

Querist: Iona Institute

Re: Query in respect of possible legal effects of proposed Thirty-fourth Amendment of the Constitution (Marriage referendum)

Agent: Dockery Solicitors

Date: 14th April 2015

OPINION

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EXECUTIVE SUMMARY

This section is offered only as a convenient summary of some of the matters considered in the remainder of this Opinion. It must be read in light of the fuller analysis, qualifications and more detailed advices contained therein. It does not constitute and should not be relied upon as stand-alone advices.

ES1. Introduction

The Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015 proposes the insertion of a new provision into Article 41 of the Constitution, after s. 3 thereof, as follows (the “**Amendment**”):

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

We are asked to advise in respect of the following query:

If the Amendment takes effect will it be constitutionally permissible in any law or in the application of any law to require, permit or give effect to more favourable treatment for a married couple comprising a man and woman than for any other type of married couple, in particular with regard to laws (a) providing for adoption and fostering of children, (b) regulating surrogacy, (c) regulating assisted human reproduction?

This query is essentially concerned with the constitutionality (post-Amendment) of discriminatory treatment of any kind as between different classes of married couples based on the sex of the spouses with regard to the legal entitlements of the couples in respect of adopting, fostering and the use of AHR or surrogacy. Thus the sole focus of this Opinion is on the constitutionality of any discriminatory classification under such laws in favour of opposite sex married (“OSM”) couples as against same sex married (“SSM”) couples.

In summary, it is our view that that any such discriminatory treatment would probably be unconstitutional. This conclusion follows from an application of a number of fundamental and well-settled legal and constitutional principles. The argument (hereinafter referred to as “**the principal argument**”) can be stated as follows:

ES2. The Principal Argument

Article 41.3 and related Supreme Court jurisprudence holds that “the Family” for the purposes of Irish law is “founded” on the “institution of Marriage”. This has been interpreted to mean that a married couple, even without children, constitute a “Family” for the purposes of the Constitution and Irish law. The Amendment prohibits any discrimination in respect of the right to marry that is based on the sex of the prospective spouses. Assuming that the Amendment is passed, it follows that the “institution of

Marriage” for the purposes of the Constitution is an institution which is blind to and exists without regard to the sex of the persons who are married. It is on such an institution that Article 41.3 states “the Family” is “founded”. It must therefore also follow that two married men or two married women constitute a “Family” for the purposes of the Constitution and Irish law.

The status and entitlements of two married men or two married women as such a “Family” would thus include (emphasis added):

- Recognition by the State, pursuant to Article 41.1.1°, as being 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.”
- The benefit of the State’s guarantee, pursuant to Article 41.1.2°, “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.”
- The benefit of the State’s pledge, pursuant to Article 41.3, “to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”
- The benefit of the State’s acknowledgement, pursuant to Article 42.1, “that the primary and natural educator of the child is the Family...”
- Rights recognised by the Supreme Court as ones “which the State cannot control”¹ and are “superior to those of the State itself”.²

Any effort to justify, despite the foregoing, a difference in status or entitlements as between two class of couples equally recognised as being a constitutional “Family” would run contrary to the rights of the constitutional Family under Articles 41 and 42 and to the guarantee of equality before the law pursuant to Article 40.1. For any discrimination between OSM and SSM couples (as a class) would necessarily be based on the sex of the persons involved in circumstances where (i) the purpose of the Amendment is the addition of an Article 41.4 recognising a right to marry on the part of couples that is “without distinction as to their sex” and (ii) there is nothing in the constitutional provisions dealing with the entitlements of the Family that requires or supports sex-based discrimination between two classes of Family, each enjoying different entitlements (as a matter either of kind or degree). In such circumstances, it would be difficult to argue that the grounds of physical capacity, moral capacity or social

¹ *McGee v Attorney General* [1974] IR 284 at 310 (Walsh J).

² *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 at 190 (Fennelly J).

functions mentioned in the second paragraph of Article 40.1 could apply or operate to save such discrimination.

In sum, any discrimination as regards the status and entitlements enjoyed by OSM and SSM couples on the basis of their sex could only be justified if one could show that, as a matter of constitutional law, either (i) a valid marriage in accordance with law is not *per se* sufficient to constitute or found a Family (i.e. it is necessary in addition to have regard to the sex of the spouses so that the concept of “the Family” under the Constitution remains a concept based on OSM couples) or (ii) that every married couple constitutes a Family but that there are two classes of such Family with different entitlements.

The first contention finds no support in and is hard to reconcile with the text of Article 41.3 (that the Family is founded on the institution of marriage), the text and purpose of the new Article 41.4 and the settled jurisprudence of the Supreme Court on the connection between a valid civil marriage and the existence of a Family for the purposes of the Constitution and Irish law. Such an argument would have to proceed on the basis that the existing jurisprudence must be read in the light of the fact that marriage as understood at the time of the adoption of the Constitution and as understood and interpreted by courts since then was based on OSM couples and therefore the Family which is founded on marriage is a concept which, despite the Amendment, remains restricted to OSM couples and their children (if any). However, given that the new Article 41.4 prevents any impediment in law to the marriage of SSM couples, it is very difficult to argue that the marriage thus resulting is not a marriage for every point at which marriage is referred to in the Constitution given that no amendments to any of the other relevant provisions of the Constitution are proposed.

The second contention finds no support in and is hard to reconcile with the text of Articles 41 and 42, in particular 41.1.1°, 41.1.2° and 42.1. Indeed, it hardly makes sense to contend simultaneously that (a) “the Family” is “the natural primary and fundamental unit group of Society ... [and] the necessary basis of social order and ... indispensable to the welfare of the Nation and the State [and] the primary and natural educator of the child” and that (b) there are two distinct classes of this “primary ... unit group” with different entitlements in respect of children.

ES3. Relevant constitutional law and jurisprudence

Part 3 of the Opinion surveys under the following headings a number of constitutional rights and rulings which are potentially relevant to any assessment of the constitutional law implications of the Amendment:

- 3.1 Provisions of the Constitution principally engaged;
- 3.2 Constitutional entitlements of the family based on marriage (the “Family”);
- 3.3 Constitutional entitlements of children;
- 3.4 Constitutional entitlements of natural parents;
- 3.5 Article 40.1 guarantee of equality before the law.

ES4. Counter-arguments

The principal argument just set out seems to us (as a matter of probability) to be the correct analysis of the issue. There are a number of counter-arguments, however, which might be constructed to support the contention that, even if the Amendment was passed, it would still be constitutionally permissible, at least in certain particular cases and respects, to discriminate between SSM and OSM couples (as a class) in relation to such matters as fostering, adoption, surrogacy and/or AHR. The more plausible of those which have occurred to us are as follows:

- (A) Discrimination between the statutory rights of OSM and SSM couples respectively to apply for an adoption order or to become a provider of foster care may be argued to be justified to the extent necessary:
 - (i) to protect the right and/or interests of an adopted child to be provided with a married mother and father wherever practicable and unless contrary to the child’s best interests in all the particular circumstances of a given case;
 - (ii) to protect the right and/or interests of a fostered child to be provided with care by a married man and woman wherever practicable and unless contrary to the child’s best interests in all the particular circumstances of a given case.

Such discrimination would be argued to be justified having regard, *inter alia*, to (i) its relevance to a legitimate legislative purpose; (ii) the absence of any stand-alone right to adopt or provide foster care; and (iii) the State’s entitlement under Article 40.1 to have regard in its enactments to differences of physical capacity and social function.

- (B) In the case of facially neutral laws regulating AHR and surrogacy practices for the purpose of ensuring that children conceived through such measures are subsequently parented by their own married, biological mother and father (i.e. a law restricting AHR to married couples and banning gamete donation), the argument would be that indirect discrimination or disparity in the effects upon OSM and SSM couples respectively would result due to the different natural/biological functions and capacities of men and women with regards to the act/process of sexual reproduction. The argument would contend such indirect discrimination could be justified as proportionate, however, having regard, inter alia, to (i) its relevance to a legitimate legislative purpose; (ii) the absence of any clearly recognised stand-alone constitutional right on the part of married persons to procreate by means of AHR which involves gamete donation; and (iii) the State's entitlement under Article 40.1 to have regard in its enactments to differences of physical capacity and social function.

Though not a stand-alone rebuttal or alternatives to the principal argument, the following argument might also be made to buttress the above two counter-arguments:

- (C) The Courts are reluctant to interfere with legislative policy decisions in sensitive and complex areas of social policy. Hence, it is unlikely even post-Amendment that they would entertain a challenge to the constitutionality of acts of the Oireachtas providing for or regulating adoption, fostering, AHR and/or surrogacy on the grounds that they gave more favourable treatment to OSM couples as compared to SSM couples.

A generic and, we consider, compelling response to all of these counter-arguments flows from the relative simplicity and directness of the principal argument, namely: if the Amendment was intended to create or permit a distinction between the entitlements of OSM and SSM, it could and should have expressly provided for this. On the contrary, it is worded solely in terms of the question of eligibility or capacity to contract a valid marriage. It does not purport to recognise or make any change to the package of entitlements currently associated with marriage (and therefore with "the Family" founded upon marriage) as a matter of settled constitutional law. Nor is there any good reason to conclude that it must do so by implication. For the clear intent of the Amendment is to prohibit any discrimination in respect of the right of couples to marry which is based on the sex of the persons concerned. It would be a strange and somewhat self-defeating measure, therefore, if its true legal effect was nevertheless to create or permit discrimination in respect of the legal entitlements of couples once married provided it was based on the sex of the persons concerned. In the absence of any wording in the Amendment either compelling or even tending to support such an

interpretation, we can see no convincing basis for construing the legal effect of the Amendment in this way.

Moreover, for either counter arguments (A) and (B) to succeed it must first be established that any regulation of adoption, fostering, AHR or surrogacy so as to provide for the right or interest of any child involved in having the care and company of a married mother and father (wherever practicable and unless contrary to the child's best interests in all the particular circumstances of a given case) constitutes a legitimate objective or legislative purpose. The primary and most serious obstacle in this regard, post-Amendment, is arguably the provisions of Article 41 and 42. If a SSM couple constitutes a Family for the purposes of Article 41 and Article 42 it is very difficult to see what legitimate legislative objective could be said to be served by preferring OSM couples as a class over SSM couples. In particular we consider the acknowledgement in Article 42.1 "that the primary and natural educator of the child is the Family" presents a direct rejoinder to any contention that, post-Amendment, any particular class of constitutional Family (which is defined solely by the sex of the spouses) may lawfully be deemed or treated (as a class) as a superior or preferable option for the purposes of parenting children.

In addition, even if it could be established (post-Amendment) that preference in law for OSM couples over SSM couples could, in principle, serve a legitimate legislative objective, the Amendment would have the effect of creating a new and onerous evidential burden for any government or other party advocating such a preference by requiring it to establish that the welfare or interests of children would be so severely harmed or put at risk of such harm by their being raised by SSM couples as compared to being raised by OSM couples as to warrant otherwise discriminatory treatment as between different classes of married couple / constitutional Family distinguished on grounds of sex.

ES5. International human rights law

Given the fairly extensive domestic case law on Articles 40.1, 41 and 42, it is unlikely that any EU or international law precedent, including even ECHR jurisprudence, will be determinative for the question of whether discriminatory treatment as between SSM and OSM couples in respect of adoption, fostering, AHR and surrogacy would be unconstitutional post-Amendment. However, the arguments and reasoning used in such precedents may well be opened before and carefully considered by the Irish courts in the event that the constitutionality of any legislative or executive measures requiring, permitting or giving effect to such discrimination fell to be considered by them.

As a matter of EU and international human rights law (as to which see Appendix 1), same sex couples cannot avail directly of any express right to marry and found a family

but may well secure the same practical effect and legal outcome in the areas of AHR and adoption by appeal to expanding conceptions of rights to equal treatment, privacy and respect for “family life”.

That approach can be summarised as an “all or nothing” strategy. In other words, while States are not obliged to recognise same sex marriage or to give rights to apply for adoption or to avail of AHR to persons other than married (opposite sex) couples, if any State does extend such rights beyond married couples then it cannot distinguish between persons or couples by reference to their sex or sexual orientation. That general approach is consonant with and supportive of the principal argument which we have advanced in answer to the present query.

1. INTRODUCTION

This opinion is based on the letter from Agent dated 6 February 2015 with enclosed query. Agent instructs that the Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015 proposes the insertion of a new provision into Article 41 of the Constitution, after s. 3 thereof, as follows (the “**Amendment**”):

“4. Féadfaidh beirt, cibé acu is fir nó mná iad, conradh a dhéanamh i leith pósadh de réir dlí.”³

or, in the English language:

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

We are asked to advise in respect of the following query:

If the Amendment takes effect will it be constitutionally permissible in any law or in the application of any law to require, permit or give effect to more favourable treatment for a married couple comprising a man and woman than for any other type of married couple, in particular with regard to laws (a) providing for adoption and fostering of children, (b) regulating surrogacy, (c) regulating assisted human reproduction?

At the outset, there are a number of observations which we wish to make regarding the query itself.

We note first that the question is framed with respect to “any law” or the “application” of any law. It is important to point out that different considerations, standards of review and remedies may apply to any challenge to the constitutionality of a given “law” depending on its particular nature. For example, an act of the Oireachtas will enjoy a presumption of constitutionality that must be rebutted. By contrast, decisions or acts of a public body (e.g. the Adoption Authority) made or done pursuant to statute do not enjoy a similar presumption. For the purposes of this opinion we shall confine ourselves to laws in the sense of enactments of the Oireachtas.⁴

Second, it must be emphasised that there are considerable difficulties with giving a legal opinion on abstract questions (such as the present query) that are not grounded in a specific case or concrete set of circumstances and facts. To take one example, the present query speaks of “more favourable” treatment. That may cover a wide range of scenarios. In the context of adoption, for example, it may range from precluding any

³ The Bill is currently being considered by the Seanad. The Irish text of the amendment in the Bill as passed by Dáil Éireann states: “Féadfaidh beirt, gan beann ar a ngnéas, conradh pósta a dhéanamh de réir dlí.”

⁴ It should also be noted that, in certain circumstances, constitutional entitlements may also be invoked “horizontally” against and in respect of the actions of private persons / non-public actors.

joint adoption by same sex married couples to subjecting any right of such couples to apply for joint adoption to certain qualifications which are not imposed in the case of opposite sex married couples.⁵ We have endeavoured to deal with this as best we can by limiting ourselves to a consideration of discriminatory measures in favour of opposite sex married couples which we consider to have at least a *prima facie* chance of being deemed constitutional post-Amendment. Nevertheless, our advices herein are offered subject to the fundamental caveat that any determinate legal analysis or future judicial determination of the issues addressed will be coloured by the facts upon which the issues are actually litigated and that a given set of facts may throw up aspects which we may not have considered or which may lead to a somewhat different conclusion.

Another notable feature of the query is that it concerns a future contingent. Advice is sought on what the law will say on various matters if the Amendment is passed. In this regard and for the purposes of this opinion it shall be assumed that it would be constitutionally impermissible for the Oireachtas to provide for marriage between persons of the same sex without the Amendment. This appears also to be the assumption upon which the Government's decision to propose the Amendment is itself premised. For the purposes of this opinion it is not, therefore, necessary to consider the merits of arguments to the effect that persons of the same sex ought to be entitled to marry under the existing (pre-referendum) Constitutional text.⁶ Nor have we been asked for and neither are we providing any view on desirability of the Amendment.

For convenience opposite sex marriage and same sex marriage shall be abbreviated as OSM and SSM respectively. Accordingly, opposite sex married couples shall be referred to as OSM couples and same sex married couples as SSM couples.

Finally, we confirm that this opinion is addressed and provided solely to the Querist herein for its own use and that no liability or responsibility whatsoever is assumed or accepted by us in respect of any other party howsoever such liability or responsibility is alleged to arise.

⁵ An example of such a qualified right to apply for adoption can presently be found in s. 33(1)(a)(iii) of the Adoption Act 2010 which provides for an adoption order being made to an unmarried, sole applicant (who is unrelated to the child) subject to certain considerations which are not prescribed in the case of married applicants or a sole applicant who is related to the child.

⁶ Arguments to this effect were advanced unsuccessfully in *Zappone v. Revenue Commissioners* [2008] 2 IR 417.

2. THE PRINCIPAL ARGUMENT

This query is essentially concerned with the constitutionality (post-Amendment) of discriminatory treatment of any kind as between different classes of married couples based on the sex of the spouses with regard to the legal entitlements⁷ of the couples in respect of adopting, fostering and the use of AHR or surrogacy. Thus it is not necessary to opine on the constitutionality of laws which either provide for or proscribe (absolutely or in part) adoption, fostering, surrogacy or AHR (of whatever kind) on the same terms for both SSM and OSM couples. The sole focus is on the constitutionality of any discriminatory classification under such laws in favour of OSM couples as against SSM couples.⁸

For the reasons set out below, it is our view that that any such discriminatory treatment would probably be unconstitutional. This conclusion follows from an application of a number of fundamental and well-settled legal and constitutional principles. The argument (hereinafter referred to as “**the principal argument**”) can be stated as follows:

⁷ The term ‘*entitlement*’ is used throughout to refer compendiously to rights, duties, powers, liberties etc. provided for or recognised in Irish law (whether as ‘*natural*’, ‘*constitutional*’, ‘*legal*’, ‘*positive*’, statutory, common law or otherwise).

⁸ The distinction between a claim based on the breach of a stand-alone constitutional right and a claim based on discriminatory treatment contrary to Article 40.1 was recognised and applied by the High Court (Laffoy J) in *S.M. v Ireland (No. 2)* [2007] 4 IR 369 at 381-2 as follows:

“25 Underlying the invocation of the doctrine of separation of powers by the defendants is the assumption that the plaintiff is inviting the court to form a judgment on the appropriateness of the maximum penalty for indecent assault on a male person. Counsel for the defendants submitted that the question of the appropriateness of a penalty is an area warranting strong judicial restraint, ...

26 As I understand the plaintiff's case, it is not predicated on a necessity for the court to form a judgment as to the appropriateness of either the penalty provided in s. 62 of the Act of 1861 for indecent assault on a male or the penalty provided in s. 6 of the Act of 1935 for indecent assault on a female. I see nothing in the plaintiff's case which is an explicit invitation to the court to stray into an area which the Constitution has reserved to either the Oireachtas or the Executive. ...

27 ... The kernel of the plaintiff's case is whether that is permissible having regard to the guarantee of equality contained in Article 40.1. I will return to that issue later.

Non justiciability

28. The defendants' argument on non-justiciability is merely a continuance of their argument on the applicability of the doctrine of separation of powers, in that they argue that the appropriateness of a particular maximum statutory penalty is a non-justiciable matter, save only in an exceptional case where it is suggested that the penalty would amount to a cruel and unusual punishment. However, as I have stated, the appropriateness or otherwise of the maximum penalty provided in s. 62 is not part of the plaintiff's case. It is not the plaintiff's case that the penalty itself is unconstitutional; it is that the discrimination based on the gender of the victim is unjustified and contrary to Article 40.1.”

2.1 The Principal Argument

Article 41.3 and related Supreme Court jurisprudence holds that “the Family” for the purposes of Irish law is “founded” on the “institution of Marriage”. This has been interpreted to mean that a married couple, even without children, constitute a “Family” for the purposes of the Constitution and Irish law. The Amendment prohibits any discrimination in respect of the right to marry that is based on the sex of the prospective spouses. Assuming that the Amendment is passed, it follows that the “institution of Marriage” for the purposes of the Constitution is an institution which is blind to and exists without regard to the sex of the persons who are married. It is on such an institution that Article 41.3 states “the Family” is “founded”. It must therefore also follow that two married men or two married women constitute a “Family” for the purposes of the Constitution and Irish law.

The status and entitlements of two married men or two married women as such a “Family” would thus include (emphasis added):

- Recognition by the State, pursuant to Article 41.1.1°, as being 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.”
- The benefit of the State’s guarantee, pursuant to Article 41.1.2°, “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.”
- The benefit of the State’s pledge, pursuant to Article 41.3, “to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”
- The benefit of the State’s acknowledgement, pursuant to Article 42.1, “that the primary and natural educator of the child is the Family...”
- Rights recognised by the Supreme Court as ones “which the State cannot control”⁹ and are “superior to those of the State itself”.¹⁰

Any effort to justify, despite the foregoing, a difference in status or entitlements as between two class of couples equally recognised as being a constitutional “Family” would probably run contrary to the guarantee of equality before the law pursuant to

⁹ *McGee v Attorney General* [1974] IR 284 at 310 (Walsh J).

¹⁰ *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 at 190 (Fennelly J).

Article 40.1.¹¹ For any discrimination between OSM and SSM couples (as a class) would necessarily be based on the sex of the persons involved in circumstances where (i) the purpose of the Amendment is the addition of an Article 41.4 recognising a right to marry on the part of couples that is “without distinction as to their sex” and (ii) there is nothing in the constitutional provisions dealing with the entitlements of the Family that requires or supports sex-based discrimination between two classes of Family, each enjoying different entitlements (as a matter either of kind or degree). In such circumstances, it would be difficult to argue that the grounds of physical capacity, moral capacity or social functions mentioned in the second paragraph of Article 40.1 could apply or operate to save such discrimination.

In sum, any discrimination as regards the status and entitlements enjoyed by OSM and SSM couples on the basis of their sex could only be justified if one could show that, as a matter of constitutional law, either (i) a valid marriage in accordance with law is not *per se* sufficient to constitute or found a Family (i.e. it is necessary in addition have regard to the sex of the spouses) or (ii) that every married couple constitutes a Family but that there are two classes of such Family with different entitlements.

The first contention finds no support in and is hard to reconcile with the text of Article 41.3 (that the family is formed on the institution of marriage), the text and purpose of the new Article 41.4 and the settled jurisprudence of the Supreme Court on the connection between a valid civil marriage and the existence of a Family for the purposes of the Constitution and Irish law.

The second contention finds no support in and is hard to reconcile with the text of Articles 41 and 42, in particular 41.1.1°, 41.1.2° and 42.1. Indeed, it hardly makes sense to contend simultaneously that (a) “the Family” is “the natural primary and fundamental unit group of Society ... [and] the necessary basis of social order and ... indispensable to the welfare of the Nation and the State [and] the primary and natural educator of the child” and that (b) there are two distinct classes of this “primary ... unit group” with different entitlements in respect of children.

2.2 Counter-Arguments

The principal argument just set out seems to us (as a matter of probability) to be the correct analysis of the issue. There are a number of counter-arguments, however, which might be constructed to support the contention that, even if the Amendment was

¹¹ It might also be viewed as an interference with the rights under Article 41 or 42 of the Family which is less favourable treated, e.g. an interference with the “constitution and authority” of that Family contrary to the State’s guarantee pursuant to Article 41.1.2°. On that guarantee see generally: *P.H. v John Murphy & Sons Ltd* [1987] IR 621 at 626 (Costello J), approved in *North Western Health Board v H.W.* [2001] 3 IR 622 at 764 (Hardiman J); and *Re The Matrimonial Home Bill, 1993* [1994] 1 IR 305 at 326 (Finlay CJ).

passed, it would still be constitutionally permissible, at least in certain particular cases and respects, to discriminate between SSM and OSM couples (as a class) in relation to such matters as fostering, adoption, surrogacy and/or AHR. The more plausible of those which have occurred to us are as follows:¹²

(A) Discrimination between the statutory rights of OSM and SSM couples respectively to apply for an adoption order or to become a provider of foster care may be argued to be justified to the extent necessary:

- (i) to protect the right and/or interests of an adopted child to be provided with a married mother and father wherever practicable and unless contrary to the child's best interests in all the particular circumstances of a given case;
- (ii) to protect the right and/or interests of a fostered child to be provided with care by a married man and woman wherever practicable and unless contrary to the child's best interests in all the particular circumstances of a given case.

Such discrimination would be argued to be justified having regard, *inter alia*, to (i) its relevance to a legitimate legislative purpose; (ii) the absence of any stand-alone right to adopt or provide foster care; and (iii) the State's entitlement under Article 40.1 to have regard in its enactments to differences of physical capacity and social function.

(B) In the case of facially neutral laws regulating AHR and surrogacy practices for the purpose of ensuring that children conceived through such measures are subsequently parented by their own married, biological mother and father (i.e. a law restricting AHR to married couples and banning gamete donation), the argument would be that indirect discrimination or disparity in the effects upon OSM and SSM couples respectively would result due to the different natural/biological functions and capacities of men and women with regards to the act/process of sexual reproduction. The argument would contend such indirect discrimination could be justified as proportionate, however, having regard, *inter alia*, to (i) its relevance to a legitimate legislative purpose; (ii) the absence of any clearly recognised stand-alone constitutional right on the part of married persons to procreate by means of AHR which involves gamete donation; and (iii) the State's entitlement under Article 40.1 to have regard in its enactments to differences of physical capacity and social function.

¹² We note again the difficulties inherent in attempting to offer legal advice in abstract terms and outside of any concrete circumstances or *inter-partes* dispute. Accordingly, we make no claim to exhaustiveness with respect to the possible counter-arguments considered.

Though not a stand-alone rebuttal or alternatives to the principal argument, the following argument might also be made to buttress the above two counter-arguments:

- (C) The Courts are reluctant to interfere with legislative policy decisions in sensitive and complex areas of social policy. Hence, it is unlikely even post-Amendment that they would entertain a challenge to the constitutionality of acts of the Oireachtas providing for or regulating adoption, fostering, AHR and/or surrogacy on the grounds that they gave more favourable treatment to OSM couples as compared to SSM couples.

A generic and, we consider, compelling response to all of these counter-arguments flows from the relative simplicity and directness of the principal argument, namely: if the Amendment was intended to create or permit a distinction between the entitlements of OSM and SSM, it could and should have expressly provided for this. On the contrary, it is worded solely in terms of the question of eligibility or capacity to contract a valid marriage. It does not purport to recognise or make any change to the package of entitlements currently associated with marriage (and therefore with “the Family” founded upon marriage) as a matter of settled constitutional law. Nor is there any good reason to conclude that it must do so by implication. For the clear intent of the Amendment is to prohibit any discrimination in respect of the right of couples to marry which is based on the sex of the persons concerned. It would be a strange and somewhat self-defeating measure, therefore, if its true legal effect was nevertheless to create or permit discrimination in respect of the legal entitlements of couples once married provided it was based on the sex of the persons concerned. In the absence of any wording in the Amendment either compelling or even tending to support such an interpretation, we can see no convincing basis for construing the legal effect of the Amendment in this way.

Moreover, for either counter arguments (A) and (B) to succeed it must first be established that any regulation of adoption, fostering, AHR or surrogacy so as to provide for the right or interest of any child involved in having the care and company of a married mother and father (wherever practicable and unless contrary to the child’s best interests in all the particular circumstances of a given case) constitutes a legitimate objective or legislative purpose. The primary and most serious obstacle in this regard, post-Amendment, is arguably the provisions of Article 41 and 42. If a SSM couple constitutes a Family for the purposes of Article 41 and Article 42 it is very difficult to see what legitimate legislative objective could be said to be served by preferring OSM couples as a class over SSM couples. In particular we consider the acknowledgement in Article 42.1 “that the primary and natural educator of the child is the Family” presents a direct rejoinder to any contention that, post-Amendment, any particular class of constitutional Family (which is defined solely by the sex of the spouses) may lawfully be

deemed or treated (as a class) as a superior or preferable option for the purposes of parenting children.

In addition, even if it could be established (post-Amendment) that preference in law for OSM couples over SSM couples could, in principle, serve a legitimate legislative objective, the Amendment would have the effect of creating a new and onerous evidential burden for any government or other party advocating such a preference by requiring it to establish that the welfare or interests of children would be so severely harmed or put at risk of such harm by their being raised by SSM couples as compared to being raised by OSM couples as to warrant otherwise discriminatory treatment as between different classes of married couple / constitutional Family distinguished on grounds of sex.

For the sake of completeness, we consider further in Part 4 the counter-arguments (A) to (C) mentioned above.

In the next Part we survey the legal principles which underpin the principal argument which we have proposed and which are relevant for our critical discussion of the counter arguments.

3. CONSTITUTIONAL RIGHTS POTENTIALLY RELEVANT TO QUERY

This Part surveys a number of constitutional rights and rulings which are potentially relevant to any assessment of the constitutional law implications of the Amendment.

3.1 Provisions of the Constitution principally engaged;

3.2 Constitutional entitlements of the family based on marriage (the “Family”);

3.3 Constitutional entitlements of children;

3.4 Constitutional entitlements of natural parents;

3.5 Article 40.1 guarantee of equality before the law.

3.1 Provisions of the Constitution principally engaged

Article 40.1 provides:

All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

Article 41 deals with marriage and the Family and its relevant provisions are as follows:

1. *1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."
2. *1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*
2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.
3. *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.*

Article 42 deals with education and the Family and includes the following:

1. *The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and*

duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

...

5. *In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

A Bill to amend the Constitution¹³ by deleting Article 42.5 and inserting a new Article 42A was passed by the Oireachtas on 10 October 2012 and approved by 58% of voters in a referendum on 10 November 2012. The Bill has not been signed into law by the President due to a legal challenge to the referendum that is currently before the Supreme Court.

The new Article 42A provides as follows:

- 1 *The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*
- 2 *1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such an extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*
2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.
- 3 *Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*
- 4 *1° Provision shall be made by law that in the resolution of all proceedings—*
 - i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*
 - ii concerning the adoption, guardianship or custody of, or access to, any child,**the best interests of the child shall be the paramount consideration.*

¹³ Thirty-first Amendment of the Constitution (Children) Bill 2012.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

3.2 Constitutional entitlements of the family based on marriage (the “Family”)

Relevant principles arising from existing constitutional jurisprudence dealing with marriage and the Family are considered in the remainder of this sub-section under the following headings:

3.2.1 The nature of “the institution of Marriage”;

3.2.2 The constitutional right to marry;

3.2.3 The constitutional rights of married persons;

3.2.4 The nature of the Family;

3.2.5 The constitutional rights of the Family.

3.2.1 The nature of the “institution of Marriage”

The nature and definition of marriage have been touched on in a number of seminal common law and Irish judgments.¹⁴ For present purposes it suffices to merely quote the key judicial pronouncements in this regard.

At common law the classic definition of marriage was stated in the case of *Hyde v Hyde*¹⁵ by Lord Penzance as “*The voluntary union for life of one man and one woman, to the exclusion of all others.*” This was restated in *B. v R.*¹⁶ by Costello J who held:

Marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life.

In *T.F. v Ireland*¹⁷ (decided later in the same year, 1995) Hamilton CJ stated (emphasis added):

As to how marriage should be defined, the Court adopts the definition given by Costello J. in Murray v. Ireland [1985] I.R. 532 at p. 535:-

¹⁴ See references contained in *Zappone v Revenue Commissioners* [2008] 2 IR 417.

¹⁵ (1866) LR 1 P & D 130 at 133.

¹⁶ (Validity of marriage) [1996] 3 IR 549 at 554 (Costello J).

¹⁷ [1995] 1 IR 321 at 373.

'... the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian¹⁸ notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship.'

And in *N. v. K.* [1985] I.R. 733, McCarthy J. said in his judgment at p. 754:-

'Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole.'

One of the reciprocating rights and duties is obviously that of cohabitation. It is an important element in marriage that the spouses live together. The unique and special lifelong relationship referred to by Costello J. could not be developed otherwise.

In the 2002 decision of the High Court in *Foy v An t-Ard Chláraitheoir*¹⁹ McKechnie J stated:

It seems to me that marriage as understood by the Constitution, by statute and by case law refers to the union of a biological man with a biological woman.

Having cited various authorities in support of that proposition,²⁰ the court went on:

Accordingly in my view there is no sustainable basis for the applicant's submission that the existing law ... 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 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.

Later in 2002, in *D.T. v C.T.*,²¹ the Supreme Court (Murray J) referred to marriage as (emphasis added):

¹⁸ With regard to this reference to the "Christian notion", it should be noted that Hamilton CJ went on at 377 to approve expressly the following passage from the High Court's decision in that case (at 333, Murphy J): "I declined to hear evidence from a distinguished moral theologian as to the natural moral law or the rights which it purports to protect. Again I declined to hear a Catholic theologian giving evidence as to the essential features of a Christian marriage. It may well be that 'marriage' as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws."

¹⁹ [2002] IEHC 116.

²⁰ Namely: *Hyde v Hyde* (1866) LR 1 P & D 130; *B. v R. (Validity of marriage)* [1996] 3 IR 549, (1995) 1 ILRM 491; and *T.F. v Ireland* (1995) 1 I.R. 321.

A solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution. It is one which is entered into, in principle, for life.

This judgment of Murray J discusses marriage and the family under Article 41 at some length. Of particular relevance however is the following paragraph from that judgment:²²

*In acknowledging the nature and status of marriage and the family in society, the Constitution reflects its historical, cultural and social role underpinned by values common to all religious traditions. This is by no means unique to Ireland and is reflected in the constitutions of many states and the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948 (see my judgment in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 at p. 736).*

This is significant because, first, it is difficult to find a religious tradition that (at least historically) recognises SSM or considers the family to be grounded on such unions; and second, it is generally accepted that the wording of Article 16 of the Universal Declaration of Human Rights refers only to marriage as between a man and a woman.²³ Accordingly, an amendment in the terms of the proposed new Article 41.4 represents a radical rupture and discontinuity from what the courts have recognised as the animating philosophy and spirit of Article 41 as originally drafted. At the very least that puts a question mark over the continued applicability of at least some aspects of the judicial discussion and construal of Articles 41 and 42 by the Supreme Court which has been consciously informed by that philosophy and spirit.

In *Zappone v Revenue Commissioners*²⁴ Dunne J concluded that (emphasis added):

*Marriage was understood under the Constitution of 1937 to be confined to persons of the opposite sex. That has been reiterated in a number of the decisions which have already been referred to above, notably the decision of Costello J. in *Murray v. Ireland* [1985] I.R. 532, the Supreme Court decision in *T.F. v. Ireland* [1995] 1 I.R. 321 and the judgment of Murray J. in *D.T. v. C.T. (Divorce: Ample resources)* [2002] 3 I.R. 334. The definition was reiterated in *Foy v. An t-Ard Chláraitheoir* (Unreported, High Court, McKechnie J., 9th July, 2002), although there must be a caveat concerning the use of the words *biological man* and *biological woman* given the decision in *Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 447. That has always been the definition.*

...

In this case the court is being asked to redefine marriage to mean something which it has never done to date. ...

²¹ (*Divorce: Ample resources*) [2002] 3 IR 334 at 405.

²² *D.T. v C.T. (Divorce: Ample resources)* [2002] 3 IR 334 at 405.

²³ See Appendix 3 at A3.3.1.

²⁴ [2008] 2 IR 417 at 504-7.

...

The definition of marriage to date has always been understood as being opposite sex marriage.

...

Having regard to the clear understanding of the meaning of marriage as set out in the numerous authorities opened to the court from this jurisdiction and elsewhere, I do not see how marriage can be redefined by the court to encompass same sex marriage

...

The final point I wish to make in relation to the definition of marriage as understood within the Constitution is that I think one has to bear in mind all of the provisions of Articles 41 and 42 in considering the definition of marriage. Read together, I find it very difficult to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words used, relate to a same sex couple.

...

The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit that there is no evidence of any adverse impact on welfare.

In *S (R) v S (P)*²⁵ Abbot J, in construing and applying s. 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989,²⁶ stated

*59. The case *T.F. v. Ireland, the Attorney General and M.F.*[1991] 1 I.R. at p. 321 is helpful in relation to providing a guide as to what a normal marital relationship involves in this jurisdiction. The judgment of Murphy J. in the High Court in that case isolated two pertinent aspects which are well summarised in the head note of the report of his judgment as follows:-*

‘7 ...that the essential ingredients of a valid marriage and the elements which must continue to exist to enable it to be described as

²⁵ [2009] IEHC 579 at paragraph 59.

²⁶ Which provides: “2.(1) An application by a spouse for a decree of judicial separation from the other spouse may be made to the court having jurisdiction to hear and determine proceedings under Part III of this Act on one or more of the following grounds: ... (f) that the marriage has broken down to the extent that the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application.”

a functioning marriage as opposed to one which, in the words of s. 2, subs. 1(f) had "broken down" were difficult to define and would exist in varying degrees in different marriages, but that those essential elements must include the physical capacity to consummate the marriage and the creation of an emotional and psychological relationship between the spouses ...

8. that while the word "break down" might be appropriate to describe a variety of conditions or problems within marriage, the Oireachtas must be presumed to have intended a constitutional meaning, so that "break down" must be limited in its application to a break down which involves the loss of an essential ingredient to the extent as stated in subs. 1(f) that a normal marital relationship had ceased to exist.

9. That it must be recognised that the consent of either party that the continuation of the marriage was an essential ingredient thereof as the implacable opposition - however unreasonable - of one or other of the spouses to its continuation must destroy the fundamental relationship.'

This reference to a "physical capacity to consummate the marriage" as an "essential element" of a "valid marriage" would seem, by implication, to exclude the possibility of a same sex couple entering into a valid marriage.²⁷

Finally, in the Supreme Court case of *J. McD. v P.L.*²⁸ Denham J stated (emphasis added):

... arising from the terms of the Constitution, "family" means a family based on marriage, the marriage of a man and a woman. ... Under the Constitution it has been clearly established that the family in Irish law is based on a marriage between a man and a woman.

Despite the foregoing, some commentators have argued that it would be constitutionally permissible for the Oireachtas to legislate for SSM without a prior amendment to the Constitution.²⁹ In essence, they categorise *Zappone* as merely part of a long line of authorities which espouse judicial deference to the Oireachtas in matters

²⁷ Impotence has been omitted as a ground of nullity of a civil partnership under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. See S. 107. Fergus Ryan suggests that this omission "more than likely reflects the gendered requirements of consummation, which comprises a single act of heterosexual sexual intercourse." Fergus Ryan, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Round Hall, 2011) at 178.

²⁸ [2010] 2 IR 199 at 270 and 274.

²⁹ Conor O'Mahony, 'Constitution is not an obstacle to legalising gay marriage', Irish Times, 16 July 2012; Eoin Daly, 'Same sex marriage doesn't need a referendum' 15 July 2012 <<<http://humanrights.ie/civil-liberties/same-sex-marriage-doesnt-need-a-referendum/>>>; and Fergus Ryan, 'Are Two Irish Mammies (even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution' in Eoin Carolan (ed) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury, 2012) at 451.

of political and social controversy.³⁰ Accordingly, *Zappone* is taken merely to have established the impermissibility of a judicial extension of marriage to same sex couples and not necessarily to have ruled out the validity of a legislative redefinition of marriage.³¹

As against this, however, it could be argued that such analysis presupposes a problematically positivist approach to Articles 41.1 and 41.3 according to which “*the natural primary and fundamental unit group of society*” which the State “*recognises as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law*” could in fact be “*founded*” on whatever conception of the “*institution of Marriage*” the legislature may choose to provide for.³² Indeed, since *Zappone* the High Court has again demonstrated that the institution of marriage protected by the Constitution has a relatively definite form and is not a plastic concept.

³⁰ Conor O’Mahony, ‘Constitutional Amendment and Judicial Restraining’ in Eoin Carolan (ed) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury, 2012) at 161. See, e.g., *MacMathúna v Attorney General* [1995] 1 IR 484 at 499 (Finlay CJ); *I. O’T. v B.* [1998] 2 IR 321 at 379 (Keane CJ); *T.D. v Minister for Education* [2001] 4 IR 259; *Sinnott v Minister for Education* [2001] 2 IR 545; *North Western Health Board v H.W.* [2001] 3 IR 622; *Roche v Roche* [2010] 2 IR 321.

³¹ A second strand in this analysis relies on arguments over the correct methods of constitutional interpretation and the significance of various dicta requiring the Constitution to be treated as a ‘*living document*’ that is written in the ‘*present tense*’ (*Sinnott v Minister for Education* [2001] 2 IR 545 at 664 and 679, relying principally on *McGee v Attorney General* [1974] IR 284 at 319). It is not proposed to address that aspect here, as we consider it sufficient to note that while interpretative arguments of this type might reasonably have been thought to support the position of these commentators in the absence of any case law directly on the point prior to the judgment in *Zappone*, that view is arguably less tenable given the express rejection of this line of argument in that case precisely in respect of the question of the meaning of marriage for the purposes of Article 41.

³² Such an approach is clearly at odds with the following understanding of Article 41 adopted by the High Court in *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 622 (Henchy J) (emphasis added):

“Article 41 deals with only one kind of family, namely, a family founded on the institution of marriage. ... I am satisfied that no union or grouping of people is entitled to be designated a family for the purposes of the Article if it is founded on any relationship other than that of marriage. If the solemn guarantees and rights which the Article gives to the family were held to be extended to units of people founded on extra-marital unions, such interpretation would be quite inconsistent with the letter and the spirit of the Article. It would be tantamount to recognition of such units “as the necessary basis of social order and as indispensable to the welfare of the Nation and the State” (Article 41, 1, 2). For the State to award equal constitutional protection to the family founded on marriage and the “family” founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41, 3, 1, to guard with special care the institution of marriage.”

In light of the recent Supreme Court judgments in *M.R. v An t-Ard -Chláraitheoir* [2014] IESC 60, however, one must acknowledge that a “thinner” or a more positivistic reading of Article 41 appears to be on the ascendant with the possible consequences this may have for any legal arguments heavily reliant on a “thicker” or more teleological understanding of its provisions by reference to a “conjugal” model of marriage (as to which see Part 4.2.2 below).

In *H (HA) v A (SA) & Ors*³³ Dunne J, in declining to make a declaration pursuant to s. 29 of the Family Law Act 1995 in respect of a marriage which occurred in the Lebanon in 1975, concluded a lengthy judgment by stating:

People coming to this country have brought their own traditions and values with them, some of which will seem strange and sometimes alien to our traditions and culture. From time to time it is inevitable that there will be a clash of cultures. This case provides one such example. Polygamous marriage is at odds with the institution of marriage as understood in this country and protected by the Constitution as described in the cases to which I have referred above. I repeat that I have no doubt that the marriage of the applicant and the respondent is a valid marriage according to the law of Lebanon, but for the reasons I have outlined I cannot grant the reliefs sought by the applicant in these proceedings.

Accordingly, we proceed in this Opinion on the assumption that a constitutional amendment is required for the Oireachtas to validly legislate for same sex marriage.³⁴

It follows from this premise that the Amendment, if passed, will represent a significant change in the nature of the “institution of Marriage” as previously referred to, provided for and protected by the Constitution and by Article 41 in particular. In sum, it will render it an institution which is blind to and exists without regard to the sex of the persons who are married. Our view on the implications of this change for the issues raised in the Querist’s question are as set out in Part 2.1 above (“the Principal Argument”).

3.2.2 *The constitutional right to marry*

The Constitution protects a right to marry and the substance of that right is necessarily correlated to the nature of the institution of marriage as it is understood by the Constitution. We consider this point in more detail in this section.

The right to marry and to found a family is not expressly recognised by the Constitution as it is, for example, by Article 12 of the European Convention on Human Rights. Nevertheless, it is now beyond doubt that the Constitution recognises and protects a right to marry either by reason of the personal rights jurisprudence of Article 40.3 or by implication from Article 41.³⁵

³³ [2010] IEHC 497.

³⁴ We note that this is the position of Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus, 2008) at [9.10].

³⁵ *O’Shea v Ireland* [2007] 2 IR 313; *Zappone v Revenue Commissioners* [2008] 2 IR 417.

In *Murray v Ireland*³⁶ Costello J endorsed previous *obiter dicta* that the right to marry is protected by Article 40 as follows:

There is strong and persuasive authority to support the view that the right to beget children should more properly be regarded as a "personal right" within the meaning of Article 40, s. 3, sub-section 1. Mr. Justice Kenny in Ryan v. The Attorney General [1965] I.R. 294 referred to the right to marry as one of the unenumerated personal rights referred to in Article 40, s. 3, sub-s. 1, and Mr. Justice Budd in McGee v. The Attorney General [1974] I.R. 284 at p. 322, concurring with this view, observed "What more important personal right could there be in a citizen than the right to determine in marriage his attitude and resolve his mode of life concerning the procreation of children?" It is also to be borne in mind that a majority of the Supreme Court in McGee v. The Attorney General took the view that the right to privacy in marital sexual matters was a "personal" right within the meaning of this Article rather than a right derived from Article 41, s. 1, sub-section 1. If, then, the right to marry, the right to marital privacy and the right to resolve matters relating to the procreation of children are constitutionally protected by Article 40 rather than Article 41, there are strong reasons for supposing that the right of spouses to beget children should likewise be so regarded.

Also relevant is the following passage from the dissenting judgment of Fitzgerald CJ in *McGee v Attorney General*³⁷ in which he stated (emphasis added):

The right to marry and the intimate relations between husband and wife are fundamental rights which have existed in most, if not all, civilised countries for many centuries. These rights were not conferred by the Constitution in this country in 1937. The Constitution goes no further than to guarantee to defend and vindicate and protect those rights from attack.

In *O'Shea v Ireland*³⁸ Laffoy J was required to address directly the nature of the constitutional right to marry and stated:

Although, as is pointed out in Kelly on The Irish Constitution (4th ed.) at para. 7.6.12, there is no judicial decision on the right to marry, as distinct from rights arising from marriage once contracted, apart from the decision of Kingsmill Moore J. in 1951 in Donovan v. Minister for Justice (1951) 85 I.L.T.R. 134, the constitutional jurisprudence which has developed over the last four decades not only recognises that right but also gives guidance on the extent to which freedom to marry may be constitutionally circumscribed by law. The comment by the editors of Kelly in the same paragraph that nowadays the right to marry, although it would seem to be a necessary derivative from the recognition accorded to the institution of marriage, is likely to be related to Article 40.3 rather than Article 41, in my view, is justified in the light of the jurisprudence.

³⁶ *Murray v Ireland* [1985] IR 532 at 537.

³⁷ [1974] IR 284 at 301.

³⁸ *O'Shea v Ireland* [2007] 2 IR 313 at 324.

Laffoy J's judgment issued just a few days after the hearing had concluded in *Zappone v Revenue Commissioners*³⁹ and is not referred to by Dunne J in her judgment which took a different view as to the basis for the right to marry as follows:⁴⁰

The right to marry contained in the Constitution is undoubtedly not an express right but is clearly implicit from the terms of Article 41. It is not a case where the court requires to ascertain a previously unenumerated right as the right to marry falls squarely within the terms of the Constitution.

While the precise parameters of the right to marry remain undefined it follows from the working assumption adopted by us in light of the materials set out in the foregoing section that it does not at present extend to a constitutional right to enter into or have recognised a form of marriage other than that currently contemplated by Article 41, i.e. a marriage as between one man and one woman. In the *Zappone* case an attempt to argue otherwise was unsuccessful. In this respect, we note, however, that the Plaintiff's case as argued was somewhat different to that analysed in the judgment. The Plaintiffs did not argue for a new constitutional right to same sex marriage purportedly based on a changing consensus in society. Rather, their argument was that all adults have a fundamental right to marry the partner of their choice and that this is a well-established existing constitutional right. Like all rights, it is not absolute, and the State has imposed restrictions on the exercise of that right whereby there is deemed to be an impediment to the exercise of the right by certain couples (e.g. couples within prohibited degrees of consanguinity). The issue, according to the Plaintiffs, was whether the impediment to the exercise of the right to marry (as understood by them) by same sex couples on the grounds of their sex or sexual orientation as distinct from opposite sex couples satisfies the test developed under the Article 40.1 jurisprudence such as *Brennan*,⁴¹ *An Blascód Mór v Commissioner of Public Works (No. 3)*⁴² and *Re Article 26 and the Employment Equality Bill*⁴³ - namely that the distinction must (1) serve a legitimate State purpose, (2) must be reasonably related to that purpose and (3) must be fair to the two classes that result. (On this test see Part 3.5.1 below).

Nonetheless, and whatever the arguments which might be made to the effect that the existing right to marry under the Constitution encompasses the right of two persons of the same sex to marry each other, that is not the state of Irish constitutional law as it

³⁹ [2008] 2 IR 417.

⁴⁰ [2008] 2 IR 417 at 505.

⁴¹ [1983] ILRM 449.

⁴² [2000] 1 IR 6

⁴³ [1997] 2 IR 321.

currently stands under the the case law referred to above and, unless overruled, the decision of the High Court in *Zappone* represents the law as of the date of this opinion.⁴⁴

The wording of the Amendment is framed in terms of the capacity or eligibility of two persons to contract a marriage in accordance with law. It provides, in effect, that the capacity of those two persons to marry or, correlatively, their respective rights to marry cannot be predicated on their sex. We have seen that the case law to date closely relates the nature of the right to marry under the Constitution with the nature of the “institution of Marriage” recognised in Article 41. It seems impossible to conclude therefore that the nature of the “institution of Marriage” recognised under Article 41 would be left unchanged by an amendment expressly extending the right to marry to same sex couples. Indeed, on its face, the Amendment has the potential to place a real question mark over the continued authority of currently seminal judicial *dicta* on the concept or understanding of marriage which informs Article 41 as a whole.⁴⁵

3.2.3 *The constitutional rights of married persons*

There are a number of constitutionally protected rights which the courts to date have held accrue to spouses by reason of their marriage. In *Murray v Ireland*⁴⁶ the Supreme Court (Finlay CJ) stated (emphasis added):

I accept that the fact that the Constitution so clearly protects the institution of marriage necessarily involves a constitutional protection of certain marital rights. They include the right of cohabitation; the right to take responsibility for and actively participate in the education of any children born of the marriage; the right to beget children or further children of the marriage; and the right to privacy within the marriage: privacy of communication and of association.

Though not expressly addressed by the Supreme Court, there is considerable case law to suggest that the “marital rights” enjoyed by spouses by reason of their being married are recognised and protected by the Constitution pursuant to Article 40.3 (personal

⁴⁴ It is likely that any decision overruling *Zappone* would need to be made at a level superior to that of the High Court, having regard to the deference one judge of the High Court is likely to show to a recent judgment of another on the same issue, even where the second judge would have decided the first case differently: see *Re Worldport Ireland Ltd (in liq.)* [2005] IEHC 189; *Kadri v Governor of Wheatfield Prison* [2012] IESC 27.

⁴⁵ See e.g.: *Murray v Ireland* [1985] IR 532 at 535 (Costello J) (emphasis added): “... the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special lifelong relationship.” And *D.T. v C.T. (Divorce: Ample resources)* [2002] 3 IR 334 at 405 (Murray J): “In acknowledging the nature and status of marriage and the family in society, the Constitution reflects its historical, cultural and social role underpinned by values common to all religious traditions. This is by no means unique to Ireland and is reflected in the constitutions of many states and the Universal Declaration of Human Rights, adopted by the general assembly of the United Nations in 1948...”.

⁴⁶ [1991] ILRM 465 at 472.

rights) and not Article 41. The relevant case law was well summarised by Costello J in *Murray v Ireland*⁴⁷ as follows:

The plaintiffs assert (a) that each, as a married person, has a basic human right to procreate children with his or her spouse, and (b) that this right is protected by Article 41 of the Constitution.

...

Can the right asserted be regarded as stemming from the imprescriptible and inalienable rights accorded to the Family in Article 41 or is it more proper to consider that it is one of the unspecified personal rights which, by Article 40, the State is required to vindicate and defend? ...

*There is strong and persuasive authority to support the view that the right to beget children should more properly be regarded as a "personal right" within the meaning of Article 40, s. 3, sub-section 1. Mr. Justice Kenny in *Ryan v. The Attorney General* [1965] I.R. 294 referred to the right to marry as one of the unenumerated personal rights referred to in Article 40, s. 3, sub-s. 1, and Mr. Justice Budd in *McGee v. The Attorney General* [1974] I.R. 284 at p. 322, concurring with this view, observed "What more important personal right could there be in a citizen than the right to determine in marriage his attitude and resolve his mode of life concerning the procreation of children?" It is also to be borne in mind that a majority of the Supreme Court in *McGee v. The Attorney General* took the view that the right to privacy in marital sexual matters was a "personal" right within the meaning of this Article rather than a right derived from Article 41, s. 1, sub-section 1. If, then, the right to marry, the right to marital privacy and the right to resolve matters relating to the procreation of children are constitutionally protected by Article 40 rather than Article 41, there are strong reasons for supposing that the right of spouses to beget children should likewise be so regarded.*

*This view is further strengthened by the observations of Mr. Justice Kenny in *Ryan v. Attorney General* [1965] I.R. 294 at p. 308 of the report, on Article 41. He pointed out that, although the imprescriptible and inalienable rights of the Family are not defined in the Constitution, some clue to the ambit of the rights of the family mentioned in it are to be found from the provisions of Article 41, s. 1, sub-s. 2, where there is reference to a guarantee to protect the family in "its constitution and authority", and he suggested that the rights of the family must be those which relate to its "constitution and authority." This would confirm the view that the rights, in Article 41, s. 1, sub-s. 1, are those which can properly be said to belong to the institution itself as distinct from the personal rights, which each individual member might enjoy by virtue of membership of the family. No doubt if the rights of the unit group were threatened or infringed, any member of the family could move the court to uphold them, but the cause of action would then be the threat to the rights granted to the unit, and not to those of its individual members. The authorities to which I have referred and an analysis of Article 41 itself would tend, therefore, to support the view that the rights asserted*

⁴⁷ *Murray v Ireland* [1985] IR 532 at 535-538.

by the plaintiffs in this case, find recognition and protection as personal rights under article 40, s. 1, sub-section 1.

In *T.F. v Ireland*⁴⁸ the High Court (Murphy J) opined on the constitutional rights possessed by the family as follows:

In Murray v. Ireland [1985] I.R. 532 Costello J. held that the right to beget children is one of the unspecified personal rights which, by Article 40, the State is required to defend and vindicate. The learned judge held that each of the plaintiffs in that case, as a married person, had the basic human right to procreate children with his or her spouse and that that right was protected by the Constitution as a personal right under Article 40. In my view this decision is equally applicable to all of the basic rights deriving from the relationship of marriage, such as, the right of the married couple to cohabit, the right of each spouse to give to and receive from the other moral as well as financial support and the right (as noted in In Re The Matrimonial Home Bill, 1993 [1994] 1 I.R. 305) of spouses to make and adhere to decisions made in relation to family property. However, these are not absolute or unqualified rights.

Murphy J here grounds the rights of the family in Article 40 and refers in this regard to the Supreme Court decision in *re The Matrimonial Home Bill, 1993* – however in that case Finlay CJ actually concluded that the right mentioned was:⁴⁹

possessed by the family which is recognised by the State in Article 41, s. 1, sub-s. 1 of the Constitution as antecedent and superior to all positive law and its exercise is part, and an important part, of the authority of the family which in Article 41, s. 1, sub-s. 2 the State guarantees to protect.

It is not proposed to elaborate here on all of the above mentioned marital rights. For present purposes the key rights are those in respect of the children of the constitutional Family and, in particular, the “procreation” or “begetting” of such children.

In the High Court in *Murray v Ireland*, Costello J spoke of the latter right variously as the “right to beget children” and the “right to procreate children”. We have already noted above the mention by Finlay CJ in *Murray* of “the right to beget children or further children of the marriage”. The other judgment given in that case by the Supreme Court was by McCarthy J who added a further gloss (emphasis added):⁵⁰

The right to procreate children within marriage is not expressly stated in the Constitution; it is one of the unenumerated personal rights guaranteed by Article 40 as being essential to the human condition and personal dignity. It is independent of and antecedent to all positive law; it is of the essence of humanity.

⁴⁸ [1995] 1 IR 321 at 334.

⁴⁹ [1994] 1 IR 305 at 325 (Finlay CJ).

⁵⁰ [1991] ILRM 465 at 476.

In *Roche v Roche*⁵¹ Denham CJ considered as follows, in *obiter* remarks,⁵² the interaction of a husband and wife's rights to procreate in circumstances where the wife wished to have implanted in her womb the couple's frozen embryos but her estranged husband did not.⁵³

[114] As indicated earlier, I am satisfied that there was no prior agreement in this case to the implantation of the surplus frozen embryos. However, even if the first defendant had made such agreement, which he did not, I would not regard it as irrevocable. All the circumstances would have to be considered carefully. If a party had no children, and had no other opportunity of having a child, that would be a relevant factor for consideration. In this case the plaintiff and the first defendant already have two children. It is also relevant that they are now separated. Another important factor is that the first defendant does not wish to have further children with the plaintiff. If the embryos were implanted he would be the father of any subsequent children with constitutional rights and duties.

[115] The right to procreate was recognised in Murray v. Ireland [1991] 1 I.L.R.M. 465. There is an equal and opposite right not to procreate. In the circumstances of this case, while the plaintiff and the first defendant have family rights, the exercise of a right not to procreate by the first defendant is a proportionate interference to the right of the plaintiff to procreate.

Given the factual context of the case, it does seem implicit in the Chief Justice's remarks that she believed the right to procreate to include procreation by means of IVF where the sperm of the husband and the eggs and womb of the wife are used, i.e. where no gamete donation is involved. However, her citation of *Murray v Ireland* in this regard is without any direct or express consideration of this point and the right to procreate was not mentioned by any of the other members of the Supreme Court in *Roche*.

For the reasons already noted at the outset, namely that this query is concerned with the permissibility of certain differences in treatment rather than stand-alone violations of rights so to speak, we do not consider it is necessary to opine here on whether there is any constitutionally recognised right to avail of donor-assisted AHR on the part of married couples (either currently or post the Amendment).

3.2.4 The nature of the Family

⁵¹ [2010] 2 IR 321.

⁵² Denham CJ held there was no prior agreement between the parties as to the implantation of surplus frozen embryos. Her consideration of the right to procreate was expressly addressed to the hypothetical question (which would only have arisen if the first defendant (the husband) had in fact entered into such an agreement) whether such agreement was irrevocable on his part. Her therefore *obiter* discussion of this point was also premised on her finding that the frozen embryos were not "unborn" for the purposes of Article 40.3.3. See [2010] 2 IR 321 at 364 at para. 109.

⁵³ *Roche v Roche* [2010] 2 IR 321 at 366.

The key principles regarding the nature of the Family said by Article 41 to be founded on marriage can be summarised as follows:

- The family based on a valid marriage in accordance with the law of the State is the only family recognised by the courts for the purposes of Article 41 and there is no concept of a “*de facto family*” for the purposes of Irish constitutional law.⁵⁴ Oran Doyle has usefully summarised what may reasonably be seen as the key effects of this principle as follows:⁵⁵

(a) it precludes unmarried families from availing themselves of protections contained in Art 41 ...; (b) it provides constitutional authorisation for legislative discrimination against unmarried families (see O’Brien v Stoutt [1984] IR 316; [1985] ILRM 86...; and (c) it implicitly deems non-marital families to be less worthy of recognition than marital families.

- Both a married couple without children⁵⁶ and an orphan of married parents⁵⁷ may constitute a Family for the purposes of Article 41.
- A married but separated couple remain a Family for the purposes of Article 41.⁵⁸
- With respect to his or her constitutional rights, including under Article 41, a child adopted by a married couple has the same status as if born to them.⁵⁹

⁵⁴ *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567 at 643 (Walsh J): Family referred to in Article 41 ‘is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State.’; *G v An Bord Uchtála* [1980] IR 32; *O’B. v S.* [1984] IR 316; *J.K. v V.W.* [1990] 2 IR 437; *T.F. v Ireland* [1995] 1 IR 321; *W.O’R. v E.H. (Guardianship)* [1996] 2 IR 248 at 265 (Hamilton CJ); *N v HSE* [2006] 4 IR 374 at 541 (Geoghegan J); *J. McD. v P.L.* [2010] 2 IR 199 at 274.

⁵⁵ Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus, 2008) at [9.06].

⁵⁶ *Murray v Ireland* [1985] IR 532 at 537 (Costello J): ‘A married couple without children can properly be described as a ‘unit group’ of society such as is referred to in Article 41 and the life-long relationship to which each married person is committed is certainly a ‘moral institution’. The words used in Article 41 to describe the ‘Family’ are therefore apt to describe both a married couple with children and a married couple without children. It is true that the rights and duties of a married couple with children are more varied than a married couple without children but each ‘unit group’ has the same nucleus and it is reasonable to assume that both were given the same constitutional protection.’ Cited with approval in *T.F. v Ireland* [1995] 1 IR 321 at 372 (Hamilton CJ).

⁵⁷ *G v An Bord Uchtála* [1980] IR 32 at 70 (Walsh J): ‘...there is no doubt, in my view, that orphaned children who are members of a family continue to constitute a family for the purpose of the Constitution even though their parents have died. It can scarcely be contended that a unit consisting of four or five children who range in age between five and sixteen years, and whose parents may have been killed simultaneously in a car accident or may have died successively from illness, and who had been a family during the life of both parents or of the surviving parent, cease to be a family on the death of both parents. The family which is founded on marriage is recognised as the fundamental unit group of society; the fact that the married parents of the children have died does not alter the character of the unit.’

⁵⁸ *Sinnott v Minister for Education* [2001] 2 IR 545 at 661 (Denham J).

- Natural parents who were unmarried at the time their child was born may subsequently become a Family for the purposes of Article 41 upon their marrying each other.⁶⁰
- Grandparents and their grandchildren do not together constitute a Family.⁶¹
- The Family has rights as a “unit” and distinct from the rights of its individual members.⁶² Likewise, its members, the spouses and any children, each enjoy their own individual rights within and distinct from the Family.⁶³

3.2.5 The constitutional rights of Family

Various statements of the High Court and Supreme Court can be cited elaborating on the status and nature of the rights of the Family recognised in Article 41.

In *L. v L.*,⁶⁴ Finlay CJ made the following comments remarks in relation to Article 41

The provisions of Article 41 of the Constitution can, in my view, be separated in their purpose and object in two ways. Section 1, sub-ss. 1 and 2, clearly represent the recognition by the State of the existing fundamental rights of the family and the undertaking by the State to protect those rights. Neither sub-s. 1 nor sub-s. 2 of s. 1 of Article 41 purports to create any particular right within the family, or to grant to any individual member of the family rights, whether of property or otherwise, against other members of the family, but rather deals with the protection of the family from external forces.

With regard to Article 41, s. 2, on the other hand, the State by sub-s. 1 clearly recognises the value to the common good of the activities of the wife within the home, and by sub-s. 2 accepts an obligation to ensure that if the wife is a mother as well she shall not be obliged by economic necessity to engage in labour to the neglect of her duties in the home.

⁵⁹ *Dowse v An Bord Uchtála* [2006] 2 IR 507 at 526-7 (MacMenamin J). See also s. 58 of the Adoption Act 2010, replacing s. 24 of the Adoption Act 1952 (considered in *W. O'R. v E.H. (Guardianship)* [1996] 2 IR 248).

⁶⁰ *In re J.H.* [1985] IR 375; *N v HSE* [2006] 4 IR 374.

⁶¹ *A and B v Eastern Health Board* [1998] 1 IR 464 at 478 (Geoghegan J).

⁶² *Murray v Ireland* [1985] IR 532 at 528 (Costello J), cited in *Sinnott v Minister for Education* [2001] 2 IR 545 at 661 (Denham J).

⁶³ *North Western Health Board v H.W.* [2001] 3 IR 622 at 718 (Denham J) and at 687 (Keane CJ, dissenting). For an early statement of this principle see *The People (DPP) v J.T.* [1988] 3 Frewen 141 (CCA) at 157 (Walsh J): ‘Article 41 of the Constitution recognises the family as the fundamental unit group of society and clearly establishes that the family as such unit has its own special rights. The Constitution however also makes it clear in its various provisions that every member of the family, as an individual, has his own personal rights also guaranteed by the Constitution. One of these is the guarantee contained in Article 40, section 3 of the Constitution wherein the State undertakes to vindicate the personal rights of the person, and to vindicate the rights of such persons in the case of any injustice done.’

⁶⁴ *L. v L.* [1992] 2 IR 77 at 108.

In *North Western Health Board v H.W.*⁶⁵ the High Court (McCracken J) stated (emphasis added):

Article 41.1 places the family in a very special position as being the natural primary and fundamental unit group of society. It also provides that the family possess rights which are antecedent and superior to all positive law. It is indeed probably the provision in the Constitution which comes nearest to accepting that there is a natural law in the theological sense. There have been a number of cases which have spoken of a hierarchy of rights under the Constitution, but the wording of Article 41.1 certainly would appear to place the rights of the family and therefore, presumably, the rights of the parents in relation to their children, very high up in this hierarchy.

While it might be questioned whether the new Article 42A might qualify this ruling as to "rights of the parents in relation to their children", the new Article would not seem to impact upon the Court's view of the relative importance of the rights of the Family *per se*.

In *O'B. v S.*⁶⁶ the Supreme Court stated that:

The provisions of Article 41 of the Constitution create not merely a State interest but a State obligation to safeguard the family.

In *North Western Health Board v H.W.*⁶⁷ Murray J stated:

The Constitution and in particular Article 41 reflects a shared value of society concerning the status of the "family" in the social order. It declares that the State recognises the family as a natural primary and fundamental unit in society and in particular as a distinct moral institution possessing rights superior and anterior to positive law.

Article 41.2 confers on the State the duty of protecting the family in its Constitution and authority. I do not think it is necessary, having regard to the nature of the issues in this case, to consider the philosophy which underlies the provisions of the Constitution on the family, the terms of the Constitution being sufficiently explicit in themselves for the purposes of addressing those issues. Suffice it to say that the Constitution accords it a special status and protection, which I might add is not wholly unique. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948, having recited in its preamble its recognition "of the inherent dignity and of the equal and inalienable rights of all members of the human family" (in its broadest sense) acknowledges the duty of member states to secure the rights and freedoms recognised in the Charter which includes, at art. 16(3), "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

⁶⁵ [2001] 3 IR 622 at 633. The decision of the High Court was upheld by the Supreme Court on appeal.

⁶⁶ [1984] IR 316 at 338 (Walsh J), cited in *J. McD. v P.L.* [2010] 2 IR 199 at 269 (Denham J).

⁶⁷ [2001] 3 IR 622 at 736-8 and 739.

The Constitution of Germany (1949) recognises the family as being under the special protection of the State (art. 6) as does art. 21 of the Constitution of Greece (1975) to mention two states of the European Union.

...

Article 41 of the Constitution, in recognising the family as a moral institution possessing inalienable and imprescriptible rights, does not purport to establish the family as an institution but recognises its inherent status as such with rights which are "antecedent and superior to all positive law". In doing so it reflects, as I have mentioned, a shared value of society and places it within, what Finlay C.J. described in Webb v. Ireland [1988] I.R. 353 at p. 383, as "... the framework of the society sought to be created and sought to be protected by the Constitution ...".

One of the inherent objects of the Constitution is the protection of liberties. Article 41.2 in providing that "The State, therefore, guarantees to protect the Family in its constitution and authority ..." provides a guarantee for the liberty of the family to function as an autonomous moral institution within society and, in the context of this case, protects its authority from being compromised in a manner which would arbitrarily undermine the liberty so guaranteed.

...

As Walsh J. stated in McGee v. Attorney General [1974] I.R. 284, at p. 310:-

"The individual has natural and human rights over which the State has no authority; and the family as the natural primary and fundamental unit group of society, has rights as such which the State cannot control."

...

I think it is well established in our case law that the authority and autonomy explicitly recognised by the Constitution as residing in the family as an institution in our society means that the parents of children have primary responsibility for the upbringing and welfare generally of their children. When exercising their authority in that regard they take precedence over the State and its institutions. In this respect I agree with the observation of the Chief Justice that the family is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself.

...

A general conclusion can be drawn from the foregoing, namely that the family as a moral institution enjoys certain liberties under the Constitution which protect it from undue interference by the State, whereas the State may intervene in exceptional circumstances in the interests of the common good or where the parents have failed for physical or moral reasons in their duty towards their children. I do not see anything novel in these conclusions.

In his dissent in *Northwestern Health Board v HW*⁶⁸ Keane CJ opined as follows:

While the family, because it derives from the natural order and is not the creation of civil society, does not, either under the Constitution or positive law, take the form of a juristic entity, it is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself. While there may inevitably be tensions between laws enacted by the State for the common good of society as a whole and the unique status of the family within that society, the Constitution firmly outlaws any attempt by the State in its laws or its executive actions to usurp the exclusive and privileged role of the family in the social order.

In *D.T. v C.T.*⁶⁹ Murray J stated:

As I have previously had occasion to state, the Constitution and, in particular, Article 41 reflects a shared value of society concerning the status of the "family" in the social order as a natural primary and fundamental unit group in society. The State is required to protect the family, inter alia, because it is indispensable to the welfare of the nation and the state. Moreover, the Constitution requires the State "to guard with special care the institution of Marriage ...".

...

*In acknowledging the nature and status of marriage and the family in society, the Constitution reflects its historical, cultural and social role underpinned by values common to all religious traditions. This is by no means unique to Ireland and is reflected in the constitutions of many states and the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948 (see my judgment in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 at p. 736).*

...

The life-long commitment which marriage, in principle, entails means that there is a mutuality of an intimate relationship in which singular aspirations in life of each partner are adapted to mutual life goals. They adapt their lives to live and work together for the mutual welfare of their family which usually, but by no means necessarily so, also involves the birth and rearing of children.

...

In many marriages one spouse either does not work outside the home, works part-time or works intermittently over the years in casual or part-time work. All of these private decisions are taken because there is a fundamental importance to the role of parents in the home and it is frequently seen as desirable for the welfare of the family that one parent should devote most of his or her time to the home, particularly, where the rearing of children is involved. While these considerations may apply to

⁶⁸ [2001] 3 IR 622 at 686-7.

⁶⁹ (Divorce Ample resources) [2002] 3 IR 334 at 404.

either spouse, it must be said that in the vast majority of cases the spouse who gives the primary commitment to working in the home is the wife.

...

The Constitution views the family as indispensable to the welfare of the State. Article 41.2.1 recognises that, by her life in the home, the woman gives to the State a support without which the common good cannot be achieved. No doubt the exclusive reference to women in that provision reflects social thinking and conditions at the time. It does, however, expressly recognise that work in the home by a parent is indispensable to the welfare of the State by virtue of the fact that it promotes the welfare of the family as a fundamental unit in society. A fortiori it recognises that work in the home is indispensable for the welfare of the family, husband, wife and children, where there are children.

...

I would observe, in passing, that the Constitution, as this court has stated on a number of occasions, is to be interpreted as a contemporary document. The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on this point in this case, it seems to me, that it implicitly recognises similarly the value of a man's contribution in the home as a parent.

The dissenting judgment of Fennelly J in *A.O. & D.L. v Minister for Justice*⁷⁰ is also notable for its lengthy discussion of Article 41. In addition to his citing many of the passages from *North Western Health Board v. H.W* already considered above, Fennelly J noted:⁷¹

*Article 41 of the Constitution assigns to the family an exceptionally important status and role in society and in the "welfare of the Nation and the State." This distinguishes the Irish Constitution from the founding documents of many of the nations to whose legal systems we look with respect. The applicants have cited a number of authorities which demonstrate the deference allowed by our courts to the primacy of the family in certain practical contexts. The courts are sadly but frequently called upon to resolve disputes internal to the family, arising in proceedings relating to, for example, adoption or marriage breakdown. Less frequently, the State or one of its organs seeks the intervention of the courts, where it perceives a risk to the welfare of the child, i.e., where the family, exceptionally, does not sufficiently protect the interests of one of its children. The present case is unique in that the State asserts that its own sovereign rights are so urgent and compelling that they should prevail and be accorded precedence over the constitutional rights of the child. Only in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151 has this court previously considered this direct clash between the interests of a child and the rights of the State.*

⁷⁰ [2003] 1 IR 1 at 185-190.

⁷¹ [2003] 1 IR 1 at 185 and 189-190.

...

*This lengthy exposition is, I think, justified in the very particular circumstances of this case. The present case pits the claims of the State itself against the constitutional rights of an Irish born citizen child to be raised as a member of his family in the State. The words of Article 41 are, as stated by Hardiman J., "exceptionally strongly worded." I do not think that any of the international instruments to which reference has been made or any comparative national constitution benefits from the philosophical underpinning that is expressed in the clear language of the Article. Article 41.1 describes the nature of the family and the philosophical basis for its role in society. This is that it is a "moral institution" and that it is the "natural primary and fundamental unit group of Society." It follows that it enjoys rights. These are declared to be "inalienable and imprescriptible" as well as what must be consequential, "antecedent and superior to all positive law". It remains impossible to improve on the compendious explication of this provision contained in the judgment of Walsh J. in *McGee v. Attorney General* [1974] I.R. 284, at p. 310:-*

"Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control. However, at the same time it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society."

Elsewhere in the same judgment Walsh J. explained that the moral foundation of the family and similar rights had to take account of the pluralist character of our society and said that at p. 318:-

"... the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law."

It is true that the common law is deeply influenced by the natural law, as suggested by Hardiman J. in the passage I have quoted. The great commentators made constant appeal to the divine inspiration of the laws. In modern common law countries, things are different. Legislatures make laws in an almost entirely secular context. Article 41 of the Constitution, however, situates the family on a moral plane reflective of Christian notions of natural law. The important point is that the rights of the family are unambiguously founded on its character as a natural and moral institution.

As has been frequently said the rights of the family are superior to those of the State itself.

However, as intimated by Walsh J in *McGee v Attorney General*⁷² (in the passage quoted by Fennelly J above), the statement in Article 41 that the Family possesses “inalienable and imprescriptible rights, antecedent and superior to all positive law” does not render it or its rights free from legitimate curtailment by the law.⁷³ This point was addressed in detail in *Murray v Ireland*⁷⁴ by Costello J who held:⁷⁵

*...the power of the State, to delimit the exercise of constitutionally protected rights, is expressly given in some Articles and not referred to at all in others, but this cannot mean that, where absent, the power does not exist. For example, no reference is made in Article 41 to any restrictive power but it is clear that the exercise by the Family, of its imprescriptible and inalienable right to integrity as a unit group, can be severely and validly restricted by the State when, for example, its laws permit a father to be banned from a family home or allows for the imprisonment of both parents of young children. As I suggested in *The Attorney General v. Paperlink Ltd. [1984] I.L.R.M. 373* at p. 385, in construing the Constitution, the courts should bear in mind that the document is a political one as well as a legal one and whilst not ignoring the express text of the Constitution, a purposive approach to interpretation which would look at the whole text of the Constitution and identify its purpose and objectives in protecting human rights, is frequently a desirable one. This view seems to be in accord with that recently expressed in the Supreme Court in *Tormey v. Ireland [1985] I.R. 289* by Mr. Justice Henchy who referred to the need to adopt a construction of the constitutional provisions which would “achieve the smooth and harmonious operation of the Constitution” and to avoid a strict construction which “would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution.”*

*... So, if the court is required to make a valuation between two constitutionally protected human rights, (as it was required to do in *People v. Shaw [1982] I.R. 1*), it should have particular regard to the intrinsic nature of the rights concerned, a view consistent with the views of Mr. Justice Griffin at p. 56 and Mr. Justice Kenny at p. 63 of that report.”*

3.3 Constitutional entitlements of children

3.3.1 Constitutional rights of children generally

⁷² [1974] IR 284 at 310.

⁷³ See: *Murray v Ireland* [1985] IR 532; *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 at 60 (Denham J). See also *Pok Sun Shun v Ireland* [1986] ILRM 593 at 596-7 (Costello J) and *Osheku v Ireland* [1986] IR 733 at 746 (Gannon J), both considered with approval by majority of Supreme Court in *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 at 37 (Keane CJ) and 52 and 58 (Denham J).

⁷⁴ [1985] IR 532.

⁷⁵ [1985] IR 532 at 537.

The content of the ‘*natural and imprescriptible*’ rights of the child referred to in the Constitution⁷⁶ have been elaborated upon in several judgment of the Supreme Court as follows.⁷⁷

There are several very commonly cited passages from the High Court and Supreme Court judgments in *G v An Bord Uchtála*⁷⁸ describing (non-exhaustively) the ‘natural’ rights of children protected by the Constitution.

The child's unenumerated rights were said by the High Court (Finlay P) to include:⁷⁹

...a constitutional right to bodily integrity and ... an unenumerated right to an opportunity to be reared with due regard to her religious, moral, intellectual, physical and social welfare. The State, having regard to the provisions of Article 40, s. 3, sub-s. 1 of the Constitution, must by its laws defend and vindicate those rights as far as practicable.

In dismissing the appeal of the notice party (natural father), Walsh J stated (emphasis added):⁸⁰

Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such.

...

The Constitution rejected the English common-law view of the position of the illegitimate child in so far as its fundamental rights are concerned. It guarantees to protect the child's natural rights in the same way as it guarantees to protect the natural rights of the mother of the child.

⁷⁶ Article 42.5 and Article 42A.1 (as to the respective status of each, see part 4.1 above).

⁷⁷ Obviously the child also enjoys the personal rights referred to in Articles 40, 43 and 44: *The Adoption (No. 2) Bill, 1987* [1989] IR 656 at 662 (Finlay CJ).

⁷⁸ [1980] IR 32.

⁷⁹ 1980] IR 32 at 44.

⁸⁰ [1980] IR 32 at 69 and 78.

...

There is nothing in the Constitution to indicate that in cases of conflict the rights of the parents are always to be given primacy.⁸¹

In his dissent O'Higgins CJ stated (in a passage that has been often cited since):⁸²

*The child also has natural rights. Normally, these will be safe under the care and protection of its mother. Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State.*⁸³

It should be noted that in dissent from the position taken by the majority (Walsh, Henchy, Kenny JJ and O'Higgins CJ) Parke J stated:⁸⁴

The child has personal rights to life, to be fed, to be protected, reared and educated in a proper way; these rights are recognised by Article 40 of the Constitution. In my view, a child has no constitutional right to have these obligations discharged by his or her natural parent and, if there are other persons able and willing to satisfy such requirements, then a child's constitutional rights are sufficiently defended and vindicated.

In *F.N. and E.B. v C.O.*⁸⁵ the High Court (Finlay-Geoghegan J) identified the right of a child to have its welfare taken into account in guardianship proceedings to be a constitutional

⁸¹ This last (underlined point) was strongly re-stated by Hardiman J in *N v HSE* [2006] 4 IR 374 at 504 as follows:

"There are certain misapprehensions on which repeated and unchallenged public airings have conferred undeserved currency. One of these relates to the position of children in the Constitution. It would be quite untrue to say that the Constitution puts the rights of parents first and those of children second. It fully acknowledges the "natural and imprescriptible rights" and the human dignity, of children, but equally recognises the inescapable fact that a young child cannot exercise his or her own rights. The Constitution does not prefer parents to children. The preference the Constitution gives is this: it prefers parents to third parties, official or private, priest or social worker, as the enablers and guardians of the child's rights. This preference has its limitations: parents cannot, for example, ignore the responsibility of educating their child. More fundamentally, the Constitution provides for the wholly exceptional situation where, for physical or moral reasons, parents fail in their duty towards their child. Then, indeed, the State must intervene and endeavour to supply the place of the parents, always with due regard to the rights of the child."

⁸² [1980] IR 32 at 56.

⁸³ This list was closely echoed in *D.G. v Eastern Health Board* [1997] 3 IR 511 at 537 by Denham J (dissenting) who stated that the child had 'the right to be reared with due regard to his religious, moral, intellectual, physical and social welfare; to be fed, accommodated and educated; to suitable care and treatment; to have the opportunity of working, and of realising his personality and dignity as a human being.'

⁸⁴ [1980] IR 32 at 100.

⁸⁵ (Guardianship) [2004] 4 IR 311.

right of the child which was to operate in tandem with the rights of the parents and family as follows:⁸⁶

The Supreme Court in The Adoption (No. 2) Bill 1987 [1989] I.R. 656 has stated that the rights of a child who is a member of a family are rights referred to in Articles 40, 43 and 44 in addition to Articles 41 and 42. It appears to me that the right of a child to have decisions in relation to guardianship, custody or upbringing, taken in the interests of his/her welfare is a personal right of the child within the meaning of Article 40.3 and therefore one which the State pledges to vindicate as far as practicable.

Section 3 does not preclude a court from taking into consideration other matters, including the constitutional position of the family unit and constitutional rights of both parents and the child under Articles 41 and 42.

...

*Even if, as I have concluded earlier in this judgment, the personal rights of a child referred to in Article 40.3 include a right to have a decision in relation to his/her custody taken in the interests of his/her welfare, the above extract [from *In re J.H. (inf)* [1985] IR 375] requires the court in considering the child's welfare to have due regard for the natural and imprescriptible rights of the child including the right to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education.*

Finally, and though the exact status of Article 42.5 is presently uncertain (see part 3.1 above), it is relevant to note that the Supreme Court has ruled that it is not confined to education *per se* or in a narrow sense:⁸⁷

Article 42, s. 5 of the Constitution should not, in the view of the Court, be construed as being confined, in its reference to the duty of parents towards their children, to the duty of providing education for them. In the exceptional cases envisaged by that section where a failure in duty has occurred, the State by appropriate means shall endeavour to supply the place of the parents. This must necessarily involve supplying not only the parental duty to educate but also the parental duty to cater for the other personal rights of the child.

3.3.2 Rights of children to the company, society, care and support of and education by their parents / family

*In re J.H. (inf.)*⁸⁸ Finlay CJ said that the infant had, in addition to the rights of every child, rights under the Constitution as a member of a family which rights he defined as including the right:

⁸⁶ *F.N. and E.B. v C.O. (Guardianship)* [2004] 4 IR 311 at 323 and 327.

⁸⁷ *The Adoption (No. 2) Bill*, 1987 [1989] IR 656 at 663.

⁸⁸ [1985] IR 375 at 394.

(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41, s. 1);

(b) to protection by the State of the family to which it belongs (Article 41, s. 2); and

(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, s. 1).

Finlay CJ's account of the rights of the child to 'belong to' and be 'educated by' the family has been cited and approved by the Supreme Court on several occasions.⁸⁹ In *A.O. & D.L. v Minister for Justice*⁹⁰ Keane CJ, having cited the above rights listed (a) to (c) from in *re J.H.*, went on to add:

... in my view, these rights are universal and not the preserve of any particular legal system. The articles in question reflect a philosophy which treats them as existing independently of the existence of civil society itself and as not being at the disposal of such societies.

In cases dealing with the legality of the deportation of the married non-citizen-parents of citizen-children, the Supreme Court has reformulated the rights specified by Finlay CJ in *re J.H.* as the children's

*...constitutional right to the company, care and parentage of their parents within a family unit...*⁹¹

In *N v HSE*⁹² the High Court (MacMenamin J) stated:

The rights of a child are to have his or her needs provided for by his or her parents and a corresponding right and duty of a parent or parents is to provide for those needs.

In *N. McK. v Information Commissioner*⁹³ a unanimous Supreme Court held that 'a child has rights to parental care'.

⁸⁹ e.g. *North Western Health Board v H.W.* [2001] 3 IR 622; *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1; *N v HSE* [2006] 4 IR 374.

⁹⁰ [2003] 1 IR 1 at 24.

⁹¹ *Fajujonu v Minister for Justice* [1990] 2 IR 151 at 162 (Finlay CJ); and *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 at 83 (Murray J) (emphasis added).

⁹² [2006] 4 IR 374 at 447. The decision of MacMenamin J was overturned by the Supreme Court on appeal but not in respect of this dictum.

⁹³ [2006] 1 IR 260 at 267 (Denham J). The full paragraph states as follows:

"The relationship between parent and child has a special status in Ireland. Under the Constitution the family is the primary and fundamental unit group in our society: Article 41.1.1. The State has guaranteed to protect the family in its constitution and authority: Article 41.1.2. The State encompasses the judicial branch of government which has a consequent duty to protect the family and its authority. While the family unit has its rights, so too each member of the unit has rights. Thus while the parents have duties and rights in

The above *dicta* leave unspoken exactly who counts as the child's parents or how one is to determine the allocation of parentage in all of the scenarios that might arise following the use of donor-assisted AHR or surrogacy. Some further specification is perhaps given on these points by the following remarks of Walsh J in *G v An Bord Uchtála* (emphasis added).⁹⁴

[A] child is just as entitled to be supported and reared by its parent or parents, who are the ones responsible for its birth, as a child born in lawful wedlock. ... in this respect there is no difference between the obligations of the unmarried parent to the child and those of the married parent. These obligations of the parent or parents amount to natural rights of the child and they exist for the benefit of the child. The child's natural rights in these matters are primarily to be satisfied by the parent or parents.

Again, however, questions might be raised as to who exactly is "responsible for" the birth of a child conceived in the course of AHR involving, say, gamete donation (of sperm or egg or both) and/or a surrogate birth-mother.

The significance of the qualifier "primarily" in the final sentence of Walsh J's statement is made clear later in the same judgment as follows:

In so far as children born out of wedlock are concerned, it has been pointed out in Nicolaou's Case ... (at p. 644) that there is no provision in Article 40 of the Constitution which prohibits or restricts the surrender, abdication or transfer of any of the rights guaranteed in that Article by the person entitled to them. Thus, in an appropriate case, the mother may transfer her rights in favour of another or abandon them, but in a way in which the essential natural rights of the child in respect of its care, welfare, health and upbringing are not infringed. The Adoption Acts provide such a way.

These passages from the judgment of O'Higgins CJ and Walsh J for the majority in *G v An Bord Uchtála* have been summarised by the High Court (Irvine J) in *O.E. v Minister for Justice* as follows:⁹⁵

The decision of the court in G. v. An Bord Uchtála [1980] I.R. 32 is authority for the proposition that all children, irrespective of the marital relationship existing between the parents, enjoy a constitutional right to bodily integrity, the right to be reared with due regard to religious, moral, intellectual, physical and social welfare, to be fed, to be educated, to work and to enjoy personal dignity. In addition, these children also enjoy the constitutional right to the society and support of their parents.

Irvine J later described the same right in slightly different terms as follows:⁹⁶

relation to a child, and a child has rights to parental care, the child also has personal rights which the State is required to vindicate if the parent fails in his or her duty."

⁹⁴ [1980] IR 32 at 68.

⁹⁵ [2008] 3 IR 760 at 778 (Irvine J).

a constitutional right to the support, company and care of both of his parents following upon his birth;

O.E. v Minister for Justice is also significant for its holding that the rights of an unborn child of unmarried parents include *'the infant's right to expect that, once born, he would enjoy the care, society and support of his parents'*.⁹⁷ The case concerned the judicial review of a refusal by the Minister for Justice to revoke a deportation order in respect of the unmarried father of the applicant (who was an unborn child at the time of the impugned decision). Accordingly, it was not a case where there was any debate about who (as a matter of law) was or should be deemed the child's mother or father.

A child's right of access to or contact with both of his or her married parents was considered by the High Court in *U.V. v V.U.*⁹⁸ The case dealt with the question of "relocation", that is, where a custodial parent applies to the court to bring children in their care to live permanently in a different country. MacMenamin J held:⁹⁹

The decision as to relocation is to be arrived at by a process of identification and balancing of constitutional and legal rights and applying them to the factual situation.

...

This is not a case where there is a conflict between the rights of the state on the one hand, and the parents, on the other; but rather, one where the court must endeavour to identify and balance the rights of individual family members who remain a family, despite the decree of judicial separation.

...

*that balancing exercise must have regard to the constitutional rights of children to have issues of custody or upbringing taken in the interest of their welfare. Such interests include the rights of children, subject to their welfare, to have access to or contact with their parents as part of a family unit, even where there is marital breakdown (see *M.D. v. G.D.* (Unreported, High Court, Carroll J., 30th July, 1992) and also *E.G. v. D.D.* [2004] IEHC 265, (Unreported, High Court, Peart J., 9th July, 2004)).*

In his judgment in *M.R. v An t-Ard Chláraitheoir*¹⁰⁰ MacMenamin J took a different approach to the appropriate remedy from that adopted by the other members of the Supreme Court in the majority (with whom he joined on the substantive issue of the appeal). His proposal recognised a constitutional right on the part of the twins in that case (whose biological parents were married but who had been born of their biological -

⁹⁶ [2008] 3 IR 760 at 792 (Irvine J).

⁹⁷ [2008] 3 IR 760 at 780 (Irvine J) (emphasis added).

⁹⁸ [2012] 3 IR 19.

⁹⁹ [2012] 3 IR 19 at 23 and 32.

¹⁰⁰ [2014] IESC 60.

mother's sister following IVF in accordance with an surrogacy arrangement) 'to be parented ...in a family unit'. However, in lines that are not without ambiguity, MacMenamin J stated that this right was to be balanced against other rights as set out in the following passage:¹⁰¹

I would have been disposed to remit the matter to the High Court to determine whether, in accordance with its inherent jurisdiction, and in vindication of the children's rights to be reared and educated in a family unit, and in order to eliminate the risk of any other adverse legal consequence of their present uncertain status, the third and fourth-named applicants should first be appointed as the twins legal guardians, as a preliminary step to adoption. ...

The power of the courts should be sufficiently ample to vindicate the rights of children which arise under the Constitution (DG v. Eastern Health Board [1997] 3 I.R. 611). MR and DR do have constitutional rights to be parented, and to be reared and educated where possible, in a family unit. They have, at minimum, a clear interest in having their identities and status established in law. But their rights and interests must be balanced against the broader rights of others, the public at large, and both adults and children, all of which are engaged here. These broader considerations militate against a resolution of the case which would extend the recognition of the twins' rights at the cost of the right of the State to regulate matters in the public interest, or the creation of uncertainty where it is unnecessary. No legislative intention precluding reliance on inherent jurisdiction appears in the 1964 Guardianship of Infants Act or its amendments. The twins should, in my view, be entitled to enjoy rights on the same basis as other children. The legitimate State interest in the policy questions identified earlier in this judgment may be protected by supervision and review by the High Court in this exceptional, indeed unique, case.

Also relevant is the Supreme Court decision in *I. O'T v B.* which concerned the rights of (informally) adopted children to know the identity of their natural mothers. Hamilton CJ ruled that:

*The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child, which relationship is clearly acknowledged in the passages quoted from the judgments in *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 and in *G. v. An Bord Uchtála* [1980] I.R. 32.*

The existence of such right is not dependent on the obligation to protect the child's right to bodily integrity or such rights as the child might enjoy in relation to the property of his or her natural mother but stems directly from the aforesaid relationship.

It is not, however, an absolute or unqualified right: its exercise may be restricted by the constitutional rights of others, and by the requirement of the common good.

¹⁰¹ [2014] IESC 60 per MacMenamin J para 68.

Its exercise is restricted in the case of children who have been lawfully adopted in accordance with the provisions of the Adoption Act, 1952 as the effect of an adoption order is that all parental rights and duties of the natural parents are ended, while the child becomes a member of the family of the adoptive parents as if he or she had been their natural child.

3.3.3 Constitutional presumption as to welfare of child within the family

The foregoing statements of what the Supreme Court has elsewhere termed the child's 'rights to and in a family'¹⁰² are now also formulated in terms of a 'constitutional presumption' as a result of¹⁰³ the following oft-cited and approved passages from the judgment of Finlay CJ in *In re J.H. (inf.)*¹⁰⁴ (emphasis added):

In the case, therefore, of a contest between the parents of a legitimate child - who with the child constitute a family within the meaning of Articles 41 and 42 of the Constitution - and persons other than the parents as to the custody of the child, as this case is, it does not seem to me that section 3 of the Act of 1964 can be construed as meaning simply that the balance of welfare as defined in section 2 of the Act of 1964 must be the sole criterion for the determination by the court of the issue as to custody of the child.

...

A child of over two years of age, as this infant is, in the dominant or general custody of persons other than its parents and continuing in such custody against the wishes of its parents, cannot be said to enjoy the right of education by its family and parents granted by Article 42, s. 1 of the Constitution. And no additional arrangements, as were indeed put in train in this case by the orders of the High Court for access by its parents to the child or participation by them in the decision-making processes concerning its education, could alter that situation. Furthermore, notwithstanding the presumption of validity which attaches to the Act of 1964 and the absence of a challenge in these proceedings to that validity, the Court cannot, it seems to me, as an organ of the State supplant the right to education by the family and parents which is conferred on the child by the Constitution unless there is established to the satisfaction of the court a failure on the part of the parents as defined in Article 42, s. 5 and 'exceptional circumstances'.

I would, therefore, accept the contention that in this case s. 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which is defined in s. 2 of the Act in terms identical to

¹⁰² *North Western Health Board v H.W.* [2001] 3 IR 622 at 727 (Denham J). See also at 722 and 725 (Denham J).

¹⁰³ For earlier approaches to the reconciliation of s. 3 of the Guardianship Act 1964 with Articles 41 and 42 see *In re J., an Infant* [1966] IR 295 at 299 (where counsel for the prosecutors cited to *In Re O'Brien, an Infant* [1954] IR 1) and at 308 (where Henchy J expressly reserved his position on the question).

¹⁰⁴ [1985] IR 375 at 394-5.

those contained in Art. 42, s. 1, is to be found within the family, unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons.

In *N. McK. v Information Commissioner*¹⁰⁵ the Supreme Court unanimously stated in respect of the appellant (a married father) that:

A parent, the appellant, has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental. ...

The relationship between parent and child has a special status in Ireland. Under the Constitution the family is the primary and fundamental unit group in our society: Article 41.1.1. The State has guaranteed to protect the family in its constitution and authority: Article 41.1.2. The State encompasses the judicial branch of government which has a consequent duty to protect the family and its authority. While the family unit has its rights, so too each member of the unit has rights. Thus while the parents have duties and rights in relation to a child, and a child has rights to parental care, the child also has personal rights which the State is required to vindicate if the parent fails in his or her duty.

A parent's rights and duties include the care of a child who is ill. As a consequence a parent is entitled to information about the medical care a child is receiving so that he or she may make appropriate decisions for the child, as his or her guardian. The presumption is that a parent is entitled to access such information. That position is not absolute. The circumstances may be such that the presumption may be rebutted. But the primary position is that the presumption exists.

The nature and rationale for the presumption articulated in *In re J.H. (inf.)*¹⁰⁶ was the subject of an extended discussion by Hardiman J in *N v HSE*¹⁰⁷ as follows (emphasis added):

I do not regard the constitutional provisions summarised above, or the jurisprudence to which they have given rise, as in any sense constituting an adult centred dispensation or as preferring the interests of marital parents to those of the child. In the case of a child of very tender years, as here, the decisions to be taken and the work to be done, daily and hourly, for the securing of her welfare through nurturing and education, must of necessity be taken and performed by a person or persons other than the child herself. Both according to the natural order, and according to the constitutional order, the rights and duties necessary for those purposes are vested in the child's parents. Though selflessness and devotion towards children may

¹⁰⁵ [2006] 1 IR 260 at 267.

¹⁰⁶ [1985] IR 375 at 394-5.

¹⁰⁷ [2006] 4 IR 374 at 501-505.

easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict the interest of the child will usually be preferred. A graphic and ancient example of this may be found in I Kings 3:16-28. This bond is greatly valued by parents and children alike, and by natural siblings in respect of their shared parentage. It is illustrated by the frequently found phenomenon of the mature adult who, separated at birth or in infancy from his or her parents and siblings, feels a strong desire to locate them many years later. It is equally illustrated by the widespread legal recognition given to the family, even in instruments whose social and cultural context is different from, and perhaps more varied than, those of the Constitution of Ireland 1937. I cannot escape the feeling that this factor is insufficiently emphasised in the High Court judgment here. Like *Geoghegan and Fennelly JJ.*, I have been struck by the coincidental reporting, while the judgments in this case were being drafted, of an English case, *In re G. (Children)* [2006] UKHL 43, [2006] 1 W.L.R. 2305. The context of that case is far removed from the facts of the present dispute. But it is most interesting to see that, in a jurisdiction lacking the specific social and cultural context which has led Ireland to protect the rights of the family by express constitutional provision, the interest of a child in being reared in his or her biological family is nonetheless fully acknowledged. I wish specifically to refer to what was said in that case by Lord Nicholls of Birkenhead at para. 2, p. 2307:-

"In this case, as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interests of the children. Their welfare is the court's paramount consideration. In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly."

Quite evidently, the Constitution establishes demanding criteria which must be met before the right of the child to be reared and nurtured by his or her parents, and the right of the parents to take and act on the decisions required by the obligation to nurture the child, can be displaced either in relation to a particular issue or in general. In part, the argument on behalf of the proposed adopters in this case invited the court to review and displace the position of the parents as guardians of the child's welfare, by adopting less demanding criteria.

In the case of a young child, an approach to its welfare which is sometimes described as "child centred", in a particular sense, in reality involves acting wholly or partly upon some third party's view of the interests of the child. It is, of course, difficult to criticise an approach denominated "child centred" or to fail to acknowledge imperatives denominated "the rights of the child". But, especially in dealing with very young children who can express no meaningful views of their own, it is of great importance that terms such as

those just mentioned should be thought through, should evoke an intellectual and not merely an emotional response, and that their actual content should be ascertained. A right conferred on or deemed to inhere in a very young child will in practice fall to be exercised by another on his or her behalf. In practice, therefore, though such a right may be ascribed to a child, it will actually empower whoever is in a position to assert it and not the child himself or herself. The person actually asserting such a right may of course be a parent or guardian, but it might equally be a public authority, a stranger, or indeed the State itself.

...

The effect of our constitutional dispensation is that, presumptively, the right to form a view of the child's welfare and to act on it belongs to the parents. The facts of this case make it unnecessary to consider the difficulties which arise where the parents themselves are in disagreement as to how the welfare of the child may best be secured.

...

If the prerogatives of the parents in enabling and protecting the rights of the child were to be diluted, the question would immediately arise: to whom and on what conditions are the powers removed from the parents to be transferred? And why?

There is, of course, no doubt that the form and content of our constitutional dispensation in regard to the family and children was significantly influenced by Christian, and specifically Catholic, teaching on those subjects. But that is not to say that the preference for the natural parents as carers for a child is exclusively referable to those sources. In my judgment in *North Western Health Board v. H.W.* [2001] 3 I.R. 622, I expressed the view that this preference for the parents as the natural and primary guardians was equally consistent with quite different strands of thought, even a Benthamite one. I reiterate that view here, without repeating what was said in the judgment referred to. A presumptive view that children should be nurtured by their parents is, in my view, itself a child centred one and the alternative view, calling itself "child centred" because it is prepared more easily to dispense with the rights and duties of parents must guard against the possibility that in real individual cases it may become merely a proxy for the views of social workers or other third parties. That is not for a moment to belittle the need for State intervention in the nurturing of children in appropriate cases, but to emphasise that the presumption mandated by our Constitution is a presumption that the welfare of the child is presumptively best secured in his or her natural family.

It is also noteworthy that, in the language of the Constitution, state intervention or provision in the event of a failure in parental duty is in the nature of an "endeavour to supply the place of the parents". In the specific context of adoption O'Higgins C.J. said in the course of his judgment in *G. v. An Bord Uchtála* [1980] I.R. 32 at p. 56:-

"the State has the added obligation to defend and vindicate in its laws all natural rights of all citizens. In relation to illegitimate children

and certain others, the State has endeavoured to discharge this obligation by the Adoption Acts. The purpose of these Acts is to give to these children the opportunity to become members of a family and to have the status and protection which such membership entails."

It appears to me to follow from this language that the State has adopted a preference for a familial model in its attempts to secure the welfare of a child in respect of whom the nurturing of his or her natural family is unavailable. But this is a default position: the child has a right to the nurture of his or her natural family where that is possible.

As is discussed further below, one must take care not to read too much into the final sentence of this passage. As the previous quote from O'Higgins CJ makes clear, Hardiman J is referring to the "natural family" in contradistinction to the "adoptive family" and his assertion of the "default position" is unlikely to be viewed by a future court as determining the issues that arise in respect of donor-conceived children.¹⁰⁸

This constitutional presumption was also discussed by Geoghegan J in *N v HSE*¹⁰⁹ as follows (emphasis added):

... it is important to emphasise that the constitutional presumption that the welfare of the child is best served by being with his married parents is not some kind of artificial presumption. It is clearly based on the perceived wisdom at the time that the Constitution was enacted and, I have no particular reason to believe that it is not still the perceived wisdom even if not wholly approved of in some quarters. The importance of family and marriage and quite frankly also the biological link should not be minimised. It is common knowledge that in the case of so many adoptions, the adopted children at some stage want to see their real parents. Many people, I suspect, would consider that there is an appreciable advantage for a child to be reared within a natural family and having real parents and real aunts and uncles.

*In case it should be thought in some circles that the attachment of importance to the biological link is an outdated concept and is rooted merely in some conservative Irish view of the family, it is of considerable interest that this same concept has been reiterated by the House of Lords in the recent case of *In re G. (Children)* [2006] UKHL 43, [2006] 1 W.L.R. 2305. There is, of course, no presumption in favour of the child being with the natural parents under English law ever since a statute of 1925. What the House of Lords has held however is that the biological link is an important factor to be considered in assessing the child's best interests. Baroness Hale of Richmond who delivered the main speech approved a decision of the full court of the Family Court of Australia in which it was made clear that "the fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child". In*

¹⁰⁸ This is evident not least from Hardiman J's own ambivalence to such matters in his judgment in *M.R. v An t-Ard Chláraitheoir* [2014] IESC 60.

¹⁰⁹ [2006] 4 IR 374 at 547-9.

the English case, there had been a certain amount of unmeritorious conduct on the part of the natural mother and the conclusion of Baroness Hale was that "the courts below have allowed the unusual context of this case to distract them from principles which are of universal application". The Baroness identified one of those principles as being that even though there was no presumption in her favour in the case, the fact that one of the parties was the natural mother was "undoubtedly an important and significant factor in determining what will be best for them now and in the future". She is then critical of the fact that "nowhere is that factor explored in the judgment below". While the other Law Lords were in agreement with Baroness Hale's speech, Lord Nicholls of Birkenhead added a rider at para. 2, p. 2307, which is worth quoting:-

"I wish to emphasise one point. In this case the dispute is not between two biological parents. The present unhappy dispute is between the children's mother and her former partner Ms. CW. In this case, as in all cases concerning the upbringing of children, the court seeks to identify the course which is in the best interests of the children. Their welfare is the court's paramount consideration. In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reasons. Where such a reason exists the judge should spell this out explicitly."

Lord Rodger of Earlsferry agreed with the speech of Baroness Hale but also with the additional observations of Lord Nicholls. As will have been clear from the quotations the relationship which had broken in that case was a lesbian one. The children were the biological children of one of the two women but each was looking for custody.

In his judgment in *N v HSE*, Fennelly J endorsed the above comments of Hardiman and Geoghegan JJ observing as follows in respect of what he called a 'primordial constitutional principle':¹¹⁰

I turn then to the central importance of the family, founded by marriage and the natural blood links and relationship between Ann and the applicants. I am in entire agreement with the judgments of Hardiman and Geoghegan JJ. on these issues. I can, therefore, state my own views briefly.

The applicants constitute with Ann a family. This is no mere constitutional shibboleth. Article 41 speaks of the rights of the family being "antecedent and superior to all positive law". In my view, that is no more than the statement of the simple facts of life. People of opposite sexes meet, marry, procreate and raise children. Prevailing trends towards the recognition of non-marital and even same sex relationships are invoked from time to time with a view to expanding the legal definition of the family. None of that

¹¹⁰ [2006] 4 IR 374 at 583-4 and 592.

arises in the present case. Even if it should become necessary to recognise the family relationships of the increasing number of couples who raise children outside marriage, such a development would be based in most cases on the natural blood bond. It would in no way undermine, but would tend to emphasise the centrality of the mutual rights and obligations of the natural parents and their children.

One does not have to seek far to find that courts widely separated in time and place have accepted the need to recognise and give weight to what has been variously characterised as the blood, or natural, or biological link between parent and child. In *In re O'Hara* [1900] 2 I.R. 232 at p. 239, Lord Ashbourne L.C. declared:-

"I would never, except for the strongest reasons, deprive the mother of the duty and the right to direct, control, and educate her child under twelve years of age."

Fitzgibbon L.J., at p. 240 expressed similar sentiments:-

"In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

As recently as July of this year, Baroness Hale of Richmond, in speaking for a unanimous House of Lords in *In re G. (Children)* [2006] UKHL 43, [2006] 1 W.L.R. 2305, cited the latter statement among a number of other authorities representing a statement of the principle of paramountcy of the welfare of the child prior to modern English legislation. With due deference to the very different circumstances of a case concerning the custody of a child born to one partner in a lesbian couple, a case as far removed from the present as it is possible to imagine, it is instructive to note the importance attached to the natural relationship. There is no legal presumption, in modern English law, in favour of natural parents. Baroness Hale identified the elements of genetic, gestational and social and psychological parenthood and continued at para. 36, p. 2316:-

"in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique."

In the curial part of her speech, she stated:-

"the fact that C.G. is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them now and in the future."

Lord Nicholls of Birkenhead, concurring, stated at para. 2, p. 2307:-

"In reaching its decision the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests, both in the short term and also, and importantly, in the longer term. I decry any tendency to diminish the significance of this factor. A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly."

The House of Lords reversed the decision of the Court of Appeal and awarded custody.

The only reason for these observations is to emphasise that the applicants constitute a family with Ann regardless of the definition of family which is adopted. I am happy to adopt the references to the several constitutional references to the family and the rights of its members which are contained in the judgments of Hardiman and Geoghegan JJ.

...

In this case, there is a primordial constitutional principle that a child's welfare is best served in the heart of its natural family. It is well established and widely known. There must be compelling reasons to rebut that presumption.

This constitutional presumption was also extensively discussed by Denham and Hardiman JJ in the earlier Supreme Court case of *North Western Health Board v H.W.*¹¹¹ The relevant passages from each judgment are included here:

North Western Health Board v H.W. per Denham J:¹¹²

... Articles 40.1, 41 and 42.5 ... should be construed harmoniously. Thus, the child has personal rights: Article 40.1. The State has a duty to respect, and, as far as practicable, by its laws to defend and vindicate these rights. The State has a duty to vindicate the life and person of the child. Thus, the Guardianship of Infants Act, 1964 and the Child Care Act, 1991, advanced the concept of the welfare of the child as the first and paramount consideration.

However, the legislation and the rights of the child have to be construed in accordance with Article 41 which places the family at the centre of the child's life and as the core unit of society. The language of Article 41 (set out previously) is clear and strong. The family is the fundamental unit group of society and the State (which includes the courts) guarantees to protect the family in its constitution and authority.

Article 42.5 envisages, in exceptional cases, where parents fail in their duty to the child, that the State as guardian of the common good shall by appropriate means endeavour to supply the place of the parents, but this is subject to the rights of the

¹¹¹ [2001] 3 IR 622.

¹¹² [2001] 3 IR 622 at 718, 722, 724 and 725.

child. It is clear that under Article 42.5 the State is the default parent and not the super parent.

The Constitution clearly envisages the common good requiring the State to take the place of parents where they for physical or moral reasons fail in their duty towards their children. When taking this approach, due regard must be given to the right of the child to its family. However, the child at all times retains his or her personal rights also.

...

The decision in this case requires the correct constitutional balance between the responsibility of the defendants and the plaintiff and the constitutional rights (family and personal) of the child. The fundamental principles by which the community wishes to live are to be found in the Constitution. The Constitution clearly places the family as the fundamental unit of the State. The family is the decision maker for family matters - both for the unit and for the individuals in the family. Responsibility rests fundamentally with the family. The people have chosen to live in a society where parents make decisions concerning the welfare of their children and the State intervenes only in exceptional circumstances. Responsibility for children rests with their parents except in exceptional circumstances. In assessing whether State intervention is necessary the fundamental principle is that the welfare of the child is paramount. However, part of the analysis of the welfare of the child is the wider picture of the place of the child in the family; his or her right to be part of that unit. In such a unit the dynamics of relationships are sensitive and important and should be upheld when possible as it is usually to a child's benefit to be part of the family unit.

In seeking the balance to be achieved between the child's rights within and to his family, and the rights of the family as an institution and the parents' right to exercise their responsibility for the child, and the child's personal constitutional rights, the threshold will depend on the circumstances of the case. Thus, if the child's life is in immediate danger (e.g. needing an operation) then there is a heavy weight to be put on the child's personal rights superseding family and parental considerations.

...

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: *In re J.H. (inf.)* [1985] I.R. 375.

...

The Constitution recognises the family as the fundamental unit group of our society. Even when, as here, it is alleged that parents have failed in their duty to the child and the State endeavours to supply the place of parents it does so with due regard to the rights of the child. The rights of the child encompass the panoply of constitutional rights which include personal rights to life and bodily integrity. However, in addition the child has a right to and in his family. When assessing the welfare of a child - the fundamental concept when analysing the position of a child - complex social, political, educational and health rights of the child in and to his

family are important. The bonds which bind a child in a family are strong. However, any intervention by the courts in the delicate filigree of relationships within the family has profound effects. The State (which includes the legislature, the executive and the courts) should not intervene so as to weaken or threaten these bonds unless there are exceptional circumstances. Exceptional circumstances will depend on the facts of a case; they include an immediate threat to the health or life of the child.

The principle behind excluding the State from decision making in relation to the child where parents are exercising their responsibilities and duties is a constitutional principle. It is one of the fundamental principles of the Constitution. The Constitution describes a society which aspires to a community of families. Families are to be protected. This means that State interventions are limited.

In relation to the child, the fundamental principle is the welfare of the child. The welfare of the child includes religious, moral, intellectual, physical and social welfare. These elements must be analysed in light of the facts relating to the child and the family in issue. The court has a constitutional duty to protect the life or health of the child from serious threat and the court has a constitutional duty to protect the family. A just and constitutional balance has to be sought.

North Western Health Board v H.W. per Hardiman J:¹¹³

... a presumption exists that the welfare of the child is to be found in the family exercising its authority as such. ...

This seems to me to follow from the exceptionally strongly worded provisions of Articles 41 and 42 of the Constitution and from the rights of the child thereunder. I would respectfully adopt the statement of those rights set out at p. 394 of the report of the judgment of Finlay C.J. in In re J.H. (inf.) [1985] I.R. 375 ...

The presumption to which I have referred is not, of course, a presumption that the parents are always correct in their decisions according to some objective criterion. It is a presumption that where the constitutional family exists and is discharging its functions as such and the parents have not for physical or moral reasons failed in their duty towards their children, their decisions should not be overridden by the State or in particular by the courts in the absence of a jurisdiction conferred by statute. Where there is at least a statutory jurisdiction, the presumption will colour its exercise and may preclude it.

The presumption is not of course conclusive and might be open to displacement by countervailing constitutional considerations, as perhaps in the case of an immediate threat to life.

...

The strength of the language in which, in Article 41 of the Constitution, the prerogatives of the family are acknowledged has often been remarked upon. The obligation of the State, set out in Article 41.1.2 "to protect the family in its

¹¹³ [2001] 3 IR 622 at 755, 757 and 764.

constitution and authority" is entirely consistent with the restricted statement, in Article 42.5, of the circumstances in which alone the State "may endeavour to supply the place of the parents". Analogies or precedents from jurisdictions lacking this distinctive assertion of the position of the family are of a limited utility in the exposition of the powers of the State, or other public bodies, under the Irish Constitution.

It has been observed that Articles 41 and 42 of the Constitution "are generally thought to have been inspired by papal encyclicals and by Catholic teaching" (Kelly, The Irish Constitution, 3rd ed. at p. 991). Counsel for the defendants in this case have submitted, in my view convincingly, that the same approach can be grounded otherwise and have referred us to an American academic authority, Prof. Goldstein. The latter suggests that the common law "reflecting Bentham's view, has a strong presumption in favour of parental authority free of coercive intrusions by agents of the State". I would endorse this as a description of the Irish constitutional dispensation, even if any reflection of the views of Jeremy Bentham is coincidental. I do not regard the approach to the issue in the present case mandated by Articles 41 and 42 of the Constitution as reflecting uniquely any confessional view.

...

A family, such as the family of which the defendants are the heads, consists of parents and children. Since a child will not himself or herself be capable of making or of acting upon any decision as to its own welfare, these decisions must necessarily be made by some person or agency on his or her behalf. In practice, this will almost invariably be either the parents or a parent on the one hand or a State or public agency of some sort on the other. ... But in the choice of decision maker, the Constitution plainly accords a primacy to the parent and this primacy, in my view, gives rise to a presumption that the welfare of the child is to be found in the family exercising its authority as such. This reflects the right, both of the parents and of the children, to have the family protected in its Constitution and authority.

A notable feature of the passages quoted above from the judgments of Hardiman and Geoghegan JJ in *N v HSE*¹¹⁴ is their apparent equivocation between the marital (or constitutional) and natural family and, hence, between married and unmarried parents as regards the constitutional presumption that the welfare of a child is to be found within his or her family and in the care of his or her parents. On one reading of these judgments, the failure to distinguish between married and unmarried parents in this regard represents either loose drafting or a careless oversight. However, in light of the established principle that children enjoy the same constitutional rights regardless of the marital status of their parents,¹¹⁵ perhaps a better way to interpret the judgments in *N v HSE* is to conclude that the constitutional presumption enjoyed by the married Family is merely a specified re-statement of a more general principle – namely that there should

¹¹⁴ [2006] 4 IR 374 at 501-505 and 547-9 respectively.

¹¹⁵ See: *In re M an Infant* [1946] IR 334 at 344; *G v An Bord Uchtála* [1980] IR 32 at 86 (Henchy J). See also *G v An Bord Uchtála* [1980] IR 32 at 68 (Walsh J).

be a default presumption (all else being equal) in favour of a child's interests being best served within the custody and care of its "natural" parents (as against third parties). This presumption, flowing from the child's personal rights under Article 40.3, then gains constitutional weight and protection under Article 41 if or when the child's natural parents have married.

Finally, it should be noted that the presumption in favour of a child's parents has been expressed in statute in s. 3 of the Child Care Act 1991 (as amended) the relevant provisions of which state (emphasis added):

3.—(1) It shall be a function of the Child and Family Agency to promote the welfare of children who are not receiving adequate care and protection.

(2) In the performance of this function, the Child and Family Agency shall—

(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children;

(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise—

(i) regard the welfare of the child as the first and paramount consideration,

And

(ii) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and

(c) have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.

3.4 Constitutional entitlements of natural parents

As will be noted further on, two points of particular importance for the present query relating to the constitutional entitlements of a child's natural mother and father are (1) that there is a marked difference in how unmarried mothers and fathers fare and (2) that the nature of motherhood for the purposes of the constitution is itself now in some doubt.

3.4.1 Rights of unmarried fathers

The key principles for present purposes can be summarised as follows:

- An unmarried natural/biological father has no natural or constitutional rights in respect of his child (e.g. rights to guardianship, custody or access) from the mere fact of genetic fatherhood.¹¹⁶
- An unmarried natural/biological father may possess a gradation of legal rights contingent upon the particular facts of his relationship with the natural mother of the child and child herself but these arise, if at all, as aspects of and by reference to the welfare of the child which is the first and paramount consideration.¹¹⁷

The leading cases on the constitutional rights of unmarried natural fathers are the Supreme Court decisions in *State (Nicolau) v An Bord Uchtála*,¹¹⁸ *J.K. v V.W.*,¹¹⁹ *W'O.R. v E.H.*¹²⁰ and *J. McD. v P.L.*¹²¹

It is interesting to note that the a key element of the reasoning of Walsh J in *State (Nicolau) v An Bord Uchtála* concerned what he perceived as the different “moral capacity” and “social function” of unmarried fathers (as a class) as compared with other classes of person upon whom certain entitlements were conferred by ss. 14(1) and 16(1) of the Adoption Act 1952.¹²² The relevant passage is as follows:

¹¹⁶ *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 643 (Walsh J); *J.K. v V.W.* [1990] 2 IR 437 (SC) at 447 (Finlay CJ. McCarthy J dissenting) overturning High Court (Barron J); *W'O.R v E.H* [1996] 2 IR 248 (SC) at 286 (Murphy J, Barrington J dissenting).

¹¹⁷ *J.K. v V.W.* [1990] 2 IR 437 (SC) at 447 (Finlay CJ); *W'OR v E.H.* [1996] 2 IR 248 (SC) at 286 (Murphy J); *J. McD. v P.L.* [2010] 2 IR 199 at 308-10 (Fennelly J)

¹¹⁸ [1966] IR 567.

¹¹⁹ [1990] 2 IR 437.

¹²⁰ [1996] 2 IR 248.

¹²¹ [2010] 2 IR 199. For a critique of these decisions and a discussion of the dissents by McCarthy J in *J.K. v V.W.* and Barrington J in *W'OR v E.H* see Thomas Finegan, 'An unmarried father's right to guardianship of his child and a child's right to the support of his/her father: a Hohfeldian view of the Irish Constitution' (2010) 1 DULJ 320.

¹²² S. 14(1) of the Act provides:

"An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section."

S. 16(1) of the Act provides that the following persons are entitled to be heard on an application for an adoption order:

- "(a) the applicants,*
- (b) the mother of the child,*
- (c) the guardian of the child,*
- (d) a person having charge of or control over the child,*
- (e) a relative of the child,*
- (f) a representative of a registered adoption society which is or has been at any time concerned with the child,*

Under the provisions of these sections of the Act certain persons are given rights and all other persons are excluded. Whether or not the natural father is excluded depends upon the circumstance whether or not he comes within the description of a person who is given a right, and he may or may not come within some such description. If he is in fact excluded it is because in common with other blood relations and strangers he happens not to come within any such description. There is no discrimination against the natural father as such. The question remains whether there is any unfair discrimination in giving the rights in question to the persons described and denying them to others.

In the opinion of the Court each of the persons described as having rights under s. 14, sub-s. 1, and s. 16, sub-s. 1, can be regarded as having, or capable of having, in relation to the adoption of a child a moral capacity or social function which differentiates him from persons who are not given such rights. When it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question. In presenting their argument under this head counsel for the appellant have undertaken the onus of showing that in denying to the natural father certain rights conferred upon others s. 14, sub-s. 1, and s. 16, sub-s. 1, of the Act are invalid having regard to Article 40 of the Constitution. In the opinion of the Court they have failed to discharge that onus.

The state of Irish law regarding the rights of unmarried fathers was well set out in the following passage from the judgment of Fennelly J in *J. McD. v P.L.* (emphasis added).¹²³

This court has considered the rights or interests of a natural father in two leading cases.

[291] In J.K. v. V.W. [1990] 2 I.R. 437 at p. 446, Finlay C.J., with whom Walsh, Griffin and Hederman JJ. agreed, disapproved in clear terms the test which had been propounded by Barron J. in the High Court in that case, namely that, if the natural father was fit to be appointed a guardian, then the question was "whether there are circumstances involving the welfare of the child which require that, notwithstanding that he is a fit person, he should not be so appointed." ...

(g) a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion,

(h) an officer of the Board,

(i) any other person whom the Board, in its discretion, decides to hear."

¹²³ [2010] 2 IR 199 at 306-10.

[292] *The statements of Finlay C.J. on the relationship generally between the status of the natural father and the welfare of his child are authoritative and constitute a binding statement of the law for the instant case. He said at p. 446:-*

"Section 6A gives a right to the natural father to apply to be appointed guardian. It does not give him a right to be guardian, and it does not equate his position vis-à-vis the infant as a matter of law with the position of a father who is married to the mother of the infant. In the latter instance the father is the guardian of the infant and must remain so, although certain of the powers and rights of a guardian may, in the interests of the welfare of the infant, be taken from him."

[293] *The natural father thus had "a right to apply pursuant to a statute which specifically provides that the court in deciding upon such application shall regard the welfare of the infant as the first and paramount consideration".*

[294] *Finlay C.J. at p. 446 directly addressed the test proposed by Barron J. in the following trenchant terms:-*

"A right to guardianship defeasible by circumstances or reasons 'involving the welfare of the child' could not possibly be equated with regarding the welfare of the child as the first and paramount consideration in the exercise by the court of its discretion as to whether or not to appoint the father guardian. The construction apparently placed by the trial judge in the case stated upon s. 6A to a large extent would appear to spring from the submission made on behalf of the applicant on this appeal that he has got a constitutional right, or a natural right identified by the Constitution, to the guardianship of the child, and that the Act of 1987, by inserting s. 6A into the Act of 1964, is thereby declaring or acknowledging that right.

I am satisfied that this submission is not correct and that although there may be rights of interest or concern arising from the blood link between the father and the child, no constitutional right to guardianship in the father of the child exists. This conclusion does not, of course, in any way infringe on such considerations appropriate to the welfare of the child in different circumstances as may make it desirable for the child to enjoy the society, protection and guardianship of its father, even though its father and mother are not married.

[295] *Finlay C.J. observed at p. 447 that:-*

"The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as the result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as the result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation

bearing nearly all of the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

[296] He concluded:-

"I am satisfied that the correct construction of s. 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from even a defeasible right to be a guardian. The discretion vested in the Court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration.

The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court as relevant to its welfare."

[297] The theme of the "blood link" was taken up by Hamilton C.J. in *W.O'R. v. E.H. (Guardianship)* [1996] 2 I.R. 248 at p. 269:-

"The rights of interest or concern in the context of the guardianship application arise on the making of the application. However, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional family, then the natural father, on application to the Court under s. 6A of the Guardianship of Infants Act 1964, has extensive rights of interest and concern. However, they are subordinate to the paramount concern of the court which is the welfare of the children."

[298] Denham J. in her judgment in the same case, at p. 273, spoke of the weight to be given to the blood link in identical terms.

[299] The legal position as it emerges from these cases is that the natural or non-marital father:-

1. has no constitutional right to the guardianship or custody of or access to a child of which he is the natural father;
2. has a statutory right to apply for guardianship or other orders relating to a child; this entails only a right to have his application considered;
3. the strength of the father's case, which is described in the three judgments from which I have quoted as consisting of "rights of interests or concern," will depend on an assessment of the entirety of the circumstances,

of which the blood link is one element, whose importance will also vary with the circumstances; in some situations it will be of "small weight";

4. both Hamilton C.J. and Denham J. spoke of *de facto* families in the context of an application for guardianship pursuant to the Act of 1964 and only in the sense of a natural father living with his child and unmarried partner in an ostensible family unit; a *de facto* family does not exist in law independent of the statutory context of an application for guardianship;

5. The father's rights, i.e., right to apply, if any, are in all cases subordinate to the best interests of the child.

[300] The notion of "rights of interest or concern" has not been further analysed. In its context, it is an expression designed to lay emphasis on the interests of the child and not to confer any distinct rights on the father.

[301] The blood link is an unavoidable biological fact. Equally, it exists outside marriage in situations as diverse as human life itself. In our changing society, many children are born into apparently normal and stable family situations, though the parents have never married. At the other extreme, a child may be the fruit of an act of casual lust or commerce or, worse, an act of violence. Advances in science have made it possible for conception and birth to take place even without any act of human intercourse. It is both right and natural to have particular regard to the context of conception, birth and subsequent family links.

[302] Although it is not suggested, in the present case, that the applicant is any less the biological father of the child by reason of being a sperm donor, he has, as a non-marital father, no constitutional right to guardianship or custody. The principle is that he has the legal right to apply and to have his application considered. To the extent that Finlay C.J. and Denham J. postulated a scale for assessment of "rights of interests or concern", it seems likely that the sperm donor would be placed quite low, certainly by comparison with the natural father in a long term relationship approximating to a family.

[303] The particular context of a sperm donor has not previously come before our courts, though we were referred to a Scottish case where a sheriff held a sperm donor to have parental rights. Murphy J. referred to the matter in his judgment in *W.O'R. v. E.H. (Guardianship)* [1996] 2 I.R. 248, at p. 286, as support for the argument against recognition of the mere fact of fatherhood as conferring constitutional rights. In my view, the matter must be viewed only by reference to the interests of the child.

[304] The blood link, as a matter of almost universal experience, exerts a powerful influence on people. The applicant, in the present case, stands as proof that participation in the limited role of sperm donor under the terms of a restrictive agreement does not prevent the development of unforeseen but powerful paternal instincts. Dr. Byrne acknowledged that it would be "beyond what a man in that circumstance would be capable of" for him not to wish to be involved. More importantly, from the point of view of the child, the psychiatrists were in agreement that a child should normally have knowledge, as part of the formation of his or her identity, of both parents, in

the absence compelling reasons to the contrary. There is natural human curiosity about parentage. Scientific advances have made us aware that our unique genetic make up derives from two independent but equally unique sources of genetic material. That is the aspect of the welfare of the child which arises.

3.4.2 Rights of unmarried mothers

Until the recent case of *M.R. v An t-Ard -Chláraitheoir*¹²⁴ Irish case law dealt only with the rights of unmarried mothers who were both the biological and birth mother of the child. The application by the High Court (Abbot J) in *M.R.* to the female donor of an egg for the purpose of AHR of judicial *dicta* relating to the significance of the genetic or blood link between natural fathers and their children was rejected by the Supreme Court on appeal. In this regard two of the judgments in the Supreme Court emphasised the difference between the distinct male and female roles in human reproduction.¹²⁵ Also emphasised by the Chief Justice, however, was the indeterminate nature of motherhood as a constitutional term:¹²⁶

61. The Constitution does not give a general definition to the term “mother”. There are two references to “mother” in the Constitution.

...

62. Article 40.3.3° refers to the special connection that exists in the particular circumstances which arise after implantation.

...

64. A much broader approach to mothers is seen in Article 41.2.2° of the Constitution.

...

¹²⁴ [2013] 1 ILRM 449 (HC) and [2014] IESC 60.

¹²⁵ *M.R. v An t-Ard Chláraitheoir* [2014] IESC 60 per MacMenamin J at paras 50 and 61-2 and O'Donnell J at para 37.

¹²⁶ *M.R. v An t-Ard -Chláraitheoir* [2014] IESC 60 per Denham CJ at paras. 61, 62, 64, 65, 66, 85 and 114. This problem had also been raised by the Supreme Court (Murphy J) nearly 20 years earlier in *W. O'R. v E.H. (Guardianship)* [1996] 2 IR 248 at 286:

“Scientific advances may pose even greater problems in relation to the rights of mothers. If it is possible — as I understand it to be — to transplant a fertilised ovum in a woman who in due course gives birth to a child, who is the mother for the purposes of Article 40 of the Constitution? The woman who provided the ovum or the woman who gave birth to the child?

These very questions illustrate the fundamental distinction between the line which may have to be drawn between the provision of the genetic material on which life depends and the nurturing of the being, not merely from the time of birth, but from the moment of conception.”

65. Article 41.2.2° clearly encompasses a more expansive view of mothers. For example, it would include mothers who are neither the gestational nor genetic mother of the child.

66. Thus, there is no definitive definition of “mother” in the Constitution.

...

85. The English literature is noteworthy as it acknowledges the uncertainty surrounding the basis of motherhood in light of modern scientific and medical advances.

...

114. As stated earlier, there is no definitive definition of “mother” in the Constitution. Nor is there anything in the Constitution which would inhibit the development of appropriate laws on surrogacy.

Consistent with this view, the reasoning in the Supreme Court’s judgments in *M.R. v An t-Ard Chláraitheoir*¹²⁷ turned primarily on issues of statutory interpretation and the principle of the separation of powers and the limited role of the courts in areas requiring legislative policy decisions. It left largely untouched the existing jurisprudence in respect of the rights of the unmarried natural (i.e. both biological and birth) mother. That jurisprudence can be summarised as follows.

- The unmarried natural (i.e. biological and birth) mother has a right to the guardianship and custody of her child though there has been some judicial disagreement as to the nature and basis of that right.

The seminal Supreme Court case addressing directly the rights of an unmarried mother to the guardianship and custody of her child was *G v An Bord Uchtála*.¹²⁸ However, the judges of the majority (Walsh, Henchy and Kenny JJ) each offered a different characterisation of the nature of those rights as follows:

- Per Walsh J: An unmarried mother has an unenumerated constitutional right pursuant to Article 40.3.1 to the guardianship and custody of her child.¹²⁹ In this regard, the constitution merely recognises what is a ‘*natural*’ right of the mother.¹³⁰
- Per Henchy J: An unmarried mother’s rights of guardianship and custody, ‘*although deriving from the ties of nature, are given constitutional footing only*

¹²⁷ [2014] IESC 60.

¹²⁸ [1980] IR 32.

¹²⁹ Assumed in *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 644 (Walsh J). Decided in *G v An Bord Uchtála* [1980] IR 32 at 79 (Walsh J) and 55 (O’Higgins CJ, dissenting).

¹³⁰ *G v An Bord Uchtála* [1980] IR 32 at 57 and 79 (Walsh J) and 55 (O’Higgins CJ, dissenting).

*to the extent that they are founded on the constitutionally guaranteed rights of the child.*¹³¹

- Per Kenny J: An unmarried mother ‘has a statutory right under the Guardianship of Infants Act, 1964, to the custody of her child but she has not a constitutional one.’¹³²

The view of Walsh J that the unmarried mother enjoyed constitutionally protected natural rights was subsequently approved in *obiter* remarks by O’Flaherty J (Hamilton CJ, Egan, Blayney and Denham JJ concurring)¹³³ and has since become the established position.¹³⁴

As to the justification or basis for the recognition of such a right, O’Higgins CJ wrote of the nature of the bond between mother and child in a passage of his dissenting judgment in *G. v An Bord Uchtála*¹³⁵ often cited by the Supreme Court since¹³⁶ as follows (emphasis added):

*But the plaintiff is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself. These rights are among her personal rights as a human being and they are rights which, under Article 40, s. 3, sub-s. 1, the State is bound to respect, defend and vindicate. As a mother, she has the right to protect and care for, and to have the custody of, her infant child. The existence of this right was recognised in the judgment of this Court in *The State (Nicolaou) v. An Bord Uchtála*. This right is clearly based on the natural relationship which exists between a mother and child. In my view, it arises from the infant’s total dependency and helplessness and from the mother’s natural determination to protect and sustain her child. How far and to what extent it survives as the child grows up is not a matter of concern in the present case. Suffice to say that this plaintiff, as a mother, had a natural right to the custody of her child who was an infant, and that this natural right of hers is recognised and protected by Article 40, s. 3, sub-s. 1, of the Constitution. Section 6, sub-s. 4, and s. 10, sub-s. 2 (a), of the Guardianship of Infants Act, 1964, constitute a compliance by the State with its obligation, in relation to the mother of an illegitimate child, to defend and vindicate in its laws this right to custody. These statutory provisions make the mother guardian of her illegitimate child and give the mother statutory rights to sue for custody.*

¹³¹ *G v An Bord Uchtála* [1980] IR 32 at 52 (Henchy J), distinguishing as merely *obiter* the contrary dictum of Walsh J in *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 644.

¹³² *G v An Bord Uchtála* [1980] IR 32 (SC) at 92 (Kenny J), criticising the contrary dictum of Walsh J in *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 644.

¹³³ *M.O’C v Sacred Heart Adoption Society* [1996] 1 ILRM 297 at 305, citing to *The Adoption (No. 2) Bill, 1987* [1989] IR 656.

¹³⁴ See, e.g., *J. McD. v P.L.* [2008] 1 IR 417 at 428 (Denham J) and 430 (Fennelly J, dissenting).

¹³⁵ [1980] IR 32 at 55.

¹³⁶ See, e.g., *I. O’T. v B.* [1998] 2 IR 321; *J. McD. v P.L.* [2010] 2 IR 199 at 305 (Fennelly J).

However, these rights of the mother in relation to her child are neither inalienable nor imprescriptible, as are the rights of the family under Article 41. They can be alienated or transferred in whole or in part and either subject to conditions or absolutely, or they can be lost by the mother if her conduct towards the child amounts to an abandonment or an abdication of her rights and duties.

The Chief Justice went on to recognise the equal constitutional rights of the child, but considered that these are normally ‘safe under the care and protection of its mother’.¹³⁷

Referring to the above passage, Hamilton CJ said in *I. O'T. v B.*¹³⁸ that:

they establish that rights arising from the relationship between a mother and her child born out of wedlock arise from and are governed by Article 40.3 of the Constitution and are not dependent on any other provision of the Constitution. Such rights, however, are neither inalienable nor imprescriptible; can be alienated or transferred in whole or in part, either subject to conditions or absolutely; or they can be lost by the mother if her conduct towards the child amounts to an abandonment or abdication of her rights and duties.

In his dissent in *I. O'T. v B.*¹³⁹ Keane J stated (emphasis added):

In the judgment of the Chief Justice, he treats the right as deriving from the particular relationship between mother and child. As to the unique nature of that bond between the natural mother and her child, there can be no doubt. As O'Higgins C.J. pointed out, the helplessness of the child and its complete dependence on its mother leads to an inevitable conclusion that, not merely has the mother a natural right to the custody of the child: the child has a natural right to be protected and nurtured by its biological mother. But these rights would also be void of legal content if there were not correlative duties: the duty of the State through its organs to protect and vindicate the right of the mother to the custody and care of her child and the duty of the mother herself to protect and care for the child. (That latter duty, it must be emphasised again, can be constitutionally assumed by others in particular circumstances.)

Again, as pointed out by O'Higgins C.J., the rights of the child do not end there: he or she has the right to be cared for, brought up and educated by both his or her parents until he or she is an adult. In the case of both the applicants in the present case, the duties of the natural mothers were assumed, when they were still babies, by the adoptive parents. It seems to me that the right of the applicants, or anyone in their position, to know the identities of their natural mothers, to the extent that it exists, is a right entirely separate from, and should not be confused with, the right they enjoyed to be nurtured and cared for by their natural mothers until the time of their informal adoption and the similar right which they enjoyed to be

¹³⁷ [1980] IR 32 at 55 and 56.

¹³⁸ *I. O'T. v B.* [1998] 2 IR 321 at 347.

¹³⁹ *I. O'T. v B.* [1998] 2 IR 321 at 371.

brought up and educated by the adoptive parents who had assumed those particular responsibilities.

Parke J's dissenting judgment in *G v An Bord Uchtála*¹⁴⁰ also discusses the source of an unmarried mother's rights to her child as follows:

In my view ... they are among the personal rights which the State guarantees in its laws to defend and vindicate under Article 40, s.3 sub-s. 1, of the Constitution. The emotional and physical bonds between a woman and the child which she has borne give to her rights which spring from the law of nature and which have been recognised at common law long antecedent to the adoption of the Constitution.

3.4.3 Coda on existence of right of a child to care and company of natural mother and father wherever practicable

It may be useful at this point to distinguish five broad types of factual scenario in which the various propositions of law relating to the rights of children and parents have been articulated by the Irish courts:

- (1) Disputes in respect of the custody or care of or access to a child between the natural parents (whether married or unmarried) and the State (or other public body) (e.g. *North Western Health Board v H.W.* [2001] 3 IR 622);
- (2) Disputes in respect of the custody or care of or access to a child between the natural parent or parents (whether married or unmarried) and other persons having a *de facto* relationship with the child (e.g. *In re J., an Infant* [1966] IR 295, *G v An Bord Uchtála* [1980] IR 32, *In re J.H. (inf)* [1985] IR 375, *J.K. v V.W.* [1990] 2 IR 43, *Northern Area Health Board v An Bord Uchtála* [2002] 4 IR 252, *N v HSE* [2006] 4 IR 374);
- (3) Disputes in respect of the custody or care of or access to a child between the married parents (e.g. *U.V. v V.U.* [2012] 3 IR 19);
- (4) Disputes in respect of the guardianship, custody or care of or access to a child between the biological father of the child and the natural (i.e. biological and birth) mother (e.g. *W. O'R. v E.H. (Guardianship)* [1996] 2 IR 248, *J. McD. v P.L.* [2010] 2 IR 199);
- (5) Disputes in respect of the registration of the legal parentage of a child conceived by means of donor assisted AHR as between persons with various "natural"

¹⁴⁰ [1980] IR 32 at 99.

and/or *de facto* relationships with the child (*M.R. v An t-Ard Chláraitheoir* [2014] IESC 60).

It is difficult to distil from the case law which we have surveyed thus far any firm ground for the assertion of a constitutionally protected right or interest on the part of children (arising independently of the “institution of Marriage”) in or to the care and company of their natural / biological mother and father, wherever practicable, that would impose on the State a corresponding duty (or even a liberty) to respect or protect such a right in any legislation providing for the entitlements of married couples in the areas of adoption, fostering, AHR or surrogacy.

In so far as counter arguments (A) and (B) invoke or rely upon such a right to justify *prima facie* sex-based discriminatory classification of constitutional Families, this absence of any directly relevant supporting authority poses a significant difficulty for them. A second difficulty, moreover, is the case law which appears to directly undermine the existence of any such right or interest as a matter of constitutional law. This has been dealt with more extensively in the above survey already but can be summarised as follows.

Right to care and company of natural (i.e. both birth and biological) mother

In *G v An Bord Uchtála* Walsh J expressly referred to the Adoption Acts as one example of how a mother may transfer or abandon her rights in respect of her child in favour of another. The question therefore arises whether any legislation may validly provide another such way; for the reasoning of Walsh J clearly implies that “*essential natural rights of the child*” are not necessarily infringed merely because a child’s own (unmarried) natural mother transfers her rights in respect of the child in favour of another. This would seem to apply *a fortiori* to the merely biological mother (i.e. a mere ovum donor)¹⁴¹ and this can be seen in the Chief Justice’s denial in *M.R.* that the Constitution provides a determinative definition of motherhood. Prior to *M.R.* all of the existing jurisprudence referred to the natural and constitutional rights of natural mothers (i.e. mother who are both the biological and birth mother).¹⁴² As a result of *M.R.* it does not appear that any of that jurisprudence can be invoked on behalf of a woman who is only either the biological mother or the birth mother.

¹⁴¹ Of course the absence of any necessary connection between the abandonment by a natural mother of her rights over her child in favour of another and a breach of the child’s natural rights, does not mean that, whatever the circumstances, such an abandonment (or its deliberate facilitation through legislation) could never constitute *per se* an infringement of the natural rights of the child.

¹⁴² The terminology used was not always consistent and “natural” and “biological” tended to be treated as synonymous – which was obviously unproblematic on the facts of those previous cases.

A second question, however, is whether it is permissible (even pre-Amendment) for the legislature to implicitly deem lawful or practically facilitate private surrogacy arrangements as a result of which a child is conceived and born who has been deliberately deprived, by such arrangements, of having a “natural mother” (in the constitutional sense of a woman who is both the biological and birth mother) with whom the child would have a jural relationship of reciprocal and constitutionally protected rights. Though this question was not directly argued before the Supreme Court in *M.R.* it is not difficult to surmise the answer the current Chief Justice would give in light of her observations as follows in that case (emphasis added):¹⁴³

66. ... *there is no definitive definition of “mother” in the Constitution.*

...

85. *The English literature is noteworthy as it acknowledges the uncertainty surrounding the basis of motherhood in light of modern scientific and medical advances.*

...

104. *There is a core issue on this appeal. It is as to the registration of the “mother” under the Civil Registration Act, 2004. On the question of – who is the mother? – a quotation from Lord Simon of Glaisdale in **The Amphyll Peerage** case [1977] AC 547, has echoed throughout, and was initially followed, in many common law jurisdictions. He stated at p. 577:-*

“Legitimacy is a status: it is the condition of belonging to class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their father. Motherhood, although also a legal relationship, is based on fact, being proved demonstrably by parturition. Fatherhood, by contrast, is a presumption.” (emphasis added)

105. *That statement of Lord Simon is evocative of its time. It reflects a different society, and a time prior to the modern scientific and medical developments of assisted human reproduction.*

106. *Following in the slip stream of modern medical developments in assisted human reproduction, other States have passed legislation to govern and regulate the area.*

107. *Such statutory development has not occurred yet in Ireland.*

...

111. *There have been statutory developments in other jurisdictions to address issues which arise where there has been assisted human reproduction. Legislatures have recognised the need to address issues that*

¹⁴³ *M.R. v An t-Ard Chláraitheoir* [2014] IESC 60 per Denham J at paras 104-118.

now arise as a result of scientific and medical developments enabling children to be born in circumstances such as surrogacy.

...

113. Any law on surrogacy affects the status and rights of persons, especially those of the children; it creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas.

114. As stated earlier, there is no definitive definition of "mother" in the Constitution. Nor is there anything in the Constitution which would inhibit the development of appropriate laws on surrogacy.

*115. The words *mater semper certa est*, upon which the appellants laid much stress, is not the basis of Irish law on the issue before the Court. The words simply recognise a fact, which existed in times gone by and up until recently, that a birth mother was the mother: both gestational and genetic. This was the factual situation until scientific and medical advances enabled persons to avail of assisted human reproduction.*

116. There is a lacuna in the law as to certain rights, especially those of the children born in such circumstances. Such lacuna should be addressed in legislation and not by this Court. There is clearly merit in the legislature addressing this lacuna, and providing for retrospective situations of surrogacy.

...

118. The issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas. They relate to the status and rights of children and a family. It is important that the rights of the twins, the parent respondents, the notice party and the family are vindicated pursuant to the law and the Constitution.

It is hard to reconcile these comments of the current Chief Justice with the view that it is a breach of a child's constitutionally protected rights to be conceived and born such that a child's natural relationship to his or her mother (i.e. as both biological and birth mother) is deliberately split between two women and legal parentage assigned under statute to one or other (or possibly both) in accordance with the intention of the adults involved (including to the possible exclusion of any legal recognition of the natural father or even a step-father).

It is not necessary for us to take a view on these matters here. However we raise these points to show that it is far from unproblematic to claim on the basis of existing jurisprudence that children enjoy a constitutional right to or presumption in favour of the care and company of their biological mother that can be invoked as part of a justification for legislation in the areas of AHR or surrogacy that would affect OSM and SSM couples differently.

Right to care and company of natural father

In *J. McD. v P.L.*¹⁴⁴ the Supreme Court unanimously upheld the refusal of the High Court to grant the sperm donor's application for guardianship, though it overturned the refusal to grant his application for access and remitted that issue to the High Court for its reconsideration. While the case dealt with the welfare of an existing child and the operation in that regard of the Guardianship of Infants Act 1964, the decision of the Supreme Court to refuse guardianship even when actively sought by a sperm donor does not bode well for any argument seeking to justify sex-based discrimination between OSM and SSM couples post-Amendment on the grounds that it is addressed to protecting the rights or interests of a child to the '*company, care and parentage*' of his or her biological father or to belong to and be educated by a family composed of the child's natural mother and father. For it appears very difficult, if not impossible, to reconcile the judgments and outcome in *J. McD. v P.L.* with the existence of any such right or interest on the part of children at least as a matter of constitutional law pursuant to Article 40, 41, 42 or 42A.

3.4.4 Relevance of equal rights of the children of married and unmarried parents

In *G v An Bord Uchtála* the Supreme Court held that the natural rights of the child which are concerned with the child's welfare are primarily to be satisfied by the child's parent or parents and the resulting obligations on the parents are the same regardless of whether that they are married or unmarried.¹⁴⁵

However, it is not easy to reconcile the various principles of Irish constitutional jurisprudence relating respectively to (i) the equal constitutional rights of children of married and unmarried parents,¹⁴⁶ (ii) the equal (constitutional) obligations to their children of married and unmarried parents,¹⁴⁷ (iii) the unequal constitutional rights of married and unmarried parents,¹⁴⁸ and (v) the unequal constitutional rights of unmarried mothers and fathers (discussed above).

¹⁴⁴ [2010] 2 IR 199 at 306-10.

¹⁴⁵ *G v An Bord Uchtála* [1980] IR 32 at 68 (Walsh J):

'In my view, in this respect (the welfare of the child) there is no difference between the obligations of the unmarried parent to the child and those of the married parent. These obligations of the parent or parents amount to natural rights of the child and they exist for the benefit of the child. The child's natural rights in these matters are primarily to be satisfied by the parent or parents.' (emphasis added).

¹⁴⁶ *In re M an Infant* [1946] IR 334 at 344 (Gavan Duffy P).

¹⁴⁷ *G v An Bord Uchtála* [1980] IR 32 at 68 (Walsh J).

¹⁴⁸ *G v An Bord Uchtála* [1980] IR 32 at 87 (Walsh J):

"I share the view that, while the relevant constitutional rights of children are available equally to legitimate and illegitimate children, the constitutional guarantee for the family

The seeming irrationality of the current situation was ably articulated by Barrington J in *W. O'R. v E.H. (Guardianship)*¹⁴⁹ where he agreed with the outcome of the majority but differed radically in his justificatory reasoning. The essence of the alternative account of the rights and duties of parents proposed by Barrington J is set out in the following passage (emphasis added):¹⁵⁰

Article 42 of the Constitution is an extension of Article 41 and refers to parents and children within a family context. It refers to the inalienable rights and duties of parents and to the imprescriptible rights of the child. In other words it refers to a relationship between three people which carries with it reciprocal rights and duties which the positive law is enjoined to respect. The rights of the child are clearly predominant. They alone are described as being imprescriptible, but the parents also have rights. The positive law has accordingly prescribed (in s. 3 of the Guardianship of Infants Act, 1964) that a court, in deciding any question concerning custody or guardianship of an infant shall regard the welfare of the infant "as the first and paramount consideration". The clear implication of this phrase is that the welfare of the infant is to be the most important consideration, but also that it is not the only consideration. Otherwise the statute would not choose the adjective "first". The welfare of the infant, while paramount, has to be reconciled so far as practicable with the rights of both parents.

Article 42 of the Constitution is concerned primarily with the relative rights and duties of parents and children, though it also defines the role of the State in the event of the parents failing in their duties to their children.

Article 41, by contrast, is concerned with the family as a group or institution and with its rights vis-à-vis other groups or institutions in society.

Article 41 and Article 42 both refer to the family based on marriage. But Article 42 is helpful in describing the relationship between parent and child.

*In *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 the Supreme Court held (at p. 644 of its judgment) that the right of a natural mother to the care and custody of her child, borne out of wedlock, is governed not by Articles 41 and 42 of the Constitution, but is a personal right within the meaning of Article 40, s. 3 of the Constitution. Few would now dispute the dictum of Gavan Duffy P. in *In re M., an infant* [1946] I.R. 334 at p. 344) that a child born out of wedlock has the same "natural and imprescriptible rights . . . as a child born in wedlock" though he may have been mistaken in deriving them directly from Article 42 of the Constitution. But if the dictum of Gavan Duffy P. is to be anything more than a pious platitude, one must ask oneself the second question, "in respect of whom do these rights exist and from where are they derived."*

does not avail the mother (still less the father) of an illegitimate child. There is no parity of moral capacity or of social function which would justify reading s. 3 of Article 40 as importing for such a mother the natural and imprescriptible rights and duties of parents within a family."

¹⁴⁹ [1996] 2 IR 248.

¹⁵⁰ *W. O'R. v E.H. (Guardianship)* [1996] 2 IR 248 at 282.

*One cannot derive them from positive law because what the positive law gives the positive law can take away. Moreover, at common law an illegitimate child was nullius filius and was regarded as a charge on the parish. To have held otherwise would have threatened the system of primogeniture and the whole system of feudal landholding. As pointed out by Gavan Duffy P. in *In re M., an infant* [1946] I.R. 334, the common law judges were, at a later stage, driven to the expedient of justifying the natural mother's right to the custody of her child by reference to the fact that she was under a statutory duty to maintain it. Other judges refer to the "blood tie" between mother and child or to the bonds of nature between them. Finally the courts of equity were prepared to listen to anyone - be he or she natural parent or not - who could offer anything touching the welfare of the child.*

None of the matters referred to in the previous paragraph amounts, in itself, to a proper approach to this problem under the Irish Constitution because they all proceed on the approach of severing the relationship between parent and child. The Irish Constitution, by contrast, stresses the relationship between parent and child and derives from that relationship a system of moral rights and duties which the law is enjoined to respect.

*These reciprocal rights and duties may derive from the blood tie between parents and child but they are not the same thing as that blood tie. Rather do they amount to a moral code based upon it. It appears to me that they can be referred to as natural rights or duties or constitutional rights and duties and that, in the context of Articles 41 and 42, the two terms are indistinguishable. In so far as Kenny J. suggests the contrary in *G. v. An Bord Uchtála* [1980] I.R. 32 at p. 97, I respectfully disagree with him.*

The relationship between natural parents and their child can be compared with that existing between married parents and their children under Article 42 of the Constitution but the group does not form a unit group or institution within the meaning of Article 41. The relationship will give rise to reciprocal duties and rights but the manner in which these will, or can, be expressed will vary greatly with the circumstances. On the one hand the parents may be living together in what could be described as a de facto family. On the other hand the circumstances attending the child's conception or birth may be so horrific as to make it undesirable, or unthinkable, that the parents should live together.

As Kenny J. has pointed out, illegitimate children are not mentioned in the Constitution. Yet the case law acknowledges that they have the same rights as other children. These rights must include, where practicable, the right to the society and support of their parents. These rights are determined by analogy to Article 42 and are captured by the general provisions of Article 40, s. 3 which places justice above the law. Likewise a natural mother who has honoured her obligation to her child will normally have a right to its custody and to its care. No one doubts that a natural father has the duty to support his child and, I suggest, that a natural father who has observed his duties towards his child has, so far as practicable, some rights in relation to it, if only the right to carry out these duties. To say that the child has rights protected by Article 40, s. 3 and that the mother, who has stood by the

child, has rights under Article 40, s. 3 but that the father, who has stood by the child has no rights under Article 40, s. 3 is illogical, denies the relationship of parent and child and may, upon occasion, work a cruel injustice.

In these circumstances I would accept the dictum of Finlay C.J. in J.K. v. V.W. [1990] 2 I.R. 437 at p. 447 where he says:-

"The extent and character of the rights which accrue arising from the relationship of a father to a child to whose mother he is not married must vary very greatly depending on the circumstances of each individual case.

The range of variation would, I am satisfied, extend from the situation of the father of a child conceived as a result of a casual intercourse, where the rights might well be so minimal as practically to be non-existent, to the situation of a child born as a result of a stable and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all the characteristics of a constitutionally protected family, when the rights would be very extensive indeed."

As the rights of the child would be the same in all the circumstances discussed by the learned Chief Justice in the passage quoted, I can only assume that the variation in the strength of the rights of which the Chief Justice speaks refers to variations in the rights of the father.

The analysis offered by Barrington J, if it were to be adopted by the courts, would arguably be of assistance for the purposes of any attempt to justify discrimination as between OSM and SSM couples in adoption and AHR law by reference to the rights or interests of the children involved to be cared for and educated by their own two biological parents. Nearly 20 years after his judgment, however, there is no indication that the Supreme Court would be minded to reverse itself regarding the lack of constitutional rights enjoyed by unmarried fathers. On the contrary, as recently as its 2009 decision in *J. McD. v P.L.* the Supreme Court has strongly stood by and affirmed the reasoning of the majority in *W. O'R v E.H.*¹⁵¹

3.5 Article 40.1 guarantee of equality before the law

3.5.1 General principles

¹⁵¹ [2010] 2 IR 199.

Article 40.1 has been discussed and interpreted by the Supreme Court on many occasions. The general principles related to its guarantee of equality are sketched out in what follows.

- Article 40.1 “does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids invidious or arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.”¹⁵²
- Article 40.1 is a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.¹⁵³
- The forms of discrimination which are, presumptively at least, prescribed by Article 40.1 extend to classifications based on sex, race, language, religious or political opinions.¹⁵⁴
- *Prima facie* discrimination based on the classification of persons for legislative purposes is nevertheless permissible provided (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.¹⁵⁵
- Giving effect to other provisions of the Constitution will constitute a legitimate legislative purpose.¹⁵⁶

¹⁵² *de Búrca v Attorney General* [1976] IR 38 at 68 (Walsh J) citing to: *State (Nicolau) v An Bord Uchtála* [1966] IR 567 at 639; *State (Hartley) v Governor of Mountjoy Prison* (21 December 1967); *Quinn's Supermarket v Attorney General* [1972] IR 1; *O'Brien v The Manufacturing Engineering Co. Ltd.* [1973] IR 334; and *O'Brien v Keogh* [1972] IR 144. See also *M.D. (a minor) v Ireland* [2012] 1 IR 697 (SC).

¹⁵³ See *Quinn's Supermarket v Attorney General* [1972] IR 1 at 13 (Walsh J), applied in *Greene v Minister for Agriculture* [1990] 2 IR 17 (HC) (alleged discrimination against the married state).

¹⁵⁴ *The Employment Equality Bill, 1996* [1997] 2 IR 321 at 347 (Hamilton CJ). See also *J.D. v Residential Institutions Redress Review Committee* [2010] 1 IR 262 at 272 (Murray CJ).

¹⁵⁵ *Brennan v Attorney General* [1983] ILRM 449 at 480 (HC) (Barrington J), subsequently cited with approval and/or applied by the Supreme Court in *The Employment Equality Bill, 1996* [1997] 2 IR 321 at 346 (Hamilton CJ); *Lowth v Minister for Social Welfare* [1998] 4 IR 321 at 341 (Hamilton CJ); *An Blascaod Mór Teo. v Commissioners of Public Works (No. 3)* [2000] 1 IR 6 at 18 (Barrington J); *The Planning and Development Bill, 1999* [2000] 2 IR 321 at 357 (Keane CJ); *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 at 402 (Keane CJ); and *J.D. v Residential Institutions Redress Review Committee* [2010] 1 IR 262 (Murray CJ).

¹⁵⁶ See, e.g., *Dennehy v Minister for Social Welfare* (Unreported, High Court, Barron J, 24 July 1984 at p. 19 (more favourable treatment of deserted wives as compared to deserted husbands

- A *prima facie* discriminatory enactment based on a difference in social function will be upheld unless it is invidious, arbitrary or capricious.¹⁵⁷
- A *prima facie* discriminatory enactment which is not justified by the proviso in Article 40.1 may nevertheless be deemed lawful having regard to the state's obligations under Article 41.¹⁵⁸

An overview of the philosophy of Article 40.1 as it has been construed to date was recently provided by Denham CJ in *M.D. (a Minor) v Ireland*¹⁵⁹ as follows (emphasis added):

"[38] The principle of equal treatment of citizens, indeed of all human persons, is implicit in the free and democratic nature of the State. It permeates the Constitution. Two explicit examples can be given. Article 40.6.2° requires that laws regulating the formation of associations and unions and the right of free assembly shall "contain no political, religious or class discrimination". Article 44.2.3° provides that, whether by its laws or otherwise, "the State shall not impose any disabilities or make any

justified by reference to Article 41.2), followed in *Lowth v Minister for Social Welfare* [1998] 4 IR 321 at 333 (Costello J). See also *O'B. v S.* [1984] IR 316 (SC).

¹⁵⁷ See *Dillane v Ireland* [1980] ILRM 167 (SC) at 169 (Henchy J, O'Higgins CJ, Griffin, Kenny and Parke JJ concurring):

"When the State, whether directly by statute or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of."

¹⁵⁸ *O'B. v S.* [1984] IR 316 (SC). The headnote of the report usefully summarises the relevant holdings as follows:

"5. That the "family" recognised in Article 41 of the Constitution is the family which is based on a valid marriage in accordance with the law of the State.

6. That the main issue was whether the discrimination in favour of legitimate issue effected by s. 67 of the Act of 1965 was a contravention of the provisions of Article 40, s. 1, of the Constitution which state that "all citizens shall, as human persons, be held equal before the law" but which adds the proviso "this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

7. That the said discrimination could not be justified as being due to any of the differences of capacity or of social function mentioned in the said proviso.

8. That, nevertheless, the said discrimination, although not justified by the proviso to Article 40, s. 1, of the Constitution, was justified by ss. 1 and 3 of Article 41 of the Constitution since ss. 67 and 69 of the Act of 1965 form part of an Act which is designed to strengthen the protection of the family in accordance with the provisions of Article 41.

9. That, therefore, the said discrimination was not an invidious discrimination in the sense of being unjust, unreasonable or arbitrary and, accordingly, the provisions of ss. 67 and 69 of the Act of 1965 were not invalid having regard to the provisions of the Constitution."

¹⁵⁹ [2012] 1 IR 697 at paras. 38-44.

discrimination on the grounds of religious profession, belief or status". These are but aspects of the principles of freedom, justice and human dignity, which, inter alia, the preamble of the Constitution aims to safeguard. Equality is among the highest and noblest aspirations included in the Constitution of every modern state.

[39] Article 40.1 is both more specific and more general. It is specific insofar as it relates expressly to "the law". At the same time it prescribes the general principle that citizens are to "be held equal before the law".

[40] Equality is not, in all cases, an easy principle to apply in concrete situations. People may be equal in some respects but not in others. Aristotle's oft-quoted definition illustrates the lack of precision in the notion of equality. His definition of the principle of equality is paraphrased as meaning "that things that are equal should be treated alike while things that are unlike should be treated unlike in proportion to their unalikehood." [Nicomachean Ethics 1131a]. In other words, not only must the law treat comparable situations equally, it must not treat different situations in the same way, in the absence of justification.

[41] Article 40.1 provides:-

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

The central principle of the Article rests, firstly, on the common humanity which we all share and, secondly, on the general understanding that for the State to pass a law which treats people, who are objectively in the same situation vis-a-vis the law unequally is an affront to fundamental ideas of justice and even to rationality.

[42] Thus strict equality is the norm laid down by Article 40.1. However, the Article recognises that perfectly equal treatment is not always achievable, rather the Article recognises that applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves.

[43] The second sentence of Article 40.1 recognises that human persons have or may be perceived by the Oireachtas to have "differences of capacity, physical and moral, and of social function". Some of these differences, particularly of capacity, are inherent, most obviously in the case of the sexes. It is axiomatic that only a woman can become pregnant. Thus, the Maternity (Protection) Act 1994 and the Maternity Protection (Amendment) Act 2004 apply to women, although a father is allowed to take time where a mother has died. Laws prohibiting discrimination on the grounds of pregnancy have justifiably applied to women.

[44] It follows that laws such as these are not an example of the State holding men or women respectively unequal before the law. It follows also that the first and second sentences of Article 40.1 should not be treated as if they were in separate compartments. It is not correct to look at a law to see if it offends against the first sentence before turning to the second sentence

to seek justification. The second sentence is concerned with what the first sentence means.

3.5.2 Discrimination on grounds of sex

Several cases have concerned the constitutionality pursuant to Article 40.1 of discrimination based on grounds of sex and these are of particular relevance to the present query. (It should be noted that where the cases concerned issues of equality between spouses, they have sometimes be resolved by reference to Articles 41 or 42 in addition to¹⁶⁰ or instead of¹⁶¹ Article 40.1.) The picture that emerges from the survey below is a mixed one. While the courts have struck down common law and legislative provisions for discriminating on grounds of sex, there are also precedents permitting and accepting as justified sex-based discrimination in certain circumstances.

To begin, one should recall the proposed Amendment adds a new Article 41.4 stating that “Marriage may be contracted in accordance with law by two persons without distinction as to their sex.” There are four existing provisions of the Constitution that refer to “sex”. They are each concerned with prohibiting discrimination on grounds of sex as follows:

- Article 9.1.3° “No person may be excluded from Irish nationality and citizenship by reason of the sex of such person.”
- Article 16.1.1° “Every citizen without distinction of sex who has reached the age of twenty-one years, and who is not placed under disability or incapacity by this Constitution or by law, shall be eligible for membership of Dáil Éireann.”
- Article 16.1.2° “i All citizens, and ii such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáil Éireann, shall have the right to vote at an election for members of Dáil Éireann.”
- Article 45.4.2° “The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.”

¹⁶⁰ See *M. v M.* [1990] 2 IR 52 at 63 (Barr J) and, the later judgment in the same proceedings, *M. v M.* [1991] ILRM 268 (Barr J).

¹⁶¹ *In re Tilson, infants* [1951] IR 1.

Article 9.1.3° was considered, in conjunction with Article 40.1, by the High Court in *Somjee v Minister for Justice*.¹⁶² The sex based difference in treatment with which that case was concerned can be framed as a difference in treatment as between the (non-citizen) husband of an Irish citizen wife and the (non-citizen) wife of an Irish citizen husband. Under s. 8 of the Irish Nationality and Citizenship Act 1956 the non-citizen wife could acquire citizenship immediately after the marriage on making and lodging a declaration. By contrast, under ss. 15 and 16 of the Act a non-citizen husband had to complete a five year residency to become eligible for citizenship, though this could be shortened at the Minister's discretion. In *Somjee* the first-named plaintiff applied to the first-named defendant for a certificate of naturalisation, he having married the second-named plaintiff, an Irish citizen, one year previous to the application. The Minister refused the application but reduced the residency requirement from 5 years to 2 years. The plaintiffs alleged that the differentiation between alien men and women was unconstitutional but this was rejected by the High Court (Keane J) on the grounds, inter alia, that the "diversity of arrangements" did not constitute discrimination that was "invidious". In this regard the court relied on a narrow construal of Article 9.1.3° noting that there had been no breach because "different arrangements, so far as the acquisition of citizenship was concerned" based on the sex of the alien spouse did not amount to anyone being "thereby excluded" from citizenship.¹⁶³ Though the reasoning of this judgment has been sharply criticised¹⁶⁴ and the decision was influenced by several other factors,¹⁶⁵ it arguably provides some precedent by analogy for the argument that, post-Amendment, sex-based discrimination between different classes of married couple could be constitutional provided it concerns only different qualifications on a right enjoyed by SSM couples compared to OSM couples, rather than a complete denial of the right in question.

The rather deferential attitude to statute-based discrimination in *Somjee* can be contrasted with the decision of the majority of the Supreme Court in the earlier and seminal case on sex equality *de Búrca v Attorney General*.¹⁶⁶ Nevertheless, even that case contains statement which could conceivably be put to use to justify post-Amendment discrimination between OSM and SSM couples in respect of child-related

¹⁶² [1981] ILRM 324.

¹⁶³ [1981] ILRM 324 at 326.

¹⁶⁴ Doyle, *Constitutional Equality Law* (2004), pp. 156-8.

¹⁶⁵ The court considered it an independent "fatal obstacle" to the claim of the plaintiffs that they would have enjoyed no personal benefit from the impugned sections being declared invalid. The court also ruled that the discretion of the Minister could, if necessary be deployed to remedy any difference in time period and therefore, applying the presumption that the Act would be operated constitutionally, it was not open to the court to strike down the statutory provisions at issue.

¹⁶⁶ [1976] IR 38.

entitlements. Of particular relevance is the following passage from the judgment of Walsh J (emphasis added):¹⁶⁷

There can be little doubt that the Oireachtas could validly enact statutory provisions which could have due regard, within the provisions of Article 40, to differences of capacity both physical and moral and of social function in so far as jury service is concerned. For example, it could provide that all mothers with young children could be exempt from jury service. On virtually the same considerations, it could provide that all widowers, husbands with invalid wives, and husbands deserted by their wives would be entitled to a similar exemption if they were looking after their young children. It might also provide exemptions for the proprietors of one-man businesses who have no assistance, whether the proprietors be men or women. It could provide that certain occupations, such as a general practitioner in the medical profession (whether man or woman), be exempt because of the importance of the social function fulfilled by persons of such occupation.

However, the provision made in the Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only.

...

To be of either sex, without more, is not per se to have a social function within the meaning of Article 40 of the Constitution. To be an architect or a doctor, for example, is to have a social function. but the function does not depend upon the sex of the person exercising the profession. Clearly some social functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that certain social functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary.

This classification of “motherhood” and “fatherhood” as distinct “social functions” for the purposes of Article 40.1 is potentially significant.¹⁶⁸

¹⁶⁷ [1976] IR 38 at 71 and 72.

¹⁶⁸ Of course for the purposes of Article 40.1 it is not sufficient to show that any discriminatory classification is based on a difference in social functions. One must also show, *inter alia*, that the classification serves a legitimate legislative purpose. The query herein is whether, post

A possible counter-weight to this recognition of the distinct functions of mother and fathers, albeit a weak one,¹⁶⁹ is *O'G. v Attorney General*¹⁷⁰ in which the plaintiff successfully challenged the constitutionality of section 5(1) of the Adoption Act 1974 which allowed for adoption orders being made in favour of widows but precluded them in respect of childless widowers and only allowed them in respect of widowers who already had a child subject to certain special conditions being met. The plaintiff and his wife had commenced a process of joint adoption and the child had been placed with them. However, his wife died before the final adoption order was made. The adoption board contended that s. 5 precluded it from making the order. The position of the natural mother was no doubt significant for the decision reached and was described by the court (McMahon J) as follows:¹⁷¹

The natural mother applied for an order of habeas corpus to recover custody of the child and her application was adjourned for hearing with this action. In the course of the hearing having been told of the evidence which is referred to hereinafter of the happy and healthy life of her child with the plaintiff and the motional and psychological damage which he might suffer by being removed from the custody of the plaintiff the natural mother withdrew her opposition to the plaintiff's claim in this action and is willing to consent to an order under s. 3 (2) of the Adoption Act 1974 giving custody of the child to the plaintiff. She reserves for the present her decision on consenting to the adoption of the child by the plaintiff but the parties have agreed on access satisfactory to them. It is right that the court should acknowledge the generous an self-sacrificing spirit shown by the mother in her concern for her child's welfare.

The court was advised of the ruling of Walsh J in *de Burca* that motherhood and fatherhood were social functions, but rejected the argument that one could be lawfully preferred over the other in the manner contemplated by s. 5(1) of the Act. In doing so, the court made a number of findings of fact on the basis of what appears to have been expert evidence provided principally by the plaintiff and uncontested by any expert for the defendant (whether by design or not is uncertain). The key passages are as follows:¹⁷²

The qualities required to make a person eligible to be accepted by the Board as an adopter are stated in s. 13 (1) of the Act of 1952 already quoted. Counsel for the plaintiff argued that the effect of the proviso to s. 5 of the Act of 1974 is to classify widowers as unsuitable or less suitable than

Amendment, it would be or remain a legitimate legislative purpose to discriminate between different classes of constitutional Family based on sex in order to recognise or give effect to a difference in social function as between motherhood and fatherhood.

¹⁶⁹ See further below.

¹⁷⁰ [1985] ILRM 61.

¹⁷¹ [1985] ILRM 61 at 62

¹⁷² [1985] ILRM 61 at 63-65.

widows to have parental rights and duties and there was no basis in fact for that assumption. Doctor Una O'Donnell said that the notion of maternal instinct as a quality necessary to the proper rearing of a child was a myth. Studies of fathers as single parents showed there was nothing a father could not do for a child. A man was just as capable as a woman of the most important function of parenthood which is to provide the child with a person with whom the child can form an emotional relationship. The process is referred to as bonding and gives the child a sense of security and of being loved. In about one third of two parent families this bond is formed with the father rather than the mother. The process of bonding takes place between the ages of six months and three years and it cannot be repeated. If the bond with the psychological parent is broken the child may be emotionally scarred for life. He will grow up emotionally superficial and promiscuous and in some cases a delinquent or a psychopath. Doctor O'Donnell was satisfied that the child had formed a strong bond with the plaintiff and secondary bonds with the plaintiff's father who lived in the family home and with a neighbour who is a nurse and a frequent visitor with her children to the home. Doctor O'Donnell said that in her opinion it would be disastrous for the child to remove him from his present surroundings. Mr. de Courcy a psychologist attached to the Eastern Health Board was called as a witness for the natural mother and he did not dispute the ability of the plaintiff to act as a parent or the importance of the emotional bond but he qualified the evidence of Doctor O'Donnell by saying that the consequences of breaking the bond are not invariably disastrous or serious and the result depends on other factors. I accept that in some cases it may be possible to minimise the injurious result of disruption of the parent/child relationship but not in the present case because the mother is clearly not in a position to take on custody of the child and if it is removed from its present home it would have to be put in an institution for some time. There will be many similar cases where this would also be the result of refusing to allow adoption by the widower in cases coming within s. 5. I am satisfied that to remove the child from his present surroundings would expose him to danger of serious emotional damage and could not be justified by any considerations of his welfare.

Why then is the plaintiff excluded from consideration on his merits as an adopter of this child? Widowers as a class are not less competent than widows to provide for the material needs of children and their exclusion as a class must be based on a belief that a woman by virtue of her sex has an innate capacity for parenthood which is denied to a man and the lack of which renders a man unsuitable as an adopter. This view is not supported by any medical evidence adduced before me and the fact that s. 5 permits a widower who has already custody of a child to adopt another appears to be an admission that a man may acquire skills or capacities necessary to be an adopter. In England under s. 15 of the Adoption Act 1976 a single unmarried person may obtain an Adoption Order (see Halsbury Fourth Edition Volume 24, paragraph 657). Counsel for the Attorney General did not claim that there was anything in the Constitution to justify this discrimination apart from the proviso to Article 40. He submitted that to be of either sex without more is not in itself to have a social function but the law may have regard to the fact that certain functions are more usually performed by one person and the functions of widow or widower are motherhood or fatherhood and

adoption legislation recognises this difference. The culture of our society has assigned distinct roles to father and mother in two parent families in the past just as families on the land recognised a distinction between men's work and women's work but this is a feature of our culture which appears to be changing as the younger generation of married people tend to exchange roles freely. No medical or psychological evidence has been adduced to explain the difference between these roles and its significance for the welfare of the child or to establish that the roles are mutually exclusive or that both are essential for the proper upbringing of children or to establish that there is any difference in capacity for parenthood between a widow and a widower.

Counsel for the Attorney General referred to Article 41.2.1 in which the State recognises that by her life in the home woman gives to the State a support without which the common good cannot be achieved as conferring on a widow an advantage over a widower as an adopter. The article recognises the social value of a mother's services in the home but that does not involve a denial of the capacity of widowers as a class to be considered on their merits as suitable adopters.

I am satisfied that in the circumstances envisaged by s. 5 of the Act of 1974 that is 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. It is unreasonable because the widower's relationship with the child and his suitability as an adopter from the point of view of the emotional needs of the child is something which a qualified psychologist can readily assess by observing the inter-action between the widower and the child. Disruption of the bond between the child and the widower will in many cases subject the child to emotional trauma. It is therefore unjust to the child as well as unreasonable. I am satisfied that the proviso to s. 5 is founded on an idea of difference in capacity between men and women which has no foundation in fact and the proviso is therefore an unwarranted denial of human equality and repugnant to Article 40 (1) of the Constitution. Sub-paragraph (ii) is repugnant to the Constitution since it requires as a condition for the validity of the consent to adoption by a widower something which is not required where the adopter is a woman.

At first sight this may appear to support the principal argument proposed by us in Part 2 above for it appears to undermine any argument that, post-Amendment, sex-based discrimination between SSM and OSM couples could be justified by reference to a child's entitlement to both a mother and a father where practicable. There are reasons, however, to doubt its strength as a precedent in these respects. First, it was concerned with a remedial provision that only applied where a joint adoption by an OSM couple had already commenced such that the child was in their custody but was interrupted by the untimely death of one of the spouses. A finding of unconstitutional discrimination between widows and widowers in the context of such a remedial measure does not necessarily apply to legislative provisions which seek to provide a child (whether in the case of adoption, fostering or AHR) with both a mother and a father where practicable

by giving preference to OSM couples over SSM couples. Second, given the emphasis put by McMahon J on the dearth of relevant empirical evidence put before the court by the State, it seems possible that the decision could have been different if the case had of been defended with more vigour and resources by the State. In this regard, it is perhaps significant that the defence was represented by a junior counsel only and no appeal was pursued.¹⁷³

In *S.M. v Ireland (No. 2)*¹⁷⁴ Laffoy J declared that the statutory maximum sentence for indecent assault upon a male person in s. 62 of the Offences Against the Person Act 1861 was inconsistent with Article 40.1. The court ruled that nothing in the Act or on an objective consideration of the differences of physical capacity, moral capacity and social function of men and women pointed to a legitimate legislative purpose for imposing a more severe maximum penalty for indecent assault on a male person than for the same offence against a female person.

In *W. v W.*¹⁷⁵ and *McKinley v Minister for Defence*¹⁷⁶, the Supreme Court struck down common law rules that discriminated as between wives and husbands and located the equality of spouses in Article 40.1. In *W. v W.*¹⁷⁷ the majority held that the dependent domicile rule was unconstitutional and Hederman J observed:¹⁷⁸

Although the married state could be regarded as a social function for the purposes of the second paragraph of Article 40, s. 1, it is equally so for both spouses and there can be no sex discrimination between equals.

To conclude, it is useful to note several cases in which *prima facie* discrimination on grounds of sex was found not to be in breach of Article 40.1.

In *Dennehy v Minister for Social Welfare* (Unreported, High Court, Barron J, 26 July 1984) and *Lowth v Minister for Social Welfare*¹⁷⁹ provisions of the social welfare code which gave more favourable treatment to deserted wives as compared to deserted husbands were upheld as constitutional. With respect to the question of whether the discrimination was relevant to a legitimate legislative purpose and treated each class

¹⁷³ See comments of Doyle on the potentially limited precedential value of *O'G.* in Doyle, *Constitutional Equality Law* (2004), pp. 166.

¹⁷⁴ [2007] 4 IR 369.

¹⁷⁵ [1993] 2 IR 476.

¹⁷⁶ [1992] 2 IR 333.

¹⁷⁷ [1993] 2 IR 476.

¹⁷⁸ [1993] 2 IR 476 at 485.

¹⁷⁹ [1998] 4 IR 321.

fairly, the Supreme Court in *Lowth*, dismissing the appeal from the ruling of Costello J in the High Court, concluded (emphasis added):¹⁸⁰

The facts proved in evidence before the learned High Court Judge show clearly how women in employment at the material times were at a financial disadvantage in comparison to men. Again the statistics adduced in evidence established the relatively small proportion of married women in the work force. Moreover the provisions of the Constitution dealing with the family recognise a social and domestic order in which married women were unlikely to work outside the family home. Furthermore the Married Women's Property Acts, 1882 to 1907, which significantly limited the rights of a married woman to deal with her own property were not repealed until the Married Women's Status Act, 1957. An even more obvious impediment to the married woman engaging in business was the Civil Service Regulation Act, 1956, which required the retirement on marriage from the civil service of women who were civil servants. It was not until 1973, that that prohibition was repealed by the Civil Service (Employment of Married Women) Act, 1973. At about the same time a comparable restriction on married women working in banks was lifted. These realities confirm and enliven the picture provided by the statistics given in evidence by the defendants. It is no function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs.

*M.D. (a minor) v Ireland*¹⁸¹ is another example of a case in which the Supreme Court accepted that the sex discrimination involved in the impugned statutory provision was justified by reference to an “objective which the Oireachtas was entitled to regard as relating to ‘differences of capacity, physical and moral and of social function’, as provided for in Article 40.1 of the Constitution”.¹⁸² In that case the court considered the constitutionality of ss. 3 and 5 of the Criminal Law (Sexual Offences) Act 2006. S. 3 of the Act provides, *inter alia*, that any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence. S. 5 provides that a female child under the age of 17 years shall not be guilty of an offence under the Act by reason only of her engaging in an act of sexual intercourse. Significantly, this special exemption for girls under 17 does not extend to all of the sexual acts proscribed by s. 3. The reasoning of the court focused closely on the difference in physical capacity as between males and females in respect of sexual intercourse in support of its finding that the Oireachtas was entitled within its discretion to take account of any such difference in legislative classification. Some of the key passages in this regard are as follows:

¹⁸⁰ [1998] 4 IR 321 at 341.

¹⁸¹ [2012] 1 IR 697.

¹⁸² [2012] 1 IR 697 at 719.

[46] ... the natural physiological differences between males and females cannot be entirely assimilated. ...

[47] The act of sexual intercourse itself is engaged in by a male and a female. However, each performs a distinct physiological function. The male's penis penetrates the female's vagina and may emit the sperm which, relevantly for this appeal, is capable of rendering the female pregnant. Thus some natural and inevitable differentiation of treatment is inherent in the statutory scheme.

[48] The plaintiff challenges, as infringing Article 40.1 of the Constitution, s. 5 of the Act of 2006, which expressly differentiates between the male and the female, but only in the case of the act of sexual intercourse, and only when the female is herself under the age of 17.

...

[51] The decision of the United States Supreme Court in *Michael M. v. Sonoma County Superior Court* (1981) 450 U.S. 464 was cited in argument and is of some interest. ... The majority judgments are relevant to the present case. ... Rehnquist J. delivered the principal judgment. ... The Equal Protection Clause did not, he said at p. 469, "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact . . . to be treated in law as though they were the same". Thus, the court had "consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances". ...

Stewart J. delivered a concurring judgment, noting at p. 478, *inter alia*, that the court was dealing with the most basic of the differences between males and females: "females can become pregnant as the result of sexual intercourse; males cannot". He thought at p. 478 that "in certain narrow circumstances, men and women are not similarly situated; in these circumstances, a gender classification based on clear differences between the sexes is not invidious".

...

[53] The legislation in California recognised the innate differences between males and females participating in the act of sexual intercourse. To recognise this difference is not necessarily to discriminate. The exemption of a very young female from prosecution for an offence of taking part in an act of intercourse was regarded by the legislature as justified by the need to deter the male from having sexual intercourse with her, protecting her from the risk of pregnancy, and encouraging her to report the case. A similar approach was taken by the Oireachtas.

We cite these at length merely to note that the differences identified in *M.D.* concern only the physical act of intercourse (and, relatedly, the natural process of impregnation) and not differences of capacity or social function with respect to the parenting of any child by the woman and man respectively.

4. COUNTER-ARGUMENTS

4.1 General observations

4.1.1 Structure of the counter arguments and the relevant legal tests

The counter arguments considered below are each directed towards defending the contention that different treatment as between OSM and SSM couples in respect of adoption, fostering, AHR and surrogacy law would be constitutionally permissible. Counter argument (A) deals with adoption and fostering. Counter argument (B) deals with AHR and surrogacy. Counter argument (C) purports to provide additional support for (A) and (B).

Counter arguments (A) and (B) share a common structure. They both accept that laws providing for a difference in treatment between OSM and SSM couples constitute what is *prima facie* or presumptively discrimination of a kind contrary to Article 40.1 (i.e. discrimination on grounds of sex¹⁸³). They both contend that, nevertheless, the difference in treatment does not ultimately render the law unconstitutional. Before considering each argument, therefore, it is useful to briefly note the general principles of Irish constitutional law which are of relevance to any challenge brought before the courts to the validity of a piece of legislation by reference to the Constitution. It suffices here to summarise them in very brief terms as follows:

- Every Act of the Oireachtas enjoys a presumption of constitutionality. The burden is on a complainant to argue that a provision of any Act is unconstitutional.
- This presumption of constitutionality has two further consequences. First, it must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by an Act are intended to be conducted in accordance with the principles of constitutional justice. Second, as between two or more reasonable constructions of the terms of an Act the construction that is in accordance with the provisions of the Constitution would prevail over any construction that is not in accordance with such provisions.¹⁸⁴
- In seeking to strike down a piece of legislation on the grounds that it breaches a person's constitutional right it is not enough to show that the legislation at issue restricts or interferes with that right. Rather what one must show to the satisfaction of the Court is that the limitation or interference alleged is an impermissible or unlawful one.

¹⁸³ See *The Employment Equality Bill, 1996* [1997] 2 IR 321 at 347 (Hamilton CJ).

¹⁸⁴ *Donegal Co-operative Livestock Marts Ltd v The Attorney General* [1970] IR 317; and *Re Article 26 of The Adoption (No. 2) Bill, 1987* [1989] IR 656 at 661.

- The authoritatively preferred methodology of the Irish superior courts for assessing the permissibility of legality of any alleged interference with a constitutional right is now the so-called proportionality test. This was recently reiterated by the Supreme Court in *Damache v DPP*¹⁸⁵ as follows:

The Oireachtas may interfere with the constitutional rights of a person. However, in so doing its actions must be proportionate. The proportionality test, adopted from Canada, was first declared clearly in Ireland by Costello J. in Heaney v. Ireland [1994] 3 I.R. 593 at p. 607: -

"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right as little as possible; and

(c) be such that their effects on rights are proportionate to the objective ..."

- For convenience of analysis the Heaney proportionality test can be re-formulated in terms of the following four requirements:
 - **Legitimacy of the objective** of the legislative provision (in terms of its reasonableness, the pressing and substantial concerns in a free and democratic society, the public interest and/or the common good);
 - **Rationality of the connection** between the provision and the said objective;
 - The **minimal impairment** or "**minimum invasion**"¹⁸⁶ of any affected right by the provision (taking into account its objective);
 - **Proportionality** as between **the effects** on any affected right and the objective sought.
- There exists a general rule against a court, when assessing the constitutional validity of a legislative measure which involves or evidences a balancing and/or

¹⁸⁵ [2012] 2 IR 266 at 283 per Denham C.J. (delivering the sole judgment pursuant to Article 34.4.5).

¹⁸⁶ This limb of the Heaney test was referred to and approved by the High Court in *Dunnes Stores Ireland Company v Ryan* [2002] 2 IR 60 at 123 (Kearns J) as the 'minimum invasion' test.

regulating of competing constitutional rights, substituting its own view of the “correct or desirable balance” to be struck by the measure.¹⁸⁷

- The jurisprudence relating to Article 40.1 is marked by a significant degree of judicial deference and would tend to suggest the view that the burden of justification for a law providing for a *prima facie* difference of treatment is, relatively speaking, less onerous than the process of justification of *prima facie* breach of personal rights required by the proportionality test.¹⁸⁸ However that is not to say that the same considerations and arguments will not apply equally to both processes of justification.¹⁸⁹ Moreover, to the extent that the tripartite test commonly applied in Article 40.1-based challenges¹⁹⁰ is distinct from (and not merely an alternative formulation of) the *Heaney* proportionality test, both can be said to commence with the same question: does the impugned provision have a legitimate legislative purpose / objective?¹⁹¹

4.1.2 Is there a legitimate legislative purpose / objective?

For either to succeed counter arguments (A) and (B) must first establish that any regulation of adoption, fostering, AHR or surrogacy so as to provide for the right or interest of any child involved in having the care and company of a married mother and father (wherever practicable and unless contrary to the child’s best interests in all the particular circumstances of a given case) constitutes a legitimate objective or legislative purpose.

¹⁸⁷ As to which see: *Tuohy v Courtney* [1994] 2 ILRM 503 at 514 (Finlay CJ); *Re Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 at 45 (Hamilton CJ); *T.F. v Ireland* [1995] 1 IR 321 at 370 (Hamilton CJ); *Iarnród Éireann v Ireland* [1996] 3 IR 321; *Re Article 26 of the Constitution and the Planning and Development Bill, 1999* [2000] 2 IR 321 at 358 (Keane CJ); *White v Dublin City Council* [2004] 2 ILRM 509; *Health (Amendment) (No. 2) Bill 2004* [2005] 1 IR 105 at 205 (Murray CJ).

¹⁸⁸ See discussion in Oran Doyle, *Judicial Scrutiny of Legislative Classification* (2012) 47(1) *Irish Jurist* 175, in particular at 184.

¹⁸⁹ This was evident in the judgment of the Divisional High Court in *Fleming v Ireland* [2013] IEHC 2 (Kearns P, Carney and Hogan JJ) which dismissed the violation of Article 40.1 alleged in those proceedings by noting at para. 122 that: “for all the reasons which we have set out with regard to the Article 40.3.2, we consider that this differential treatment is amply justified by the range of factors bearing on the necessity to safeguard the lives of others which we have already set out at some length.”

¹⁹⁰ See Part 3.5.1 above.

¹⁹¹ For the “legitimate legislative purpose” requirement in relation to Article 40.1 see *The Employment Equality Bill, 1996* [1997] 2 IR 321 at 346 (Hamilton CJ); *Lowth v Minister for Social Welfare* [1998] 4 IR 321 at 341 (Hamilton CJ); *An Blascaod Mór Teo. v Commissioners of Public Works (No. 3)* [2000] 1 IR 6 at 18 (Barrington J); *The Planning and Development Bill, 1999* [2000] 2 IR 321 at 357 (Keane CJ); *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 IR 360 at 402 (Keane CJ); and *J.D. v Residential Institutions Redress Review Committee* [2010] 1 IR 262 (Murray CJ).

The primary and most serious obstacle in this regard, post-Amendment, is arguably the provisions of Article 41 and 42. If a SSM couple constitutes a Family for the purposes of Article 41 and Article 42 it is very difficult to see what legitimate legislative objective could be said to be served by preferring OSM couples as a class over SSM couples. In particular we consider the acknowledgement in Article 42.1 “*that the primary and natural educator of the child is the Family*” presents a direct rejoinder to any contention that, post-Amendment, any particular class of constitutional Family (which is defined solely by the sex of the spouses) may lawfully be deemed or treated (as a class) as a superior or preferable option for the purposes of parenting children.

We consider that there are two at least stateable ways that the obstacle presented by the provisions of Articles 41 and 42 might conceivably be overcome, though we consider neither likely to succeed.

The first is if the case could be made that the discriminatory legislative provision at issue was justified by “compelling reasons” which establish that a child’s welfare cannot be secured within a constitutional Family founded on a same sex marriage, by virtue of the inherent character of same sex marriage.¹⁹² In other words, the Amendment would have the effect of creating a new and onerous evidential burden for any government or other party advocating a preference in law for OSM couples as compared to SSM couples by requiring it to provide something along the lines of a “*coercive reason to believe that the proper nurturing of the child ... was not possible*”¹⁹³ in any constitutional Family founded on a SSM couple. We have no instructions on such matters, but based on the evidence advanced in *Zappone v Revenue Commissioners*¹⁹⁴ it did not seem at that time that any evidence existed which suggested that such an onerous test could be satisfied.¹⁹⁵ (It should be noted, of course, that the State did not advance any such argument in *Zappone*.) We have not been instructed as to any more recent developments in the academic and empirical literature in this area. The second way by which one might establish that the legislation in question had a legitimate objective or purpose would be to show that, post-Amendment, there existed (or continued to exist) a constitutional presumption in favour of a child’s welfare being within the care and company of a

¹⁹² We are invoking here the test articulated in *In re J.H. (inf.)* [1985] I.R. 375 and in *N v HSE* [2006] 4 IR 374 for lawful interference with the authority of a constitutional Family with respect to the children of the Family. The possibility, in principle, of sex-based discrimination being justified by an evidence-based argument for a difference in capacity or function between the sexes relevant to the difference in treatment is evident from the Supreme Court’s decision in *Lowth v Minister for Social Welfare* [1998] 4 IR 321.

¹⁹³ *N v HSE* [2006] 4 IR 374 at 514 (Hardiman J).

¹⁹⁴ (2008) 2 IR 417.

married mother and father as distinct from two married parents (of whatever sex). This possibility is considered and ultimately rejected in Part 4.2 below. That part deals primarily with counter argument (A) but its discussion and conclusion in this regard applies equally to counter argument (B).

4.1.3 Remaining limbs of the Heaney proportionality test

Assuming for the sake of argument that we are mistaken and that, post-Amendment, it would still be constitutionally permissible to regard as a legitimate aim of legislation the provision for the right or interest of any child involved in having the care and company of a married mother and father (wherever practicable and unless contrary to the child's best interests in all the particular circumstances of a given case), it would remain to be established that the means adopted in the various fields of adoption, fostering, AHR or surrogacy were rationally connected to this objective, a minimal invasion of the rights affected and proportional all things considered. A detailed treatment of these aspects of the *Heaney* proportionality test is obviously not possible in the context of an abstract query such as this where we are not being asked to advise in respect of any actual piece of legislation. In such circumstances, one can only observe that the more serious or extensive the interference of any right or the difference in treatment, status or entitlement of SSM couples as compared with OSM couples which is given effect by a legislative provision the less likely it is to pass judicial scrutiny pursuant to these limbs of the *Heaney* test.

4.1.4 Remaining limbs of the test under Article 40.1

As noted already, the classification of persons for legislative purposes is permissible provided (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.¹⁹⁶ Assuming for the sake of argument that we are mistaken and that, post-Amendment, it would still be constitutionally permissible to regard as a legitimate aim of legislation the provision for the (appropriately qualified) right or interest of any child involved in having the care and company of a married mother and father, we do not see limbs (ii) and (iii) proving difficult to satisfy in the case of the types of legislative restrictions envisaged by counter arguments (A) and (B) below.

¹⁹⁶ See 3.5.1 above.

4.2 Counter Argument (A)

4.2.1 Discrimination in right to apply or be considered for an adoption order

To recap, we proposed a possible counter argument (A) in respect of adoption law along the following lines:

Discrimination between the statutory rights of OSM and SSM couples respectively to apply for an adoption order may be argued to be justified to the extent necessary to protect the right and/or interests of an adopted child to be provided with a married mother and father wherever practicable and unless contrary to the child's best interests in all the particular circumstances of a given case. Such discrimination would be argued to be justified having regard, inter alia, to (i) its relevance to a legitimate legislative purpose; (ii) the absence of any stand-alone right to adopt; and (iii) the State's entitlement under Article 40.1 to have regard in its enactments to differences of physical capacity and social function.

Points (i) and (iii) of the argument both turn on the prior question of whether the envisaged discriminatory classification could permissibly be deemed a "legitimate" legislative purpose. That is considered further below.

With respect to point (ii) it is trite law that adoption law operates for the benefit of the children concerned and not of the adults.¹⁹⁷ In Irish adoption law prospective adopters are subject to discrete criteria of "eligibility" and "suitability". Ss. 33 and 34 of the Adoption Act 2010 provide, *inter alia*, as follows:

33.— (1) (a) *The Authority shall not make an adoption order, or recognise an intercountry adoption effected outside the State, unless—*

(i) the applicants are a married couple who are living together,

(ii) the applicant is the mother or father or a relative of the child, or

(iii) the applicant, notwithstanding that he or she does not fall within subparagraph (ii), satisfies the Authority that, in the particular circumstances, the adoption is desirable and in the best interests of the child.

¹⁹⁷ See, *inter alia*, Article 42A.4.1° (on the status of which see Part 4.1 above) and s. 19 of the Adoption Act 2010 provides:

"In any matter, application or proceedings before— (a) the Authority, or (b) any court, relating to the question of the arrangements for the adoption of a child, for the making of an adoption order or for the recognition of an intercountry adoption outside the State, the Authority or the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration."

See also decision of ECtHR in *E.B. v France* (App no 43546/02, Grand Chamber) 22 January 2008 at paras. 41 and 42.

(b) Notwithstanding paragraph (a), the Authority may recognise an intercountry adoption effected outside the State on the application of a person referred to in paragraph (a) or (c) of section 90 (3).

(2) Except as provided in subsection (1)(a), the Authority shall not make an adoption order, or recognise an intercountry adoption effected outside the State, for the adoption of a child by more than one person.

...

(7) The Authority shall issue policy guidelines respecting the circumstances in which an adoption order in favour of an applicant referred to in subsection (1)(a)(iii) may be made.

34.— The Authority shall not make an adoption order or, except where the applicant is a person referred to in paragraph (a) or (c) of section 90 (3), recognise an intercountry adoption, unless the Authority is satisfied that the applicant or, if the applicants are a married couple living together, each of them—

(a) is a suitable person to have parental rights and duties in respect of the child, and

(b) without prejudice to the generality of paragraph (a), is of good moral character, in good health and of an age so that he or she has a reasonable expectation of being capable throughout the child's childhood of—

(i) fulfilling his or her parental duties in respect of the child,

(ii) promoting and supporting the child's development and well-being,

(iii) safeguarding and supporting the child's welfare,

(iv) providing the necessary health, social, educational and other interventions for the child, and

(v) valuing and supporting the child's needs in relation to his or her—

(I) identity, and

(II) ethnic, religious and cultural background,

(c) has adequate financial means to support the child, and

(d) has been provided with appropriate information, advice and counselling concerning adoption.

For present purposes, we do not consider it relevant whether a hypothetical adoption law providing for or permitting (post Amendment) more favourable treatment of OSM couples (as a class) as compared with SSM couples sought to achieve this effect through

its provisions defining eligibility or its provisions outlining relevant determinants of suitability.¹⁹⁸

In *G v An Bord Uchtála*¹⁹⁹ it was held that (emphasis added):

*...the State has the ... obligation to defend and vindicate in its laws all natural rights of all citizens. In relation to illegitimate children and certain others, the State has endeavoured to discharge this obligation by the Adoption Acts. The purpose of these Acts is to give to these children the opportunity to become members of a family and to have the status and protection which such membership entails.*²⁰⁰

In *The Adoption (No. 2) Bill, 1987*²⁰¹ Finlay CJ made reference to the benefit for children of the protection given to the family based in marriage by Article 41 as follows (emphasis added):

The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family.

When one considers these *dicta* in light of the non-recognition in Irish law of the “*de facto* family” and the “constitutional presumption that the welfare of the child ... is to be found within the [married] family”, it seems to us that there would not be any constitutional difficulty, as the Constitution presently stands, with adoption legislation which gave preferential treatment or consideration to constitutional Families over other prospective adopters provided any such ranking was subject to the possibility of revision on the basis of the facts of any particular child’s case. In other words, a statutory presumption that a child’s rights and best interests will be best served by an adoption order which places that child within a constitutional Family would be constitutionally permissible provided it was only a “presumption” and there was provision for it to be rebutted on the facts of any given application, for example, to give an obvious case, where an unmarried, single person adopter was applying to adopt a child whom he or she has already been looking after *in loco parentis* for many years.

If one assumes the foregoing to be correct, the net question becomes whether, post-Amendment, it is open to the Oireachtas to further refine and narrow any such statutory

¹⁹⁸ As will become clear in what follows, the distinction is insignificant because, in line with the principal argument, we consider it improbable that, post Amendment, any sex-based legislative discrimination between different classes of constitutional Family could be deemed to serve a “legitimate” legislative purpose having regard to the terms of Articles 41 and 42.

¹⁹⁹ [1980] IR 32.

²⁰⁰ *G v An Bord Uchtála* [1980] IR 32 at 56 (O’Higgins CJ).

²⁰¹ [1989] IR 656 at 663.

presumption in adoption legislation so as not to include constitutional Families comprising SSM couples,²⁰² i.e. could this ever be deemed as serving a legitimate legislative purpose? This issue can be considered in two stages as follows:

- First, is there anything in the case law to date which would support a construal of pre-Amendment jurisprudence regarding the special constitutional status of the Family founded on marriage and the constitutional presumption of child welfare being within the Family according to which the rationale for both is, at least in part, the interests of children in having a mother and father and not solely their interests in becoming the member of a “unit group” enjoying special legal recognition?
- Second, even if such a rationale could be discerned and the relevant jurisprudence construed in terms of a child’s right or interests in having two opposite sex rather than merely married parents, is there good reason to conclude that this aspect of the case law would survive the Amendment and the change to the permitted sexual make-up of “institution of Marriage” (upon which “the Family” is founded) which it is expressly designed to effect?

These two questions are considered (and answered in the negative) in the following three sub-parts.

4.2.2 Existing jurisprudence on rationale for special status of married Family

In *P.H. v John Murphy & Sons Ltd*²⁰³ Costello J ruled that the rights of the Family which obtain constitutional protection by virtue of the provisions of the first sub-section of Article 41.1 must be the same as those which obtain protection under its second sub-section; and thus the rights which obtain constitutional protection under both sub-sections can be derived from the duties imposed on the State under the second sub-section.²⁰⁴

²⁰² Compare with the following formulation by the Supreme Court (Denham CJ) of the question at issue in *M.D. (a minor) v Ireland* [2012] 1 IR 697 at 716:

“[49] The fundamental constitutional question is whether it falls to the court or to the Oireachtas to make the judgment as to whether the risk that the female will become pregnant justifies exempting her, but not her male counterpart, from prosecution.”

²⁰³ [1987] IR 621,

²⁰⁴ See *P.H. v John Murphy & Sons Ltd* [1987] IR 621 at 626 (Costello J) (emphasis added):

“Arising from the nature of the Family, which is acknowledged in the first paragraph of Article 41, and as a consequence of it, its second paragraph provides that the State “guarantees to protect the Family in its constitution and authority” and explains that it is doing so because the Family is “the necessary basis of social order” and because it is “indispensable to the welfare of the Nation and the State”. It will be noted that this sub-section (Article 41, s. 1, sub-s. 2) imposes duties on the State vis-à-vis the Family. The rights

This proposed principle of interpretation (which has not been cited or adopted by the Supreme Court²⁰⁵) suggests that the ‘inalienable and imprescriptible rights’ of the Family should be identified through a consideration of the possible grounds upon or ways in which the Family founded on the marriage of one man and one woman might properly be viewed as ‘the necessary basis of social order and as indispensable to the welfare of the Nation and the State.’

Outside of the courts, various theories of the social function and value of “unit groups” based on marriage and, by necessary correlation, competing views of marriage itself have been expounded. For example, in their short paper for the UK think-tank ResPublica, Roger Scruton and Phillip Blond usefully differentiate the “conjugal” and “partnership” models of marriage.²⁰⁶ In his dissenting judgment in the US Supreme Court decision in *United States v Windsor*,²⁰⁷ for example, Alito J similarly distinguishes between two fundamentally competing views of marriage which he terms the ‘traditional’/‘conjugal’ and the ‘consent-based’ views.

which the Family enjoys vis-à-vis the State are those which are correlative to the duties imposed by the sub-paragraph and can be ascertained by reference to those duties.

*This action, however, is one in which the alleged infringer is not the State but a non-statutory company. Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials. In this case the basis for such a claim should be sought in Article 41, s. 1, sub-s. 1 rather than in Article 41, s. 1, sub-s. 2 which relates to the State's obligations towards the Family. But the undefined rights which obtain constitutional protection by virtue of the provisions of the first sub-paragraph must be the same as those which obtain protection under Article 41, s. 1, sub-s. 2 for it would be an unreasonable construction of the Constitution to suggest that the rights which obtain protection from the State's "recognition" in Article 41, s. 1, sub-s. 1 are either more extensive or more restricted than those which the State "guarantees to protect" in Article 41, s. 1, sub-section 2. This was the conclusion which Kenny J. reached in *Ryan v. The Attorney General* [1965] I.R. 294 at 309 and I respectfully agree with what he there said. I will, therefore, look a little closer at the duties imposed on the State by Article 41, s. 1, sub-s. 2 and from these derive the rights which obtain constitutional protection under both sub-sections of Article 41, section 1."*

The passage from the judgment of Kenny J in *Ryan v The Attorney General* referred to by Costello J states as follows:

"Some clue to the ambit of the rights of the family referred to in Article 41 is to be found in sub-s. 2 of section 1 where there is a reference to a guarantee by the State to protect the family in its constitution and authority. It seems, therefore, that the rights referred to in section 1, sub-s. 1, of Article 41 relate to the constitution and authority of the family."

²⁰⁵ Though related aspects of Costello's reasoning and judgment in *P.H. v John Murphy & Sons Ltd* were cited with approval in *Sinnott v Minister for Education* [2001] 2 IR 545 at 632 (Keane CJ).

²⁰⁶ Scruton & Blond "Marriage: Union for the future or contract for the present" 3 February 2013. <http://www.respublica.org.uk/wp-content/uploads/2013/02/thr_Marriage-Union-for-the-future-or-contract-for-the-present-pdf.pdf>.

²⁰⁷ (2013) 133 S. Ct. 2675 at 2718. Available http://www2.bloomberglaw.com/public/desktop/document/United_States_v_Windsor_No_123_07_2013_BL_168683_US_June_26_2013_C/1>.

The latter of these two views tends to focus on the benefits to the individuals concerned and to society of mutual and legally recognised commitment between adults (of whatever sex) – regardless of whether such couples typically²⁰⁸ can or do go on to procreate or raise children.²⁰⁹ Whatever their soundness, it might be argued that such ‘consent-based’ or ‘partnership’ theories appear more directed to the social status and value of ‘marriage’ per se as distinct from the social function of ‘the Family’ – a distinction which, even if not conceptually water-tight, is manifest at least to some degree in the wording of Article 41 itself and the separate provisions therein guaranteeing protection of the Family and of the institution of marriage respectively.²¹⁰

Alternatively, the social function and value of the Family (and/or of the ‘institution of Marriage’ itself) may be predicated in various ways on its provision or promotion of a particular environment conducive to responsible procreation²¹¹ and (typically) raising of children by two opposite sex parents – the so called traditional or conjugal view.²¹² Such

²⁰⁸ i.e. as a matter of statistical frequency.

²⁰⁹ A paradigmatic example is provided by the account of the ‘*essence of the right to marry*’ as submitted by the plaintiffs in *Zappone v Revenue Commissioners* [2008] 2 IR 417, viz. ‘*the right to marry the person of your choice with whom you wish to make a lifelong commitment and who you love*’ (at 457). (For the contrary argument by counsel for the State see 480). See also (at 469) the contention of the plaintiffs that ‘*something that most people strive for because it is a life altering and enhancing relationship for those who enter into it and who marry the person they love.*’

See also *Goodridge v Department of Public Health*, 440 Mass. 309 (Massachusetts SC) at 332 (Marshall CJ): ‘*While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.*’ (Cited by the plaintiffs in *Zappone* and quoted by Dunne J at 464, available at <<[http://scholar.google.com/scholar_case?case=16499869016395834644&q=Goodridge+v.+Department+of+Public+Health++\(2003\)+440+Mass.+309&hl=en&as_sdt=2006&as_vis=1](http://scholar.google.com/scholar_case?case=16499869016395834644&q=Goodridge+v.+Department+of+Public+Health++(2003)+440+Mass.+309&hl=en&as_sdt=2006&as_vis=1)>>.

For Irish proponents see, e.g., Ross Aylward, *Pre-nuptial Agreements* (Thomson Round Hall, 2006) Chapters 2 and 3; and Fergus Ryan, ‘From Stonewall(s) to Picket Fences: The Mainstreaming of Same-Sex Couples in Contemporary Legal Discourse’ in Binchy & Doyle (eds) *Committed Relationships and the Law* (2007) at p. 60.

²¹⁰ It is at least arguable that purely voluntaristic accounts of marriage (with the demand-led plasticity of form which they entail) cannot ultimately maintain any stable concept of the (social or legal) institution of marriage or prevent the collapse of a ‘right to marry’ into a mere instance of the ostensibly more fundamental ‘liberal’ rights of equality, autonomy or even self-expression. For an example of the logic of such a collapse at work see Maebh Harding, ‘The Right to Marry in Irish Law: Three Different High Court Approaches’ (September 7, 2009). <<<http://ssrn.com/abstract=1729237>>>.

²¹¹ e.g. procreation by adults intending to and committed to providing for, educating and entering into a personal relationship with the children which result

²¹² See for example:

Skinner v Oklahoma (1942) 316 U.S. 535 (US SC) at 541: ‘*Marriage and procreation are fundamental to the very existence and survival of the race*’;

United States v Windsor (2013), 133 S. Ct. 2675 at 2715 (including references at n.6) and 2718 (Alito J, dissenting);

theories focus more on the inter-generational significance and effects of marriage and the Family for what Article 41 refers to as the ‘*social order*’ and the ‘*welfare of the Nation and of the State*’ rather than on the intra-generational significance and effects for the participating adults which tends to be the primary focus of adult-centric or partnership theories.

Some idea of the challenge faced within contemporary legal discourse by any proponent of the view that there is an intrinsic or constitutive link between the nature of marriage and the (responsible) procreation and/or (optimal) raising of children can be gleaned from the majority judgment of the Massachusetts Supreme Court in *Goodridge v*

DeBoer v Snyder (US 6th Circuit) (unreported 6 November 2014) (available at <<<http://www.ca6.uscourts.gov/opinions.pdf/14a0275p-06.pdf>>>, the most recent Federal decision to uphold constitutionality of limitation of marriage to opposite-sex couples, now under appeal before the US Supreme Court);

Goodridge v Department of Public Health (2003), 440 Mass. 309 (Massachusetts SC) at 366- 371 (Cordy J, dissenting) (extracts of which are cited by Dunne J in *Zappone v Revenue Commissioners* [2008] 2 IR 417 at 490);

Morrison v Sadler (2005) 821 N.E. 2d 15 (Indiana Court of Appeal) at 24-31 (Barnes J);

Standhardt v Superior Court, County of Maricopa (2003), 77 P.3d 451 (Arizona Court of Appeal) at 461-464 (Timmer J);

Kerrigan v Commissioner of Public Health (2008) 957 A.2d 407 (Connecticut SC) at 520 (Zarella J, dissenting);

Hernandez v Robles (2005) 805 NYS 2d 354 (New York App. Div) at 361 and 374 (Catterson J, concurring), affirmed 855 N.E.2d 1 (New York SC);

In re Marriage of J.B. and H.B. (2006), 326 S.W.3d 654 (Texas App.) at 674; *Andersen v. Washington* (2006), 158 Wn.2d 1 (Washington SC) at 28, 29 n.12 & 30: “...the right to marry is not grounded in the State’s interest in promoting loving, committed relationships...Federal decisions have found the fundamental right to marry at issue only where opposite-sex marriage was involved. *Loving, Zablocki, and Skinner* tie the right to procreation and survival of the race.”

See further: Reply Brief of Appellants in *Baskin v Bogan* (unreported, 4 September 2014, US Seventh Circuit Court, Posner J) at pp. 12-22 (available at <<<http://www.lgbtqnation.com/assets/2014/08/Ind-Baskin-reply-brief.pdf>>>; Monte Neil Stewart ‘Judicial Redefinition of Marriage’ 21 Can. J. Fam. L. 13, 132 (2004); Maggie Gallagher ‘What is Marriage For? The Public Purposes of Marriage Law’ 62 La. L.Rev. 773, 782 (2002); Lynn D. Wardle, ‘Form and Substance in committed relationships in American law’ in Binchy & Doyle (eds), *Committed Relationships and the Law* (Four Courts Press, 2007) at 71-9; and the Parliamentary Report on the Family and the Rights of Children of the French National Assembly, Paris, 26 January 2006 at 89:

“Le mariage n’est ainsi pas seulement la reconnaissance contractuelle de l’amour d’un couple. C’est un cadre exigeant de droits et de devoirs conçu pour permettre l’accueil et le développement harmonieux de l’enfant.” [“Marriage is not merely the contractual recognition of the love between a couple. It is a framework requiring rights and obligations conceived in order to allow for the welcome and the harmonious development of the child.”].

See also the ‘*main end and design of marriage*’ according to the ‘*reason of our ...law*’ as stated in the passage of Blackstone cited (and dismissed as no longer relevant) by Denham CJ in *M.R. v Ant-Ard -Chláraitheoir* [2014] IESC 60 at para 72.

Department of Public Health (2003).²¹³ Indeed the State in *Zappone v Revenue Commissioners* appears not to have even advanced an argument in this regard.²¹⁴

²¹³ See 440 Mass. 309 at 331-6 (Marshall CJ). For examples of judicial rejection of or doubt concerning arguments articulating the nature or function of marriage by reference to procreation see also:

Perry v Schwarzenegger 704 F.Supp.2d 921 (N.D. Cal., 2010) (Walker J) (decision of US District Court striking down California's 'Proposition 8' constitutional exclusion of same sex marriage, unreported judgment available at <<<https://ecf.cand.uscourts.gov/cand/09cv2292/files/09cv2292-ORDER.pdf>>>);

Baskin v Bogan (unreported, 4 September 2014, US Seventh Circuit Court, Posner J) (affirming US District Court judgments invalidating and enjoining prohibitions of same sex marriage by Indiana and Wisconsin, unreported judgment available at <<<http://caselaw.findlaw.com/us-7th-circuit/1677242.html>>>);

Morrison v Sadler (2005) 821 N.E. 2d 15 (Indiana Court of Appeal) where Friedlander J (though concurring with decision rejecting challenge to Indiana's limitation of marriage to opposite-sex couples and finding that this limitation furthered a legitimate state interest of encouraging responsible procreation) observed at 36:

"I must admit that I am somewhat troubled by this reasoning. Pursuant to this rationale, the State presumably could also prohibit sterile individuals or women past their child-bearing years from marrying. In fact, I would assume the State may place any restrictions on the right to marry that do not negatively impact the State's interest in encouraging fertile, opposite-sex couples to marry."

²¹⁴ See [2008] 2 IR 417 at 449 and 461-4. It may be, however, that Dunne J was not wholly accurate in observing (at 458) that the US Supreme Court decision in *Turner v Safley* (1978) 482 US 78 "*whilst dealing with some of the key attributes of marriage, proceeded on the basis that the ability to procreate was not one of them.*" The case dealt with the constitutionality of restrictions in Missouri on the right of prison inmates to marry (available at <<<https://supreme.justia.com/cases/federal/us/482/78/case.html>>>). The relevant passage from part IIIB of the judgment of O'Connor J (with which all other members of the Court concurred) actually held as follows (at 95):

"The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of marriage remain, however, after taking into account the limitations imposed by prison life. First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Taken together, we conclude that these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context."

Nevertheless, in *Zappone* Dunne J appeared to link the special status afforded by the Constitution to the institution of (what she held to be opposite-sex) marriage to its function in respect of family life and the welfare of children as follows:²¹⁵

The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit that there is no evidence of any adverse impact on welfare.

This aspect of the Court's reasoning seems to echo the following submissions made by counsel for the State as recorded earlier in the judgment (emphasis added):

It was noted that the context in which recognition has been given to the institution of marriage is the context of the family which is described as the natural primary and fundamental unit group of society. It was submitted that in looking at the provisions of Article 41 as a whole there could be no doubt that what is in mind is the family constituting a mother, father and the children of a heterosexual marriage. It is in that context that the State guaranteed to protect the family in its Constitution and authority as the necessary basis of social order. Counsel referred expressly to all of the provisions of Article 41 dealing with the family. It was pointed out that there was no dispute between the parties that in 1937 there was no doubt what was understood by the institution of marriage and the special protection that was given to marriage in the Constitution upon which the family is founded, namely heterosexual marriage.

We note that, despite the foregoing, the State in *Zappone* did not seek to rely upon any argument that the prohibition on SSM could be justified by factors such as the couple's inability to biologically procreate as between themselves or that the rights or the welfare of a child raised by such a couple would be in any way adversely affected as compared to that of a child raised by an OSM couple. The argument rested almost entirely on the proposition that marriage had been traditionally understood as between a man and a woman and therefore the references to family in the Constitution must be a reference to a family constituting an opposite sex couple with or without children.

Nonetheless, both before and after *Zappone* there have been statements from the Supreme Court which would support an understanding of the Constitution's privileged

It is also surely significant that the power of a prison superintendant to permit a marriage where there are "compelling reasons" to do so was typically exercised, according to the Court in *Turner*, in cases of pregnancy or the birth of a child to the unmarried couple.

²¹⁵ *Zappone v Revenue Commissioners* [2008] 2 IR 417 at 507 (emphasis added).

recognition of the Family based on marriage that grounds it in the social function and value of married (opposite-sex) couples with respect to the procreation and raising of children.

In *The Adoption (No. 2) Bill, 1987*²¹⁶ Finlay CJ made reference to the benefit for children of the protection given to the family based in marriage by Article 41 as follows (emphasis added):

The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family.

In *T.F. v Ireland*²¹⁷ Hamilton CJ explicitly connected the special status of marriage in the Constitution with the social importance of the family as follows (emphasis added):

It is clear from ss. 1 and 3 of Article 41 that the institution of marriage enjoys a very special position in the Constitution as being the institution on which the family is founded, the family being stated to be the primary and fundamental unit group of society, a moral institution, the necessary basis of social order, and indispensable to the welfare of the nation and the State. It is because of its close connection with the family that the institution of marriage receives the pledge of the State to guard it with special care and protect it against attack. It is clear, accordingly, that this pledge is given in recognition of the contribution made by the institution of marriage to the welfare of the nation and the State, and the pledge must be seen in this light. It is not concerned solely with marriage itself, or with the spouses in a marriage, but also with the common good.

...

The beginning of the Irish version of Article 41, s. 3, sub-s. 1 is as follows:-

"Ós ar an bPósadh atá an Teaghlach bunaithe..."

The literal translation of this would be: "Since it is on marriage that the family is founded . . ." And apart from confirming that there is no difference between the phrase "the institution of marriage" and "marriage" this would also seem to confirm that the reason for the special pledge given by the State to marriage is because it is on marriage that the family is founded.

Similarly in *Northwestern Health Board v HW*²¹⁸ Keane CJ opined (in his dissent) as follows:

²¹⁶ [1989] IR 656 at 663.

²¹⁷ [1995] 1 IR 321 at 372.

²¹⁸ [2001] 3 IR 622 at 686-7.

[Articles 41 and 42] are described in Kelly on The Irish Constitution, (3rd ed., 1994) at p. 991 as "among the most innovatory in the entire Constitution". The learned editors also comment that the Articles are generally thought to have been inspired by papal encyclicals and by Catholic teaching: they point out, however, that the 1919 Weimar Constitution contained a declaration of the special status, and the State's special protection, of marriage and motherhood, as well as of parents' rights and duties.

While art. 12 of the European Convention on Human Rights and Fundamental Freedoms acknowledges the right of everyone to respect for his family life, neither the Canadian Charter of Rights and Freedoms nor the Commonwealth of Australia Constitution Act - to mention two jurisdictions' precedents from which were cited in the submissions - contain any articles equivalent to those contained in our Constitution.

Article 41.1 acknowledges the primary role of the family in society. In philosophic terms, it existed as a unit in human society before other social units and, in particular, before the unit of the State itself. The philosophical origins of the modern system of democracy are to be found in the beliefs of Locke and Rousseau that civil government is the result of a contract between the people and their rulers: the family existed before that unit and enjoys rights which, in the hierarchy of rights posited by the Constitution, are superior to those which are the result of the positive laws created by the State itself. As the trial judge noted, this is an express recognition by the framers of the Constitution of the natural law theory of human rights, but the belief that the family occupies that philosophic status in contrast to the role of the State is by no means confined to those thinkers who subscribe to that particular philosophy.

What is beyond argument is that the emphatic language used by the Constitution in Article 41 reflects the Christian belief that the greatest of human virtues is love which, in its necessarily imperfect human form, reflects the divine love of the creator for all his creation. Of the various forms which human love can take, the love of parents for their children is the purest and most protective, at least in that period of their development when they are so dependant on, and in need of, that love and protection. I believe that Article 41, although couched in the language of "rights", should not be seen as denying the truth to be derived from the experience of life itself, that parents do not pause to think of their "rights" as against the State, still less as against their children, but rather of the responsibilities which they joyfully assume for their children's happiness and welfare, however difficult the discharge of those responsibilities may be in the sorrows and difficulties almost inseparable from the development of every human being. The rights acknowledged in Article 41 are both the rights of the family as an institution, and the rights of its individual members, which also are guaranteed in Article 42, under the heading "Education", and which also derive protection from other articles of the Constitution, most notably Article 40.3.

Again, the Article speaks, not of the authority of parents, but of the authority of the family. While the family, because it derives from the natural order and is not the creation of civil society, does not, either under the

Constitution or positive law, take the form of a juristic entity, it is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself. While there may inevitably be tensions between laws enacted by the State for the common good of society as a whole and the unique status of the family within that society, the Constitution firmly outlaws any attempt by the State in its laws or its executive actions to usurp the exclusive and privileged role of the family in the social order.

It is interesting to contrast this with the following terse (and arguably more positivistic) account of the same provision that was offered in that case by Denham J who declined to elaborate upon it in the light of any intelligible rationale or normative conception of (to borrow the words of Keane CJ) the ‘*role of the family in the social order*’:²¹⁹

The family in the context of Article 41 of the Constitution is the family founded on the institution of marriage. The fact that the family is the fundamental unit group of society is a constitutional principle. Whatever historical origin or origins may be given for this principle it is a principle of the Constitution.

These brief remarks should be read in conjunction, however, with the lengthy discussion of Article 41 given by Denham J some months earlier in her dissent in *Sinnott v Minister for Education* from which the following passages are of particular significance (emphasis added):²²⁰

The family of the Constitution, which has rights and duties, is based on a valid marriage....

Article 41.1 recognises the family as a unit. It is the building block of our society. This unit has rights.

...

The rights recognised by Article 41 are those of the family and they may be protected by a member of the unit. The member qua member of the unit also has rights which he or she may defend. The parents have a duty to the children of the family which they may defend.

Thus the second plaintiff has rights as part of the unit of the family and duties as a parent within that unit. If there is a breach by the State of a right of one of the members of the unit, as, for example, here the child the first plaintiff, then because of the nature of the right breached this may have an impact on the family as a unit and the parent in the family. The negative impact on the family and the second plaintiff of the breach by the State was fully documented by the learned High Court judge.

Article 41 does not mention the child. It has been inferred that this may be interpreted as giving to parents more value than children. Even taking this

²¹⁹ *Northwestern Health Board v HW* [2001] 3 IR 622 at 718.

²²⁰ [2001] 2 IR 545 at 661-5.

interpretation at face value it strengthens the position of the second plaintiff.

The Constitution does not recognise a special role for fathers. However, at the time when the Constitution was enacted, as case law illustrates, the father had a dominant authority in the family. It was taken for granted that he would provide for the family and lead the family.

The mother is specifically mentioned in Article 41.2. which states:-

"41.2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

41.2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

And Article 41.3.1 further emphasises the special position of the family by stating:-

"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."

The position afforded to women and mothers by Article 41 has been described in a negative fashion. Thus the Constitution Review Group, at p. 333, stated:-

"Article 41.2 assigns to women a domestic role as wives and mothers. It is a dated provision much criticised in recent years. Notwithstanding its terms, it has not been of any particular assistance even to women working exclusively within the home."

...

When Article 41 was being drafted and included in the Constitution there was a negative view expressed of the role apparently consigned to women. It has been considered by some that the Article was rooted in a particular Christian philosophy. It was queried as to whether it placed the woman in the home to the detriment of other areas.

*Whatever historical concepts and byways may be traced the reality is that the Constitution sets out constitutional rights, duties and powers. The Constitution is a living document. It must be construed as a document of its time. In *McGee v. Attorney General* [1974] I.R. 284 at p. 319 Walsh J. stated:-*

"... no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

Thus Article 41 is an Article of the 21st century, an Article of our times. In this century the family remains the core unit of our society. While the nature of family is evolving in society, as a constitutional unit the family remains grounded on marriage.

The Constitution is a constitution of the people expressing principles for its society. It sets the norms for the community. It is a document for the people of Ireland, not an economy or a commercial company. The first of the cases in this judgment illustrates the promise given by the people of Ireland to future generations that the State would provide for free primary education for its children. ...

Equally, the second case in this appeal is grounded on a fundamental concept - even more so perhaps - that our society is built on the family. Further, that within the family the special benefit given by women in the home, is recognised. It is acknowledged that that benefit is not just for the particular home, family and children, but for the common good.

This special recognition is of the 21st century and belongs to the whole of society. It is not to be construed as representing a norm of a society long changed utterly. Rather it is to be construed in the Ireland of the Celtic Tiger. As important now as ever, is the recognition given. It is a recognition for all families - of whatever religion or none.

Thus, in Ireland, in relation to the family and the home, women have a constitutionally recognised role which is acknowledged as being for the common good. This gives to women an acknowledged status in recognition not merely of the physical aspect of home making and family building, but of the emotional, social, physical, intellectual and spiritual work of women and mothers. The undefined and valuable role of the father was presumed and remained unenumerated by the drafters of the Constitution.

Article 41.2 does not assign women to a domestic role. Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work performed by women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.

In *N v HSE*, Fennelly J observed:²²¹

The applicants constitute with Ann a family. This is no mere constitutional shibboleth. Article 41 speaks of the rights of the family being "antecedent and superior to all positive law". In my view, that is no more than the statement of the simple facts of life. People of opposite sexes meet, marry, procreate and raise children.

In *Nottinghamshire Co Council v B (K) & B (K)*²²² O'Donnell J opined at paragraph 49:

49. When shorn of the rhetoric that has become encrusted upon Articles 41 and 42 through successive generations of judicial decision and legal commentary, it is perhaps possible to see that Articles 41 and 42 say nothing in explicit terms about adoption. On the contrary, the Articles at

²²¹ [2006] 4 IR 374 at 583.

²²² [2011] IESC 48.

least in general terms, state propositions that are by no means eccentric, uniquely Irish or necessarily outdated: there is a working assumption that a family with married parents is believed to have been shown by experience to be a desirable location for the upbringing of children; that as such the family created by marriage is an essential unit in society; that accordingly, marriage and family based upon it is to be supported by the State. Consequently the State's position is one which does not seek to pre-empt the family but rather seeks to supplement its position so that the State will only interfere when a family is not functioning and providing the benefits to its members (and thus the benefits to society) which the Constitution contemplates. In that case, the State may be entitled to intervene in discharge of its own duty under the Constitution and to protect the rights of the individuals involved. This is not to say that these Articles do not express a distinctive view and do so with considerable force.

For completeness, we note here also the following reported argument made at the Supreme Court hearing by Donal O'Donnell SC (as he then was) on behalf of the respondent parents in *North Western Health Board v H.W.* (emphasis added):²²³

Mr. O'Donnell S.C.: Part of the importance of the family unit is the security it gives the children. It then follows that a non-marital child has personal rights under Article 40.3.1 and to the same security in a union which is not founded on marriage. If it could not be forced on children of a marriage, then it could not be forced on the child of a non-marital union.

At High Court level perhaps one of the most explicit statements of the connection between marriage (as Constitutionally protected) and procreation is the following by Costello J in *Murray v Ireland*²²⁴ (emphasis added):

The plaintiffs assert (a) that each, as a married person, has a basic human right to procreate children with his or her spouse, ...

As to (a), the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship. According to this concept the procreation and education of children by the spouses is especially ordained. By explicitly recognising and protecting this concept of the institution of marriage, it would follow that the right of each spouse to beget children is implicitly recognised and protected.

Finally, one should note the reference in Article 41.2.2 to “mothers” thus implying a further connection between marriage and child-rearing.²²⁵

²²³ [2001] 3 IR 622 at 661.

²²⁴ [1985] IR 532 at 535-6.

²²⁵ See *L. v L.* [1992] 2 IR 77 (SC), where at 112 O'Flaherty J noted (obiter):

‘While Article 41 of the Constitution is headed “The Family”, s. 2 of the Article is clearly referring to “mothers” only, not wives, nor wives and mothers, but mothers. This makes clear that it cannot be called in aid to govern the division of property rights between

4.2.3 Application to requirement for legitimate legislative purpose or objective

As it was an undoubted operating assumption at the time of most if not all of the cases mentioned above that marriage was necessarily a union between a man and a woman (and therefore, at least typically, a procreative one), it is perhaps unsurprising that, as is clear from the foregoing survey (and from the case law set out in Part 3.3 above), there is no authority which in express and unambiguous terms grounds the special status of marriage in the Constitution or the constitutional presumption that a child's welfare is found within the Family upon the rights or interests of a child in being raised by both a mother and a father as distinct merely from having two married parents and being a member of a "unit group" enjoying special constitutional recognition.

Even if this is granted, however, there remain significant difficulties with reading any of the authorities which have been surveyed as supportive of the argument that, post Amendment, a discriminatory distinction between OSM and SSM couples as a class is a legitimate legislative purpose or objective because of some constitutionally recognised principle or presumption as to the right or interest of children in having married parents of the opposite sex.

First, there is the ambivalence and acceptance shown by several members of the Supreme Court in *J. McD. v P.L.*²²⁶ regarding the use of donor-assisted AHR for the purpose of providing a same sex couple with a child.²²⁷ There was no suggestion in any of the judgments in that case that the arrangements entered into between the lesbian couple and sperm donor raised any questions or required any justification or consideration in light of a constitutional presumption in favour of the child's welfare being found in a family comprised of his or her own biological mother and father (or of any opposite sex couple as distinct from a same sex couple).

Second, (as discussed above at 3.4.3) it is particularly hard to reconcile the authorities dealing with the disparate rights of unmarried, natural/biological mothers and fathers with any constitutionally grounded principle or presumption in favour of a child's right to or interest in being cared for and educated by both his or her biological/natural mother and father wherever practicable. In the absence of any such principle or

spouses. What it does do is to require the State to endeavour to ensure that mothers with children to rear or to be cared for are given economic aid by the State. If a mother in dire economic straits were to invoke this Article it would be no answer for the State to say that it did not have to make any effort in her regard at all, though it would be open for it to say that it was doing its best having regard to the State's overall budgetary situation.'

²²⁶ [2010] 2 IR 199.

²²⁷ It should be noted, of course, that in *J. McD.* the natural (i.e. biological and birth) mother of the child was one of the persons in the same sex couple who had commissioned the AHR process. Thus strictly speaking the case concerned a dispute as between the unmarried biological father and natural mother rather than between him and a same sex couple *per se*.

presumption, it is very difficult to find any constitutionally grounded basis for an argument seeking to justify (post-Amendment) a discriminatory classification as between married couples / constitutional Families based on sex.

Third, even if one accepts that it was an implicit and assumed premise in much of the jurisprudence to date on the rationale for the special status of the Family grounded in marriage that the benefits for children accrued from having both a mother and a father (and not merely two “adults”) who had entered into a solemn and legally recognised lifelong contract of mutual support and fidelity, the absence of any express specification of these silently assumed benefits arising from opposite sex parenting makes it difficult to argue that the Amendment should not be construed as altering the law’s operating presumptions in this regard such that the rights of the Family set out in Articles 41 and 42 and any account of the rationale for the special status of the Family grounded in marriage must, post-Amendment, be construed (or re-construed) in sex-neutral terms.

For these reasons, we conclude that an argument to justify discrimination, post-Amendment, against constitutional families comprising SSM couples as compared with constitutional families comprising OSM couples would likely fail at the first limb of both the Article 40.1 and *Heaney* proportionality tests in that its legislative purpose / objective could not reasonably be deemed “legitimate” having regard either to existing case law or the terms of Articles 41 and 42.

4.2.4 Conclusions in respect of adoption

For all of the foregoing reasons, we do not consider counter argument (A) succeeds as against the principal argument set out above. Accordingly, we do not consider that, post-Amendment, it would be constitutionally permissible to treat SSM couples as a class differently as compared to OSM couples for the purposes of adoption law.

4.2.5 Discrimination in respect of right to provide foster care

The provision made by the State for a system of foster care²²⁸ and the establishment in law of a formal adoption process,²²⁹ though related, are legally and conceptually discrete matters. In light of our conclusions in respect of adoption, it is unnecessary to consider the law and practice of foster care in Ireland.²³⁰ For, *a fortiori*, if it would be unconstitutional to discriminate against SSM couples as a class as compared to OSM couples in legislation providing for adoption (where the rights of the natural parents are wholly extinguished and the adopters become the legal parents and guardians of the

²²⁸ See sections 36, 39, 43A and 43B of the Child Care Act 1991 (as amended) and the Child Care (Placement of Children in Foster Care) Regulations 1995 (SI No 260 of 1995).

²²⁹ See Adoption Act 2010.

²³⁰ See generally Shannon, *Child Law* (2nd edn. 2010) Chapter 5.

child), we can see no basis upon which such discrimination could be found constitutional in the context of foster care arrangements which by definition concern principally a reversible transfer of the rights of custody (and not guardianship or parenthood *per se*)²³¹ in respect of the child to a non-relative third party caring for the child in a non-occupational capacity.

4.3 Counter Argument (B)

To recap, we proposed a possible counter argument (B) in respect of AHR and surrogacy law along the following lines:

(B) In the case of facially neutral laws regulating AHR and surrogacy practices for the purpose of ensuring that children conceived through such measures are subsequently parented by their own married, biological mother and father (i.e. a law restricting AHR to married couples and banning gamete donation), indirect discrimination or disparity in the effects upon OSM and SSM couples respectively would result due to the different natural/biological functions and capacities of men and women with regards to the act/process of sexual reproduction. Such indirect discrimination could be argued to be justified as proportionate, however, having regard, inter alia, to (i) its relevance to a legitimate legislative purpose; (ii) the absence of any clearly recognised stand-alone constitutional right on the part of married persons to procreate by means of AHR which involves gamete donation; and (iii) the State's entitlement under Article 40.1 to have regard in its enactments to differences of physical capacity and social function.

Point (ii) is true to an extent, but it differs from the claim made in counter argument (A) regarding the absence of a right to adopt. The difference is that there is simply no Irish case law one way or another on how donor-assisted AHR might fit into the recognised right of married couples to procreate. By contrast, the absence of any right to an adoption order and the subjection of adult interests in adoption to those of the children involved are well settled principles. Either way, it remains the case that, as with counter argument (A), the primary question which this argument must address is whether the envisaged discriminatory classification could permissibly be deemed to serve a "legitimate" legislative purpose post Amendment.

In this regard it may appear that differences in the physical (reproductive) capacities of men and women are potentially of more relevance here than in adoption or fostering and so may be invoked to justify discrimination in a way that was not available in counter argument (A) which dealt with adoption and fostering.²³² However, in so far as

²³¹ Certain additional rights are enjoyed by foster parents after five years of caring for a child which are akin to those of a guardian or parent, e.g. right to consent to any medical or psychiatric examination, treatment or assessment and to the issue of passports.

²³² For recognition by the Supreme Court of such differences see *M.D. (a minor) v Ireland* [2012] 1 IR 697 at 716-718 and *M.R. v An t-Ard Chláraitheoir* [2014] IESC 60 per MacMenamin J at paras 50 and 61-2 and O'Donnell J at para 37.

the intended legislative purpose or objective of restriction on AHR or surrogacy is also framed by counter argument (B) in terms of the rights or interests of the child conceived as a result of the practices in question, we consider that the analysis and criticism provided above in respect of counter argument (A) equally applies here. In short, we conclude that an argument to justify discrimination, post Amendment, against constitutional families comprising SSM couples as compared with constitutional families comprising OSM couples would likely fail at the first limb of both the Article 40.1 and *Heaney* proportionality tests in that its legislative purpose / objective could not reasonably be deemed “legitimate” having regard either to existing case law or the terms of Articles 41 and 42.

4.4 Counter Argument (C)

It is a well established principle of Irish law that courts should be reluctant to accede to constitutional challenges to legislation where doing so would involve double-guessing or displacing the view of the Oireachtas on sensitive,²³³ complex²³⁴ and difficult²³⁵ matters of policy, in particular (though not exclusively²³⁶) “social policy”.²³⁷

²³³ *M.D. (a minor) v Ireland* [2012] 1 IR 697 at 716 (Denham CJ).

²³⁴ *Madigan v The Attorney General* [1986] IRLM 123 (O’Hanlon J); *M.D. (a minor) v Ireland* [2012] 1 IR 697. See also *A.O. & D.L. v Minister for Justice* [2003] 1 IR 1 at 26 (Keane CJ) (emphasis added):

‘Many would wish to see the development in Ireland of a tolerant and pluralist society capable of accommodating immigrants from diverse ethnic and cultural backgrounds, because that is a desirable objective in itself, recognises the openness and generosity with which Irish emigrants in times past were received in other countries and, on a purely economic level, remedies serious shortages in the skilled and unskilled labour markets. At the same time, the legislature and executive cannot be expected to disregard the problems which an increased volume of immigration inevitably creates, because of the strains it places on the infrastructure of social services and, human nature being what it is, the difficulty of integrating people from very different ethnic and cultural backgrounds into the fabric of Irish society. The resolution of these complex political, social and economic issues which, it need hardly be said, are not in any sense unique to Ireland, is entirely a matter for the Oireachtas and the executive. The function of the courts is to ensure that the constitutional and legal rights of all the persons affected by the legislation in question are protected and vindicated.’

²³⁵ *Hyland v Minister for Social Welfare* [1989] IR 624 (Barrington J).

²³⁶ Heightened concerns for judicial deference are also evident in Irish jurisprudence in relation to fiscal and tax matters and to related questions of so called ‘*distributive justice*’ more generally. See: *Madigan v The Attorney General* [1986] IRLM 123 (O’Hanlon J); *O’Reilly v Limerick Corporation* [1989] IRLM 181 (Costello J); *T.D. v Minister for Education* [2001] 4 IR 259; *Sinnott v Minister for Education* [2001] 2 IR 545.

²³⁷ See generally Brian Foley, *Deference and the Presumption of Constitutionality* (IPA, 2008) at 141-7 and 153-9. On the general constitutional principle of respect for the properly legislative function of the Oireachtas see, e.g., *MacMathúna v Attorney General* [1995] 1 IR 484 at 499 (Finlay CJ); *I. O’T. v B.* [1998] 2 IR 321 at 379 (Keane CJ); *T.D. v Minister for Education* [2001] 4 IR 259; *Sinnott v Minister for Education* [2001] 2 IR 545; *Roche v Roche* [2010] 2 IR 321; *M.D. (a minor) v Ireland* [2012] 1 IR 697.

One might argue that, on its face, this principle appears naturally to support counter-arguments (A) and (B) and to weigh against the credibility of the principal argument. In our opinion, however, this view cannot be sustained upon closer consideration of the nature of the principle itself and of the net issue of discriminatory classification between married couples on grounds of sex with which this query is concerned

4.4.1 The principle of special judicial deference in respect of certain types of sensitive or complex social legislation

The principle of special judicial deference in respect of certain types of sensitive or complex social legislation is closely related to the general principles governing challenges to the constitutionality of legislation (see Part 4.1.1 above) but is worth considering in its own right if only because of its increasing presence in Supreme Court jurisprudence. Before considering its prominence in the very recent judgments of the Supreme Court in *M.R. v An t-Ard Chláraitheoir*²³⁸ it is worth noting some of the earlier decisions in which this principle has been articulated and deployed.

In a passage which later came to be treated as something of a *locus classicus* Kenny J in *Ryan v The Attorney General*²³⁹ stated:

None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefit which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen.

This passage has been frequently cited since the mid 1990s.²⁴⁰

An example of the application of this principle can be found in *Foy v An t-Ard Chláraitheoir*²⁴¹ where McKechnie J stated (emphasis added):

²³⁸ [2014] IESC 60.

²³⁹ [1965] IR 294 at 312-3. See also the ruling of the same judge in *McDonald v Bord nag Con (No. 2)* [1965] IR 217 at 235: 'While the Court has the power to declare an Act to be unconstitutional because it does not defend and vindicate the personal rights of the citizen, it is a jurisdiction to be exercised with extreme care and caution, particularly having regard to the now accepted extensive role of the state in economic and social matters.'

²⁴⁰ Foley mentions: *T.F. v Ireland* [1995] 1 IR 321 at 334-5 (HC) (Murphy J) ; *Murphy v IRTC* [1999] 1 IR 12 at 25; *Lowth v Minister for Social Welfare* [1998] 4 IR 321 at 339-340; *Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 at 238-9; and *Re Article 26 of the Constitution and the Planning and Development Bill, 1999* [2000] 2 IR 321 at 357-8. See also: *North Western Health Board v H.W.* [2001] 3 IR 622 at 760 (HardimanJ); *L.B. v Ireland* [2008] 1 IR 134 at 147 (MacMenamin J) and *Dellway v NAMA* [2011] 4 IR 1 at 225 (Denham J).

In conclusion could I say that many of the issues raised in this case touched the lives, in a most personal and profound way, of many individuals and also are of deep concern to any caring society. These proceedings involve complex social, ethical, medical and legal issues. In my respectful view, such inter-related and inter-dependent matters are best dealt with by the legislature. The Oireachtas, as a forum, could fully debate what changes, if any, are required and then, if necessary, the scope and scale of such changes. All those who might be impacted by any such change could have their interests fully considered and reputably debated.

In *M.D. (a minor) v Ireland*²⁴² Denham CJ held that (emphasis added):

[49] The fundamental constitutional question is whether it falls to the court or to the Oireachtas to make the judgment as to whether the risk that the female will become pregnant justifies exempting her, but not her male counterpart, from prosecution. The framing of sexual offences in such a way as to protect young people from the dangers of early sexual activity is a matter of notorious difficulty. States have, for centuries, wrestled with questions of great sensitivity concerning the appropriate age to set, whether to differentiate between males of different ages, or to differentiate on grounds of difference in age between the persons, not to mention the more recent liberation of same sex activities from the stigma of criminality.

[50] Decisions on matters of such social sensitivity and difficulty are in essence a matter for the legislature. Courts should be deferential to the legislative view on such matters of social policy.

...

[54] In considering s. 5 of the Act of 2006, the State justified the legislation by a social policy of protecting young girls from pregnancy, by creating a law governing anti-social behaviour, i.e. under age sexual intercourse. This was a choice of the Oireachtas. Even in a time of social change, it is a policy within the power of the legislature. The issue of under age sexual activities by young persons involves complex social issues which are appropriately determined by the Oireachtas, which makes the determination as to how to maintain social order. The Oireachtas could have applied a different social policy but s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis, and was not arbitrary.

...

[56] The Oireachtas made a choice, and such a legislative decision reflects a social policy on the issue. While the legislature could have enacted another social policy, it was an approach the legislature was entitled to take, it was an issue in society to which the legislature had to respond. The danger of pregnancy for the teenage girl was an objective which the Oireachtas was entitled to regard as relating to "differences of capacity, physical and moral and of social function", as provided for in Article 40.1 of the Constitution.

²⁴¹ [2002] IEHC 116 at para 177 (McKechnie J).

²⁴² [2012] 1 IR 697 at 716 and 719 (Denham CJ, per curiam).

The court would dismiss the appeal and reject the claim that s. 5 of the Act of 2006 is invalid having regard to the Constitution.

It is also relevant to note the following remark of Geoghegan J in *Roche v Roche*²⁴³:

Hardly a week passes now when some new alleged medical use of an embryo is signposted in the media, one of the latest being a cure for total blindness. The moral and ethical problems in this area are legion. There is no common agreement on their resolution. Since most of these problems are of an ultra-modern nature, I rather doubt that there is a constitutional solution to them but that does not mean that there cannot and indeed should not be regulation by the Oireachtas.

In the recent Supreme Court case addressing the identification and registration of the legal mother following a birth by a surrogate, In *M.R. v An t-Ard –Chláraitheoir*,²⁴⁴ Denham CJ stated (emphasis added):

Legislation to date in Ireland has not addressed the issues arising as a result of surrogacy arrangements. As a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for this Court to legislate on the issue.

...

Any law on surrogacy affects the status and rights of persons, especially those of the children; it creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas.

...

There is a lacuna in the law as to certain rights, especially those of the children born in such circumstances. Such lacuna should be addressed in legislation and not by this Court. There is clearly merit in the legislature addressing this lacuna, and providing for retrospective situations of surrogacy.

...

The issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas. They relate to the status and rights of children and a family. It is important that the rights of the twins, the parent respondents, the notice party and the family are vindicated pursuant to the law and the Constitution.

Very similar views were expressed by all of the other four judges.²⁴⁵

²⁴³ [2010] 2 IR 321 at 393 (SC) (emphasis added).

²⁴⁴ [2014] IESC 60 per Denham CJ at paras 96, 113, 116 and 118.

²⁴⁵ See per MacMenamin J at paras 11, 52 and 69; per O'Donnell J at paras 6, 16 and 17; per Hardiman J at paras 5, 9, 15, 17 and 19; per Clarke J (dissent) at paras 2.18-23, 8.6, 8.8, 9.6, 10.2 and 10.3.

Thus, while the Supreme Court (and O'Donnell J in particular) was careful not to suggest that the Oireachtas was unbounded in its discretion when legislating in respect of AHR²⁴⁶ and to avoid formally pre-judging the various issues of constitutional rights that might arise,²⁴⁷ it is undeniable that the overall sense from the judgments is that the Oireachtas will be afforded a relatively 'wide discretion'.²⁴⁸ In particular, it seems unlikely that the present Supreme Court (or a majority of it) would have any appetite to derive from Articles 41 and 42 a substantive normative vision of family life and relationships with which to assess or strike down legislation providing for or otherwise regulating AHR (including donor-based AHR and perhaps even surrogacy).²⁴⁹

A possible exception to the above conclusion might conceivably be recognised with respect to O'Donnell J²⁵⁰ and, to a lesser extent, Clarke J²⁵¹ who both expressly allowed for the possibility that a future legislative scheme allocating parentage in AHR could

²⁴⁶ [2014] IESC 60 *per* Denham CJ at paras 104 and 118; *per* MacMenamin J at para 68; *per* O'Donnell J at para 38; *per* Clarke J (dissent) at paras 8.6 and 9.6.

²⁴⁷ [2014] IESC 60 *per* MacMenamin J at paras 12 and 65; *per* O'Donnell J at paras 3, 28 and 38; *per* Hardiman J at paras; *per* Clarke J (dissent) at paras 8.9 and 9.6.

²⁴⁸ [2014] IESC 60 *per* Clarke J (dissent) at 8.6 and 9.6. See also *per* Denham CJ at paras 65, 85, 96, 113-4, 116, 118; *per* MacMenamin J at paras 11, 52 and 68-9; *per* O'Donnell J at paras 5-6, 17; *per* Hardiman J at paras 4, 5, 19 and 8-9 ('*The question as to whom the Court should regard as the mother of a particular child, born as a result of assisted reproduction, raises fundamental issues the most basic of which is, "what is motherhood?"*'. It is to my mind self evident that the questions as basic as the one just posed cannot be answered by any technical legal exegesis or even by any purely logical process. This is because, at bottom, the question raised is not a legal question or a purely logical question. It is a question of values and attitudes so deep that it is an understatement to call it a matter of policy. In my judgments in *Sinnott and T.D* ([2001] 2 I.R. 545 and [2001] 4 I.R. 259, respectively) I give several reasons for the conclusion that the Courts should not impose their own opinions on questions which are not, fundamentally, of a legal nature at all.'). *per* Clarke J (dissent) at paras. 8.5-8.6, 8.10, 9.6, 10.2-10.4

²⁴⁹ [2014] IESC 60 *per* Denham CJ at para 65 ('...there is no definitive definition of "mother" in the Constitution'), 114, 97-103 (citing from CAHR report), 113-4, 116 and 118; *per* MacMenamin J at paras 38-39 ('*The issue in question simply was not within the contemplation of the drafters of the Constitution in 1936/1937. ... I am not persuaded that the constitutional provisions on the family (Article 41) or education (Article 42) assist in the process of interpretation.*') and 52; *per* Hardiman J at paras 5, 8-9; *per* Clarke J (dissent) at paras. 8.1-8.3 and 8.7-8.10.

²⁵⁰ [2014] IESC 60 *per* O'Donnell J at para 38.

See also the dictum of O'Donnell J in *Nottinghamshire Co Council v B (K) & B (K)* [2011] IESC 48 at para 49 (cited elsewhere in this Opinion).

²⁵¹ [2014] IESC 60 *per* Clarke J (dissenting) at para 9.6 (emphasis added):

'I should also restate my view that, in the complex situation with which it is now faced, the Oireachtas must be afforded a wide margin of appreciation in attempting to regulate the very difficult issues which arise. However, it seems to me that a form of regulation which precluded any possibility in any circumstances of a genetic mother from being recognised as the mother of a child or which precluded giving at least some recognition to the status of the genetic mother in some appropriate way, would be of doubtful constitutional validity. It would, for example, as already noted, preclude persons, such as the twins in this case, from ever being part of a constitutional family with their father.'

See similarly *per* Clarke J at para 8.9.

breach constitutional rights. In the case of O'Donnell J, this point was made in the context of his efforts to characterise the Court's decision as being a narrow one with limited knock-on consequences (emphasis added):²⁵²

For the purposes of registration, a choice must be made between two persons who each fulfil part of the function traditionally performed by a mother. It is not self-evidently contrary to any constitutional scheme to require the registration of the birth mother as mother, at least initially, especially when to do so maintains consistency with all other births, and indeed other birth registration systems.

It should be apparent however that this conclusion is dependent upon the essentially narrow focus of this case. It is in my judgment permissible to have a birth registration system registering the birth mother, initially. That is what the 2004 Act does. But that only illustrates the fact that serious constitutional issues must necessarily arise if that position is maintained for all time and for all purposes. From a human point of view it is completely wrong that a system, having failed to regulate in any way the process of assisted reproduction, and which accordingly permits children to be born, nevertheless fails to provide any system which acknowledges the existence of a genetic mother not merely for the purpose of registration, but also in the realities of life including not just important financial issues such as inheritance and taxation, but also the many important details of family and personal life which the Constitution recognises as vital to the human person. Very different issues would arise in such circumstances. In my view however, on the narrow question of registration on birth raised in this case, the first named respondent is correct that the 2004 Act on true construction requires the registration of the birth mother and in doing so is not unconstitutional. I wish to make it as clear as is possible that this decision is limited to the question of immediate registration of birth: it should not be taken as deciding anything more.

This characterisation by O'Donnell J of the significance and limits of the Supreme Court's decision in *M.R.* is important because not only did Hardiman J concur but O'Donnell J concurred with the judgments of Denham CJ and MacMenamin J which suggests that he at least considered nothing in their judgments to contradict his own narrow construal of the decision's meaning and effects.

Returning to the broader constitutional principle, we note that Brian Foley usefully distinguishes two broad categories of reasons for judicial deference when reviewing legislation that involves the balancing of competing rights or complex, difficult or sensitive areas of social policy, namely those based (1) on institutional competence and (2) on normative considerations (such as issues of democratic legitimacy and

²⁵² [2014] IESC 60 *per* O'Donnell J at paras 37-38.

accountability).²⁵³ Falling somewhere between the two categories is a further concern expressed by O'Donnell J in *M.R. v An t-Ard Chláraitheoir*²⁵⁴ as follows:

... the absence of legislative action means that citizens will inevitably seek a resolution of their problems through litigation. Courts cannot abstain from determining a legal issue which is properly before a court and which requires to be decided. But this does not mean that the Court can provide a legislative scheme, whether detailed or simple. Instead a decision on a constitutional matter can be a frustratingly binary choice between upholding legislation, or striking it down and leaving a gap which it is for the other constitutional organs to fill. In some cases the consequence of a decision on constitutionality may even limit the options for legislation. In the case of statutory interpretation, a court's function will be to declare what the law is, rather than what it ought to be. Any such declaration of the law will however inevitably affect other cases. Thus in this case for example, the issue might be said to be whether under the Civil Registration Act 2004 the genetic mother or the birth mother is to be registered on the birth certificates. The choice of one excludes the other and will apply to all cases.

...

The High Court Judgment is a careful consideration of a very difficult area. Considering itself to be faced with a choice between a birth mother and a genetic mother, it eschewed ideology, and followed what it considered was the best scientific knowledge, and in doing so can be said to have made new law. In deciding individual cases courts may unavoidably establish principles which determine all other disputes raising the same issue of principle (at least until those principles are themselves altered by further decisions, legislation or possibly constitutional amendments). That is in one sense to make law, even if it occurs much less often than students and commentators imagine or would perhaps like. But such decision making, even with far-reaching effect, is not legislation nor is it the same as legislation. A court's function and skill is in deciding justly the particular case before it, and it does not necessarily have full visibility of, or information in relation to, all other circumstances potentially affected by its decision. Furthermore, it is constrained as to how it can decide a case. The court is required to decide a case according to the law. It is not free to decide a case simply because it considers the result popular, wiser or more attractive, or indeed because it affects an acceptable if illogical compromise between competing interest groups. The court's options are limited. Taking this case as one example, the decision in the High Court appears to have been one to all intents and purposes between the genetic mother and the birth mother, and the choice of one excludes the other. Even then, whoever is registered must stay registered for all time, as I understand it, no one suggests that it is open to the Court to create a scheme for sequential registration. Nor can

²⁵³ Foley, *Deference and the Presumption of Constitutionality* (IPA, 2008) at 122-6. One should probably also add as a third category (though perhaps operating at a different level of explanation) reasons which are grounded in appeals to what the text of the Constitution itself requires.

²⁵⁴ [2014] IESC 60 per O'Donnell J at paras 7 and 17-18.

it decide that if certain requirements are followed, the commissioning parent is to be treated as the parent; still less can it decide what those requirements are. In principle, and subject to the Constitution, a much wider range of options are open to the Oireachtas.

These structural constraints impose limits on the manner in which courts develop the law. In most cases courts develop principles incrementally and avoid so far as possible sweeping generalisations, however much that might be applauded by the law student in search of a simple or memorable principle, or commentators who happen to agree with the outcome. Sometimes this incremental approach is couched in terms that the Court should not usurp the functions of the legislature. In this jurisdiction, courts on occasions point to the sole and exclusive power to legislate conferred upon the legislature by Article 15.2 of the Constitution. But in my view, this limitation is perhaps better understood as a limitation on the powers of courts which is inherent in the nature of courts and the administration of justice. Sometimes the administration of justice may indeed require a decision which has dramatic and far-reaching implications. If the decision is truly required to decide the case then it is not a valid objection that it sweeps far and it would not be contrary to Article 15.2. But such a step must be truly required by the obligation to administer justice in the case, even considered broadly. If it is not necessary to decide a particular issue or decide it in a particular way to decide the case, then it may be necessary, or at least wise, not to decide it.

The undesirability of judicial decisions subsequently binding the hands of the Oireachtas in the area of AHR legislation in particular was also emphasised in the judgment of Hardiman J in *M.R.*,²⁵⁵ with clear echoes of his observations in the earlier Supreme Court case of *North Western Health Board v H.W.*²⁵⁶

²⁵⁵ *M.R. v An t-Ard -Chláraitheoir*[2014] IESC 60 per Hardiman J at paras 17-20.

²⁵⁶ [2001] 3 IR 622 at 761-2 (emphasis added):

'I would however, observe that in a case such as the present it is particularly desirable from every point of view that any initiative to compel parents to subject their children to a test such as P.K.U. be based on statute law and not on an application such as the present. I am expressing no view whatever as to whether such legislation would be desirable or otherwise. But if it were thought that a parent should be deprived of a right to refuse to consent to the P.K.U. test, or any test, inoculation, examination, or procedure, that would be a major departure in public policy. The legislature, and not the courts, are in the best position to judge whether such an innovation is necessary, proportionate or desirable, whether there are countervailing considerations of a social or medical nature or otherwise; whether there exists sufficient consensus in the community to make legislation feasible or desirable and many other relevant considerations.

...

Moreover, if and when the legislature decides to introduce legislation of the relevant kind it will be for the courts to determine, if the occasion arises, whether such legislation is consistent with the provisions of the Constitution. If the court is called upon to make this decision, it will have the benefit of evidence and argument on a specific provision, probably in circumstances where the parties are more on a footing of equality from the point of view of resources than the present plaintiff and defendants. If the court itself imposed a novel

4.4.2 Application of the principle to present query

Notwithstanding all of the foregoing, it is of course not the case that legislation dealing with complex or sensitive issues of social policy is necessarily immune from judicial scrutiny or impervious to challenge by reference to the constitution. Moreover, there is a significant difference between, on the one hand, a claim that a legislative provision, for example, prohibiting a particular type of AHR practice (say egg donation) for all persons, including married couples, should be declared unconstitutional based on a substantive argument as to the rights of the couples affected and, on the other hand, a claim that a similar prohibition, but with an exemption for OSM couples only, unlawfully discriminates between two classes of married couple on the grounds of their sex.²⁵⁷ A determination in favour of the former claim necessarily involves the court in the recognition of novel and previously unarticulated personal rights to AHR techniques and in substantive policy judgments as to the moral rights and wrongs or potential benefits and harms of competing regulatory regimes for AHR. The above mentioned case law strongly suggests courts should and will avoid trespassing upon legislative decisions in such ways wherever possible. By contrast, a determination of the second claim involves a more oblique and indirect engagement with the legislature's policy decision. It is not concerned *per se* with the decision to prohibit the practice in question (or the existence of personal rights in respect of such practices) but only the decision to do so in different ways with respect to different married couples / constitutional Families based on their sex. This narrows considerably the issues to be determined. The net question becomes, as identified in the principal argument above, whether it would even remain open to the Oireachtas following the Amendment to engage in sex-based discrimination as between the entitlements under law of different classes of married couples / constitutional Families. That is a more conventional and justiciable issue for judicial determination. For while it is an issue with undoubted potential for wide-ranging effects upon social policy, it is less obviously a question of social policy in that it admits of analysis and resolution by the construction of the terms of the Amendment itself and the application of existing legal principles in respect of the entitlements of the Family under Articles 41 and 42 and the equality guarantee under Article 40.1, e.g. in the manner proposed in the principal argument above.

In short, we accept that the above-cited jurisprudence on the deference to be shown by the courts to legislative measures concerned with sensitive, complex and difficult matters of social policy is broadly relevant to the areas of law and policy touched upon

obligation, the constitutionally envisaged arrangement whereby one organ of government makes law and another decides on its constitutionality, would be inhibited in its operation.'

²⁵⁷ The distinction between a claim based on the breach of a stand-alone constitutional right and a claim based on discriminatory treatment contrary to Article 40.1 was recognised and applied by the High Court (Laffoy J) in *S.M. v Ireland (No. 2)* [2007] 4 IR 369 at 381-2.

by this query. However, we do not consider that the principle would apply with such determining force in respect of the specific legal issues raised by this query as to affect our conclusion that something akin to the principal argument set out above more probably states the law correctly than either counter argument (A) or (B). The principal argument has a logical and straight-forward structure that is grounded in uncontroversial and well settled principles. We do not consider that arguments based on an appeal to generic principles of judicial deference would be sufficient to resist it even if made in conjunction with counter arguments (A) or (B).

5. NOTE ON HUMAN RIGHTS LAW

Given the fairly extensive domestic case law on Articles 40.1, 41 and 42, it is unlikely that any EU or international law precedent, including even ECHR jurisprudence, will be determinative for the question of whether discriminatory treatment as between SSM and OSM couples in respect of adoption, fostering, AHR and surrogacy would be unconstitutional post-Amendment. However, the arguments and reasoning used in such precedents may well be opened before and carefully considered by the Irish courts in the event that the constitutionality of any legislative or executive measures requiring, permitting or giving effect to such discrimination fell to be considered by them.

The overall picture that emerges from the materials set out in more detail in Appendix 3 is essentially as follows. As a matter of EU and international human rights law, same sex couples cannot avail directly of any express right to marry and found a family but may well secure the same practical effect and legal outcome in the areas of AHR and adoption by appeal to expanding conceptions of rights to equal treatment, privacy and respect for “family life”. The effectiveness before the Irish courts of a reliance on such rights is considerably reduced by a number of factors peculiar to the Irish legal order, not least our relatively conservative jurisprudence in respect of the equality guarantee in Article 40. 1 and our more articulated jurisprudence on marriage and the Family on foot of Articles 41 and 42 which naturally reduces the scope for judicial innovation by recourse to more abstract concepts of privacy and respect for (*de facto*) family life.

Nevertheless, it remains the case that the approach to equality claims by same sex couples which is evident in EU and international jurisprudence considered in Appendix 3 may have a persuasive impact on any Irish court called to determine the constitutionality of measures discriminating between OSM and SSM couples. That approach can be summarised as an “all or nothing” strategy. In other words, while States are not obliged to recognise same sex marriage or to give rights to apply for adoption or to avail of AHR to persons other than married (opposite sex) couples, if any State does extend such rights beyond married couples then it cannot distinguish between persons or couples by reference to their sex or sexual orientation.²⁵⁸ That

²⁵⁸ For examples of this “all or nothing” strategy in relation to the rights of same sex couples:

(a) In respect of the Court of Justice of the EU: *Maruko* (C-267/06) [2008] ECR I-01757 and *Römer v Freie und Hansestadt Hamburg* (C-147/08) [2011] ECR I-03591 at para. 52;

(b) In respect of the European Court of Human Rights: *E.B. v France* (App no 43546/02, Grand Chamber) 22 January 2008 at para. 49 and *X and others v Austria* (App no 19010/07, Grand Chamber) 19 February 2013;

(c) In respect of the decisions of the (ICCPR) Human Rights Committee: *Young v Australia* Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) and *X v Colombia* Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007).

general approach is consonant with and supportive of the principal argument which we have advanced in answer to the present query.

Paul Brady BL
Michael M Collins SC
14th April 2015

APPENDIX 1 : Relevant EU and International Human Rights Law

A1.1 ECHR

The relevant articles of the ECHR provide as follows:

Article 8 Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The European Convention on Human Rights (the 'Convention') and the first, fourth, sixth and seventh protocols to it are incorporated into Irish law in accordance with the provision of the European Convention on Human Rights Act 2003 (the 'ECHR Act'). The ECHR Act provides as follows:-

2.(1) In interpreting and applying any statutory provision or rule of law, a court shall, insofar as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

3.(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1) may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court and the court may award to the person such damages (if any) as it considers appropriate.

It is clear from the foregoing that the ECHR is thus incorporated into Irish law at what has been termed a “sub-constitutional” level.²⁵⁹ Nevertheless, the Irish courts are likely to take cognisance of equivalent ECtHR jurisprudence when interpreting or applying Irish constitutional law to novel legal questions and problems, such as those raised by AHR.²⁶⁰ The Supreme Court has indicated, however, that in cases where there is a direct conflict between the position taken by the ECtHR and a requirement of the Irish Constitution, the Constitution will necessarily prevail. This issue arose in *J. McD. v P.L.*²⁶¹ where the High Court (Hedigan J) held that although there was no case directly on point, the jurisprudence of the ECtHR seemed to “*demonstrate a substantial movement towards ... a finding*” that a lesbian couple living “*together in a long term committed relationship of mutual support involving close ties of a personal nature*” constituted a *de facto* family enjoying rights under Article 8 of the ECHR.²⁶² As it happens, Hedigan J’s prognosis was proven correct just over 2 years after his judgment was handed down, when the ECtHR departed from its previous position and ruled that a same sex couple enjoyed “family life” for the purposes of Article 8 protection.²⁶³ The Supreme Court overturned the judgment of Hedigan J on appeal, however, in a decision that came approximately 6 months before the ECtHR reversal of its views on the issue.

In their judgments, the members of the Supreme Court took issue with 4 aspects of Hedigan J’s findings in respect of ECHR law. First, Murray CJ ruled that the High Court had erred in purporting to directly apply the Convention and by-passing the provisions of the ECHR Act 2003 which governed the application of the Convention in Irish law.²⁶⁴ Second, Denham J ruled that, as a matter of ECHR case law as it stood at the time of both the High and Supreme Court decisions, Hedigan J was simply incorrect to find that same sex couples constituted a *de facto* family for the purposes of the protection of family life under Article 8.²⁶⁵ Third, Fennelly J ruled that even if the High Court was correct in its analysis of the direction in which ECHR jurisprudence was evolving on the question, it was not appropriate for an Irish Court to anticipate such developments

²⁵⁹ For a detailed discussion of the interaction between Irish and ECHR law and the role of the ECHR Act 2003 in this regard see *J. McD. v P.L.* [2010] 2 IR 199 at 245-253 (Murray CJ).

²⁶⁰ As the Supreme Court has put it: “...recourse may and has been had by our courts to the case law of the European Court of Human Rights for comparative law purposes when a court is considering the import of a right under our law which is the same or similar to a right under the Convention.” *J. McD. v P.L.* [2010] 2 IR 199 at 247 (Murray CJ).

²⁶¹ [2010] 2 IR 199.

²⁶² [2010] 2 IR 199 at 235.

²⁶³ *Schalk and Kopf v Austria* (App no 30131/04, First Section) 22 June 2010 – discussed further below.

²⁶⁴ *J. McD. v P.L.* [2010] 2 IR 199 at 253-256.

²⁶⁵ *J. McD. v P.L.* [2010] 2 IR 199 at 274.

when applying the Convention under the ECHR Act 2003.²⁶⁶ Fourth, and most importantly for present purposes, Denham J held that in any conflict between ECHR and Irish constitutional jurisprudence the latter must prevail.²⁶⁷

I am satisfied that the trial judge fell into error in his analysis of the case law which has arisen under article 8 of the Convention and in the European Court of Human Rights, in treating the respondents and the child as a family. However, even if this is not so, the Irish law would conflict with such a scenario and would govern the situation. Under the Constitution it has been clearly established that the family in Irish law is based on a marriage between a man and a woman.

Quite apart from the question of the effect of the ECHR or judgments of the ECtHR within Irish law, there is the further consideration of the potential political effects should Irish constitutional law be construed by the courts in a way that puts it at odds with the trajectory of ECHR jurisprudence and leaves the State liable to an adverse finding from the European court that it has failed to comply with its obligations under the Convention.

With the foregoing legal context in mind, it is now proposed to briefly review the leading ECtHR cases in the areas of relevance to the present query.

A1.1.1 Right to marry

The ECtHR has so far consistently rejected efforts to read a right to same sex marriage into the ECHR.²⁶⁸ It has held that that Article 12 of the Convention does not (at least yet²⁶⁹) impose an obligation on the governments of the Contracting States to grant same

²⁶⁶ *J. McD. v P.L.* [2010] 2 IR 199 at 314-6.

²⁶⁷ *J. McD. v P.L.* [2010] 2 IR 199 at 274.

²⁶⁸ See, e.g., *Sheffield and Horsham v United Kingdom* (App nos 22985/93 & 23390/94, Grand Chamber) 30 July 1998 and *Schalk and Kopf v Austria* (App no 30131/04) 22 June 2010.

²⁶⁹ The Court's position on this is far from categorical and it has expressly left itself room to amend its position pending changes to the national legal frameworks of the contracting state parties:

"61. Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State." *Schalk and Kopf v Austria* (App no 30131/04) 22 June 2010 at para 61 (emphasis added).

It is thus relevant to note that there are several other "communicated cases" concerning the right to legal recognition of same sex unions currently being processed by the ECtHR. See *Oliarai and others v Italy* (App no 36030/11) and *Felicetti and others v Italy* (App no 18766/11) (both involving same sex Italian couples married in America seeking recognition of the marriage in Italy). See also *Orlandi and others v Italy* (App no 26431/12) and *Chapin and Charpentier v France* (App no 40183/07). There is also a communicated case concerning alleged discrimination against

sex couples access to marriage. Nor can a right to same sex marriage be derived from Article 14 taken in conjunction with Article 8. The Court has further held that, where a State chooses to provide same sex couples with an alternative means of recognition, it enjoys a certain margin of appreciation as regards the exact status conferred.²⁷⁰

In its most recent judgment on the issue the Grand Chamber has gone even further still holding (by 14 vote to 3) that (emphasis added):²⁷¹

96. The Court reiterates that Article 12 of the Convention is a lex specialis for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman (see Rees v. the United Kingdom, cited above, § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see Schalk and Kopf v. Austria, cited above, § 63).

There has never been a case before the Court dealing with a difference in treatment between same sex married couples and opposite sex married couples.²⁷²

Despite the foregoing, the ECHR does not give unqualified permission to states to discriminate on the grounds of a person's marital status if it deems the unmarried person to be in a relevantly similar position to that of a married person. Thus in *P.M. v United Kingdom*²⁷³ the applicant complained that he was not allowed to deduct from his taxable income the payments he made for the maintenance of his daughter solely because he had not been married to the mother. The Court said (emphasis added):

27... This applicant differs from a married father only as regards the issue of marital status and may, for the purposes of this application, claim to be in an relevantly similar position.

a same sex couple by an Italian immigration law which limits family visas to (married) spouses. *Taddeucci and McCall v Italy* (App no 51362/09).

²⁷⁰ *Schalk and Kopf v Austria* (App no 30131/04) 22 June 2010 at paras. 49-64, 101 and 108. See also *Manenc v France* (App no 66686/09, admissibility decision) 21 September 2010 ruling inadmissible a complaint based on the refusal of a reversionary pension to survivor of a same sex civil partnership. While the pension entitlement was available to a surviving spouse, the Court ruled that the civil partnership scheme in France was sufficiently different from marriage (particular with respect to inheritance, dissolution and joint financial responsibilities) that the applicant had not been in a situation identical to or comparable with that of a surviving spouse.

²⁷¹ *Hämäläinen v Finland* (App no 37359/09) 16 July 2014.

²⁷² The discrepancies between French marriage and adoption law (where same sex and opposite sex couples have identical rights) and French law regulating AHR (which restricts it to opposite sex couples) may prove a ripe target for future proceedings in this regard.

²⁷³ (App no 6638/030) 15 September 2005.

28. *The justification for the difference in treatment relied on by the Government is the special regime of marriage which confers specific rights and obligations on those who choose to join it. The Court recalls that it has in some cases found that differences in treatment on the basis of marital status has had objective and reasonable justification... It may be noted however that as a general rule unmarried fathers, who have established family life with their children, can claim equal rights of contact and custody with married fathers.... In the present case, the applicant has been acknowledged as the father and has acted in that role. Given that he has financial obligations towards his daughter, which he has duly fulfilled, the Court perceives no reason for treating him differently from a married father, now divorced and separated from the mother, as regards the tax deductibility of those payments. The purpose of the tax deductions was purportedly to render it easier for married fathers to support a new family; it is not readily apparent why unmarried fathers, who undertook similar new relationships, would not have similar financial commitments equally requiring relief.*

29. *The Court concludes therefore that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of the first Protocol in this case.*

This shows the reluctance of the Court to look for a rationale behind the literal terms of Article 12 and attribute any special status or social function to the family based on marriage.

A1.1.2 Respect for private and family life

In contrast to its literal approach to Article 12, the ECtHR has tended to construe the concept of “family life” broadly so as to include various *de facto* families under Article 8. Indeed as more and more socially and politically contentious issues are litigated before the ECtHR, a liberal and somewhat *ad hoc* extension of the key operative concepts of the Article, namely “private life” and “family life”, has become a notable feature of its Article 8 jurisprudence.²⁷⁴ With respect to same sex couples the most significant recent development has been a shift by the ECtHR from considerations of “private life” to those of “family life” when considering alleged violations of the Article 8 rights of such couples.²⁷⁵ This occurred in the judgment of the First Section in *Schalk and Kopf v Austria*²⁷⁶ which argued as follows:

²⁷⁴ It appears, for example, that even co-habitation is not a necessary requirement for an unmarried couple to be regarded as a “family”. See *Vallianatos v Greece* (App no 29381/09 and 32684/09, Grand Chamber) 7 November 2013 at para. 73.

²⁷⁵ The seeds for this development were sown in the first cases in which gay applicants succeeded in claims advanced under Article 8: *Salgueiro da Silva Mouta v Portugal* (App no 33290/96) 21 December 1999 and *Karner v Austria* (App no 40016/98) 24 July 2003.

²⁷⁶ (App no 30131/04, First Section) 22 June 2010.

90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes "family life".

91. The Courts reiterates its established case-law in respect of different-sex couples, namely that the notion of "family" under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit from the moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000-VIII; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and *Johnston and Others v. Ireland*, 18 December 1986, § 56, Series A no. 112).

92. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, with further references). In *Karner* (cited above, § 33), concerning the succession of a same-sex couple's surviving partner to the deceased's tenancy rights, which fell under the notion of "home", the Court explicitly left open the question whether the case also concerned the applicant's "private and family life".

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then, a considerable number of member States have afforded legal recognition to same-sex couples (see paragraphs 27-30 above). Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above²⁷⁷).

94. In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 of the Convention applies.

²⁷⁷ The Court here refers to Directives 2003/86/EC and 2004/38/EC – as to which see A3.2 below.

The Court thereby departed from and reversed the position it had taken in 2001 in *Mata Estevez v Spain*.²⁷⁸

In *Gas and Dubois v France*²⁷⁹, an admissibility decision made only a few months after the judgment in *Schalk and Kopf v Austria*, the Court (Fifth Section) found that the relationship between two women who were living together and had entered into a civil partnership, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted “family life” within the meaning of Article 8 of the Convention.

The Grand Chamber went even further in the more recent case of *Vallianatos v Greece*.²⁸⁰ It found Greece to be in violation of the Convention in creating a civil partnership scheme for opposite sex couples only. The Court asserted the interest of same-sex couples to have “*their relationship officially recognised by the State*” on the basis that “*same-sex couples are just as capable as different-sex couples of entering into stable committed relationships*” (para. 81). It found that the interest of these couples is “*to have their relationship legally recognised*” (para. 90) is a component of their private and family life which is guaranteed by Article 8 of the Convention.²⁸¹

It should be noted that, strictly speaking, the Court does continue to accept that “*protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment*”²⁸² – but in practice this has had

²⁷⁸ (App no 56501/00) 10 May 2001. In the case the Court had ruled:

“As regards establishing whether the decision in question concerns the sphere of ‘family life’ within the meaning of article 8 s.1 of the Convention, the court reiterates that, according to the established case law of the Convention Institutions, long term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by article 8 of the Convention. ... The court considers that, despite the growing tendency in a number of European States toward the legal and judicial recognition of stable de facto partnerships between homosexuals, this is, given the existence of little common ground between the contracting states, an area in which they still enjoy a wide margin of appreciation ... Accordingly, the applicant’s relationship with his late partner does not fall within article 8 in so far as that provision protects the right to respect for family life. It follows that this part of the application is incompatible ratione materiae with the provisions of the Convention for the purposes of article 35, s. 3.”

²⁷⁹ (App no 25951/07) 31 August 2010 at para. 82. (Not to be confused with the judgment delivered in that case on 15 March 2012, discussed below).

²⁸⁰ (App no 29381/09 and 32684/09, Grand Chamber) 7 November 2013. The same result is apparent in the Court’s “all or nothing” approach to civil registration schemes.

²⁸¹ Strictly speaking, however, the Grand Chamber in *Vallianatos* did not rule on whether a State has a positive obligation under Article 8 to offer legal recognition to same sex couples (para. 75). Rather, it held that such an obligation arises by a combination of Article 8 and Article 14 if and when a State offers such recognition, other than marriage, to different sex couples (para. 92).

²⁸² *Vallianatos v Greece* (App no 29381/09 and 32684/09, Grand Chamber) 7 November 2013 at para. 83; *X. and others v Austria* (App no 19010/07, Grand Chamber) 19 February 2013 at para.

little effect on the Court when assessing the proportionality of alleged interferences with the rights of unmarried and same sex couples.

A1.1.3 Right to procreate / use AHR

The two strands of ECHR jurisprudence just discussed (one upholding the legal privileging of opposite sex marriage, the other extending the Article 8 rights to “family life” to same sex couples) sit somewhat uneasily together and have resulted in an approach to issues of AHR and adoption which can perhaps be summarised as an “all or nothing” strategy.²⁸³ In other words, the Court proceeds on the basis that the ECHR does not oblige a State to give rights to apply for adoption or to avail of AHR to persons other than married (opposite sex) couples, but if any State does then it cannot distinguish between persons or couples by reference to their sex or sexual orientation.²⁸⁴

In *S.H. and others v Austria*,²⁸⁵ the Grand Chamber held that the right of a couple to conceive a child and to make use of AHR for that purpose is protected by Article 8, as such a choice is deemed to be an expression of private and family life. This finding was consonant with the views expressed by the Grand Chamber in 2007 in *Dickson v United*

128; *Kozak v Poland* (App no 13102/02) 2 March 2010 at para. 98; *Karner v Austria* (App no 40016/98) 24 July 2003 at para. 40.

²⁸³ The same result is apparent in the Court’s “all or nothing” approach to civil registration schemes, see e.g. *Vallianatos v Greece* (App no 29381/09 and 32684/09, Grand Chamber) 7 November 2013 discussed above.

²⁸⁴ The same strategy is evident in the CJEU’s reasoning in *Maruko* (C-267/06) [2008] ECR I-01757 and *Römer v Freie und Hansestadt Hamburg* (C-147/08) [2011] ECR I-03591 at para. 52. See similarly the decisions of the (ICCPR) Human Rights Committee in *Young v Australia* Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) and *X v Colombia* Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007). On these decisions see part A3.3.1 below.

²⁸⁵ (App no 57813/00) 3 November 2011.

Kingdom,²⁸⁶ but appears hard to reconcile with the Grand Chamber's 2008 judgment in *E. B. v France*²⁸⁷ (a case not even referred to in *S.H.*).

The court in *S.H.* went on, however, to reject the contention that the 1992 legislative ban in Austria on the use of donated gametes in IVF²⁸⁸ was a disproportionate interference with the Article 8 rights of two opposite-sex couples who required sperm and ovum donation respectively for the purposes of AHR. As single persons or same sex couples likewise cannot commission a child through IVF without the use of either donated sperm or donated ova, the judgment presents a significant obstacle to any argument that such persons or couples must be allowed to avail of AHR in order to comply with the State's obligations under the ECHR.

As against this, however, it should be noted that since the judgment in *S.H.* both the Italian the Austrian Constitutional Courts (applying what was in each case held to be the relevant principles of ECHR jurisprudence) have upheld challenges to certain provisions of domestic legislation concerning AHR which restricted heterologous fertilisation.

²⁸⁶ (App no 44363/04, Grand Chamber) 4 December 2007 at paras. 65-6 (emphasis added):

"65. The restriction in issue in the present case concerned the refusal to the applicants of facilities for artificial insemination. The parties did not dispute the applicability of Article 8, although before the Grand Chamber the Government appeared to suggest that Article 8 might not apply in certain circumstances: where, for example, a prisoner's sentence was so long that there was no expectation of ever "taking part" in the life of any child conceived and Article 8 did not guarantee a right to procreate.

66. The Court considers that Article 8 is applicable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives, which notions incorporate the right to respect for their decision to become genetic parents (see E.L.H. and P.B.H. v. the United Kingdom, nos. 32094/96 and 32568/96, Commission decision of 22 October 1997, DR 91-A, p. 61; Kalashnikov v. Russia (dec.), no. 47095/99, ECHR 2001-XI; Aliev v. Ukraine, no. 41220/98, § 187-89, 29 April 2003; and Evans v. the United Kingdom [GC], no. 6339/05, § 71-72, ECHR 2007-I)."

²⁸⁷ (App no 43546/02, Grand Chamber) 22 January 2008 at para 41 (emphasis added):

"41. The Court, noting that the applicant based her application on Article 14 of the Convention, taken in conjunction with Article 8, reiterates at the outset that the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see Fretté, cited above, § 32). Neither party contests this. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family (see Marckx v. Belgium, judgment of 13 June 1979, Series A no. 31, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see Nylund v. Finland (dec.), no. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, § 62), or the relationship that arises from a lawful and genuine adoption (see Pini and Others v. Romania, nos. 78028/01 and 78030/01, § 148, ECHR 2004-V)."

²⁸⁸ Somewhat curiously the Austrian law in question did not prohibit heterologous sperm donation in respect of *in vivo* fertilisation.

In April 2014 the Italian Constitutional Court found the 2004 statutory restriction on sperm and egg donation to be unconstitutional.²⁸⁹ A detailed and accurate on-line summary in English of the facts and reasoning notes as follows:²⁹⁰

The issue was whether art. 4 § 3, art.9 §1 and art. 12 § 1 of the Italian Medically Assisted Reproductive Act of 2004 (hereinafter l. no. 40/2004), enacted by the Parliament on February 19th 2004, were unconstitutional. They prohibited fertilization by means of both egg and semen donors by using gametes that did not belong to the couple. Besides, they imposed administrative sanctions between €300.000 and €600.000 to doctors violating the prohibition (art. 4 of l. 40/2004).

The Constitutional Court indicated that the above mentioned provisions are in contrast with the principle of equality (art. 3 Const.), according to which likes should be treated alike, and different situations should be treated differently. Nevertheless, the violation of art. 3 Const. also occurs in the event of different situations that are reasonably similar (Const. Court, no. 162/2014, §13). The Parliament is allowed to treat different situations differently—the Court indicated in the reasoning part— but only through use of both the principle of reasonableness and the proportionality test as the criteria for distinguishing case by case (Const. Court, no.162/2014, §13).

Inasmuch as the right to marry and establish a family (art. 29 Const.) implies the reproductive purpose of marriage, the Constitution protects the right to choose whether or not to have children, that is to say, the freedom of self-determination, only in case couples are affected by absolute or not reversible infertility (as a condicio sine qua non: Const. Court, no. 162/2014, §11.1). Such a fundamental freedom may be trumped only to protect equivalent constitutional interests (Const. Court, no. 162/2014, §6). The legislative provisions at issue did not comply with such criteria at all.

Furthermore, the Court asserted that Law No. 40/2004 is also inconsistent with the judgment of the European Court of Human Rights, in the case of S.H. and others v. Austria, Grand Chamber, 2011. As a result, the Law no. 40/2004 also infringed art. 117 Const. which entrenches the requirement for domestic legislation to comply with the constraints deriving from international obligations and EU legislation.

In addition, by drawing a comparison between fertilization and adoption, the Court inferred that genetic origin should not be regarded as a compulsory requirement for the family itself (Const. Court, no. 162/2014, §6). The legal status of children born by means of heterologous fertilization techniques (hereinafter HFT) is not questionable: they have the same status as those born in wedlock (Const. Court, no. 162/2014, §11.1) and the HFT do not affect their rights in any way.

²⁸⁹ Decision No. 162/2014 (9 April 2014). Text of judgment available here: <http://www.giurcost.org/decisioni/2014/0162s-14.html>.

²⁹⁰ <http://www3.unisi.it/dipec/palomar/italy.html>.

Finally, Law No. 40/2004 brought about an additional discrimination, since wealthy couples were able to afford the expenses involved in going abroad in order to have HFT, whereas more needy persons could not afford it.

In conclusion, the rationale of the decision states that couples affected by absolute or not reversible infertility have the right to have children by means of HFT under the law (art. 2, 3, 29, 31, 32 and 117 Const). As a result, it declares art. 4 § 3, art.9 §1 and art.12 § 1 inconsistent with the Constitution.

In December 2014 the Austrian Constitutional Court found the statutory restriction on sperm donation to be unconstitutional and the law was subsequently amended to take this into account.²⁹¹ The Constitutional Court placed particular emphasis on the impact of the law on lesbian couples. It noted that lesbian couples were allowed to adopt and held that it was irrational to prevent a lesbian couple having a child via AHR and sperm donation (where one of the couple would be the biological and birth mother) while allowing them to adopt and parent a child to whom they had no relation. In effect, the Court concluded that that lesbian couples enjoy a right to medically assisted procreation under Article 8 of the ECHR.²⁹² It should be noted that the ECHR has the status of and forms a substantive part of Austria's constitutional law.²⁹³

The Italian²⁹⁴ and Austrian decisions show that ECHR jurisprudence can be deployed (despite the Grand Chamber's own decision in *S.H. v Austria*) both to articulate at least a *prima facie* right on the part of infertile opposite sex couples and same sex couples to AHR procedures involving egg or sperm donation, and to challenge restrictions on that right premised on the right of children to the care and company of their natural mother and father.

With respect to the closely related but nevertheless distinct question of the registration and/or attribution of legal parentage following AHR, in 2013 the ECtHR (5th section) rejected as inadmissible a claim by a German lesbian couple that German law violates the Convention in failing to extend the presumption of legal parentage enjoyed in law by the husband of a child's birth mother to the same sex registered civil partner of a birth mother.²⁹⁵ While the decision turned to some degree on the specifics of German law in

²⁹¹ VfGH G 16/2013, G 44/2013 (10 December 2013). See << [<https://www.vfgh.gv.at/cms/vfgh-site/attachments/0/8/2/CH0006/CMS1396267035063/fortpflanzungsmedizing_g16-2013ua.pdf>>](https://www.vfgh.gv.at/cms/vfgh-site/attachments/0/8/2/CH0006/CMS1396267035063/fortpflanzungsmedizing_g16-2013ua.pdf).

²⁹² Particular emphasis was placed on the Grand Chamber's decision in *X. and others v Austria* (App no 19010/07, Grand Chamber) 19 February 2013. See further below.

²⁹³ See Martinico & Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Europa Law Publishing, 2010) at p. 66.

²⁹⁴ On the complex relationship between the ECHR and Italian constitutional law pursuant to article 117 of the Italian constitution see discussion in Martinico & Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Europa Law Publishing, 2010) at pp. 281-96.

²⁹⁵ *Boeckel v Germany* (App no 8017/11, decision) 7 May 2013. Summary: The applicants, two women in a registered civil partnership, complained about the refusal to register one of them as

the area and was concerned with the operation of a legal presumption, it weighs against the idea that a same sex civil partner or co-habitant of a child's birth mother enjoys a human right under the Convention to be recognised in law as the parent of that child.

With respect to the particular issue of surrogacy, it is evident three recent judgments on the topic²⁹⁶ that the ECtHR does not consider that the practice of surrogacy itself necessarily involves a violation of any identifiable human right or a failure to respect the best interests of the child (e.g. the right or interests of a child not to be brought into being in circumstances where it has two "natural" mothers, e.g. the genetic and the gestational). On the contrary, while the Court has allowed States a margin of appreciation with respect to whether to prohibit or permit surrogacy, in these three cases it invoked the "best interests" principle to criticise the way in which States have dealt with the *de facto* families arising on foot of surrogacy arrangements executed abroad in order to evade the letter of domestic prohibitions.²⁹⁷ Thus the freedom in principle of States to prohibit surrogacy is considerably limited in practice by the Court's (far from clear) jurisprudence on how the fact of surrogacy is subsequently addressed.

Finally, with respect to the recognition of any class of a justiciable right on the part of a child to the care and company of his or her biological parent²⁹⁸ there appears to be no ECtHR jurisprudence supporting such a right in the absence of some other ground of connection or obligation as between the biological parent and the child. Thus in the case of two children born by way of an anonymous egg donation, a Californian surrogate mother and the sperm of the commissioning French couple, the ECtHR concluded that the children's right to respect for their "private life" (not family life) under Article 8 had been disproportionately interfered with by French legislation restricting the *de jure*

a parent in the birth certificate of the other partner's child born during their partnership. They relied on Article 8 (right to respect for private and family life) taken alone and in conjunction with Article 14 (prohibition of discrimination) of the Convention. The Court declared the application inadmissible (manifestly ill-founded). It found that the applicants were not in a relevantly similar situation to a married different-sex couple when it came to the issue of the entries to be made in a child's birth certificate.

²⁹⁶ *Mennesson v France* (App no 65192/11, Fifth Section) 26 June 2014, (with similar facts and identical ruling) *Labassee v France* (65941/11, Fifth Section) 26 June 2014 and *Paradiso and Campanelli v Italy* (App no 25358/12, Second Section) 27 January 2015.

²⁹⁷ By contrast in a fourth recent case, *D and R v Belgium* (App no 29176/13, admissibility decision) 8 August 2014, the Court (Second Section) found that interference in the family rights of the applicants (a commissioning couple who had used a surrogate mother in the Ukraine and then experienced several months of delay in receiving the necessary immigration papers to bring the child back to Belgium while authorities there investigated the circumstances of the birth and confirmed the applicant father's biological link with the child) was justified and proportionate and ruled the claim inadmissible.

²⁹⁸ As distinct from the child's right to know its genetic identity or origins, as to which see, e.g., *Odievre v France* (App no 42326/98, Grand Chamber) 13 February 2003 para. 44 (and cases cited therein) and *Mennesson v France* (App no 65192/11, Fifth Section) 26 June 2014 at para. 99.

transcription into French law of the legal parenthood under Californian law of the commissioning couple (emphasis added).²⁹⁹

99. *The Court can accept that France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory (see paragraph 62 above). Having regard to the foregoing, however, the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard.*

100. *This analysis takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent. Having regard to the importance of biological parentage as a component of identity (see, for example, Jäggi, cited above, § 37), it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof. Not only was the relationship between the third and fourth applicants and their biological father not recognised when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of de facto enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard The Court considers, having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation.*

101. *Having regard also to the importance to be given to the child's interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed.*

This analysis is consonant the Commission's decision in *J.R.M. v. Netherlands*³⁰⁰ where it held:

The Commission considers that the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child.

²⁹⁹ *Mennesson v France* (App no 65192/11, Fifth Section) 26 June 2014 at paras. 99-101.

³⁰⁰ (App no 16944/90, admissibility decision) 8 February 1993.

As to the applicant's argument that there is family life between him and the child as there have been regular contacts between them for a period of several months after the child's birth, the Commission notes that these contacts were limited in time and intensity. Furthermore the applicant has apparently not considered to make any contribution, financially or otherwise, to the child's upbringing. The Commission is of the opinion that the applicant's contacts with the child, both in itself and together with his donorship, form an insufficient basis for the conclusion that as a result thereof such close personal tie has developed between them that their relationship falls within the scope of "family life" as referred to in Article 8 (Art. 8) of the Convention and, therefore, considers that the decision by the Dutch authorities on the applicant's request for access does not amount to a lack of respect for the applicant's family life.

A1.1.4 Adoption

The starting point of ECHR jurisprudence in respect of adoption is that Article does not guarantee the right to adopt.³⁰¹ Moreover, very recent judgments of the European Court (including its Grand Chamber) make it clear that it is not contrary to the ECHR for a State by law to limit joint adoption and "second-parent adoption"³⁰² to married couples – including where marriage itself is limited by law to opposite sex couples.³⁰³ States are entitled to a broad margin of appreciation in determining what the best interests of the child require when it comes to the legislative regulation of adoption.³⁰⁴ Problems of discrimination contrary to Article 14 may quickly arise, however, where rights to apply for adoption are conferred by domestic law on single persons and unmarried opposite sex couples but are denied to single homosexuals³⁰⁵ or to same sex couples.³⁰⁶ In such

³⁰¹ See, e.g., *E. B. v France* (App no 43546/02, Grand Chamber) 22 January 2008 at para 41.

³⁰² i.e. where a partner (e.g. spouse, civil partner, co-habitant) of a child's existing legal parent seeks to become the child's (second) legal parent by means of a simple adoption (i.e. an adoption which does not extinguish or sever the existing rights and duties of the first parent).

³⁰³ *Gas and Dubois v France* (App No 25951/07) 15 March 2012. Summary: The applicants were two cohabiting women. The case concerned the refusal of the first applicant's application for a simple adoption order in respect of the second applicant's child. They maintained that this decision had infringed their right to private and family life in a discriminatory manner. The Court held that there had been no violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the Convention. It considered in particular that the applicants' legal situation could not be said to be comparable to that of married couples when it came to adoption by the second parent. It further saw no evidence of a difference in treatment based on the applicants' sexual orientation, as opposite-sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order. In reply to the applicants' argument that opposite-sex couples in a civil partnership could circumvent the aforementioned prohibition by marrying, the Court reiterated its findings regarding access to marriage for same sex couples (See *Schalk and Kopf v Austria* at A3.1.1 above).

³⁰⁴ *Fretté v France* (App no 36515/97) 26 February 2002. Cited by the Grand Chamber in *E.B. v France* (App no 43546/02, Grand Chamber) 22 January 2008 at para. 70.

³⁰⁵ *E.B. v France* (App no 43546/02, Grand Chamber) 22 January 2008. See, in particular, at para. 49 as follows (emphasis added):

cases the Court has rejected arguments seeking to justify differences in treatment based on the sex of the adopting parents by reference to the best interests of the children involved.

An obvious and important corollary of the foregoing case law is that where a State provides for same sex marriage, it will almost certainly be contrary to Article 14 of the ECHR for the State to distinguish in its laws between OSM and SSM couples for the purposes of adoption, fostering, AHR or surrogacy law.

A1.2 EU Law

EU law does directly regulate the law or rights relating to marriage, AHR, surrogacy or adoption – though its legislation in other areas coupled with general equal treatment provisions may sometimes indirectly affect national law touching upon such issues.³⁰⁷

“49. The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 ...”

³⁰⁶ *X and others v Austria* (App no 19010/07, Grand Chamber) 19 February 2013. Summary: This case concerned the complaint by two women who live in a stable homosexual relationship about the Austrian courts’ refusal to grant one of the partners the right to adopt the son of the other partner without severing the mother’s legal ties with the child (second-parent adoption). The applicants submitted that there was no reasonable and objective justification for allowing adoption of one partner’s child by the other partner if heterosexual couples were concerned, be they married or unmarried, while prohibiting the adoption of one partner’s child by the other partner in the case of homosexual couples. The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the Convention on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in which one partner wished to adopt the other partner’s child. It further held that there had been no violation of Article 14 taken in conjunction with Article 8 when the applicants’ situation was compared with that of a married couple in which one spouse wished to adopt the other spouse’s child. The Court found in particular that the difference in treatment between the applicants and an unmarried heterosexual couple in which one partner sought to adopt the other partner’s child had been based on the first and third applicants’ sexual orientation. No convincing reasons had been advanced to show that such difference in treatment was necessary for the protection of the family or for the protection of the interests of the child. At the same time, the Court underlined that the Convention did not oblige States to extend the right to second-parent adoption to unmarried couples.

³⁰⁷ See, e.g.:

- judgments of CJEU applying EU sex discrimination and maternity leave legislation to the case of women caring for a child born by a surrogate mother: *C.D. v S.T.* (C-167/12) [2014] (Unreported, Grand Chamber, 18 March 2014) and *Z. v A government department* (C-363/12) (Unreported, Grand Chamber, 18 March 2014);

Articles 10 and 19 of the Treaty on the Functioning of the European Union include provisions for combating discrimination on grounds of sex and sexual orientation.

Article 6(1) of the Treaty of the European Union incorporates the Charter of Fundamental Rights of the European Union ("**the Charter**") into EU law as follows:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Title VII of the Charter provides (emphasis added):

Article 51

Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

-
- the legal entitlements conferred on same sex partners by reason of Article 4 of the Council Directive 2003/86/EC of 22 September 2003 (on the right to family reunification determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the member States) and Article 2 of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (concerns the right of citizens of the Union and their family members to move and reside freely within the territory of the member States).

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Turning to the substantive rights recognised in the EU Charter, the following are the most relevant for present purposes.

Article 7 of the Charter provides:

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 9 of the Charter provides:

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

In *Goodwin v United Kingdom*³⁰⁸ the ECtHR commented in passing on Article 9 of the EU Charter as follows:

³⁰⁸ (App no 28957/95, Grand Chamber) 11 July 2002.

100. ... There have been major social changes in the institution of marriage since the adoption of the Convention [in 1950] ... Art. 9 of the [2000] [EU] Charter of Fundamental Rights departs, no doubt deliberately, from the wording of Art. 12 [of the Convention] in removing the reference to men and women.

The relevant parts of the 2006 (non-binding) Commentary of the Charter prepared by the “EU Network of Independent Experts on Fundamental Rights” states as follows in respect of Article 9 at pp. 101-104 (references omitted):

Article 9 of the Charter approaches the rights at stake, i.e. the right to found a family and the right to marry as two different and separate rights, suggesting that the former is not necessarily connected with the latter. Apparently, it seems from the wording, i.e., the usage of the plural form ‘these rights’, that a disconnection between the right to marry and to found a family has been envisaged. In other words, a marriage does not necessarily imply procreation. This in itself signals a broader approach to Article 9 compared to e.g. Article 16 of the UDHR, Article 12 of the ECHR and Article 23 of the ICCPR.

...

Current legislative and judicial developments within Europe indicate that it is relatively common for men and women to cohabit, with or without children, instead of getting married. Formal, legally recognized marriage is consequently no longer a legal precondition for family foundation, i.e., it is not the only way to establish family life with a right to be protected against state interference. This tendency suggests that the concept of ‘family’ should be perceived in a flexible, broad way, as to include the multiplicity of family forms, including de facto family unions. In order to reflect rapidly shifting social conditions, Article 9 of the Charter upholds a diversity of family arrangements (through the reference to domestic law), in which the nuclear family centered on marriage is only one among many. It comprises in other words founding of a family other than within marriage. Member States of the EU are encouraged by the European Parliament to mutually recognize legally recognized nonmarital relationships (between persons of the same sex or of different sexes) and to adopt measures, which provide the same judicial protection for long term cohabitants as for married couples.

One of the characteristics of a family, besides affective bonds, is life in common. The Council Directive 2003/86/EC on the right to family reunification of 22 September 2003 is based on a contemporary conceptualization of the family, i.e., family members eligible under it covers the applicant’s spouse or cohabitant, including same-sex cohabitants (Article 4 §3). In other words, the tie between same-sex persons is considered family entity, which is legally protected regardless of the celebration of marriage.

...

The foundation of a family may imply childbearing. The right to found a family thus provides for some aspects of reproductive choice including the use of new procreative technologies. It appears that there is a diversity of domestic legislation on this subject. While some European countries guarantee access to treatment for infertility and to various means of assistance to reproduction (conception by medical intervention) - and public authorities are expected to fully or partially fund such services - other countries omit regulations on such a rights-based approach, i.e., that medical technology should be made available to persons who are not able to have children because of infertility or sexual orientation.

In its rulings on cases where unlawful discrimination is alleged on the basis of the more favourable treatment given to married persons, the CJEU tends to adopt the prevailing jurisprudence of the ECtHR and it has changed its position in recent years accordingly.³⁰⁹

Article 21 of the Charter provides that:

any discrimination based on any ground such as sex ...or sexual orientation shall be prohibited.

Article 24 of the Charter provides as follows (emphasis added):

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

On its face Article 24(3) may seem of assistance for the argument that there is no over-arching legal obligation upon the Irish State to facilitate the wishes of single persons or same sex couples to avail of AHR or to adopt in circumstances where this will involve a child being raised without both a mother and a father. On the other hand, the two decisions of the CJEU which have invoked this provision to date both adopted a highly

³⁰⁹ For example, contrast the earlier judgments in *Grant v South-West Trains Ltd* (Case C-249/96) [1998] ECR I-621 (refusal of travel concessions to cohabitantes of the same sex) at para. 14 and *D and Sweden v Council* (C-122/99P and 125/99P) [2001] ECR I-4319 (refusal of household allowance to same sex civil partner) at paras. 33-36 and 48-52 with the more recent judgments in *Maruko* (C-267/06) [2008] ECR I-01757; *Römer v Freie und Hansestadt Hamburg* (C-147/08) [2011] ECR I-03591 at para. 52; and *Hay v Crédit agricole mutuel* (Unreported, Fifth Chamber, 12 December 2013) at paras. 37, 39 and 47.

deferential stance to the law and policy decisions of the Member States with respect to the practical implementation of the right articulated in Article 24(3).³¹⁰

A1.3 International Human Rights Treaties

There is no obligation on the State arising from the treaties which it has ratified to recognise a stand-alone right on the part of a same sex couple to marry, to adopt or to procreate via AHR or surrogacy.

Before considering the relevant treaty provisions, however, it is worth noting the status of such instruments in Irish law. There is no legal right or duty that can be directly invoked or enforced in Irish courts with regard to any act or omission by the State solely on the grounds that the particular right or duty is provided for in an international treaty ratified by the State, such as the International Covenant on Civil and Political Rights (ICCPR) or the Convention on the Rights of the Child (CRC).³¹¹ Nor, as a matter of Irish law, does the State's ratification of an international human rights instrument create a "legitimate expectation" that allows an individual to plead that instrument, or the determinations of any body established by that instrument, directly in municipal law.³¹²

Where there is a question of statutory interpretation, however, it was held in *O'Domhnaill v Merrick*³¹³ that:

"one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations."

A1.3.1 Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR)

The Universal Declaration of Human Rights (UDHR) was unanimously adopted by the General Assembly of the United Nations in 1948 (with 8 abstentions). Recognising in its preamble *"the inherent dignity and of the equal and inalienable rights of all members of the human family"* it acknowledges the duty of member states to secure the rights and freedoms recognised in the Declaration.

Article 16 of the UDHR provides:

³¹⁰ See *J. Mc.B v L.E.* (C-400/10) [2010] ECR I-08965 at paras. 60 and 62; and *O. and S. v Maahanmuuttovirasto* (C-356/11 and C-357/11) ECLI:EU:C:2012:776 at paras. 78-81.

³¹¹ *In Re O Laighleis* [1960] IR 93. With regard to the status of ECHR in particular and the effect of the European Convention on Human Rights Act 2003 see also the more recent Supreme Court decision in *McD v L* [2009] IESC 81.

³¹² *Kavanagh v The Governor of Mountjoy Prison* [2002] IESC 13.

³¹³ [1984] IR 151 at 159 (Henchy J). A similar principle was affirmed by McCarthy J in his dissenting opinion

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

...

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The International Covenant on Civil and Political Rights (ICCPR) was ratified by Ireland in 1989. Article 23 closely mirrors the language of Article 16 of the UDHR as follows:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

...

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

The implications for Article 23(2) on the issue of same sex marriage was considered by the Human Rights Committee³¹⁴ in *Joslin v New Zealand*.³¹⁵ The Committee held that the text of article 23(2) only requires states to recognise as marriage a union that takes place between a man and a woman and failure to provide for same sex marriage does not constitute a breach of the ICCPR. It stated at para. 8.2:

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

³¹⁴ The Committee is a monitoring body established pursuant to Part IV of the ICCPR. Under the Optional Protocol to the ICCPR (also ratified by Ireland) the Committee also has competence to receive and consider communications from individuals who claim to be victims of a violation by a State Party to the Optional Protocol of any of the rights set forth in the ICCPR.

³¹⁵ Communication No 902/1999, UN Doc A/57/40 at 214 (2002).

Despite the clarity of the conclusion in *Joslin* Aleardo Zanghellini has attempted to derive a “right to procreate” on the part of same sex couples from the combined effects of Articles 17, 23 and 26 of the ICCPR.³¹⁶

Articles 17(1) and 26 of the ICCPR further provide:

17(1). No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

...

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Zanghellini’s analysis is more speculative and polemical than expositive³¹⁷ and it is sufficient for present purposes to note his acknowledgement that (emphasis added):

The human rights to found a family, to protection for the family and to family life contained in arts 23 and 17 of the ICCPR respectively seem the best candidates for the task of promoting lesbians’ and gay men’s procreative and parental rights. An isolated look at the approach taken by the Human Rights Committee to arts 17 and 23 may initially suggest otherwise. In particular, from the Committee’s approach to art 23(2), it is relatively clear that the procreative rights of lesbians and gay men qua lesbians and gay men are not protected under the ICCPR. And from the Committee’s approach to arts 17 and 23(1), it is unclear whether their parental rights are protected, at least to the extent that the individuals concerned wish to create parenting configurations which deviate from those well-established in the heterosexual context: one mother and one father or single mothers.

However, what we have referred to above as the “all or nothing” strategy characteristic of how equality claims by same sex couples have been addressed by international courts

³¹⁶ Zanghellini, “To what extent does the ICCPR support procreation and parenting by lesbians and gay men?” (2008) *Melbourne Journal of International Law*, 9 (1). pp. 125-150. See <<http://www.law.unimelb.edu.au/files/dmfile/download78541.pdf>>.

³¹⁷ There is nothing in the General Observations of the Human Rights Committee in respect of Articles 17, 23 or 26 that assists Zanghellini’s argument. On the contrary, his argument is exclusively based on working out what he argues are the implicit premises and principles of the Committee’s reasoning in the decisions in *Young v Australia* Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003) and *X v Colombia* Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007) (discussed below).

is exemplified in the decisions of the Human Rights Committee in *Young v Australia*³¹⁸ and *X v Colombia*³¹⁹ which Zanghellini cites in aid of his argument.

In *Young v Australia* the Committee, applying Article 26, found certain legal provisions on pensions for the “dependants” of war veterans discriminatory because they did not apply to same sex partners while they did cover *de facto* and married opposite sex partners. The key passage of the decision states at para. 10.4:

in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences. It transpires from the contested sections of the [Veteran’s Entitlement Act 1986 (Cth)] that individuals who are part of a married couple or of a heterosexual cohabiting couple ... fulfill the definition of ... a ‘dependant’, for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr C, for the purpose of receiving pension benefits, because of his sex or sexual orientation ... The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

The decision of the Human Rights Committee *X v Colombia*³²⁰ concerned the denial of survivor’s pension benefits to the same sex partner of a deceased man in circumstances where a survivor in an unmarried heterosexual relationship would have enjoyed the benefits. The Committee stated that differential treatment between unmarried heterosexual couples and unmarried same-sex couples could not be justified on the basis of the arguments advanced by Colombia, which included the contention that same-sex couples were not “families”, unlike unmarried heterosexual couples.

A1.3.2 Convention on the Rights of the Child (CRC)

Ireland ratified the CRC on 21 September 1992.

Its relevant provisions include:

Article 3 (1)

³¹⁸ Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000 (18 September 2003).

³¹⁹ Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007).

³²⁰ Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005 (14 May 2007).

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 7(1)

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 8 (1)

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Article 9 (3)

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 18 (1)

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

It is not proposed to repeat here the detailed discussion of these provisions found in Finnegan, "The Normative Relevance of Articles 7(1), 9(3) and 18 of the UNCRC for Irish Adoption Law" 2010 *Irish Journal of Family Law*. The following passages from that article suffice for present purposes (references omitted):

A child's human right to be raised by both his/her parents has implications for the debate on who exactly has a right to apply to adopt a child (and, similarly, to participate in assisted human reproduction treatment ...

...

According to art.31(1) of the Vienna Convention on the Law of Treaties (1969): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." It borders on the self-evident to add that the ordinary meaning of the term "parents" refers to a mother and father, a view further endorsed by the fact that art.5 of the Convention makes an explicit distinction between parents on the one hand, and legal guardians/extended family/local custom on the other. ... Article 32 of the Vienna Convention states that: "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances to its conclusion ..." ... there is ample evidence in the

drafting history of the Convention to suggest that the term “parents” refers to a mother and a father.

This analysis of the relevant articles of the CRC is contested and others have argued that the Convention permits or even positively requires rights to parenthood and adoption on the part of same sex couples.³²¹ It is not necessary to resolve that debate here.

³²¹ Finnegan refers in particular to John Tobin and Ruth McNair, “Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?” (2009) 23 *International Journal of Law, Policy and the Family* 110.