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Chapter 11
Ireland

11.1. Constitutional framework

The Irish Constitution, as enacted in 1937, makes no express provision for the right to respect for private life. This right is covered by Article 40.3, which protects more generally the 'personal rights' (see Chapter 5, section 5.1). Two other Articles that are highly relevant in the context of the present case study are Article 40.1 (equality before the law) and Article 41 (protection of marriage and the family).

11.1.1. Equality before the law

Article 40.1 of the Irish Constitution provides that '[a]ll citizens shall, as human persons, be held equal before the law.' While this Article does not specify any discrimination grounds, under statutory law sexual orientation has constituted a prohibited ground of discrimination in employment[1] and access to goods and services since the late 1990s.[2] These statutory norms have proven a more common and more successful avenue for complaints about discrimination on grounds of sexual orientation than Article 40.1 of the Constitution.

11.1.2. The right to marry and the protection of family under the Irish Constitution

Even though the Irish Constitution (1937) does not contain an express right to marry, the institution of marriage is strongly embedded in it. Article 41.1.1° 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.' The third paragraph of this Article furthermore reads:

> '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]

1 Art. 6(2)(d) Unfair Dismissals (Amendment) Act 1993 and Employment Equality Act 1998, No. 21/1998.
2 Art. 3(2)(d) Equal Status Act 2000, No. 8/2000.
3 Art. 41.3.1° Constitution of Ireland.

In *Donovan* v. *Minister for Justice* (1951) the High Court found for the first time that a right to marry was implied in the Irish Constitution.[4] This right was subsequently recognised by Justice Kenny in *Ryan* (1965)[5] as an example of the personal rights latent in Article 40.3.1°.[6] The constitutional right to marry was confirmed in later case law on various occasions.[7]

Marriage and family are intrinsically linked in Article 41 of the Irish Constitution. Consequently, the constitutional protection of the family is confined to families based on marriage, as the Court held in *the State (Nicolaou)* v. *An Bord Uchtála* (1966)[8] and since then this has repeatedly been confirmed.[9] In other words, non-marital families do not enjoy protection under the Irish Constitution. As Ryan has explained, this implies that '[…] somewhat counter-intuitively […], children do not necessarily make a constitutional "family". Everything depends on the marital status of their parents.'[10] The marital family unit is thus afforded 'robust protection'.[11] As a consequence, as observed in 2010 '[i]n practice in Irish law the marital status of a child's parents will often have a significant, if not decisive, bearing on the nature and extent of the rights of the child and his or her parents.'[12] Such concerns have been addressed in both the envisaged Thirty-first Amendment to the Constitution (see Chapter 5, section 5.1.3) as well as in the Children and Family Relationships Bill (see section 11.3.5.3 below).

At the same time, childless married couples also enjoy protection under this constitutional provision;[13] procreation is not essential in the context of the Irish

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4 *Donovan* v. *Minister for Justice* [1951] 85 ILTR 134. See also A. O'Sullivan, 'Same-sex marriage and the Irish Constitution', 13 *The International Journal of Human Rights* (2009) p. 477 at pp. 480 and 487, who explains that '[a]s 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".'

5 *Ryan* v. *Attorney General* [1965] IESC 1; [1965] IR 294.

6 See G. Hogan and G. Whyte, *J.M. Kelly, The Irish Constitution* (Dublin, LexisNexis Butterworths 2003) p. 1468.

7 E.g. *O'Shea* v. *Ireland* [2007] 2 IR 313. See F. Ryan, 'Out of the shadow of the Constitution: civil partnership, cohabitation and the constitutional family', 48 *The Irish Jurist* (2012) p. 201 at p. 209. See also C. Power, 'The right to Marry', 9 *Irish Journal of Family Law* (2006) p. 3.

8 *The State (Nicolaou)* v. *An Bord Uchtála* [1966] IR 567. See also Ryan 2012, *supra* n. 7, at p. 210.

9 E.g. in *WO'R* v. *EH* [1996] IESC 4; [1996] 2 IR 248. See Ryan 2012, *supra* n. 7, at pp. 211–212.

10 Ryan 2012, *supra* n. 7, at p. 208.

11 N. O'Shea, 'Can Ireland's Constitution Remain Premised on the "Inalienable" Protection of the Marital Family Unit Without Continuing to Fail its International Obligations on the Rights of the Child?', *Irish Journal of Family Law* (2012) p. 87 at pp. 92–93. The author observed: 'While the referendum's positive result may have symbolic value for the rights of the Irish child, any practical changes brought about by the referendum are likely to be minimal, particularly as Art. 41 remains unchanged.'

12 Joint Committee on the Constitutional Amendment on Children, *Third Report. Twenty-eighth Amendment of the Constitution Bill 2007 Proposal for a constitutional amendment to strengthen children's rights. Final Report*, February 2010, p. 19, online available at www.oireachtas.ie/parliament/media/housesoftheoireachtas/contentassets/documents/JC-Constitutional-Amendment-on-Children-Final-Report.pdf, visited September 2010. In *The State (Nicolaou)* v. *An Bord Uchtála* (1966) the Supreme Court held that that while all children had the same natural and imprescriptible rights regardless of the marital status of their parents at birth, children with unmarried parents did 'not necessarily' have the same legal rights. Walsh J. in *The State (Nicolaou)* v. *An Bord Uchtála* [1966] IR 567.

13 *Murray* v. *Ireland* [1985] IR 532.

constitutional protection of marriage.[14] Indeed, also the Irish courts accepted in 1985 that the inability to procreate does not remove the right to marry.[15]

The exclusion of non-marital relationships and families from constitutional protection does not mean that protection by the law of these relationships and families is precluded. As long as they are not treated more favourably than married couples and marriage-based families,[16] legal recognition of non-marital couples and families is not unconstitutional.[17]

The text of Article 41 of the Irish Constitution is neutral as regards gender of the spouses, but the reference to the role of women and mothers in that same provision is a first indication that only traditional families, based on a marriage between one man and one woman, have been legally recognised in Ireland. This reading has indeed been repeatedly confirmed in case law. In *Murphy* v. *Attorney General* (1982), Hamilton J. spoke of marriage as a 'permanent, indissoluble union of man and woman'.[18] In *Murray* (1985), it was noted that '[t]he concept and nature of marriage, was derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship'.[19] In *B.* v. *R.* (1995)[20] Judge Costello held marriage to be '[…] the voluntary and permanent union of one man and one woman to the exclusion of all others for life'.[21] In *Foy -v- An t-Ard Chláraitheoir & Ors* (2002), a case involving a transsexual, High Court Judge McKechnie held that 'marriage as understood by the Constitution, by statute and by case law' referred to 'the union of a biological man with a biological woman'. The Judge considered it to be 'crucial for legal purposes' in the Irish jurisdiction that the parties were of different sexes and concluded that Article 12 ECHR was 'equally so predicated'.[22] The Judge ruled in conclusion:

> '[…] in my view there is no sustainable basis for the applicant's submission that the existing law, which carries the impugned provision which prohibits the applicant from marrying a party who is of the same biological sex as herself, is a violation of her constitutional right to marry. Finally and in any event, as with the other rights as asserted, this right to marry is not absolute and has to be evaluated in the context of several other rights including the

14 B. Tobin, 'Law, politics and the child-centric approach to marriage in Ireland', 48 *The Irish Jurist* (2012) p. 210.

15 Tobin has held that as a result of *Murray* v. *Ireland* '[…] procreation is not an essential element of a valid subsisting marriage under Irish law'. B. Tobin, 'Gay marriage – a bridge too far?', 15 *Irish Student Law Review* (2007) p. 175 at p. 176 and *Murray* v. *Ireland* [1985] IR 532, 537.

16 C. Power, 'Family law', 12 *Irish Journal of Family Law* (2009) p. 22, referring to *Murphy* v. *Attorney General* [1982] IR 241 and *Zappone* v. *Revenue Commissioners* [2006] IEHC 404. See also Ryan 2012, *supra* n. 7, at p. 231.

17 See also Ryan 2012, *supra* n. 7, at pp. 211–212.

18 *Murphy* v. *Attorney General* [1982] IR 241. Compare the judgment of Costello J. in *Murray* v. *Ireland*, [1985] IR 532.

19 *Murray* v. *Ireland* [1985] ILRM 536.

20 *B* v. *R* [1995] 1 ILRM 491.

21 *Idem*, at 495.

22 *Foy* v. *An t-Ard Chláraitheoir & Ors* [2002] IEHC 116, at 175.

> rights of society. When so looked at I believe that for the purposes of marriage the State can legitimately hold the view which is espoused by and is evident from its laws.'[23]

The position that the Irish constitutional right to marry only concerns marriage between parties of different sexes was confirmed in subsequent case law. In *D.T.* v. *C.T.* (2002)[24] Justice Murray defined marriage as 'a solemn contract of partnership entered into between a man and a woman with a special status recognised by the Constitution.' Another judgment to this effect is *Zappone & Anor* v. *Revenue Commissioners & Ors* (2006),[25] which is discussed in more detail below.[26] An even more recent confirmation that only different-sex spouses enjoy a constitutional right to marry dates from 2010.[27]

11.2. (De-)criminalisation of homosexual activities

Until the 1990s, certain homosexual activities between consenting adult men were punishable under Irish law.[28] Section 11 of the Criminal Law Amendment Act 1885 provided that:

> 'Any male person who, in public or in private, commits […] any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.'[29]

What particular acts in any given case could be held to amount to gross indecency was a matter which was not statutorily defined and was therefore for the courts to decide on the basis of the particular facts of each case. Although in practice hardly any prosecutions were brought on this basis, Irish courts were unwilling to declare

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23 *Idem.* After the ECtHR judgment in the case of *Christine Goodwin* (2002, see Ch. 8, section 8.2.1), a new case was brought by Dr. Foy, however, this time the High Court did not make any finding on the applicant's complaint under Art. 12 ECHR and accordingly did not address the question whether of the Irish constitutional right to marry concerns different-sex spouses only. *Foy -v- An t-Ard Chláraitheoir & Ors* [2007] IEHC 470.

24 *D.T.* v. *C.T.* [2003] 1 ILRM 321.

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

26 Section 11.3.2.

27 *HAH* v. *SAA*, unreported, High Court, November 4, 2010, as referred to in B. Tobin, 'Same-Sex Marriage in Ireland: The Rocky Road to Recognition', *Irish Journal of Family Law* (2012) p. 102 at p. 104.

28 Sections 61 and 62 of the Offences against the Person Act, 1861 and Section 11 of the Criminal Law Amendment Act, 1885.

29 This section of the 1885 Act is also known as the *Labouchere Amendment*, named after the Member of Parliament who introduced it. Section 61 of the Offences against the Person Act, 1861 provided: 'Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life.' Section 62 of the same Act read: 'Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon a male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years.'

the relevant provisions unconstitutional. It took a judgment by the ECtHR for this effect to be reached.

In November 1977 Mr. Norris, an active homosexual and campaigner for homosexual rights in Ireland, instituted proceedings in the High Court. Although he himself had not been prosecuted for gross indecency with another male person, he claimed before the High Court that these laws were no longer in force by reason of the effect of Article 50 of the Constitution of Ireland, which declared that laws passed before the enactment of the Constitution but which were inconsistent with it, did not continue to be in force. The High Court dismissed Mr. Norris's action on legal grounds.[30] On appeal, the Supreme Court, by a three to two majority in its decision of 22 April 1983, upheld the judgment of the High Court. Chief Justice O'Higgins, who was in the majority, held:

> 'On the ground of the Christian nature of our State and on the grounds that the deliberate practice of homosexuality is morally wrong, that it is damaging to the health both of individuals and the public and, finally, that it is potentially harmful to the institution of marriage, I can find no inconsistency with the Constitution in the laws which make such conduct criminal. It follows, in my view, that no right of privacy, as claimed by the plaintiff, can prevail against the operation of such criminal sanctions.'[31]

According to the majority the State had an interest in the general moral well-being of the community and was entitled to discourage conduct which was 'morally wrong and harmful to a way of life and to values which the State wishes to protect'. Hamilton remarked that the three-of-two majority was heavily influenced by the Christian ethos of the Constitution itself, that was particularly prevalent in the Preamble.[32] O'Connell observed that the majority relied 'on a perfectionist theory of morality to limit the right to sexual freedom of gay men and others wishing to have anal intercourse'. Thereby the majority accepted that the conventional morality of society defined the limits of individual freedom.[33] O'Connell contrasted this approach with that of the majority in *McGee* (1973),[34] a case on contraceptives, where the judges paid 'great respect to the principles of autonomy and pluralism'.[35]

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30 *Norris* v. *Attorney General* [1983] IESC 3; [1984] IR 36.

31 *Idem*, judgment by O'Higgins CJ. In its majority decision, the Supreme Court based itself, furthermore, and, *inter alia*, on the following considerations: '(1) Homosexuality has always been condemned in Christian teaching as being morally wrong. It has equally been regarded by society for many centuries as an offence against nature and a very serious crime; (2) Exclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide; (3) The homosexually oriented can be importuned into a homosexual lifestyle which can become habitual; (4) Male homosexual conduct has resulted, in other countries, in the spread of all forms of venereal disease and this has now become a significant public health problem in England; (5) Homosexual conduct can be inimical to marriage and is per se harmful to it as an institution.'

32 L. Hamilton, 'Matters of life and death', 65 *Fordham Law Review* (1996) p. 543 at p. 547.

33 R. O'Connell 2010, *supra* n. 3, at p. 598.

34 See Ch. 5, section 5.1.1.

35 R. O'Connell 2010, *supra* n. 3, at p. 599.

Before the Supreme Court Mr. Norris contended unsuccessfully that the ECtHR judgment in the case of *Dudgeon* (1981) had to be followed,[36] as the ECtHR had ruled in that case that the very same statutory provisions as had been in force until that time in the United Kingdom constituted a violation of Article 8 ECHR. Chief Justice O'Higgins, in the majority judgment, held that the Convention, being an international agreement, did not, and could not, form part of Ireland's domestic law, nor affect in any way questions which arose thereunder.

Norris lodged a complaint with the European Commission for Human Rights (ECmHR), which referred the case to the ECtHR. In its judgment of October 1988, the Court, under reference to the 'indistinguishable' case of *Dudgeon*, held the relevant Irish statutory provisions to be in violation of Article 8 ECHR.[37] The Court delivered its judgment in 1988, but the criminal law in Ireland remained unchanged until the Criminal Justice (Sexual Offences) Act of 1993 entered into force,[38] which made consensual sexual activity between all persons above 17 years of age lawful.[39] It has been submitted that the Convention played a relatively minor role in this change of the law; by that time other legislative measures, making sexual orientation a protected status in various fields, had already been adopted or were to be adopted.[40]

The abolishment of the criminalisation of homosexual activities as late as 1993, formed the starting point for dramatic changes in respect of legal recognition of same-sex relationships in a time frame of two decades only. Less than 20 years later, in 2011, a civil partnership for same-sex couples was introduced, as will now be discussed.

11.3. Legal recognition of same-sex relationships under Irish law

As noted in section 11.1.2 above, the family holds a very prominent place in the Irish Constitution. It is recognised as 'the natural primary and fundamental unit group of Society'. The Constitution only protects the family based on marriage and consequently Irish family laws for long also only employed this restrictive definition of the family (see 11.3.5 below).[41] Very traditional family laws have been in force for a longtime, for example:

36 ECtHR [GC] 22 October 1981, *Dudgeon* v. *the United Kingdom*, no. 7525/76. See Ch. 8, section 8.1.1.

37 ECtHR 26 October 1988, *Norris* v. *Ireland*, no. 10581/83.

38 Criminal Justice (Sexual Offences) Act, 1993, No. 20/1993.

39 See D. O'Connell, 'Ireland', in: R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The ECHR and its Member States 1950–2000* (Oxford: Oxford University Press 2001) p. 423 at p. 467.

40 See L. Flynn, 'From individual Protection to Recognition of Relationships? Same-Sex Couples and the Irish Experience of Sexual Orientation Law Reform', in: R. Wintemute and M. Andenæs (eds.), *The legal recognition of same-sex partnerships? A study of national, European and international law* (Oxford: Hart 2001) p. 591 at pp. 594–595.

41 F. Ryan, The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Round Hall, Dublin 2011) p. 8.

> 'Only in 1973 was a ban on married women working in the civil service lifted. Women were not allowed to sit on juries before this date either. Nor were single mothers entitled to social assistance. Contraceptives became available to everyone only in 1984. Divorce – limited – arrived in 1986. In 1991, it became illegal for a man to rape his wife. Two years later homosexuality was decriminalised.'[42]

Until a decade into the second millennium, there was hardly any recognition of non-marital relationships in general, including those of different-sex couples. As Ryan explains, to the extent that non-martial relationships enjoyed legal protection, same-sex couples were generally excluded as the relevant provisions applied to couples 'living together as husband and wife'.[43] Once the first steps were made, however, change was brought about at a relatively fast pace: in 2011 the civil partnership was introduced for same-sex couples; in 2013 legislation was drafted which would allow for joint adoption by same-sex couples; and even a referendum on same-sex marriage has been planned for 2015. This section 11.3 describes and analyses the various developments over time under Irish law in the direction of legal recognition of relationships between same-sex partners.

11.3.1. Early developments towards legal recognition

At the beginning of the new millennium the Irish Equality Authority[44] published various reports that were of direct relevance to the rights of same-sex partners. The first report dealt with partnership rights of same-sex couples.[45] Its authors recognised a need for action in this area but did not make specific recommendations. The report served as a basis for the work of the Advisory Committee established to report to the Equality Authority on the equality agenda for lesbian, gay and bisexual people, which issued a report in 2002.[46] One of the recommendations made by the latter Committee read:

> 'The Department [of Justice, Equality and Law Reform] should ensure that same-sex couples are treated in an equal manner by extending the right to nominate a partner with legal rights to same-sex couples, comparable with those recognised for a spouse.'[47]

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42 Wording ascribed to S.-A. Buckley, a social historian at National University of Ireland in Galway, as quoted in H. Mahoney, 'Same-sex marriage underlines social change in Ireland', *euobserver.com* 7 May 2013, www.euobserver.com/lgbti/119963, visited July 2013.

43 Ryan 2011, *supra* n. 41, at pp. 8–9. This was, for instance, the case in respect of social assistance. See Ryan 2011, *supra* n. 41, at p. 20.

44 The Irish Equality Authority is an independent body set up under the Employment Equality Act 1998. It was established on 18th October 1999.

45 J. Mee and K. Ronayne, *Partnership rights of same sex couples* (Dublin, The Equality Authority 2000).

46 The Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals*, 2002, online available www.equality.ie, visited September 2002.

47 *Idem*, at p. 29.

This was the first time that a statutory organisation publicly made such statements in support of legal recognition of same-sex relationships.[48] In April 2004 the Irish Law Reform Commission (LRC)[49] issued a consultation paper on the rights and obligations of cohabitants.[50] The Commission proposed a presumptive scheme, imposing certain legal rights and duties on 'qualified cohabitants',[51] who had been living together in a marriage-like relationship for three years.[52] The LRC took the view that such a scheme should be extended to different-sex as well as same-sex cohabitants.[53] The option of civil registration of same-sex relationships was not addressed in the consultation paper.[54]

The recommendations of the LRC were not immediately followed up. Instead, in 2004 a new Act on Civil Registration entered into force, which provided that there was an impediment to a marriage if both parties are of the same sex.[55] The inclusion of this explicit provision at a time when the first European countries had opened up marriage to same-sex couples was criticised by equality groups for being discriminatory.[56]

Further, in that same year the Civil Partnership Act was introduced in the United Kingdom, including in Northern Ireland, which provided for civil partnership for same-sex couples.[57] Various authorities and authors claimed that this entailed a need for action for the Irish legislature, as under the Good Friday agreement, the Republic

48 Center for Evaluation Innovation, *Civil Partnership and Ireland: How a Minority Achieved a Majority. A case study of the gay and lesbian equality network*, Center for Evaluation Innovation November 2012, p. 2, online available at www.glen.ie/attachments/Case_Study_-_How_a_minority.PDF, visited July 2014.

49 The Law Reform Commission was established on 20 October 1975, pursuant to section 3 of the Law Reform Commission Act 1975. It is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform, 'so that the law reflects the changing needs of Irish society'. See www. lawreform.ie, visited October 2010.

50 Law Reform Commission, *Consultation Paper on the Rights and Duties of Cohabitants*, Law Reform Commission: April 2004 CP 32–2004.

51 The Commission defined 'qualified cohabitees' as persons who, although they are not married to one another, live together in a 'marriage like' relationship for a continuous period of three years, or where there is a child of the relationship, for two years. Law Reform Commission 2004, *supra* n. 50, at pp. 1 and 4.

52 Presumptive meant that the scheme only applied once the cohabitation had ended. See B. Tobin, 'Relationship Recognition for Same-Sex Couples in Ireland: The Proposed Models Critiqued', 11 *Irish Journal of Family Law* (2008) p. 10.

53 Law Reform Commission 2004, *supra* n. 50, at p. 14.

54 Critical in this regard was Mee. J. Mee, 'A critique of the Law Reform Commission's consultation paper on the rights and duties of cohabitees', 39 *The Irish Jurist* (2004) p. 74. In 2006 the paper was followed up by a report in which the LRC also pleaded for the development of a legal framework concerning cohabitants, either different-sex or same-sex, who live together in an intimate relationship. Again, the option of civil partnership was not discussed. Law Reform Commission, *Report, Rights and Duties of Cohabitants* (Law Reform Commission December 2006, LRC 82-2006).

55 Section 2(2)(e) Civil Registration Act 2004. Tobin has noted that this impediment to same-sex marriage was not discussed during the Committee's debate. Tobin 2012B, *supra* n. 27, at p. 103.

56 See C. Power, 'The benefits of marriage', 7 *Irish Journal of Family Law* (2004) p. 29.

57 Civil Partnership Act 2004, Act of 18 November 2004, 2004 ch. 33.

of Ireland was under an obligation to provide for an 'at least an equivalent level of human rights protection' as prevalent in Northern Ireland.[58]

It was also in 2004 that Senator Norris – who had also been a successful plaintiff in various legal proceedings on the prohibition on homosexual conduct (see 11.3 above) – presented his Civil Partnership Bill.[59] According to its Explanatory Memorandum the purpose of the Bill was:

> '[…] to make provision for and in connection with civil partnership, that is a conjugal relationship entered into and registered in accordance with the Act between two persons aged 18 and upwards of either the same or different gender or sex, who are cohabiting, and who are not already married or in another civil partnership, and are not within certain prohibited degrees of relationship with each other.'[60]

The Bill was the first legislative initiative for introducing legal recognition of same-sex relationships. It provided that civil partners were to be regarded in law '[…] as having the same rights and entitlements as parties to a marriage'.[61]

When the Norris Bill was debated in the Senate ('*Seanad*') in February 2005, the Minister for Justice acknowledged that the position before the law of same-sex couples and the possible extension of State recognition to civil partnerships between such persons, needed to be addressed. Two aspects of this Bill were nevertheless considered problematic: (1) the fact that the Bill provided a status for cohabitants which attracted the same rights and entitlements as conventional marriage; and (2) the fact that the proposed legislation was restricted to so-called 'conjugal relations'. The first issue was even held to be contrary to the Constitution. Consequently the debate on the Bill was adjourned[62] and ultimately (on 11 October 2007) this Bill was withdrawn. This delay and withdrawal had much to do with other ongoing issues, such as the issuing of the tenth progress report of the *Oireachtas* Committee on the Constitution in 2006. In this report the Committee held that:

> 'Provision for same-sex marriage would bring practical benefits. But it would require a constitutional amendment to extend the definition of the family. However, legislation could extend to such couples a broad range of marriage-like privileges without any need to amend the Constitution (as has been suggested in the case of cohabiting heterosexual couples).'[63]

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58 See Irish Council for Civil Liberties, *Equality for all families*, April 2006, pp. 49 and 60, online available at: www.iccl.ie/equality-for-all-families-.html, visited 19 June 2014, p. 60; B. Tobin, 'Same-Sex Couples and the Law: Recent Developments in the British Isles', 23 *International Journal of Law, Policy and the Family* (2009) p. 309 at p. 318 and Ryan 2011, *supra* n. 41, at p. 12.

59 Bill Number 54 of 2004.

60 Explanatory memorandum to Bill Number 54 of 2004.

61 Section 6 of the Bill Number 54 of 2004.

62 Seanad Éireann Debates [Senate debates], Vol. 179, 16 February 2005.

63 The All-party Oireachtas Committee on the Constitution, *Tenth progress report, The Family* (Stationery Office, Dublin 2006), p. 87, online available at www.constitution.ie/Documents/Oireachtas%20 10th-Report-Family%202006.pdf, visited June 2014.

The Committee furthermore held that '[…] an amendment to extend the definition of the family would cause deep and long-lasting division in our society and would not necessarily be passed by a majority.'[64] Still, it recommended the introduction of the civil partnership for both same-sex and different-sex couples.[65] Other authoritative pleas for the introduction of legal recognition of same-sex relationships were simultaneously made. A 2006 report of the Irish Human Rights Commission (IHRC) on *de facto* couples concluded that from an international human rights point of view there was a compelling case to be made for the State to provide some formal level of legal recognition to same-sex couples, if not to *de facto* couples generally.[66] The Irish Council for Civil Liberties, for its part, made a plea for the opening up of marriage to same-sex couples.[67]

In March 2006 the Minister for Justice, Equality and Law Reform established a Working Group on Domestic Partnership.[68] The Group's task was

> '[…] to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions and to identify options as to how and to what extent legal recognition could be given to those alternative forms of partnership, including partnerships entered into outside the State.'[69]

For this purpose the Working Group was to take into account models in place in other countries.[70] By the end of November 2006 the working group published an options paper,[71] which examined various options for unmarried cohabiting couples, namely: contractual arrangements; a presumptive scheme; limited civil partnership; full civil partnership; and legislative review and reform. The introduction of partnership for different-sex couples which would be equivalent or closely analogous to marriage was considered to be '[…] vulnerable to constitutional challenge on the ground that it constitute[d] an attack on the institution of marriage by providing a competing institution'.[72] In addition the Working Group was '[…] not convinced that there [were] many cohabiting opposite-sex couples who [were] unwilling to marry but [would] be willing to enter a registration scheme which ha[d] all the attendant obligations of

64 *Idem*, at p. 122.

65 Tobin argued that a civil partnership for different-sex couples would be unconstitutional, as it would amount to a state-sponsored institution competing with marriage. Tobin 2008, *supra* n. 52.

66 J. Walsh and F. Ryan, *The Rights of De Facto Couples* (Dublin, Irish Human Rights Commission 2006) p. 130, online available at www.ihrc.ie/download/pdf/report_defactocouples.pdf, visited June 2014.

67 Irish Council for Civil Liberties, *Equality for all families*, April 2006, p. 60, online available at www.iccl.ie/equality-for-all-families-.html, visited June 2014.

68 See www.justice.ie/en/JELR/Pages/PR07000328, visited June 2014.

69 Www.justice.ie/en/JELR/Pages/PR07000947, visited June 2014.

70 See the Group's Terms of reference as reproduced on www.justice.ie/en/JELR/Pages/PR07000328, visited June 2014.

71 Options Paper presented by the Working Group on Domestic Partnership to the Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D., November 2006, online available at www.justice.ie/en/JELR/OptionsPaper.pdf/Files/OptionsPaper.pdf, visited July 2014.

72 *Idem*, at p. 45.

marriage'.[73] By contrast, the Group believed that full civil partnership for same-sex couples was recommendable. Such a partnership was seen as a distinct institution separate from, and not competing with, marriage, and thus not suffering the same constitutional vulnerability as full civil partnership for different-sex couples.[74] The opening up of marriage to same-sex couples was nevertheless held to be vulnerable to constitutional challenge, '[…] given the special position marriage [was] afforded in the Constitution and the interpretation of the definition of marriage in constitutional actions before the Courts'.[75] In this respect the options paper also noted that a High Court judgment was pending in the *Zappone & Anor* case, concerning the recognition of a foreign same-sex marriage.[76] Even though this concerned a cross-border case, and would thus fit in best under section 11.4 below, it is discussed most extensively in this section, as the case has proven highly important for Ireland's national debate and standard-setting on legal recognition of same-sex couples.

11.3.2. The *Zappone & Anor* judgment (2006)

In *Zappone & Anor* v. *Revenue Commissioners & Ors* (2006),[77] two women who had concluded a marriage in Canada unsuccessfully claimed they should be allowed to profit from certain tax benefits that were afforded exclusively to married couples under the Taxes Consolidation Act 1997. The Revenue Commissioner refused to recognise their marriage certificate from British Columbia, Canada. When the case came before the Irish High Court in 2006, Justice Dunne was confronted with the question of whether the right to marry inherent in the Constitution encompassed the right to same-sex marriage, and if not, whether the traditional right as interpreted in the impugned provisions was incompatible with the provisions of the ECHR. Justice Dunne ruled that the refusal to recognise the Canadian marriage certificate had not breached any of the plaintiffs' rights as marriage as defined in the Irish Constitution was between a man and a woman. The Justice did not accept the arguments of the plaintiffs to the effect that the definition of marriage as understood in 1937, when the Constitution was enacted, required to be reconsidered in the light of standards and conditions prevailing in 2010.

Justice Dunne first observed that there was no consensus around the world that supported a widespread move towards same-sex marriage. She then continued:

> 'Marriage was understood under the 1937 Constitution to be confined to persons of the opposite sex. That has been reiterated in a number of […] decisions […], notably the decision of Costello J. in *Murray* v. *Ireland*, the Supreme Court decision in *T.F.* v. *Ireland* and the judgment of Murray J. in *T.* v. *T.* […] Judgment in the *T.* v. *T.* case was given as

73 *Idem*, at p. 45.
74 *Idem*, at p. 51.
75 *Idem*, at pp. 50–51.
76 *Idem*, at p. 51.
77 *Zappone & Anor* v. *Revenue Commissioners & Ors* [2006] IEHC 404.

recently as 2003. Thus it cannot be said that this is some kind of fossilised understanding of marriage.'[78]

Justice Dunne furthermore pointed out that in Ireland 'as recently as 2004' Section 2(2)(e) of the Civil Registration Act had been enacted, an Act which was entitled to a presumption of constitutionality and which had to be considered 'an expression of the prevailing view as to the basis for capacity to marry'. Reading Articles 41 and 42 of the Constitution together,[79] Justice Dunne found it '[…] very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same sex couple.'

The High Court Justice furthermore found that the plaintiffs were not treated in law any differently from any other non-married different-sex couple. And even if there was in fact any form of discriminatory distinction between same-sex couples and different-sex couples by reason of the exclusion of same-sex couples from the right to marry, 'then Article 41 in its clear terms as to guarding' and 'the issue as to the welfare of children' provided the necessary justification.[80] In conclusion Justice Dunne held that the plaintiffs' claim for recognition of their Canadian marriage and the challenge to the relevant provisions of the Tax Code failed.

The strong adherence by Justice Dunne to the historical approach, instead of interpreting the Constitution contemporaneously as a living instrument, was criticised for not being consistent with previous case law.[81] O'Sullivan furthermore wondered whether '[…] in dealing with capacity to exercise a right constituting a traditional constitutional value, recently enacted legislation or regulation [could] suffice.'[82]

As regards the claims made under the ECHR, Justice Dunne referred to the judgment of the English High Court in the case of *Wilkinson and Kitzenger*.[83] She found that judgment 'compelling' in setting out '[…] the position in relation to the right of marriage as identified by the European Court of Human Rights in [*Christine*] *Goodwin*.'[84] *Christine Goodwin* had concerned a post-operative transsexual who was refused an alteration of her sex on the birth register and could therefore not marry someone from the post-operative different sex. The English High Court had held that the breach of Article 12 found in *Christine Goodwin* was based on the

78 *Idem*. The *T.* v. *T* case to which the Judge refers concerns *D.T.* v. *C.T.,* 1 ILRM 321.

79 Art. 42 of the Constitution of Ireland provides for a right to education and refers to 'parents' in this regards.

80 For a critique on this reasoning see B. Tobin, 'Recognition of Canadian Same-sex Marriage: Zappone and Gilligan v Revenue Commissioners and Others', 1 *Irish Human Rights Law Review* (2010) p. 217 at p. 222.

81 O'Sullivan for example argues that the contemporaneous interpretation as adopted by the Court in *Sinnott* v. *Minister for Education* [2001] 2 IR 505 should have been applied. O'Sullivan 2009, *supra* n. 4, at p. 488.

82 *Idem*, at p. 485.

83 *Wilkinson and Kitzinger* v. *Attorney General*, a decision of the High Court (Unreported, 31st July, 2006) by Potter J.

84 On *Christine Goodwin* (2002), see Ch. 8, section 8.2.1.

ECtHR's finding that gender could be determined by criteria other than simply biological factors. Thus, from *Christine Goodwin* no right to same-sex marriage could be deduced. The English High Court held that '[…] the wording of Article 12 refer[red] to the right to "marry" in the traditional sense (namely as a marriage between a man and a woman)' and noted that there were clear limitations to the 'living instrument' doctrine. Because there was no Europe-wide consensus on the subject, the Convention could not be treated as having evolved and as having expanded its scope to encompass same-sex relationships within the concept of marriage, the English Court concluded. Justice Dunne saw no reason for reaching any conclusion different from that which the English High Court had reached in the *Wilkinson and Kitzenger* case.

Justice Dunne nevertheless explicitly invited the Irish legislature to take further action in this field. She acknowledged that undoubtedly people in the position of the plaintiffs, whether they were same-sex couples or different-sex couples, could '[…] suffer great difficulty or hardship in the event of the death or serious illness of their partners.' Therefore she held that it was 'to be hoped that the legislative changes to ameliorate these difficulties' would not be 'long in coming.' The Justice did not consider this a matter up to the courts though; ultimately, it was for the legislature to determine the extent to which such changes had to be made, she held. This invitation did not go unheard, but the legislative process proved time consuming.[85]

11.3.3. Towards a Civil Partnership Act

In December 2006 – the same month in which the High Court judgment in *Zappone & Anor* was delivered – the Irish Labour Party tabled its Civil Unions Bill.[86] In line with the abovementioned options paper on domestic partnership, the Bill proposed a civil registration scheme extending the full range of rights and duties of marriage to same-sex couples.[87] The second stage of the debate on the Bill was delayed after the approval of a government amendment to that effect. The amendment noted that terms of the Civil Unions Bill 2006, as presented, appeared to be 'inconsistent with the provisions of the Constitution', in particular 'the State's constitutional duty to protect with special care the institution of marriage'. Also, it was regarded as prudent to await the Supreme Court decision in the *Zappone & Anor* case as that case had been appealed in the meantime.[88]

Late April 2007 the *Dáil Éireann* was dissolved. After the elections of May 24, 2007 the Bill was put before the new parliament, but again the debate was adjourned.

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85 As explained further in section 11.3.6 below, the *Zappone* case was subsequently appealed to the Supreme Court.

86 Bill Number 68 of 2006.

87 Explanatory Memorandum to Bill Number 68 of 2006, p. 3.

88 Dáil Éireann – Volume 632 – 21 February, 2007, Civil Unions Bill 2006: Second Stage (Resumed), online available at www.historical-debates.oireachtas.ie/D/0632/D.0632.200702210028.html, visited 9 July 2014.

Reportedly the Minister for Justice Equality and Law Reform, opposed the Bill after having been '[…] advised by the Attorney General that it was contrary to the explicit recognition given to the family based on marriage in the Constitution.'[89] The legislative programme of the newly appointed Irish government, however, contained the commitment to legislate for civil partnership at the earliest possible date in the lifetime of the government.[90] Subsequently in June 2008, the General Scheme of the Civil Partnership Bill was published[91] and a year later, in June 2009, the government presented its Civil Partnership Bill 2009 to the Houses of the Oireachtas.[92] According to its Explanatory Memorandum the purpose of the Bill was the following:

> 'The purpose of the Bill is to establish a statutory civil partnership registration scheme for same-sex couples together with a range of rights, obligations and protections consequent on registration, and to set out the manner in which civil partnerships may be dissolved and with what conditions.'[93]

By limiting access to civil partnership to same-sex couples, the new institution would not rival marriage (which was open to different-sex couples only) and would thus not be subject to constitutional challenge on this point.[94] It was presumably because of the same constitutional concerns that the complex and lengthy Bill stated in detail which rights and obligations applied to civil partners. Ryan observed in this regard at the time:

> 'The earlier bills simply stated that civil partnership would be equivalent to marriage in most respects. The Government Bill, by contrast, seeks to enumerate one by one the various rights and responsibilities that will apply to civil partners. While far more laborious, it appears this approach was preferred for constitutional reasons, the logic being that a direct equation with marriage is more likely to provoke constitutional concerns. The Government thus preferred to list explicitly the various consequences of civil partnership without seeking to compare it directly with marriage. A review of the proposal, however, reveals a union that (with some important exceptions) is substantially

89 Y. Moynihan, "God has given you one face and you give yourself another": The implications of transsexual recognition in matters of marriage: Dr Lydia Foy's laudable victory spawns reform in terms of same-sex unions', 11 *Irish Journal of Family Law* (2008) p. 38.

90 Programme for Government 2007–2012, www.taoiseach.gov.ie/eng/.../ProgforGovEng.rtf, visited June 2014. At p. 87 of this Programme it was held: 'This Government is committed to full equality for all in our society. Taking account of the options paper prepared by the Colley Group and the pending Supreme Court case, we will legislate for Civil Partnerships at the earliest possible date in the lifetime of the Government.'

91 Ryan referred to the publication of this scheme as marking 'a watershed in modern Irish law'. F. Ryan, 'The General Scheme of the Civil Partnership Bill 2008: Brave New Dawn or Missed Opportunity?', 11 *Irish Journal of Family Law* (2008) p. 51.

92 Civil Partnership Bill 2009, Bill No. 44 of 2009.

93 Explanatory Memorandum to the Civil Partnership Bill 2009, p. 1.

94 Ryan 2012, *supra* n. 7, at pp. 233–234, referring (in footnote 182) to J. Mee, 'Cohabitation, Civil Partnership and the Constitution' in Doyle and Binchy (eds.), *Committed Relationships and the Law* (Dublin, Four Courts Press 2007), pp. 201–207.

> equivalent to marriage. In fact, it is clear from the heavy borrowing from current marriage legislation, that civil partnership is based largely on the same blueprint.'[95]

This approach thus removed most constitutional concerns and the Bill passed through the *Dáil* 'relatively smooth and speedy'.[96] In the *Senead* it met with more concerns, mainly, as Ryan has explained, in relation to conscientious objections.[97] Still, in July 2010, both Houses of the Oireachtas passed the Bill; in the *Dáil* it was passed without a vote, while the *Senead* adopted the Bill with a 48-4 vote.[98] Soon thereafter, on 19 July, the President signed the Bill, without a reference to the Supreme Court for a review of its constitutionality.[99] The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010[100] (hereafter referred to as 'Civil Partnership Act' or 'the 2010 Act') entered into force in January 2011. The Act introduced two new schemes, namely civil partnership and (qualified) cohabitation.[101] The latter scheme, that applies automatically to cohabiting partners in an 'intimate and committed relationship' – whether of different or the same sex – who meet certain criteria, is not extensively discussed here. Instead, the focus lies on the civil partnership.

11.3.4. The Civil Partnership Act 2010

Civil partnership as introduced by the 2010 Act is open to same-sex partners only. In other words, only same-sex couples have the option of entering into a civil partnership, while different-sex couples only have the option of concluding a civil marriage. Other impediments to the registration of a civil partnership occur, *inter alia*, when the parties to the intended civil partnership are married, already in a civil partnership or are under the age of 18 years.[102]

The prospective civil partners must give three months' written notice of their intention to enter into the partnership. While marriage can be celebrated by religious solemnisers, this does not hold for civil partnership; the ceremony for registering the partnership is wholly secular.[103] A civil partnership can be dissolved through a court order, after the partners have lived apart for two out of the three preceding years.[104]

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95 Ryan 2008, *supra* n. 91, at pp. 51- 57. See also Ryan 2012, *supra* n. 7, at p. 247.

96 See Ryan 2011, *supra* n. 41, at p. 13.

97 *Idem*. This concern was no longer very visible in the debate once the Act was adopted.

98 See Center for Evaluation Innovation, *Civil Partnership and Ireland: How a Minority Achieved a Majority. A case study of the gay and lesbian equality network* (Center for Evaluation Innovation, November 2012) p. 13, online available at www.glen.ie/attachments/Case_Study_-_How_a_minority.PDF, visited 9 July 2014.

99 Art. 26 Constitution of Ireland.

100 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, No. 24/2010, online available at www.irishstatutebook.ie/2010/en/act/pub/0024/print.html, visited 9 July 2014.

101 Ryan 2011, *supra* n. 41, at p. 8.

102 Section 2(2)(A) Civil Registration Act 2004, as amended by Section 7(3) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

103 See Ryan 2011, *supra* n. 41, at p. 13.

104 Section 12 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

Again, there is a difference with marriage in this regard, as spouses must have been living apart for four out of the five preceding years before they can divorce.[105]

Despite these differences of a more procedural nature, civil partnership has substantially generally been put on a par with marriage. The rights and obligations of civil partners are in many respects 'largely identical' to those of spouses, for example in respect of maintenance, property and succession.[106] The Civil Partnership Act does not deal with taxes and social assistance, but simultaneous and subsequent amendments of the relevant legislation established that, also in respect of these matters, civil partners were treated the same as spouses.[107] Still, a 2011 study by LGBT advocacy organisation *Marriage Equality* found 169 differences in treatment between civil partners and spouses under Irish legislation, concerning mainly '[…] family law, immigration, housing, court procedure, inheritance, taxation and freedom of information […].'[108]

The most prominent – and much debated – exception to the general equalisation of civil partnership with marriage indeed concerned parental rights and various other situations involving children. As discussed more extensively in the following subsection, the 2010 Civil Partnership Act did not provide for anything in this regard. As this was heavily criticised, in the years that followed, new proposals for legislation were drafted which aimed to protect the position of children born with civil partners and cohabiting (same-sex) partners (see section 11.3.5 below).

While the Civil Partnership Act was generally welcomed as a great improvement for the protection of the rights of same-sex couples, the 'separate but equal' approach at the bottom of the introduction of this new regime for same-sex couples only, has been criticised.[109] As Ryan has pointed out, an important implication thereof is that there is no constitutional protection of the civil partnership. As a consequence, 'civil partnership could be abolished without constitutional difficulty'.[110] This lack of constitutional protection was further confirmed by the Supreme Court, which ruled in a 2009 judgment that the constitutional protection of the family did not extend to *de facto* families, as further explained hereafter in section 11.3.5.1.[111]

105 Art. 41.3.2° of the Constitution of Ireland.
106 Ryan 2011, *supra* n. 41, at p. 14.
107 Finance (No. 3) Act 2011, No. 18/2011 and Social Welfare and Pensions Act 2010, No. 37/2010.
108 P. Faugan, *Missing pieces. A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland* (Marriage Equality 2011) p. 6, online available at www.marriagequality.ie/download/pdf/missing_pieces.pdf, visited July 2014.
109 Ryan 2008, *supra* n. 91, referring (in footnote 4) to the arguments put forward by *Marriag Equality*. See www.marriagequality.ie, visited July 2014.
110 Ryan 2012, *supra* n. 7, at p. 242.
111 *McD* v. *L. & Anor* [2009] IESC 81, [2010] 2 IR 199. See 11.3.5.1 below.

11.3.5. Parental rights for same-sex couples under Irish law

As the previous sections have made clear, for a long time same-sex relationships did not enjoy any legal protection under Irish law. This was even more so for so-called rainbow families – families built by same-sex partners. In fact, *de facto* families in general – including unmarried different-sex couples – have long had to do without any legal protection.[112] The Irish constitutional reading and protection of the family is limited to the family based on marriage (as explained above) and the legislation long showed a strong adherence to biological parenthood. As O'Connell noted in 2010, '[a]part from adoption and guardianship situations, there is no recognition of non-biological parenthood in Irish law.'[113] In that same year McLoone observed that there seemed to be '[…] a reluctance to recognise the position of same-sex couples as parents'.[114] Reddington noted that '[…] perhaps it [was] time that Ireland's own historic interpretation of the family under the Constitution [was] revisited and amended to suit the needs of the citizens it serve[d] in a more modern, diverse and increasingly secular society.'[115] As explained in the following subsections, change may indeed be underway.

Access to reproductive services is in principle guaranteed for same-sex couples and lesbian and gay individuals under equality legislation that has been in place in Ireland since the year 2000. Nonetheless, as explained in Chapter 5, section 5.3.3, same-sex couples may encounter refusals when they try to get access to AHR treatment.

Yet before the introduction of civil partnership for same-sex couples in 2011, incidental High Court rulings showed an increased recognition of parenting by same-sex couples. In *Zappone & Anor* (2006) Justice Dunne held that further studies were necessary before a firm conclusion as to the consequences of same-sex marriage for the welfare of children could be reached,[116] but she also held that there was

> '[…] no evidence of any kind tendered to the court to demonstrate that children brought up by a same sex couple or a single homosexual parent [were] adversely affected by the family structure in which they are raised.'[117]

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112 The lack of legal rights for non-biological parents was also 'one of the key themes' running through a 2013 study on LGBT parents in Ireland. J. Pillinger and P. Fagan, *LGBT parents in Ireland. A study into the experiences of Lesbian, Gay, Bisexual and Transgender People in Ireland who are parents or who are planning parenthood*, Report commissioned by LGBT Diversity, February 2013, p. 113, online available at www.marriagequality.ie/download/pdf/lgbt_parents_in_ireland_full_report.pdf, visited July 2014.

113 D. O'Connell, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Thematic Study Ireland* (Galway 2010) p. 12, online available at http://fra.europa.eu/en/national-contribution/2012/country-thematic-studies-homophobia-transphobia-and-discrimination, visited June 2014.

114 C. McLoone, 'Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010: A Practitioner's Guide', 14 *Irish Journal of Family Law* (2011) p. 58.

115 D. Reddington, 'Civil Partnership vs Marriage – the Approach of the European Court of Human Rights', 14 *Irish Journal of Family Law* (2011) p. 15.

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

117 *Idem*, at 118.

In 2008, the High Court in *McD* v. *L & Anor* even went as far as to grant legal protection to same-sex *de facto* families. This ground-breaking ruling was, however, overruled by the Supreme Court a year later.

11.3.5.1. McD v. L & Anor (2009): no constitutional protection of same-sex de facto family life

In December 2009 the Supreme Court rendered its judgment in the *McD* v. *L & Anor* case. The facts of this case about a sperm donor who wished to have access to his biological child, born to a lesbian couple, have been set out in Case Study I (see Chapter 5, section 5.3.4). In *McD* v. *L & Anor*, the High Court had initially – and for the first time – ruled that the two lesbian women and their child enjoyed protection as a *de facto* family under Article 8 ECHR. Judge Hedigan had acknowledged that the Irish Constitution did not recognise 'the concept of a same-sex de facto family', but had noted that this did not preclude the recognition of the '*de facto* heterosexual family' by the courts.[118] The High Court Judge based this protection on the right to respect for family life ex Article 8 ECHR, even though the ECtHR had at the time not yet brought same-sex relationships within the scope of that Article. The Judge concluded:

> '[…] where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded as a de facto family, they must be regarded as themselves constituting a de facto family enjoying rights as such under article 8 of the European Convention on Human Rights. Moreover, where a child is born into such a family unit and is cared for and nurtured therein, then the child itself is a part of such a de facto family unit. Applying this to the case here it seems clear that between the respondents and the infant there exist such personal ties as give rise to family rights under article 8 of the ECHR.'[119]

On this basis the High Court denied the applicant, the sperm donor, access to his biological child that was being raised by its biological and genetic mother and her lesbian partner. The case was, however, appealed and consequently the ruling of the Irish High Court was overturned by a unanimous Supreme Court judgment of 10 December 2009.[120] The Supreme Court judges felt that the High Court had gone too far and exceeded its jurisdiction by 'outpacing' the ECtHR and so developing 'previously non-existent rights by reference to the ECHR'.[121] In the words of Judge Fennelly:

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118 C. Power and G. Shannon, 'Practice and Procedure, Sperm donors and the legal recognition for same-sex couples', 11 *Irish Journal of Family Law* (2008) p. 44.

119 *McD* v. *L. & Anor* [2009] IESC 81, [2010] 2 IR 199 at 235–236, as quoted in Ryan 2012, *supra* n. 7, at p. 216.

120 C. Hogan,'JMcD v PL and BM Sperm Donor Fathers and De Facto Families', 13 *Irish Journal of Family Law* (2010) p. 83.

121 C. Murray, 'Recognising the Modern Family: Extending Legislative Guardianship Rights in Ireland', 15 *Irish Journal of Family Law* (2012) p. 39.

> 'The existing case-law of the European Court seems clearly to be to the effect that a de facto family of the sort claimed does not come within the scope of Article 8. […] It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence.'

The Supreme Court reiterated that the protection of the family under the Irish Constitution only saw at the family based on marriage and in addition held that there was no Irish law in place that recognised *de facto* same-sex families. Judge Fennelly explained that '[…] [n]either the Constitution nor the law in force in Ireland recognise[d] persons in the position of the respondents as constituting a family with the natural child of one of them'.[122] Judge Geoghegan observed that there was '[…] nothing wrong with the rather useful expression 'de facto family' provided it [was] not regarded as a legal term or given a legal connotation'.[123] Judge Denham was as firm as to hold that '[t]here is no institution in Ireland of a de facto family.'[124]

The Supreme Court made clear that this finding did not mean that the *de facto* situation of the parties to the case should not be taken into consideration. However, in assessing the matter, so the Supreme Court ruled, the child's welfare was a primary consideration. It was 'the kernel of the issue' in questions concerning guardianship, custody and access.[125] On the basis of the welfare of the child central to this case, the Supreme Court requested the High Court to make access arrangements for the applicant to the child.[126]

This Supreme Court judgment thus once again confirmed the 'narrow conception of the family in the Constitution'.[127] Hogan observed that the judgment was 'in keeping with the trend in favour of biological truth and contact with natural parents' and 'clearly' represented 'a blow for so called "non-traditional families"'.[128] Daly held it conceivable that the decision would be challenged in the future 'on the basis that it is no longer in conformity with the Convention.'[129] Ryan observed, on the other hand, that the judgment made clear that, '[…] to the extent that the definition of family in the Convention would bring the Convention into conflict with the Constitution, the Constitution would, as a matter of domestic law, prevail.'[130] With a view to the later judgment of the ECtHR in the case of *Schalk and Kopf* v. *Austria* to the effect that same-sex couples enjoy protection of the right to respect for family life under Article 8 ECHR,[131] this is an even more interesting finding.

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122 *McD* v. *L & Anor* [2010]1 ILRM 461, Fennelly J.
123 *McD* v. *L & Anor* [2010]1 ILRM 461 at 495, Geoghegan J.
124 *McD* v. *L & Anor* [2010]1 ILRM 461, Denham J.
125 *Idem*, at 63.
126 O'Shea 2012, *supra* n. 11, at p. 90.
127 Murray 2012, *supra* n. 121.
128 Hogan 2010, *supra* n. 120.
129 A. Daly, 'Ignoring Reality: Children and the Civil Partnership Act in Ireland', 14 *Irish Journal of Family Law* (2011) p. 82.
130 Ryan 2008, *supra* n. 91, p. 218.
131 See Ch. 8, section 8.2.2.

The Supreme Court's ruling thus denied the legal protection that High Court Judge Hedigan had granted to rainbow families. Supreme Court Judge Fennelly expressly noted that the absence of any provisions in Irish law securing the rights of these families seemed something that called 'for urgent consideration by the legislature.'[132] By the time the *McD* v. *L & Anor* judgment came out, the Civil Partnership Act and a revision of the Adoption Act were yet under debate in Parliament. However, both Acts failed to provide for the identified need for legal protection of rainbow families.

11.3.5.2. Limited change brought about by the 2010 Adoption Act and the 2010 Civil Partnership Act

In 2010 a new Adoption Act entered into force which was still in force when this research was concluded (i.e., 31 July 2014). While until that time only married couples who were living together could adopt a child,[133] the new Act introduced single-parent adoption, rendering it possible for lesbian and gays to become parents of a non-genetic child. A single person or one partner of a couple – irrespective of his or her sexual orientation – may adopt if the Adoption Authority considers it desirable. The Authority must regard the welfare of the child as its first and paramount consideration.[134] The civil partner or cohabiting partner of an adoptive parent may seek access to the child, but cannot establish any parental links with the child.[135]

While the Ombudsman for Children had at the time advised to also enable both different-sex and same-sex unmarried couples to jointly adopt a child, no such option was introduced by the Adoption Act 2010.[136] Same-sex couples only have the option of submitting a joint application to foster children.[137] The Children's Ombudsman considered the State's policy in this regard inconsistent and 'arbitrary from the child's point of view'.[138] She wondered what the purpose was of barring these couples from applying to adopt and observed in this respect:

> 'It cannot logically arise from a concern on the part of the State regarding the capacity of unmarried opposite-sex and same sex couples to care for children, given that the State already entrusts young people to their care – potentially for many years – and has already provided in law for a situation in which they can effectively occupy the role of guardians. Indeed, during the debates in the Seanad regarding the Adoption Bill, the Minister for

132 *McD. v. L. & Anor* [2008] IEHC 96, Hedigan J.
133 E.g. Section 10 Adoption Act 1991, No. 14/1991.
134 Section 33 Adoption Act 2010, No. 21/2010.
135 See also www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/adoption_and_unmarried_couples.html, visited July 2014.
136 Ombudsman for Children, *Advice of the Ombudsman for Children on the Adoption Bill 2009*, 2009, p. 27, online available at www.oco.ie/wp-content/uploads/2014/03/Adviceonadoption.pdf, visited July 2014.
137 Murray 2012, *supra* n. 121.
138 Ombudsman for Children 2009, *supra* n. 136, at p. 23.

> Children and Youth Affairs clarified that, based on the experience of the foster services, the State has no difficulty with same-sex couples being parents or minding children.'[139]

The Civil Partnership Act that entered into force a few months after the 2010 Adoption Act did not bring any further protection for rainbow families. In fact, the Act did simply not address the question of parental rights for civil partners.[140] As Ryan observed, 'a studious effort' had been made '[…] generally to avoid the use of the term "family" as a description for civil partners'. The author was of the view that this was 'undoubtedly a consequence of the confinement of family in the Constitution to the family based on marriage.'[141] Daly explained that the 2010 Civil Partnership Act contained many provisions that were taken from laws relating to marriage and noted that while '[…] in many of the original provisions, references were made to the need to provide for the interests of children of the family', such references had not been included in the Civil Partnership Act 2010, 'intentionally removing children from the legislative picture.'[142]

That the matter had simply not been unforeseen, was also illustrated by the fact that during the debates on the Civil Partnership Bill in the *Seanad* an amendment to provide for step-parenthood for civil partners had been rejected.[143] Also, the Ombudsman for Children had been critical of the Civil Partnership Bill:

> 'Although the situation of children was clearly considered in the drafting of the Civil Partnership Bill, the approach adopted was not one which placed the rights of the children who will be affected by the Bill to the forefront. Indeed, provisions from other areas of the law that acted as templates for the Civil Partnership Bill and which included references to the need to provide for dependent children of the family were adapted for the Civil Partnership Bill in a manner which effectively removed the protections afforded to children of marital families from children with same-sex parents in a civil partnership.'[144]

As a result of the approach chosen, children of parents in civil partnerships were not granted the same protection as children of married parents. For example, as explained

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139 *Idem*, p. 24, referring (in footnote 36) to Seanad Éireann, Parliamentary Debates, Vol. 194 No. 6, p. 361, online available at www.oco.ie/wp-content/uploads/2014/03/Adviceonadoption.pdf, visited July 2014. See also GLEN – Gay and Lesbian Equality Network, *Submission to Joint Oireachtas Committee on Justice, Defence and Equality on the Heads of the Children and Family Relationships Bill*, February 2014, p. 3, online available at www.glen.ie/attachments/GLEN_Submission_to_Oireachtas_Committee_on_the_Heads_of_Children__Family_Relationships_Bill.pdf, visited July 2014.

140 As Ryan explains, the Act was not 'entirely oblivious to the existence of children'. For example, in granting maintenance in case of dissolution of a civil partnership, the Court must take into account the civil partner's obligations to his or her biological and adopted child(ren). Ryan 2011, *supra* n. 41, at p. 27.

141 Ryan 2012, *supra* n. 7, at pp. 236–237.

142 Daly 2011A, *supra* n. 133.

143 Amendment 37. See also Law Reform Commission, *Report on the Legal Aspects of Family Relationships,* December 2010, LRC 101–2010, p. 39, online available on www.lawreform.ie/_fileupload/Reports/r101Family(1).pdf, visited July 2014.

144 Ombudsman for Children, *Advice of the Ombudsman for Children on the Civil Partnership Bill 2009*, July 2010, online available at www.oco.ie/wp-content/uploads/2014/03/Advice-OCO-Civil-Partnership-Bill-2009.pdf, visited July 2014.

by Ryan, '[…] civil partnership dissolution […] may be granted without reference to the needs of children' and no mechanism is in place '[…] allowing the biological parent to share guardianship rights with his or her civil partner.'[145] Other differences between the legal position of children raised by spouses and those growing up with civil partners relate to maintenance upon relationship breakdown, shared home protection and succession to the tenancy of a deceased parent.[146]

The Law Reform Commission urged the legislature in December 2010, thus right before the entry into force of the Civil Partnership Act, to introduce legislation to facilitate the extension of parental responsibility to civil partners and step-parents.[147] This did not go unheard, although it would take the Minister until January 2014 to introduce draft legislation.

11.3.5.3. The Children and Family Relationships Bill (2014)

The Irish government announced in 2011 that it intended to amend the 2010 Civil Partnership Act, in order 'to address any anomalies or omissions, including those relating to children'.[148] It took until 2014, however, for the Children and Family Relationships Bill (as also discussed in Chapter 5, section 5.3.2) to be drafted, in which (some of) these matters were indeed addressed.

A first important change that was to be brought about by the Children and Family Relationships Bill concerned joint adoption by civil partners,[149] something which the Ombudsman for Children had pleaded for years earlier.[150] The Bill envisaged that civil partners would be able to jointly adopt a child, including in intercountry situations. In a revised version of the Bill this was extended to cohabiting couples who had been living together for at least three years.[151] The Bill did not explicitly provide for second-parent or successive adoption, but it seems unlikely that this would be outlawed now that joint adoption is to be introduced.

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145 Ryan 2012, *supra* n. 7, at p. 239.

146 Daly 2011A, *supra* n. 129, at pp. 82–86.

147 The Commission recommended that where parental responsibility was extended by court order the court would have regard 'to, among other factors, the wishes and best interests of the child and the views of other parties with parental responsibility.' Law Reform Commission 2010, *supra* n. 143, at p. 41.

148 Government for National Recovery 2011–2016, online available at www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_2011–2016.pdf, visited June 2014.

149 Children and Family Relationships Bill 2014, Head 77.

150 See note 136 above. This development was welcomed by the Ombudsman for Children. Ombudsman for Children, *Advice on the General Scheme of the Children and Family Relationships Bill 2014*, May 2014, p. 57, online available at www.oco.ie/wp-content/uploads/2014/06/OCOAdviceonChildandFamilyRelBill2014.pdf, visited June 2014.

151 General Scheme of the Children and Family Relationships Bill, Summary of Provisions, online available at www.justice.ie/en/JELR/Note%20on%20the%20General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/Note%20on%20the%20General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf, visited July 2014.

Secondly, the Bill provided for detailed rules on the establishment of parental links in situations involving AHR treatment and/or surrogacy. As explained in Chapter 5,[152] the relevant provisions of the Bill were based on the rule that the birth mother was always considered the child's mother, and thus, as the parent. Importantly, provision was made for legal parenthood by operation of the law for female civil partners. Under the Bill it was made possible for the civil or cohabiting partner of the mother to become the parent, and thus guardian, of the child.[153] As explained in the General Scheme, '[t]he husband, civil partner or cohabitant of the mother [was] considered to be the other parent of the child if he or she ha[d] given a consent which remain[ed] valid at the time the procedure leading to implantation [took] place.'[154] Also, there was a rebuttable presumption of consent on the part of the mother's spouse, partner or cohabitant to becoming a child's parent.[155]

Further, disputes between parents were not solved on the basis of a genetic link only; in order to protect the rights of the child '[…] a genetic parent [could not] exclude the other parent by obtaining a declaration that s/he [was] not a parent of the child, nor [could] a parent repudiate her or his responsibilities to a child on the grounds that they [were] not genetically connected.'[156] These rules thus implied a correction of the *McD* v. *L & Anor* case (see 11.3.5.1 above).

The described rules thus envisaged the granting of strong protection to the families of same-sex couples consisting of two women. This protection was not extended to male same-sex couples. The proposed rules concerning parentage in cases involving surrogacy would have enabled same-sex couples consisting of two men to both establish parental links with a child born with a surrogate mother that was genetically related to one of them.[157] Following the proposed Bill this could be done through assignment of parentage by the Court. The consent of the birth mother would have been decisive; if she did not consent, she would be the legal mother. This would also hold in situations where a lesbian couple resorted to a surrogacy agreement, including where one of them provided the ovum for the creation of an embryo that was to be implanted in the surrogate mother's womb.[158] As explained in Chapter 5,[159] the provisions on surrogacy were, however, removed from the revised version of the Bill that was published in September 2014.

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152 See section 5.3.2.

153 Heads 10 and 38 Children and Family Relationships Bill 2014.

154 Explanation to Head 10, General Scheme, p. 22. Following Head 10(8) it is for the Minister to make regulations on the form that such consent must take.

155 Head 10(6) Children and Family Relationships Bill 2014.

156 Explanation to Head 10, General Scheme, p. 23. As acknowledged in the Explanatory Memorandum, these rules […] could limit the rights of a "known donor" who wishes to establish a legal connection with a child.'. 'However', it is held, '[…] there is a balance of rights to be achieved and the best interests of the child are likely to be served by having legal certainty and security in his or her family unit.'

157 Head 12(1) Children and Family Relationships Bill 2014.

158 Head 12(2) Children and Family Relationships Bill 2014.

159 See section 5.3.9.

The Bill furthermore provided for the equalisation of the legal position of children whose parents were in a civil partnership with that of children whose parents were spouses, in respect of maintenance, shared home protection and responsibilities towards the children in situation of a dissolution.[160] The Minister for Justice affirmed in April 2014 that the Bill would not 'downgrade or devalue' the traditional marital family but [would] ensure all children are treated equally'.[161]

11.3.6. Towards access to marriage for same-sex couples?

Already before civil partnership was introduced in Ireland, voices were heard that the creation of a new institution only for same-sex couples, instead of opening up marriage to these couples was discriminatory and treated this group as second-class citizens. The Irish Council for Civil Liberties (ICCL), for example, held such in 2006. The ICCL noted 'the inherent paradox in the adage "separate but equal"' and was of the view that the marriage ban compromised same-sex couples' right to dignity and equality.[162] In legal scholarship it was also observed that full equality for same-sex couples 'undoubtedly' demanded equal access to civil marriage.[163]

It has been much debated in legal academia and in politics whether the opening up of marriage to same-sex couples would require constitutional amendment, and thus whether a referendum on the matter would be mandatory. While the Constitution refers to the marriage institution in neutral terms, the Supreme Court in its case law defined marriage as between a man and a woman only.[164] As Ryan explained in 2011:

> '[…] it remains somewhat unclear whether the Constitution precludes same-sex marriage. Article 41.3 does not define marriage and on its face does not appear to prevent same-sex marriage from being enacted. On the other hand, to interpret Article 41.3 as potentially applying to same-sex as well as opposite-sex marriage would involve a significant departure from the historical meaning of marriage.'[165]

The strong reliance on this historical and static constitutional understanding of marriage by High Court Justice Dunne in *Zappone*, could be held to support the conclusion that the opening up of marriage to same-sex couples would require a

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160 Heads 72–74 of the Children and Family Relationships Bill 2014 (Revised version September 2014). See also GLEN – Gay and Lesbian Equality Network, *Submission to Joint Oireachtas Committee on Justice, Defence and Equality on the Heads of the Children and Family Relationships Bill*, February 2014, p. 8, online available at www.glen.ie/attachments/GLEN_Submission_to_Oireachtas_Committee_on_the_Heads_of_Children__Family_Relationships_Bill.pdf, visited June 2014.

161 P. Duncan, 'New Bill 'won't devalue' traditional marital families', *Irishtimes.com* 10 April 2014, www.irishtimes.com/news/social-affairs/new-bill-won-t-devalue-traditional-marital-families-1.1757969, visited July 2014.

162 Faugan 2011, *supra* n. 108, at p. 8.

163 Ryan 2008, *supra* n. 91.

164 See 11.1.2 above. O'Sullivan held in 2009 that there was '[…] no textual exclusion in the Constitution precluding a same-sex couple from exercising a personal right to marry each other.' O'Sullivan 2009, *supra* n. 4, at p. 487.

165 Ryan 2011, *supra* n. 41, at p. 36.

referendum.[166] Others expressed the view that there was no constitutional impediment to the opening up of marriage.[167] Tobin grounded this conclusion in the clear judicial deference of the Court in this matter and in other sensitive social matters, as displayed by Justice Dunne in *Zappone*.[168] At the same, the author took into account the option that the judiciary would instead 'slam the door firmly shut on same-sex marriage', if a Bill opening up marriage to same-sex couples would be referred to the Supreme Court by the President under Article 26 of the Irish Constitution.[169]

When the Irish government prepared the Civil Partnership Act, some authors wondered whether the government planned 'on it being the last word on the same-sex marriage debate'.[170] This turned out not to be the case, however, for long, an argument against the undertaking of any legislative action on the matter was the pending appeal in the *Zappone & Anor* case (see 11.3.2 above) before the Supreme Court.[171] Many authors at the time thought that the Supreme Court was likely to defer to the legislature, just like the High Court had.[172] The case remained pending for several years, however, and in the meantime, the legislature took the initiative in the matter.

In 2011 the government announced the establishment of a Constitutional Convention, a forum of 100 representatives from Irish society and politics, to make recommendations on possible Constitutional reform. Amongst the topics to be covered by the Convention was 'provision for same-sex marriage'.[173]

While the Convention was in progress, a hearing in the *Zappone* case was scheduled for June 2012. Reportedly, the plaintiffs dropped the case just a few weeks before that, and lodged a fresh application with the High Court instead. As Tobin explained:

166 Ryan 2012, *supra* n. 7, at pp. 222–223.

167 *Idem*, at p. 223, referring (in footnotes 120 and 121) to E. Carolan, 'Committed Non-Marital Couples and the Irish Constitution', in Doyle and Binchy (eds.), *Committed Relationships and the Law* (Dublin, Four Courts Press 2007); Tobin 2012A, *supra* n. 14; C. O'Mahony, 'Constitution is not an obstacle to legalising gay marriage', *Irish Times*, July 16, 2012, online available at www.irishtimes.com/newspaper/opinion/2012/0716/1224320203659.html and E. Daly, "Same sex marriage doesn't need a referendum", 15 July 2012, online available at www.humanrights.ie/index.php/2012/07/15/same-sex-marriage-doesnt-need-a-referendum.

168 Tobin 2012A, *supra* n. 14.

169 *Idem*. See also *supra* n. 99.

170 *Idem*, at p. 321. Tobin later opined that the enactment of Civil Partnership legislation '[…] could sound the death knell for the recognition of a right to same-sex marriage under Art. 41 of the Constitution.' He explained that that was '[…] because the High Court could display the same legislative deference as Dunne J. in 2006 and consequently refuse to expand the current constitutional understanding that marriage is heterosexual in nature by finding that the 2010 Act represents the prevailing social consensus on the appropriate form of legal recognition for same-sex relationships.' Tobin 2012B, *supra* n. 27, at p.104.

171 The appeal to the Supreme Court was lodged in 2007. See also Tobin 2007, *supra* n. 15, at p. 175.

172 *Inter alia*, O'Sullivan, *supra* n. 4, at p. 488 and Tobin 2010, *supra* n. 80, at p. 221.

173 The task that the Constitutional Convention has been given is set out in the Resolution of the Houses of the Oireachtas of July, 2012, online available at www.constitution.ie/Documents/Terms_of_Reference.pdf, visited 8 July 2014.

> 'In the new High Court proceedings, the plaintiffs are seeking to impugn s. 2(2)(e) of the Civil Registration Act 2004 […], the first Irish statutory provision to define marriage as between a man and a woman. This provision went unchallenged in the original High Court proceedings in 2006. The plaintiffs also claimed that they would mount a challenge to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 […].'[174]

The latter application was still pending at the time of conclusion of this research (i.e., 31 July 2014). As a result of rapid developments in the meantime, however, the opening up of marriage to same-sex couples in Ireland has become increasingly more realistic. In July 2012 the Deputy Prime Minister, the *Tánaiste*, declared his support for marriage equality.[175] In April 2013 the Constitutional Convention favoured a Constitutional amendment requiring the legislature to legislate for same-sex marriage, by a clear majority of 79 per cent.[176] The Convention also supported the introduction of legislation '[…] to address the parentage, guardianship and upbringing of children in families headed by same-sex married parents.'[177] In early 2014 the government announced that a referendum on same-sex marriage would be held in spring 2015. It was furthermore announced that the Minister for Justice and Equality would bring legislative proposals to government in 2014.[178] By the time this research was concluded (i.e., 31 July 2014), no such Bill had been published.

11.4. Same-sex relationships and cross-border movement

11.4.1. Cross-border movement; some statistics

The Central Statistics Office (CSO) of Ireland keeps statistics on the number of civil partnerships registered per year. For example, there were 536 civil partnerships registered in 2011[179] and 429 in 2012.[180] These statistics do not give any details on matters like the nationality of the partners concerned.

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174 Tobin 2012B, *supra* n. 27, at p. 102.

175 See www.humanrights.ie/index.php/2012/07/01/marriage-equality-and-the-weight-to-be-borne-by-the-constitutional-convention, visited July 2014.

176 This outcome was in line with opinion polls of 2012 which showed that at the time 74 per cent of the Irish people was in favour of marriage equality for same-sex couples. See *Marriage Equality*'s submission to the 2013 Constitutional Convention, pp. 4–5, online available at www.marriagequality.ie/getinformed/me_publications/marriage-equality-constitutional-convention-submission, visited July 2014.

177 *Third Report of the Convention on the Constitution. Amending the Constitution to provide for same-sex marriage*, June 2013, online available at www.constitution.ie/AttachmentDownload.ashx?mid=c90ab08b-ece2-e211-a5a0-005056a32ee4, visited July 2014.

178 *Programme for Government: Annual Report 2014, Government for National Recovery 2011–2016*, March 2014, p. 70, online available at: www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/Programme_for_Government_Annual_Report_20141.pdf, visited June 2014.

179 These concerned 335 male unions and 201 female unions. See www.cso.ie/en/newsandevents/pressreleases/2013pressreleases/pressreleasemarriagesandcivilpartnerships2011, visited June 2014.

180 These concerned 263 male unions and 166 female unions. See www.cso.ie/en/newsandevents/pressreleases/2014pressreleases/pressreleasemarriagesandcivilpartnerships2012, visited June 2014.

This is different for statistics that Gay and Lesbian Equality Network GLEN has published, on the basis of figures provided by the General Registrar Office.[181] These statistics show that by August 2014, in total 2,934 people entered Civil Partnerships in Ireland since they first became available in 2011. It was thereby noted that '[t]hese figures [did] not account for the hundreds of Irish lesbian and gay people who were married or entered a civil partnership abroad.'[182]

Of the 2,934 people that entered Civil Partnerships in Ireland since 2011, no less than 25 per cent (714 persons) had another nationality than Irish. Almost half of them (300 persons) were EU citizens, with UK nationals and Polish nationals being the biggest groups represented (136 and 53 respectively). At the same time, it was noted that '[…] most of the couples who entered a Civil Partnership in Ireland intended to live in Ireland after their civil partnership.' Only 64 out of 1,467 couples – hence 9.6 per cent – intended to live in another country. Out of these 64, 22 intended to live in another EU Member State. This may be an indication of the scale at which so-called 'registration tourism' takes place, however, because these statistics are not accompanied by any interpretation, no firm conclusions can be drawn in this regard.

11.4.2. Access to civil partnership for foreign same-sex couples

Before civil partnership was introduced in the Irish jurisdiction, foreign same-sex couples had, just as Irish same-sex couples, no access to any form of legal recognition in Ireland. This changed with the entry into force of the Civil Partnership Act 2010. Under this Act there is no requirement of residence, domicile or nationality of the (future) civil partners.[183] This implies that foreign same-sex couples can enter into a civil partnership in Ireland, so long as they – like residents and nationals of Ireland – fulfil the criteria under the 2010 Act[184] and meet the general requirements set out by the General Register Office (GRO).[185] The statistics referred to above show that this opportunity has indeed been seized upon by same-sex couples consisting of one or two foreign partners.

181 GLEN – Gay and Lesbian Equality Network, *Civil Partnerships in Ireland: Figures from April 2011 to 30th June 2014* Released: 17th August 2014, online available at www.glen.ie/attachments/Civil_Partnership_Statistics_to_June_2014.pdf, visited June 2014.

182 *Idem* .

183 A domicile requirement has only been set for special court orders, for instance for court orders declaring '[…] that the civil partnership was at its inception a valid civil partnership'. Art. 4(1) Civil Partnership Act.

184 Article 7A Civil Partnership Act.

185 General Register Office (GRO) of Ireland, 'Information note on Civil Partnership', www.welfare.ie/en/Pages/Civil_Partnership.aspx, visited July 2014.

11.4.3. Implementation of Directives 2004/38 and 2003/86 in Irish law

The Free Movement Directive (2004/38) was implemented in Ireland by means of a statutory instrument of 2006 ('the 2006 Regulations').[186] This instrument makes a distinction between 'qualifying family members' of Union citizens and 'permitted family members'. The first group includes the spouse of the EU citizen and their minor or dependant children.[187] Qualifying family members may not be refused entry, unless there is a clear and individualised health or public security risk.[188] The category of 'permitted family members' includes other members of the EU citizen's household, as well as 'the partner with whom the Union citizen has a durable relationship, duly attested'.[189] Whether someone is indeed a 'permitted family member' within the meaning of this instrument, is established on the basis of 'an extensive examination of the personal circumstances of the person concerned'.[190] Unless the Minister is not satisfied that the person concerned is a permitted family member, entry may, again, only be refused if such entry would pose a clear and individualised health or public security risk.[191]

The Family Reunification Directive (2003/86/EC) has not been transposed into Irish law.[192] Only for persons with refugee status has provision been made for family reunification. Under Article 18 of the Refugee Act 1996,[193] spouses, minor children and – in exceptional cases – other dependent family members[194] of refugees can apply for family reunification. This excludes same-sex partners, whether they are spouses, civil partners or stable partners. As pointed out by O'Connell in 2010, the existence of such formal relationships could, however, '[…] impact positively on the assessment of a relationship for the purpose of dealing with a family reunification claim […].'[195] On an *ad hoc* discretionary basis exceptional leave to enter for the

186 European Communities (Free Movement of Persons) (No. 2) Regulations 2006, S.I. No. 656 of 2006, amended in 2008 by European Communities (Free Movement Of Persons) (Amendment) Regulations 2008, S.I. No. 310 of 2008.

187 Art. 2(1) S.I. No. 656 of 2006 reads: '[…] "qualifying family member", in relation to a Union citizen, means – (a) the Union citizen's spouse; (b) a direct descendant of the Union citizen who is – (i) under the age of 21, or (ii) a dependant of the Union citizen; (c) a direct descendant of the spouse of the Union citizen who is – (i) under the age of 21, or (ii) a dependant of the spouse of the Union citizen; (d) a dependent direct relative of the Union citizen in the ascending line, or (e) a dependent direct relative of the spouse of the Union citizen in the ascending line.'

188 Art. 4(2) S.I. No. 656 of 2006.

189 Art. 2(1) S.I. No. 656 of 2006.

190 Art. 5(2) S.I. No. 656 of 2006.

191 Art. 5(4) S.I. No. 656 of 2006.

192 D. O'Connell 2010, *supra* n. 113, at p. 13.

193 Refugee Act 1996, No. 17/1996.

194 This excluded life partners, as 'dependent member of the family', in relation to a refugee, is defined as '[…] any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.' Art. 18(4)(b) Refugee Act 1996.

195 D. O'Connell 2010, *supra* n. 113, at p. 13.

purpose of reunifying same-sex partners had been granted by the Minister for Justice, Equality and Law Reform.[196]

When Civil Partnership was introduced in Ireland in 2011, neither the 2006 Regulations, nor the Refugee Act were amended. The immigration authorities, however, adopted an official policy of treating a civil partnership in the same way as marriage for immigration purposes.[197] In other words, both same-sex registered partners and same-sex spouses of EU citizens are – in principle – granted entry as 'qualifying family members' under the 2006 Regulations, and same-sex civil partners and same-sex spouses of refugees qualify for family reunification under the Refugee Act. Couples in partnerships that are not recognised under Irish law as civil partnership,[198] may be recognised as *de facto* couples (hence as 'permitted family members') under the 2006 Regulations. There is also a policy of treating same-sex stable partners and different-sex stable partners in the same way.[199] These policies were only made publicly available through the website of the Irish Naturalisation and Immigration Service.

LGBT advocacy organisation *Marriage Equality* reported in 2011 that there was a gap between the official policy and the legislative reality. It was held:

> 'Differences include, civil partners not being included under the definition of 'qualifying family members' in regulations which transposed EU free movement provisions. This may mean the Irish Government are in breach of their obligations under this EU directive. As a result of the approach taken to deal with civil partnership through immigration policy rather than by amending immigration legislation […] civil partners are left without the protection and certainty of the law. Rather they are reliant on measures of policy that may change in a way that does not apply to legislation.'[200]

When this research was concluded (i.e., 31 July 2014) no legislative amendments had been made in this respect, except for that in 2011 it was established that civil partners are treated equally with and married couples in legislation on acquiring Irish citizenship.[201]

196 O'Connell underlined that there was only anecdotal evidence to this effect and that in the absence of statistical evidence of this granting of exceptional leave, it was 'impossible to analyse the manner in which this discretion [had been or was being] exercised.' D. O'Connell 2010, *supra* n. 113, at p. 13.

197 Website of the Irish Naturalisation and Immigration Service, www.inis.gov.ie/en/INIS/Pages/Civil%20Partnership, visited June 2014.

198 On recognition, see section 11.4.4 below.

199 Website of the Irish Naturalisation and Immigration Service, www.inis.gov.ie/en/INIS/Pages/Civil%20Partnership, visited June 2014. It is there held that: 'There is no change in the manner in which partners who are neither civil partners […] nor married persons are dealt with. The existing arrangements continue to apply and the gender mix in such partnerships is not material to the immigration decision.'

200 Faugan 2011, *supra* n. 108, at p. 7.

201 Section 33 of the Civil Law (Miscellaneous Provisions) Act 2011, No. 23/2011.

11.4.4. Recognition of foreign partnerships and marriages under Irish law

Before the introduction of civil partnership in Ireland, foreign same-sex civil partnerships and marriages were not recognised under Irish law. This practice was confirmed by the High Court judgment in *Zappone & Anor*, where the High Court held that under Irish law 'marriage' saw at different-sex marriage only (see 11.3.2 above).

The situation changed with the entry into force of the Civil Partnership Act in 2011. Following its Section 5, foreign legal relationships can be recognised as civil partnerships under Irish law, provided certain requirements are met. The relationship must be exclusive in nature under the law of the jurisdiction in which the legal relationship was entered into. Also, it must be registered under the law of that jurisdiction and it must be permanent, unless the parties dissolve it through the courts. Lastly, the rights and obligations attendant on the relationship must be, in the opinion of the Irish Minister for Justice, Equality and Law Reform, '[…] sufficient to indicate that the relationship would be treated comparably to a civil partnership'.[202] If the same-sex partners to a relationship legally recognised in another country are within the prohibited degrees of relationship, as set out in the Irish Civil Registration Act, they are not treated as civil partners under Irish law.[203] This means, *inter alia*, that foreign different-sex partnerships are not recognised as civil partnership in Ireland, as there is an impediment to enter into a civil partnership in Ireland if the partners are not of the same sex.

The Minister for Justice, Equality and Law Reform has the power to recognise classes of foreign civil partnerships by order, which must be laid before the Houses of the Oireachtas.[204] Since the entry into force of the 2010 Act, three such orders have been adopted.[205] The lists of recognised partnerships includes the UK Registered Partnership and the German *Eigetragene Lebenspartnerschaft*, but the French PACS and the Dutch registered partnership – which can both be dissolved without court order – are not on the list and thus not recognised as civil partnerships under Irish law.

Foreign same-sex marriages are only recognised as civil partnerships in Ireland, not as marriages. Same-sex marriages from countries like the Netherlands, Belgium, Spain and Portugal are included in the relevant orders. Consequently, 'downgrading' takes place in the Irish context. The present author is not aware of any case law

202 Art. 5(1) S.I. No. 656 of 2006.

203 Art. 5(3) S.I. No. 656 of 2006.

204 Art. 5(1) and (5) S.I. No. 656 of 2006.

205 State of affairs on 31 July 2104. These concern: S.I. No. 649 of 2010 Civil Partnership (Recognition of Registered Foreign Relationships) Order 2010; S.I. No. 642 of 2011 Civil Partnership (Recognition of Registered Foreign Relationships) Order 2011 and S.I. No. 505 of 2012 Civil Partnership (Recognition of Registered Foreign Relationships) Order 2012. These are online available on the website of the Irish Naturalisation and Immigration Service, www.inis.gov.ie/en/INIS/Pages/Civil%20Partnership, visited July 2014.

from the Irish courts in which this has been challenged on the basis of the EU free movement provisions.

11.4.5. Parental issues

The present author has not become aware of any court proceedings following difficulties that foreign same-sex couples have had in having their parental links recognised in Ireland. A 2008 study by O'Connell implied that such difficulties could, nonetheless, occur. He noted:

> 'Because of the privilege attaching to biological parenthood in Irish law the family reunification rights of children and their biological parents are stronger. Obviously, this may have a further disproportionate adverse impact on LGBT parents where only one or neither party is the biological parent of the child or children in question.'[206]

Same-sex couples who have resorted to surrogacy in another country, may, moreover, experience difficulties in establishing their legal parenthood in Ireland, as set out in Chapter 5, section 5.5.4.

The 2014 Family Relationships Bill provided for various amendments to the Adoption Act as a result of which adoptive parents from other countries moving to Ireland would have their adoptions recognised in Ireland.[207] Gay and Lesbian Equality Network GLEN observed in this regard:

> 'This is an important provision for lesbian and gay couples who may have adopted jointly in other countries, for example the UK and who subsequently move to live and work Ireland, to be recognised as the parents of the child here.'[208]

11.4.6. Recognition of Irish civil partnerships in other Member States

There is little reason to think that people who concluded a civil partnership in Ireland will experience difficulties in having their partnership recognised in other EU Member States that also provide for a civil partnership for same-sex couples. Obviously this may be different in States that do not provide for any such form of recognition.

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206 D. O'Connell, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity, Thematic Study Ireland* (Galway 2008), p. 10, online available at http://fra.europa.eu/en/country-report/2012/country-reports-homophobia-and-discrimination-grounds-sexual-orientation-part-1, visited June 2014, as confirmed in D. O'Connell 2010, *supra* n. 113, at p. 13.

207 Part 12 of Children and Family Relationships Bill 2014 (version September 2014).

208 GLEN – Gay and Lesbian Equality Network, *Submission to the Justice, Defence and Equality Committee on the Heads of the Children & Family Relationships Bill*, February 2014, pp. 8–9, online available at www.glen.ie/attachments/GLEN_Submission_to_Oireachtas_Committee_on_the_Heads_of_Children__Family_Relationships_Bill.pdf, visited June 2014.

11.5. Conclusions

The development of the Irish law on legal recognition of same-sex couples demonstrates how much Ireland has changed in over one generation.[209] While homosexual conduct was criminalised until 1993, because it was considered 'morally wrong' and 'damaging to the health both of individuals and the public',[210] in 2013 the Constitutional Convention, by a clear majority, favoured a Constitutional amendment requiring the legislature to legislate for same-sex marriage. These progressive legal changes have been attributed to a series of factors, such as '[…] joining the EU in 1973, an increasingly vocal feminist movement, the economic boom of the 1990s and the weakening grip of the Catholic Church, largely due to sex abuse scandals.'[211]

The Irish Courts have been firm in defining marriage as protected under the Irish Constitution as between man and woman only. They explicitly deferred to the legislature in respect of the introduction of any form of legal recognition of same-sex relationships. The High Court *Zappone* judgment (2006) thus formed an impetus for legislative change, together with the introduction of civil unions in the UK in 2004 combined with Ireland's obligations under the Good Friday agreement (section 11.3).

While the first civil partnership Bill was already on the table in 2004, it took until 2011 before the introduction of civil partnership for same-sex couples was a reality. Various debates were adjourned and bills withdrawn. Also, there were constitutional concerns that the new institute would be too similar to marriage. This was reason for the legislature to take a 'separate but equal' approach (section 11.3.4). Parental matters have proven most controversial in this context. This is, again, explained by the traditional understanding of family that dominated the Irish laws for centuries. At the time of conclusion of this research (i.e., 31 July 2014), there was no second-parent adoption, no successive adoption, no joint adoption and no legal parenthood by operation of the law for same-sex couples. This could all change at once if the Children and Family Relationships Bill is adopted. The guiding principle for this fundamental change has been the rights of the child.[212]

Moreover, by 2014 the opening up of marriage to same-sex couple had become a realistic option. Because a constitutional amendment was considered necessary, a referendum was announced for spring 2015. All in all, because of these significant changes, Ireland is '[…] less likely to be seen as an anomalous case among Western developed nations.'[213]

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209 Ryan noted in 2011 that '[…] in many respects the [Civil Partnerships] Act demonstrate[d] just how much Ireland [had] changed in less than a generation.' Ryan 2011, *supra* n. 41, at p. v.

210 *Norris* v. *Attorney General* [1983] IESC 3; [1984] IR 36.

211 Wording ascribed to S.-A. Buckley, a social historian at National University of Ireland in Galway, by H. Mahoney, 'Same-sex marriage underlines social change in Ireland', *euobserver.com* 7 May 2013, www.euobserver.com/lgbti/119963, visited July 2014.

212 As noted by Canavan in 2012, 'Ireland has been part of the global shift in the position of children, primarily facilitated by an increasing emphasis on children's rights […]'. J. Canavan, 'Family and Family Change in Ireland: An Overview', 33 *Journal of Family Issues* (2012) p. 10 at p. 24.

213 *Idem*, at p. 23.

Religion played a fairly modest role in the Irish debates and standard-setting in respect of legal recognition of same-sex relationships. While in early cases like *Norris* (1983) and *Murray* (1985) references were made to Christianity, in later cases in this area, no such references were repeated. When civil partnership was introduced in 2010, religion was explicitly left out of the equation, as it was provided that religious solemnisers could not celebrate civil partnership.

The case law of the ECtHR has played a twofold role in the Irish context. On the one hand it has been an important (although presumably not the only) factor in abolishing the criminalisation of homosexual conduct in the early 1990s. On the other hand, it has been referred by Irish courts as a ground for not extending certain rights to same-sex couples.[214]

In cross-border cases the Irish standard is upheld. Foreign same-sex civil partnerships and marriages are only recognised in Ireland if they meet the criteria of the Irish civil partnership. This means that partnerships that can be dissolved outside the courts and different-sex partnerships are not recognised. Most relevant rules in this regard are laid down in Ministerial orders and policy documents, instead of in statutory legislation. In respect of cross-border cases involving parental matters, much may change when the foreseen changes of Family Relationships Bill may take effect. Also, if marriage is indeed opened up, this will inevitably mean that foreign same-sex marriages are also recognised as such under Irish law

Because Irish law sets no domicile or nationality requirements, the Irish civil partnership is very accessible to foreign same-sex couples. Statistics show that the Irish civil partnership indeed has an international character (section 11.4.1), yet as these statistics are not accompanied by any further interpretation, one has to be careful in inferring any conclusions from these numbers.

[214] In *Zappone & Anor* v. *Revenue Commissioners & Ors* (2006) the Court (indirectly) referred to the ECtHR's judgment in *Christine Goodwin* (2002) as justification for holding on to the traditional marriage concept, while in *McD* v. *L & Anor* (2009) the Supreme Court referred to the ECtHR caselaw when it ruled that *de facto* same-sex family life enjoyed no protection under the Convention or Irish law. The Court explicitly held in the latter case that the Irish Courts were not to 'outpace' the ECtHR (see section 11.3.5.1 above).