitution and be "inconsistent with the declarations" specified in the revised Section 51(4).

Since most religious marriage declarations (and perhaps others) are explicitly and exclusively between a man and a woman, the validity of such declarations in civil law, if the referendum were approved, would be in serious doubt. It is strongly arguable that An tArd-Chláraitheoir would be prohibited from approving any such ceremony for the purposes of the Act. A non-conforming ceremony or marriage declaration would always be open to challenge in the Courts, for example in the course of a divorce or nullity dispute.[63]

Registered Solemnisers cannot act unless the Chief Registrar has approved the marriage ceremony of their religious body.[64] Even if the legal conflict were addressed and could be rectified in some manner—it must first be identified and acknowledged—it is open to question

whether a minister of religion committed to the present concept of marriage could, on moral grounds, agree to co-operate with the civil aspects of a ceremony conducted in the new legal order. If the referendum is approved without this problem being resolved, solemnisers should not act in the civil sphere, because there is a clear danger that any marriages over which they preside may be invalidated in the future. A mass resignation of solemnisers following the referendum would pose significant problems for the State.

Separate religious and civil marriage ceremonies

In these circumstances, civil and religious marriage ceremonies would have to be separated entirely, as is the case in France. Even then—and notwithstanding Head 7 of the Marriage Bill (which says that Churches will not be obliged to perform same-sex marriages)—serious doubts would remain as to whether the State would be entitled under the Constitution, or the European Convention on Human Rights, to exempt any group in society from the requirements of the Constitution in the performance of an act (the solemnisation of marriage) which has from time immemorial been considered in law a public act.

The fundamental basis for the relationship between every marriage (civil, secular or religious) and the law is its *public* nature. The matter was explained as follows (so far as the interaction of English law with the European Convention on Human Rights & Freedoms is concerned) by the UK Home Secretary during a debate on the Human Rights Bill in May 1998:

> *"Much of what the Churches do is, in the legal context and in the context of the European convention on human rights, essentially private in nature, and would not be affected by the Bill even as originally drafted. For example, the regulation of divine worship, the administration of the sacrament, admission to Church membership or to the priesthood and decisions of parochial church councils about the running of the parish church are, in our judgment, all private matters. In such matters, Churches will not be public authorities; the requirement to comply with convention rights will not bite on them. …*
>
> *On the occasions when Churches stand in place of the state, convention rights are relevant to what they do. The two most obvious examples relate to marriages and to the provision of education in Church schools. In both areas, the Churches are engaged, through the actions of the minister or of the governing body of a school, in an activity which is also carried out by the state, and which, if the Churches were not engaged in it, would be carried out directly by the state.*[65]

If then, family and marriage *antecede* the Constitution and possess superior rights which cannot be taken away or lost, the question arises whether religious marriage—which has heretofore been recognised by the State as a public function having civil effects—would now be subject to the provisions of the proposed Article 41.4?

The import of Article 41.1.1° taken with Article 41.3.1° would seem to be that the law must continue to recognise marriages contracted by means of a religious ceremony, and also the personal right to contract marriage in this form. Such marriages would therefore have to be integrated in some way into the new constitutional scheme of marriage. This would seem to create a constitutional obligation on the State (and in time, a European Convention obligation also) to ensure that *all* marriage ceremonies conform to the principle "*without distinction as to their sex*". It may also give rise to new personal rights in this respect.

The following important questions arise from the proposed amendment, therefore, and should be considered and resolved by the Oireachtas before submitting the referendum to the people:

- Would the proposed Article 41.4 imply that there is to be a personal constitutional right to contract a same-sex marriage in a religious ceremony?[66]
- Could the State lawfully exempt the Churches from any obligation to solemnize such marriages (i.e. authorize the Churches to make a *distinction as to their sex* as regards what marriages they solemnize)?
- Would such an exemption in respect of a public function place the State in breach of its obligations under the European Convention on Human Rights in the future?

These are not just academic questions. It is surely too simplistic to suppose that such marriages would in future become merely private affairs, and that only marriages solemnized according to the civil law would be recognised by the Constitution.

One legal commentator suggested that *"the reference to marriage being 'contracted' clarifies that the amendment relates to the civil law marriage contract, and not to the religious sacrament of marriage. This forestalls any possible opposition based on the amendment being an attack on religious freedom."*[67] With respect, this view appears to be somewhat ill-considered. The expression *to contract marriage* has been part of marriage law since the earliest times. There is nothing novel or exclusively civil in the concept.[68]

One doesn't have to deny that the Constitution can be amended to provide for a new form of marriage in order to hold that—so long as Article 41.3.1° remains an integral part of the same Article of the Constitution—the religious form of marriage cannot be taken to have lost its standing merely by implication or inference. Indeed it would be an affront to democracy to purport to excise these solemn rights from the Constitution by a sleight of hand, rather than by a deliberate decision of the people. The proposition before the people is a *Marriage Equality Bill* (which presupposes the continuance of the existing forms of marriage), not a *Marriage Redefinition Bill* (although this paper argues that it actually entails a redefinition).

If the State (as proposed in the Head 7 of the Marriage Bill) were to exempt religious bodies by statute—assuming for the moment that such exemption would be compatible with the Constitution—the State might find itself before the European Court of Human Rights. The exemptions granted by the State may in time come to be regarded as incompatible with the Convention, on the ground that the State adopts a regime that discriminates on grounds of sexual orientation in the provision of a public service, namely the solemnization of marriages by religious authorities that also have some status as civil marriages.[69] The admissibility of such claims was acknowledged in the speech by the UK Home Secretary referred to above:

> *We think it right in principle—there was no real argument about it on Second Reading—that people should be able to raise convention points in respect of the actions of the Churches in those areas on the same basis as they will be able to in respect of the actions of other public authorities, however rarely such occasions may arise. … There was a time when one could get married only in church but, these days, marriage is a matter of civil law—it is the exercise of a public right. The Churches are standing in the stead of the state in arranging the ceremony of marriage, which is recognised not only in canon law, but in civil law. In that instance, the Church is performing a function not only for itself, but for civil society."*[70]

It is not suggested that the proposed amendment intends to create a conflict between Church and State in regard to solemnizing marriage. It does appear, however, that the very brief and unqualified principle of equality proposed in the amendment would achieve just that. These issues illustrate once more the necessity of a thorough process of analysis and inquiry of this issue before the wording of the referendum is settled and the question is put to the people.

MARRIAGE LAW

Marriage, as we know it, entails a whole ensemble of legal, social and moral concepts which would have no rational place in an arrangement called "marriage" between persons of the same sex. These concepts are based on the idea of marriage as a specifically heterosexual union, publicly witnessed and registered because of its potential fecundity.

The basis for the civil recognition of religious marriage in Ireland and England has a long history.[71] After the disestablishment of the Church of Ireland on 1st January 1871, the jurisdiction of the Ecclesiastical Courts was transferred to a newly established civil court, the Court of Matrimonial Causes and Matters.[72] This Court was specifically mandated to *"proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts of Ireland have heretofore acted and given relief"*.[73]

The Constitution has inherited and amended this former jurisprudence in matrimonial matters.[74] Thus, for example, the earlier canonical marriage impediments were recently re-enacted in the *Civil Registration Act,* 2004 by reference to the *Marriage Act*, 1835.[75] In *Murray v. Ireland*, Costello J. stated:— *"The concept and nature of marriage, was derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship."*[76] In the case of *T.F. v. Ireland,*[77] this definition of marriage by Costello J. was adopted by the Supreme Court. An essentially similar concept is enshrined in the Article 12 of the European Convention on Human Rights and was recently affirmed in the Judgement of the Grand Chamber in the case of *Hämäläinen v. Finland*.[78]

The constitutional understanding of the family, founded on a received notion of marriage, acknowledges it as the *natural primary and fundamental unit group of society,* and *a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*[79] What is true of the natural institution of the *family* must also apply, *mutatis mutandis,* to the institution of *marriage* on which it is founded. The reception into constitutional law of the received tenets of marriage law clearly acknowledges that the institution of marriage itself is not a construct of the Oireachtas or the Constitution, but *a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

Nothing is more fundamental to the notion of marriage received in the Constitution than sexual complementarity. The essence of the marriage contract is currently gender-specific. A woman accepts a man (not just another person) as her husband and the father of her children, and vice versa. Together they establish a family unit and agree to consummate a sexual intimacy which is naturally apt to producing offspring. So much is this the case that, in law, a marriage can be declared *not to have come into being* if it is subsequently shown that one of the parties was impotent at the time of the marriage, or that it has not been consummated. The impediments of consanguinity, likewise, are all premised on the notion that the marriage bond normally implies offspring. In her judgement in the *Zappone* case on same-sex marriage, Dunne J. stated clearly: *"In this case the court is being asked to redefine marriage to mean something which it has never done to date."*[80] To deny that this amendment proposes a redefinition of marriage would be patently disingenuous.

The affirmation in the Constitution of a principle of marriage equality between heterosexual and homosexual unions would imply that whatever is permitted in one case must also be permitted in the other.

The legal effects of the amendment over time—and its eventual interpretation by the Supreme Court—seem likely to be quite radical and irreversible. Much of the current corpus of marriage law, which is based on sexual complementarity, would be undermined. At a minimum, much of the received statutory law would have to be revised and re-enacted—and much of the family case law abandoned—to take account of the new concept of marriage *invented* by the proposed amendment.

The law of nullity—on the ground of impotence or incapacity—would change radically. Impotence could no longer be alleged as a basis for voiding any marriage. The discovery of incapacity (e.g. due to prior homosexuality) would no longer entitle the other spouse to a declaration of nullity.[81] The nullity ground of *inability to enter into and sustain a caring and considerate marital relationship* would likewise enter uncharted waters.

The law of judicial separation would change for all marriages, because the ground of adultery would no longer be sustainable.[82] It would be impossible to define extramarital or 'adulterous' homosexual intimacy. The right of fidelity and exclusivity in respect of either form of intimacy would be difficult to sustain in a regime of *marriage* which is common to homosexual (i.e. lesbian, gay, bisexual and transgender) and heterosexual relationships.

Why and for how long would a "gender-neutral" marriage regime continue to be restrained and circumscribed by centuries-old restrictions designed exclusively for a potentially fecund heterosexual marriage? As in the case of consanguinity, the traditional restrictions may eventually be seen to be unworkable as well as irrational, giving rise to pressure for further constitutional change or judicial *fiat*. Why bind a homosexual couple to marriage for life? Is the case for equal marriage rights rationally limited to couples? Why not, for example, formalize a "triple" or even a "quadruple" or other polyamorous loving relationship? There is no social imperative limiting a same-sex marriage to *two*, other than a mimicry of the procreative complementarity which is specific to an opposite-sex relationship. Once that requirement is removed, the empty shell of 'marriage' might equally validly be applied to any one or more persons wishing to establish a *family* unit.

These impediments may eventually be undermined for *all* marriages, whether homosexual or heterosexual, as lacking any justification in a common civil marriage regime which is focused on private personal attraction and not on a public responsibility for dependents or a societal interest in the institution of the natural family. One can scarcely imagine the consequences for extended family relationships, and the minefield in secondary matters such as succession, inheritance, legal relationships, parental leave, pension rights etc.[83] *Cui bono*?

There is a certain natural 'ecology' about marriage and family, acknowledged in the Constitution in language such as *the natural primary and fundamental unit group of Society,* and *a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.* [84] This ecology is a basic human culture and value system which precedes society itself and holds it together. The institution of marriage is the most fundamental social and legal construct in this ecology. It is something which this present generation has inherited, as a sacred trust, from the countless generations which have gone before. It cannot be arrogantly reinvented or emptied of its essential meaning without undermining the whole natural eco-system on which society is based. It has undoubtedly been damaged by the introduction of no-fault divorce. It must not be completely emptied of meaning by separating it from the transmission of human life.

It is not too late to turn away from this madness and indeed, like Croatia[85] and Slovenia,[86] to light a beacon for other countries in Europe which may not have the opportunity to make informed democratic choices in these matters.

BLOOD RELATIONSHIPS

Marriage between closely related persons has to a lesser or greater extent been proscribed by custom or law in most cultures. Marriage law in Great Britain and Ireland included prohibitions based on affinity and consanguinity drawn from ancient ecclesiastical law.[87] These impediments were recently re-enacted in Ireland in the *Civil Registration Act* 2004 by reference to the Act of 1835.[88]

The principal justification for consanguinity restrictions has been the well-founded concern that close blood ties between spouses can significantly increase the risk of genetic defects in their offspring. Recent legislation on civil partnerships (for same-sex couples) mimics these impediments,[89] although there is no public health reason for excluding such partnerships among mature persons even if related by blood.[90] It appears to have been done largely for the sake of "parity of esteem" and to create an appearance of equality with heterosexual marriage.[91] The arbitrary nature of these impediments to civil partnership may be immune from legal challenge as there is no constitutional right to enter such a partnership.

We take these impediments so much for granted that, in the debate thus far, it has been assumed that such provisions would transfer neatly into a new common regime for homosexual and heterosexual "marriage", perhaps with a few minor technical adjustments. A moment's reflection should make it clear that there is no rational basis for such a naïve assumption.

The principal effect of the proposed amendment would be to prohibit any legislative distinction based on an identity or a difference of sex in the prospective spouses.

In the first instance, it would render unconstitutional and inoperable the existing impediment on marrying a person of the same sex.[92] Under the law as it stands, a woman cannot marry her own mother, not because of a consanguinity impediment, but because they are not of the opposite sex. To prevent consanguineous same-sex marriages—and to maintain an equality of treatment—*new* impediments would have to be introduced by legislation to prohibit marriage with a relative of either sex within the prohibited degrees. The Marriage Bill 2015 proposes, at Head 6 that *"Any prohibition on marriage between persons of the opposite sex based on the degree of consanguinity or affinity between them contained in any provision of law shall, with the necessary changes, be construed as applying to marriage between persons of the same sex within the equivalent degree of consanguinity or, as the case may be, affinity."* The question would then arise whether such imprecise and widely drawn legislative restrictions on the newly formulated constitutional right to marry—which in the case of same-sex couples would lack any compelling basis in the common good—could withstand a legal challenge.

The right to marry *in accordance with law* (and, in consequence, to found a family) in the Constitution could only be restricted for essential reasons of public policy. Even before the proposed amendment, the prohibition on the right to marry the sibling of a divorced spouse was held to be unconstitutional in the High Court in 2007 as being in breach of the unenumerated personal right to marry.[93] That right is also protected by Article 12 of the European Convention on Human Rights. Impediments based on affinity—based primarily on tradition—have been found to breach that right in the Convention.[94]

A recent case in the Supreme Court concerning a woman who acted as a surrogate mother for her sister's child[95] suggests one type of case which might lead to a striking down of widely drawn consanguinity impediments in same-sex unions—which lack a rational foundation—and thus clear the way for siblings to marry under the new constitutional provision.

Suppose two women, mature siblings, co-operated in the birth of a child (one as genetic mother and the other as gestational mother); could they not reasonably claim a natural parental and family relationship with their child? If they decided to marry and to live together with their child as a family unit, on what rational legal basis—in the proposed constitutional scheme of gender-neutral marriage—could they be denied access to this status? Would they not meet all of the essential criteria and more besides?

If the same-sex consanguinity impediment were removed, as being an unnecessary and irrational limitation between mature adults, a new duality would emerge in marriage law—one set of rules for homosexual marriage, another for heterosexual. Yet it is precisely in the name of equality and in order to eliminate such duality that the present proposal is being advanced.

The inherent gender-neutral logic of the new marriage regime in the Constitution would then seem to demand an equality of treatment in this regard also, putting in doubt the legality of the traditional heterosexual consanguinity impediments.[96] The law might thus be obliged to allow a man to marry any relative that a woman could marry, and vice versa, without regard to potential offspring, since procreation would be formally dissociated from the new constitutional notion of marriage. The awful 'logic' of this argument would be supported by the fact that there is no restriction in the Children & Family Relationships Bill to prevent incestuous donor-assisted human reproduction, whether deliberate or accidental.

An amendment specifically to prohibit incestuous donation was defeated in the Seanad debate at the Report stage of the Bill.[97] The Minister's response was that it would never happen. *"It would be nonsensical to suggest that clinics will provide fertility treatment using clearly consanguineous gametes. It would be a complete breach of all relevant medical ethics and duty of care. There is no question of that."*[98] This response begs so many questions that it is clear that the Minister has not considered the problem. Very often the recipient will not know who her half-siblings might be. Has the Minister not heard of the work and personal experience of Dr. Joanna Rose?[99] What steps will a clinic take to establish that there is no consanguineous relationship? Who will ensure that this will always happen, if there is no law in place to require it? On the other hand, does it make sense to prevent two siblings from marrying if the law actually allows them to conceive children by gamete donation? Is it not precisely the function of the legislation to ensure that such practices are declared illegal?

A ban on heterosexual incest is widespread in Europe—in the context of traditional marriage—but a substantial minority of European countries do not criminalise it.[100] Homosexual 'incest' is not generally illegal. The jurisprudence of the ECtHR strongly suggests that once a sufficient number of 'advanced' countries have moved in a particular direction, a consensus will be deemed to have been established and the rest will be obliged to follow. The same result might come about more directly in Ireland if the Supreme Court decided to follow through on the logic of the redefinition of marriage in the current proposal.

Some proponents of same-sex marriage now acknowledge and even advocate, as an inherent consequence, that consanguinity can have no place in a gender-neutral marriage regime, since the former link between marriage and the potential for procreation would be completely sundered. At most, the State might be shown to have a compelling interest in prohibiting consanguineous *procreation* (as distinct from infertile sexual activity). Any such legal prohibition, however, would lead to pressure for the termination of any consanguineous pregnancies.

"Oh! What a tangled web we weave, when first we practice to deceive!" [101]

A TROJAN HORSE IN THE CONSTITUTION

A radical change in the concept of family

The *family* based on marriage is the *natural primary and fundamental unit group* of *society*.[102] This constitutional definition necessarily implies that, in principle, the *family* contains *within itself* a capacity for human reproduction and replication through many generations.

It is often objected that since not all marriages produce children but they are nevertheless valid, same-sex marriages are no different in that respect. That is a fallacy. Lack of offspring does not invalidate a marriage, because the validity of the marriage depends on the presumed capacity of the spouses *at the time the marriage took place,* not on the fecundity of the subsequent relationship. A marriage would be voidable, however, if impotence or incapacity at the time of marriage were later established.

The constitutional family has the primary natural responsibility for the education of children.[103] This right is exercised by the parents of the child's family.[104] The Constitution thus acknowledges that the *family* is the proper natural social environment in which children born to (or, in exceptional cases, adopted by)[105] the parents of the family are to be nurtured.

Without an ordered regeneration, society would lack the primary means to survive and develop. The Constitution therefore defines marriage as an institution or status in which *society itself* has a vital and compelling interest. It is not just a matter of protecting the private interests of the parties to a marriage; it is a fundamental social institution on which the future of society itself depends.

The referendum proposal would expand the meaning and constitutional protection of *marriage* [106] to encompass every variety of homosexual, transsexual, intersexual and bisexual union and to establish this new gender-blind institution in the Constitution as the foundation of the *family*.[107] There is no intrinsic societal or constitutional interest in such relationships *per se*. This new concept of *family,* founded on a notionally infertile *marriage,* might have children accidentally related to it in particular cases, but they would not be intrinsic to it as an institution. Any one person—or group of persons of the same sex—established as a *family* by *marriage*, could procreate outside that family and 'import' or adopt the child into the family unit. Such a family would not owe its development to the *marriage* as such but precisely to an *extra-marital* relationship or intervention, of whatever kind.

The amendment would thus authorize and promote the procreation of children out of wedlock—since marriage *as such* would lack this intrinsic capacity—and also the guardianship of children by persons other than their natural parents, contrary to the best interests and *the natural and imprescriptible rights of the child*. [108] The redefinition of marriage would therefore forfeit the compelling interest of society[109]—and the protection of the natural rights of children—in favour of the private interests of an adult or group of adults. They would only acquire the status of *marriage,* however, at the cost of abolishing the very institution which they seek to adapt to their own desires.

The same-sex marriage proposal would thus introduce inherently absurd and contradictory policies on the family and children into the Constitution, rejecting existing constitutional principles in favour of recent developments in gender ideology.[110] In fact, the deeper *rationale* for this proposal can be found precisely in this radical ideology, which rejects the natural distinction between male and female, promotes a subjective approach to 'gender identity' and separates sexual activity entirely from any responsibility for procreation.

Implications for legislation on human reproduction

Following such a radical change in the policy concerning marriage, on which the family and society will nevertheless be "founded", it must be expected that some of the restrictions intended to be imposed by ordinary legislation will be challenged. In particular, restrictions in areas such as donor-assisted human reproduction (DAHR), surrogacy, more recent developments in multi-parent and even single-parent embryos and the irrational limitations on same-sex marriages on the grounds of affinity or consanguinity (while permitting DAHR within such degrees of relationship), will all be vulnerable to attack.

The first difficulty is that marriage as a constitutional institution will be entitled to protection from legislative and other attack because of the guarantee in Article 41.3.1°: *"The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."*[111] The Supreme Court stated in *Murray v Ireland*,[112] that this guarantee necessarily involved the protection of certain marital rights such as the right of cohabitation, the right to take responsibility for and actively participate in the education of any children born of the marriage, the right to beget children or further children of the marriage, the right to privacy within the marriage, privacy of communication and privacy of association.

This protection and these guarantees would be adapted and extended to every form of marriage envisaged by the proposed Article 41.4. Legislation which put a childless married couple of the same biological sex at a disadvantage vis-à-vis a couple of opposite sex would be especially vulnerable to attack. Evidently, an adoption agency could not distinguish in any way between a same-sex and an opposite-sex couple. Surrogacy would be constitutionally endorsed as a consequence of Article 41.4, taken together with Article 42A.3 (if and when enacted).[113] If a family based on same-sex marriage has a right to beget children, any legislation which restricted that right for extraneous policy reasons (e.g. by banning surrogacy unless it was deemed altruistic) would be in danger of being struck down by the courts. A similar challenge could be taken by an opposite-sex couple, unable to give birth to their own child, who preferred to rely on a particular surrogate gestational mother to carry their embryo to term and whom they wished to pay for the service.

Just as surrogacy would be necessary for a male couple to 'beget' children, sperm donation would be necessary for a female couple. The prohibition of anonymous DAHR in the Children & Family Relationships Act 2015 could be attacked on the grounds that it unreasonably restricted the availability of suitable gametes to a lesbian couple and that the disclosure rule at 18 years was inoperable, uncertain, illusory and contrary to the new constitutional doctrine of gender-blind family make-up.

Consider the case of a lesbian couple who marry after the referendum has been passed. One of them will provide the egg for a child and the other will act as the surrogate mother. They can only obtain suitable sperm, however, from a man known to them (perhaps a friend or even a sibling) who wants to remain permanently anonymous to the child. They challenge the constitutionality of the requirement that the child is to be informed as to who his or her father is at eighteen years of age. They argue that, as the Constitution now protects a 'marriage' of two men, and a family (based on surrogacy) founded upon their 'marriage'—even though men can never provide an egg or act as the surrogate mother—the denial to this lesbian couple of the suitable donor's sperm, by reason of a requirement of disclosure of identity when the child is eighteen, is discriminatory and unconstitutional.

The proposed Article 41.4 is likely to prove to be a Trojan Horse in the Constitution, carrying with it commercial surrogacy, anonymous DAHR and a whole host of other exploitative and socially regressive consequences.

EDUCATION & CONSCIENCE

One of the more immediate and general consequences of the proposed change of constitutional policy in regard to marriage and the family may be in the area of education, especially at primary and secondary level, where the State holds a dominant position.[114]

Although the entire corpus of literary and artistic culture witnesses to the contrary, if *marriage* no longer implies a man and woman and *family* a mother and father, then fidelity to the revised Constitution would seem to authorize the State, through the Department of Education & Science, to engage in a programme of 'positive discrimination' in schools and elsewhere, to inculcate an acceptance of the *new reality* of gender-neutral marriage in children and young adults.

There are already State-sponsored and State-supported private initiatives promoting respect for homosexuality in general, e.g. as part of an anti-bullying programme. The insertion of a radical change of this kind in the Constitution would probably be taken to mandate a much more active and thoroughgoing programme of re-education.

Educational texts of every description would in time be revised to ensure that they reflect and promote this 'new reality' among the younger generations.[115] Inherited assumptions regarding siblings, mothers and fathers would gradually be replaced with 'neutral' concepts such as progenitors and (legal) parents.[116] Thus, for example, instead of referring to a child's mum and dad, a teacher might have to ask about "your Progenitor A (or, as the case may be, your Parent A) and your Progenitor B (or, as the case may be, your Parent B)".

The State exercises a considerable influence on syllabi and policy even in private fee-paying schools, especially through inspections, assessments and State examinations. It would be very difficult for religious bodies or other faith-based schools to maintain a traditional family doctrine, in the face of a publicly funded and constitutionally endorsed programme to inculcate a theory of gender-neutral marriage.

This process would directly pit the State against many families and religious bodies in the area of education and would involve a serious conflict of constitutional values and rights. The Constitution acknowledges that the family is the primary educator of the child.[117] However, if a family chooses—albeit in most cases from economic necessity—to send their children to a State school,[118] they would in effect be subjecting them to the values inculcated in such State programmes. Withdrawing their children from specific classes or programmes of this kind would expose those children to peer pressure and bullying on that account.

The marriage referendum will not provide any protection for those who, on grounds of conscience, do not wish to co-operate with same-sex marriage. "It sounds so reasonable at first, a conscience clause to protect beliefs. It is anything but, and in a republic it is unacceptable. People don't get to decide which laws to follow. It is an attempt to undermine the law of the land." So says Tiernan Brady, policy director of the Irish Gay and Lesbian Equality Network, described by Larissa Nolan (Page 10, Sunday Times, 22 March) as "a leading figure in the Yes Equality campaign".

Mr Brady is somewhat ahead of himself. It is not yet "the law of the land". In this referendum, the people will "get to decide" on the law in question. Mr Brady's frankness makes it plain that many are being invited, not merely to respect and accommodate others in a spirit of civic generosity, but to formally abandon their own beliefs and to imprison themselves in a new marriage law that would substitute for the man-woman-child relationship, the new pansexual orthodoxy advocated by Mr Brady's lobby group.

NOTES

[1] *Ninth Report of the Convention on the Constitution*: Conclusions and final recommendations, 31 March 2014

[2] Thirty-Fourth Amendment of the Constitution (Marriage Equality) Bill 2015 (Number 5 of 2015), published on 23rd January 2015

[3] *Ibid.*, Explanatory Memorandum

[4] *Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage*, Presentation by Prof. Jim Sheehan, p. 36 et seq.

[5] The Government is working on a *Children and Family Relationships Bill* to address some of these issues in advance of the referendum, but the law regarding surrogacy will not be included, due to its complexity.

[6] "Again a strong majority recommended legislation to accompany any such amendment, to provide specifically for changed arrangements in regard to the parentage, guardianship and upbringing of children. The reason for including this option on the ballot paper was that in the case of same-sex couples *in loco parentis* to children, at least one parent will not be a genetic parent and therefore the usual rules regarding custody, guardianship etc. would need to be reviewed and – according to the Convention's preference – adapted for this situation." *Third Report of the Convention on the Constitution: Amending the Constitution to provide for same-sex marriage*, p. 6

[7] *Ibid.*, Presentation by Dr Sarah Fennell BL, p. 13 et seq.

[8] *Ibid.*, Presentation by Dr Eimear Brown BL, p. 19 et seq.

[9] A detailed assessment was published in the UK before the introduction of same-sex marriage. See the *Impact Assessment, Marriage (Same Sex Couples) Bill*, 17 January 2013.

[10] G.K. CHESTERTON, Editorial, *G.K.'s Weekly,* July 26, 1930

[11] ARTICLE 40.1

> "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

[12] A Press Statement by the Department of Justice, 21 January 2015, quotes the Minister as saying "The issue is one of equality, Marriage Equality. It is about removing the barriers which deny some couples the chance of marrying and of having relationships that are constitutionally protected."

[13] Criticism of the political claims of homosexuals is often brushed aside as "homophobia"—an *ad hominem* argument, implying a judgement as to motive—without addressing the substance of the criticism. This pejorative neologism has a rather curious etymology. It should mean an irrational fear of *sameness* (from the Greek *homos*, same and *phobos,* fear or flight)—as opposed to heterophobia, an irrational fear of *difference*—rather than a fear of homosexuality in particular, or even a hatred of men, as is sometimes supposed. It often suggests a fear of reasoned argument on the part of the one who uses it as a defence.

[14] *Zappone & Anor v. Revenue Commissioners & Ors,* [2006] IEHC 404

[15] Thirty-Fourth Amendment of the Constitution (Marriage Equality) Bill 2015, Explanatory Memorandum

[16] ARTICLE 40.1

[17] "In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made." O'Donnell Donal J., in *M.R. and D.R. (suing by their father and next friend O.R.) & ors v. An t-Ard-Chláraitheoir & ors,* [2014] IESC 60 at 36.

[18] ARTICLE 40.1

[19] See ARTICLES 2 & 9.

[20] ARTICLE 9.1.2°

[21] *Third Report of the Convention on the Constitution Amending the Constitution to provide for same-sex marriage*: Presentation by Gerard Durcan SC, p. 11 "The effect of this would be that such a marriage would be entitled to protection under the Constitution as would a Family and its members founded on such a marriage."

[22] Every unimpeded man and woman has an equal right to enter the state of civil marriage. If one is impeded or disinclined for whatever reason, he or she may freely choose among alternatives, which now include civil legal

options designed to accommodate impeded same-sex couples, as well as heterosexual couples who choose not to marry.

[23] See, for example, the decision of the US Supreme Court in *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972) which confirmed that a state law banning same-sex marriage was not discriminatory. Baker and McConnell appealed the Minnesota court's decision to the U.S. Supreme Court. There, they claimed the Minnesota marriage statutes implicated three rights: they abridged their fundamental right to marry under the Due Process Clause of the Fourteenth Amendment; discriminated based on gender, contrary to the Equal Protection Clause of the Fourteenth Amendment; and deprived them of privacy rights flowing from the Ninth Amendment to the United States Constitution. On October 10, 1972, the U.S. Supreme Court issued a one-sentence order stating "The appeal is dismissed for want of a substantial federal question."

[24] *Brave New World* is a novel written in 1931 by Aldous Huxley. Set in London in 2540 AD, the novel anticipates developments in reproductive technology, sleep-learning, psychological manipulation, and classical conditioning that combine profoundly to change society.

[25] Financial Times, Comment & Analysis, 21 March 2015, p. 11

[26] LEON R. KASS AND JAMES Q. WILSON, *The Ethics of Human Cloning* (Washington: AEI Press, 1998). Leon Kass is an American physician, scientist, educator, and public intellectual. He was chairman of the President's Council on Bioethics from 2001 to 2005.

[27] See www.familiesthrusurrogacy.com

[28] Guardianship means the rights and duties of parents in respect of the upbringing of their children. The natural mother of a child is automatically a guardian of the child. Whether the father of a child is an automatic guardian depends on his relationship with the mother. The married mother and father of a child are the most common guardians and they are so entitled by virtue of section 6(1) of the Guardianship of Infants Act, 1964. However, for the father to have guardianship status, the parties must be married at the time of the birth of the child. Alternatively, he can acquire guardianship status if the parties marry after the birth of the child. If the natural parents remain unmarried, the natural father of the child can also apply to the court under section 6A of the Guardianship of Infants Act, 1964 to be appointed guardian.

[29] Guardianship of Infants Act 1964, section 2 (as amended) provides that a *parent* means a mother or a father, whether by birth or by adoption order. Where the mother is married there is a presumption in law that her husband is the father of the child unless the contrary is proved. If parents are not married to each other there is no presumption in law as to who is the father of the child, unless the father's name is on the birth certificate. Children of parents who are not married to each other may have to prove paternity in order to get their maintenance or inheritance entitlements.

[30] In *Keegan v. Ireland,* (Application no. 16969/90), Judgment of 26 May 1994, the ECtHR found that Ireland's failure to allow an unmarried father to be consulted when his child had been placed for adoption constituted a breach of Article 8.

[31] Murray C.J. in *McD. v. L. & anor*, [2007] IESC 81: "I agree with my colleagues who have written judgments in this matter that the agreement must, at least for the purposes of determining the issues in this case, be considered unenforceable, although it is relevant as a factual background and context to those issues."

[32] Murray C.J. in *McD. v. L. & anor*, [2007] IESC 81: "It is the welfare of the child, as the first and paramount consideration, which is central to the determination of the issues in this case as s. 3 of the Guardianship of Infants Act 1964 provides. There must be some doubt as to whether any such agreement to donate sperm could be enforceable generally. In particular it is difficult to see on what basis an agreement or consent of the putative father at that stage as to his future relationship with his yet to be born child could be considered as valid and binding. In the High Court it was argued at one point that a father in the situation of McD could give his consent in a way that paralleled the consent which a mother or even a married couple could give with regard to adoption. Even if that were a true parallel a consent of a mother to adoption prior to the conception or birth of a child could not, in my view, be considered a full or valid consent. The fact is that a person in the position of McD when faced after birth with the reality of a child, a person, who is his son or daughter, even if biologically in the sense of the facts of this case, may, quite forseeably, experience strong natural feelings of parental empathy and identity which may overcome previous perceptions of the relationship between father and child arrived at in the more abstract situation before the child was even conceived. That such a change of heart would occur must also be foreseeable as at least a real possibility by parties in a position similar to that of PL and BM. Although the rights of such a father are limited, as explained in other written judgments in this case, such a change of heart may be, as it was

in this case, an event which raises issues as to whether in the interests of the child access or guardianship ought to be granted to the father."

[33] ARTICLE 42A.2.1° "In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the *natural and imprescriptible rights of the child*." (not yet enacted, pending a constitutional challenge). See also Murray C.J. in *McD. -v- L.* & anor, [2007] IESC 81: "In any event, in this case, as the law stands, and as the learned trial Judge recognised, PL as the mother of the child, is entitled to exercise her rights of custody and parenthood under the law and the Constitution. She must be entitled to do so without those rights being trammeled by any legal rights that might be said to be vested under the Convention in BM on the basis of the interpretation given by the High Court to Article 8. Similarly, McD is entitled to have any rights which he may have as the biological father without being qualified by supposed Article 8 rights vested in the respondents."

[34] The European Court of Human Rights, Chamber judgments in the cases of Mennesson v. France (application no. 65192/11) and Labassee v. France (no. 65941/11).

[35] Press release issued by the Registrar of the Court, ECHR 185 (2014) 26.06.2014.

[36] ARTICLE 9.2.1°

> "Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law."

[37] Per Dunne J. in *Zappone & Anor v. Revenue Commissioners & Ors,* [2006] IEHC 404

[38] See ARTICLE 42A (not yet enacted, pending a constitutional challenge).

[39] In *O'Shea and O'Shea v. Ireland and the Attorney General* (High Court, 17 October 2006, Laffoy J.), the High Court held that section 3(2) of the *Deceased Wife's Sister's Marriage Act* 1907, as amended by section 1(2) (b) of the *Deceased Brother's Widow's Marriage Act* 1921, [referred to in S. 2, 2(a), *Civil Registration Act* 2004] which prohibited the marriage of a man with a divorced wife of his brother or half-brother, was unconstitutional because it restricted the right to marry under Article 40.3.1° of the Constitution.

[40] Per Dunne J. in *Zappone & Anor v. Revenue Commissioners & Ors* [2006] IEHC 404

[41] *Murphy v. Attorney General* [1982] IR 241, at 286. Kenny J. for the High Court, said that the pledge to "guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations ...will be given special protection so that it will continue to fulfill its function as the basis of the family and as a permanent, indissoluble union of man and woman".

Murray v. Ireland (1985) I.R. 532. Costello J. in the High Court stated that "the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship."

TF v. Ireland [1995] 1 IR 321. *Murray v. Ireland* was quoted with approval in the decision of the Supreme Court in *TF v. Ireland* (1995). The Supreme Court also noted that "marriage is a civil contract which creates reciprocating rights and duties between the parties."

B v. R [1995] 1 ILRM 491. Costello J. defined marriage as "the voluntary and permanent union of one man and one woman to the exclusion of all others for life".

Foy v. An t-Ard Chláraitheoir [2002] IEHC (9 July 2002). McKechnie J. in the High Court restricted the definition of marriage to a biological man and woman, refusing to allow individuals who have undergone gender reassignment to marry individuals of the same biological sex.

D.T. v. C.T [2003] 1 ILRM 231. Following the introduction of divorce, in *D.T. v C.T.*, Murray J. says that, although society is evolving, "marriage itself remains a solemn contract of partnership entered into between man and woman".

Zappone & Anor -v- Revenue Commissioners & Ors, [2006] IEHC 404. Dunne J. said "Marriage was understood under the 1937 Constitution to be confined to persons of the opposite sex. That has been reiterated in a number of the decisions which have already been referred to above, notably the decision of Costello J. in *Murray v. Ireland,* the Supreme Court decision in *T.F. v. Ireland* and the judgment of Murray J. in *T. v. T.* The definition was

reiterated in *Foy v. An tÁrd Claraitheóir* although there must be a caveat concerning the use of the words biological man and biological woman given the decision in the *Goodwin* case. That has always been the definition."

See also Lord Penzance, in *Hyde v Hyde* [1866] L.R. 1 P & D 130.

[42] Civil Registration Act 2004, S. 2(2) "For the purposes of this Act there is an impediment to a marriage if— (e) both parties are of the same sex."

[43] The personal right to marry is an unenumerated right protected by ARTICLE 40.3.1°, see *O'Shea and O'Shea v. Ireland and the Attorney General* (High Court, 17 October 2006, Laffoy J.).

[44] ARTICLE 41.3.1° is a constitutional guarantee to protect the institution of marriage from attack, e.g. by putting it at a disadvantage in the tax or social welfare codes of the State. If the couple do marry, they will also enjoy certain rights as a *family* (which either spouse can litigate, but not vis-à-vis one another).

[45] The question cannot therefore be presented as one of *equality* between categories of couples. The title and presentation of the *Marriage Equality Bill* are entirely disingenuous.

[46] Schedule, Part 2, Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015, (as passed by Dáil Éireann).

[47] *Zappone & Anor -v- Revenue Commissioners & Ors*, [2006] IEHC 404. Dunne J. said "In this case the court is being asked to redefine marriage to mean something which it has never done to date. ... Having regard to the clear understanding of the meaning of marriage as set out in the numerous authorities opened to the Court from this jurisdiction and elsewhere, I do not see how marriage can be redefined by the Court to encompass same-sex marriage."

[48] Press Statement by the Department of Justice, 21 January 2015: *"If the wording is approved by the people, the establishment of the right of two persons to marry without distinction as to their sex implies a corresponding obligation and requirement on the state to respect and vindicate that right in its legislation."*

[49] ARTICLE 41, 3

> "1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

[50] Facebook's Diversity team said: "*Now, if you do not identify with the pre-populated list of gender identities, you are able to add your own. As before, you can add up to 10 gender terms and also have the ability to control the audience with whom you would like to share your custom gender. We recognize that some people face challenges sharing their true gender identity with others, and this setting gives people the ability to express themselves in an authentic way."* See www.rt.com, 27 February 2015

[51] *The Yogyakarta Principles,* Preamble, Recitals 5 & 6

> "UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;
>
> UNDERSTANDING 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."

[52] The Principles have never been accepted by the United Nations and the attempt to make gender identity and sexual orientation new categories of non-discrimination has been repeatedly rejected by the General Assembly, the UN Human Rights Council and other UN bodies.

[53] See for example, Opinion of Advocate General Sharpston, delivered on 17 July 2014, in Joined Cases C-148/13, C-149/13 and C-150/13, *A, B and C*, at Note 47: "So far as the UNHCR's (helpful) intervention is concerned, I note that paragraph 7 of the UNHCR Guidelines on international protection No 9 ('the UNHCR Guidelines') refer to the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ('the Yogyakarta Principles'), adopted in 2007. The Yogyakarta Principles are not legally binding, but they nevertheless reflect established principles of international law. In paragraph 4 of the preamble to the Yogyakarta Principles, 'sexual orientation' refers to 'a person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender'."

[54] Principle 24 requires that States shall:

a. take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;
b. ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;
e. take all necessary legislative, administrative and other measures to ensure that in states that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
f. take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
g. ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners.

[55] Michael O'Flaherty, the rapporteur responsible for the drafting and development of *The Yogyakarta Principles*, is Professor of Human Rights Law and Director of the Irish Centre for Human Rights at the National University of Ireland, Galway. His colleague Ray Murphy, also a Professor at the Irish Centre for Human Rights at the National University of Ireland (NUIG), is currently a Board Member of the IHREC, as is Kieran Rose, a founder member and chair of GLEN (Gay and Lesbian Equality Network).

[56] See Foy v. An t-Ard Chláraitheoir [2002] IEHC (9 July 2002), in which McKechnie J. in the High Court restricted the definition of marriage to a biological man and woman, refusing to allow individuals who have undergone gender reassignment to marry individuals of the same biological sex.

[57] Section 10(1)(f)(iii) of the Gender Recognition Bill 2014, as passed by the Seanad

[58] For example, Head 10(a) provides for the deletion of Section 9(2)(b) of the Gender Recognition Bill, which lists the qualifying conditions for an applicant for a Gender Recognition Certificate, including "(b) not be married or a civil partner". Likewise, it would delete Section 10(1)(f)(i), which includes in the information to be provided by the applicant "(f) a statutory declaration declaring that he or she—(i) is not married or a civil partner". There are seven such deletions from the Gender Recognition Bill, each to the same effect.

[59] Section 51 of the Civil Registration Act 2004.

[60] See Foy v. An t-Ard Chlaraitheoir & Ors [2002] IEHC 116 (9 July 2002) and the Case of Hämäläinen v. Finland, Application no. 37359/09, Judgement 16 July 2014.

[61] Section 51(4) of the Civil Registration Act 2004.

[62] Section 51(3) of the Civil Registration Act 2004.

[63] Section 51(4) of the Civil Registration Act 2004: The provisions of Section 51(1)-(3) are "substantive requirements for marriage", such that a defect would render the marriage void.

[64] Section 51(3)(a) of the Civil Registration Act 2004.

[65] Hansard, House of Commons, 20 May 1998, at cols 1017-18, emphasis added.

[66] This possibility is not at all as unlikely as it might seem. In the case of *Hämäläinen v. Finland* (Application no. 37359/09), Judgement 16 July 2014, an applicant for registration of change of sex was refused the available remedy of divorce and remarriage on the grounds that divorce was contrary to their religious beliefs.

[67] Conor O'Mahony, *Same-sex marriage referendum: a legal review*, Irish Times, 22 January 2015.

[68] For example, Section 36 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 states: *"When both the parties about to contract marriage are Protestant Episcopalians, any bishop of the said Church may grant special licences to marry at any convenient time in any place within his episcopal superintendence."*

[69] The Court has held in *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010, that there is no right to same-sex marriage under Article 12, as things stand today. The jurisprudence of the ECtHR strongly suggests that

once a sufficient number of 'advanced' countries have moved in a particular direction, a consensus will be deemed to have been established and the rest will be obliged to follow.

[70] Hansard, House of Commons, 20 May 1998, at cols 1017-18, emphasis added.

[71] The law of marriage and matrimonial causes was originally part of the canon law of the Catholic Church. Ecclesiastical Courts throughout Europe administered and applied the canon law, with a right of appeal to Rome. After the Reformation, the right of appeal to Rome was abolished and the Church of Ireland was designated by legislation as an autonomous jurisdiction, administering canon law subject to civil statutes (such as the Marriage Act, 1835) and the common law. See BINCHY, William, *A Casebook on Irish Family Law*, Professional Books, Oxford 1984, p. 2. "The law in Ireland can be traced back to the Marriage Act 1537, which proscribed marriage within the degrees 'prohibited by God's law', listing a range of specific degrees of relationship to which the prohibition applied." Prof. John Mee, *Marriage, Civil Partnership And The Prohibited Degrees Of Relationship,* Irish Law Times—No. 18, 2009.

[72] *Matrimonial Causes and Marriage Law (Ireland) Amendment Act* 1870, Section 7: "All jurisdiction now vested in or exerciseable by any ecclesiastical court or person in Ireland in respect of divorces *a mensâ et thoro*, suits of nullity of marriage, suits for restitution of conjugal rights or jactitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty, and such jurisdiction shall be exercised in the name of Her Majesty in a court of record, to be called the Court for Matrimonial Causes and Matters."

[73] *Ibid.*, Section 13: "In all suits and proceedings the said Court for Matrimonial Causes and Matters shall proceed and act and give relief on principles and rules which, in the opinion of the said Court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts of Ireland have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders to be made by the said Court under this Act."

[74] In the dissenting judgment of Fitzgerald C.J. in *McGee v. Attorney General* [1974] I.R. 284 at p. 301, he stated: *"The right to marry and the intimate relations between husband and wife are fundamental rights which have existed in most, if not all, civilised countries for many centuries. These rights were not conferred by the Constitution in this country in 1937. The Constitution goes no further than to guarantee to defend and vindicate and protect those rights from attack."* Whilst this was a dissenting judgment, it is not a passage which would have expressed a view different from that of the majority in the case.

[75] Section 2 of the Civil Registration Act 2004 includes the traditional prohibited degrees of affinity and consanguinity inherited from the earlier body of marriage law: "(2) For the purposes of this Act there is an impediment to a marriage if—(a) the marriage would be void by virtue of the Marriage Act 1835 as amended by the Marriage (Prohibited Degrees of Relationship) Acts 1907 and 1921."

[76] *Murray v. Ireland* [1985] I.R. 532 at 536

[77] *T.F. v. Ireland* [1995] I.R. 321

[78] European Court of Human Rights, Judgement of the Grand Chamber, Case of Hämäläinen v. Finland, (Application no. 37359/09) 16 July 2014: "96. The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see Rees v. the United Kingdom, cited above, § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see Schalk and Kopf v. Austria, cited above, § 63)."

[79] ARTICLE 41.1.1°

[80] "Having regard to the clear understanding of the meaning of marriage as set out in the numerous authorities opened to the Court from this jurisdiction and elsewhere, I do not see how marriage can be redefined by the Court to encompass same-sex marriage. ... The final point I wish to make in relation to the definition of marriage as understood within the Constitution is that I think one has to bear in mind all of the provisions of Article 41 and Article 42 in considering the definition of marriage. Read together, I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same-sex couple." Dunne J. in *Zappone & Anor v. Revenue Commissioners & Ors,* [2006] IEHC 404

[81] In *F (orse C) v. C* [High Court, 11 July 1990], the Chief Justice said on appeal that incapacity by virtue of prior homosexuality of which the petitioner was unaware was a ground for nullity. Finlay CJ said incapacity was

comparable to impotence as a ground for nullity where the incapacity arose from "*some other inherent quality or characteristic of an individual's nature or personality which could not be said to be voluntary or self-induced.*" See also Finlay CJ, in *UF (orse UC) v. JC*, [1991] 2IR 330.

[82] Cf. news report in *MailOnline*, 26 January 2013: "Plans to allow same-sex couples to marry in Britain could pave the way for the concept of adultery to be abolished in law, experts have said. Under the Government's draft Bill only infidelity between a man and a woman constitutes adultery. So while the law would give same-sex couples the right to wed, they would not be able to divorce their partner on the basis of adultery if their spouse went on to be unfaithful - unless they cheated with somebody of the opposite sex. It also states that a straight person who discovered their husband or wife had a lover of the same-sex could not accuse their unfaithful partner of adultery in a divorce court. Lawyers and MPs have ... warned it would create inequality between heterosexual and homosexual married couples who found themselves in the divorce courts, and said it would likely result in adultery being abolished altogether as a grounds for divorce."

[83] Spain introduced same-sex marriage in 2006. When a child is adopted by a homosexual "marriage", or the child who is the biological son/daughter of one of the partners is adopted by the other partner, both parents have been recognised to be entitled to parental leave. Widowed partners of married same-sex couples have equal rights with widows married to an opposite-sex person. See the *Report on the Impact of Same-sex Marriage Act in the National Law*, 22 September 2009, *Servicio Juridico, Profesionales por la Ética,* www.profesionalesetica.org.

[84] ARTICLE 41, 1, 1°

[85] A constitutional referendum was held in Croatia on 1 December 2013 on a proposed amendment to the constitution to define marriage as being a union between a man and a woman, which would create a constitutional prohibition against same-sex marriage. The amendment was approved by 65.87% to 33.51% in a turnout of 37.9% of eligible voters. The referendum was supported by four political parties, the Catholic Church and by several other faith groups. The ruling left-wing coalition opposed the amendment along with numerous human rights organizations and the majority of the Croatian media.

[86] On March 25th 2012, Slovenia held a post-legislative referendum on a new Family Code (which equated the position of homosexual and conjugal marriages) adopted in the Slovenian parliament in June 2011. In a popular vote, 55% of voters rejected the new Family Code and 45% supported the law. Turnout was 30%.

[87] The degrees of affinity and consanguinity were regarded under canon law and, subsequently, under common law, as representing relationships within which marriage was prohibited. Thus, the degrees came to be known as the "prohibited degrees of marriage." These prohibitions were later codified in Archbishop Parker's Table of Degrees, published in the Book of Common Prayer of the Church of England in 1563 and imposed by Canon 99 in 1603. The degrees of affinity and of consanguinity were recognized, interpreted, and applied as part of the common law and were given a statutory basis in the Marriage Act 1835 (Lord Lyndhurst's Act). The 1835 Act altered the judicial interpretation of the impact of the prohibited degrees under canon and, subsequently, common law. Marriages which were previously voidable now became null and void *ab initio*. The Act provided that *"all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."*

"The legislative history of the relevant rules is very complex, partly because of the apparent divergences between the statutes enacted by the Irish and English parliaments. The law in Ireland can be traced back to the Marriage Act 1537, which proscribed marriage within the degrees 'prohibited by God's law', listing a range of specific degrees of relationship to which the prohibition applied." Prof. John Mee, *Marriage, Civil Partnership And The Prohibited Degrees Of Relationship,* Irish Law Times — No. 18, 2009

[88] S. 2, 2(a), Civil Registration Act 2004.

[89] S. 26 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act,* 2010

[90] Civil Registration Act 2004 (as amended):

"Third Schedule, Prohibited Degrees of Relationship:

A person may not enter a civil partnership with someone within the prohibited degrees of relationship, as set out in the table below. Relationships within that table should be construed as including relationships in the half-blood (e.g. sibling includes a sibling where there is only one parent in common, etc.), and all the relationships include relationships and former relationships by adoption.

A man may not enter a civil partnership with his:	A woman may not enter a civil partnership with her:
Grandfather	Grandmother
Grandparent's brother	Grandparent's sister
Father	Mother
Father's brother	Mother's sister
Mother's brother	Father's sister
Brother	Sister
Nephew	Niece
Son	Daughter
Grandson	Granddaughter
Grandnephew	Grandniece"

[91] "It is obviously a difficult question as to whether or not the marital consanguinity rules, based partly on genetic considerations, should be applied to same-sex civil partnership. However, in the interests of parity of esteem, there are clear attractions in the idea of ensuring equivalent rules in relation to both institutions in respect of the prohibited degrees of relationship." Prof. John Mee, *Marriage, Civil Partnership And The Prohibited Degrees Of Relationship,* Irish Law Times — No. 18, 2009

[92] S. 2, 2(e), Civil Registration Act 2004

[93] In *O'Shea and O'Shea v. Ireland and the Attorney General* (High Court, 17 October 2006, Laffoy J.), the High Court held that section 3(2) of the *Deceased Wife's Sister's Marriage Act* 1907, as amended by section 1(2) (b) of the *Deceased Brother's Widow's Marriage Act* 1921, [referred to in S. 2, 2(a), *Civil Registration Act* 2004] which prohibited the marriage of a man with a divorced wife of his brother or half brother, was unconstitutional because it restricted the right to marry under Article 40.3.1° of the Constitution.

[94] *B & L v. the United Kingdom* (2005): English law prohibited a parent-in-law from marrying their child-in-law unless both had reached aged 21 and both their respective spouses had died. B was L's father-in-law, and they wished to marry. L's son treated his grandfather, B, as 'Dad'. The court accepted the government's argument that the legislation had the legitimate aim of protecting the family and any children of the couple. However, it nonetheless considered that there had been a violation of the right to marry. The prohibition was based primarily on tradition. There was no legal prohibition on a couple in this situation engaging in an extra-marital relationship. Moreover, on several occasions couples had obtained exemptions from the prohibition by personal Acts of Parliament. This showed that the objections to such marriages were not absolute.

[95] *M.R. and D.R. (suing by their father and next friend O.R.) & ors v. An t-Ard-Chláraitheoir & ors,* [2014] IESC 60

[96] "The differential treatment of same-sex and opposite-sex couples must be necessary to protect the family in the traditional sense. This is a very high bar indeed, as this means that without the measure in question such protection cannot be achieved." Jens M. Scherpe, *The Legal Recognition of Same-Sex Couples in Europe and the Role of the European Court of Human Rights,* The Equal Rights Review, Vol. Ten (2013)

[97] "Prohibition on use of gamete or embryo of related donor.

27. The operator of a DAHR facility shall not use or permit to be used in a DAHR procedure a gamete or an embryo provided by a donor where —

(a) the donor of that gamete or embryo, as the case may be, and the intending parent or any one of the intending parents, as the case may be, are within the prohibited degrees of relationship as set out in Part 1 of the Schedule #, or

(b) the donor of that gamete or embryo, as the case may be, and the spouse, civil partner or cohabitant of the intending parent or any one of the intending parents, as the case may be, are within the prohibited degrees of relationship as set out in Part 2 of the Schedule #.".

—Senators Rónán Mullen, Feargal Quinn.

[98] Debate, Children and Family Relationships Bill 2015 - Report and Final Stages, Seanad Eireann, 30 March 2015.

[99] In 2002 Dr Joanna Rose won a human rights test case in the English High Court, which forced the British government to acknowledge the significance of the genetic, as well as the legal, identity of donor offspring. Dr Rose, who was conceived in the UK through a sperm bank and who has earned a doctorate for her research on the subject, said that she tracked down her genetic father and discovered that, coincidentally, he had been in England and Australia at the same time that she had lived in those countries. The possibility that her genetic father could have fathered between 200-300 children made her fearful about who and where her half-siblings might be. She

said that following repeated efforts to arrange a meeting with him, his solicitor wrote warning her to stop writing to him. She said she had been deprived of important information about her genetic make-up which left gaps in her family's medical history.

[100] Cf. European Court of Human Rights decision (12 April 2012), in *Stübing v Germany* (no. 43547/08), at para. 61. "Applying the principles set out above to the instant case, the Court observes that there is no consensus between the member States as to whether the consensual commitment of sexual acts between adult siblings should be criminally sanctioned (see paragraphs 28-30, above). Still, a majority of altogether twenty-eight out of the forty-four States reviewed provide for criminal liability."

[101] Sir Walter Scott, Canto VI, XVII, *Marmion*

[102] ARTICLE 41.1.1°

[103] ARTICLE 42.1

"The State acknowledges that the primary and natural educator of the child is the Family ..."

[104] ARTICLE 42.1

"The State ... guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

[105] ARTICLE 42A.2.2° (when enacted): "Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require."

[106] ARTICLE 41.3

[107] *Third Report of the Convention on the Constitution Amending the Constitution to provide for same-sex marriage*. Presentation by Gerard Durcan SC, p. 11: "*The effect of this would be that such a marriage would be entitled to protection under the Constitution as would a Family and its members founded on such a marriage*."

[108] ARTICLE 42A.2.1° (when enacted)

[109] ARTICLE 41.1.2° *"The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."*

[110] See *The Yogyakarta Principles (Principles on the application of international human rights law in relation to sexual orientation and gender identity)*, published by a group of human rights activists in March 2007 and now being promoted and implemented around the world by political elites.

[111] That guarantee has been successfully invoked in a series of cases, beginning with *Murphy v. Attorney General* [1982] IR 241, at 286. See also *Muckley v Ireland* [1985] IR 472; [1986] ILRM 364, *Hyland v Minister for Social Welfare*, [1989] IR 624; [1990] ILRM 213.

[112] *Murray v. Ireland* [1991] ILRM 465

[113] Article 42A.3 would provide for voluntary (no-fault) adoption, apparently to facilitate the legalisation of surrogacy: *"Provision shall be made by law for the voluntary placement for adoption and the adoption of any child*." S. 109 of the Children & Family Relationships Bill relies on this provision. If the *Jordan* case—currently before the Supreme Court—results in the overturning of the Children's Referendum, the whole issue of surrogacy would be put in doubt, which may account for the delay in presenting a draft Surrogacy Bill.

[114] This situation has evolved notwithstanding ARTICLE 42.3, which provides "1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State."

[115] ARTICLE 42.3.2°: "The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social."

[116] In Spain "According to an announcement in the Official Bulletin of State, "The expression 'father' will be replaced with 'Progenitor A', and 'mother' will be replaced with 'Progenitor B'." The head of the national Civil Register, Pilar Blanco-Morales, told the newspaper ABC that the change took account of a new law on same-sex marriages passed by the socialist government in July." David Rennie, Europe Correspondent, The Telegraph, 7th March 2006.

[117] ARTICLE 42.1

[118] See ARTICLE 42.4: "The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."