

# Same-Sex Marriage and the Irish Constitution

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**Abstract:** This paper examines the recent Irish High Court case of *Zappone and Gilligan v. Revenue Commissioners and others*, a challenge to the constitutionality of the state’s interpretation of the Irish Tax Code *vis-à-vis* the foreign marriage of a same-sex couple and their right to marry each other under Irish law. The right to marry and the nature of marriage are undefined in the Irish Constitution. Thus, a progressive interpretation may take into account contemporary knowledge of sexuality and sexual orientation and norms of equality and non-discrimination. This paper also discusses the ‘living document’ approach to constitutional interpretation and argues that the High Court misapplied the methodology of Supreme Court Justice Murray in *Sinnott v. Minister for Education*, which may offer the means to interpreting the Irish Constitution as protecting the right to marry another person of the same sex.

## Introduction

The case of *Zappone and Gilligan v. Revenue Commissioners and others*<sup>1</sup> was the first detailed judicial discussion in Ireland on an individual’s right, if any, to marry another person of the same sex under the Irish Constitution and laws together with one’s right to private and family life and to marry under the European Convention on Human Rights. In analysing the High Court judgment, I will focus solely on the constitutional questions that it poses as the appellate proceedings currently pending before the Supreme Court will rest on the constitutional questions on the right to marry and not compatibility with the Convention. I will examine the judicial interpretive approach underpinning the High Court judgment, namely, the ‘living document’ approach, and argue that the approach adopted by the High Court did not comport with that by the Supreme Court Justice Murray in *Sinnott v. Minister for Education*<sup>2</sup> upon which the High Court approach was

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<sup>1</sup> [2006] IEHC 404.

<sup>2</sup> [2001] 2 IR 545.

supposedly based. Indeed, I argue that the *Sinnott* approach offers hopes for an interpretation alternative to the High Court's finding that recognises a constitutional right to marry another person of the same sex.

### **Bunreacht na hÉireann (Constitution of Ireland) 1937**

The drafting of the Irish Constitution preceded the process of international human rights standard-setting within the United Nations and regional organisations and is much reflected by the language and substantive content of its fundamental rights provisions (Articles 40-44). As Whyte argues,<sup>3</sup> the language of the Constitution demonstrates the fusion of Christian and liberal democratic ideology, with the former influenced 'to some extent' by the Catholic teachings and doctrines of the time.<sup>4</sup> While this fusion, or perhaps tension, subsumes the entire text of the Constitution, it is particularly glaring in the fundamental rights provisions. For example, it has been argued that Article 40, which guarantees the personal rights of the citizen including equality and the right to life, derives from 'secular and rationalist theory'.<sup>5</sup> In contrast, Article 41, which protects the rights of the family, and Article 42, which guarantees the right to education, are both considered to have been influenced by papal encyclicals and contemporary Catholic social teachings.<sup>6</sup> The family, which the Constitution defines as 'a natural and fundamental unit group' and whose rights are 'inalienable', 'imprescriptible' and 'antecedent and superior to all positive law',<sup>7</sup> is a 'moral institution' founded upon 'marriage'.<sup>8</sup>

Chubb has applied Martin's theory of secularisation to early twentieth-century state-building in Ireland on the basis of a religious and nationalist identity,<sup>9</sup> where Martin argues that an 'indissoluble union' of Church and State occurs in circumstances where the Church constitutes the sole agent of nationalism against political and cultural domination by a foreign power.<sup>10</sup> Thus, nations with such a union remain 'areas of high practice and belief'.<sup>11</sup> Keogh explains that in the decade following the Irish war of independence and a bitter civil war in Ireland, there was 'a pressing need for common ground where citizens could gather irrespective of political affiliation, which found expression in the search for marks of national identity, which were identifiably different from those that have long characterised the British national ethos'.<sup>12</sup> In particular,

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<sup>3</sup> G. Whyte, 'Some Reflections on the Role of Religion in the Constitutional Order', in P. Tuomey and T. Murphy, eds., *Ireland's Evolving Constitution 1939-1997* (Dublin: Hart, 1998), 51, 60-61.

<sup>4</sup> J.M. Kelly, *Fundamental Rights in Irish Law* (Dublin: Allen Figgis, 1967), 57-58. See also M. Gallagher, 'The Constitution and the Judiciary', in J. Coakley and M. Gallagher, *Politics in the Republic of Ireland*, 4<sup>th</sup> ed. (Dublin: Routledge, 2005), 72.

<sup>5</sup> D. Costello, 'The Natural Law and the Irish Constitution', *Studies*, Vol.45 (1956), 403, 414.

<sup>6</sup> J.H. Whyte, *Church and State in Modern Ireland 1923-1970* (Dublin: Gill and Macmillan, 1980), 51-52. See also W.R. Duncan, 'Supporting the Institution of Marriage in Ireland', *Irish Jurist*, Vol.13 (1978), 215, 221.

<sup>7</sup> Article 41(1)(1) states that '[t]he 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.' See *The State (Nicolaou) v. An Bord Úchtála* [1966] IR 567.

<sup>8</sup> Article 41(3)(1) states 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.'

<sup>9</sup> B. Chubb, *The Politics of the Irish Constitution* (Dublin: Institute of Public Administration, 1991), 40.

<sup>10</sup> D.A. Martin, *A General Theory of Secularisation* (Oxford: Blackwell, 1978), 107.

<sup>11</sup> *Ibid.*

<sup>12</sup> R. Fanning, 'Mr de Valera drafts a Constitution', in B. Farrell, ed., *De Valera's Constitution and Ours* (Dublin: Gill and Macmillan, 1988), 33, 42.

religion and language became ‘the two most obvious hallmarks of independent Ireland’.<sup>13</sup> More recently, however, Hogan criticises previous literature on the drafting of the Constitution for over-emphasising the influences of the Church and failing to acknowledge the extent of improvements upon the 1922 Saorstát Éireann (Free State) Constitution and the role of drafters other than incumbent Taoiseach (Prime Minister) Eamon de Valera, and argues that as a result of the Northern Ireland conflict, many commentators focused on aspects of the Irish Constitution considered to be confessional or to be offensive to the minority religious or political traditions.<sup>14</sup> Instead, the more remarkable facet of the Constitution, Hogan discerns, is the extent of its secular or liberal democratic values, its respect for individual rights, its separation of Church and State, and the extent to which it does *not* reflect the Catholic teachings of the 1930s.<sup>15</sup> Based on a comparative analysis, he contends that the Constitution in many respects is not dissimilar to other constitutions of its age. The original text of Article 44, respecting freedom of religion yet explicitly recognising the special position of the Roman Catholic Church, is often cited as a prime example of the Irish Constitution’s overt Catholic influences and its uniqueness.<sup>16</sup> However, from ‘a necessarily incomplete’ survey of written or ‘unwritten’ constitutions from other European states in the pre- and post-World War II periods,<sup>17</sup> Hogan concludes that a ‘broad pattern’ emerged: predominantly Protestant or Lutheran states would provide for an established Church; predominantly Catholic states the ‘special position’ status of the Roman Catholic Church; and predominantly Orthodox states either an established or a specially positioned Church.<sup>18</sup> Thus, judging by the contemporary European standards of 1937, Hogan argues that the ‘special position’ of the Roman Catholic Church in the original text of Article 44 was not of an exceptional character.<sup>19</sup>

Another provision often cited as embodying and representing the influences of Catholic social teaching is the express constitutional protection for the institution of marriage in Articles 41 and 42. However, this was not an idea original to the drafters. Hogan refers to Article 119 of the 1919 Constitution of the Weimar Republic, which expressly conferred special constitutional protection on the institution of marriage.<sup>20</sup> In fact, the Irish and the Weimar Constitutions had other similarities,<sup>21</sup> demonstrating the influence of comparative constitutional traditions already prevalent at the time. Hogan argues that Articles 41 and 42 most probably ‘reflect a diverse jumble of sources, ranging from papal encyclicals to the Weimar provisions to Article 16 of the [Anglo-Irish Treaty

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<sup>13</sup> Ibid.

<sup>14</sup> G. Hogan, ‘De Valera, the Constitution and the Historians’, *Irish Jurist*, Vol.40 (2005), 293.

<sup>15</sup> Ibid., 294.

<sup>16</sup> D. Keogh, ‘The Irish Constitutional Revolution: An Analysis of the Making of the Irish Constitution’, in F. Litton, *The Constitution of Ireland: 1937–1987* (Dublin: Institute of Public Administration, 1988), 4, 39.

<sup>17</sup> Hogan, note 14 above, 301 (referring to the Act of Settlement 1701 (England), the 1814 Constitution of Norway, the 1921 Constitution of Poland, the 1948 Constitution of the Italian Republic, the 1978 Constitution of the Republic of Spain, and the 2001 Constitution of the Hellenic Republic of Greece).

<sup>18</sup> Ibid.

<sup>19</sup> Ibid., 302.

<sup>20</sup> Ibid., 303. Article 119 of the 1919 Constitution of the Weimar Republic, quoted *ibid.*, stated that ‘marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the constitution’.

<sup>21</sup> Hogan, *ibid.*

of 1921]’.<sup>22</sup> Expectation for a wholly secular document would be unrealistic given Ireland’s pre-Constitution history and the Constitution’s language and content reflect a wider range of sources than has previously been considered.<sup>23</sup>

### **Interpretation of Bunreacht na hÉireann**

How important is the source of inspiration for Articles 41 and 42? Hogan argues that even if the provisions were exclusively inspired by Catholic social teaching, ‘the case law has long since broken loose of that particular inspirational source’.<sup>24</sup> This independence began with *McGee v. A.G.*,<sup>25</sup> where the Supreme Court ruled that a right to marital privacy protected a spouse from state interference against the use of contraceptives within marriage through enforcement of the criminal law. However, the inspiration did also enable the natural law approach to constitutional interpretation to have particular vibrancy in early jurisprudence, most notably through application of the doctrine of unenumerated rights developed in *Ryan v. A.G.*<sup>26</sup> There the High Court held that Article 40(3)(2), which respected ‘in particular’ the right to life, person, good name and property,’ was a ‘detailed statement’ of the rights protected under the general guarantee of Article 40(3)(1) which ‘must extend to rights not specified in Article 40’ as derived from ‘the Christian and democratic nature of the State’.<sup>27</sup> Thus, it fell upon individual judges to determine the existence of such unenumerated rights, which the courts have since undertaken as part of the common law tradition.<sup>28</sup>

As one of the factors for its continuing prevalence, the ‘willingness’ of some judges to invoke a natural legal order enabling the natural law approach to have a ‘stubborn vibrancy’ has been cited.<sup>29</sup> However, Hogan and Whyte argue that there has also been growing ‘judicial unease’ with determining the theoretical source for the rights protections.<sup>30</sup> For example, in *T.F. v. Ireland*,<sup>31</sup> the High Court refused to admit the expert testimony of theologians on natural legal theory regarding marriage or the essential features of Christian marriage,<sup>32</sup> holding that while the constitutional order may recognise a natural legal order, the determining factor for the judge was the express or implied terms of the fundamental rights provisions, ‘from whatever source they are derived’.<sup>33</sup> In *Re Article 26 and the Information (Termination of Pregnancies) Bill, 1995*,<sup>34</sup> the Supreme Court rejected the notion that natural law as the fundamental law of the state prevailed over the express determination of the people, who are ‘paramount’,<sup>35</sup>

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<sup>22</sup> *Ibid.*, 306.

<sup>23</sup> *Ibid.*

<sup>24</sup> G. Hogan, ‘The Constitution, Property Right and Proportionality’, *Irish Jurist*, Vol.32 (1997), 373, 396.

<sup>25</sup> [1974] IR 384.

<sup>26</sup> [1965] IR 294.

<sup>27</sup> *Ibid.*, 312. Article 40(3)(1) states that ‘[t]he State shall guarantee in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.’

<sup>28</sup> *Ryan*, *ibid.*, 313.

<sup>29</sup> G.W. Hogan and G.F. Whyte, *J.M. Kelly: The Irish Constitution*, 4<sup>th</sup> ed. (Dublin: Tottel, 2006), 31.

<sup>30</sup> *Ibid.*, 1827.

<sup>31</sup> [1995] 1 IR 321.

<sup>32</sup> *Ibid.*, 333.

<sup>33</sup> *Ibid.*

<sup>34</sup> [1995] 1 IR 1.

<sup>35</sup> *Ibid.*, 38.

in exercising their power to amend the Constitution through a referendum.<sup>36</sup> However, the courts have failed to reach a consensus on the philosophy underpinning the rights protections, with *North Western Health Board v. H.W.*<sup>37</sup> being a clear demonstration of the differing views. There the Supreme Court offered two philosophies underpinning Article 41: natural law in common with other philosophies<sup>38</sup> and the pre-Reformation common law tradition.<sup>39</sup> In this respect, Hogan advocates a focus solely on the ‘inherent value of the right’ to be protected rather than on the probable philosophical underpinnings.<sup>40</sup>

The natural law approach is one of five different interpretative approaches traditionally identified within the jurisprudence; the others are, namely, the literal, the broad, the harmonious, and the historical.<sup>41</sup> As Hogan and White emphasise, there is no consistency within the case law regarding any of the particular approaches, raising worry that ‘individual judges are willing to rely on any such approach as will offer adventitious support for a conclusion’ already reached.<sup>42</sup> These approaches, in particular the natural law approach, have been discussed elsewhere.<sup>43</sup>

### **The right to marry and the institution of marriage in Ireland**

In 1951, the High Court adjudicated on a provision within the code of practice for members of An Garda Síochána (Irish Police) requiring police officers to inform the Garda Commissioner of their intention to marry. *Donovan v. Minister for Justice*<sup>44</sup> is noteworthy as it was the first judgment to find that a right to marry was implied in the Constitution. Subsequently in *Ryan*, the High Court discerned that a right to marry derived from Article 41 of the Constitution, particularly the reference to ‘the institution of marriage’ in Article 41(3)(1), but that such a right was protected also as a personal right under Article 40(3)(1). The court reasoned that the terms ‘constitution and authority’ in Article 41 determined the scope of the rights of the family as a ‘moral institution’ founded upon marriage.<sup>45</sup> The ruling was then followed by the High Court in *Murray v. Ireland*<sup>46</sup> and subsequently upheld by the Supreme Court; the High Court in *Murray* supported the finding of Article 41 as a provision protecting the collective rights of the family whereas ‘personal rights, which each individual member might enjoy by virtue of membership of the family’, must be protected under Article 40(3).<sup>47</sup>

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<sup>36</sup> Ibid.

<sup>37</sup> [2001] 3 IR 662.

<sup>38</sup> Ibid., 687.

<sup>39</sup> Ibid., 757.

<sup>40</sup> Hogan, note 14 above, 306. His position was supported by the Supreme Court in *North Western Health Board*, note 37 above.

<sup>41</sup> Hogan and Whyte, note 29 above, 3.

<sup>42</sup> Ibid.

<sup>43</sup> For more recent criticisms, see, e.g., O. Doyle, ‘Legal Validity: Reflections on the Irish Constitution’, *Dublin University Law Journal*, Vol.25 (1993), 56; G.F. Whyte, ‘Natural Law and the Constitution’, *Irish Law Times*, Vol.14 (N.S.) (1996), 8; M. de Blacam, ‘Justice and Natural Law’, *Irish Jurist*, Vol.32 (1997), 323; S. Mullally, ‘Searching for Foundations in Irish Constitutional Law’, *Irish Jurist*, Vol.33 (1998), 333; A. O’Sullivan and P.C.W. Chan, ‘Judicial Review in Ireland and the Relationship between the Irish Constitution and Natural Law’, *Nottingham Law Journal*, Vol.15 No.2 (2006), 18.

<sup>44</sup> (1951) 85 ILTR 134.

<sup>45</sup> *Ryan*, note 26 above, 308. The Supreme Court approved the reasoning of the High Court.

<sup>46</sup> [1985] ILRM 545.

<sup>47</sup> Ibid., 547.

The courts have interpreted the nature of marriage in accordance with the common law tradition. The oft-cited definition of marriage originated from the English matrimonial court's decision in *Hyde v. Hyde and Woodmansee*,<sup>48</sup> where it was polygamy that was in issue. The court concluded that 'marriage, as understood in Christendom, may ... be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'.<sup>49</sup> In *Ussher v. Ussher*,<sup>50</sup> the former Irish High Court of Justice described the common law and canon law of England and Ireland as identical in the pre-Reformation period and 'all were substantially governed, so far as marriage law is concerned, by the Canon law, as decreed and expounded from Rome'<sup>51</sup> but administered by the ecclesiastical court sometimes referred to as the 'Court Christian'.<sup>52</sup>

However, pre-1937 statute law and case law must be consistent with the Irish Constitution.<sup>53</sup> According to *Pigs Marketing Board v. Donnelly (Dublin)*<sup>54</sup> and *Educational Company v. Fitzpatrick*,<sup>55</sup> a statute enacted by Parliament of Saorstát Éireann (Irish Free State) or of the United Kingdom does not enjoy a presumption of constitutionality that attaches to post-1937 Acts of the Oireachtas (Houses of Parliament of Ireland). The courts apply a presumption of constitutionality to guarantee judicial deference to the Oireachtas and place the burden on the petitioner to prove otherwise. The only exception for a pre-1937 law is where the Oireachtas has effectively re-enacted the common law or statutory rule.<sup>56</sup> The common law definition of marriage has been applied by Irish courts and re-enacted by the Oireachtas through the Civil Registration Act 2004, which lists 'both parties are of the same sex' as an impediment to a valid marriage.<sup>57</sup> Express reference to the common law definition of marriage was made in *B. v. R.*,<sup>58</sup> where the High Court prescribed marriage, as previously and contemporaneously conceived, as 'the voluntary and permanent union of one man and one woman to the exclusion of all others for life'.<sup>59</sup> In *Murray*, the High Court described marriage as 'derived from a Christian notion of partnership', 'a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship'.<sup>60</sup> Supreme Court Justice McCarthy in *N. v. K.*<sup>61</sup> went further to hold that marriage, as a 'civil contract', created 'reciprocating rights and duties between the

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<sup>48</sup> (1866) LR P & D 130.

<sup>49</sup> *Ibid.*, 133.

<sup>50</sup> [1912] 2 IR 445.

<sup>51</sup> *Ibid.*, 458.

<sup>52</sup> *Ibid.*, 459.

<sup>53</sup> Article 50(1) states that '[s]ubject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.'

<sup>54</sup> [1939] IR 413.

<sup>55</sup> [1961] IR 345.

<sup>56</sup> *ESB v. Gormley* [1985] ILRM 494.

<sup>57</sup> Civil Registration Act 2004, No.3/2004, Art.2(2)(e). There was no debate on this paragraph in the Dáil (Chamber of Representatives): see Dáil debates, Vol.578, col.276. The only disquiet raised in the Seanad (Senate) was from Senator David Norris: see Seanad debates, Vol.175, col.652.

<sup>58</sup> [1995] 1 ILRM 491.

<sup>59</sup> *Ibid.*, 495.

<sup>60</sup> *Murray*, note 46 above, 536.

<sup>61</sup> [1985] IR 733.

parties' and constituted a 'status' relationship affecting the individual parties and the community as a whole.<sup>62</sup> *Murray and N. v. K.* were subsequently approved by the Supreme Court in *T.F. v. Ireland*.<sup>63</sup> In *T. (D.) v. T. (C.)*,<sup>64</sup> Supreme Court Justice Murray held marriage to be 'a solemn contract of partnership entered into between a man and a woman with a special status recognised by the Constitution'.<sup>65</sup>

In *Foy v. An t-Ard Chláraitheoir*,<sup>66</sup> the High Court discussed the issue of capacity. The petitioner, who suffered from gender dysphoria, challenged the refusal of the Registrar to amend her birth certificate to accord with her male-to-female gender reassignment<sup>67</sup> and sought a declaration of unconstitutionality *vis-à-vis* the Registration of Births and Deaths (Ireland) Act 1863 (as amended) for breaching her rights to equality, privacy, and dignity as well as her right to marry under the Constitution.<sup>68</sup> While the court refused relief, it called upon the Oireachtas to urgently review the matter that had such impact on many individuals 'in a most personal and profound way ... of deep concern to any caring society'.<sup>69</sup> It must be noted that the petitioner claimed that the state arbitrarily interfered with her right to marry a biological male and was not seeking to be or remain married to a biological female. Hence, the petitioner did not challenge the common law definition of marriage as opposite-sex-based but the legal concept of gender as solely based on biological factors determined at birth. Importantly for the court, she was legally married to (albeit separated from) a biological female and had not sought divorce or annulment.<sup>70</sup> Thus, her existing marriage was more immediately relevant to her lack of capacity than her birth certificate.<sup>71</sup> Notwithstanding, the court reaffirmed the common law definition of marriage as opposite-sex-based<sup>72</sup> and held that the right to marry was not absolute and must be evaluated in the context of other constitutional rights including the 'rights of society'.<sup>73</sup> It is clear that the potential dissolution of the petitioner's marriage weighed heavily in the court's decision.<sup>74</sup> Such 'unease', in the light of the fact that all of her other legal documents recognised her reassigned gender identity, struck a 'fair, reasonable and just balance' in the context of competing constitutional rights.<sup>75</sup> Thus, it would appear that the right to marry under Article 40(3) was evaluated *against* the rights of the family under Article 41. As for the 'rights of society', the court stressed the need to be 'conscious of society as a whole',<sup>76</sup> which appeared to be invoking concepts such as the 'common good' that the Preamble prescribes as a goal sought to be achieved by the state in order to ensure the dignity of the individual and to attain true

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<sup>62</sup> *Ibid.*, 754.

<sup>63</sup> [1995] 1 IR 321.

<sup>64</sup> [2002] 3 IR 355.

<sup>65</sup> *Ibid.*, 405. However, the appellate judgment examined the terms of a divorce settlement awarded by the High Court and consequently neither the Chief Justice for the majority nor the dissenting judgments made declarations on the concept of marriage under Article 41.

<sup>66</sup> [2002] IEHC 116.

<sup>67</sup> *Ibid.*, para.62.

<sup>68</sup> *Ibid.*, para.65.

<sup>69</sup> *Ibid.*, para.177.

<sup>70</sup> *Ibid.*, para.175.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, para.131.

<sup>74</sup> *Ibid.*, para.128.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, para.126.

social order. In its judgment, the court referred to the harmonious approach,<sup>77</sup> whereby a provision of the Constitution must be construed in such a way that it would not ‘lead to conflict with other Articles and which conforms with the Constitution’s general scheme’.<sup>78</sup> The courts, thus, must interpret provisions not in isolation but must harmonise a particular provision with the Constitution as a whole.<sup>79</sup> The doctrine has been described as ‘no more than a presumption that the people who enacted the Constitution had a single scale of values and wished those values to permeate their charter evenly and without internal discordance’.<sup>80</sup> Thus, in *Foy* the court must harmoniously interpret the right to marry with the context of the fundamental rights provisions as a whole and the avowed aspirations of the Constitution. Again, it is clear that the controlling issue was the inability of the petitioner’s marriage to remain legally valid if her reassigned gender identity were to be legally recognised on her birth certificate given that under the law as it stood marriage must be between two persons of opposite sexes. The High Court, then, appeared to find that the right to marry must not impinge upon the rights of the family or bring about the dissolution of a valid marriage other than by divorce or annulment.

As Eardly argues, however, by interpreting the Constitution on the basis of the common law and statute, the court in *Foy* effectively sidestepped the inevitable result of the petition, that the definition of marriage under the common law and statute was itself unconstitutional.<sup>81</sup> Thus, the Constitution must ‘reflect the common law and statute rather than the other way round’.<sup>82</sup> As Supreme Court Justice Walsh pointed out in his extra-judicial writings, the Constitution as the ‘basic law of the State’ ‘controls the Statute and Common law’ and, in cases of conflict, prevails.<sup>83</sup>

It is also of note that the court’s judgment was delivered immediately before the European Court of Human Rights rendered its judgment in *Goodwin v. United Kingdom*,<sup>84</sup> where the Strasbourg court ruled that gender may be determined by criteria other than ones ‘purely biological’,<sup>85</sup> thus recognising the gender of post-operative transgender persons. After *Goodwin*, the European Convention on Human Rights Act 2003 was enacted, incorporating the Convention into Irish law through an interpretative mode of incorporation at sub-constitutional level.<sup>86</sup> The courts must thenceforth interpret and apply any statutory provision or rule of law ‘as far as possible’ in a manner compatible with Ireland’s obligations under the Convention<sup>87</sup> and, in cases where no other legal remedy is adequate, issue a declaration of incompatibility.<sup>88</sup> In 2007, Foy became the first person to be granted a declaration of incompatibility by the High

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<sup>77</sup> Ibid., para.101.

<sup>78</sup> *The State (Director of Public Prosecutions) v. Walsh* [1981] IR 412, 425.

<sup>79</sup> Hogan and Whyte, note 29 above, 8. See also *Dillane v. Ireland* [1980] IRLM 167.

<sup>80</sup> Hogan and Whyte, *ibid.*

<sup>81</sup> J. Eardly, ‘The Constitution and Marriage – The Scope of Protection’, *Irish Law Times*, Vol.11 (2006), 167, 168.

<sup>82</sup> Ibid.

<sup>83</sup> B. Walsh, ‘The Constitution: A View from the Bench’, in Farrell, note 12 above, 188, 191.

<sup>84</sup> (2002) 35 EHRR 447.

<sup>85</sup> Ibid., para.99.

<sup>86</sup> A. Lowry, ‘Practice and Procedure under the European Convention on Human Rights Act 2003’, *Bar Review* (November 2003), 183, 185.

<sup>87</sup> European Convention on Human Rights Act 2003, No.20/2003, s.2(1).

<sup>88</sup> Ibid., s.5(1).



Court.<sup>89</sup> There the court strongly reprimanded the state for its failure to legislate for gender recognition<sup>90</sup> given the intervening five-year period since its initial decision and *Goodwin*. The court noted the petitioner's ongoing divorce proceedings<sup>91</sup> but maintained that if the petitioner had been divorced, it would hold the reasoning in *Goodwin* on the right to marry under Article 12 to be compelling and applicable in Ireland notwithstanding Articles 41 and 42 of the Constitution.<sup>92</sup> Consequently, while it has not been definitively stated,<sup>93</sup> it seems certain that the right to marry in Irish law extends to persons who have undergone post-gender reassignment and who seek to marry another person of the opposite sex.

In *Zappone and Gilligan v. Revenue Commissioners and others*, the petitioners challenged the Revenue Commissioners' decision to preclude them from availing of tax benefits afforded exclusively married couples under the Taxes Consolidation Act 1997.<sup>94</sup> The petitioners supported their claim as a married couple with their marriage certificate from British Columbia, Canada.<sup>95</sup> However, the commissioners refused their claim on the basis of the phrase 'husband and wife' in the taxes legislation as defined by the Oxford English dictionary, which referred to an opposite-sex marital relationship.<sup>96</sup> In their application before the High Court, the petitioners argued that by failing to recognise their marriage, the state 'acted without lawful authority, subjected the plaintiffs to unjust and invidious discrimination and acted in breach of the constitutional rights of the plaintiffs' under Articles 40 and 41. Further and alternatively, the state's refusal to legally recognise their foreign marriage constituted discrimination on grounds of gender and/or sexual orientation in breach of Article 14 of the European Convention on Human Rights in conjunction with Articles 8 (right to private and family life) and Article 12 (right to marry).

The petitioners argued that the right to marry was a gender-neutral 'right to marry the one you love' and the state arbitrarily interfered with their right to marry through unjustifiable legal restrictions on capacity such as gender or sexual orientation in contrast to justifiable restrictions such as degrees of relationship or marriageable age.<sup>97</sup> The petitioners argued that gender and sexual orientation constituted *prima facie* discriminatory grounds<sup>98</sup> and the burden shifted to the state to justify such restrictions on their right to marry each other.<sup>99</sup>

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<sup>89</sup> *Foy v. An t-Ard Chláraitheoir and others* [2007] IEHC 470. In light of *Goodwin* and the enactment of the European Convention on Human Rights Act 2003, the petitioner sought to raise new issues in her appeal before the Supreme Court, which instead re-directed her case to the High Court to re-determine the question of compatibility at first instance.

<sup>90</sup> *Ibid.*, paras.100-102.

<sup>91</sup> *Ibid.*, para.104.

<sup>92</sup> *Ibid.*

<sup>93</sup> It was, however, mentioned in *Zappone and Gilligan*, note 1 above, 530, as a caveat to the traditional concept of marriage.

<sup>94</sup> Taxes Consolidation Act 1997, No.39/1997. Pt.15, ch.1. Under sections 1017 and 1019, married persons may elect to be jointly assessed for taxation purposes.

<sup>95</sup> Under section 29(1) of the Family Law Act 1995, No.26/1995, a foreign marriage may be recognised in Ireland where the applicants are domiciled in Ireland at the date of application or have ordinarily been resident in Ireland for a period of one year ending on that date.

<sup>96</sup> *Zappone and Gilligan*, note 1 above, 407.

<sup>97</sup> *Ibid.*, 444.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*, 445.

While the petitioners conceded that the framers of the Constitution considered the nature of marriage as opposite-sex-based, they nonetheless emphasised that the courts had never considered ‘whether marriage could encompass same sex marriage’.<sup>100</sup> Importantly, the description of marriage as a ‘very special life-long relationship’ equally applied to marriage between two persons of the same sex.<sup>101</sup> Furthermore, while the common law exclusion of same-sex marriage was based on capacity, there was no equivalent provision in the Constitution.<sup>102</sup> Underpinning their case was that the Constitution should be interpreted as a ‘living document’.<sup>103</sup> Thus, the definition of marriage was not constitutionally fixed or frozen but must be interpreted in accordance with ‘prevailing ideas and concepts’. In this respect, they cited a changing consensus on marriage with reference to decisions from the United States and Canada.<sup>104</sup>

In contrast, the state argued that the established methods of interpreting the Constitution could not give rise to a right to marry for the petitioners.<sup>105</sup> Otherwise, the court would ‘rewrite the plain wording of Article 41’ as well as the recent social policy choice of the Oireachtas.<sup>106</sup> Instead of harmoniously construing Article 41 with the fundamental rights provisions as a whole, the provision clearly intended for ‘the family constituting a mother, father and children of a heterosexual marriage’.<sup>107</sup> For the court to rule otherwise would amount to an amendment to the Constitution without requisite referendum.<sup>108</sup> Furthermore, the state contended that no jurisprudential basis had been presented that would allow for such radical alteration of the nature of marriage. The ‘living document’ approach, advocated by the petitioners, did not allow ‘the courts to depart from what the Constitution says or implies or was understood in 1937’.<sup>109</sup> While the courts may interpret the Constitution in light of prevailing ideas, it did not mean that ‘the words of the Constitution can be divorced from their historical context’.<sup>110</sup> Although the High Court considered that the Constitution should be interpreted as a ‘living document’, it agreed with the state that there was a difference between discovering unenumerated rights in *McGee* and re-defining a right ‘clearly understood ... to mean something which it has never done to date’.<sup>111</sup> Based on its analysis of Supreme Court Justice Murray’s methodology in *Sinnott*,<sup>112</sup> the court ultimately found that marriage, as contemporaneously understood, was opposite-sex-based and refused relief.

The ‘living document’ approach to constitutional interpretation is one yet to be entrenched within the jurisprudence. It may be traced to Supreme Court Justice Walsh’s dictum in *McGee* where he proposed the virtues of prudence, justice and charity as jurisprudential guides to ‘discovering’ the existence of unenumerated rights, holding that ‘[i]t is but natural that from time to time the prevailing ideas of these virtues may be

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<sup>100</sup> *Ibid.*, 470.

<sup>101</sup> *Ibid.*, 471.

<sup>102</sup> *Ibid.*, 450.

<sup>103</sup> *Ibid.*, 477.

<sup>104</sup> *Ibid.*, 454-477.

<sup>105</sup> *Ibid.*, 479.

<sup>106</sup> *Ibid.*, 483.

<sup>107</sup> *Ibid.*, 484.

<sup>108</sup> *Ibid.*, 483.

<sup>109</sup> *Ibid.*, 501.

<sup>110</sup> *Ibid.*, 484.

<sup>111</sup> *Ibid.*, 530.

<sup>112</sup> *Sinnott*, note 2 above.

conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts'.<sup>113</sup> It ought to be noted that Justice Walsh himself interpreted the Constitution in *McGee* on the basis of the natural law approach,<sup>114</sup> reiterating that Articles 40-44 subordinated law to justice,<sup>115</sup> the highest virtue in ancient Greek and early Christian philosophy, reinforced by prudence and charity, two other virtues that were also highly esteemed in ancient Greece and Christianity.<sup>116</sup> These three virtues were expressly stated in the Preamble to the Constitution as part of the central aim 'to promote the common good ... so that the dignity and freedom of the individual may be assured [and] true social order attained'.<sup>117</sup> Thus, judges must 'as best they can from their training and their experience interpret these rights in accordance with *their* ideas of prudence, justice and charity'.<sup>118</sup>

However, can his analysis have a broader application than as a jurisprudential tool for discovering unenumerated rights? Support may be derived from Justice Walsh's use of the semi-colon. *Hart's Rules* state that a semi-colon 'separates two or more clauses which are of more or less equal importance and are linked as a pair or series'.<sup>119</sup> Thus, the conditioning of prevailing ideas of prudence, justice and charity by the passage of time and the lack of a fixed interpretation of the Constitution are independent clauses. They have a close relation to one another and possess equal importance. My argument is further supported by the final sentence in the passage. 'It' refers to the interpretation of the Constitution, which must be interpreted in accordance with 'prevailing ideas and concepts'. In addition, as Justice Walsh has stated extra-judicially, the courts should view the Constitution as a 'contemporary fundamental law that speaks in the present tense'.<sup>120</sup> Thus, 'as a document, [the Constitution] speaks from 1937, but as law it speaks from today',<sup>121</sup> and it should not be interpreted as 'having a static meaning determined 50 years ago but on the basis that it lays down broad governing principles that can cope with current problems'.<sup>122</sup> It is argued that Justice Walsh advocated contemporaneous interpretation of the Constitution on the basis of 'prevailing' ideas of prudence, justice and charity. However, the 'prevailing ideas and concepts' are to be determined by individual judges who may or may not be influenced by their own subjective ideas and concepts when interpreting the Constitution. Subsequently, the Supreme Court in *State (Healy) v. O'Donoghue*<sup>123</sup> invoked Justice Walsh's dictum and argued that the 'rights given by the Constitution' must be 'considered' or determined in accordance with prudence, justice and charity, concepts which may gradually change and develop

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<sup>113</sup> *McGee*, note 25 above, 319.

<sup>114</sup> *Ibid.*, 310.

<sup>115</sup> *Ibid.*, 318.

<sup>116</sup> *Ibid.*, 319.

<sup>117</sup> Bunreacht na hÉireann 1937, Preamble.

<sup>118</sup> *McGee*, note 25 above, 319 (emphasis added).

<sup>119</sup> R. Hart, *Hart's Rules for Compositors and Readers at the University Press*, 39<sup>th</sup> ed. (Oxford: Oxford University Press, 1983).

<sup>120</sup> Walsh, note 83 above, 195.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> [1976] IR 325.

according to prevailing ideas and concepts.<sup>124</sup> The court held that such an approach to constitutional interpretation inhered in the Preamble to the Constitution.<sup>125</sup>

More recently in *Sinnott*, Supreme Court Justices Murray, Geoghegan, and Denham agreed with the thesis that the Constitution should be regarded as a living document and interpreted in accordance with ‘contemporary circumstances’ including prevailing ideas and mores.<sup>126</sup> Justice Murray, however, qualified that an interpretation ‘in accordance with contemporary circumstances’ cannot be ‘divorced from its historical context’;<sup>127</sup> ‘by definition that which is contemporary is determined by reference to its historical context’.<sup>128</sup> He endorsed Kelly’s guidance for balancing competing claims between the historical and the ‘present tense’ approaches.<sup>129</sup> Kelly contended that the ‘present tense’ approach was appropriate to standards and values; personal rights, the common good, social justice, and equality ‘can (indeed can only be) interpreted according to the lights of today as Judges perceive and share them’.<sup>130</sup> Yet the historical approach was appropriate ‘where some law-based *system* is in issue, like jury trial, county councils, the census’.<sup>131</sup> This, however, did not mean that ‘the shape of such systems is in every respect fixed in the permafrost of 1937. The courts ought to have some leeway for considering which dimensions of the system are secondary, and which are so material to traditional constitutional values that a willingness to see them diluted or substantially abolished without a referendum could not be imputed to the enacting electorate’.<sup>132</sup>

In *Sinnott*, the petitioner was a 22-year-old person with profound general learning disability and autism, who succeeded in his claim before the High Court that the state was under a duty to provide free primary education beyond the age of eighteen and for so long as his educational needs required.<sup>133</sup> The Supreme Court by majority allowed a limited appeal by the state and ruled that the duty of the state was owed children not adults and the petitioner was entitled to free primary education up to the age of 18 as appropriate to his needs as an autistic child.<sup>134</sup> There Justice Murray held that historically the meaning of primary education was always understood as basic education to children in the primary school cycle. While the ages where the primary cycle was to begin and to end may be ‘a variant of history, culture and policy in any given country’, it was understood to be the primary school cycle in which children and not adults were taught.<sup>135</sup> However, the judge held that the ‘nature and concept’ of primary education may be determined in light of present-day circumstances with the concept of primary education being an ‘abstract concept with connotations of standards and values’.<sup>136</sup> Historically as at the time of the

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<sup>124</sup> *Ibid.*, 347.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Sinnott*, note 2 above, 680. However, Justice Denham subscribed to the ‘living document’ approach in her dissenting judgment and did not explore the ‘living document’ approach in any detail: *ibid.*, 652.

<sup>127</sup> *Ibid.*, 680.

<sup>128</sup> *Ibid.*

<sup>129</sup> J.M. Kelly, ‘Law and Manifesto’, in Litton, note 16 above, 208, 215.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Sinnott*, note 2 above, 582.

<sup>134</sup> *Ibid.*; see also *esp.* Murray J.’s opinion, 682; Hardiman J.’s, 690; Geoghegan J.’s, 720; and Fennelly J.’s, 726.

<sup>135</sup> *Ibid.*, 680.

<sup>136</sup> *Ibid.*, 681.

promulgation of the Constitution, persons with intellectual disability were not able to benefit from primary education as traditionally available for it would not have been considered to encompass the provision of basic education and training skills, such as toilet training and basic mobility, but rather the primary school cycle and curriculum.<sup>137</sup> Justice Murray maintained that ‘with greater insight into the nature of people’s handicaps, the evolution of teaching methods, new curricula as well as new tools of education, there is no doubt that the nature and content of primary education must be defined in contemporary circumstances’,<sup>138</sup> and that where children ‘are capable of benefiting from primary education (however its content is defined), the State is under an obligation to ensure that it is provided free to children’.<sup>139</sup> As for the duration of childhood, Justice Murray considered it a secondary matter and reasoned that limitations were for the government and the Oireachtas to determine although they were subject to judicial review by the courts in cases where their determination may have failed their constitutional obligations.<sup>140</sup> Justice Murray’s emphasis on ‘contemporary circumstances’ modified Justice Walsh’s dictum that the judge ought to interpret the Constitution in accordance with his or her prevailing ideas of prudence, justice and charity, and arguably lessened the room for judicial subjectivity by focusing on contemporary knowledge in medical, scientific and sociological research rather than on abstract philosophical concepts. Justice Murray then supported his reasoning through the harmonious approach, interpreting the duty of the state in the context of Article 42 as a whole and concluding that the provision was ‘child-centred’.<sup>141</sup> The reference in Article 42(1) to the ‘Family’ as the natural educator of the ‘child’ set the tone and subsequent paragraphs in Article 42 outlined the parameters for state interference with the rights and duties of parents in its role as ‘guardian of the common good’.<sup>142</sup>

In *Zappone and Gilligan*, then, the High Court held that on the basis of *Sinnott* the concept of marriage as at 1937 ought to be established with capacity determined in accordance with the prevailing law.<sup>143</sup> Thus, the court acknowledged that the framers of the Constitution could not have contemplated a same-sex union within the concept of marriage in 1937 but the prevailing law, including the High Court decision in *Foy* and the Supreme Court decision in *T. v. T.*,<sup>144</sup> clearly did not support a concept of marriage as ‘fossilised’.<sup>145</sup> The court also referred to the recent reform of marriage law through the Civil Registration Act 2004, which enjoyed the presumption of constitutionality and must constitute a clear indication of the prevailing ‘ideas and concepts’ of marriage.<sup>146</sup>

This, however, begs the question as to whether in dealing with capacity to exercise a right constituting a traditional constitutional value, recently enacted legislation or regulation may suffice. Clearly, deference should be had to the Oireachtas which is

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<sup>137</sup> Ibid., 682.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid. In a similar vein, Justice Geoghegan, *ibid.*, 721-722, explicitly approved the High Court judgment in *O’Donoghue v. Minister for Health* [1993] IEHC 2.

<sup>141</sup> *Sinnott*, *ibid.*, 682.

<sup>142</sup> Ibid., 683.

<sup>143</sup> *Zappone and Gilligan*, note 1 above, 531.

<sup>144</sup> [2003] 1 ILRM 321.

<sup>145</sup> *Zappone and Gilligan*, note 1 above, 530.

<sup>146</sup> Ibid.

under a constitutional duty to legislate in accordance with the Constitution, and such deference by the courts is mandated by the presumption of constitutionality that must be rebutted by a petitioner. In *Zappone and Gilligan*, success for the petitioners would have rendered the Civil Registration Act 2004 unconstitutional despite the fact that they did not directly challenge the particular statute; the subject of their challenge was the Taxes Consolidation Act 1997, which applied the same interpretation of marriage as the Civil Registration Act.

Furthermore, while legislation may indicate the contemporary majority view, the majority view itself, in the words of South African Constitutional Court Justice Albie Sachs, ‘can often be harsh to minorities that exist outside the mainstream’.<sup>147</sup> Thus, the function of the Constitution is ‘to step in and counteract rather than reinforce unfair discrimination against a minority’.<sup>148</sup> Vindicating rights under the Constitution protects groups who have been discriminated against by the ordinary law and, who cannot ‘count on popular support and strong representation in the legislature’.<sup>149</sup> The judge considered that the test under the South African Constitution was whether the measure ‘promotes or retards the achievement of human dignity, equality and freedom’.<sup>150</sup> In a somewhat similar vein, the Irish Constitution embodies and enshrines the objective that measures by the state ensure the dignity of the individual so that true social order may be attained.<sup>151</sup> As the High Court held in *Murray*, when dealing with limitations imposed by the state, it is not to balance the right of the state and the right of the individual but the power of the state and whether the exercise of its power is constitutionally permissible. Thus, the Constitution imposes ‘very clear and specific correlative duties’ upon the state to protect and vindicate the personal rights of the citizen but it also designates the state as the guardian of the common good which as such is empowered to restrict a personal right in certain circumstances.<sup>152</sup> In *Zappone and Gilligan*, the High Court did not examine whether *the relevant case law and statute* undermined a personal right. In other words, can an indefinite bar to exercising the right to marry, rather than an age-related limitation, constitute a legitimate exercise of state power?

It is important to note that the approach to contemporaneous constitutional interpretation taken by the High Court in *Zappone and Gilligan* differed from that by Supreme Court Justice Murray’s methodology in *Sinnott*, where capacity to partake in a law-based system (state primary education) was first discerned against historical and contemporary circumstances to derive a traditional constitutional value (right to education) and then assessed through a harmonious textual analysis of Article 42. To adopt the approach in relation to the question of marriage, it is clear that marriage as an institution is a law-based system derived from what is a core ‘traditional constitutional value’, namely, the right to marry. Therefore, the nature and content of marriage as a law-based system must be examined from a historical context and yet interpreted in accordance with ‘contemporary circumstances’; thus, the institution of marriage must be interpreted in accordance with contemporary standards and values, including greater insights into sexuality and sexual orientation, relevant advances in technologies, and,

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<sup>147</sup> *Minister of Home Affairs and another v. Fourie and another*, 2006 (3) BCLR 355, para.94.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*, para.74.

<sup>150</sup> *Ibid.*

<sup>151</sup> Bunreacht na hÉireann 1937, Preamble.

<sup>152</sup> *Murray*, note 46 above, 549.

above all, contemporary standards of equality and non-discrimination. Then, a harmonious textual analysis of Articles 40(3) and 41 must support such an examination with regard to capacity to marry.

While the institution of marriage in Ireland was conceived in accordance with the common law tradition as exclusive to opposite-sex couples and has been repeatedly and consistently upheld by the courts and recently re-enacted by the Oireachtas, it is noteworthy that certain jurisdictions where this common-law definition was applicable have now moved forward in order to recognise the equal worth and dignity of sexual minorities in all aspects of their lives. As the Canadian Supreme Court pointed out in its *Reference re Same-Sex Marriage*:<sup>153</sup>

The reference to ‘Christendom’ is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The ‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.<sup>154</sup>

Recognition of pluralism and maintenance of religious neutrality have always been noted in Irish jurisprudence.<sup>155</sup> Thus, while bearing in mind the historical origins and context of marriage, the Irish Constitution ought to be interpreted in the light of ‘contemporary circumstances’, including the recognition that sexuality is ‘a feature of the human condition’.<sup>156</sup> In Ireland, sexual orientation already constitutes a prohibited ground of discrimination in employment<sup>157</sup> and access to goods and services.<sup>158</sup>

Under the Constitution, all citizens are equal before the law.<sup>159</sup> In *In re Article 26 and the Employment Equality Bill 1996*,<sup>160</sup> the Supreme Court held that while presumptive forms of discrimination under the Constitution were not particularised, discrimination on grounds of ‘sex, race, language, religious or political opinion’ was clearly prohibited.<sup>161</sup> Where a piece of legislation discriminates in favour of a certain class of persons, it need not be justified if justification can be found within the Constitution.<sup>162</sup> However, such legislation objectively must not be arbitrary, unreasonable or unjust and as such incapable of justifying the discrimination.<sup>163</sup> In *In re Article 26 and the Employment Equality Bill 1996*, the Supreme Court approved the approach of the

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<sup>153</sup> [2004] 3 SCR 698.

<sup>154</sup> *Ibid.*, para.22.

<sup>155</sup> *McGee*, note 25 above, 317. See also *T. (D.) v. T. (C.)*, note 64 above.

<sup>156</sup> *Zappone and Gilligan*, note 1 above, 416, per evidence of Professor Henry Kennedy, Professor of Forensic Psychiatry, University of Dublin.

<sup>157</sup> Employment Equality Act 1998, No. 21/1998, s.6(2)(d).

<sup>158</sup> Equal Status Act 2000, No.8/2000, s.3(2)(d).

<sup>159</sup> Bunreacht na hÉireann 1937, Art.40(1).

<sup>160</sup> [1997] 2 IR 321.

<sup>161</sup> *Ibid.*, 347.

<sup>162</sup> *O’B v. S.* [1984] IR 316; *De Burca v. A.G.* [1976] IR 38.

<sup>163</sup> *Dillane v. A.G.* [1980] IRLM 167.

High Court in *Brennan v. Attorney General*<sup>164</sup> that a classification must be ‘for a legitimate legislative purpose... It must be relevant to that purpose, and ... each class must be treated fairly’.<sup>165</sup>

Thus, the exclusion of a same-sex couple from their capacity to marry each other is based solely on grounds of sexual orientation and Irish marriage law favours persons who are sexually inclined towards others of the opposite sex. Is there a different physical or moral capacity or social function between same-sex and opposite-sex relationships? The state in *Zappone and Gilligan* argued that Article 41 expressly contemplated a distinction between the committed relationship of the petitioners and a marriage between two persons of opposite sexes.<sup>166</sup> The argument, however, circularly circumvented the central issue: the agreed component of marriage – a ‘unique and special life-long relationship’ to the exclusion of all others – is clearly applicable to both a committed opposite-sex relationship and a committed same-sex relationship equally. The committed life-long unions that result from both kinds of relationships serve an equal, and equally important, social function within the community: that of life-long partnership in love and support within a broader family unit.

Some words should be laid on the welfare of children reared by same-sex couples, which was a key issue for the High Court where there was disagreement among psychologists as to the adequacies, methodologies and conclusions of relevant empirical studies. In the absence of scientific consensus within the evidence, the court took a cautious stance calling for longitudinal studies before definite findings could be made. However, the absence of scientific consensus over the welfare of children cannot normatively deny a same-sex couple from marrying each other if doing so is *their* right. Furthermore, as de Londras has pointed out, a gay man or a lesbian may already apply as an unmarried individual to adopt a child and is subject to a rigorous assessment process as to his or her suitability as a parent, in the same manner as an unmarried heterosexual is to apply and with the best interests and welfare of the child being a paramount consideration.<sup>167</sup>

As stated above, the right to marry is implied in the reference to marriage in Article 41, but it is also protected as an unenumerated personal right under Article 40(3), which imposes upon the state the duty to guarantee in its laws and vindicate by its laws ‘as far as practicable’ the personal rights of the citizen. As a personal right, it is not absolute and its exercise may be restricted by the state within constitutionally permissible limits, namely, protection of other constitutional rights and maintenance of the ‘common good’. There is, however, no textual exclusion in the Constitution precluding a same-sex couple from exercising a personal right to marry each other.

Furthermore, under Article 41, the family is a unit group founded upon marriage with its nature and content undefined. A duty, however, is imposed upon the state to guard with special care the institution of marriage. In its analysis in *Zappone and Gilligan* using the harmonious approach, the High Court found that Article 41 as a whole clearly excluded a same-sex union and the duty on the state to guard marriage and protect it from attack justified the exclusion based on the historical and prevailing definition of

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<sup>164</sup> [1983] ILRM 449.

<sup>165</sup> *Ibid.*, 480.

<sup>166</sup> *Zappone and Gilligan*, note 1 above, 497.

<sup>167</sup> F. de Londras, ‘The Law that Dare not Speak its Name?’, *Irish Journal of Family Law*, Vol.2 (2006), 24.



marriage and the lack of conclusive longitudinal studies as to the long-term psychological and psychosexual developmental effect on the welfare of children reared by same-sex parents.<sup>168</sup>

However, I argue that the only potential exclusionary textual references (similar to the word ‘child’ in Article 42) are references to a ‘woman’s life within the home’ and ‘mothers’ in Article 41(2), which connote a ‘nuclear’ family. Given that contemporarily there are different kinds of committed relationships, textually a lesbian couple could come within such references. Article 41(2) is a highly controversial provision, which within the lifetime of the Constitution hitherto has largely been dormant in the jurisprudence and appears to be little more than a convenient tool for judges in times of need. The provision has been heavily criticised for its evident gender stereotyping and the Constitutional Review Group has recommended that it be amended to embrace a gender-neutral recognition of carers in the home,<sup>169</sup> which unfortunately has been rejected by the All-Party Oireachtas Committee on the Constitution.<sup>170</sup> To justify the exclusion of all committed same-sex relationships from access to the institution of marriage requires a stronger basis than a textual difficulty. This textual difficulty contrasts with the significance of the terms ‘child’ and ‘parents’ in Article 42 as dissected in *Sinnott*.

## Conclusion

This paper has shown that the High Court in *Zappone and Gilligan* misapplied the approach of Supreme Court Justice Murray in *Sinnott* when interpreting the Constitution contemporaneously. While *Sinnott* offers hopes for an individual to vindicate his or her right under the Constitution to marry another person regardless of gender or sexual orientation, it is likely that the Supreme Court in the appellate *Zappone and Gilligan* proceedings currently pending will uphold the High Court judgment out of deference to the Oireachtas given its recent re-enactment of the common law definition of marriage through the Civil Registration Act 2004.<sup>171</sup> Full recognition of the equal worth and dignity of sexual minorities in Ireland, thus, lies in the hands of the Oireachtas.<sup>172</sup>

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<sup>168</sup> *Zappone and Gilligan*, note 1 above, 533.

<sup>169</sup> Constitutional Review Group, *Report of the Constitutional Review Group* (Dublin: Stationary Office, 1996), 311.

<sup>170</sup> All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family* (Dublin: Stationary Office, 2006), 106.

<sup>171</sup> Equally, Justice Murray himself had previously referred to marriage as opposite-sex-based: *T. (D.) v. T. (C.)*, note 64 above, 405.

<sup>172</sup> However, it is clear that section 2(2)(e) of the Civil Registration Act 2004 is unlikely to be amended in the near future. Parliamentary debate has focused on civil partnership legislation, and the government has stalled debate on the only Bills to-date, the Civil Partnership Bill 2004 moved by Senator Norris in the Seanad and the Civil Unions Bill 2006 moved by the Labour Party in the Dáil. Nevertheless, in June 2008, the Department of Justice, Equality and Law Reform published its scheme for civil partnership legislation which has not yet been submitted to the Oireachtas and if enacted would accord same-sex partners legal rights regarding wrongful death, pensions and immigration albeit not joint tax assessment: see Department of Justice, Equality and Law Reform, ‘General Scheme of Civil Partnership Bill’, [http://www.justice.ie/en/JELR/Pages/General\\_Scheme\\_of\\_Civil\\_Partnership\\_Bill](http://www.justice.ie/en/JELR/Pages/General_Scheme_of_Civil_Partnership_Bill) (last accessed at 31 December 2008).