

Constitutional Equality, the Right to Procreate, and the Marriage Referendum: a Reply to Dr. O'Mahony

by Dr. Thomas Finegan

The following is a reply to Dr. Conor O'Mahony's recent [post](#) critiquing certain statements made by me regarding the possible impact of the proposed marriage amendment on the law relating to adoption, donor-assisted human reproduction and surrogacy. Outside of an article in the Sunday Business Post (behind paywall) everything I have hitherto stated on this particular matter has been said during live debate, either on radio or on TV. The following constitutes a far more in-depth treatment of the relevant constitutional issues.

Introduction

It is helpful to begin with some common ground. If the proposed marriage amendment passes, all married couples, without distinction of sex, will have the same status, rights and protections under the Constitution. All married couples, whether opposite or same-sex, will constitute "Families" for the purposes of the Constitution. They will all deserve equal recognition and treatment as such by the legislature and courts. Such propositions have the support of both the [Irish Council for Civil Liberties](#) (at p. 4) and [Lawyers for Yes](#) (at pp. 4 & 13).

Public advocates of a Yes vote appear unwilling to recognise the logical implications of these legal effects for any future laws in the areas of adoption, donor-assisted human reproduction (DAHR) and surrogacy.

The implications for such laws arise from two stand-alone and distinct consequences of the proposed amendment. I shall consider each in turn. In doing so I shall respond to the claim made by Dr. O'Mahony that my claims do not "conform to the reality of Irish constitutional law". Dr. O'Mahony's critique is important because it remains, by some distance, the most considered attempt to address and rebut the actual legal claims which the No side are making. What follows shows that Dr. O'Mahony's own account, while correct in many significant respects, is fundamentally marred by reason of what it omits to mention and consider.

First consequence: prohibition on preferential treatment for opposite-sex married couples

The first consequence of the proposed marriage amendment is that it will become unconstitutional to treat opposite-sex married couples (as a class) differently from same-sex couples in the areas of adoption, donor-assisted human reproduction (DAHR) and surrogacy. And because it will remain unconstitutional to discriminate against married couples as compared with unmarried couples, a further knock-on consequence is that it will become unconstitutional to treat opposite-sex couples (whether married or not) more favourably than same-sex couples in those same areas – even though only the former can provide a child with both a mother and a father.

In concrete terms, it would become unconstitutional to recognise in law any right or interest on the part of a jointly adopted child to be provided with both a mother and a father wherever practicable to do so and unless the best interests of the child in the particular circumstances of any individual case require otherwise (e.g. where the child has been in the care of or has an existing biological or *de facto* parental relationship with a same-sex couple). It would also become unconstitutional to restrict DAHR or surrogacy to opposite-sex married couples only or to couples who can provide the child born with both a mother and a father.

Dr. O'Mahony disputes this. He argues that such laws,

“could potentially be justified if the court could be convinced that sufficient evidence was available to prove that children experience worse outcomes when raised by same-sex rather than opposite-sex couples.”

In the final analysis he considers that the outcome of the referendum will have “no impact” in itself on the laws identified above. His legal argument for this view, however, is unconvincing for two main reasons. First his discussion of the post-amendment constitutionality of laws which would discriminate between different classes of married couples/constitutional Families omits (quite remarkably) to consider the effect of Articles 41 and 42. Second, and related to this, his discussion of how the courts would likely review such laws pursuant to Article 40.1 omits to consider the relevant tests.

It is worth beginning by briefly alluding to two key governing principles relating to challenges to legislation grounded in the equality guarantee in Article 40.1. Simplifying a large body of jurisprudence for space reasons, it suffices for present purposes to note as follows:

First, discrimination based on the classification of persons for legislative purposes on grounds of sex is, at least presumptively, proscribed by Article 40.1 (*The Employment Equality Bill, 1996* [1997] 2 IR 321).

Second, *prima facie* discrimination is nevertheless permissible provided the following three conditions are satisfied: (i) the classification is for a legitimate legislative purpose; (ii) the classification is relevant to that purpose; and (iii) that each class is treated fairly (*The Employment Equality Bill, 1996* [1997] 2 IR 321, *J.D. v Residential Institutions Redress Review Committee* [2010] 1 IR 262).

Take the hypothetical example, post-amendment, of new adoption legislation which undoes the changes to adoption law brought about by the recent Children and Family Relationships Act 2015 and provides for only a qualified right of same-sex married couples to apply to adopt jointly, e.g. along the lines of the qualified right of non-relative, single persons to apply to adopt which remains in Irish law by reason of Section 33(1)(a)(iii) of the Adoption Act 2010. How would such a difference in legislative treatment as between two classes of married couple be treated by the courts? Dr. O'Mahony approaches the issue thus,

“The final question is whether a Yes vote might in some sense impact on the question of placing restrictions on access by same-sex couples to AHR services that do not apply to opposite-sex married couples. There are two constitutional provisions that would be central in such a case: the equality guarantee of Article 40.1, and the provisions of Article 42A on children ...”

True, Articles 40.1 and Article 42A would be central to such a case. But Articles 41 and 42 would also play a central role in any review of a law discriminating between opposite-sex and same-sex married couples.

Beginning with Article 40.1, it follows from the test outlined above that the first question facing any court would be whether the legislative provision in question was for “a legitimate legislative purpose”. There are at least two levels of generality at which such a purpose might be articulated. At the more concrete level, the purpose of the hypothetical adoption law mentioned above could be stated as the protection of a child's natural right to or interest in being provided with, when being jointly adopted, both a mother and a father wherever it is

practicable to do so and unless contrary to the child's best interests in the particular circumstances of the case.

It is here worth recalling that the right of a child to a mother and a father is not understood by those advocating a No vote as a right by a child to be provided by the State with a mother and a father. Such a "right" is clearly as incoherent as it is impractical on any viable theory of rights. On the contrary, what is at issue is a more modest claim-right of the child against the State not to be needlessly and deliberately left legally motherless or fatherless simply by operation of the State's laws on adoption and AHR. It can be justified as a derivation from the human right of every child to know and be cared for by their own mother and father (viz. Article 7(1) of the UNCRC) in conjunction with the norm that in all legal matters dealing with children it is their best interests – and neither adult equality nor adult autonomy nor adult reproductive choice – that should be given paramount consideration. No doubt some Yes advocates will dispute the cogency of such a right. Some may point to the term "parents" in Article 7(1) of the UNCRC and argue that it does not necessarily signify a mother and father (though this argument runs into difficulties when faced with the stress laid upon "ordinary meaning", context and a treaty's *travaux préparatoires* for interpretative purposes by Articles 31 and 32 of the Vienna Convention on the Law of Treaties). But none of this is the immediate concern of the discussion here or in Dr. O'Mahony's piece. The principal point is this: the Oireachtas is currently free to offer (and up until roughly seven weeks ago did offer) protection for that right of a child to a mother and a father by reflecting in its adoption laws the privileged constitutional status of the Family based on the marriage of a man and woman.

The critical question therefore is whether, in the wake of a passed referendum, the vindication of this right could even be viewed by a court as a "legitimate" legislative purpose? While the new Article 42A.4.1^o provides that the "best interests of the child shall be the paramount consideration" in the resolution of all proceedings, this must be viewed in light of the well-established and oft-repeated jurisprudence of the Supreme Court that

"There is a constitutional presumption that the welfare of a child is to be found within the family unless there are compelling reasons why that cannot be achieved or unless there are exceptional circumstances where parents have failed to provide education for the child." (North Western Health Board v H.W. [2001] 3 IR 622 at 724)

The presumption that a child's welfare is to be found in the Family would equally apply, post-amendment, to the constitutional Family founded on the marriage of a same-sex couple. More broadly the status and protections afforded the constitutional Family under Articles 41 and 42 will also apply to a same-sex married couple. Such couples will enjoy, on an equal footing with opposite-sex couples, benefits that include: the State's recognition of it as an instance of "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" (Article 41.1.1^o); the State's guarantee "to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State" (Article 41.1.2^o); the State's pledge "to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack" (Article 41.3); the State's acknowledgement "that the primary and natural educator of the child is the Family..." (Article 42.1).

In the event of a passed referendum, it is difficult to conceive how it could possibly be a “legitimate legislative objective” to distinguish and treat differently one class of constitutional Family from another on grounds of sex. Any such classification and difference in treatment would be grounded on the very distinction which the new Article 41.4 prohibits with respect to the capacity of couples to marry and become a constitutional Family in the first place, i.e. the sex of the parties to the marriage. In such a context, there appears no basis for a court to view it as “legitimate” for the Oireachtas to seek to distinguish and treat differently, on grounds of sex alone, one class of “primary and natural educator of the child” from another class of “primary and natural educator of the child” with respect to their entitlements under statute to become a child’s parents (and primary educators) via adoption, DAHR or surrogacy. Such a carving up of “the natural primary and fundamental unit group of Society” into different classes on grounds of sex (so that one class is deemed, in effect, *more* natural, primary or fundamental than another) would be repugnant both to the new Article 41.4 and to Article 41’s existing recognition of a single “moral institution” that is “founded” upon marriage. This line of argument is articulated and defended in detail in a recently published opinion by Michael Collins SC and Paul Brady BL: see [here](#).

Dr. O’Mahony may respond that the “legitimate legislative object” should instead be framed as the purpose of promoting the welfare and best interests of the child (i.e. not principally in terms of the aforementioned claim-right on behalf of a child to a mother and a father). But this re-articulation of the purpose merely postpones rather than avoids the impact of Articles 41 and 42. For the next step in the tri-partite test under Article 40.1 is to ask whether the classification is “relevant” to the legislative purpose. And this brings us back to the issue of whether it could ever be constitutionally open to a court to conclude that, notwithstanding the fact that a same-sex married couple is equally the foundation of a Family and equally the “primary and natural educator of the child” etc. a discriminatory legislative classification of married couples on grounds of sex alone can be “relevant” *in se* to the legislative purpose of promoting the welfare and best interests of children.

Dr. O’Mahony sidesteps the thrust of the analysis so far and simply assumes that the hypothetical law would have no difficulty in being construed as forming either a “legitimate legislative objective” or a “reasonably relevant” means to the pursuit of a legitimate legislative objective. He grounds his discussion of the application of Article 40.1 to the issue in question on a single High Court decision: *T O’G v Attorney General* [1985] ILRM 61. From a consideration of this case he concludes,

“The implication of this decision in the present context is that the question of whether access to AHR services for same-sex couples could be subjected to restrictions hinges not on their marital status but on the relevant evidence regarding their parenting capacity.”

This summation of the case and its significance does not fully capture how the equality guarantee was actually approached by the Court. The references to “a belief that a woman by virtue of her sex has an innate capacity for parenthood which is denied to a man”, “an unwarranted denial of human equality”, and widowers “as a class” of people, were not presented by the judge as totally reducible to and contingent upon social scientific evidence. Rather, the fact that both sexes, and hence both widows and widowers, were of an equal constitutional status set a very particular context for McMahon J’s (relatively truncated) consideration of the evidence adduced. Furthermore, the case concerned a very unusual provision of the Adoption Act 1974 (viz. “where a married couple have received an infant for

adoption and the wife dies before the final adoption order is made it is unreasonable and unjust to exclude the widower from being considered as a suitable person to adopt the child.”).

The more problematic aspect of Dr. O’Mahony’s appeal to *T O’G*, however, is the fact that any Article 40.1 analysis predicated exclusively upon the judgment proceeds with no sense of the jurisprudential principles which were developed in subsequent equality cases and which would undoubtedly be influential in any future case in this area. The tripartite test mentioned above is entirely absent from *T O’G* as that test only really took root in *The Employment Equality Bill, 1996* [1997] 2 IR 321 at 346, roughly twelve years after *T O’G* was decided.

Dr. O’Mahony is asking a singular High Court case from 30 years ago to bear a lot of weight. Yet even if one were to go along with his argument and simply assume that the State would have no difficulty in arguing that the hypothetical law clears both the “legitimate legislative purpose” and the “reasonably related” hurdles, Dr. O’Mahony’s conclusions are still not borne out. He omits to consider how the amendment would create a new and onerous burden not presently there. There is simply no way that the courts would be steadfastly deferential towards the Oireachtas’ attempts at drawing a sex-based legislative distinction precisely where Article 41 neither sees nor permits such a distinction. Any preferential treatment for opposite-sex as compared to same-sex married couples would be presumptively unconstitutional and its justification would carry with it a heavy burden of proof; it would have to rebut the entrenched constitutional presumption that the welfare of a child is to be found within the marital family unless there are compelling reasons why that cannot be achieved. No such burden exists under our current constitutional arrangement in cases where the State would seek to protect the interest of a child in having, where practicable, a mother and a father.

This new and already onerous evidential burden would be especially hard to discharge when we consider just how beset with methodological difficulties the social science on same-sex parenting is, e.g. difficulties due to the particularly small random sample sizes available to researchers and to the complexities in presenting like-for-like comparisons with analogous examples of opposite-sex parenting. This is not to mention how particular laws (e.g. regulating DAHR) may require distinct studies to justify the unequal treatment of parenting types.

The aforementioned evidential burden is so far considered only in the context of what would suffice to justify discriminatory *restrictions*. Dr. O’Mahony omits to consider the prospect of a law analogous to that which obtained roughly seven weeks ago (i.e. prior to the 2015 Act), whereby same-sex couples had *no right at all* to apply to jointly adopt a child. Clearly, the evidential burden would be weightier again in such a case, to say the least. There is a very genuine possibility that the courts would deem a legislative measure granting a general right to opposite-sex married couple to jointly apply to adopt a child but no right to same-sex married couples to so apply as irredeemably “unfair” (the third limb of the tripartite test) to same-sex married couples as a class, and therefore a violation of the constitutional guarantee of equality (irregardless of the state of the social scientific research). This holds *mutatis mutandis* for legislative measures allowing for the use of DAHR and surrogacy arrangements by opposite-sex married couples *only*.

So it is quite clearly not the case that the outcome of the referendum will have “no impact”, as Dr. O’Mahony put it, on the freedom of the Oireachtas to legislate in favour of a child’s interest in having a mother and father. Nor is it the case that the Oireachtas will remain free to regulate AHR “as it sees fit”, as he further concludes. At a minimum any effort to justify legislating for a child’s interest in having both a mother and father would, if the amendment passes, face a new and onerous evidential burden. Beyond that, there remains the primary problem that any such legislation will necessarily involve a discriminatory classification of constitutional Families on grounds of sex in circumstances where any such classification appears intrinsically and irremediably repugnant to several provisions of Article 41 (as amended). Accordingly, the better view is that a passed referendum will prohibit the Oireachtas from seeking to vindicate a child’s interest in having a mother and a father in the context of adoption, surrogacy and DAHR laws.

And this is without even considering the very significant impact that ECtHR jurisprudence would have on our own law in this regard, whether by its persuasive influence on constitutional litigation before our own courts, its statutory authority in the context of a declaration of Convention incompatibility under s. 5(1) of the European Convention on Human Rights Act 2003, or via a ruling against the Irish State itself by the Strasbourg Court. The ECtHR has ruled, in *E.B. v. France* (Grand Chamber, 22nd January 2008), that where domestic law provides for single persons having a right to adopt it cannot discriminate on the basis of sexual orientation; and, in *X v. Austria* (Grand Chamber, 19th February 2013), that where unmarried heterosexual couples can avail of second-parent adoption (whereby one partner adopts the other partner’s biological child to become a co-parent) it is unjust discrimination to deprive unmarried same-sex couples of the same right. The common core of these two judgments is that a State will be found to violate Articles 8 and 14 of the ECHR when it grants a right to adopt to a class of persons generally but then discriminates in favour of heterosexual members of that class. It would seem very likely that the ECtHR would hold a similar view of adoption, DAHR and surrogacy laws which, despite the equal availability of marriage to same-sex couples, treated same-sex married couples as a class less favourably than opposite-sex married couples.

Second consequence: creation of a new ground of constitutional challenge against restrictions on DAHR and surrogacy

Again, some common ground to begin with. A second consequence of the amendment’s conferral upon same-sex married couples of all existing rights and protections of married couples is that same-sex couples will equally enjoy the constitutional right to procreate children. This is not disputed by either side and Dr. O’Mahony accurately sets out the limited case law in the area. The real problem, of course, is what such a right means or, synonymously, what the courts are likely, if asked, to hold that it means. Here, one is necessarily and unavoidably in the realm of educated speculation. But that is a common and familiar realm for all lawyers, both practising and academic.

Dr. O’Mahony rightly points out that *Murray v Ireland* [1991] ILRM 465 established a constitutional right of married persons to procreate, a right established purely in the context of natural procreation. He also points out that Denham J in *Roche v Roche* [2010] 2 IR 321 at 366 accepted, albeit *obiter*, that the right to procreate encompasses the right to procreate using regular AHR. (He goes on to suggest that in *Roche* and in *MR and DR v An tÁrd Chláraitheoir* [2014] IESC 60 the Supreme Court missed opportunities to establish that

access to AHR is encompassed by the constitutionally protected right to procreate. But neither case concerned the issue of whether the right to procreate had this character and so it is hardly surprising that the courts chose not to grasp the supposed opportunity: the former case dealt with whether *in vitro* embryos enjoy a constitutionally protected right to life under Article 40.3.3°, while the latter case concerned the identity of a child's mother for the purposes of the Civil Registration Act 2004.)

In navigating this matter we have only a few uncontested points of reference: if the amendment is passed same-sex couples will have a constitutionally protected right to procreate; no *dictum* from the bench has ever indicated that the right to procreate does *not* extend to the use of AHR; one *dictum*, by the now Chief Justice, has suggested that it does. So no one can be certain whether a future court would find for or against a constitutionally protected right to procreate using AHR, DAHR or surrogacy arrangements. What we should be able to agree on, and what Dr. O'Mahony himself indicates, is that it is at least a genuine possibility.

It is reasonable to go a little further. The amendment's conferral upon same-sex couples of a constitutionally protected right to procreate would *in and of itself* make it more likely that the courts would recognise, as a corollary to that right, the right to access DAHR and surrogacy arrangements. It would give greater force to the case for recognising such a right because, without it, same-sex married couples' constitutional right to procreate would be utterly devoid of all content; it would be a constitutional dead letter. The courts would be left with two possibilities: decide that same-sex married couples do not, in any real or effective sense, possess a right to procreate, or decide that the right to procreate encompasses, for some or all married couples, a right to avail of DAHR and surrogacy. Further support for the latter possibility comes from the familiar idea that the Constitution is a living document falling to be interpreted in light of changing conditions in Irish society (not to mention deliberately amended Constitutional articles).

We now reach the crux of the matter. Dr. O'Mahony argues that even if the courts recognised the use of DAHR and surrogacy as a constitutionally protected right – and he professes openness to that possibility – it would still be open to the Oireachtas to enact reasonable and proportionate restrictions on this right, as the judgment in *Murray* effectively established. He points to the judgments in *Roche* and *MR* and how, in effect, they considered the regulation of these areas as quintessentially a matter for the Oireachtas. This is a fair summation of those judgments in this regard but it is of little or no relevance in the event of a redefined Article 41 conferring upon same-sex married couples the constitutional right to avail of surrogacy and DAHR as an aspect of the general right to procreate.

This is because a ban on gamete donation and surrogacy would not merely restrict or regulate the right to procreate of same-sex married couples but would extinguish it completely. For the effect of such bans would be vastly more keenly felt by same-sex married couples as a class than by opposite-sex married couples as a class: the hypothetical prohibitions would nullify the right to procreate of the entire class of same-sex married couples but only a small minority of opposite-sex married couples.

The distinction between regulating and extinguishing a right was recognised by the Supreme Court in *The Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105 at 205. It is relevant for two reasons. First, the constitutionality of any legislative impairment of a right is assessed by recourse to the so-called proportionality test first set out in *Heaney v Ireland* [1994] 3 IR 593 at 607. The greater the extent of the interference with the right, the more difficult it becomes

to satisfy the final two limbs of the test, i.e. that the measure impairs the right as little as possible and the effects on rights are proportionate to the legislative objective. Second, a deferential approach is less appropriate where the legislation extinguishes or abrogates a right.

Thus an amendment extending the right to marry and the associated right to procreate to same-sex couples makes any future prohibition of gamete donation and surrogacy more vulnerable to constitutional challenge for two reasons: (a) the amendment would in and of itself make it more likely that the courts would recognise access to DAHR and surrogacy as part of the constitutionally protected right to procreate in order to give some meaning and content to the right to procreate of married same-sex couples; (b) post-amendment, a statutory prohibition on gamete donation and surrogacy would necessarily extinguish the right to procreate of an entire (sex-based) class of married couple.

In this sense it is quite reasonable to say that an amended Article 41 would render any future decision by the Oireachtas to follow the policy choices of Germany, Italy, Austria and Switzerland and prohibit gamete donation open to challenge on a wholly new ground (i.e. interference in constitutional right to procreate of same-sex married couples) and thus more vulnerable to a *successful* constitutional challenge than if the amendment was not passed. It would have the same effect should the Oireachtas legislate to prohibit surrogacy outright as has been done in Spain, Italy, Finland and Germany. So the amendment would create a new and significant ground of challenge to any future legislation which sought properly to vindicate a child's right to know and be cared for by their biological parents (in the context of DAHR law) and to not have their natural child-mother relationship deliberately split and complicated (in the context of surrogacy law).

Conclusion

Dr. O'Mahony's conclusions are well summarised in his final paragraph (numbering added),

"[1] The outcome of the referendum will have no impact in this area [of AHR]. The Oireachtas will remain free to regulate AHR as it sees fit. [2] Article 41 of the Constitution has played almost no role in the case law to date and is therefore of minimal significance to any future constitutional challenges in this area. [3] Article 40.1 mandates equality in the absence of compelling evidence justifying discrimination, which suggests that social science rather than law may be the real consideration in any theoretical attempt to restrict access by same-sex couples to AHR services."

It should now be apparent why and how each of these three points is mistaken.

The first point is patently inaccurate in light of the two distinct and stand-alone consequences of the amendment discussed above.

The second point is a *non sequitur*. There is a considerable volume of case law concerning Articles 41 and 42. Contrary to the impression given by Dr. O'Mahony, Article 41 has played a very significant role in case law concerning adoption. While he is correct that it has played almost no role to date in the very small number of Irish cases concerning AHR or DAHR, it is equally true that the Oireachtas has not yet attempted to distinguish between one class of married couple/constitutional Family and another in order to, in effect, give one class preferential treatment with regard to having or raising children. It has certainly never attempted to distinguish between two classes of marital family on the grounds of sex and in

the wake of an amendment explicitly enshrining within the Constitution the view that the right to marry (and thus to found a constitutional Family) exists without distinction of sex.

The third point in Dr. O'Mahony's conclusion is too quick to make social science evidence the determining factor for challenges under Article 40.1. His discussion overlooks the jurisprudence concerning breaches of Article 40.1 and it therefore fails to attend to the implications for the first and second limbs of the commonly invoked tripartite test of the terms of Articles 41 and 42 for any future differential treatment, post amendment, of same-sex and opposite-sex married couples. It is those constitutional provisions which would present the first and foremost obstacle to the constitutionality of any preferential treatment of opposite-sex couples in legislation dealing with adoption, DAHR and surrogacy, e.g. with a view to vindicating the child's right to or interest in a mother and a father where practicable.