

Marriage: Redefined and Realigned with *Bunreacht na hÉireann*

Jonathan Ennis*

The same-sex marriage debate rose to constitutional prominence in 2006 in *Zappone v. Revenue Commissioners*, where the High Court rejected a claim to extend the constitutional definition of ‘Marriage’ in Article 41 to include same-sex marriage. This paper thoroughly evaluates the High Court decision, and its consideration of the core arguments against extending marriage to same-sex couples. In light of this analysis, this paper then considers the impact of the unenumerated constitutional right to marry and the equality guarantee on the same-sex marriage debate, how they were dealt with in *Zappone v. Revenue Commissioners*, and why their particular treatment was ultimately unconvincing.

[W]hat is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting.¹

I - Introduction

The fundamental importance of ‘marriage’ to individuals and society is recognised in Article 41 of *Bunreacht na hÉireann 1937*.² The question of allowing same-sex couples access to this revered institution is amongst one of the most challenging of constitutional issues. In *Zappone v. Revenue Commissioners*,³ the same-sex marriage debate came before the High Court, transforming the debate from a contemporary academic subject to a real constitutional issue. The Zappones, a lesbian couple, sought recognition of their Canadian marriage and an extension of the Constitution’s definition of marriage – they were unsuccessful on both counts.

* BA in Legal Studies, Waterford Institute of Technology, BA (Honours) in Legal & Business Studies, Waterford Institute of Technology, LLB, University College Cork, LLM, University College Cork. My thanks go to Dr. Conor O’Mahony (Senior Lecturer, University College Cork).

¹ *Minister of Home Affairs v. Fourie*, [2005] Z.A.C.C. 19 at para. 60. *Per* Sachs J. [hereinafter *Fourie*]

² Article 41.1 provides that “1° The State recognises the Family as the natural primary and fundamental

unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. 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.”

Article 41.3 provides that “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.”

³ *Zappone v. Revenue Commissioners*, [2006] I.E.H.C. 404 (14 December 2006, unreported), High Court (Dunne J.) [hereinafter *Zappone*].

The Zappones have appealed the High Court's refusal to extend the definition of marriage to the Supreme Court. Although the High Court decision itself is well known, the reasons underlying the decision are less so. Thus, the aim of this paper is to thoroughly evaluate the High Court decision and the arguments against same-sex marriage.

In particular, the first section shall consider the argument that the term 'marriage', by very definition, can only relate to heterosexual unions (the 'definitional' argument). It will further analyse whether the opposite-sex requirement is an immutable requirement which can only be surpassed through constitutional amendment. This section will also evaluate whether allowing same-sex couples access to marriage could be considered an 'attack' upon the institution of marriage. It will further consider whether the unique ability of heterosexual couples to naturally procreate justifies the exclusion of same-sex couples from marriage. This section will also examine whether the 'child-welfare' argument constitutes a convincing reason to exclude same-sex couples from the institution of marriage.

Against this backdrop, this paper will also consider what impact the unenumerated constitutional 'right to marry' has on the same-sex marriage debate. Naturally, this involves a consideration of the contours of the unenumerated constitutional 'right to marry' to discern its legitimate limitations and whether the complete exclusion of same-sex couples from this fundamental right can be justified.

The same-sex marriage debate constitutes one of the greatest challenges to the constitutional equality guarantee, culminating as it must in a measure of *Bunreacht na hÉireann's* commitment to equality in Article 40.1. Thus, the final section of this article shall consider how important a role the constitutional equality guarantee plays in the same-sex marriage debate in light of recent decisions indicating that a more assertive role may be given to Article 40.1.

In particular, this section will consider the importance of constitutionally recognising 'sexual orientation' as an attribute attracting protection under Article 40.1. It will further analyse whether the preclusion of same-sex marriage constitutes a form of gender discrimination. This section shall also evaluate the contentious proposition that the preclusion of same-sex marriage can be justified by the second

tier of Article 40.1⁴ or by Article 41.⁵ This final section will also consider the standard to which derogations from Article 40.1 must be justified and, perhaps most importantly, whether limitations of fundamental rights (*e.g.* the right to marry) are subject to a more searching standard of review under Article 40.1.

II - The 'definitional' argument

One of the primary arguments against same-sex marriage is the 'definitional' argument. The kernel of this argument is that the term 'marriage' describes a unique opposite-sex bond, which by definition cannot extend to same-sex couples. This definitional argument was afforded considerable weight in *Zappone* as Justice Dunne stated that:

... the court is being asked to redefine marriage to mean something which it has never done to date ... [t]he definition of marriage ... has always been understood as being opposite sex marriage. How then can it be argued that in light of prevailing ideas and concepts that [the] definition be changed to encompass same sex marriage? Having regard to the clear understanding of the meaning of marriage ... I do not see how marriage can be redefined to encompass same sex marriage.⁶

The importance of reverting to the traditional definition of marriage to exclude same-sex marriage cannot be underestimated. The reason for this is that in collapsing the issue as to whether the current definition is justifiable, by simply reverting to the traditional definition,⁷ the Courts avoid any meaningful in-depth analysis into whether the State's exclusion of same-sex couples from the right to marry is justifiable in the first place,⁸ *i.e.* sidesteps the more important question of whether the current definition is justified, in essence defeating a same-sex marriage claim pre-analytically.

⁴ Article 40.1 provides that "All citizens shall, as human persons, be held equal before the law." However, the second tier of Article 40.1 provides that this *proviso* "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."

⁵ A classification which provides for unequal treatment may be justified where it supports another constitutional value. This is referred to as an equality-derogating classification. O. Doyle, *Constitutional Equality Law* (Dublin: Round Hall Ltd., 2004) at 94.

⁶ *Zappone*, *supra* note 3 at 69.

⁷ The consequent conclusion of this being that the right to marry only extends to opposite-sex couples.

⁸ J. Culhane, "Uprooting the Arguments Against Same-Sex Marriage" (1999) 20 *Cardozo Law Review* 1119 at 1131.

Thus, such a conclusion is self-refuting – of course the concept of marriage has always been understood as being opposite-sex marriage, but that is because the law has *always* excluded same-sex couples from its definition – that is the point. Indeed, Trosino notes the circularity of the ‘definitional’ argument stating it amounts to “an intellectually unsatisfying response: marriage is the union of a man and a woman because marriage is the union between a man and a woman.”⁹

More pertinently, to argue that same-sex marriage is impermissible simply because marriage is and has always referred to opposite-sex marriage only demonstrates an understanding of how things are and how they have always been: they are not consequential arguments about what the definition of marriage can and should be.¹⁰ In other words, a definition supported by historical pedigree might explain what the current law is, but this should not be converted into an argument for ignoring the rights of those whom the definition excludes.¹¹ In the words of Sachs J., “the antiquity of a prejudice is no reason for its survival.”¹²

In *Halpern v. Attorney General*,¹³ the Canadian Supreme Court noted that the argument that marriage is heterosexual because it ‘just is’ only offers an explanation of the opposite-sex requirement, not a justification for fossilising the definition with the effect of excluding issues such as equality, *i.e.* the proper approach is to determine whether excluding same-sex couples from marriage is discriminatory.¹⁴ Thus, the argument here is not that it was irrational to define marriage as only referring to opposite-sex unions, but rather that it is irrational to continue to define marriage as an exclusively heterosexual union simply because marriage is currently defined as an opposite-sex union.¹⁵ Furthermore, the reliance on the traditional

⁹ J. Trosino, “American Weddings: Same-Sex Marriage and the Miscegenation Analogy” (1993) 73 *Boston University Law Review* 93 at 97.

¹⁰ E. Gerstmann, *Same-Sex Marriage and the Constitution*, 2nd ed. (Cambridge: Cambridge University Press, 2008) at 22.

¹¹ Culhane, *supra* note 8 at 1132.

¹² *Supra* note 1 at para. 75.

¹³ *Halpern v. Attorney General*, (2003) 106 C.R.R. (2d) 329 [hereinafter *Halpern*].

¹⁴ *Ibid.* at para.117. Later in the judgment the court put it even more bluntly, stating that it is nonsensical to justify a law on the very basis upon which it is being challenged. *Ibid.* at para. 119. Similarly, in *Goodridge v. Department of Public Health*, Greaney J. in the Massachusetts Supreme Court held that as a “matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.” (2003) 440 Mass. 309 at 349 [hereinafter *Goodridge*].

¹⁵ Gerstmann, *supra* note 10 at 24.

definition to preclude same-sex marriage is fallacious as it implies that definitions can escape judicial scrutiny.¹⁶

More fundamentally however, the definitional argument fails by the very definition of ‘definition’ – definitions are arbitrary and ultimately dependent on *who* defines them.¹⁷ On this point, it becomes clear that the definitional argument is ultimately circular because civil marriage is currently defined and has always been defined by the heterosexual majority, who merely limited access to the institution to their form of relationship. This has been described as one of the final remaining discriminatory measures perpetuated by a powerful majority against a historically despised minority group.¹⁸

III - The significance (if any) of *T v. T*

In *Zappone*, Dunne J. further stated that, “[m]arriage was understood under the 1937 Constitution to be confined to persons of the opposite sex That has always been the definition. Judgment in the *T. v. T.* case was given as recently as 2003. Thus it cannot be said that this is some kind of fossilised understanding of marriage.”¹⁹

In the divorce Supreme Court case of *T. v. T.*, Murray J. (as he was then) stated that, “marriage ... remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution. It is one which is entered into in principle for life. It is not entered into for a determinate period.”²⁰

However, considering that this case did not involve any consideration of the same-sex marriage debate, this recent Supreme Court decision does not necessarily

¹⁶ M. Strasser, “Domestic Relations and the Great Slumbering Baehr: On Definitional Preclusion, Equal Protection and Fundamental Interests” (1995) 64 *Fordham Law Review* 921 at 922.

¹⁷ Gerstmann, *supra* note 10 at 23.

¹⁸ R. Wintemute, “Marriage or ‘Civil Partnership’ for Same-Sex Couples: Will Ireland Lead or Follow the United Kingdom?” in O. Doyle & W. Binchy, eds., *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007) 87 at 93.

¹⁹ *Zappone*, *supra* note 3 at 68.

²⁰ *T. v. T.*, [2003] I.L.R.M. 321 at 362 (hereinafter *T v. T*). Thus, the Supreme Court modified the original requirement stated in *Hyde v. Hyde* that marriage is ‘for life’. *Hyde v. Hyde*, [1866] L.R. P.&D. 130 [hereinafter *Hyde*].

preclude same-sex marriage as Murray J. merely stated what the definition of marriage currently is – Murray J. did not state that the Constitution is incapable of recognising same-sex marriage.

Moreover, one of the most important aspects of *T. v. T.* (which was not addressed in *Zappone*) was that Murray J. importantly stated that Article 41 is to be interpreted in a contemporary manner. In relation to Article 41.2.1^o,²¹ which recognises the social value of women who work in the home, Murray J. stated that, “the Constitution ... is to be interpreted as a contemporary document ... it seems to me that it implicitly recognises similarly the value of a man’s contribution in the home as a parent.”²²

The significance of this for same-sex marriage is that the Supreme Court has articulated that gender stereotypes and perceived division of roles for men and women no longer have resonance in Article 41. This is particularly apt in relation to the ‘definitional’ argument which reflects deeply embedded assumptions about stereotypical gender roles,²³ and perhaps more importantly, in relation to assumptions about same-sex parenting which played a decisive role in Dunne J.’s rejection of the plaintiff’s same-sex marriage claim.²⁴

In *T v. T*, due to the reintroduction of divorce, diluting the permanency requirement, Murray J. stated that marriage is ‘in principle’ for life thus curtailing the requirement stated in *Hyde* that marriage be ‘for life’. Divorce was introduced through the Fifteenth Amendment to the Constitution. Some then argue that a referendum would also be needed to extend the definition of marriage. However, those who argue that the divorce referendum acts as a binding precedent for the proposition that a referendum is needed to introduce same-sex marriage overlook the fact that Article 41.3.2^o originally contained an express constitutional prohibition on divorce, as it originally provided that, “[n]o law shall be enacted providing for the grant of a dissolution of Marriage.”

²¹ “1^o In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.”

²² *T v. T*, *supra* note 20 at 363. (Because two cases mentioned in footnote 20)

²³ Culhane, *supra* note 8 at 1104.

²⁴ See discussion *infra* under “The ‘child welfare’ argument”, at pp 42-46.

In contrast to divorce, there is no express constitutional prohibition on same-sex marriage. The purpose of the divorce referendum was not to alter the definition of marriage itself, this was only an incidental consequence of the constitutional amendment. This is reinforced by the fact that although Dunne J. refused to extend the constitutional definition of marriage, she did so because she believed there was a lack of consensus on the issue not because there was a constitutional impediment to same-sex marriage which could only be surpassed through constitutional amendment.

It is quite ironic however that, despite the current Executive's insistence that there is a constitutional impediment to same-sex marriage, in the All-Party Oireachtas Committee Report in 2006, the Committee noted that the Constitution does not actually define the term marriage, and suggested, if not invited, the courts to develop the term.²⁵

IV - Could same-sex marriage be considered an 'attack' upon the institution of marriage?

Article 41.3.1° of *Bunreacht na hÉireann* provides that, "[t]he State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack." Could same-sex marriage be considered an 'attack' upon the institution of marriage, against which the institution must be guarded by the State? At the outset however, it is worth remembering that Article 41 places a duty on the State to guard marriage from attack, not change.

In *Zappone*, Dunne J. in rejecting the plaintiffs' claim to extend the definition of marriage so as to encompass same-sex marriage held that, "if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples ... then Article 41 in its clear terms as to *guarding* provides the necessary justification."²⁶

²⁵ All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family* (Dublin: Stationery Office, 2006) at 123. Here the Committee stated that, "the way is ... open for the courts to say the traditional requirement that the couple be of the opposite sex is not of the essence of the marital relationship. On this reading of Article 41, common law and legislative stipulations that the couple be of the opposite sex would be found to be unconstitutional."

²⁶ *Zappone*, *supra* note 3 at 70 [emphasis added].

Although Dunne J. did not elaborate as to why same-sex marriage might be considered a threat to marriage, which must be guarded against, it is reasonable to assume that she considered that it would constitute an attack on Article 41's understanding of marriage which, unarguably, derives from the Christian understanding of marriage.

However, in *T.F. v. Ireland*,²⁷ the Supreme Court upheld McCarthy J.'s conclusion that 'marriage' must be interpreted in a secular way stating that, "[i]t may well be that 'marriage' as referred to in our Constitution *derives* from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws ...".²⁸ Thus, although the Constitution's understanding of marriage derives from the Christian understanding of marriage, it is not bound by it.²⁹ Consequently, in relation to same-sex marriage, against what exactly does the institution of marriage need to be guarded?

Ironically, as Ryan notes, a fact frequently overlooked is that same-sex couples actually seek to reaffirm the 'traditional' values of marriage (*e.g.* stability, security, commitment, mutual trust *etc.*).³⁰ Indeed in this respect, in *Goodridge*, Marshall C.J. noted that:

[h]ere, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage Recognising the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite sex marriage, any more than recognising the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.³¹

²⁷ *T.F. v. Ireland*, [1995] 1 I.R. 321 [hereinafter *T.F.*]

²⁸ *Ibid.* at 332 [emphasis added]. Similarly, in *N v. K.*, McCarthy J., referring to 'marriage', held that, "[m]arriage is a *civil contract* which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole. The contract is unique in that it enjoys, as an institution, a pledge by the State to guard it with special care and to protect it against attack" [1985] I.R. 733 [emphasis added].

²⁹ In *T.F.*, Hamilton C.J. stated that to determine what is an 'attack' upon the institution of marriage, the court, from an objective stance, must determine that what is proposed is, "so contrary to *reason and fairness* as to constitute an attack on the institution of marriage; a failure to guard with special care such institution and to protect it against attack" *Supra* note 27 at 371 [emphasis added].

³⁰ F. Ryan, "From Stonewall(s) to Picket Fences: the Mainstreaming of Same-Sex Couples in Contemporary Legal Discourses" in O. Doyle & W. Binchy, eds., *supra* note 18 at 3.

³¹ *Goodridge*, *supra* note 14 at 337.

Thus, despite its ‘reformist veneer’, the recognition of same-sex marriage would reaffirm the traditional values of marriage, not replace them³². In the Canadian case *Egan v. Canada*,³³ Iacobucci J. (dissenting) rejected the argument that same-sex marriage could be considered a threat to the institution of marriage, stating that, “it eludes me how according same sex couples the benefits flowing to opposite sex couples in any way inhibits, dissuades, or impedes the formation of heterosexual unions. Where is the threat?”³⁴ The point so succinctly made by Iacobucci J. is that a same-sex marriage only affects the legal rights of same-sex couples – it has no effect whatsoever on heterosexual couples.³⁵

Moreover, the perception that same-sex marriage would undermine the institution of marriage is a *value* judgement, predicated on the belief that there is something inferior, or inappropriate, about same-sex relationships which merits their exclusion from an institution placed on a pedestal which some believe same-sex couples can never satisfy. Indeed such a perception is surely based on the perception that to allow same-sex marriage would be to allow a type of ‘counterfeit’ marriage, *i.e.* just as counterfeit money devalues ‘real’ money, same-sex marriage would devalue ‘real’ marriage.³⁶

In *Fourie*, Sachs J. noted³⁷ that, “ the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships ... commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.”³⁸ Clearly then, opinions as to whether allowing same-sex couples access to marriage strengthens or attacks marriage are ultimately coloured by a person’s own view on the value of same-sex relationships.

³² Ryan, *supra* note 30 at 4.

³³ *Egan v. Canada*. [1995] 2 S.C.R. 513.

³⁴ *Ibid.* at 616.

³⁵ A similar statement was made in the South African case of *Fourie*, where Sachs J. noted that the “ applicants’ wish was not to deprive others of any rights. It was to gain access for themselves, without limiting that enjoyed by others.” *Supra* note 1 at para. 17.

³⁶ C. Cahill, “The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage” (2007) 64 *Wash & Lee Law Review* 393 at 412.

³⁷ Citing *dicta* from Cameron J.A.’s decision in the Supreme Court of Appeal’s decision in *Fourie*, *supra* note 1.

³⁸ *Fourie*, *supra* note 1 at para. 17. Later in his judgment, Sachs J. put it even more bluntly stating that the ban on same-sex marriage “signifies that their capacity for love, commitment and accepting responsibility is by *definition* less worthy of regard than that of heterosexuals.” *Ibid.* at para. 71 [emphasis added].

Importantly, in the Massachusetts' Supreme Court case of *Goodridge*, Marshall C.J. progressively held that, "[i]f anything, extending civil marriage to same sex couples *reinforces* the importance of marriage [and] is a testament to the enduring place of marriage in our laws and in the human spirit."³⁹

Thus, viewed in this light, permitting more committed couples to avail of the institution of marriage strengthens the institution, rather than weakens it. Indeed, it could be argued that forcing such committed couples (and their families) to operate outside of marriage operates as the real threat to the continuing significance of the institution of marriage by unnecessarily diverting such couples to the Legislature's soon-to-be implemented Civil Partnership regime. Consequently, could the State's failure to adapt the institution of marriage so as to allow more committed couples entry, be in itself an attack upon the institution of marriage or a failure to guard it so as to ensure its continued prominent role in society?

Furthermore, by recognising same-sex marriage, the Supreme Court has the opportunity to revisit its views on the gay community and how they impact on marriage,⁴⁰ and to demonstrate the value it places on same-sex relationships and the lives of homosexuals generally. This would strengthen the institution of marriage because the institution appears to have already been harmed by the breakdown of heterosexual unions where one of the parties was a homosexual, but due to societal pressures, entered a heterosexual union.⁴¹ This problem would be further eroded if the Supreme Court expressed through its actions (not words) the equal importance of same-sex relationships. Indeed, for a Constitution underpinned by the values of prudence, justice, charity, dignity, and freedom,⁴² the recognition of same-sex marriage would actually ensure that marriage regains its status as an essential

³⁹ *Ibid.* at 337. Marshall C.J. further stated that, "[a]larms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce ... Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution." At 340.

⁴⁰ *E.g. Norris v. Attorney General* [1984] I.R. 36 [hereinafter *Norris*]. Here, O'Higgins C.J. held that, "homosexual activity and its encouragement may not be consistent with respect and regard for marriage as an institution. I would not think it unreasonable to conclude that an open and general increase in homosexual activity in any society must have serious consequences of a harmful nature so far as marriage is concerned." At 63.

⁴¹ J. Mee, "Cohabitation, civil partnership and the Constitution" in O. Doyle & W. Binchy, eds., *Committed Relationships and the Law* (Dublin: Four Courts Press, 2007) 181 at 208.

⁴² *Bunreacht na hÉireann 1937*, Preamble.

element of social morality and as a socially unitary force which celebrates our common values, rather than as a divisive institution which emphasises what divides us⁴³ – the search for such common ground bears the hallmarks of a true democracy.⁴⁴

V - Procreation

One of the primary arguments against same-sex marriage is that the unique ability of opposite-sex couples to naturally procreate merits the exclusion of same-sex couples from the definition of marriage.⁴⁵ However, considering that neither infertile heterosexual couples nor those who simply do not wish to have children are excluded from marriage negates this argument in its entirety, *i.e.* if taken literally this argument would ban many marriages that are allowed today (*e.g.* infertile couples, women post-menopause), but thankfully this does not occur.⁴⁶ Indeed, the fact that post-menopausal women (for instance) get married and are allowed to do so suggests that marriage can be about more than procreation and child rearing, and more importantly – that the civil definition of marriage accepts this fact.⁴⁷ So why does the law single out same-sex couples to preclude them from marriage but not infertile opposite-sex couples?

In the U.S. case of *Adams v. Howerton*,⁴⁸ the Court attempted to justify the distinction stating that while same-sex couples are clearly incapable of naturally procreating, this is not the case with opposite-sex couples, and sterility tests *etc.* to ascertain this would be too intrusive to withstand constitutional scrutiny. However, the fact that post-menopausal women are allowed to marry even though they obviously cannot procreate demonstrates that this argument cannot even survive superficial scrutiny.⁴⁹ The only conceivable reason for viewing the ability to procreate as a prerequisite to marry in one case and not for others is for the purpose of excluding same-sex couples from marriage.⁵⁰

⁴³ N. Cox, “A question of definition: same-sex marriage and the law” in O. Doyle & W. Binchy, eds. *supra* note 18, 104 at 121.

⁴⁴ R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006) at 86-89.

⁴⁵ Cahill, *supra* note 36 at 405.

⁴⁶ Gerstmann, *supra* note 10 at 29.

⁴⁷ Cox, *supra* note 43 at 112.

⁴⁸ *Adams v. Howerton*, (1980) 486 F. Supp. 119 (Central District of California).

⁴⁹ Gerstmann, *supra* note 10 at 100.

⁵⁰ Culhane, *supra* note 8 at 1196.

In the South African constitutional case of *Fourie*, Sachs J., in rejecting the procreation argument, stated that:

[f]rom a legal and constitutional point of view, procreative potential is not a deeply defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples ... who, for whatever reason, are incapable of procreating It is likewise demeaning to couples who commence such relationships at any age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.⁵¹

Furthermore, the procreation argument ignores the fact that same-sex couples are capable of having children (assisted reproduction *etc.*), a point recognised in the Canadian case *Halpern*⁵² where the Court held that due to adoption, donor insemination, surrogacy *etc.*, the procreation argument is becoming more and more unconvincing.

In *Goodridge* Marshall C.J. incisively noted that the procreation argument focuses on the single unbridgeable difference between same-sex and opposite-sex couples and transforms that difference into the essence of civil marriage.⁵³ Indeed, it is quite ironic that ‘procreation,’ the very point which traditionally justified differential treatment of opposite and same-sex couples is now (due to donor insemination, surrogacy *etc.*) the very thing that is starting to bridge the gap between them, as same-sex relationships mirror that of their heterosexual counterparts – leaving those opposed to same-sex marriage struggling to find a coherent reason to justify the prohibition.⁵⁴

At this point, it is worth emphasising that in *Zappone*, the procreation argument was not accepted by Dunne J. However, Dunne J. implicitly referring to

⁵¹ *Fourie*, *supra* note 1 at para. 86.

⁵² “The ability to “naturally” procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed many opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law ... excludes same-sex couples that have and raise children.” *Supra* note 13 at para. 130.

⁵³ *Goodridge supra* note 14 at 333.

⁵⁴ Cahill, *supra* note 36 at 454.

the ‘child-centred’ emphasis of Article 41 and 42 stated that, “[r]ead 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, relate to a same sex couple.”⁵⁵ Thus, since it is unclear what interpretation the Supreme Court will take, it is necessary to enquire whether procreation is integral to the Constitution’s understanding of marriage.

Article 41 of *Bunreacht na hÉireann* provides that the institution of marriage is founded on the family. Does this automatically exclude same-sex couples from marriage? In *Murray v. Ireland*,⁵⁶ Costello J. held that the institution of marriage may be separated from the concept of conceiving and rearing children, stating that, “[a] married couple *without children* can properly be described as a ‘unit group’ of society such as referred to in Article 41 The words used in the Article to describe the ‘Family’ are therefore apt to describe both a married couple with children and a married couple without children.”⁵⁷

Thus, considering that a childless heterosexual couple can be a ‘family’ for the purposes of Article 41, it would defy logic that access to the institution of marriage could rest on the ability/inability to procreate considering that a same-sex couple without children could constitute a ‘family’ for the purposes of Article 41, in the same way that a childless heterosexual couple can.⁵⁸

In *McGee v. Attorney General*,⁵⁹ Fitzgerald C.J. stated that, “it appears ... to be fundamental to the married state that the husband and wife – and they alone – shall decide whether they wish to have children”⁶⁰ Walsh J. further stated that spouses have “a correlative right to agree to have no children”⁶¹

⁵⁵ *Zappone*, *supra* note 3 at 70.

⁵⁶ *Murray v. Ireland*, [1985] I.R. 532 (hereinafter *Murray*).

⁵⁷ *Ibid.* at 537 [emphasis added].

⁵⁸ However, it is worth noting that the Supreme Court appeared to foreclose the possibility of any such interpretation in *McD. v. L.* [2007] I.E.S.C. 81 (10 December 2009, unreported), Supreme Court. *McD.* was a case involving a guardianship dispute between a same-sex lesbian couple who had custody of the child and the sperm donor father who was seeking to be appointed guardian. Although the Supreme Court did not consider any aspect of the same-sex marriage debate in this case, it is worth noting that Denham J. in discussing the Family under the Constitution stated that, “arising from the terms of the Constitution, “family” means a family based on marriage, the marriage of a man and a woman.” At para 62.

⁵⁹ *McGee v. Attorney General*, [1974] I.R. 284 [hereinafter *McGee*].

⁶⁰ *Ibid.* at 302.

⁶¹ *Ibid.* at 311.

Thus, in light of *McGee*, it would be illogical for the Supreme Court to proclaim that due to the ‘child-centred’ terminology of Article 41, the ability to ‘naturally’ procreate justifies the exclusion of same-sex couples from the institution of marriage. The reason for this is that the court would be effectively stating that procreation constitutes an overriding State concern for access to marriage, but once access has been gained the rights of the marital couple prevails.⁶²

A further point which refutes the procreation argument and reinforces the fact that it has no place in Irish law is the fact that in *S. v. S.*,⁶³ Kenny J. held that infertility of a spouse does not constitute a ground on which a decree of nullity may be obtained.⁶⁴ More pertinently, if Murray J.’s suggestion in *T v. T* that Article 41 be interpreted in a contemporary manner is to have substance, then it must surely recognise the outdated reliance on the ability to naturally procreate as a prerequisite to marriage, and recognise the benefits of assisted reproduction, for both opposite and same-sex couples.

VI - The ‘child welfare’ argument

Nowhere is the difficulty of courts in trying to reconcile their unexamined views of same-sex couples with the truth more apparent than in the law relating to parents and children.⁶⁵

In *Zappone*, although Dunne J. did not base her refusal on the procreation ground, viewing marriage as a ‘child-centred’ institution, she held that the exclusion of same-sex couples from marriage was justifiable to ensure the welfare of children. Dunne J. held that, “if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples ... justification must surely lie in the issue as to the welfare of children.”⁶⁶ Dunne J. held that the exclusion was justifiable even though accepting that “there is no evidence of any adverse impact on welfare.”⁶⁷

⁶² This needs to be cited from *McGee* if it comes from the case.

⁶³ *S. v. S.* [1976-1977] I.L.R.M. 156.

⁶⁴ Indeed, spouses who have never even consummated their marriage, and never plan to, may remain married – such a marriage only being voidable, not void.

⁶⁵ Culhane, *supra* note 8 at 1143.

⁶⁶ *Zappone*, *supra* note 3, at 70.

⁶⁷ *Ibid.*

Thus, Dunne J. based her decision (in part) on the proposition that being raised by same-sex couples might be detrimental to children.

Marcossan cogently argues that this ‘double-standard’ is illogical because the marriage of heterosexual couples is allowed without any inquiry into, indeed, without showing the slightest interest in whether they will provide an optimal, or even an adequate environment for children.⁶⁸ Similarly, Eskridge criticises the reliance on child welfare on the logical basis that there is no impediment on access to marriage for heterosexuals convicted of statutory rape, divorced parents who refuse to pay child support *etc.*:⁶⁹ so why should an *unproven* risk justify the exclusion of *all* same-sex couples from marriage?

More pertinently, in accepting that there is no definitive evidence⁷⁰ to suggest that being raised in a same-sex household has an adverse impact on child welfare, Dunne J. thus based her refusal on the unproven assumption that same-sex parenting might be detrimental to the welfare of children. In the Canadian case *Halpern*, the issue of welfare to children similarly arose. Here the court held that restricting marriage to opposite-sex couples on the basis that one of the fundamental purposes of marriage is the rearing of children, is based on an impermissible assumption that same-sex couples are not equally capable of rearing children.⁷¹ Furthermore, the court, noting that social science research is not yet capable of definitively supporting either argument, held that, “[i]n the absence of cogent evidence, it is our view that the objective is based on a *stereotypical assumption* that is not acceptable in a free and democratic society”⁷² Indeed, Cox argues that to exclude same-sex couples from marriage on the basis that being raised by heterosexual parents may be a slightly better location for children to be raised constitutes an entirely disproportionate reaction to uncertain statistics.⁷³

⁶⁸ S. Marcossan, “The Lessons of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Gay Rights to their Second Tier of Defense” (1996/1997) 36 *University of Louisville Journal of Family Law* 721 at 738 *et seq.*

⁶⁹ W. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilised Commitment* (New York, Free Press, 1996), at p.12, as cited by Gerstmann, *supra* note 10 at 30.

⁷⁰ In *Zappone*, reference was made to sociological studies involving same-sex parents. However, currently the social science research is not yet capable of definitively supporting either argument. For this reason Dunne J accepted that there is no evidence that being raised by same-sex parents has an adverse impact on child welfare.

⁷¹ *Halpern*, *supra* note 13 at para. 123.

⁷² *Ibid.* [emphasis added].

⁷³ Cox, *supra* note 43 at 114.

The disparity between the attitudes of different courts on same-sex parenting and marriage is truly striking. In *Morrison v. Sadler*,⁷⁴ the Indiana Court of Appeal upheld the state's prohibition on same-sex marriage, concluding that since opposite-sex reproduction may be accidental (as a result of casual intercourse *etc.*), then the institution of marriage should be preserved for heterosexuals as a way of ensuring that heterosexual reproduction occurs in a stable environment,⁷⁵ *i.e.* since same-sex couples can only reproduce responsibly, marriage is unnecessary to create a responsible environment for children of same-sex couples because the manner in which they reproduce already ensures this.⁷⁶

Curiously, in contrast to the approach taken in *Zappone*, this approach suggests that, unlike heterosexuals, same-sex couples are so good at parenting that they do not need the institution of marriage. The disparity between the *Morrison* approach and the *Zappone* approach could not be more pronounced. In *Zappone*, same-sex couples were excluded from marriage because of an assumption that being raised by same-sex parents might be detrimental to children. Conversely, in *Morrison* the Court concluded that same-sex couples are so good at parenting that they do not need the institution of marriage.⁷⁷ This disparity is important because although in

⁷⁴ *Morrison v. Sadler* (2005) 821 N.E. 2d. 15 (Ind. Ct. App.) [hereinafter *Morrison*].

⁷⁵ *Ibid.* at 466.

⁷⁶ “[T]hose persons wanting to have children by assisted reproduction or adoption are, by necessity, heavily invested, financially and emotionally, in those processes. Those processes also require a great deal of foresight and planning. “Natural” procreation, on the other hand, may occur only between opposite-sex couples and with no foresight or planning. All that is required is one instance of sexual intercourse with a man for a woman to become pregnant Those persons who have invested the significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child in the first place. By contrast ... natural reproduction may occur without any thought for the future.” *Ibid.* at 24-25, *per Barnes J.* Thus, the Court concluded that the State may, “legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from ‘casual intercourse.’” *Ibid.*

⁷⁷ Despite its superficial ingenuity, it is fanciful to suggest that (in relation to children) same-sex couples are so committed and stable that this amounts to a convincing reason to justify the ban on same-sex marriage. The reason for this is that if we accept that same-sex couples do not need marriage because they are always responsible parents, then so too we must also believe that infertile heterosexual couples must also be excluded from marriage for precisely the same reason – they too do not need marriage as they too can only reproduce responsibly. Thus, this reformulation of the procreation argument is unconvincing as it suffers from the same flaws as its predecessor, namely that it cannot explain why same-sex couples are excluded from marriage while infertile heterosexual couples are not. Interestingly, as Cahill notes, while the original procreation argument excluded same-sex couples for what they *lacked* (*i.e.* the ability to procreate naturally), this reformulation seeks

both cases ‘children’ were cited as a reason justifying the prohibition on same-sex marriage – their respective reasoning is irreconcilable *i.e.* how can one court attempt to justify the exclusion of same-sex couples because they are so good at parenting that they do not need marriage whilst another court excludes same-sex couples because of an assumption that same-sex parenting might be detrimental to the welfare of children?

The ‘welfare of children’ argument is further undermined by the fact that since there are no restrictions on donor insemination, surrogacy *etc.* – same-sex couples are already rearing children and will continue to have and rear children whether they are married or not. Thus, all that the preclusion of same-sex marriage achieves is to ensure that such children cannot be members of a marital family, forcing such families to operate outside of the marital framework.

Indeed, Dunne J. was correct in stating that the issue of same-sex marriage pertains to the issue of welfare of children: but in support of same-sex marriage, rather than as a reason to reject it.⁷⁸ Ironically, it is Dunne J.’s conclusion which adversely affects the welfare of children, as the effect of the ban is to preclude children already being raised in same-sex households from having the opportunity of being raised in a marital family: the very institution the State advocates as the secure and ideal environment for rearing children.

Indeed in *Goodridge*, Marshall C.J. reasoned that the ban on same-sex marriage prevents “children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a ... stable family structure in which children will be reared, educated, and socialized.”⁷⁹ Thus, viewed differently, can it seriously be argued that it is legitimate to penalise children of same-sex couples by denying them the opportunity to be a member of a constitutional family because the

to exclude same-sex couples for what they *possess* (*i.e.* the ability to reproduce responsibly every time they wish to reproduce). Cahill, *supra* note 36 at 408.

⁷⁸ Gerstmann, *supra* note 10 at 39.

⁷⁹ *Ibid.* at 335, *per* Marshall C.J., citing Cordy J. at 381. Greaney J. stated that the effect of the exclusion creates a *caste* like system which is “irreconcilable with, indeed, totally repugnant to, the State’s strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on ... the best interests of the child.” At 348.

State has irrational concerns over the impact their parents' sexual orientation might have on them?⁸⁰

Clearly, the issue of same-sex marriage will place the Supreme Court in a quandary because allowing same-sex couples to marry would encourage the monogamous, committed and long-term relationships that the State otherwise encourages, but their exclusion forces such couples and their children to operate outside the very institution advocated as the ideal institution for child rearing.⁸¹

VII - The significance of the right to marry: what are the limits of the unenumerated constitutional right to marry?

The unenumerated 'right to marry' was among the first fundamental rights recognised under *Bunreacht na hÉireann*, recognised in both *Ryan v. Attorney General*,⁸² and *McGee*. Fundamental rights are important because they ask us what rights we all share as individuals, irrespective of whether we are powerful, powerless, popular, or despised.⁸³ Unarguably, in both cases the Courts envisaged the right applying to heterosexual marriage, but should same-sex couples have a right to marry their chosen partner? Thus far, in both *Foy* and *Zappone* the courts have answered this question with an emphatic 'no'. However, in both cases, the analysis of the claim only occurred against the backdrop of the current definition, thus precluding anything more than a superficial analysis of the claim.

⁸⁰ Interestingly, in *McD. v. L.*, Hedigan J. held that a committed lesbian couple and their child were a 'family' for the purposes of Article 8 of the E.C.H.R. (in the same way as committed heterosexual couples and their children can be). Although interpretations of the E.C.H.R. in no way bind constitutional interpretations, *McD.* is still important because Hedigan J. implicitly rejected the 'child welfare' assumption on which Dunne J. justified her exclusion of same-sex couples from marriage. [2008] I.E.H.C. 96; (16 April 2008, unreported), High Court [hereinafter *McD.*]. Although this decision was overturned by the Supreme Court, the Supreme Court did not do so on 'child welfare' grounds but because the High Court acted *ultra vires* the *European Convention of Human Rights Act 2003* in reaching such an interpretation. Section 2 of the *European Convention of Human Rights Act 2003* requires the courts when interpreting and applying any statutory provision or rule of law, to do so in a manner compatible with the E.C.H.R. in so far as this is possible subject to the rules of law relating to such interpretation and application. At High Court, no statutory provision or rule of law was identified, and in the absence of such, the High Court essentially gave 'direct effect' to the E.C.H.R., which is not permitted because of Article 29 of *Bunreacht na hÉireann*. Furthermore, the Supreme Court emphasised that the E.Ct.H.R. has the prime responsibility of interpreting the E.C.H.R. and that National Courts should not adopt interpretations which are at variance with the existing jurisprudence of the E.Ct.H.R. Consequently, since the E.Ct.H.R. has not yet interpreted Article 8 as giving protection to same-sex couples with children, such families have no protection at national level through the E.C.H.R. Act as section 2 only requires compliance with the Convention, *i.e.* such families are not yet protected by the Convention.

⁸¹ Culhane, *supra* note 8 at 1190.

⁸² *Ryan v. Attorney General*, [1965] I.R. 294 [hereinafter *Ryan*].

⁸³ Gerstmann, *supra* note 10 at 9.

From a policy perspective, the significance of framing the same-sex marriage question in terms of the ‘right to marry’ is that it forces us to re-examine what our laws are actually trying to prevent, whether these goals are legitimate, and whether the current laws even achieve these goals.⁸⁴ A popular argument is that the ‘right to marry’ is dual-gendered by definition, and thus simply cannot relate to same-sex couples.⁸⁵ The problem with this approach is that since the strength of the right is tailored to the current definition, the definition itself escapes judicial scrutiny.

The absurdity of this argument is best illustrated by way of a (loose) analogy to the miscegenation laws which historically existed in some states in the U.S. prohibiting interracial marriages. In *Loving v. Virginia*⁸⁶ the U.S. Supreme Court held that such statutes were unconstitutional. But imagine if the U.S. Supreme Court held that the right to marry cannot extend to a person of a different race, because by definition, a marriage relates to two people of the same race.⁸⁷ Clearly, such an approach is deeply flawed, but the exact same logic is prevalent in both *Foy v. An t-Ard Chláraitheoir*⁸⁸ and *Zappone*.

In *Zappone*, Dunne J. placed considerable emphasis on the opposite-sex requirement to conclude that the right to marry did not encompass same-sex marriage.⁸⁹ In *Foy*, McKechnie J., in reference to the unenumerated right to marry, stated that, “marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman In this ... jurisdiction ... it is crucial for legal purposes that the parties should be of the opposite biological sex.”⁹⁰ Consequently, referring to the traditional definition, McKechnie J. reasoned that there was, “no sustainable basis for the ... submission

⁸⁴ *Ibid.* at 115.

⁸⁵ This argument is allied to the ‘definitional argument’ discussed previously.

⁸⁶ (1967) 388 U.S. 1.

⁸⁷ Gerstmann, *supra* note 10 at 102.

⁸⁸ *Foy v. An t-Ard Chláraitheoir*, (9 July 2002, unreported) High Court McKechnie J. [hereinafter *Foy*] McKechnie J. re-endorsed such reasoning in *Foy v. An t-Ard Chláraitheoir* [2007] I.E.H.C. 470 [hereinafter *Foy* [2007]].

⁸⁹ *Zappone*, *supra* note 3 at 69.

⁹⁰ *Ibid.* at 130 of judgment. However, as Eardly notes, to argue that the Constitution’s definition of marriage cannot encompass same-sex marriage because neither the common law nor statute have ever done so sidesteps the very argument that the common law and statutory regime are *unconstitutional* for failing to recognise such a right. J. Eardly, “The Constitution and Marriage – The Scope of Protection” (2006) 24 *Irish Law Times* 167 at 170.

that the existing law ... which prohibits the applicant from marrying a party ... of the same biological sex ... is a violation of her constitutional right to marry.”⁹¹

The fallaciousness of this approach is, however, quite succinctly outlined by Greaney J. in *Goodridge* where he stated that, “[t]he right to marry is not a *privilege* conferred by the State, but a fundamental right that is protected against unwarranted State interference I find it disingenuous, at best, to suggest that such an individual’s right to marry has not been burdened at all, because he or she remains free to choose another partner, who is of the opposite sex.”⁹²

Thus, recognising the inadequacies of the argument that the right to ‘marry’ simply cannot relate to same-sex marriage, in *Halpern* and *Goodridge* the courts moved beyond this to critique the essence of the right to marry, both courts generically terming the right in a gender-neutral way, such as a right to marry a person’s chosen partner. In *Halpern*, the Canadian Court held that, “the common law requirement that persons who marry be of the opposite sex denies persons in same-sex relationships of a fundamental choice – whether or not to marry their partner.”⁹³ In *Goodridge*, Marshall C.J. reasoned that “the right to marry means little if it does not include the right to marry the *person of one’s choice*, subject to *appropriate* government restrictions in the interests of public health, safety, and welfare.”⁹⁴

Recently, in *O’Shea v. Ireland*,⁹⁵ the High Court considered, in detail, the limits of the right to marry. Here the plaintiffs challenged the constitutionality of section 3(2) of the *Deceased Wife’s Sister’s Marriage Act 1907*, which renders unlawful a marriage between a woman and the brother of her former husband, during the lifetime of the former husband on the basis that it restricted the unenumerated right to marry.

Laffoy J., acknowledging that the right to marry is not absolute, held that the plaintiff had to prove that the statutory limitation of their rights was not within the constitutionally permitted bounds of legitimate limitation, *i.e.* the plaintiff had to

⁹¹ *Ibid.*

⁹² *Ibid.* at 345-346 [emphasis added].

⁹³ *Halpern*, *supra* note 13 at para. 87 [emphasis added].

⁹⁴ *Goodridge*, *supra* note 14 at 327 -328. [emphasis added].

⁹⁵ *O’Shea v. Ireland*, (17 October 2006, unreported) High Court [hereinafter *O’Shea*].

prove irrationality or disproportionality. Importantly, Laffoy J. held that section 3(2) was unconstitutional, stating that:

... it is an impairment of the essence of the right because it prevents each marrying her and his *chosen partner*. The question for the court is whether the plaintiffs have established that the restriction is not justified as being *necessary* in support of the constitutional protection of the *family* and the *institution of marriage*, or more generally having regard to the requirements of the *common good*. I consider that they have.⁹⁶

This decision is extremely important in relation to same-sex marriage for a number of reasons. Laffoy J. in describing the right to marry, used similar terminology to that taken in *Halpern* and *Goodridge*, namely, framing the right in a gender-neutral way, as the right to marry a person's 'chosen partner.' Furthermore, in *O'Shea* it was argued that the statutory limitation was necessary to protect the family and to guard with special care the institution of marriage, *i.e.* permitting marriage between a divorced spouse and a sibling of the other spouse would undermine the stability of the marital unit. On this basis, it was argued that retention of the law was necessary to ensure the protection of the institution of marriage and the family as permitting such marriages based on affinity might have an adverse impact on the welfare of children.

However, in *O'Shea* (unlike *Zappone*) these arguments which sought to legitimise the limitation of the right to marry were rejected on the basis that there was no definitive evidence to support such a hypothesis. Interestingly, one of the arguments supporting the prohibition based on affinity was that it was based on historical and cultural tradition, and supported by many religious denominations. However, Laffoy J. was not convinced that the right to marry should necessarily be limited by either tradition or the views of Christianity *etc.* – both points are of great significance in relation to same-sex marriage, *i.e.* although the Constitution's perception of marriage is derived from the Christian concept of marriage, the 'right to marry' is not bound by its tenets. Indeed, Laffoy J. even spoke of the right to '*re-marry*' after divorce, thus showing that the unenumerated right to marry is not limited to the Christian understanding of marriage from which the Constitution's understanding of marriage unarguably derives.

⁹⁶ P. Breen, "Constitutional right to marry restricted by 1907 Act" *The Irish Times* (6 November 2006) 20 at 20.

Thus, *O’Shea* is extremely important not just for how it termed the ‘right to marry’, but because it suggests that there must be powerful reasons to warrant limiting the right to marry a person’s chosen partner. However, in *Zappone* Dunne J. held that excluding gay couples from the right to marry was justified on the basis of an unproven risk that being raised by same-sex parents might be detrimental to child welfare. Naturally, this raises the contentious question of whether constitutional rights can be limited by justificatory grounds based on unproven stereotypical assumptions.

In *Halpern*, the Canadian Court held that they cannot and, noting the fact that social science research is not yet capable of definitively supporting either argument in relation to the welfare of children, held that, “[i]n the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society”⁹⁷ In *Goodridge*, Marshall C.J. describing the substance of the right to marry opined that, “[t]he liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.”⁹⁸

Consequently, is the limitation of the right to marry a person’s chosen partner to ‘persons of the opposite- sex’ made to advance some objective? If so, what? In *Foy* [2007], McKechnie J. stated that the right to marry may be proscribed by legal restrictions – but such restrictions must be reasonable.⁹⁹ This is somewhat ironic however because by relying strictly on the current definition, McKechnie J. avoided any in-depth analysis to determine if the limitation was reasonable.

In *Ryan*, Kenny J., discussing the legitimate limitation of personal rights stated that:

[n]one of the personal rights are unlimited: their exercise may be regulated by the Oireachtas when the *common good* requires this. When dealing with

⁹⁷ *Halpern*, *supra* note 13 at para. 123.

⁹⁸ *Ibid.* at 329.

⁹⁹ *Ibid.* at 106 of judgment. McKechnie J. reaffirmed this conclusion in *Foy* [2007] at para. 58.

controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail *unless* it was *oppressive* to all or some of the citizens or unless there is *no reasonable proportion* between the benefit ... on the citizens or a substantial body of them and the interference with the personal rights of the citizen.¹⁰⁰

This naturally raises the question of whether restricting the ‘right to marry a person’s chosen partner’ to a right to marry a person of the opposite sex serves the ‘common good’? But, as Wintemute asks, for which part of society and whose ‘good’ has the civil definition served?¹⁰¹ Undoubtedly, it is for the *perceived* good of the heterosexual majority, based on popular prejudices of the inferior status of same-sex relationships, and for the obvious reason that the majority who created the definition have no desire to marry a person of the same sex.¹⁰² More fundamentally however, Kenny J. clearly envisaged that the mantra of the ‘common good’ does not simply mean ‘majority rule’, where the limitation is oppressive to a minority and which has no reasonable objective.

More recently, the Supreme Court has adopted both a ‘rationality’ test¹⁰³ and a ‘proportionality’ test¹⁰⁴ to determine whether limitations of constitutional rights are justified.¹⁰⁵ Under the rationality test, the Court, from an objective stance has to determine whether the balance is so contrary to reason and fairness as to constitute an unjust attack on a person’s constitutional rights.¹⁰⁶ Under the proportionality test, the Court must be satisfied that: 1) the limitation must be connected to an objective, which is not arbitrary, unfair or based on irrational considerations; 2) the limitation must intrude into the constitutional right as little as possible, and; 3) the effect of the limitation must be proportionate to the objective of the limitation.¹⁰⁷

¹⁰⁰ *Ibid.* at 313 [emphasis added].

¹⁰¹ Wintemute, *supra* note 18.

¹⁰² “It is for ‘the common good’, as Professor William Binchy has put it. But ... which part of society has this definition served? Quite simply, the good of the heterosexual majority, who have no desire to marry a person of their own sex, not the good of the LGBT minority.” *Ibid.* at 93

¹⁰³ *Tuohy v. Courtney* [1994] 3 I.R. 1. [hereinafter *Tuohy*]

¹⁰⁴ *Re. Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321. [hereinafter *Equality Bill Case*].

¹⁰⁵ Although such tests were created to determine if legislative limitations on constitutional rights unlawfully contravened constitutional rights, it would be absurd if the same criteria were not also considered by the courts when they seek to impose their own limitations on constitutional rights – as this would suggest that judicial restraints are not equally bound by the Constitution.

¹⁰⁶ *Tuohy*, *supra* note 103 at 47.

¹⁰⁷ *Equality Bill Case*, *supra* note 104 at 383.

Clearly, since the arguments against same-sex marriage are quite unconvincing,¹⁰⁸ the conclusion that the ‘right to marry a person’s chosen partner’ can be legitimately limited because of the unproven assumption that being raised by same-sex parents might be detrimental to children fails under both tests. As noted above, all this achieves is to force such families to operate outside of the marital framework – the very framework the State promotes as the secure and ideal unit for raising families.

Importantly, in *Ryan, McGee*, and *O’Shea* the courts held that the ‘right to marry’ is a personal right which derives from Article 40.3.1°. However, in *Zappone* Dunne J. stated that the ‘right to marry’ derives from Article 41.¹⁰⁹ The reason why this departure is significant is because rights under Article 40 emphasise the rights of the individual, whilst Article 41 dilutes the emphasis on personal rights in favour of the unit of the marital family. But, the family unit does not exist until a marriage has actually taken place, so it is illogical to suggest that the ‘right to marry’ derives from Article 41 as such rights only have resonance after a marriage has taken place.¹¹⁰

VIII – The ‘slippery slope’ argument

Although not discussed in *Zappone*, one of the main arguments against extending the ‘right to marry’ to same-sex couples is the ‘slippery slope’¹¹¹ argument, *i.e.* if the definition of marriage and the right to marry are not confined by tradition, nature *etc.*, then what is the logical stopping point? Would legalisation of same-sex marriage inevitably lead to the legalisation of polygamous marriages and incestuous marriages?¹¹²

However, as Culhane notes, polygamous marriages and incestuous marriages are not reasons to exclude same-sex couples from the right to marry, because such

¹⁰⁸ As discussed above.

¹⁰⁹ “The right to marry ... 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.” *Supra* note 3 at 69.

¹¹⁰ I am indebted to Dr. Conor O’Mahony (Lecturer in Law, U.C.C.) for this important point.

¹¹¹ An allied argument to the ‘definitional’ argument, discussed above.

¹¹² Gerstmann, *supra* note 10 at 104.

issues should and must be addressed in isolation on their own merits, not simply advanced as reasons to oppose extending the ‘right to marry’ to same-sex couples.¹¹³ Thus, extending the ‘right to marry’ to same-sex couples does not necessarily mean that other prohibited marriages will be legalised as there may be compelling State interests not to do so, *e.g.* the decision in *O’Shea* does not mean that marital prohibitions based on consanguinity are now unconstitutional. Thus, all that framing the same-sex marriage debate in terms of the ‘right to marry’ does is to assess the reasons why the right is limited to determine if the limitation is legitimate or illegitimate.¹¹⁴ Nevertheless, same-sex marriage can be distinguished from polygamous marriages and incestuous marriages with relative ease.

In relation to polygamy, there is a fundamental difference between a right to marry whomever one wants and a right to marry however many people one wants.¹¹⁵ Moreover, gay men and women are only seeking the same right everyone else has and takes for granted – the right to marry a person they love the most.¹¹⁶ Conversely, polygamists are seeking a right that no one else has – the right to marry as many people as they want.¹¹⁷

More importantly, from a constitutional perspective where the right is necessarily limited, there are legitimate State interests in opposing polygamous marriages. The most obvious concern would be its impact on the institution of marriage, because legalising polygamy would profoundly alter the institution as it would alter the legal structure of every couple’s marriage as every married person’s spouse would suddenly have the right to marry another person without first getting a divorce.¹¹⁸ Conversely, same-sex marriage would have no legal impact on opposite-sex marriages whatsoever.¹¹⁹

¹¹³ Culhane, *supra* note 8 at 1184.

¹¹⁴ Indeed, it was for this reason that in *O’Shea* Laffoy J. struck down section 3(2) of the *Deceased Wife’s Sister’s Marriage Act 1907* because there was no legitimate reason for the limitation of the ‘right to marry’.

¹¹⁵ Gerstmann, *supra* note 10 at 110.

¹¹⁶ *Ibid.* at 111.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ Although this may affect how some opposite-sex couples feel about the value of their marriage – this view is necessarily predicated on a belief of the inferiority of same-sex relationships. *Ibid.*

The issue of incestuous marriages has also been cited as a reason to oppose same-sex marriage, *i.e.* if someone has the right to marry a person of the same sex, then why not a close relative? However, unlike same-sex marriage, there are powerful legitimate reasons for prohibiting such marriages.¹²⁰ The protection of children¹²¹ from sexual exploitation is among the most compelling of state interests as society has a compelling interest in preventing fathers and brothers from viewing their daughters and sisters in a sexualised manner.¹²² Such laws are justifiable even when the child is an adult on the basis that parental authority established during childhood may have an enduring impact, dominating and perhaps negating what should otherwise be an expression of one's volition.¹²³

IX - Same-sex couples and article 40.1: a constitutional underclass?¹²⁴

Article 40.1 of *Bunreacht na hÉireann* provides that, “[a]ll citizens shall, as human persons, be held equal before the law.” The second tier of Article 40.1 qualifies this guarantee, providing that, “[t]his 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.” Thus, the Irish experience of equality law does not provide an absolute guarantee of equality for all citizens in all circumstances, but rather imports the Aristotelian concept of equality that “we treat equals equally and unequals unequally.”¹²⁵

In relation to classifications providing for unequal treatment, Doyle notes that there are two types of legitimate classification: 1) Equality-Affirming Classifications, *i.e.* classifications which are deemed permissible because they reflect real differences (capacity, physical and moral, and social function), and 2) Equality-Derogating Classifications, *i.e.* classifications which are not justified by reference to a

¹²⁰ *Ibid* at 113

¹²¹ Rather than the ‘genetic concerns’ argument, as society does not prohibit people with serious genetic disorders but who are unrelated from marrying. *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ E. Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (London: University of Chicago Press Ltd., 1999).

¹²⁵ *De Búrca v. Attorney General* [1976] I.R. 38, *per* Walsh J. at 68.

difference between the persons distinguished but because it is supported either by another constitutional value or a legitimate legislative purpose.¹²⁶

Although legalisation of same-sex marriage through constitutional equality law represents the greatest prize for advocates of same-sex marriage, in an Irish context, there are many problems with framing a same-sex marriage claim based on constitutional equality. Article 40.1 provides that, “[a]ll citizens shall, as *human persons*, be held equal before the law.” The phrase ‘as human persons’ has been referred to as the ‘most significant textual novelty’ in Article 40.1 as it has been interpreted in a manner limiting the equality guarantee to discriminations relating only to the essential attributes of the human person.¹²⁷ The ‘human personality’ doctrine precludes classifications that are based on an assumption that some individuals are inherently inferior or superior to others by reason of their human attributes.¹²⁸ One of the main problems with framing a same-sex marriage claim based on Article 40.1 is that the courts have not yet held sexual orientation to be an essential human attribute. This necessarily raises the question of ‘what are the essential attributes of the human person?’

In *Quinn’s Supermarket v. Attorney General*,¹²⁹ Walsh J. referring to the protected human attributes referred to a person’s “human attributes ... ethnic ... racial, social or religious background” However, noting that this list was not exhaustive, Walsh J. further stated that, “[t]his list does not pretend to be complete ... it is merely intended to illustrate the view that this guarantee refers to human beings for what they are in themselves”¹³⁰

¹²⁶ O. Doyle, *supra* note 5 at 94.

¹²⁷ *Ibid.* at 125.

¹²⁸ In *Quinn’s Supermarket v. Attorney General*, Walsh J. stated that Article 40.1 is, “not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any *inequalities grounded upon an assumption*, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their *human attributes* or their ethnic or racial, social or religious background, are to be treated as the *inferior or superior* of other individuals in the community.” [1972] 1 I.R. at 13-14 [hereinafter *Quinn’s Supermarket*] [emphasis added].

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

In the *Equality Bill Case*, the Supreme Court expanded on this to include, “classifications based on sex, race, language, religious or political opinions.”¹³¹ In this respect it is worth noting that section 3(2)(d) *Equal Status Acts 2000–2004* expressly includes sexual orientation as an attribute upon which discrimination is proscribed. In light of the historic discrimination against the gay community, it is not hyperbole to suggest that a continued failure to constitutionally protect against discrimination on the basis of sexual orientation creates a ‘constitutional underclass’,¹³² a result which one would assume an equality guarantee is designed to prevent.

Hogan and Whyte argue that ‘essential attributes of the human person’ must also include a person’s sexual orientation.¹³³ The reason for this is that individuals with such attributes are powerless to do anything about them (*i.e.* immutable attribute) and consequently, classifications based on such immutable personal attributes can permanently disadvantage such groups, thus requiring a compelling need to provide protection against such classifications.¹³⁴ However, Sunstein disputes the contention that prohibited discriminations should be limited only to immutable characteristics, as the ‘immutability question’ acts as a distraction from the real question of whether disadvantaging the relevant group rests on legitimate or illegitimate grounds.¹³⁵ The fact that the courts have already indicated that classifications based on mutable (and sometimes transient) characteristics such as religious affiliations, political opinions, and wealth are *prima facie* prohibited under the first tier of Article 40.1 suggests that whatever the process of recognition is, it is not confined to immutable characteristics.

Nonetheless, it is worth noting that in *Norris*, Henchy J. (dissenting) appeared willing to accept that sexual orientation is an immutable characteristic.¹³⁶ In *Zappone*, Dunne J. held that the exclusion of same-sex couples from marriage was

¹³¹ *Equality Bill Case*, *supra*, note 104 at 347.

¹³² Gerstmann, *supra* note 124.

¹³³ G.W. Hogan & G. Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed. (Dublin: Butterworths, 2003) at para. 7.2.54.

¹³⁴ Doyle argues that in discerning what is an essential human attribute, what matters is the fact of *subordination*, not the trait around which the subordination is organised. Doyle, *supra* note 5 at 222.

¹³⁵ C. Sunstein, “Homosexuality and the Constitution” (1994) 70 *Indiana Law Journal* 1 at 9–11.

¹³⁶ Here Henchy J. stated that, “[t]he plaintiff is homosexual in nature to the extent that his sexuality is compulsively and exclusively directed towards members of his own sex ... What appears from the evidence is that his sexual condition was predestined from birth or from childhood rather than adopted by choice ...” *Norris*, *supra* note 40 at 67.

justified by another constitutional provision, namely Article 41,¹³⁷ *i.e.* an equality derogating classification. Thus, it is unclear whether Dunne J. considered that sexual orientation is a constitutionally protected attribute or whether she believed that it is not – as her conclusion that the discrimination was an equality-derogating classification meant that she did not have to reach a conclusion on this issue.

The reason why the recognition of ‘sexual orientation’ as an essential attribute of the human personality is so important is because the Supreme Court has recently indicated that distinctions relating to some attributes are *presumptively invalid*, thus requiring the State to justify the classification. In the *Equality Bill Case*, the Supreme Court held that, “[t]he forms of discrimination which are, *presumptively at least*, proscribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions.”¹³⁸ Thus, here the Supreme Court stated that discriminations based on the above human attributes are presumptively invalid, resulting in a shift of the onus of proof to the State to justify its discriminations.

Further evidence of this approach can be seen in *An Blascaod Mór v. Commissioner of Public Works*.¹³⁹ At Supreme Court, Barrington J. in referring to the classification as ‘suspect’, stated that:

... a Constitution should be pedigree blind just as it should be colour blind or gender blind except when those issues are relevant to a legitimate legislative purpose. This Court can see no legitimate legislative purpose in the present case ...¹⁴⁰

Although Barrington J. did not use the phrase ‘presumptive invalidity,’ the conclusion that the Supreme Court could see no legitimate legislative purpose for the discrimination clearly suggests that the Supreme Court was not willing to imagine a purpose and believed that it was the State’s duty to show a legitimate

¹³⁷ “ [I]f there is ... any form of discriminatory distinction between same sex couples and opposite sex couples ... then Article 41 in its clear terms as to guarding provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children.” *Supra* note 3 at 70.

¹³⁸ *Ibid.* at 347 [emphasis added].

¹³⁹ *An Blascaod Mór v. Commissioner of Public Works*, [2000] 1 I.R. 6 [hereinafter *Great Blasket Case*]. Here, the Supreme Court considered the constitutionality of compulsory acquisition powers on the Great Blasket Island which exempted those who owned/occupied land prior to 17 November 1953 (or their relatives), leaving others susceptible to compulsory acquisition.

¹⁴⁰ *Ibid.* at 19.

legislative purpose.¹⁴¹ Thus, the importance of including sexual orientation within the stated characteristics cannot be underestimated because the effect of the onus reversal is that distinctions made on such grounds are *prima facie* deemed to be based on irrational considerations¹⁴² – requiring the State to justify the prohibition on same-sex marriage, possibly subject to a more intense standard of review.

More importantly, however, the Supreme Court has indicated that the classification of certain groups might result in a differentiated standard of review.¹⁴³ In the *Equality Bill Case*, Hamilton C.J. distinguishing ‘age’ based classifications from those based on ‘race’ *etc.* stated that, “[o]nce however, it is accepted that discrimination on the grounds of age falls into a *different constitutional category* from discrimination on grounds such as sex or race, the decision of the Oireachtas not to apply the provisions of the Bill to a relatively narrowed defined class of employees in the public service whose duties are of a particular character becomes *more understandable*.”¹⁴⁴ Thus, the Supreme Court suggested that although classifications based on age are subject to Article 40.1, they are easier to justify than classifications based on race or sex (‘more understandable’), *i.e.* classifications based on sex, race *etc.* are subject to a more intense standard of review.¹⁴⁵

The Supreme Court’s conclusion that classifications based on the stated human attributes (only) are subject to a more intense standard of review is an extremely important development because in addition to the reversal of the onus of proof, Doyle argues that the *Equality Bill Case* may signal a change requiring actual justification, rather than the highly deferential standard of hypothetical

¹⁴¹ Doyle, *supra* note 5 at 141. Recently, in *S.M. v. Ireland*, the High Court followed the above case-law, endorsing the ‘presumptive invalidity’ doctrine, and that certain classifications might be subject to a more onerous standard of review. Here Laffoy J. considered the constitutionality of a statutory provision which provided that those convicted of indecent assault upon a male could be sentenced to a term of imprisonment not exceeding 10 years (*Offences Against the Person Act 1861*, s. 62), when the equivalent provision for females only provided a maximum sentence of 2 years (section 6, *Criminal Law (Amendment) Act 1935*, s. 6). Laffoy J., although stating that the gender classification was “*prima facie* discriminatory,” ultimately struck down the provision for contravening Article 40.1 but came to this conclusion “without having to reach any conclusion on whether the burden of establishing justification lies with the defendant or plaintiff. It is also unnecessary to express any view on whether gender-based discrimination warrants a strict scrutiny approach.” *S.M. v. Ireland*, [2008] 4 I.R. 369; [2007] I.E.H.C. 280 at 290.

¹⁴² Doyle, *supra* note 5 at 206.

¹⁴³ Doyle attributes this development in constitutional law to the Supreme Court’s recent preference for the ‘basis of discrimination’ interpretation of the ‘human personality’ doctrine. *Ibid.* at 137.

¹⁴⁴ *Equality Bill Case*, *supra* note 104 at 349 [emphasis added].

¹⁴⁵ Doyle, *supra* note 5 at 139.

justification.¹⁴⁶ The reason for this bold hypothesis is that in the *Equality Bill Case* Hamilton C.J. stated that classifications based on unstated characteristics are 'more understandable' than those based on the stated characteristics (*e.g.* sex, race *etc.*). Thus, it is logical to deduce from Hamilton C.J.'s stipulation that classifications based on the stated characteristics are 'less understandable,' requiring justification by the State which is scrutinised more carefully by the courts than classifications based on age *etc.* This perhaps suggests an insistence on the production of actual justifications¹⁴⁷ for classifications based on the stated characteristics – in addition to the reversal of the onus of proof.

Although some classifications deserve to be scrutinised more than others,¹⁴⁸ it is unfortunate that the Supreme Court did not articulate any guidelines as to why some personal attributes are afforded greater protection under constitutional equality law than others as Hamilton C.J. merely listed the classifications which are presumptively invalid and stated that age-based classifications are not presumptively invalid. The absence of any guidelines for determining which attributes need to be protected more than others and why such protection is needed is problematic because there is consequently no way of ascertaining why sexual orientation has not yet been recognised and no guidelines by which a Court rejecting such an argument must justify it.

X - The preclusion of same-sex marriage: a form of gender discrimination?

In *Zappone*, the plaintiffs argued that in addition to discrimination on the basis of sexual orientation the prohibition on same-sex marriage also amounts to sex discrimination, *i.e.* Mr. X cannot marry Mr. Y, but Ms. Z can, so Mr. X is being discriminated against on the basis of his gender.¹⁴⁹ In the breakthrough Hawaiian

¹⁴⁶ *Ibid.* at 139. The inadequacies of 'hypothetical justifications' are discussed below.

¹⁴⁷ *Ibid.*

¹⁴⁸ Doyle logically argues that a differentiated standard of review is justifiable because one should be more wary of classifications which seek to deny essential aspects of people's humanity. More pertinently, failing to distinguish between more serious and less serious species of classification by simply relying on one benign standard of review actually thwarts the potency of Article 40.1. *Ibid.* at 144-145.

¹⁴⁹ Gerstmann, *supra* note 10 at 50.

case *Baehr v. Lewin*,¹⁵⁰ the Supreme Court of Hawaii held that the ban on same-sex marriage was a form of gender discrimination which was unconstitutional.

However, despite its attractive simplicity and the advantageous fact that discriminations on the basis of sex have already been stated as ‘presumptively invalid,’¹⁵¹ the gender discrimination argument is unconvincing. In fact, as Sunstein notes, there is no sex discrimination at all because both men and women are treated in exactly the same way¹⁵² (a man may not marry a man and a woman may not marry a woman). Indeed in *Baker v. Vermont*,¹⁵³ the Supreme Court of Vermont recognising this stated that, “[t]he difficulty ... is that the marriage laws ... do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex Here, there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct.”¹⁵⁴

Thus, the point here is not that the prohibition on same-sex marriage is not discriminatory (it is) but rather that it is discrimination on the basis of sexual orientation, not sex.

XI - The Preclusion of Same-Sex Marriage: an Equality-Affirming Classification?

The second tier of Article 40.1 expressly envisages the possibility of disparate treatment as it provides that the equality guarantee “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.” Thus, Article 40.1 makes clear that considerations of moral capacity and social function can constitute a legitimate legislative purpose. However, as Doyle logically observes, although the terminology of the second tier permits the State to differentiate in recognition of difference, it imposes no obligation to do so (*i.e.* ‘due regard’).¹⁵⁵

¹⁵⁰ *Baehr v. Lewin*, (1993) 852 P.2d. 44.

¹⁵¹ *Equality Bill Case*, *supra* note 104 at 347.

¹⁵² Sunstein, *supra* note 135 at 19.

¹⁵³ *Baker v. Vermont*, (1999) 744 A.2d. 864..

¹⁵⁴ *Ibid.* at 880.

¹⁵⁵ Doyle, *supra* note 5 at 74.

In relation to ‘moral capacity,’ the Supreme Court’s decision in *Norris* stands as a clear authority that homosexuality is morally inferior to heterosexuality; O’Higgins C.J. put it bluntly stating that, “homosexual conduct is, of course, morally wrong, and has been so regarded by mankind through the centuries.”¹⁵⁶ However, the strength of this precedent in the modern era is perhaps undermined by the fact that not even the defendants in *Zappone* cited it to counter the plaintiff’s claim for recognition of same-sex marriage – thus perhaps indicative of a tacit acknowledgement that such reasoning is redolent of a different age.¹⁵⁷

In relation to ‘social function,’ is there a difference in social function between same-sex couples and opposite-sex couples meriting their exclusion from the institution of marriage? In *Dillane v. Attorney General*¹⁵⁸ Henchy J. stated that:

[w]hen the State ... makes a discrimination in favour of, or against, a person or a category of persons on the ... ground of social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not *arbitrary*, or *capricious*, or otherwise not *reasonably capable, when objectively viewed* in the light of the social function involved, of supporting the selection or classification complained of.¹⁵⁹

Thus, in this respect the ‘procreation,’¹⁶⁰ ‘child welfare,’¹⁶¹ and ‘threat to marriage’¹⁶² arguments are particularly relevant, but as noted previously are ultimately unconvincing. The ‘threat to marriage’ argument is unpersuasive as it is necessarily predicated on the belief that same-sex relationships are inferior or inappropriate. It is also fallacious, as the continued failure to allow such committed couples access to marriage could itself be regarded as an attack upon the institution of marriage or a failure to guard it so as to ensure its continued significance *i.e.* by unnecessarily diverting committed couples to the Civil Partnership regime, which is soon to be implemented.

¹⁵⁶ *Norris supra* note 40 at 64.

¹⁵⁷ Indeed it would be quite surprising if the Supreme Court relied on dicta from *Norris* in the Zappones’ appeal to reject their claim for same-sex marriage, as this would put the constitutionality of the Legislature’s controversial *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* in doubt.

¹⁵⁸ *Dillane v. Attorney General*, [1980] I.L.R.M. 167.

¹⁵⁹ *Ibid.* at 169 [emphasis added].

¹⁶⁰ *Supra*, at pp 39-42.

¹⁶¹ *Supra*, at pp 42-46.

¹⁶² *Supra*, at pp 35-39.

The ‘child-welfare’ argument is unconvincing as it is based on an unproven assumption of inferiority of same-sex couples. It also represents a ‘double-standard,’ as the law imposes no restrictions on heterosexuals from marrying, even for those actually proven to be a threat to children: so why should an *unproven* risk justify the exclusion of *all* same-sex couples?¹⁶³ The procreation argument is perhaps the most unconvincing of all such arguments as it simply cannot explain why infertile heterosexual couples are allowed to marry whilst same-sex couples are not.

XII - Equality derogating classifications

One of the most serious problems with framing a same-sex marriage claim based on constitutional equality is that the courts predominantly view Article 40.1 as a ‘content-free’ provision which has “no substantive, egalitarian content which could weigh against other, inegalitarian provisions of the Constitution.”¹⁶⁴ In other words, while the surrounding Articles of *Bunreacht na hÉireann* inform the interpretation of Article 40.1, Article 40.1 rarely informs how other Articles should be interpreted. For instance, in *O’B. v. S.*¹⁶⁵ the Supreme Court held that the provisions of the *Succession Act 1965* which discriminated against non-marital children were not unconstitutional due to the status Article 41 places on the marital family – the Supreme Court did not consider the possibility that Article 40.1 might limit the constitutional protection afforded to the marital family.¹⁶⁶ This issue is particularly prevalent in *Zappone*.

In *Zappone*, the plaintiffs sought to bolster their constitutional equality argument through reliance on the *Equality Bill Case* and the *Great Blasket Case*, *i.e.* that distinctions on the grounds of sexual orientation were also ‘presumptively invalid.’ This would have required Dunne J. to consider whether sexual orientation is a human attribute as strongly protected as race, sex *etc.*, and more importantly should have required a thorough analysis of the arguments against same-sex marriage to determine whether the exclusion was justifiable. However, Dunne J. did not address the issue of whether sexual orientation is an essential human attribute requiring the State to justify the discrimination through reliance on the argument

¹⁶³ Marcossan, *supra* note 68 and Eskridge, *supra* note 69.

¹⁶⁴ Doyle, *supra* note 5 at 75.

¹⁶⁵ *O’B. v. S.*, [1984] I.R. 316 [hereinafter *O’B. v. S.*].

¹⁶⁶ Doyle, *supra* note 5.

that the distinction to disallow same-sex marriage does not need to be justified because it is a distinction made by the *Constitution* itself *via* Article 41, *i.e.* the *Constitution* itself provides the distinction (equality-derogating classification).¹⁶⁷ From an Article 40.1 perspective, this is the most important aspect of the *Zappone* decision because it enabled the Court to dismiss the Article 40.1 claim without any consideration of the equality issues.

Thus, Dunne J. purported to follow a line of authorities which state that discrimination does not need to be justified under Article 40.1 if justification (or indeed the discrimination itself) is provided by other constitutional provisions. In *O'B. v. S.*, Walsh J. held that, “[l]egislation which differentiates citizens or which discriminates between them does not need to be justified under the proviso if justification ... [for] it can be found in other provisions of the Constitution.”¹⁶⁸ Similarly, in *Dennehy v. Minister for Social Welfare*¹⁶⁹ Barron J. held that a social welfare provision discriminating between deserted husbands and deserted wives challenged under Article 40.1 was not unconstitutional because of the value Article 41.2¹⁷⁰ places on women who are homemakers.¹⁷¹

However, *Zappone* differs from the above cases in a number of respects: the term ‘marriage’ in Article 41 is undefined and there is nothing in Article 41 which

¹⁶⁷ Dunne J. accepted the defendant’s argument on this point stating that, “I accept the arguments made by the defendants in relation to the issue of discrimination on the basis that the right to opposite sex marriage is derived from the Constitution and thus that is a justification for any distinction between the position of the plaintiffs and married couples.” *Supra* note 3 at 70. Thus, using the terminology of Oran Doyle, Dunne J. held that the exclusion of same-sex couples from marriage was an ‘equality-derogating’ classification, *i.e.* because it seemingly supported another constitutional value. Doyle, *supra* note 5, at 94.

¹⁶⁸ *Ibid.* at 335. Here a non-marital child challenged the constitutionality of the *Succession Act 1965* which discriminated against non-marital children in favour of marital children. The Supreme Court held that such discrimination was not unconstitutional due to the favoured status of the marital family in Article 41 of *Bunreacht na hÉireann 1937*.

¹⁶⁹ *Dennehy v. Minister for Social Welfare*, (26 July 1985, unreported), High Court, Barron J. [hereinafter *Dennehy*].

¹⁷⁰ Article 41.2 provides that, “ 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties at home.”

¹⁷¹ “Having regard to the provisions of Article 41.2, it does not seem to me that as a matter of policy it would be unreasonable, unjust or arbitrary for the Oireachtas to protect financially deserted wives who are mothers who have dependent children residing with them” *Dennehy*, *supra* note 169 at 19.

This interpretation of Article 40.1 was further re-endorsed by Costello J. in *Lowth v. Minister for Social Welfare*, [1998] 4 I.R. 321. (The impact, if any, of the contemporary approach taken in *T v. T* on *Dennehy* is unclear.

necessarily excludes same-sex couples from the institution of marriage, *i.e.* the Constitution expressly prioritises the marital family (*O'B*) and the role of women as home-makers (*Dennehy*), but there is no express definition of 'marriage', no express constitutional prohibition on same-sex marriage, and the courts have already stated that marriage is not necessarily a 'child-centred' institution.¹⁷²

Thus, to characterise the discrimination as an equality-derogating classification made by the Constitution itself is clearly disputable and contentious given the impact of such a conclusion (Article 40.1 is automatically subordinated to the competing constitutional value). For those who oppose same-sex marriage, this approach is the most advantageous because by relying on Article 41 to pre-analytically defeat an Article 40.1 claim the Court is able to side-step the more contentious questions of whether the prohibition serves a 'legitimate legislative purpose' and even more contentiously whether the classification is justified because of 'differences of capacity, moral and physical, and of social function' (equality-affirming classification). In short this approach ensures that same-sex marriage remains prohibited whilst simultaneously enabling the court to avoid being embroiled in value judgments about the differences between same-sex relationships and opposite-sex relationships which the courts undoubtedly would be reluctant to make in modern times.

The principle of 'equality-derogating' justifications is contentious in itself, as it treats the equality guarantee as a subordinate constitutional value, void of any real traction against other constitutional values which may be capable of a contemporary interpretation.¹⁷³ In *Zappone*, such an approach has the effect of further eroding the significance of Article 40.1 by subordinating it to a constitutional distinction which may not actually exist, as the provision is textually reticent on the definition of marriage. Consequently, it would make more sense to interpret 'marriage' in light of the express equality guarantee, rather than on the basis of restrictions judicially implied into the term in cases not dealing with the issue at hand.¹⁷⁴ Thus, the point in contention here is that since 'marriage' is undefined in the Constitution – it is not necessarily a distinction made by the Constitution itself.

¹⁷² *Murray supra* note 56.

¹⁷³ *Doyle, supra* note 5 at 99.

¹⁷⁴ *E.g. T v. T*, discussed above.

Interestingly, in the *Equality Bill Case* the Supreme Court appeared to attach a more prominent role to Article 40.1 when considering the interaction between competing constitutional values.¹⁷⁵ Although the Court held that the measure was disproportionate, importantly it held that such measures could *prima facie* be justified by reference to the ‘common good’ – an aspect of which was the promotion of equality. Thus, since it is reasonable to assume that this interpretation of the ‘common good’ derived from Article 40.1, it appears that the Supreme Court believed that the promotion of equality is a *positive* value (not just neutral) which can justify¹⁷⁶ the restriction of *other constitutional values*, as well as being subject to restriction itself by other constitutional values, *e.g.* *O’B. v. S.* However, the approach in *Zappone* clearly envisages the equality guarantee in a minimalist fashion – essentially a meaningless consideration when interpreting other constitutional provisions.

XIII - The inadequacies of hypothetical justifications and the possible impact of the ‘right to marry’

The interpretation of Article 40.1 differs from that of other constitutional provisions because in relation to Article 40.1 reviews the courts deploy a ‘double deferential’ standard which defers judgment both to the legislature’s assessment of what equality requires and to a hypothetical critique of the legislature’s assessment of whether there are good reasons for derogating from equality.¹⁷⁷ Thus, Doyle notes that one of the most prominent problems with Article 40.1 standards of review is the courts’ willingness to accept hypothetical justifications to justify discriminations rather than insisting on actual justifications,¹⁷⁸ *i.e.* the courts strain

¹⁷⁵ Doyle, *supra* note 5 at 102. Here the court considered the constitutionality of a Bill which prohibited discrimination against persons with a disability, but which further required employers to bear the costs of ensuring that their premises were ‘disability friendly’, unless it would cause ‘undue hardship’ for the employer. The Court considered whether this constituted an ‘unjust attack’ upon the property rights of employers protected by Article 40.3.2^o.

¹⁷⁶ Despite the development in the *Equality Bill Case* which (arguably) gives a heightened role to the equality guarantee by providing that Article 40.1 is *prima facie* capable of *justifying* the restriction of other constitutional values, there are no decisions providing that Article 40.1 can *require* the restriction of other constitutional values. [I am indebted to Dr. Conor O’Mahony (Senior Law Lecturer, U.C.C) for bringing this important distinction to my attention].

¹⁷⁷ *Ibid.* at 105.

¹⁷⁸ *Ibid.* at 113.

their imaginations to conceive of reasons that *may* have influenced the Legislature to justify the discrimination.¹⁷⁹

This willingness to accept hypothetical justifications dulls the edge of Article 40.1 reviews as there is a major disparity between questioning whether something is justified and simply asking whether it could reasonably be justified.¹⁸⁰ Thus, standards of review which permit hypothetical justification provide a very low standard of judicial review because it is arduous to discern when deference actually stops.¹⁸¹

In *Zappone*, although Dunne J. primarily held that there was no discrimination because of another constitutional value, Dunne J. later hypothesised that:

... if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry ... justification must surely lie in the issue as to the welfare of children Until such time as the state of knowledge as to the welfare of children is more advanced ... the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit that there is no evidence of any adverse impact on welfare*.¹⁸²

As noted previously, the ‘child welfare’ argument is seriously flawed because *inter alia* it conflates heterosexuality with parental competency.¹⁸³ Thus, although accepting that there is no definitive evidence that being raised by same-sex parents has an adverse impact on child welfare, Dunne J. based her refusal (in part) on a hypothetical justification that (in the absence of definitive evidence) could reasonably be justified, rather than questioning whether the discrimination is justified due to an adverse impact on child welfare. Thus, unlike in *Halpern*, where the Canadian Court held that the ‘child welfare’ argument is an impermissible assumption which contravenes its constitutional equality guarantee: in *Zappone* the ‘child welfare’ argument was relied on to justify the exclusion of same-sex couples from marriage.

¹⁷⁹ M. Marguiles, “Standards of Review and State Action” (2002) 37 *Irish Jurist* 23 at 25.

¹⁸⁰ Doyle, *supra* note 5.

¹⁸¹ *Ibid.* at 114.

¹⁸² *Zappone*, *supra* note 3 at 70 [emphasis added].

¹⁸³ *Supra*, at pp 42-46.

Since this element of the decision relates to Article 40.1, assumed parental competency, and child welfare, it is quite surprising that no reference was made to the important decision in *O’G. v. Attorney General*.¹⁸⁴ In *O’G.*, a childless widower challenged section 5(1) of the *Adoption Act 1974* which prohibited childless widowers but not childless widows from adopting a child. In light of the fact that there was no evidence to support the proposition that widowers lacked parental competency in comparison to widows, McMahan J. held that section 5(1) was unconstitutional as it was “founded on an idea of difference in capacity between men and women which has no foundation in fact and the proviso is therefore an unwarranted denial of human equality and repugnant to [Article 40.1] of the Constitution.”¹⁸⁵ Thus McMahan J. refused to imagine a hypothetical justification, instead demanding an actual justification which did not exist.

Clearly, there are parallels between *O’G.* and *Zappone*, as both discriminations derive from assumptions about parental competency and child welfare and it is only in the respective trial judges’ reasoning that the two cases diverge as Dunne J. accepted an assumption about same-sex couples and child welfare to justify the discrimination, whilst McMahan J. was not prepared to accept such assumptions in relation to widowers.

In light of her refusal to extend the definition of marriage, what is Dunne J.’s conclusion other than an assumption that being raised by same-sex couples is detrimental to child welfare? At this point it is worth recalling Walsh J.’s classic *dicta* from *Quinn’s Supermarket* that Article 40.1 is a guarantee “against any inequalities grounded upon an *assumption*, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their *human attributes* ... are to be treated as the *inferior or superior* of other individuals in the community.”¹⁸⁶

However, considering that Dunne J. relied on a hypothetical justification there was no need to seriously consider whether the discrimination was justified, and

¹⁸⁴ *O’G. v. Attorney General*, [1985] I.L.R.M. 61 [hereinafter *O’G.*].

¹⁸⁵ *Ibid.* at 65.

¹⁸⁶ *Quinn’s Supermarket*, *supra* note 129 at 13-14 [emphasis added].

a hypothetical justification based on a stereotypical assumption prevailed.¹⁸⁷ Indeed, hypothetical justifications may not even be justifications at all as the courts simply consider what could conceivably be raised as a counter argument to justify the discrimination and accept it, without any in-depth inquiry as to whether it does in fact provide justification (*i.e.* by definition this is what separates actual justification from hypothetical justification).

This raises the interesting issue of reconciling permissible hypothetical justifications with impermissible assumptions, *i.e.* where do permissible hypothetical justifications end and impermissible assumptions begin? In *Zappone* it appears that the two were conflated as the hypothetical justification itself was based on an impermissible assumption – the effect being that same-sex couples were excluded from the right to marry on the basis of a stereotypical assumption of inferiority.

Thus, since there is an unenumerated ‘right to marry,’ what impact should this have on an Article 40.1 review, *i.e.* although hypothetical justifications are normally acceptable¹⁸⁸ should an actual justification be required where a fundamental right is curtailed? (*I.e.* evidence of an actual adverse impact on child welfare). Recently, in *Redmond v. Minister for the Environment*¹⁸⁹ Herbert J. appeared to take such an approach.¹⁹⁰ Here the constitutionality of requiring election candidates to pay electoral deposits¹⁹¹ was challenged. Herbert J. reading Article 16.1 in conjunction with Article 40.1 rejected the justifications advanced by the State for the electoral deposit requirement¹⁹² and thus suggests that limitations of constitutional rights require actual justification.¹⁹³ In contrast to *Zappone*, this decision represents a coherent development of constitutional equality law, the very fact that such rights are described as ‘fundamental’ surely envisages that there must

¹⁸⁷ One would think that the very purpose of Article 40.1 is to act as a bulwark against such assumptions.

¹⁸⁸ *E.g. Somjee v. Minister for Justice* [1981] I.L.R.M. 324, *Loftus v. Attorney General* [1979] I.R. 221, *Norris, supra* note 40.

¹⁸⁹ *Redmond v. Minister for the Environment*, [2001] 4 I.R. 61.

¹⁹⁰ Doyle, *supra* note 137 at 117.

¹⁹¹ Section 47 of the *Electoral Act 1992* required candidates to pay an electoral deposit of £300. Section 14 of the *European Parliament Elections Act 1997* required candidates to pay an electoral deposit of £1000.

¹⁹² There was a viable alternative to the monetary requirement (the nomination and signatures system) which could meet the same objectives as the deposit system without excluding so many people on financial grounds.

¹⁹³ Doyle, *supra* note 5 at 117.

be powerful reasons to justify limitations or exclusions from constitutional rights, limitations based on assumptions should not be sufficient.

XIV - Conclusions

In *Fourie*, Sachs J. noted that, “[t]he test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfoting.”¹⁹⁴ Arguably, it is due to this ‘discomfort’ that the arguments against same-sex marriage have been accorded such weight – even though they cannot survive anything more than a superficial analysis.

The ‘definitional’ argument is sophistic and ultimately unconvincing as its suggestion that marriage is heterosexual because it ‘just is’ ensures that there is no in-depth inquiry to determine whether the complete exclusion of same-sex couples is justifiable in the first place. Due to the recent relaxation of other traditional elements of marriage, the perception that the opposite-sex requirement is immutable and thus unalterable is equally unconvincing. The ‘unjust attack’ argument is unpersuasive as it is necessarily predicated on the belief that same-sex relationships are inferior or inappropriate. It is also fallacious, as the continued failure to allow such committed couples access to marriage could itself be regarded as an attack upon the institution of marriage or a failure to guard it so as to ensure its continued significance *i.e.* by unnecessarily diverting such couples to the soon-to-be implemented Civil Partnership regime.

The emotive ‘child-welfare’ argument is particularly unconvincing as it is based on an unproven assumption of inferiority of same-sex couples. It also represents a ‘double-standard,’ as the law imposes no restrictions on heterosexuals from marrying, even for those actually proven to be a threat to children: so why should an *unproven* risk justify the exclusion of *all* same-sex couples?¹⁹⁵ Both the original and reformulated procreation arguments are perhaps the most unconvincing of all such arguments as they simply cannot explain why infertile heterosexual couples are allowed to marry whilst same-sex couples are not.

¹⁹⁴ *Fourie*, *supra* note 1 at para. 60.

¹⁹⁵ Marcossan, *supra* note 68 and Eskridge, *supra* note 69.

Thus, considering that there is an unenumerated constitutional right to marry, the Supreme Court must not rely on arguments, the strength of which it would not accept in other contexts in respect to the limitation of a different constitutional right. At High Court, neither the right to marry nor the equality arguments were considered in sufficient detail.

Indeed, one of the most disappointing aspects of the *Zappone* decision was the treatment of the Article 40.1 claim. Dunne J.'s conclusion that the distinction to disallow same-sex marriage does not need to be justified because it is a distinction made by the Constitution itself (*via* Article 41) is clearly questionable, given the fact that the term 'Marriage' is not expressly defined in the Constitution.

If it is accepted that the discrimination is not made by the Constitution itself, then justification for the discrimination must come either in the form of an equality-affirming classification or because it serves a legitimate legislative purpose. However, the significance of concluding that Article 41 does not contain the distinction cannot be underestimated because it then forces the court to consider whether sexual orientation is an essential attribute of the human person. If this is accepted, then it is likely that such classifications are *presumptively invalid*, requiring the State to show a legitimate legislative purpose.

In this regard given the fact that there is a personal unenumerated right to marry which is phrased in a gender-neutral way, it is entirely possible that such justifications are subject to a stricter standard of review which only accepts actual justifications, not hypothetical justifications. Given the weaknesses of the arguments against same-sex marriage, an insistence on actual justifications may cause the Supreme Court to reconsider the definition of marriage. This, however, would require the Supreme Court to give its most progressive interpretation of Article 40.1 to date: something which it may be reluctant to do given Article 40.1's emasculated¹⁹⁶ history.¹⁹⁷

¹⁹⁶ Casey criticises the restricted scope given to Article 40.1, the significance of which has been traditionally 'read-down' by the Courts through such limitations as the 'human personality' doctrine, the single benign standard of rational basis review, and the willingness to accept hypothetical justifications. J. Casey, *Constitutional Law in Ireland*, 3rd ed. (Dublin: Roundhall Sweet & Maxwell, 2000) at 452-475.

Nonetheless, it is the role of the court to protect rights for *all* people, whether powerful, powerless, popular, or despised.¹⁹⁸ The Legislature, through the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, has made its intentions clear: to perpetuate inequality and to exclude same-sex couples from the most fundamental of rights. In light of the Legislature's failure to thoroughly examine the exclusion of same-sex couples from marriage, it is not unimaginable that the Supreme Court may prefer to "light a candle, than to curse the darkness."¹⁹⁹

¹⁹⁷ If the Supreme Court categorises classifications based on sexual orientation as not being 'presumptively invalid' which are subject only to rational basis review which can be hypothetically justified then it is likely that the arguments against same-sex marriage will prevail (despite their weaknesses) given the highly deferential nature of hypothetical justification.

¹⁹⁸ Gerstmann, *supra* note 10 at 9.

¹⁹⁹ Adlai Stevenson, on learning of Eleanor Roosevelt's death stated in the *New York Times* 8 November 1962 that, "[s]he would rather light a candle than curse the darkness, and her glow has warmed the world." in T. Smart, *The Oxford Dictionary of 20th Century Quotations* (St. Helens: Oxford University Press, 1998) at 298.