

# The Normalising Power of Marriage Law: An Irish Genealogy, 1945 – 2010.

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# Summary

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Marriage law is often conceptualised as an instrument of power that illegitimately imposes the will of the State on its citizens. Paradoxically, marriage law is also offered as a route to liberation. In this thesis, I question the efficacy of this type of analysis by investigating the actual power effects of marriage law. Using Michel Foucault's concepts of bio-power and government, and his genealogical approach to history, I identify the role played by marriage law in governing the social domain over a discrete period of Irish history. Drawing on this analysis, I suggest that marriage law is part of a dense network of power relationships that cannot be reduced to a binary relationship of oppression and liberation. Rather, marriage law acts, in conjunction with other techniques of government, to conduct conformity in social behaviour.

Until the 1960s, marriage was considered a fully social matter outside the jurisdiction of politics. With the adoption of a Keynesian economic model at the end of the 1950s the welfare of the population became a matter of political concern. In the 1970s, the vulnerable dependent wife emerged as an object of regulation and marriage law was enacted to protect her through enforcement of the obligations of morally bound, gendered, lifetime marriage. The need to protect this form of marriage drove

further reform of marriage law in the 1980s and divorce legislation enacted in 1997. An increasingly rationalised, economic approach to government, adopted following ratification of the Maastricht treaty, required the deployment of social scientific knowledge by government. Within the domain of family life, science connected social stability to relationship stability. Marriage law reform in the 2000s, therefore aimed to promote stability in relationship behaviour by acknowledging, regulating, and promoting relationship practices that performed lifetime marriage. Over the research period, marriage law operated as one among many techniques of government that installed a detailed apparatus of surveillance and control around individual lives, with the objective and effect of conducting conformity in relationship behaviour.

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# One - Introduction

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Marriage as a social practice involving the union of two spouses for affective, procreative or economic purposes has existed for millennia, so too have legal rules regulating its practice. In Roman Law, the essence of legal marriage was the husband's intention to raise the rank of his wife 'to make her equal'<sup>1</sup> whilst the Brehon law of fourteenth century Ireland recognised ten types of couples of cohabitation and procreation.<sup>2</sup> Today, marriage and the law that regulates it, is an issue of significant social, legal and political concern. In 2006, Ann Louise Gilligan and Katherine Zappone failed to convince the Irish High Court that the legal definition of marriage could accommodate spouses of the same-sex.<sup>3</sup> Nonetheless, their legal action and the activities of rights campaigners have succeeded in placing the regulation of marriage, once again, on the political agenda. A Constitutional referendum on the issue will take

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<sup>1</sup> Emile Stocquart, 'Marriage in Roman Law' (1907) 16(5) Yale Law Journal 303, 304.

<sup>2</sup> The forms of marriage ranged from those between equals in terms of property and status, the 'union of common contribution' to 'union by rape or stealth' which required the payment of compensation and 'union of mockery' involving a 'union of a lunatic or madman with a deranged woman or madwoman,' neither of whom were bound to make payments. Donnchadh Ó Corráin tr, *Cáin Lánamma* (Text ID T102030, Copus of Electronic Texts UCC 2005).

<sup>3</sup> *Zappone & Anor v Revenue Commissioners & Ors* [2006] IEHC 404.

place in Ireland in 2015.<sup>4</sup> Contemporary political concern with marriage is not, however, limited to Ireland. Same-sex marriage has been legally sanctioned in a number of jurisdictions, and is the subject of vigorous political campaigns in others.<sup>5</sup> As Nicola Barker remarked in 2012, ‘same-sex marriage has become a litmus test of how gay-friendly society is.’<sup>6</sup> Central to political campaigns for the extension of legally sanctioned marriage is the assumption that marriage law reform can liberate individual lives and produce a more just social order. Barker notes that, ‘same-sex marriage is expected to provide access to specific legal provisions and equally to solve wider social problems of homophobia and heterosexism.’<sup>7</sup>

This belief that reform of the legal rules governing marriage can solve social problems is neither unique to the present nor a recent phenomenon. In 1960s and 1970s Ireland, campaigners sought solutions to female poverty and sex-based discrimination through marriage law reform. In the 1980s, campaigns for removal of the divorce ban focused on the vulnerability of dependent housewives, and in the 1990s a ‘right to remarry’ was intended to liberate those suffering in failed relationships. Marriage law reform at the end of the twentieth century was constructed as a way to redress the exclusion and vulnerability of those who formed relationships outside the parameters of traditional marriage.

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<sup>4</sup> Stephen Collins, ‘Taoiseach backs vote on same-sex marriage: Several proposals to be put to people on the same day in first half of 2015’ *The Irish Times* (Dublin, 6 November 2013).

<sup>5</sup> The world’s first same sex marriage took place in the Netherlands in 2001 and it is now legally permissible in Belgium, Spain, Canada, South Africa, Portugal, Sweden, Norway, Iceland, Argentina, Mexico City, Uruguay, New Zealand, and a number of states in the United States. Legislation facilitating same-sex marriage came into force in England and Wales on 23 March 2014; Marriage (Same Sex Couples) Act 2013, implemented by the Marriage (Same Sex Couples (Commencement No 2 and Transitional Provision) Order 2014.

<sup>6</sup> Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave-Macmillan 2012), 1.

<sup>7</sup> Barker, *Not the Marrying Kind*, 126.

Marriage law reform continues to be offered as a solution to social problems despite widespread criticism of the content, functioning, and effect of existing marriage laws.<sup>8</sup> Marriage law has been described as epitomising patriarchy,<sup>9</sup> imposing traditional values on modern relationships,<sup>10</sup> and privatising the social cost of inevitable human dependency.<sup>11</sup> Critics argue that marriage law in practice is veiled in secrecy making outcomes unpredictable,<sup>12</sup> and that existing law fails to produce justice for real lived relationships.<sup>13</sup> Marriage and family law are chaotic, not ‘real law,’<sup>14</sup> and rarely produce effective solutions to either personal or social difficulties.<sup>15</sup>

The incongruity between activist expectations for marriage law reform, and its practical effects, was the impetus for this research. I am interested in identifying what marriage law is *actually doing*, rather than assuming an effect (such as patriarchal oppression or social exclusion) and seeking to substantiate it. In broad terms, I question the exercise of political power through marriage law by describing how, over a 65 year period of history, relationships have, in fact, been governed by law in Ireland.

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<sup>8</sup> There is a large body of academic literature advocating the extension of marriage law to a broader range of relationship types, in particular to same-sex couples. Most focuses on the exclusionary effect of existing law and the extent to which this exclusion infringes legal equality guarantees. See for example, Robert Wintemute R, ‘Marriage or “Civil Partnership” for Same Sex Couples’ in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007).

<sup>9</sup> See for example, Martha Fineman, *The Autonomy Myth* (The New Press 2004), discussed further in chapter two.

<sup>10</sup> See for example, Anne Barlow, ‘Cohabitation Law Reform – Messages from Research’ (2006) 14 *Feminist Legal Studies* 167, discussed further in chapter two.

<sup>11</sup> See for example, Lucinda Ferguson, ‘Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation’ (2007) 22 *Intl Jnl Law Policy Family* 61, discussed further in chapter two.

<sup>12</sup> Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press 2009), 18 – 19.

<sup>13</sup> Alison Diduck, *Law’s Families* (2003, LexisNexis), 43.

<sup>14</sup> John Dewer, ‘The Normal Chaos of Family Law’ (1998) 61 *MLR* 467, 469.

<sup>15</sup> For example, despite the introduction of improved spousal maintenance laws in 1976, intended to reduce the financial burden on the State, the number of separated women requiring financial support from the State increased. This, and other examples of the disconnection between the purpose of legal reform and actual outcomes, are considered in chapters five *et seq.*

Furthermore, I connect the characterisation of marriage law, as both a problem and a solution to problems during this period, to shifts in broader social and economic conditions in order to identify the role played by legal regulation of couple relationships in securing the strategic objectives of political government. My work suggests that marriage law is a political technique that aims to conduct conformity in relationship behaviour. This thesis, therefore, attempts to challenge the centrality of marriage in the legal and social policy systems of Western States.

### **1.1 Michel Foucault and the Functions of Marriage Law**

These objectives require the deployment of analytical tools and concepts that facilitate a contextual, external, analysis of the process of marriage law reform and its practical effects. It is necessary to describe the politics of law reform and the effects of legal regulation, rather than participate in current debates and political struggles that assume the progressive nature of reform. Speaking in 1982, Michael Foucault described the objective of his historical studies:

It is one of my targets to show people that a lot of things that are part of their landscape – that people think are universal – are the result of some very precise historical changes. All my analyses are against the idea of universal necessities in human existence. They show the arbitrariness of institutions and show which space of freedom we still enjoy, and how many changes can still be made.<sup>16</sup>

Marriage and the law that regulates it are generally considered essential to social functioning, and whilst I do not attempt to completely deconstruct the conceptual foundations of marriage law, my more modest objectives fall broadly within Foucault's philosophical orientation. I seek to challenge current assumptions regarding the necessity of institutional marriage and the laws that regulate it.

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<sup>16</sup> Michel Foucault, 'Truth, Power, Self: an Interview with Michael Foucault October 25 1982' in Luther Martin, Huck Gutman and Patrick Hutton (eds), *Technologies of the Self: A Seminar with Michel Foucault* (University of Massachusetts Press 1988), 11.



Foucault developed a number of tools and concepts to demonstrate the contingency of our present, and I employ two of these, government and bio-power, to analyse the process of marriage law reform in Ireland. Specifically I address two central questions:

- How are we, in fact, governed by marriage law?
- What is the role of marriage law in modern ‘government of life?’<sup>17</sup>

The theoretical basis for these questions is discussed in detail in chapter three, but for the moment, a brief explanation will suffice.

### *1.1.1 Governed by law?*

Political challenges to marriage law over the research period have claimed that it illegitimately imposes patriarchy and traditional values, or excludes alternative sexualities. Nonetheless, marriage law is also seen as the solution to social problems, creating a paradoxical role for law as both oppressor and liberator. Foucault’s concept of bio-power suggests an alternative conceptualisation of political power, which in turn offers a different way to think about the operation of legal rules and processes, a way to identify how our lives are, in fact, governed by law. Foucault argues that, rather than command or prescribe social behaviour, modern governments attempt to manage the behaviour of the population in accordance with its ‘natural’ characteristics. They deploy a form of power, ‘bio-power,’ that aims to take control of life, ensuring that it is regularised and maximised. In order to achieve this, Foucault argues, government requires information, a method for identifying what is normal or natural, and a set of techniques for directing human behaviour.

In order, therefore, to identify how marriage law operates to manage social behaviour, I examine the information available to government in formulating the

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<sup>17</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality, Part I* (Robert Hurley tr, Penguin Books 1998), 141.

objectives of law reform, how a picture of normal or natural relationship behaviour was constructed or assumed, the specific legal techniques deployed by government in achieving their objectives, and the actual effects of this deployment. By examining law reform in its social and economic context, over an extended historical period, I demonstrate the mobility and complexity of political power as exercised through ‘the legal complex.’<sup>18</sup> How marriage law governs us in the present does not always correspond with past articulations, and legal change does not necessarily indicate, nor produce, social change. In Foucault’s terms, I aim to show the arbitrariness of legal regulation of marriage, and open a space within which alternative ways of thinking about the relationship between social life and the State might be formulated.

### *1.1.2 The role of marriage law*

It is often assumed in the present that marriage law can bring about greater social justice and equality for marginalised groups. Whilst not denying this possibility, I nonetheless aim to unsettle the assumed necessity of marriage law and its characterisation as a vehicle for social justice. Using Foucault’s description of the normalising objectives of modern forms of government, I investigate the possibility that marriage law has become a political technique that supports the broader, economic objectives of political government. In modern, Western liberal democratic States like Ireland, social stability, predicated on family stability, is considered essential to achieving balanced and stable economic growth. My research suggests that in legally regulating marriage the Irish government has sought to promote social stability in the

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<sup>18</sup> Nicolas Rose and Mariana Valverde use this term in preference to the more usual ‘law’ to describe legal sites, legal concepts, legal criteria of judgement, legal personnel, legal discourses, legal objects and objectives. They maintain that there is no such thing as ‘the law’ and that the term has no fixed or absolute meaning. I have repeated their approach in using ‘the legal complex’ throughout this thesis to refer to the diverse practices and ways of knowing that we commonly describe as ‘law.’ Nicolas Rose and Mariana Valverde, ‘Governed by Law?’ (1998) (7) *Social and Legal Studies* 541, 544.

interests of economic development. Encouraging lifetime marriage was an explicitly stated objective of marriage law between 1970 and 1997, but more recently, political claims for marriage law have focused on rights and justice. The aim of social, and thus economic, stability nonetheless remains and, I suggest (following Foucault), that government uses whatever knowledge is available to it (religious, moral, rights-based, sociology) to justify continued support for stable couple relationships.

In furtherance of its social-stabilisation objective, the Irish State has installed a detailed apparatus around our affective lives that promotes ‘normality’ and identifies, observes, and knows those falling outside its parameters. These detailed mechanisms act, in tandem with other techniques of government such as social provision, taxation and labour market policies, to encourage conformity in relationship behaviour. This is achieved, not only through economic advantaging of marriage, but also by acting on the self-regulatory capacities of individual citizens. Government techniques adopt and re-enforce a common standard or norm against which individuals make judgements about their own relationship behaviour. We are not simply oppressed or liberated by marriage law – rather it governs our lives through more dispersed and insidious mechanisms of power.

## **1.2 Marriage Law**

As will become apparent, this thesis is not about marriage law in the sense of ‘law regulating marriage;’ rather, it is about the legal rules and processes that regulate the relationship behaviour of individuals, encompassing, but not limited to, laws governing marriage, divorce, separation, cohabitation and civil partnership. The term ‘marriage law’ is adopted for two reasons. First, it distinguishes law governing relationships between adults from that which regulates familial relationships between adults and children. This is an important distinction as marriage law, family law, and

child law are often conflated in both political and academic debate, despite the relationship between marriage, family, and children being neither self-evident nor inevitable.<sup>19</sup> Secondly, the concept of ‘marriage’ occupies a central position in the Irish Constitutional definition of family, and has been deployed by the Irish government in managing the social domain since the foundation of the State. Thus, to maintain continuity, I use the term ‘marriage law’ to refer to that complex of legal rules and processes that regulate adult intimate relationships.<sup>20</sup> Use of the term ‘marriage’ does not imply any fixed definition or understanding of what marriage is, or ought to be, only that as a (malleable) concept it has existed over the research period.

### 1.3 An Irish Experience

Most western jurisdictions have taken hundreds of years to build a body of law corresponding to that enacted in Ireland in the past 50 years. In England, political as opposed to church regulation of marriage began in the 1750s with Lord Hardwick’s Act, and provision for widespread civil divorce was introduced in 1857.<sup>21</sup> One of the first pieces of social legislation enacted by the newly unified Germany was an act to regulate marriages,<sup>22</sup> and in France, marriage was considered a matter for State

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<sup>19</sup> Rosemary Auchmuty refers to British ‘rebranding’ of ‘matrimonial law’ as ‘family law’ at the end of the 1980s. The term ‘matrimonial law’ never held much currency in Ireland and marriage law seems to have always been referred to as ‘family law’ in Ireland. Alan Shatter’s *Family Law in the Republic of Ireland* was first published in 1977 (Wolfhound Press 1977). Rosemary Auchmuty ‘Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women’ (2012) 20 *Feminist Legal Studies* 71, 80.

<sup>20</sup> Nicola Barker refers to ‘the marriage model’ in her discussion of the extension of marriage law to same sex couples to capture the legal structure and social ideologies associated with marriage. Barker *Not the Marrying Kind*, 21.

<sup>21</sup> The Marriage Act 1753 and the Divorce Reform Act 1857 respectively. Parliamentary divorce, that is divorce by private Act of Parliament, was available to the wealthy from the end of the sixteenth century. For a full account of the history of British marriage and divorce law see Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford University Press 1992).

<sup>22</sup> German unification took place in 1871 and the Civil Marriage Law was enacted in 1875, providing a unified regulatory system for marriage registration. The legislation outlawed purely religious unions, with all couples being required to marry in a civil ceremony prior to

regulation from the 1600s.<sup>23</sup> When Ireland gained independence from Britain in 1922, it inherited a body of marriage law built upon the political concerns of a colonial power and the ecclesiastical rules of a church with few Irish adherents. Initially, no political efforts were made to reform this inheritance. The 1937 Constitution, and subsequent political practice, placed the regulation of marriage entirely within the authority of the various churches.<sup>24</sup>

Beginning in the 1970s, successive Irish governments pursued a programme of marriage law reform, initially by legislating for maintenance rights and family home protection in 1976.<sup>25</sup> Judicial Separation rules were substantially reformed in 1989, and divorce introduced in 1997.<sup>26</sup> In 2010, marriage law (but not marriage) was extended to same-sex and cohabiting couples through the introduction of civil

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participating in a religious ceremony. Para 67, Reichsgesetz über die Beurkundung des Personenstands und die Eheschließung vom 6. Februar 1875.

§ 67 Ein Geistlicher oder anderer Religionsdiener, welcher zu den religiösen Feierlichkeiten einer Eheschließung schreitet, bevor ihm nachgewiesen worden ist, daß die Ehe vor dem Standesbeamten geschlossen sei, wird mit Geldstrafe bis zu dreihundert Mark oder mit Gefängniß bis zu drei Monaten bestraft.

In English: Para 67, Commonwealth law on the certification of personal status and the entry of marriage of 6 February 1875.

Paragraph 67 A clergyman or other religious servant, who proceeds to the religious celebration of the entry of marriage, before it has been proven to him that the marriage has been entered before the civil registrar of marriage, is liable to a fine of three hundred marks or imprisonment of up to three months.

With thanks to Dr Julia Moses, University of Sheffield, for drawing my attention to the existence of the provision, and Dr Daniel Simms, Law Library, for its identification and translation.

<sup>23</sup> Sarah Hanley, 'Engendering the State: Family Formation and State Building in Early Modern France' (1989) 16(1) *French Historical Studies* 4. The French legal system used the family, based on marriage, as a proxy for the State from early modern times. The head of family, usually the husband/father was responsible for enforcing the law over his family members. Jacques Donzelot, *The Policing of Families: Welfare versus the State* (Random House, 1977), 48.

<sup>24</sup> The Constitutional provisions relating to marriage were largely adapted from Papal encyclicals and the solemnisation of Roman Catholic marriages was not subject to civil oversight. The marriage relationship itself was largely unregulated.

<sup>25</sup> Family Law (Maintenance of Spouses and Children) Act 1976, Family Home Protection Act 1976.

<sup>26</sup> Judicial Separation and Family Law Reform Act 1989 and Family Law (Divorce) Act 1996.

partnership and the concept of ‘qualified cohabitant.’<sup>27</sup> The Irish position thus provides a unique opportunity to examine the politics of marriage law reform. The outcomes of reform largely reflect those of other western liberal democracies, but almost all of the jurisdiction’s statutory regulation of marriage took place over a relatively short period.<sup>28</sup>

Although a focus on one jurisdiction has its limitations, the purpose is not to compare legal systems but to suggest alternative ways of thinking about the relationship between law, politics and the relationship practices of individual citizens. Whilst my findings may be specific to Ireland, the methodological approach and theoretical precepts have wider implications for understanding how we conceptualise the political significance of marriage law in the present. Further, this research sets out to challenge the role of legal marriage in mediating the relationship between individual citizens and the State apparatus.

Mary Ann Glendon, in a 1989 review of marriage and family law in Western Europe and the United States, noted an upheaval in the family law systems of Western industrial societies beginning in the 1960s. Legal rules, governing marriage, divorce, family support obligations, inheritance, the relationship of parent and child, and the status of children born outside marriage, relatively unchanged for centuries, were discarded or radically transformed. At the same time, other regulatory systems, not generally thought of as ‘family law,’ such as social welfare, employment and taxation

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<sup>27</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

<sup>28</sup> There are significant differences between the Irish position and that in its European neighbours. One major difference is the absence of a legislatively sanctioned ‘clean break’ on divorce or judicial separation. For a discussion of the Irish position in contrast to that in England and Wales see, Frank Martin, ‘From Prohibition to Approval: The Limitations of the ‘No Clean Break’ Divorce Regime in the Republic of Ireland’ (2002) 16(2) Intl Jnl Law Policy Family 223.

came to increasingly touch on family life.<sup>29</sup> Despite significantly different cultural and political systems, Glendon noted remarkable similarities between the jurisdictions studied. Trans-national similarities in marriage and family regulation are also apparent in the present, particularly with respect to the extension of marriage law to same-sex couples.<sup>30</sup> The intense focus on marriage law in Ireland beginning in the 1970s may therefore suggest a scheme of intelligibility for reforms begun in other jurisdictions a decade earlier.

## **1.4 Outline of Thesis**

The remainder of this chapter outlines the legal rules and practices that applied to marriage in Ireland before the programme of marriage law reform begun in the late 1960s. The purpose of this overview is to provide background information, and to demonstrate the extent to which the regulation of marriage was considered a domain outside the remit of politics during the period. Legal rules, inherited from the British, were accepted without political contest, despite their historical origins in the canon law of a church to which the majority of the Irish population did not belong. The rules for entry into marriage were left largely to the various churches, and although the property relationship between husband and wife was significantly altered by the Married Women's Status Act in 1957, this was seen as a technical rather than a substantive reform. The constitutional provisions relating to the rights of the family were, like other rights-based provisions in that document, treated as foundational statements of the new nation State, not the basis of entitlements that might contradict its sovereignty.

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<sup>29</sup> Mary Ann Glendon, *The Transformation of Family Law* (University of Chicago Press 1989), 1.

<sup>30</sup> Barker, *Not the Marrying Kind*, 67.

In chapter two, I introduce Foucault's model of juridical power and identify its relevance to political debate. I then outline the development of sociological analysis of marriage since the nineteenth century, noting in particular the challenges levelled to 'grand theories' of social change. Next, I discuss legal scholarship in the general area of marriage and family law, focusing in particular on critical approaches and the influence of Foucault. Chapter three begins by outlining Foucault's concepts of bio-power and government. His description of political power, its productivity, and connection to knowledge and truth is explained. The historical formulations of the relationship between power and knowledge - discipline and bio-power - are described, and a connection drawn between bio-power and marriage law. The concept of government, taken to mean 'the conduct of conducts,' is offered as an analytical framework for the analysis of how we are governed by marriage law and its particular efficacy in considering legislative action identified. The chapter also reviews literature that attempts to conceptualise 'law' in foucauldian terms, concluding that a universal explanation of what law 'is,' is both unnecessary and unhelpful for my purposes. Rather, a focus on how legal instruments come into being, and have effects within relationships of power, offers a more fruitful investigative framework. Building on Foucault's work and derivative literature, a research framework consisting of five specific avenues of investigation relating to the two principal research questions is constructed.

Chapter four begins by locating my research within Posner's taxonomy of legal scholarship, and goes on to set out the specific method employed by reference to the research framework developed in chapter three. The first research question 'how are we governed by marriage law?' is an empirical one, and foucauldian discourse analysis and a genealogical approach to history are offered as methodological precepts. This



aspect of the research has two specific foci: the actions and motivations of political government, and ‘the legal complex.’ The data consulted therefore consisted of documents produced by or for the use of government and legal instruments, judgments and reports. The second question, ‘what is the role of marriage law in modern “government of life?”’ is mainly theoretical and builds upon the initial research output, to identify the power effects of marriage law within its social, economic and political context. The research covers the period from 1945 to 2010, and chapter four explains how it was divided into four intervals. Finally in chapter four, I discuss the efficacy, and difficulty, of a foucauldian approach by reference to some existing scholarship.

Chapter five identifies the emergence of marriage as a problem for the Irish government in the 1960s, connecting its political problematisation to a Keynesian shift in economic policy. A developing centralised welfare system created entitlements to State services, and the vulnerable deserted wife, left indigent through a failure of male support, emerged as a deserving recipient of social assistance. A developing international human rights discourse transformed her into the embodiment of a woman’s right to be dependent in marriage, and campaigning women’s groups sought vindication of this right through marriage law. Two legislative enactments in 1976 constructed women as vulnerable dependents and men as morally obligated providers, offering relief to the middle class deserted wife whose husband had the means to support her. The legislature had accepted the morally founded proposition that marriage was a social good essential to the functioning of society, and had deployed legal measures to promote and protect it.

Chapter six moves on to the 1980s. Marriage remained central to the administration of an expanded system of social provision, and government attention turned to the general problem of ‘marriage breakdown’ that, according to statistical information,

had become more prevalent. Politics sought to address this difficulty by protecting marriage, an objective supported by a number of decisions of the Superior Courts during the decade. The courts, from a position of presumed objectivity, connected the family provisions of the Constitution to natural law, and proffered them as a limit to State power. A newly established Law Reform Commission also focused on marriage law, demonstrating law's historical involvement with marriage, and the ability of legal processes to identify and manage marital misbehaviour. The legal complex, by the end of the decade, had shown its usefulness in supporting the marriage-saving objective of government. Law's knowledge supported political understandings of normal relationship behaviour, and its processes were efficacious in identifying and containing marital abnormality. In 1989, legislation was enacted to fulfil the political objective of marriage saving. Its effect was to install a detailed legal machinery around those whose marriages failed to conform to the lifetime, dependency model favoured by government acting, not to facilitate post-relationship life, but to continue marriage after the interpersonal relationship at its core had ended.

Chapter seven deals with the period from 1990 to the introduction of divorce in 1997, during which time economic conditions improved considerably. Divorce was introduced in 1997, with the political objective of saving lifetime dependency marriage. A comprehensive machinery was established that included counselling, mediation and the enforcement of lifetime spousal support obligations. Political support for marriage, as in earlier decades, drew on dominant morality, but the superior courts began to adopt more rationalised, scientifically formulated understanding of marriage, and in managing the social domain government began to accept non-marriage-based relationships as functionally equivalent to marriage. Marriage, nonetheless, continued to confer significant financial and social benefits on

individual families. The power effects of regulating marriage with law had become clear by the end of this period. Two referenda on divorce required reflection on the importance of marriage by the entire population and emphasised its normative status. The complex system of marriage law with ancillary services such as counselling, mediation, adjudication, and legal aid aimed to save marriage, but its effect was to install a detailed machinery of (self) surveillance around those unable to conform and a series of techniques designed to re-form their broken relationships in the image of lifetime marriage.

Chapter eight examines the period following the introduction of divorce during which the Irish government moved resolutely away from moral conceptualisations of relationship and family life, calling instead on rational, sociological and statistical information in its decision making process. This did not, however, result in a devaluing of marriage, rather it facilitated the re-definition of marriage as a rationally, as opposed to morally, optimal relationship form. Both marriage and marriage-like practices became increasingly common at the level of the population, and government, in recognising the value of stable relationships to social and economic stability, began to regulate a broader range of relationships. Marriage law was again problematised early in the new millennium when it came to be seen as the solution to social exclusion and marginalisation experienced by non-heterosexual couples. Responding to rights-based campaigning, government introduced legislation applying marriage law to same-sex couples, and same and opposite sex cohabitants. This legislation mirrored the terms of that applying to married couples indicating that other forms of relationships were acceptable to the extent that they performed marriage. Meanwhile the actual operation of marriage law in the courts continued to demonstrate the dangers of marriage-

transgression. The social importance of marriage had been reaffirmed, and the government objective of social, and hence economic, stability had been advanced.

Chapter nine notes how marriage law has played a central role in defining the limits of social normativity over a forty year period of Irish history. Despite shifting mentalities of government ranging from economic protectionism to Keynesianism and neo-liberalism, marriage has remained a central point of exchange between the State and its citizens. Although we may believe ourselves more free today to exercise choices in our relationship behaviour than in the past, these choices are in reality tightly controlled. Those unwilling or unable to perform lifetime monogamy, who chose, or are required by circumstance, to live their lives outside the marital paradigm have been, despite their numbers, marginalised by pro-marriage political discourse.

## **1.5 Irish Marriage Law before 1970**

### *1.5.1 Law and marriage*

On the foundation of the Irish State in 1922, the minimum legal age for entry into marriage was 12 for girls and 14 for boys,<sup>31</sup> the heterosexual age of sexual consent was 16 (for girls),<sup>32</sup> and male homosexual activity was a criminal offence.<sup>33</sup> In 1935, the age of consent was raised to 17,<sup>34</sup> but the age at which marriage could be contracted

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<sup>31</sup> The age of majority was 21 until reduced to 18 by the Age of Majority Act 1985, s 2. Married persons were considered adults upon marriage, regardless of their chronological age.

<sup>32</sup> The offence under the Criminal Law Amendment Act 1885, s 6 was ‘defilement,’ and in relation to a girl between 13 and 16 was a misdemeanour that was not prosecutable more than three months after the offence. Defilement of a girl under 13 was a felony, punishable by imprisonment for a period of up to two years, s 5.

<sup>33</sup> The Offences Against the Person Act 1861, s 16 provided:

Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable ... to be kept in penal servitude for life.

<sup>34</sup> Criminal Law Amendment Act 1935, s 2. As with the Criminal Law Amendment Act 1885, there were two levels of offence, a misdemeanour in relation to a girl aged 15 – 17, and a felony in relation to a girl under 15, the potential sentences were, however, increased significantly.

continued to reflect the common law position until 1972.<sup>35</sup> Parental consent to marriage was not necessary to give legal validity to Catholic child marriages and marriages between children undoubtedly took place; the 1961 census report for example has a classification for ‘age at marriage’ that begins at 15 and records a, not insignificant, number of marriages by women between the ages of 15 and 19.<sup>36</sup>

This discrepancy between the State’s concern to deter sexual activity with children in general, and its disinterest in what took place between children (potentially as young as 12) and any person they might marry, demonstrates the extent to which the Irish government saw marriage as something beyond State control.<sup>37</sup> Until the late 1960s, the only regulation governing marriage (other than canon law) was common law and statutory provisions inherited from the British. The rest of this chapter reviews those rules and how they were applied in the Irish courts, demonstrating a clear division between ‘law’ and ‘politics’ in the domain of relationship regulation. The review begins with a discussion of Article 41 of the 1937 Irish Constitution, which specifically refers to marriage and the family built upon it, arguing that during this period Article 41 had no legal implications for the performance of individual relationships.

### *1.5.2 Marriage and the Irish Constitution.*

On the foundation of the Irish State in 1922, English common law and legislation enacted by the British parliament remained in force unless found repugnant to the Constitution.<sup>38</sup> For a significant period, therefore, the legal regulation of marriage in

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<sup>35</sup> Marriages Act 1972, s 1.

<sup>36</sup> Central Statistics Office, *Census of Population of Ireland 1961: Volume 2* (Stationery Office 1962), 1.

<sup>37</sup> Rape within marriage was not criminalised in Ireland until 1990, Criminal Law (Rape) (Amendment) Act 1990, s 5.

<sup>38</sup> The Irish State broke legal ties with the British Parliament in 1922. However, British legislation and common law continued to apply in Ireland after independence until specifically

Ireland was based on rules created by a government and legal system that might be considered ‘foreign.’ The 1937 Constitution contained a pledge that the State would ‘guard with special care the Institution of Marriage upon which the Family is founded’ and prohibited the enactment of legislation facilitating the dissolution of marriage.<sup>39</sup> The Family, according to the Constitution, was ‘a moral institution,’ ‘the basis of social order,’ and ‘indispensable to the welfare of the Nation and the State.’

Basil Chubb has argued that the contents of Article 41 were not directly influenced by the hierarchy of the Roman Catholic Church, but the imprint of the Church’s social teaching is undeniable.<sup>40</sup> Article 41.1 partially paraphrases *Rerum Novarum*, Pope Leo XIII’s 1891 encyclical letter, which dealt with ‘the Condition of Labour.’ Paragraph 12 states:

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repealed or declared unconstitutional. Article 73 of The Constitution of the Irish Free State (Saorstát Éireann) 1922 provided that:

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Upon enactment of the Constitution of Ireland, Bunreacht Na hÉireann, on the 1st of July 1937 this provision was replaced by Article 50 of the 1937 document:

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

<sup>39</sup> Article 41 Bunreacht na hÉireann– The Family (as enacted in 1937) stated:

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.

1.2° 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.

2.2° 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.

3.1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

3.2° No law shall be enacted providing for the dissolution of marriage.

The 1922 Constitution had contained no similar provision.

<sup>40</sup> Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991), 36.

No human law can abolish the natural and original right of marriage, nor in any way limit the chief and principal purpose of marriage ordained by God's authority from the beginning: "Increase and multiply." Hence we have the family, the "society" of a man's house – a society very small, one must admit, but none the less a true society, and one older than any State. Consequently, it has rights and duties peculiar to itself which are quite independent of the State.<sup>41</sup>

This extract also encapsulates the Roman Catholic principle of subsidiarity, an approach to social policy, which holds that the organisation of society should take place at the lowest possible level, beginning with the family.<sup>42</sup>

Article 41.2 echoes paragraph 71 of the 1931 encyclical *Quadragesimo Anno*, which declares:

Mothers, concentrating on household duties, should work primarily in the home or in its immediate vicinity. It is an intolerable abuse, and to be abolished at all cost, for mothers on account of the father's low wage to be forced to engage in gainful occupations outside the home to the neglect of their proper cares and duties, especially the training of children.<sup>43</sup>

The Catholic view of marriage was thus that husband and wife were bound together for life in a union of defined gender-roles, husband as breadwinner and wife as mother and homemaker. This union created family, the basic unit of society existing separately from the State. When the Irish Constitution was enacted in 1937, the intention of the framers in relation to social and fundamental rights was not to begin a process of social improvement, but to defend existing truths. Hogan and Whyte note that when the draft Articles 40 - 44 were published:

no great importance was attached to them and nothing very much was expected from them – possibly because the framers of the 1937 Constitution expressly

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<sup>41</sup> The Catholic Church, *Seven Great Encyclicals* (Paulist Press 1963), 7.

<sup>42</sup> A statement of the principle can be found at paragraph 80 of Encyclical of Pope Pius XI, *Quadragesimo Anno* 1931:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly... Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of 'subsidiary function,' the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.

ibid, 147.

<sup>43</sup> ibid, 144-145.

intended them as mere ‘headlines to the legislature’ rather than as an essential part of the mechanism of a vigorous judicial review.<sup>44</sup>

The framers of the Irish Constitution were setting out, they believed, self-evident moral limitations to politics, rather than anticipating present-day restrictions on State abuses of individual rights.<sup>45</sup>

Article 41, and its statements in relation to marriage, were neither challenged nor deployed in any meaningful way by political government in managing the State before 1970. In the courts, the text of the article was accepted as representing common sense and requiring neither legal vindication nor political re-enforcement.<sup>46</sup> Judicial interpretations of Article 41 largely accepted that marriage was something beyond State regulation, which the State should endeavour to protect by non-interference. For example, in 1964, the Supreme Court confirmed that that the ‘family’ attracting constitutional protection was that based on marriage,<sup>47</sup> and in *In Re Tilson’s Infants* (decided in 1951) Gavin Duffy J confirmed the moral nature of the marital family:

The cardinal position ascribed to the family by our fundamental law is profoundly significant; the home is the pivot of our plan of life. The confused philosophy of law bequeathed to us by the nineteenth century is superseded by articles which exalt the family by proclaiming and adopting in the text of the Constitution itself the Christian conception of the place of the family in society and in the State.<sup>48</sup>

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<sup>44</sup> Gerard Hogan and Gerry Whyte, *JM Kelly: The Irish Constitution* (4th edn, Tottel 2006), 1245.

<sup>45</sup> Samuel Moyn points out that revolutionary era rights, such as those of the French and American Constitutions, were considered dangerous by the authors of the Universal Declaration on Human Rights in 1948. Rousseau’s claims for the supremacy of the State were directly linked to the rise of Nazi Germany. Even in 1948, the idea of individualist rights against the State had not been formulated. The 1948 declaration was not ‘a commitment to the humanisation of world politics through international law nor affiliation with any movement of well-meaning agitators (there was yet no such thing). Instead they prompted a recognition of moral limitations to and on politics.’ Samuel Moyn, ‘The First Historian of Human Rights’ (2011) 116(1) *American Historical Review* 58, 63.

<sup>46</sup> The status of marriage as an institution was not specifically relied upon in the courts until 1979 when it was raised by the plaintiffs in *Murphy v Attorney General* [1982] 1 IR 241.

<sup>47</sup> *The State (Nicolau) v An Bord Uchtála* [1966] IR 567.

<sup>48</sup> [1951] 1 IR 1, 15.



The constitutional text also largely reflected Irish practice at the level of individual relationships. Marriage was a lifetime relationship, women did not work outside the home, and sexual relationships outside marriage, although they did occur, were either rare or well concealed.<sup>49</sup> Article 41, like other provisions of the Constitution that, from today's perspective, grant legal rights to citizens and limit the activities of government, was intended as a statement of national identity and sovereignty. The moral nature of marriage and its existence within the domain of religious regulation was unquestioned, and it was not anticipated that government should have any role in relation to it.

### *1.5.3 Legal regulation of marriage - rules for entry*

Until 2004, the conditions for, and regulation of, entry into marriage were left largely to the authority of the various churches and pre-1922 British legislation and common law.<sup>50</sup> The Marriage (Ireland) Act 1870, as amended, contained detailed rules for the celebration of marriages by non-Catholic churches and the Civil Registrar, governing such issues as the publication of banns, lodging of notices, and the form of ceremonial words required.<sup>51</sup> Somewhat bizarrely, the celebration of Roman Catholic marriages, by far the most common form in Ireland,<sup>52</sup> were not governed by statute, beyond a registration requirement.<sup>53</sup> Indeed WH Faloon commented in 1881 that:

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<sup>49</sup> Women engaging in sexual activity outside marriage could find themselves committed to the institutional care of the Church. Where such liaisons resulted in pregnancy, women were often secreted in Irish mother and baby homes, or sent to England to give birth and have their babies adopted. For an account of the experience of unmarried mothers in Ireland see Maria Luddy 'Unmarried Mothers in Ireland, 1880 – 1973' (2011) 20(1) *Women's History Review* 109.

<sup>50</sup> Until the enactment of the Civil Registration Act 2004. Section 1(1) of Marriages Act 1972, which came into force on 1 January 1975 (SI 1974/324) increased the minimum age of marriage for boys and girls to 16.

<sup>51</sup> A full account of the various rules relating to entry into marriage in the 1970s can be found in Alan Shatter, *Family Law in the Republic of Ireland* (Wolfhound Press 1977), 31-54.

<sup>52</sup> Shatter records that 20,540 out of a total of 21,113 marriages were celebrated according to the rites of the Catholic Church in 1975. Shatter, *Family Law in the Republic of Ireland* (1977), 35.

<sup>53</sup> They were also required to comply with the rules regarding prohibited degrees of relationship found in the Marriage Act 1835, the Deceased Wife's Sister's Marriage Act 1907

[Roman Catholic Marriages] might be celebrated privately or publically, at any time or place, and in any form or manner the celebrating priest thought proper, without banns, licence, notice, residence or consent; and insofar as the State is concerned this seems to be the law.<sup>54</sup>

Common law, building on the ecclesiastical law of the established church, did set out minimum requirements for a valid marriage and failure to comply with these could render a marriage void or voidable. These minimum conditions were governed by the law of nullity.

#### *1.5.4 Invalidating marriage – the law on nullity*

Marriage was easy to contract but difficult to repudiate. Divorce was prohibited by the 1937 Constitution, and although theoretically possible by private Act of the Oireachtas between 1922 and 1937, no standing orders facilitating the introduction of such Bills were made.<sup>55</sup> A decree of nullity, which had the effect of declaring that a marriage never existed, was therefore the only escape, save death, from a failed union. The Law Reform Commission, reporting in 1984, described the law of nullity as ‘being concerned with the circumstances in which a marriage will be invalid according to the law of the State.’<sup>56</sup> A void marriage was regarded as never having taken place because of lack of capacity, non-observance of formalities or the absence of consent. A voidable marriage, on the other hand, was one that remained valid until repudiated by one of the spouses, and the only basis upon which it could be declared invalid was the impotence of either party.<sup>57</sup>

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and the Deceased Brother’s Widow’s Marriage Act 1921, but these largely corresponded with canon law rules. A full list of prohibited degrees of relationship applying in 1970 is given in Shatter, *Family Law in the Republic of Ireland* (1977), 32-34. The rules on registration are contained in the Registration of Marriages (Ireland) Act 1863.

<sup>54</sup> W. Harris Faloon, *Marriage Law of Ireland* (Hodges Figgis 1881), 9, as cited in Shatter, *Family Law in the Republic of Ireland* (1977), 35.

<sup>55</sup> Hanna J in *McM v McM and McK v McK* [1936] 1 IR 177, gives an account of attempts to introduce three private divorce Bills following the establishment of the Oireachtas.

<sup>56</sup> Law Reform Commission, *Report on Nullity of Marriage* (LRC 9 1984), vii.

<sup>57</sup> *ibid*, 48.

Before 1970, applications for civil nullity were very rare in Ireland.<sup>58</sup> There are only a handful of Irish reported cases from this period, all heard in the 1930s and 1940s. The most legally influential of these was *Griffith v Griffith*, followed in the 1971 case *Kelly v Kelly*.<sup>59</sup> The husband in *Griffith* applied to have his marriage annulled on the ground of duress. His wife did not enter a reply to the petition. Haugh J referred to the duty owed ‘to the public to support marriage’ and confirmed Lord Penzance’s definition of marriage as ‘the voluntary union for life of one man and one woman, to the exclusion of all others.’<sup>60</sup> Marriage, in Haugh J’s view, was a ‘peculiar and unique relationship’ best understood as ‘part of the law of contract.’<sup>61</sup> As public policy required that ‘marriages should not be lightly set aside,’ great care and circumspection was necessary in investigating the circumstances in which an impugned marriage was contracted.<sup>62</sup> Thus, fraudulent misrepresentation by one of the parties was not enough to void a marriage for lack of consent. Neither was duress or intimidation resulting in fear ‘justly imposed.’ Haugh J ultimately granted the annulment in *Griffith* on the grounds of absence of consent, but described the case before him as ‘remarkable’ and ‘unique.’<sup>63</sup>

Obtaining a decree of nullity on the ground of impotence was likewise difficult. In two cases, heard together in 1936, Hanna J noted that in such cases ‘there is a great responsibility on the Court to see that the cases are brought *bona fide* and are clearly,

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<sup>58</sup> Shatter, *Family Law in the Republic of Ireland* (1977), 56. Shatter notes that a large increase in applications took place in 1974 and 1975 as a result of newspaper coverage of the nullity jurisdiction of the marriage tribunals of the Catholic Church. The increase may have been large in percentage terms, but remained very low in numerical terms, with just eight applications commenced in each of the two years. Previously only two or three applications were made each year.

<sup>59</sup> Unreported, O’Keeffe P, High Court 16 February 1971.

<sup>60</sup> [1944] IR 35, 40 citing Lord Penzance in *Hyde v Hyde* 3 Phill Ecc 325.

<sup>61</sup> [1944] IR 35, 41.

<sup>62</sup> [1944] IR 35, 42.

<sup>63</sup> [1944] IR 35, 46.

unequivocally and beyond doubt established according the legal principles.<sup>64</sup> These included an investigation as to whether the parties to the marriage were ‘incapable of the act of generation’ and whether their incapacity could ‘be removed by art or skill’<sup>65</sup> In the event, both applicants were unsuccessful because both respondents refused to repudiate their marriages, and an order would not be given on the basis of the petitioners’ own incapacity.

### *1.5.5 Effects of marriage – legal personality and private property*

At common law, marriage had significant legal consequences, particularly for women. Upon marriage, a wife’s legal personality merged with that of her husband,<sup>66</sup> and the doctrine of coverture vested any property she owned in him, including money she earned or inherited during marriage. In gaining control of his wife’s property and earnings, a husband was obliged to financially support her and any children of the marriage.<sup>67</sup> Sir Sydney Bell Smyth, writing in 1859, explained the theoretical basis of the doctrine:

The law looks to the husband, as head of the family, for the maintenance and education of its members. This is a duty that he could not perform, if any other had an equal control with him over the property of the family. It is of necessity,

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<sup>64</sup> *McM v Mc M and McK v McK* [1936] 1 IR 177, 185.

<sup>65</sup> *McM v Mc M and McK v McK* [1936] 1 IR 177, 190.

<sup>66</sup> The case of *Collier and Wife v Wicklow and Wexford Railway Company* [1874] 8 ILTR 24 illustrates the extent to which wives lost their legal existence. Mr. Collier took a breach of contract action against the railway company for failure to convey his wife to her destination within a reasonable time. He also sought damages for the loss of her company whilst she was locked in the railway station overnight. Keogh J commented ‘This is a case for nominal damages. The female plaintiff did not take a cab, neither did she require a doctor, nor has there been any injury sustained by the husband upon the first count [breach of contract]’ (my emphasis). With regard to the loss of company, Lawson J held, ‘[w]hen I look at the sole allegation in the first count I cannot see that a deprivation of services had taken place, as the plaintiff was not at home that night. He cannot, therefore, recover damages for the exclusion of the wife from the house that night.’

<sup>67</sup> See R S Roper, *A Treatise on the Law of Property arising from the Relation between Husband and Wife*, Vol 2 (2nd edn, London, 1820) for a detailed exposition of the support obligations of husbands at common law.

therefore, that the law has incapacitated the wife during the coverture from doing any act without the husband's consent.<sup>68</sup>

The strict application of these common law principles was modified somewhat by the equitable doctrine of 'separate property,'<sup>69</sup> which allowed married women to retain ownership of family property after marriage, but not for their own benefit. The doctrine was employed by the courts to protect family fortunes from the husbands of female successors pending the arrival of a male heir.<sup>70</sup>

In the 1860s, British middle class women began to demand property rights,<sup>71</sup> and secured partial success with the enactment of the Married Women's Property Acts 1870 – 1908. This legislation amended the common law position to allow married women to own their wages and earnings, and certain investments and property inherited from an intestate next of kin. Nevertheless, these Acts did not give married women a legal existence separate from their husbands, nor allow them complete power to acquire and dispose of property.<sup>72</sup> Common law rules, as amended by the Acts,

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<sup>68</sup> Sir Sydney Bell Smyth, *The Law of Property as Arising from the Relation of Husband and Wife* (London, 1859), 15.

<sup>69</sup> Equity accepted that property conveyed to trustees for a married woman's 'separate use' could be dealt with by her as if she were unmarried. Property accumulated by a woman after desertion by her husband was also considered separate property and was not subject to his control. The perceived risk to a wife's settled property from a predatory husband or her own folly, led to the use of 'restraint upon anticipation' clauses in property settlements enforced by the Court of Chancery, preventing the sale or mortgage of a wife's separate property during coverture and taking 'from the wife the power of bringing ruin upon herself.' Sir John Comyns, *A Digest of the Laws of England* (4th edn, Samuel Rose 1800), 395. This development was not without its critics. John Fraser Macqueen noted that: 'The wife is not bound to apply her separated property to family purposes. She may keep it accumulating at interest while her husband and family are without bread, or she may elope and bestow all on her paramour.' He was referring to a situation which arose in the House of Lords case of *Hodgens v Hodgens* [1837] 7 ER 124. John Fraser Macqueen, *A Practical Treatise on the Law of Marriage, Divorce, and Legitimacy: as Administered in the Divorce Court and in the House of Lords* (2nd edn, Greatly 1860), 126.

<sup>70</sup> Ben Griffin, 'Class, Gender and Liberalism in Parliament, 1868 – 1882: The Case of the Married Women's Property Acts' (2003) 46 *The Historical Journal* 59, 71.

<sup>71</sup> For a full account of the political process leading to the Married Women's Property Act 1870 see, Ben Griffin, 'Class, Gender and Liberalism in Parliament, 1868 – 1882: The Case of the Married Women's Property Acts.'

<sup>72</sup> Married Women's Property Act 1870, Married Women's Property Act 1882, Married Women's Property Act 1884, Married Women's Property Act 1893, Married Women's

continued to govern the property relationship and legal status of husbands and wives in Ireland until 1957.<sup>73</sup>

A number of legal anomalies arose in relation to the operation of the Married Women's Property Acts. A married woman injured in a car driven by her husband could not make a claim against his insurance because the law considered them to be one person.<sup>74</sup> A third party could not receive property stolen by a wife from her husband for the same reason.<sup>75</sup> The courts could declare that a wife's property was hers alone, and that her husband had no interest in it, but would not prevent him from entering and using the property.<sup>76</sup> In contrast, a husband could maintain an action against his wife for the recovery of property or ejectment on title.<sup>77</sup> A married woman could not act as next friend to an infant in a tort action because she had no separate property against which a cost order could be made,<sup>78</sup> nor could she enter an appearance to a summons in her own name in tort, it had to be entered by her husband as next friend.<sup>79</sup> The legislation did prove useful for the avoidance of debt. In *Lowry v Derham & Ors* a wife, ordered to pay costs arising from litigation in which she was the losing party, successfully defended a claim for payment.<sup>80</sup> At the time the costs order was

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Property Act 1903 and Married Women's Property Act 1907. In *Derham v Tyndall* [1906] 40 ILTR 222, it was held that a married woman could not act as a next friend to an infant in a tort case because she had no separate property from which a costs order could be made. In *Daunt v Coneway* [1881] 15 ILTR 48, it was held that a married woman could not enter an appearance in her own name to a summons; the appearance must be entered by her husband as 'next friend.' The 1907 Act imposed a statutory obligation on married women in possession of separate property for 'the maintenance of her parent or parents.' Married Women's Property Act 1907, s 1. This legislation applied only in England and Wales. A woman having separate property was also liable, under s 20 and 21 of the Married Women's Property Act 1882, to the parish for the maintenance of her husband and children.

<sup>73</sup> When they were substantially reformed by the Married Women's Status Act 1957.

<sup>74</sup> *Edwards v Porter* [1925] 1 AC 1.

<sup>75</sup> *R v Creamer* [1919] 1 KB 564.

<sup>76</sup> *In the Matter of the Married Women's Property Act, 1882 and Judith Gaynor v Patrick Gaynor* [1901] 35 ILTR 101.

<sup>77</sup> *McManus v McManus* [1902] 36 ILTR 224.

<sup>78</sup> *Derham v Tyndall* [1906] 40 ILTR 22.

<sup>79</sup> *Daunt v Coneway* [1881] 15 ILTR 58.

<sup>80</sup> [1895] 2 IR 123.

made she had no separate property, her entitlement as the object of a trust, which made an annuity payment shortly thereafter, was disregarded. Likewise, in *Molony v Harney* the wife was able engage the Acts to avoid payment of a debt incurred before her marriage.<sup>81</sup>

These technical legal difficulties led the Irish Government to follow its British counterpart in separating the legal personalities of married men and women.<sup>82</sup> When enacted, the Married Women's Status Act 1957 was considered a straightforward consolidation and administrative measure, designed to clarify the position with regard to the legal status of married women and remove a husband's liability for his wife's torts and debts.<sup>83</sup> The Minister for Justice, James Everett explained the extent of the legal change to the Seanad:

The Bill makes five important changes in the law. First of all, it makes a married woman liable personally for her torts, contracts and debts, and it extends liability in bankruptcy to all married women. Secondly, it allows one spouse to sue the other in tort. Thirdly, it abolishes restraint on anticipation. Fourthly, it allows a wife or child to enforce a contract made by the husband for the benefit of the wife or child, and similarly, in the case of a contract made by the wife. Finally, it abolishes a husband's liability for his wife's torts.<sup>84</sup>

He did not mention what would prove to be the most significant effect of the Act. Section 5 provided that following commencement '[a] husband and wife shall, for all purposes of acquisition of any property ... be treated as two persons.' The terms of section 5 completely and finally removed any remaining legal incidents of coverture, replacing the community of property doctrine with a separate property regime. The

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<sup>81</sup> [1895] 2 IR 169.

<sup>82</sup> The Law Reform (Married Women and Tortfeasors) Act 1935 was described by the Attorney General Mr Thomas Inskip, on reading the Bill to the House of Commons, as intended to 'relieve the husband of the responsibility which he now has to bear for his wife's torts or for his wife's liabilities.' House of Commons Deb 8 July 1935, vol 304, col 118.

<sup>83</sup> The broad policy and effect of the Married Women's Property Act 1882 had been to separate the legal personalities of husband and wife, but careless drafting led to uneven application of the principle in the courts.

<sup>84</sup> Seanad Deb 16 January 1957, vol 47, col 73.

legal doctrine of coverture had been removed but its practical eradication would prove more problematic.<sup>85</sup>

From today's perspective, the 1957 Act looks like a significant reforming measure, bringing women out from under their husbands' cloaks. When enacted, however, the problems it sought to address were of little consequence to the vast majority of the Irish population. The impetus for legal reform did not emanate from political concern with how marriage was practised or its effect on the social status of married women. The endorsement of the marriage bar in the contemporaneous Civil Service Regulation Act 1956 confirmed that the form of marriage described by the Constitution reflected accepted social practice and political understanding. In a memorandum for government dated 12<sup>th</sup> October 1956, the Department of the Taoiseach noted, in relation to rules on Income Tax that taxed a wife's income as that of her husband, as follows:

The Minister has no strong views on this one way or the other though it might be argued that now that married women are financially being 'set free' so to speak, they should be solely responsible for their own income tax. As against this, it can be said that the present provision works little hardship in practice and facilitates the collection of tax.<sup>86</sup>

#### *1.5.6 Marital obligations - maintenance*

At common law, a husband was obliged to maintain his wife and any children of the marriage, although this duty extended only to the necessities of life.<sup>87</sup> A wife had no duty to maintain her husband, and the common law prohibition on suits between

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<sup>85</sup> The editor of the *Irish Jurist*, writing in 1956, argued that the provisions of Married Women's Status Act in relation to property were contrary to partnership or community view of marriage implicit in the Constitution. 'The Legal Status of Married Women' (1956-1957) 21-22 *IJ* 49, 51.

<sup>86</sup> Department of the Taoiseach, Memorandum for Government 12 October 1956, 7. National Archives file number Taois/s 15782.

<sup>87</sup> The definition of 'necessary' extended to a wife's costs in defending a matrimonial suit, even if she were unsuccessful, *Francis v Francis* [1898] 32 *ILTR* 111.



spouses meant that a wife could generally not enforce the obligation.<sup>88</sup> In cases of desertion (by a husband), a wife could pledge his credit for necessities,<sup>89</sup> a useful right for a wife whose husbands' standing in society was such that credit would be extended.<sup>90</sup> Failure to support one's wife was a serious matter and a series of statutes from the mid-1800s criminalised men whose refusal to maintain their wives and children left them dependent on public support.<sup>91</sup> Adultery by a wife was an absolute bar to maintenance, and an effective defence to criminal proceedings for failure to maintain. An accused husband 'was entitled upon proof of infidelity to be exonerated from his liability to maintain his wife.'<sup>92</sup>

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<sup>88</sup> Shatter, *Family Law in the Republic of Ireland* (1977), 241.

<sup>89</sup> As Blackstone explains, 'the husband is bound to provide his wife with necessities by law, as much as himself; and if she contracts debts for them, he is obliged to pay them; but for anything besides necessities he is not chargeable.' Sir William Blackstone, *Commentaries on the Laws of England* (2nd edn, Clarendon Press 1799), 155.

<sup>90</sup> 'and the test of what is necessary was a subjective one; thus what the wife of a professional man may obtain might be totally different from her working-class counterpart.' James O'Reilly, 'Litigation and the Wife's Agency of Necessity' (1972) 7(2) IJ 356. A wife's costs in an application for divorce *a mensa et thoro* were 'necessaries' and to be paid by the husband, *Dixon v Verschur* [1933] 67 ILTR 49.

<sup>91</sup> The Irish Vagrancy Act 1847 criminalized men who deserted or wilfully neglected to maintain their wives or any child whom they were liable to maintain. Section 2 of the Act stated:

And be it enacted that every person who shall desert or wilfully neglect to maintain his wife or any child whom he may be liable to maintain, so that such wife or child shall become destitute, and be relieved in or out of the workhouse of any Union in Ireland, shall, on conviction therefor before any Justice of the Peace, be committed to the common gaol or House of Correction, there to be kept to hard labour for any time not exceeding three calendar months.

The section was repealed by the Public Assistance Act 1939, and replaced by s 83 of that Act which provided for a maximum prison term of six months for failure to maintain. The offence was removed by the Social Welfare (Consolidation) Act 1981, which imposed a gender-neutral duty to maintain (s 214). The Department of Social Welfare can still recover amounts paid from spouses with a liability to maintain.

<sup>92</sup> *Phillips v Guardians South Dublin Union* [1902] 2 IR 112, 123 per Boyd J. Phillips was prosecuted by the South Dublin Union following his wife's admission to a workhouse under their control. The presiding magistrate refused to hear evidence of adultery at the hearing of the action and committed him to prison for fourteen days hard labour. On appeal by way of case stated, the Queen's Bench division of the High Court held that a wife's adultery was a good defence to an action for failure to maintain and consequently he should have been permitted to introduce relevant evidence.

The British, Married Women (Maintenance in Case of Desertion) Act 1886, which applied in Ireland, amended the common law position to allow a woman deserted by her husband to apply to a magistrate's court for an order requiring him to maintain her. No action lay if the husband was not in desertion,<sup>93</sup> and un-condoned adultery by the wife was a bar to maintenance. As applied in Ireland, this legislation facilitated an application to the District Court, but enforcement of orders proved problematic and, without access to legal aid, application to the courts was impossible for most women.<sup>94</sup> The Irish Courts took a flexible approach in granting maintenance orders, applying the principle of 'constructive desertion' to cases in which a wife was obliged to leave the family home as a result of the her husband's abusive behaviour.<sup>95</sup> A wife who simply no longer wished to cohabit with her husband, without proof of marital offence, had no right to maintenance under the 1886 Act.<sup>96</sup> This legislation was of little practical

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<sup>93</sup> Section 1 of the Married Women (Maintenance in Case of Desertion) Act 1886 Act provided that:

it shall be lawful for any married woman who shall have been deserted by her husband, to summon her husband ... and thereupon such ... (District Justice), if satisfied that the husband, being able wholly or in part to maintain his wife or his wife and family has wilfully refused or neglected to so to do, and has deserted his wife, may order: (1) That the husband shall pay to his wife such weekly sum not exceeding two pounds as the ... (District Justice) may consider to be in accordance with his means and with any means the wife may have for her support and the support of her family.

A maintenance order could be enforced by execution against the husband's property, but the means most used to enforce payment was attachment and committal, a rather counter-productive action where the husband earned his income from wages.

<sup>94</sup> William Duncan 'Desertion and Cruelty in Irish Matrimonial Law' 1972 7(2) IJ 213.

<sup>95</sup> *C v C* Unreported, High Court, Kenny J, 27 July 1973, and James O'Reilly 'Limits of Constructive Desertion' 1973 8(2) IJ 303.

<sup>96</sup> The restrictive, fault based, nature of early maintenance provision is illustrated by *The Board of Public Assistance for the South Cork Public Assistance District v Michael O' Regan* [1949] 83 ILTR 173. Mrs Regan left her husband and subsequently applied for maintenance under the 1886 Act. The application was dismissed. Her husband was willing to provide support in the family home, but not otherwise. She then applied for public assistance and was allocated a sum of money. The plaintiff, as required under the Public Assistance Act 1939, attempted to recover money that it had paid to the wife on the basis that her husband had failed to maintain her. The Supreme Court held that public assistance was not properly granted and therefore not recoverable. The wife could supply the necessities of life through the 'other lawful means' of returning to her husband. Maguire CJ expressed the view that a wife is bound to live with her husband in the absence of good and sufficient cause.

import in Ireland, as the applications were expensive and enforcement difficult. In 1969, just thirty-eight maintenance orders were made in favour of wives.<sup>97</sup> The financial limit of £4 per week which applied to maintenance orders from 1940 to 1971 was an added disincentive.<sup>98</sup>

### *1.5.7 Marital obligations - cohabitation*

Marriage could not be legally ended other than by death until 1997,<sup>99</sup> and while it subsisted spouses were obliged to cohabit and provide one and other with marital services known as ‘conjugal rights.’<sup>100</sup> They could however agree to live apart by entering into a separation agreement, which usually contained maintenance provisions,<sup>101</sup> although a wife could agree to a separation without maintenance.<sup>102</sup> In the event of desertion by one spouse, the other could apply to the High Court for restitution of conjugal rights.<sup>103</sup> An action for divorce *a mensa et thoro*, originally an Ecclesiastical remedy administered by the Ecclesiastical Courts of the established Church of Ireland,<sup>104</sup> allowed suspension of the obligation to cohabit upon proof of

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<sup>97</sup> Michael Viney ‘Desertion – Who Pays.’ *The Irish Times* (Dublin, 28 October 1970), 12.

<sup>98</sup> The rate of widow’s contributory pension for a woman with no children was £4.5s per week in 1970 (Social Welfare Act 1970, s 27). A married male clerical officer in the Civil Service earned £24.45 per week in November 1972. Commission on the Status of Women, *Report to the Minister for Finance* (Prl 2760, Stationary Office 1972), 267.

<sup>99</sup> As noted at para above, the 1937 Constitution contained a prohibition on dissolution of marriage. This prohibition was removed on 30 November 1995 by referendum, and replaced with a provision facilitating divorce in restrictive circumstances.

<sup>100</sup> The legal action for restitution of conjugal rights was abolished in Ireland by the Family Law Act 1988.

<sup>101</sup> Even if the wife was cohabiting with another man who was supporting her, *Lewis v Lewis* [1940] 74 ILTR 170.

<sup>102</sup> In *Ross v Ross* [1942] 76 ILTR 83 the wife agreed to a separation agreement on the basis of a lump sum payment and no continuing maintenance. She later applied for divorce *a mensa et thoro* on the ground of the husband’s adultery, and was successful. The court refused to award permanent alimony on the basis that she had waived her right to it in the separation agreement.

<sup>103</sup> Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870, s 7.

<sup>104</sup> The jurisdiction of the Ecclesiastical Courts was transferred to the Court of Matrimonial Causes and Matters by s 13 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 and later, under the Judicature (Ireland) Act 1877 to the

cruelty, adultery or unnatural practices by one of the spouses.<sup>105</sup> Relief was temporary; if at some future time reconciliation took place the decree was discharged and the obligation to cohabit revived.<sup>106</sup> During the suspension of cohabitation, a wife's property remained under the control of her husband and lifetime alimony adequate to provide for 'necessaries' was awarded to the wife if she was not the guilty party. Alimony was always awarded as periodic payments, never as a lump sum, and the court could not award a sum for the support of children in the wife's care.<sup>107</sup> The amount was calculated as a proportion of the husband's income, ranging from one third to one-half, with the amount 'always more liberal when the husband's delinquency stands proved than pending suit.'<sup>108</sup> The remedy of divorce *a mensa et thoro* was available in Ireland until the enactment of the Judicial Separation and Family Law Reform Act 1989. As with the law on maintenance, the remedy was rarely availed of; just twenty-seven orders for divorce *a mensa et thoro* were granted by the Irish Courts between 1946 and 1970.<sup>109</sup>

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Supreme Court of Judicature in Ireland. For a detailed account of the law relating to divorce *a mensa et thoro* see William Duncan and Paula Scully, *Marriage Breakdown in Ireland, Law and Practice* (Butterworths 1990). *A mensa et thoro* is Latin for 'from bed and board' the decree providing the equivalent of a Judicial Separation. A full, and somewhat colourful account of the law on divorce *a mensa et thoro* can also be found at Law Reform Commission, *Report on Divorce a Mensa et Thoro* (LRC 8 1983). This report is dealt with further in chapter 6.

<sup>105</sup> W H Kisby, *The Law and Practice of the Court on Matrimonial Causes and Matters* (William McGee 1871). In *Ross v Ross* [1942] ILTR 83, the court granted order for judicial separation following a separation agreement. This can be compared with the current position in which a pre-existing separation agreement acts as a bar to an action for judicial separation under the Judicial Separation and Family Law Reform Act 1989, *F v F* [1995] IR 352.

<sup>106</sup> Shatter, *Family Law in the Republic of Ireland* (1977), 115.

<sup>107</sup> *MB v RB* [1989] 1 IR 412, 412, per Walsh J: 'No Statutory provision has ever been made in this jurisdiction for the payment of a capital or lump sum for alimony.'

<sup>108</sup> *Kempe v Kempe* [1800] 162 ER 668, 669, per Sir John Nicholl, as cited in Law Reform Commission, *Report on Divorce a Mensa et Thoro and Related Matters*, 28.

<sup>109</sup> Michael Viney 'Separate Lives.' *The Irish Times* (Dublin, 29 October 1970), 14.

### 1.5.8 *The end of marriage - death*

Common law rules on succession were complex and based on the distinction between real property and personalty. Real property (or realty) consisted principally of freehold interests in urban land; personalty comprised most (Irish) agricultural land, leasehold property, movable property, and money.<sup>110</sup> On the death of a wife, her husband took the whole of her personal estate, whereas on the death of a husband, the wife took only one third where there were issue and one-half where there were none. A widower was entitled to a life estate in the whole of his wife's realty, subject to conditions.<sup>111</sup> A widow was entitled to a life interest in one third of her husband's realty, again subject to conditions.<sup>112</sup> All of these rules could be avoided by will or *inter vivos* settlement. The common law rules on intestate succession were amended somewhat by the Intestates' Estates Act 1954, which applied 'where a man dies intestate ... leaving a widow but no issue.'<sup>113</sup> In such a case, where the net value of the property did not exceed £4,000, the property vested in the widow absolutely.<sup>114</sup> This small concession to childless widows was repealed and replaced in 1965 by the more comprehensive regime of the Succession Act 1965.

The 1965 Act set aside the common law rules of curtesy and dower, granting husbands and wives a share in each other's estate whether or not there was a will or issue of the marriage.<sup>115</sup> The Minister for Justice, Mr Brian Lenihan, on introducing

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<sup>110</sup> Land vested under the Land Purchase Acts was considered personalty for succession purposes. Most agricultural land in Ireland was vested under the Land Purchase Acts. See J C W Wylie, *Irish Land Law* (2nd edn, Professional Books 1986), 31 – 39.

<sup>111</sup> A right known as curtesy. For a consideration of the rights of curtesy and dower see, J C W Wylie *Irish Land Law*, 238.

<sup>112</sup> Known as Dower. The concept was considered in the Irish case of *Murland v Despard* [1956] IR 170.

<sup>113</sup> Intestates' Estates Act 1954, Section 2.

<sup>114</sup> Intestates' Estates Act 1954, Section 3.

<sup>115</sup> Section 67 of the Succession Act 1965 provides that if an intestate dies leaving a spouse and no issue, the spouse shall take the whole estate. If an intestate dies, leaving a spouse and issue, the spouse takes two third and the issue share the remaining third. Section 111 provides

the Succession Bill 1965 to Dáil Éireann, described freedom of testation as a ‘peculiarly British idea,’<sup>116</sup> and defended the limitations introduced by the Act on the basis that they supported the special place afforded to the family and the mother in the home by the Constitution:

These principles cannot be reconciled with a system of law, which allows a man to ignore the mother of his family and to leave his property to strangers. It is no answer to say that most men do, in fact, provide for their wives and children in their wills, when, as we know, there are those who do not.<sup>117</sup>

The purpose of the spouse’s legal right share conferred by the Act was to protect widows and to recognise ‘the true extent of the responsibilities that, in a civilised society, husband and wife owe to each other.’<sup>118</sup>

Government had identified a difficulty with how wives were affected by the death of their husband, and dealt with it in the course of a comprehensive reform of succession law. The reform was justified on the basis of a wife’s contribution to marriage and society:

[i]t may, perhaps, be a platitude to say that the wife and mother is the very foundation of family and society, but it is, nevertheless, true. She has moral rights above and superior to any mere right to be maintained in the house.<sup>119</sup>

The Act, although representing a significant reform of existing legal rules, like the Married Women’s Status Act 1957, was not an attempt by government to resolve problems with the marriage relationship itself. The Succession Act had no effect whilst marriage continued, and left full power and control over property with the husband

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that if a testator leaves a spouse and no children, the spouse has a legal right to one-half the estate and if the testator leaves a spouse and children, the spouse has a legal right to one third of the estate.

<sup>116</sup> Dáil Deb 25 May 1965, vol 215, col 2017.

<sup>117</sup> Dáil Deb 25 May 1965, vol 215, col 2018.

<sup>118</sup> Minister for Justice, Brian Lenihan, Dáil Deb 25 May 1965, vol 215, col 2019. The legal right share is contained in section 11 of the Succession Act 1965 and remains in force.

<sup>119</sup> Minister for Justice, Brian Lenihan, Dáil Deb 25 May 1965, vol 215, col 2020.

during his lifetime. A husband particularly determined to disinherit his wife could continue do so through *inter vivos* disposition.<sup>120</sup>

#### 1.5.9 Effects of marriage - children

At common law, children of married parents were the property of their father; their mother had no legal right to guardianship or custody. Equitable rules mitigated this position somewhat, and the Guardianship of Infants Act 1886 facilitated a mother in applying for custody of children until they were 21. Ideas about the primacy of the father nonetheless prevailed in the Irish courts. Maguire J in *Re N.P. an Infant*,<sup>121</sup> although acknowledging that the principal concern of the court was the welfare of the child, stated that:

The father is the head of the household and is liable to contribute to the cost of maintenance of his wife and family. If the circumstances show that he has not disentitled himself I rather lean in favour of conceding to him a greater claim than to the mother.<sup>122</sup>

Cases before the courts concerning guardianship mainly dealt with the moral and religious education and welfare of the children of mixed-religion marriages.<sup>123</sup> In *Re Tilson's Infants*, the Supreme Court held that a principle of equality applied between married parents in respect of decisions concerning the religious upbringing of children. The parties in this case had agreed before marriage that any children would be brought up in the mother's faith. This agreement was upheld by the court on the basis that the Constitution precluded the favouring of the religious belief of one parent over the other. The Guardianship of Infants Act 1964 extended this principle of equality

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<sup>120</sup> Section 121 of the Succession Act contains anti-avoidance provisions, which can operate to void a transaction made with a view to disinheriting a spouse or children within three years of a disponent's death.

<sup>121</sup> [1944] 84 ILTR 32.

<sup>122</sup> *Re N.P. an Infant* [1944] 78 ILTR 32 at 34.

<sup>123</sup> *In Re Corcoran* [1950] 86 ILTR 6, *In re Frost, Infants* [1947] IR 3, *In Re Keenan Infants* [1949] 84 ILTR 169.

between married parents to all matters concerning the well-being of children. Fathers and mothers became joint guardians of their children, and each could apply to the other for child-maintenance.<sup>124</sup> Sole guardianship of illegitimate children was to remain with their mothers.<sup>125</sup> Whilst the responsible Minister acknowledged that the legislation would be used mainly in ‘the abnormal situation or for the broken home’<sup>126</sup> the main issue it was intended to address was the ‘welfare of the infant,’<sup>127</sup> not problems with marriage. In the event, applications under the Act were rare before 1970, available only in the High Court, and prohibitively expensive.<sup>128</sup>

## **1.6 Conclusion.**

Before the 1970s, there were four principal forms of law potentially regulating marriage; the 1937 Constitution, statute and case law inherited from the British, Irish statute law, and Irish case law. Although the Constitution made legal statements about marriage, these had no real effect at the level of politics and, as they largely reflected the relationship practices of the majority, represented no more than a rhetorical affirmation of social behaviour. British law that continued in force did so without interference from the Irish government. It affected only a wealthy minority, able to manage their own affairs without interference from the State. Irish reforms of marriage law, although effecting significant change from a legal perspective, had little impact on marriage practices, and were not intended to solve problems with the marriage relationship itself. The separation of the legal personalities and property of husband and wife by the Married Women’s Status Act 1957 had no practical effect at the time.

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<sup>124</sup> Section 11, Guardianship of Infants Act 1964.

<sup>125</sup> Section 6, Guardianship of Infants Act 1964.

<sup>126</sup> Minister for Justice Charles Haughey, Dáil Deb 29 January 1964, vol 143, col 207.

<sup>127</sup> Minister for Justice Charles Haughey, Dáil Deb 29 January 1964, vol 143, col 207.

<sup>128</sup> Michael Viney ‘Desertion – Who Pays.’ *The Irish Times*.



Although the Succession Act 1965 gave spouses a legal right share in each other's estate, it simply continued the State's habit of using marriage as a proxy for interdependence rather than attempting to regulate it. Matrimonial litigation was rare in Ireland, and the courts applied British common law and Irish statutory provisions without political controversy or questioning. Marriage law had not yet become a technique of interest or use to politics. The institution of marriage itself, and how it was practised, was considered outside the domain of political government serving only as a useful signal of interdependence.

## Two - Marriage Law Literature

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Marriage law, and the closely related topic of family law, have generated a large body of academic literature, particularly since the 1970s. Family sociology has likewise seen significant development over a similar period and the emergence of interdisciplinary, socio-legal research in the 1980s has also impacted on academic consideration of intimate lives. Nonetheless, despite increasing sophistication of analysis in legal and sociological scholarship, political debate, as illustrated in my empirical analysis, remains focused on binary oppositions between power and powerlessness. Foucault described this conceptualisation of power as the ‘juridical model,’ and his 1976 observation that ‘[i]n political thought and analysis, we still have not cut off the head of the king’<sup>1</sup> remains pertinent today.

In this chapter, I begin by explaining Foucault’s description of juridical power by reference to legal and political theory and provide. Next, I outline the development of sociological thinking on intimate and familial lives, followed by a summary of legal scholarship in the area. In the final part of the chapter, I review literature from the

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<sup>1</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality, Part I* (Robert Hurley tr, Penguin Books 1998), 88 – 89.

socio-legal community that draws upon the insights of family sociology, as well as work that takes a specific Foucauldian approach to legal regulation of personal life.

## 2.1 Juridical Power

In the 1975 lecture series *Society Must Be Defended*, Foucault outlines the juridical, or judico-discursive theory of power:

In the case of the classical juridical theory of power, power is regarded as a right that can be possessed in the way one possesses a commodity, and which can therefore be transferred or alienated, either completely or partly, though a juridical act or an act that founds a right – it does not matter which, for the moment – thanks to the surrender of something or thanks to a contract. Power is the concrete power that an individual can hold, and which he can surrender, either as a whole or in part, so as to constitute a power or a political sovereignty.<sup>2</sup>

Juridical power, once vested in the sovereign, is exercised ‘by laying down the rule ... It speaks and that is the rule.’<sup>3</sup> Its effects are largely negative: ‘a power to say no; in no condition to produce, capable only of posting limits, it is basically anti energy.’<sup>4</sup>

Foucault’s description of juridical power is an amalgamation of social contract theory (developed by Hobbes, Locke and Rousseau), and John Austin’s command theory of law. Social contract theory conceptualises political power as a possession traded between individual subjects and a sovereign State.<sup>5</sup> For Hobbes, citizens surrender power to an unlimited state sovereign,<sup>6</sup> whereas in Locke’s formulation

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<sup>2</sup> Michel Foucault, “*Society Must be Defended: Lectures at the Collège de France 1975-76* (David Macey tr, Picador 2003), 13.

<sup>3</sup> Foucault, *The Will to Knowledge*, 83.

<sup>4</sup> Foucault, *The Will to Knowledge*, 85.

<sup>5</sup> Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (first published 1762, Wordsworth editions 1998). Rousseau saw power as a finite resource, writing, at 14, that:

men cannot engender new forces, but only unite existing ones, they have no other means of preserving themselves than the formation, by aggregation, of a sum of forces great enough to overcome the resistance. These they have to bring into play by means of a single motive power, and cause to act in concert. The social contract is the theoretical construct through which the individual power of men unites to legitimate the power of the State.

<sup>6</sup> Thomas Hobbes, *Leviathan* (First Published 1651, Start Publishing 2012).

citizens retain certain ‘natural’ rights.<sup>7</sup> Rousseau also accepts the notion of natural rights but believes that, provided the social contract transfers the will of the people to the legislature, there can be no question of law infringing rights.<sup>8</sup> In Foucault’s formulation, once power is transferred to the sovereign, it is exercised in accordance with Austin’s command theory of law. Law, according to Austin, is the command of a political superior or State sovereign supported by sanctions, also established by the sovereign.<sup>9</sup> Austin’s theory of law/power is well illustrated by Foucault’s description of the torture and death of Damians in the opening pages of *Discipline and Punish*, and generalised as the power of life and death in *The Will to Knowledge*.<sup>10</sup>

The sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing; he evidenced his power over life only through the death he was capable of requiring.<sup>11</sup>

The sovereign, having the right to command obedience and sanction disobedience, has absolute power over the life and death of his subjects. The command theory of law thus conflates law and power – the power of a sovereign is executed by commands that are always legal.

Juridical power is used by Foucault as the rhetorical foil against which he builds his description of the productive and dispersed power that operates in the modern world. Although Foucault demonstrates in his historical studies that power no longer acts in a solely juridical fashion, he also argues that, in political thought we remain fixated upon the juridical model, believing that law is the manifestation of political

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<sup>7</sup> In Locke’s view, humans have a natural right to preserve themselves and a corresponding right to ‘meat and drink’ and other necessities of life. Peter Laslett (ed) *Two Treatise of Government* (Cambridge University Press 1988), 303.

<sup>8</sup> *ibid*, 30.

<sup>9</sup> John Austin, *The Provenance of Jurisprudence Determined* (John Murray 1832), 2-30.

<sup>10</sup> Foucault has adapted the term from Rousseau’s ‘right of life and death.’ Rousseau explained that individuals could transmit the right to dispose of their lives to the sovereign because: ‘He who is willing to preserve his life at the expense of others ought also to give it up for them when necessary.’ *ibid* 35.

<sup>11</sup> Foucault, *The Will to Knowledge*, 136.

power. In *The Will to Knowledge* he argues that '[p]ower as a pure limit set on freedom is, at least in our society, the general form of its acceptability'<sup>12</sup> and 'the representation of power has remained under the spell of monarchy.'<sup>13</sup> In other words, Foucault does not believe that the juridical model fully describes the operation of power in modernity. Rather, he argues that it describes how we think about and represent law/power in political discourse.

Juridical conceptualisations of law/power assume that power has a limit, set by the social contract, moral imperatives, natural law or other claims to truth. Power exercised within the appropriate boundaries is legitimate. Thus, Foucault points out, adopting a juridical model of power in political argument allows us to both justify the actions of those in possession of power and to challenge the legitimacy of its exercise.

Either we do so in order to show the nature of the juridical armoury that invested royal power, to reveal the monarch as the effective embodiment of sovereignty, to demonstrate that his power, for all that it was absolute, was exactly that which befitted his fundamental right. Or by contrast, we do so in order to show the necessity of imposing limits upon this sovereign power, of submitting it to certain rules of right, within whose confines it had to be exercised in order for it to remain legitimate. The essential role of the theory of right, from medieval times onwards, was to fix the legitimacy of power; that is the major problem around which the whole theory of right and sovereignty is organised.<sup>14</sup>

This conceptualisation of power as a commodity which can be deployed to oppress or liberate remains, as is apparent from the history of Irish marriage law reform, the principal basis upon which political movements and actors seek legal reform. Legal and sociological scholarship have largely abandoned this mode of analysis, although the translation of scholarship into everyday perceptions and political arguments can give the impression of juridical dichotomies in academic thought.

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<sup>12</sup> *ibid*, 86.

<sup>13</sup> Foucault, *The Will to Knowledge*, 86, 88.

<sup>14</sup> Michel Foucault, 'Two Lectures' in Michel Foucault, *Power Knowledge: Selected Interviews and Other Writings 1972 - 1977* (Colin Gordon ed, Colin Gordon and others trs, Pantheon Books 1980), 95.

## **2.3 Ways of Thinking about Marriage and Family life – Family sociology.**

### *2.3.1 Family Sociology – Nineteenth and early twentieth century*

In the late nineteenth and early twentieth century family sociology was influenced by anthropology and its biological discourses of relatedness. Drawing on evolutionary schemes, authors focused on the ‘naturalness’ of marriage as the basis of family and social organisation. Lewis Morgan in his ground-breaking study of kinship systems (based on a global survey of the linguistic terms used to describe relatedness) hypothesised that human kinship evolved from promiscuity to matriliney, patriliney, and the (most advanced) English system of monogamy and marriage.<sup>15</sup> This view of the gradual emergence of marriage was contested by Edward Westermarck who described marriage as the development of a ‘primeval habit,’<sup>16</sup> the origin of which lay in biologically determined roles. He rejected Morgan’s contention that humans were ever promiscuous, arguing that the family, consisting of mother, father and biological children, existed among anthropoids and was the primary and universal unit from which modern society evolved. Marriage and the family were closely connected, because the social institution of marriage facilitated the reproductive function of the family through the provision of a male protector.<sup>17</sup>

An acceptance that familial relationships could be created by both biological and social bonds emerged in the early twentieth century. Anthropologists working beyond ‘the West’ observed kinship systems not defined by the blood-link between father and child. Bronislaw Malinowski, for example, described a complex matrilineal kinship

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<sup>15</sup> Lewis Morgan, *Systems of Consanguinity and Affinity in the Human Family* (The Smithsonian Institute 1870).

<sup>16</sup> Edward Westermarck, *The History of Human Marriage* (First published 1981, Logos Press 2007), 27.

<sup>17</sup> *ibid*, 72.

system among the Trobidander tribe of Melanesia to which biological parentage was irrelevant.<sup>18</sup> Although anthropologists of this period were primarily concerned with tracing the origins of western family types in ‘primitive’ societies, the range of marriage and kinship practices identified led to gradual acceptance that kinship could be shaped by social action as well as biological ties.<sup>19</sup>

This development, nonetheless, did nothing to undermine assumptions about gender roles within the family, and women’s role remained limited by scientific discourses that assumed their intellectual inferiority and natural affinity with domestic work. Frederick Engels challenged this biological account of women’s nature by tracing the historical evolution of family organisation from pre-history, emphasising the issues of class, women’s oppression, and private property.<sup>20</sup> His objective was to provide a social explanation for the rise of the patriarchal family, laying a direct challenge to religious and scientific discourses that considered women to be, by nature, inferior to men. Building on Morgan’s progression from promiscuity to monogamy, Engels argued that women were bound by capitalism, which made them both servants and prostitutes to men, selling their body into the slavery of marriage ‘once for all.’<sup>21</sup> This was a daring critique of Victorian marriage and society, and although widely questioned on empirical and theoretical grounds,<sup>22</sup> Engels provided a starting position for subsequent work linking gender, class and capitalism.

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<sup>18</sup> Bronislaw Malinowski, *The Sexual Life of Savages in North Western Melanesia* (First Published 1932, 3rd edn, Routledge and Keegan Paul 1968).

<sup>19</sup> Deborah Chambers, *A Sociology of Family Life: Change and Diversity in Intimate Relations* (Polity 2012), 16.

<sup>20</sup> Frederick Engels, ‘Engels on the Origin and Evolution of the Family’ (1988) 14(4) *Population and Development Review* 705.

<sup>21</sup> *ibid*, 722.

<sup>22</sup> A collection of essays critiquing Engel’s work was published in 1989 to commemorate the centenary of *The Origin of the Family*. The essays point out that the anthropological research upon which he based his work was subsequently demonstrated to be inaccurate, that he oversimplified complex phenomena, and that he inappropriately universalised social

### 2.3.2 Family Sociology – Functionalism and Family Decline

A focus on the link between economic conditions and family structures continued into the twentieth century, although with a more pro-family emphasis than demonstrated by Engels. Talcott Parsons agreed with Engels that the nuclear, two adult, family was essential to industrialized society but, unlike Engels, he believed that industrial development was positive, and the small mobile family essential to social stabilisation.<sup>23</sup> The nuclear family, he argued, socialised children, stabilised adult personalities, and was more suited to industrialised society than pre-industrial extended kinship models. Marriage, for Parsons, was essential to social functioning and gendered role-specialisation was the most efficient use of resources within this family.<sup>24</sup> Parson's principles of structural functionalism became the standard theoretical framework for most western family sociology into the 1970s.<sup>25</sup> In the Irish context, his influence is apparent in Finola Kennedy's 1989 text, *Family, Economy, Government*, which accepted without question the superior and necessary status of the nuclear two-parent family based on marriage to social functioning.<sup>26</sup> The Irish Constitution and its judicial interpretation also reflects this structural functionalist concept of family, affording social primacy and protection to gendered, heterosexual, marriage-based families.<sup>27</sup>

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processes and structures. Janet Sayers, Mary Evans and Nanneke Redclif (eds) *Engels Revisited: Feminist Essays* (Routledge Revivals, 2009).

<sup>23</sup> Talcott Parsons and Robert Bales, *Family Socialisation and Interaction Process* (Routledge & Kegan Paul 1956).

<sup>24</sup> Talcott Parsons, 'The Social Structure of the Family' in R Ashen (ed), *The Family: Its Function and Destiny* (Harper 1949) as extracted in Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State: Text, Cases and Materials* (2<sup>nd</sup> edn Hart Publishing 2006), 6.

<sup>25</sup> Deborah Chambers, *A Sociology of Family Life: Change and Diversity in Intimate Relations*, (Polity 2012), 22.

<sup>26</sup> Finola Kennedy, *Family, Economy and Government in Ireland* (ESRI 143 1989). It might be noted that Kennedy was an economist by training rather than a sociologist.

<sup>27</sup> See Chapter One.



Parsons' functionalist explanation of family change has, more recently, been challenged by social historians and sociologists who see it as an abstract theory reliant on an idealised version of society.<sup>28</sup> It is also said to ignore the role of other social institutions in socialising children,<sup>29</sup> and to provide a justification for the uneven distribution of domestic work between men and women.<sup>30</sup> Parsons had nothing to offer the study of alternate family forms or the wide range of problems facing western society, and could not account for the continued importance of wider kinship ties identified by empirical studies.<sup>31</sup> His model, as emerges clearly from Kennedy's Irish study, privileges a mono-cultural, middle-class, ideal family.<sup>32</sup>

The importance of the nuclear family to social functioning, as identified by Parsons, generated anxiety among the sociological community in the United States. It was feared that materialism, the breakdown of kinship ties, and the movement of family from economic producer to consumer would lead to social instability and family disintegration. Carle Zimmerman denounced the decline of large families and extolled the virtues of early marriage. He linked the decline of Greek and Roman civilisations to the decline of the family, and claimed that 'unless some unforeseen renaissance occurs, the family system will continue headlong its present trend toward

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<sup>28</sup> See for example, Anthony Giddens, *New Rules of Sociological Method* (Hutchinson 1976); Charles Wright Mills, *The Sociological Imagination* (Oxford University Press 2000).

<sup>29</sup> Gerald Handel, 'Sociological Perspectives on Social Development' in Peter Smith & Craig Hart, *The Wiley-Blackwell Handbook of Childhood Social Development* (2nd ed, Blackwell Publishing 2011), 124.

<sup>30</sup> For a discussion of this critique from a legal perspective, see Susan Moller Okin, *Women in Western Political Thought* (Princeton University Press 1979), 233 – 246.

<sup>31</sup> Parsons focused almost exclusively on the 'traditional' two-parent gendered family with children. More recent empirical work identifies a range of contemporary family patterns and the creative solutions they find to unique problems. See for example John Eekelaar and Mavis Maclean, 'Marriage and the Moral Basis of Personal Relationships' (2004) 31 *Jnl of Law and Society* 510; Simon Duncan and Darren Smith, 'Individualisation versus the Geography of "New" Families' (2006) 1(2) *Twenty First Century Society* 1.

<sup>32</sup> Kennedy, *Family, Economy and Government in Ireland*.

nihilism.’<sup>33</sup> Zimmerman’s methodology attracted criticism,<sup>34</sup> and although his dire warnings were not wholeheartedly accepted among the sociological community,<sup>35</sup> his narrative of family decline leading to social disintegration would become a recurring theme in family sociology. This type of argument was, nonetheless, politically powerful and, as noted in chapter five, conflated with fears about the potentially devastating effects of the decline of ‘traditional’ marriage. In Ireland, anti-divorce commentators argued, in advance of the 1986 Divorce referendum, that the protection of tradition, in the form of indissoluble marriage, was necessary to maintain social order. Easy ‘modern’ divorce would result in soaring rates of family failure and consequent social collapse.<sup>36</sup> Traditional, lifetime, heterosexual, gendered marriage symbolised a safe haven for families from the pressures of the modern world.

A more comforting account of family change was offered by Ernest Burgess who described the movement from institutional families, founded on obligation, to the companionate family based on love, individual commitment, and functional specialisation.<sup>37</sup> He argued that this shift was a response to the loss of traditional systems of control, but it also reflected the desire of individuals for more autonomy in shaping their lives. Burgess’ description of the companionate relationship was explicitly linked to the functional, gendered, marriage-based family favoured by

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<sup>33</sup> Carle Zimmerman, *Family and Civilisation* (ISI Books 2008), 248.

<sup>34</sup> See for example, Francis Hsu, ‘*Family and Civilisation* by Carle C Zimmerman’ (1949) 51(2) *American Anthropologist* 313.

<sup>35</sup> His book directly rejected the views of the ‘Chicago School,’ which saw the decline of the family as inevitable and urged the State to step in to perform the functions previously fulfilled by families. Allan Carlson, ‘Introduction to the 2008 edition’ in Zimmerman, *Family and Civilisation*, 1.

<sup>36</sup> William Binchy, *Is Divorce the Answer? An Examination of No-Fault Divorce against the Background of the Irish Debate* (Irish Academic Press 1984).

<sup>37</sup> Ernest Burgess and Harvey Locke, *The Family: Institution to Companionship* (2nd edn, American Book Co 1953)

Parsons, but it also pre-figured elements of more modern individualisation theories of relationship and family life.<sup>38</sup>

The theme of family and social decline preoccupied family sociologists into the mid twentieth century. It was feared that improved housing built following the Second World War would lead to further isolation of the nuclear family from wider kinship groups.<sup>39</sup> Growing rates of marriage breakdown and single-parenthood were also causes for concern, seen as having the potential to significantly destabilise social bonds.<sup>40</sup> Post-war, small -cale empirical studies undermined these forecasts of family decline, identifying substantial kinship networks in British cities.<sup>41</sup> Mid-century research did, however, also identify isolation and social division, particularly among working class women who were excluded from public social and leisure activities.<sup>42</sup>

### 2.3.3 Feminist perspectives on family life

In the 1970s and 1980s feminist perspectives came to the fore in sociological debates on family life. The patriarchal nature of the male breadwinner family was highlighted by empirical studies demonstrating that marriage was an unequal partnership in which women undertook the majority of domestic and care-giving labour.<sup>43</sup> The ‘family’ was

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<sup>38</sup> Carol Smart, *Personal Life* (Polity 2007), 11.

<sup>39</sup> The principal purpose of Willmott & Young’s study of a London suburb was to ‘find out what effect public authority rehousing since the war has had upon family contacts.’ Peter Willmott and Michael Young, *Family and Class in a London Suburb* (Greenwood Press 1984), 180.

<sup>40</sup> See for example, David Popenoe, ‘American Family Decline, 1960-1990, A Review and Appraisal (1993) 55 *Journal of Marriage and the Family* 527; Amitai Etzioni, *Parenting Deficit* (Demos 1993); Geoff Dench, *Rewriting the Sexual Contract* (Institute of Community Studies 1997); Patricia Morgan, *Farewell to the Family* (Institute for the Study of Civil Society 1995).

<sup>41</sup> See for example, Peter Willmott and Michael Young, *Family and Class in a London Suburb* (Greenwood Press 1984); Peter Townsend, *The Family Life of Old People* (Penguin 1957).

<sup>42</sup> The best known of which is Norman Dennis, Fernando Henriques, Clifford Slaughter, *Coal is our Life: An Analysis of a Yorkshire Mining Community* (Tavistock 1979).

<sup>43</sup> Christine Delphy and Diane Leonard, *Familiar Exploitation: A New Analysis of Marriage in Contemporary Western Societies* (Wiley 1992).

identified as an ideological concept that maintained women in a subordinate position.<sup>44</sup> Functionalist theories were criticized for justifying the ‘naturalness’ of the nuclear family and the division of labour it supported. Sociologists began to investigate domestic work, emphasising an area of life previously marginalised and ignored.<sup>45</sup> Similarly, research identifying the family as a site of domestic violence and marital rape challenged ideas about home and family as safe havens.<sup>46</sup> Christine Delphy and Diana Leonard questioned the idealisation of marriage and family life in their description of family as an economic system. Family relationships, they argued, are part of a broader system of labour relationships that benefit men and exploit the work of women. Domestic groupings based on familial ties are an important element in the continued dominance of men over women and children.<sup>47</sup> Feminist work also contributed to the development of queer theory by questioning the construction of heterosexual gendered marriage as ‘natural’ and all other forms of relationship and family life as deviant or inferior.<sup>48</sup> Feminist and queer analysis remains important in family sociology, and forms the basis for much contemporary legal scholarship in the areas of marriage and family life, discussed later in this chapter.

#### 2.3.4 Family Sociology – Individualisation and the decline of the nuclear family

The themes of tradition and family decline remain important in late modern social theory. Observations regarding the changing nature of family life, the decline of the nuclear family, the rise of divorce and the emergence of same-sex relations, have

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<sup>44</sup> See for example, Michele Barrett and Mary McIntosh, *The Anti-Social Family* (Verso 1982).

<sup>45</sup> See for example, Ann Oakley, *The Sociology of Housework* (Oxford 1974); Catriona Clear, *Women of the House: Women’s Household Work in Ireland 1922-1961* (Irish Academic Press 2000).

<sup>46</sup> For an overview see, Martha Fineman and Roxanne Mykitiuk, *The Public Nature of Private Violence* (Routledge 1994).

<sup>47</sup> Delphy and Leonard, *Familiar Exploitation*, 16.

<sup>48</sup> Chambers *A Sociology of Family Life*, 31.

generated new explanatory frameworks. The individualisation thesis offered by Giddens, Beck, Beck Gernsheim, and Bauman exemplifies this new ‘big idea’ in family sociology.<sup>49</sup> Elisabeth Beck-Gernsheim describe the traditional family as ‘a lifelong officially legitimated community of father-mother-child, held together through emotion and intimacy.’<sup>50</sup> This family has been redefined in modernity:

[I]t is no longer possible to pronounce in some binding way what family, marriage, parenthood, sexuality or love means, what they should or could be; rather these vary in substance, exceptions, norms and morality from individual to individual and from relationship to relationship.<sup>51</sup>

Modern family life is complex, requiring individuals to continually negotiate and re-negotiate their intimate lives.<sup>52</sup> The maintenance of relationships is both more important, and more difficult, now than in the past, because each one must be individually negotiated rather than simply follow an existing pattern of roles, rights and responsibilities. The internal aspect of these conflicts is emphasised by Anthony Giddens who describes a ‘project of self’ in which modern individuals must continually remake themselves and their relationships.<sup>53</sup> A relationship is:

entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is

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<sup>49</sup> Anthony Giddens, *The Transformation of Intimacy; Sexuality, Love and Eroticism in Modern Societies* (1992 Polity Press); Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (1995 Polity Press); Zigmunt Baumann, *Liquid Love: On the Frailty of Human Bonds* (2003 Polity Press).

<sup>50</sup> Elisabeth Beck-Gernsheim, *Re-inventing the Family: In Search of New Lifestyles* (Polity 2002), 13.

<sup>51</sup> Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity 1995), 5.

<sup>52</sup> Ibid, 13. Beck also contends that the institutions of marriage and family have not changed to adequately reflect social change:

The contradictions between female expectation of equality and the reality of inequality, and between male slogans of mutual responsibility and the retention of the old role assignments, are sharpening and will determine the future development in the thoroughly contradictory variety of their expression in politics and in private ... Consciousness has rushed ahead of conditions.

Ulrich Beck, *The Risk Society* (Sage 1992), 104.

<sup>53</sup> Giddens, *The Transformation of Intimacy*, 74.

thought by both parties to deliver enough satisfaction for each individual to stay within it.<sup>54</sup>

We have, according to Giddens, entered a new phase of ‘democratic’ family life. Each member has agency, able to choose the role they take. Individualisation had led to changes in the nature of social categories such as gender and sexuality, which were once considered biologically determined. Intimacy is no longer defined by social obligation but by negotiation between individuals. Giddens sees modern marriage as founded on an active contingent love, producing a ‘pure relationship’ entered into and maintained for its own sake, rather than for any institutional or social purpose. As a result, relationships in the present are more fluid than those in the past. Commitment is contingent upon the relationship continuing to fulfil the needs of the individuals. But, he notes, there are positive aspects to this change. New forms of relationship, such as same-sex relationships, have become possible. Gay and lesbian intimacies epitomise the democratic modern relationship and offer real possibilities for equality in relationship practice.

Beck and Beck Gernsheim focus on the negative aspects of modern contingency. Relationships now have an element of risk, and social behaviour is characterised by transient relationships, evidenced by increasing marriage breakdown.<sup>55</sup> The element of risk puts more pressure on relationships as people feel that they must continually work at them, developing a ‘project of the self’ that will shape the narrative of their intimate lives. But, people set standards for themselves that are impossibly high, leading to continual disappointment and a focus on love as the only thing that can give

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<sup>54</sup> *ibid*, 58.

<sup>55</sup> Beck and Beck-Gernsheim, *The Normal Chaos of Love*, 45 *et seq.*

meaning to our lives. As relationships fail to deliver, children become the focus of adult need for permanent love.<sup>56</sup>

The individualisation thesis has, like functionalist theories from earlier in the twentieth century, come under pressure from small-scale qualitative research on family life. Studies have shown people entering relationships in the present do not behave more individualistically than in the past,<sup>57</sup> and that commitment levels vary within both 'traditional' marriage and 'modern' cohabitation.<sup>58</sup> Duncan and Smith describe how pre-existing social structures have not gone away, and although more choice may be available to individuals, the behavioural assumptions of the individualisation thesis are not justified.<sup>59</sup> The feelings of obligation or intimacy that underpin intimate relationships are complex, and do not necessarily correspond with social categories or definitions.<sup>60</sup> Nikolas Rose, rather caustically, describes Beck, Beck-Gernsheim and Giddens' work as:

another chapter in the sociological 'just so story' of how the human being got his individuality ... a tale in which 'the individual' or 'individualization' appears as particularly 'modern'<sup>61</sup>

Deborah Chambers notes that the individualisation thesis has become a problem for family sociology because, although widely questioned within the sociological

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<sup>56</sup> *ibid*, 102.

<sup>57</sup> Jane Lewis, 'Repartnering and the Management of Risk' (2006) 20 *Intl Jnl Law Policy Family* 151. A core difficulty with comparing ideas about relationships in the present with those in the past is that the same or similar questions were not asked in the past, empirical investigation of relationships is a relatively new phenomenon.

<sup>58</sup> John Eekelaar and Mavis Maclean, 'Marriage and the Moral Basis of Personal Relationships' (2004) 31 *Jnl of Law and Society* 510.

<sup>59</sup> Simon Duncan and Darren Smith, 'Individualisation versus the Geography of "New" Families' (2006) 1(2) *Twenty First Century Society* 1. This study focuses on (British) country-wide statistical information to demonstrate that local structural conditions such as local economies, class and ethnicity continue to exert a far greater influence on family practices than any change in perceptions of 'connectedness' or 'risk' as posited by Beck, Beck-Gernsheim and Giddens.

<sup>60</sup> Eekelaar and Maclean, 'Marriage and the Moral Basis of Personal Relationships.' 537.

<sup>61</sup> Nikolas Rose, 'Authority and the Genealogy of Subjectivity' in Paul Heelas, Scott Lash and Paul Morris (eds) *Detraditionalization* (Blackwell Publishing Limited 1996), 301.

community, its ideas are popular in the public sphere.<sup>62</sup> Politicians and the media draw on its narrative of family decline, contrasting modern individualised families with the comfort of a ‘traditional’ past. This perspective is confirmed in my investigation of Irish marriage law reform. Sociologists invited to contribute to a government sponsored report on the Irish family, published in 1998, focused on the importance of stable couple relationships to society, and how this was threatened by the modern condition which had created fragile non-institutional relationships.<sup>63</sup> Social stability has become a key objective for western governments, and the individualisation thesis provides a justification for political attempts to promote stability in relationship practice.

A more nuanced theoretical perspective of modern relationship behaviour is offered by Andrew Cherlin in his examination of American relationship practices. Cherlin focuses on the movement in and out of relationships that has become the defining characteristic of the American experience. Whilst accepting the pessimism of the individualisation thesis in posing this flux as problematic, he argues that it arises, not from the decline of marriage, but as a result of marriage’s enduring status in American culture. Americans subscribe to two competing cultural ideals; institutional marriage and individual freedom. Marriage offers social status and financial advantage and the pro-marriage message is deeply embedded in American culture and history. At the same time, Americans are committed to ideas about individual freedom and ‘expressive individualism’ that emphasise the lifetime development of one’s sense of self.<sup>64</sup> This leads spouses to question the value of their relationships and encourages

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<sup>62</sup> Chambers, 40.

<sup>63</sup> Commission on the Family, *Final Report the Department of Social Community and Family Affairs: Strengthening Families for Life* (Pn 5818, Stationery Office 1998), 205. See chapter eight.

<sup>64</sup> Andrew Cherlin, *The Marriage-Go-Round* (Vintage 2009), 9.



them to leave when it no longer meets their personal needs.<sup>65</sup> The attraction of marriage, however, leads them to quickly re-couple resulting in a ‘marriage go-round.’ Cherlin is principally concerned with the individual experience or perception of relationships rather than how they are managed by politics. Nonetheless, in linking individual experience to wider cultural models he identifies the importance of politico-cultural ideas to individual lives. Indeed he notes that:

marriage is so important to Americans that in the mid-2000s its extension to gay men and lesbians became a major political issue, with President George W Bush supporting a federal constitutional amendment, and many states amending their own constitutions, to restrict it to heterosexuals.<sup>66</sup>

### 2.3.5 *A Sociology of Family Life – Carol Smart*

Carol Smart also moves beyond the individualisation thesis in her attempt to develop a sociology of personal life that encompasses family, kinship, friendship, same-sex intimacies and other forms of interpersonal connectedness.<sup>67</sup> Whilst noting the contribution made by individualisation theories in injecting excitement and debate in the area of family and relationships, she identifies a problematic correlation between academic theory, politics and policies:

rather than causing the current belief in the loss of altruism in family life and the decline in commitment they [individualisation theorists] seem to be reflecting it uncritically.<sup>68</sup>

Smart is suggesting that individualisation theories are less a useful account of how family life has changed, and more a reflection of political fears around the demise of the family. Certainly, the risks attending the demise of the nuclear family have occupied politics and social policy for a considerable time. The ‘marriage saving’ objectives of Irish social policy in the 1970s, ‘80s and ‘90s described in chapters five,

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<sup>65</sup> *ibid*, 10.

<sup>66</sup> *ibid*, 9.

<sup>67</sup> Carol Smart, *Personal Life* (Polity 2007).

<sup>68</sup> *ibid*, 24.

six and seven had their genesis in assumptions about the ‘naturalness’ and necessity of the two parent, gendered, nuclear family.

Whilst Smart is generally critical of the individualisation thesis, she also accepts that some of its elements can be found in many family practices. Nonetheless, the unitary narrative it presents misrepresents the unevenness of personal experience.<sup>69</sup> People of the same generation, living in the same place, at the same time can have very different lives, even though they might share the same culture, religion or gender.<sup>70</sup> This is, of course, a central problem with most theoretical explanations of social or political change. Whilst a particular theory might be compelling, and reflect some of what is happening in society, it may also have the potential to marginalise difference.<sup>71</sup> Smart’s empirical, qualitative, work focuses on issues of diversity and difference, highlighting the contingency and variation of lived experience. For example, her work on childhood (with Bren Neale and Amanda Wade) moves away from the narratives of harm that have dominated research on effects of divorce on children, focusing instead on how children conceptualise family life.<sup>72</sup> Using a social constructivist perspective, they highlight the diversity of experience, suggesting that it no longer makes sense to accept ‘the child’ and ‘the family’ as self-evident social categories. Children of divorced parents, they argue, are not damaged, out of control or irresponsible. Rather, they are social actors in their own right, conceptualising family life on the basis of the quality of the relationships that they experience and not according to structural form.

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<sup>69</sup> Carol Smart and Beccy Shipman ‘Visions in Monochrome: Families Marriage and the Individualisation Thesis’ 2004 55(5) *British Journal of Sociology* 491, 506.

<sup>70</sup> *ibid*, 494.

<sup>71</sup> Smart, *Personal Life*, 22.

<sup>72</sup> Carol Smart, Bren Neale and Amanda Wade, *The Changing Experience of Childhood: Families and Divorce* (Polity Press 2001).

In relation to the dichotomy that the individualisation thesis establishes between traditional and modern social practices, Smart's work (with Beccy Shipman) with transnational families in Britain indicates that ideas about tradition and individual satisfaction do not necessarily oppose one another. Arranged marriages, for example, can re-enforce a sense of individual identity rather than undermine it. From the perspective of spouses themselves, an arranged marriage is not necessarily an assault on individual choice; embeddedness in a particular culture produces important kinship affinities that are not inevitably perceived as placing limits on individual freedom.<sup>73</sup> Parallel, apparently conflicting, values about relationships were also identified by Smart in families where grandparents condemn divorce whilst supporting the choices of their own, divorced, children.<sup>74</sup> Images of normative families from the past, buttressed by experience, (the legal and structural conditions of 1950s and '60s Britain made lifetime unions inevitable for those who married) framed the lives of the grandparent generation. Nonetheless, grandparents accepted their own children's failure to sustain an ideal relationship, and recognised that marriages in the past may well have subsisted despite considerable spousal conflict. Government policies reflect a similar contradiction, supporting lifetime marriage, but at the same time facilitating divorce, cohabitation and same-sex relationship.

Smart's work demonstrates how a movement away from 'grand theory' toward an emphasis on context, culture, values and the individual experience can add texture and nuance to our sociological understanding of intimate and familial relationships. Nonetheless, the individualisation thesis, with its pessimistic picture of social change,

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<sup>73</sup> Smart and Shipman 'Visions in Monochrome,' 506.

<sup>74</sup> Carol Smart, 'Textures of Family Life: Further Thoughts on Change and Commitment' (2005) 34(4) *Journal of Social Policy* 541.

reflects a cultural zeitgeist,<sup>75</sup> which has been further re-enforced by government policies that adopt it as a guiding principle. I will return to Smart's work later in the chapter, in particular her examination of the role of law in regulating familial practices.

### 2.3.6 *Irish approaches to family life*

Contemporary Irish family sociology focuses on qualitative analysis of family life, with a particular emphasis on the experience of children in Irish families<sup>76</sup> and the nature and functioning of kinship networks.<sup>77</sup> In this respect, Irish sociologists have adopted a broader understanding of family life than that posed by the individualisation thesis.<sup>78</sup> Modernisation theories have, nonetheless, been influential. Hannan and Katsiaouni's analysis of farm families in the 1970s focused on the transition from 'traditional' patriarchal structures within farm families to more 'modern' negotiated roles. Tradition and family ideology have also been described as supporting a patriarchal family structure among farm families, whilst modern ideas have influenced home-ownership patterns.<sup>79</sup> Recent work adopts a more complex picture of gender roles within families. For example, Grace Collins has identified how a government health promotion campaign deliberately focused on women's insecurities about their

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<sup>75</sup> Smart, *Personal Life*, 23

<sup>76</sup> The government funded 'Growing up in Ireland' longitudinal study carried out by a consortium of researchers led by the Economic and Social Research Institute and Trinity College Dublin, has facilitated a range of research on family life from the perspective of the child. <growingup.ie> last accessed 4 February 2015.

<sup>77</sup> Damian Hannan and Louise Katsiaouni, *Traditional Families? From Culturally Prescribed to Negotiated Roles in Farm Families* (1977 ESRI).

<sup>78</sup> See for example, Jane Gray, Ruth Geraghty and David Ralph, 'Young Grandchildren and their Grandparents; a Secondary Analysis of Continuity and Change across Four Birth Cohorts' (2013) (2) *Families, Relationships and Societies*, 289; John Canavan, 'Family and Family Change in Ireland: An Overview' (2012) 33(1) *Journal of Family Issues* 10.

<sup>79</sup> Patricia O'Hara, *Partners in Production: Women, Farm and Family in Ireland* (Berghahn 1998), 114.

mothering role. This was possible because women held conflicting ideas about their role as individualised workers and that of homemaker and nurturer.<sup>80</sup>

In the Irish context, Carol Coulter finds no evidence of a society centred on the nuclear family, or the intergenerational form, in 1940s and 1950s Ireland when:

Large numbers of people did not marry at all, and Ireland had one of the lowest, and latest, marriage rates in Europe, and therefore a very low rate of family formation ... widowhood often brought destitution...children were placed in orphanages ... emigration often divided families [and] the family was then, to a great extent, a single parent family, with all the responsibility resting on the mother.<sup>81</sup>

Since its establishment in 1969, the Economic and Social Research Institute, has produced a significant body of work on the Irish family, mainly emphasising its quantitative features and tracking change in family structures over time. This work has facilitated questioning of the individualisation thesis. A 1998 government Commission, noted in 1998 that '[f]or most of this century, Ireland was unique among western countries with its low marriage rate,'<sup>82</sup> and described Ireland in the 1930s as 'marriage-averse,' with marriage rates reaching a peak in 1974, and declining thereafter, falling to 1930s levels in the 1990s.<sup>83</sup> Tony Fahey has contextualised the Irish experience within wider European demographic transitions, arguing that Irish relationship practices of the past 40 years fall broadly in line with those of other

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<sup>80</sup> Grace Collins 'Germs, globalisation and gender: the making of a food scare' in Mary Corcoran and Michael Pellion (eds) *Uncertain Ireland: A Sociological Chronicle*, (Institute of public Administration 2003).

<sup>81</sup> Carol Coulter, "'Hello Divorce, Goodbye Daddy: Women, Gender and the Divorce Debate' in Anthony Bradley and Maryann Gialanella Valiulis (eds), *Gender and Sexuality in Modern Ireland* (University of Massachusetts Press 1997), 294.

<sup>82</sup> Commission on the Family, *Final Report to the Minister for Social Community and Family Affairs: Strengthening Families for Life* (Pn 5818, Stationery office 1998), 92.

<sup>83</sup> Only to rise dramatically in the 1990s, Tony Fahey, 'Family Policy in Ireland – A Strategic Overview' in Commission on the Family, *Final Report to the Minister for Social Community and Family Affairs: Strengthening Families for Life* (Pn 5818, Stationery office 1998) 384, 396.

European jurisdictions.<sup>84</sup> In Ireland, as in other jurisdictions, a simple narrative of change from traditional nuclear patterns to modern individualised attitudes is not borne out by demographic data or localised investigation.

## **2.4 Ways of Thinking about Marriage and Family life – Legal scholarship.**

### *2.4.1 Introduction*

As mentioned in chapter one, legal rules governing marriage have existed for millennia. In Britain and the United States, academic analysis of marriage and the laws regulating it also has a long heritage, particularly from a social history perspective.<sup>85</sup> Since the 1970s, analysis of marriage law by legal academics has broadly followed the theoretical orientations of sociology with a particular emphasis on feminist analysis. More recently, lawyers have begun to use sociological theory and methods to explain legal change and to advocate for legal reform. The divide between public and private domains in legal regulation has also been used as an explanatory framework, often in the context of feminist analysis. In the next section, I give a brief overview of this work, focusing in particular on feminist analysis, the public private divide, and the influence of sociology on legal analysis.

### *2.4.2 Feminist Analysis*

Feminist theory is a hugely broad field of academic investigation, and narrowing the literature to work dealing specifically with marriage or family law does little to reduce its scope. In this section, I aim to provide only a brief overview of feminist literature

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<sup>84</sup> Tony Fahey ‘Small Bang? The Impact of Divorce Legislation on Marital Breakdown in Ireland’ (2012) 26(2) Intl Jnl Law Policy Family 242, 245.

<sup>85</sup> Some of the best known histories are: Lawrence Stone, *The Road to Divorce: England, 1530-1987* (Oxford University Press 1995); Lawrence Stone, *The Family, Sex and Marriage in England 1500 – 1800* (Penguin Books 1979); Art Cosgrove (ed), *Marriage in Ireland* (College Press 1995).

on the subject of family law. The label ‘feminist’ resists simple definition, but most feminists would accept that their aim is to challenge the social advantages and positions of power enjoyed by men in western society by identifying how male dominance acts to disadvantage women.<sup>86</sup> Alison Diduck and Katherine O’ Donovan have described feminist perspectives on family law as necessary to illuminate how the regulation of family life is related to social and political relations. A feminist perspective they argue:

emphasises the personal as political, and, born as it was of feminist activism, feminist theory is also about the possibility of the transformation or reconstruction of both.<sup>87</sup>

At its most basic level, feminist legal theory aims to connect the politics of personal life to broader systems of domination supported by the State through law, and to contest and transform those systems.

### 2.4.3 Liberal Feminism

In many jurisdictions, including Ireland, nineteenth and twentieth century reforms of marriage, and many other areas of law, were initiated by campaigning women’s groups who challenged the inequities of common law rules.<sup>88</sup> Liberal feminist campaigns

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<sup>86</sup> This is something of an oversimplification. Feminists following the work of Judith Butler, for example, contest the unity of the concepts of ‘man’ and ‘woman’ arguing that gender is socially constructed and has no fixed content. Butler described her purpose in perhaps her best known work *Gender Trouble: Feminist and the Subversion of Identity* as tracing ‘the way in which gender fables establish and circulate the misnomer of natural facts.’ Judith Butler, *Gender Trouble: Feminist and the Subversion of Identity* (Taylor & Francis 2002), xxxi.

<sup>87</sup> Alison Diduck and Katherine O’Donovan, ‘Feminism and Families: Plus Ça Change?’ in Alison Diduck and Katherine O’Donovan (eds) *Feminist Perspectives on Family Law State* (Routledge Cavendish 2006), 1.

<sup>88</sup> At common law a woman’s legal personality merged with that of her husband on marriage, she could not own property or earn money on her own behalf. Blackstone described the legal effect of marriage:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whole wing, protection and cover she performs everything; and thus is called in our law-French a *femme covert*.

highlighted how women were discriminated against by laws that excluded them from property ownership, voting rights and many types of work. Improved political and legal rights were seen as the route to equality between the sexes, and these early campaigns had many successes including voting rights for women in the nineteenth century and equal pay for equal work in the twentieth.<sup>89</sup> As a result of feminist efforts, most statute law is now drafted in sex-neutral language and the proposition that law should treat men and women equally is generally uncontested.<sup>90</sup>

This instrumental approach to law remains important for many feminist lawyers who see law as a useful tool in the fight for gender equality. Advocating broader understandings of the legal concept of equality, they encourage adoption of more rigorous equality considerations in family disputes. For example, Simone Wong has argued that legal instruments should be interpreted to produce substantive rather than formal equality in the adjudication of family property actions.<sup>91</sup> Family law adjudication in the courts has begun to take account of these arguments. The English House of Lords in dividing property following divorce in *White v White*,<sup>92</sup> approved

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Sir William Blackstone, *Commentaries on the Laws of England: In Four Books, Volume 1* (14th edn, Edward Christian, 1803), 442.

For an account of feminist campaigning leading to legislative change in Britain see Ben Griffin, 'Class, Gender and Liberalism in Parliament 1868 -1882, the Case of the Married Women's Property Acts' (2003) 46 *The Historical Journal* 59. June Levine describes the women's movement in Ireland leading to the setting-up of the Commission on the Status of Women, which was instrumental in the initiation of the legislative program of family law reform in 1976. June Levine, 'The Women's Movement in the Republic 1968-1980' in Angela Bourke (ed) *The Field Day Anthology of Irish Writing: Volume 5, Irish Women's Writing and Traditions* (Cork University Press 2002).

<sup>89</sup> For an overview of the history of women's legal and political rights see Bonnie Anderson and Judith Zinsser, 'Asserting Women's Legal and Political Equality' in Bonnie Anderson and Judith Zinsser, *A History of Their Own: Women in Europe from Prehistory to the Present, Volume 2* (Penguin 1990), 367-370.

<sup>90</sup> Joanne Conaghan, 'Reassessing the Feminist Theoretical Project' (2000) 3 *Jnl of Law and Society* 351, 352.

<sup>91</sup> Simone Wong, 'Trusting in Trust(s): The Family Home and Human Rights' (2003) 287 *Feminist Legal Studies* 119.

<sup>92</sup> [2000] AC 596.



a substantive interpretation of equality taking into account the material disadvantages suffered by women adopting a caregiving role in marriage.<sup>93</sup>

#### 2.4.4 *Second Wave Feminism*

Whilst liberal feminism accepts that law sets standards that can be applied neutrally to all, second generation feminists like Catharine MacKinnon, developed a critique of the possibility of neutrality where men and women are concerned. Disillusioned with the lack of real change effected in women's lives by legal reforms, second wave feminists called for 'a deeper understanding of equality ... based not on copying male norms but on ending the oppression of women.'<sup>94</sup> MacKinnon, in the United States context describes how law was often not enough:

The Equal Rights Amendment, designed to make sex legally irrelevant was lost, in part through opposition by women. The abortion right, framed as a right to privacy rather than a right to sex equality, was recognized, only to be taken almost immediately from women who have least access to it ... Women are poor, and pay is at least as far from being sex-equal as it was before the passage of legislation guaranteeing pay equality by law.<sup>95</sup>

Social, cultural and economic practices have a significant impact on the advantages and disadvantages suffered by men and women, law reform alone cannot counteract these forces. Feminist approaches to law, therefore, level a powerful challenge to the notion of 'individual rights bearer' and its assumption of equality before the law.<sup>96</sup> They have the capacity to move beyond an analysis of legal measures in their own terms by identifying and questioning the gendered assumptions that underpin judicial reasoning and legal instruments.

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<sup>93</sup> For a discussion of *White v White* and its implications for divorce law in England see Alison Diduck, 'Fairness and Justice for All? The House of Lords in *White v White* [2000] 2 FLR 981' (2001) 9 *Feminist Legal Studies* 173.

<sup>94</sup> Jenny Beale, *Women in Ireland: Voices of Change* (Macmillan 1986), 187.

<sup>95</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), 1.

<sup>96</sup> Conaghan, 'Reassessing the Feminist Theoretical Project,' 361.

Feminists often see the Western cultural concept of family as a reflection of the patriarchal nature of society. How we think about and ‘do’ family is based on suppositions about the naturalness of the nuclear heterosexual form, the gender roles it implies, and its necessary separateness from the public domain. Law re-enforces these cultural assumptions through doctrines like family privacy and the production of specific rules that apply only to familial interactions. Radical feminist like Martha Fineman have therefore argued that, because of its role in re-enforcing the culturally entrenched dependency of women, marriage law should be abolished.<sup>97</sup>

It is unusual for feminist lawyers to suggest such draconian measures as the abolition of their object of study. More usual is identification of the specific ways in which patriarchal power is enforced by law. The legal institution of marriage, for instance, is said to mask the effects of patriarchy on women. This is demonstrated by the difficulties experienced by women when marriage breaks down, it is only then that the effects of women’s dependency with marriage are fully revealed.<sup>98</sup> The application of marriage-type law to other relationships is resisted by many second wave feminists because it risks extending patriarchal assumptions to other relationship types.<sup>99</sup> Rosemary Auchmuty has recently re-iterated this point, and has observed that, in any

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<sup>97</sup> Fineman, *The Autonomy Myth*, 133 – 134. Carol Smart takes a slightly less radical approach in calling for the remaking of relationship laws so that they do not rely on the concepts of marriage or coupledness. Marriage law, she argues, helps to construct the economic dependency and social vulnerability of women. Carol Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations*. (Routledge & Kegan Paul 1984), xi.

<sup>98</sup> Pamela Symes, ‘Indissolubility and the Clean Break’ (1985) 48(1) MLR 44, 50.

<sup>99</sup> Anne Bottomley and Simone Wong, ‘Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations’ in Alison Diduck and Katherine O’Donovan (eds) *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006), 42, and see Nicola Barker, *Not the Marrying Kind: A Feminist Critique of Same Sex Marriage* (Palgrave MacMillan 2013).

event, the institution of marriage has been subverted by women themselves who have rejected the assumption of a dependent role that it implies.<sup>100</sup>

#### 2.4.5 *Third wave and post-modern feminists.*

Third wave feminists use the concept of gender, describing not biological sex, but the quality of being either male or female, to question the assumptions underpinning many sex-neutral laws.<sup>101</sup> Gender is a cultural concept that takes its meaning from social practices and expectations. Women and men have gendered existences, living according to cultural norms that affect their opportunities for self-fulfilment.<sup>102</sup> Women are expected, for example, to provide care to others without payment, or accept low-paid work, and this social understanding of gender, rather than biological sex establishes their route through life.<sup>103</sup> Gender, it is argued, has a greater influence on outcomes than legal rules admit, and gender-neutral laws can affect men and women differently.<sup>104</sup> The law can also act to construct gender by ascribing 'normal' status to sex-based division of roles within couple relationships.<sup>105</sup>

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<sup>100</sup> Rosemary Auchmuty 'Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women' (2012) 20 *Feminist Legal Studies* 71.

<sup>101</sup> Lucinda Finley 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886.

<sup>102</sup> Judith Butler states that 'gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all.' Butler, *Gender Trouble: Feminist and the Subversion of Identity*, 178.

<sup>103</sup> *ibid*, 95.

<sup>104</sup> A number of authors have pointed out the differential economic outcomes for men and women following divorce. Perhaps the best known is Lenore Weitzman's *The Divorce Revolution: The Unexpected Consequences for Women and Children in America* (Free Press 1987) in which she reports a 42 percent improvement in men's standard of living and a 73 percent decline for women one year after divorce, 339.

<sup>105</sup> Katherine O'Donovan, *Family Law Matters* (Pluto 1993). Richard Collier in *Masculinity, Law, and the Family* (Routledge 1995) argues that the law also constructs masculinity. 'Gender' in these accounts means the quality of being either male or female. The law, it is argued, assigns sex-specific or gendering characteristics. Therefore, for example, spousal support law could be said to assign the role of provider to men and that of dependent to women.

Drawing upon Judith Butler's questioning of the efficacy of identity politics, feminists have begun to reject the idea that a single explanation of women's oppression is possible or that there are specific routes to liberation.<sup>106</sup> Butler advocates a movement away from feminist concerns with the ontology of women and asks: '[w]hat new shape of politics emerges when identity as a common ground no longer constrains the discourse on feminist politics?'<sup>107</sup> The answer is that difference becomes the key word; women can be whichever type of women, or feminists they want to be. Gender is not the only disadvantaging factor in society. Black women may be more oppressed by white women than by black men, poverty or class may produce more disadvantage than gender. This perspective feeds into the legal academy through more nuanced concepts of equality. Maleiha Malik, for example, argues that feminist family lawyers need to take more account of multiculturalism and the differing experiences of minority women. She describes how British family law remedies can produce clashes between 'sexual and cultural, racial or religious equality.'<sup>108</sup>

#### 2.4.6 *Public Law and Private Lives*

Family law is generally categorised as part of the private law of a state, governing the relationships between private individuals.<sup>109</sup> The division between private and public domains is also part of the liberal political philosophy upon which contemporary Irish

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<sup>106</sup> Rosemary Tong, *Feminist Thought* (3rd edn, Westview Press 2009), 270.

<sup>107</sup> Butler, *Gender Trouble: Feminism and the Subversion of Identity*, xxiv.

<sup>108</sup> Maleiha Malik, 'The Branch on Which We Sit: Multiculturalism, Minority Women and Family Law' in Diduck and O'Donovan (eds) *Feminist Perspectives on Family Law*, 213.

<sup>109</sup> In contrast to public law, which governs the relationship between individual citizens and the State. Michael Freeman argues that the distinction between public and private spheres in the liberal democratic State can be traced to Aristotle who described how men lived in the *polis*, the political arena where the highest good could be attained and women, children and slaves were confined to the *oikos* or household. Michael Freeman, 'Towards a Critical Theory of Family Law' (1985) 38 *Current Legal Problems* 153, 176.

and British law are based,<sup>110</sup> and acts to designate family life as a private matter that should be insulated from State interference. The Irish Constitution, for example, protects the privacy of the marital family, ostensibly restraining the State from interfering with decisions made within it.<sup>111</sup> Katherine O'Donovan demonstrates how the division between public and private domains perpetuates social power relationships, in particular that of men over women.<sup>112</sup> The categorisation serves to insulate the private family from the public sphere in which the State has competence. The family, then, becomes a domain within which government has no competence and has facilitated, for example, non-intervention in domestic violence and marital rape for most of the twentieth century.<sup>113</sup>

The division between public and private domains is also said to privatise the cost of inevitable dependency,<sup>114</sup> leading to a 'family first' approach to financial need. Family members are required to provide for the young, disabled, unemployed or elderly before a claim can be made against the State.<sup>115</sup> In *The Autonomy Myth*, Martha

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<sup>110</sup> Originating with John Stuart Mill, Nikolas Rose, 'Beyond the Public Private Division: Law Power and the Family.' (1987) 14(1) *Jnl of Law and Society* 61.

<sup>111</sup> The Supreme Court in *McGee v Attorney General* [1974] 1 IR 284 held that the right to privacy is an un-enumerated right protected by Article 40.1 of the Constitution, and in *In Re Matrimonial Home Bill* [1994] 1 IR 305 the same court held that the State could not unduly interfere with the authority of the family based on marriage.

<sup>112</sup> Katharine O'Donovan, *Sexual Divisions in the Law* (Weidenfeld & Nicholson 1985), 9.

<sup>113</sup> Alison Diduck and Felicity Kaganas, *Family Law Gender and the State* (2nd edn, Hart Publishing 2006), 288. In England, the common law defence available to a husband against a charge of raping his wife was removed by the House of Lords in the case of *R v R* [1991] 4 All ER 481, followed by legislation in 1994, the Criminal Justice and Public Order Act 1994. A similar change took place in Ireland in 1990, with the passage of the Criminal Law (Rape) (Amendment) Act 1990. There has been only one conviction in the State for marital rape since the law was introduced. Family privacy was used more productively as a barrier to State action in the Irish Supreme Court decision of *McGee v The Attorney General* [1974] 1 IR 284. The court held that legislative restrictions on the importation of contraceptives interfered with Mrs McGee's right to privacy in the conduct of her marital relationship.

<sup>114</sup> Fineman, *The Autonomy Myth*, 40- 44.

<sup>115</sup> In Ireland, as in other jurisdictions, social assistance applications are determined following an examination of household rather than individual income, and student grants are allocated on the basis of parental income. Young unemployed people receive less assistance than those over 25, and the income of a parent living with them is taken into account in

Fineman describes family privacy as a ‘meta-narrative’ of American social policy, which offers to free the family from government intervention in exchange for its containment of the cost of dependency. Thus, the law enforces support obligations after a relationship has broken down in order to insulate the State from the cost of alleviating the resultant poverty. Retaining the privacy of the family, Fineman argues, traps women in a dependent role, supplicants of a male provider even after a relationship has ended.

Lucinda Ferguson calls for recognition that the outcome of family disputes is not only a private matter. The State, and not just individual participants, have an interest in the outcome of financial support applications: if provision is inadequate, the State may be called upon to provide support. Furthermore, providing public compensation to women who sacrifice the opportunity of income in order to care for dependents both promotes gender equality and recognises unpaid care-work, important values which the State should support.<sup>116</sup> Using the jurisprudence of the Canadian Supreme Court, Ferguson shows that the factors taken into account by courts in making financial awards following relationship breakdown, go beyond the interpersonal and attempt to redress social inequalities.<sup>117</sup> When considering the economic vulnerability of women at the end of an intimate relationship, the court is not only dealing with a question of a former partner’s obligation to compensate loss sustained as a result of the relationship, but also for structural barriers to self-sufficiency. Ferguson contends that debate on the nature of interpersonal obligations following relationship breakdown

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assessing their eligibility, Social Welfare Consolidation Act 2005 as amended by Finance Acts 2006 – 2012.

<sup>116</sup> Lucinda Ferguson, ‘Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation’ (2007) 22 Intl Jnl Law Policy Family 61, 63 - 64. See also, Jonathon Herring, ‘Why Financial Orders on Divorce should be Unfair’ (2005) 19 Intl Jnl Law Policy Family 218.

<sup>117</sup> Ferguson, ‘Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation,’ 71.

must be broadened to take account of the social obligation to address need, particularly when there are no private resources available to meet it.<sup>118</sup>

The family provides an important link between constructions of ‘private’ life and ‘public’ institutions. Law, when regulating family life produces, constitutes, and defines social order: women are defined as dependent, children as objects rather than subjects, families as private domains. Enforcing the public/private distinction through law, therefore, re-enforces power structures embedded in the family and, Michael Freeman proposes, is functionally useful to the State.<sup>119</sup> Freeman’s work indicates that the public/private divide is a way of thinking about families that extends beyond State institutions. The State does not act in a one-dimensional way to regulate the social domain but takes account of, and utilises, social practices and understandings to secure effective social management. Freeman draws attention to the role of the public/private divide as a form of truth present at all levels of society, a shared mode of communication that allows State institutions to utilise non-State regulatory systems, including citizen’s own ideas about what is public/regulable and what is private/non-regulable.

#### *2.4.7 Public law – human rights*

Human and Constitutional rights are considered part of the domain of public law, mediating the relationship between citizens and the State. They are not generally implicated in disputes between private citizens, but family law scholars have noted the migration of rights-based argument into family law disputes. Alison Diduck, for example, argues that this is evidence of the convergence of public and private interests

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<sup>118</sup> *ibid*, 85.

<sup>119</sup> Michael Freeman, ‘Towards a Critical Theory of Family Law’ (1985) 38 *Current Legal Problems* 153, 155.

in the outcome of family conflict.<sup>120</sup> The influence of rights is not just through the direct deployment of rights-based argument in family law cases but also indirectly through the application of rights-based concepts.<sup>121</sup> Diduck uses the jurisprudence of the English House of Lords to suggest that the concept of ‘fairness’ in English divorce law has been extended through cases like *White v White*,<sup>122</sup> to include consideration of public law values such as equality and non-discrimination.<sup>123</sup> This movement in the courts indicates a connection between the private and the political in which the law recognises not only individual choices but also the moral and social conditions within which those choices are made.<sup>124</sup> Robert Leckey, on the other hand, identifies the mixing of public law values with private law disputes as problematic. Human rights litigation in the area of family law can serve to insulate legislation from reform. Once a particular family law principle has been given the human rights seal of approval, it is unlikely to be subject to political challenge.<sup>125</sup> As was the case with *White v White*, where a fundamental change in the aims of financial relief on divorce is effected by the courts based on human rights principles, the usual process of politically informed change can be avoided.

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<sup>120</sup> Alison Diduck ‘Public Norms and Private Lives: Rights, Fairness and Family Law’ in Julie Walbank, Shazia Choudhry and Jonathon Herring (eds) *Rights, Gender and Family Law* (Routledge 2010), 199-200.

<sup>121</sup> *ibid*, 203.

<sup>122</sup> [2001] AC 596.

<sup>123</sup> Section 25 of the English Matrimonial Causes Act 1973 provides for a discretionary regime based on which the Courts make financial provision on divorce. The House of Lords in *White v White* [2001] AC 596 confirmed that the underlying objective of the court in making provision is ‘fairness’ based on a ‘yardstick of equality.’ The pre-existing requirement of providing for the ‘reasonable requirements’ of a dependent spouse was rejected as discriminatory. For an account of the decision in *White* and subsequent development of the principles set out by the House of Lords see Samantha Singer, ‘Charman v Charman (No. 4) [2007] 1 FLR 1246’ (2008) 30 (2) *Journal of Social Welfare and Family Law* 155.

<sup>124</sup> Diduck, ‘Public Norms and Private Lives: Rights, Fairness and Family Law,’ 213.

<sup>125</sup> Robert Leckey, ‘Family Law as Fundamental Private Law’ (2007) 86 *Canadian Bar Review* 69, 94.



Human rights concerns have underpinned recent campaigns for the extension of marriage law to a greater range of intimate relationships. Robert Wintemute, for example, argues that the exclusion of same-sex couples from civil marriage is a breach of the equal rights provisions of both the Irish constitution and the European Convention on Human Rights.<sup>126</sup> Arguments for extension of marriage law to same-sex couples demonstrate the extent to which human rights based arguments have become politically useful, and broader arguments based on the public/private divide illustrate the close relationship between legal analysis and politics. Writing in 1997, Carol Smart noted how in Britain, ‘*at the level of political rhetoric*, it is always assumed that the family should stand apart ... and should not become a location of client/provider exchanges or internal markets.’<sup>127</sup> In other words, political discourse accepts the essential nature of the divide between public and private domains, despite sociological understandings stretching back to Engels and Parsons that conceptualise family life as inherently connected to its institutional and structural contexts.

#### *2.4.8 Empirical sociology and law*

Sociology has, nonetheless begun to have an influence on political discourse and consequently legal analysis. A movement toward evidence based policy-making, initiated by Tony Blair’s Labour government in the United Kingdom, generated demand for sociological answers to political questions.<sup>128</sup> Wayne Parsons notes how this represented an opportunity for social science to exercise ‘influence’ on the policy

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<sup>126</sup> Robert Wintemute, ‘Marriage or “Civil Partnership” for Same Sex Couples’ in Oran Doyle and William Binchy (eds), *Committed Relationships and the Law* (Four Courts Press 2007).

<sup>127</sup> Carol Smart, ‘Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy’ (1997) 26(3) *Journal of Social Policy* 301, 302.

<sup>128</sup> Wayne Parsons, ‘From Muddling Through to Muddling Up – Evidence Based Policy Making and the Modernisation of British Government’ (2002) 17(3) *Public Policy and Administration* 43. Parsons offers a critique of the form of evidence-based policy making practised by the British government.

making process,<sup>129</sup> an opportunity taken-up by family lawyers seeking to extend the boundaries of marriage law. Ann Barlow, for example, argues that changing social practices require a regulation based on the functions performed by relationships rather than the legal form they take.<sup>130</sup> Barlow's qualitative research suggests a preference for asset-sharing among unmarried couples with children,<sup>131</sup> and a 'newly-mainstream' status for cohabitation.<sup>132</sup> These empirical findings are used to support an argument that cohabitation produces families that are functionally equivalent to those based on marriage and, therefore, as a matter of justice and equality, should be regulated in a similar manner. Law must be reformed to reflect changing social practices 'if the functions of family law itself are not to be rendered obsolete.'<sup>133</sup>

#### *2.4.8 Politics, Law and Sociology*

Recently, legal commentators have explained differences in how the State regulates individuals as workers or family members in terms of sociological understandings of tradition and modernity drawn from the work of Beck, Beck-Gernsheim and Giddens. Important in this work, is the observation that the State applies different rules to different people in varying contexts. In comparing British and German regulatory frameworks, Mary Daly and Kirsten Scheiwe find that both countries are trying to 'modernise' their family and employment laws in ways that draw upon long-standing principles and values, whilst at the same time instituting profound change. Law and social policy in these jurisdictions, they argue, has attempted to straddle the gap between tradition and modernity in different ways depending on its purpose.

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<sup>129</sup> *ibid*, 44.

<sup>130</sup> *ibid*, 177.

<sup>131</sup> Anne Barlow, 'Cohabiting Relationships, Money and Property: The Legal Backdrop' (2006) 37 *Journal of Socio-Economics* 502, 518.

<sup>132</sup> Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) 67(2) *MLR* 143.

<sup>133</sup> *ibid*, 145.

Individuals are separated from their traditional caring and relationship responsibilities when seen as workers, but interdependency and mutual support become more important in managing familial relationships.<sup>134</sup> In this analysis, tradition is equated with values of inter-family support, and modernity with value-free marketization of workers. Family law enforces traditional caring, whilst employment law supports modern individualism. Moving toward a more nuanced understanding of the relationship between sociological expertise and politics, Daly and Scheiwe appreciate that tradition and modernity are concepts deployed to support different strategic objectives within varying social domains.<sup>135</sup> The issue for marriage law reform suggested by Daly and Scheiwe is how tradition and modernity have been deployed, by whom, and for what purpose.

### *2.6.2 The political relevance of tradition and modernity*

Ideas about tradition and modernity do not only operate at the level of politics. Alison Diduck argues that traditional and modern family ideologies shape both relationship practices and legal interventions. Individual citizens, and legal regulation, must mediate between these contrasting ideological positions. Diduck contends that, at least in the British context, law has not attained an effective compromise. As a result, in aiming to protect traditional marriage and facilitate modern relationships, law fails to do justice to real, lived families.<sup>136</sup> Diduck's work draws careful attention to the ways in which people understand themselves by reference to both traditional and modern family ideals and how this results in complex relationship behaviour. Similarly, legal regulation is capable of embodying a range of truth positions, but has demonstrated its

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<sup>134</sup> Mary Daly and Kirsten Scheiwe, 'Individualisation and Personal Obligations – Social Policy, Family Policy, and Law Reform in Germany and the UK.' (2010) 24(2) *Intl Jnl Law Policy Family* 177, 195.

<sup>135</sup> *ibid*, 195.

<sup>136</sup> Alison Diduck, *Law's Families* (LexisNexis 2003), 211.

inability to engage with complexity in a way that offers effective solutions to families in difficulty.<sup>137</sup> Rather, legal instruments and processes construct a (somewhat conflicted) picture of what constitutes ‘good’ relationship behaviour and encourage individuals to adopt it.<sup>138</sup> Diduck produces a convincing account of how ideas about tradition and modernity, as well as materialist, care-giving, and gender concerns can affect familial and political decision-making. She also identifies law’s constitutive effects – legal rules do not simply regulate reality, they also produce it.<sup>139</sup> Legal rules, instruments, and procedures operate to manage relationship behaviour, not through direct command, but through processes of subjectivisation and normalisation.<sup>140</sup>

## **2.5 Marriage Law, Sociology and the Influence of Foucault**

The role of marriage law in the construction and maintenance of women’s dependency is the focus of Carol Smart’s historical analysis of British law reform completed in 1984.<sup>141</sup> She sees law as, not essentially or purposely oppressive to women, but as a discourse that contributes to the construction of women as vulnerable and necessarily dependent. British post-war divorce reforms perpetuated notions of gender inequality and the ‘natural’ division of labour within the home. It is therefore facile to argue that legal gains in the area of women’s rights have produced equality; equality of the sexes will never be achieved whilst the institutions of marriage and divorce assume and re-enforce women’s dependency. In her text, Smart focuses on the practical implications of marriage law reforms, as well as the historical, sociological and ideological contexts within which they occurred. This facilitates the forging of a connection between the

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<sup>137</sup> *ibid*, 196 – 212.

<sup>138</sup> *ibid*, 43.

<sup>139</sup> *ibid*, 43.

<sup>140</sup> *ibid*, 27 – 28.

<sup>141</sup> Carol Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Keegan Paul 1984).

process of law reform and its effects at the level of individual relationships. Marriage law is mediated through ‘locally powerful’ solicitors, magistrates, registrars and others who are charged with actually implementing the law. Smart’s research into how these local actors perceive and seek to implement the law finds that their focus on individual disputes removes the effects of divorce from its wider structural context. The position of the parties is seen as one created only by their relationships and not by wider systems of power that prevent women’s self-sufficiency during and after marriage. ‘The state, which defines the terms of marriage and provides an exit from marriage, remains invisible...’<sup>142</sup>

Smart continues her exploration of law’s power to subordinate women from a more explicitly post-structuralist, Foucauldian perspective in *Feminism and the Power of Law*.<sup>143</sup> Although not specifically concerned with marriage law, this book is important for my purposes because it directly addresses the efficacy of a Foucauldian perspective in legal analysis, and signposts the theoretical orientation of Smart’s later sociological work in the area of personal life. Her objective is to investigate why law is ‘so resistant to the challenge of feminist knowledge and critique.’<sup>144</sup> Smart argues, drawing on Foucault, that law is a form of power/knowledge that acts to disqualify other forms of knowledge, in particular that generated by feminist analysis. Prefiguring later Foucauldian accounts of ‘law,’<sup>145</sup> she rejects the notion of a law unified in intent, theory and practice, noting nonetheless, that the claim to unity inherent in references to ‘law,’ is itself a claim to power. This value of this claim has, she argues, multiplied

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<sup>142</sup> *ibid*, 191.

<sup>143</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

<sup>144</sup> *ibid*, 2.

<sup>145</sup> Nicholas Rose, ‘Beyond the Public Private Division: Law Power and the Family;’ Nicholas Rose and Marianna Valverde, ‘Governed by Law’ (1998) 7(4) *Social and Legal Studies* 541. See chapter three.

in modernity as legal regulation colonises more and more aspects of everyday life.<sup>146</sup> Law is understood to have the power to right wrongs, to determine truth or innocence, but in so doing it ‘translates everyday experience into legal relevances (*sic*)’ thus excluding alternative accounts of reality or ways of knowing.<sup>147</sup> Smart uses a number of specific examples to illustrate her understanding of law’s power, setting women’s experience against legal discourse and processes. In relation to rape, for example, she notes that although legal reform may be helpful in some instances, such reform will be pyrrhic until the fundamental problem of social and legal phallocentrism is challenged.<sup>148</sup>

Smart’s later work actively decentres law, focusing instead on how ideas and ways of knowing shape individual experiences of legal processes. A 1997 study, with Bren Neale, looks at the impact of legislative and procedural changes on child custody disputes, and in particular, the extent to which the ideological objectives of legislation are adopted by practising lawyers.<sup>149</sup> Legislation, specifically the Children Act 1989, constructs a picture of ‘good’ and ‘bad’ lawyers that serves to obscure and devalue the complexities involved in negotiating custody disputes. Legislation also has a symbolic value, in this case stressing ‘responsibilities’ over ‘rights,’ shaping how disputes are constructed by parents and mediated by lawyers. Since the 1970s, British divorce law has moved away from a focus on spousal relationships to an understanding of divorce as an issue for parents who must act in the best interests of their children.<sup>150</sup> The culture of divorce has also changed over the same period, becoming both more

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<sup>146</sup> Smart, *Feminism and the Power of Law*, 8.

<sup>147</sup> *ibid*, 11.

<sup>148</sup> *ibid*, 49.

<sup>149</sup> Bren Neale and Carol Smart, “‘Good’ and ‘Bad’ Lawyers? Struggling in the Shadow of the New Law” (1997) 19(4) *Journal of Social Welfare and Family Law* 377.

<sup>150</sup> Carol Smart, ‘Changing Landscapes of Family Life: Rethinking Divorce’ (2004) 4(3) *Social Policy and Society* 401, 402.

common and more acceptable. Those experiencing divorce no longer see it as the end of a marriage, but as an ongoing relationship centred on shared parenting.<sup>151</sup>

Smart's work thus emphasises the interior aspect of legal discourse, how it translates into individual experience and shapes people's understandings of their own lives. Katherine O'Donovan, also taking a post-structural approach, aims to give a voice to unheard or excluded discourses on family law. In her discussion of marriage law, O'Donovan describes how marriage iconography links the social and the legal, a connection also emphasised by political discourse. Marriage is the basic unit of society, the foundation of family within which the next generation is nurtured.<sup>152</sup> Despite (or perhaps because of) a mythology of marriage built upon sacramental, permanent, gendered relationships, formerly excluded categories of person 'claim right of entry to this sacred terrain.'<sup>153</sup> This claim for admission must not, she argues, be seen as confirmation of traditional marriage. Rather, we must identify the aspects of the married state sought in order to unpick why law constructs marriage as a sacred non-negotiable institution rather than a private contract.<sup>154</sup> Calling for legal reform based on claims of discrimination or unfair outcomes is not enough she argues. In order to effectively reform legal rules we need to understand 'where they come from, what they stand for, how they are represented, how they change.'<sup>155</sup> Without this broad perspective, institutionalised ways of thinking confine reforms within existing legal and social paradigms, resisting the potential offered by new ways of thinking.

Succession law provides a framework for Daniel Monk to explore the extent to which legal discourse contributes to the production of societal norms in relationship

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<sup>151</sup> *ibid*, 403

<sup>152</sup> Katherine O'Donovan, *Family Law Matters* (1993 Pluto Press), 57.

<sup>153</sup> *ibid* 49.

<sup>154</sup> *ibid*, 48.

<sup>155</sup> *ibid*, xv.

practice.<sup>156</sup> Using five reported judgments involving disputed wills where the testator was either gay or lesbian, Monk uncovers the gendered assumptions underlying key succession law doctrines. Although judicial perspectives appear to have tracked societal norms, denying same-sex relationships in the 1950s and recognising them in the present, the judiciary's ability to understand the texture of gay and lesbian lives is central to dispute outcomes. Further 'legal discourse is a key site for the production of societal norms and ... in a post equality age the claims of lesbians and gays can hinge and are contingent on tensions resulting from differences as opposed to exclusions.'<sup>157</sup> In other words, although legal discourse, at least in the domain of succession law, may not exclude gays and lesbians, it does construct them as different from, or existing outside, social norms. Monk is suggesting that legal equality, both formal and discursive, does not adequately respond to the reality of lived experience. Gendered assumptions based on marital status permeate the decision making process, eliding the particularity of gay and lesbian experience.

## **2.6 Conclusion.**

### *2.6.1 The sociology of marriage and family life*

Academic interest in marriage and the law that regulates it, begun by late nineteenth century anthropologists, has expanded considerably since the 1970s. Sociologists initially assumed that heterosexual, lifetime marriage was a 'natural,' biologically determined state. Within this 'traditional' relationship, men and women performed gender-based roles that were essential to the continuance and stability of society. Frederick Engels led the way in challenging this perspective, arguing that social

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<sup>156</sup> Daniel Monk, 'Sexuality and Succession Law: Beyond Formal Equality.' (2011) 19 *Feminist Legal Studies* 231.

<sup>157</sup> *ibid*, 247.



practices were determined by wider economic structures. Talcott Parsons subverted this critique by emphasising the positive contribution that the nuclear family made to economic development, and his perspective remained influential in both sociology and political discourse well into the 1970s. As sociological methodologies developed, small scale investigation of social practices began to question the ‘grand narrative’ of functionalism. Feminist sociology further undermined Parson’s perspective, demonstrating the patriarchal nature of the nuclear family and how it fed into wider systems of labour relationships that benefited men at women’s expense.

In the late 1980s and 1990s, a new explanatory framework for modern family life emerged. The ‘individualisation thesis’ replaced functionalism as the ‘big idea’ in family sociology. Relationships were no longer based around institutional marriage, but had become fluid and required continual negotiation and re-negotiation. This has facilitated the practice of non-traditional intimacies such as same-sex relationship and non-marital cohabitation, but it has also made relationships more fragile than ever before. Like functionalism, the individualisation thesis has come under pressure from empirical studies questioning its behavioural assumptions and its suggestion that traditional family structures have been abandoned. The theory, nonetheless, remains influential at the level of politics, providing support for pro-marriage policies that seek to prevent the continued fracturing of family ties. Meanwhile, family sociology has moved on, shifting focus away from holistic explanations toward investigation of actual experiences and how ideas, like those offered by the individualisation thesis, shape the ways in which people view and perform their own lives. Carol Smart’s work preferences individual experience over grand narrative. She contends that individuals within social categories can have very different experiences; her small-scale empirical work highlights the contingency and diversity of this experience. Tradition and

modernity are not mutually exclusive, as suggested by the individualisation thesis, rather they are ideas that people can refer to, often simultaneously, in making decisions regarding their own lives.

Irish family sociology has largely followed the pattern of work elsewhere, although Irish sociologists may have been slower to discard the functionalist perspective. The work of the Economic and Social research Institute has produced a large body of quantitative analysis of Irish family practices that tends to question, rather than affirm, the ‘grand narratives’ of functionalism and individualisation. Tony Fahey’s work, in particular, questions notions about Irish exceptionalism and the assumed influence of tradition on Irish family practices.

#### *2.6.2 Legal regulation of marriage and family life*

Academic consideration of marriage and family law led the way in adopting ideas from other disciplines in the analysis of legal topics. At the end of the nineteenth century, women’s campaigns for equal citizenship adopted the ideas of liberal feminism. As feminist thought developed a deeper understanding of equality, legal scholars began to challenge law’s claim to neutrality where gender was concerned. Second wave feminists pointed to the disadvantages suffered by women on marriage breakdown as evidence of the patriarchal nature of marriage and the law that regulates it. Contemporary feminist critique focuses on law’s role in the construction of gendered existences, the diversity of individual experience, and law’s failure to adequately address it.

Marriage is both a private and a public institution. The private love and commitment expressed in the act of marriage unites two lives in a way that is both publically acknowledged and politically useful. This juxtaposition of two very different domains of life has generated significant attention among lawyers. When

articulated in feminist terms, the division between public and private domains becomes an ideological mask behind which the state privatises the cost of inevitable dependency. The public/private dichotomy also speaks to the infiltration of public law ideas into private law adjudication and the need to promote public law values such as equality and non-discrimination in private law rules governing relationships. But, notions of what is public and what is private also resonate with ideas we hold about our own lives and relationships and are therefore *politically* useful. As Carol Smart pointed out in the British context (and as emerges in my own empirical investigation), despite sociologists since Parsons acknowledging that family life is imbedded in economic and cultural contexts, political rhetoric adopts and deploys social understandings of the family as existing outside the free market.

Some sociological thinking has, nonetheless, had an impact at the level of politics. A recent turn toward evidence based policy-making has encouraged scholars to deploy empirical sociology in the pursuit of legal reform. Anne Barlow's research suggests that married and co-habiting couples perform the same social function and should, therefore, be regulated in a similar manner. The individualisation thesis has also attracted political attention, and provided an analytic framework for legal analysis. In drawing connections between social theory and legal regulation, lawyers have identified, not the strict dichotomy between tradition and modernity presented by Beck *et al*, but a complex system of rules that support both traditional and modern family practices. Alison Diduck's work, reflecting small scale sociological studies that have gradually chipped away at the individualisation thesis, draws out how individuals aspire to both modern and traditional family ideals resulting in complex relationship behaviour. Law links into this complexity by offering conflicting models of 'good' relationship behaviour.

The relationship between legal analysis and family sociology has produced complex and nuanced perspectives on both law and family practice. Most interesting among the socio-legal scholars for my purposes are those who engage with Foucault's ideas about the nature of political power. His work offers a way to understand how relationship practices are linked to political objectives through shared understandings of what constitutes a 'good' relationship. Law plays a central role in forging this connection by supporting and re-enforcing social ideas about gender, tradition, modernity, public rights and private lives. Carol Smart's work focuses primarily on how law shapes individuals' understanding of their own lives whilst Katherine O'Donovan invites reflection on how the process of legal reform can operated to perpetuate existing institutional ways of thinking. O'Donovan is particularly concerned with the exclusionary effect of legal discourse, a perspective also adopted by Daniel Monk.

Alan Hunt and Gary Wickham have argued that Foucault 'expelled' the law from modernity, equating it with juridical 'power over' that has receded in importance in the modern regulatory State. Political debate, as observed by Foucault himself, tends to accept this view of a law that has the power to command obedience, to shape society, to promote good behaviour and discourage bad. Academic consideration of marriage, whether emanating from the legal or sociological tradition, produces a significantly more complex perspective of law's role in governing the social domain. Carol Smart, Katherine O'Donovan, Daniel Monk and others who have adopted a Foucauldian perspective on the nature of political power have, in my view, uniquely succeeded in grasping the complexity of legal regulation and its relationship with social practice. My objective in this thesis is to identify what marriage law is *actually doing* using the Irish experience as a case study example. The legal literature reviewed in this chapter

points to some potential effects, the oppression of women, the privatisation of care, the imposition of traditional values on families preferring to think and live otherwise. Literature emanating from the sociological tradition highlights the connection between the contours of family life and prevailing economic and social conditions. Foucault's work, as demonstrated by Smart and others, offers a way to think about marriage law as a point of connection between politics and individual lives.

### 2.6.3 *Juridical politics and complex relationships*

Law reform is an intensely political process. As Foucault points out, and my own analysis confirms, political debate remains focused on dichotomous oppositions between power and powerlessness. At the level of politics, it is assumed that law has the power to liberate lives, to save marriage, to stabilise society. Academic analysis has, however, identified the failure of legal measures to reflect or adequately address the complexity of lived relationships. Katharine O' Donovan urges an unpicking of how law constructs marriage and argues that we must analyse the origin of legal rules, what they represent, how they have changed, in order to open a space for analysis beyond existing legal and social paradigms. Carol Smart draws attention to how legal rules translate into individual experience and shape people's understandings of their own lives. Law is not the only force shaping lives; Alison Diduck identifies the complex nature of family ideologies that people must continually negotiate within their own lives. Even within law, the actual operation of legal adjudication, the cultural assumptions of the judiciary and litigants themselves have an influence on outcomes. Emerging from Foucauldian analysis is the sense that law does not exist in isolation, nor operate in predictable ways. Further, it does not act alone in shaping possibilities, but is intimately connected with wider systems of power and forms of knowledge existing throughout the social body.

In the next chapter, I explore Foucault's work on the issue of political power in more detail in order to build a theoretical framework capable of accounting for this complexity in the history of Irish marriage law reform.

## Three - Theoretical Framework

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Foucault maintains that power is not exerted by a unified entity called ‘the State,’ but through a network of mobile relationships between varied authorities in strategies intended to govern diverse aspects of economic activity, social life and individual conduct.<sup>1</sup> To exercise power is not to place constraints upon citizens, but to produce citizens capable of exercising a type of regulated freedom;<sup>2</sup> individuals are not the

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<sup>1</sup> Peter Miller and Nikolas Rose, ‘Political Power Beyond the State’ (1992) 43(2) *British Journal of Sociology* 173. Michel Foucault’s historical studies of mental illness, the asylum, sexuality and imprisonment demonstrate that the State is not the source of all power. In Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-78* (Michel Sennellart ed, Graham Burchell tr, Palgrave Macmillan 2007), 276 he states that:

The State is inseparable from the set of practices by which the state actually became a way of governing, a way of doing things, and a way too of relating to government.

The State therefore is not a source of power but an effect of power relations. In a 1977 interview Foucault remarked:

[R]elations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the state. In two senses: first of all because the state, for all the omnipotence of its apparatuses is far from being able to occupy the whole field of actual power relations, and further because the state can only operate on the basis of other, already existing power relations. ... I would say that the state consists in the codification of a whole number of power relations which render its functioning possible.

Michel Foucault, ‘Truth and Power’ (interview with Alessandro Fontana and Pasquale Pasquino 1977) in Michel Foucault, *Power Knowledge: Selected Interviews and Other Writings 1972 - 1977* (Colin Gordon ed, Colin Gordon and others trs, Pantheon Books 1980), 122.

<sup>2</sup> Power from Foucault’s perspective is not repressive but productive, its efficacy built upon its ability to produce what we accept as reality. See, for example, Michel Foucault, *Abnormal* (Graham Burchell tr, Picador 2003), 14-15.

subjects of power but play an important role in its operation.<sup>3</sup> In calling into question how power is exercised through legal instruments and processes, therefore, an approach moving beyond dichotomous oppositions of power and powerlessness is necessary. In this chapter, I explain how Foucault conceptualises power, and how he connects his theory of power to the functioning of modern government. I describe how legal scholars have interpreted his ideas, and build upon this work to develop a theoretical framework for analysis of Irish marriage law.

### **3.1 Foucault and Power**

#### *3.1.1 Power is not a commodity*

Foucault conceptualises power, not as commodity that some possess and others do not, but as a relationship of force instigated for a purpose. Purposive relationships of power, involving a variety of actors are, he argues, replicated across both institutional and non-institutional settings, ensuring that ‘relationships of power traverse characterise and constitute the social body.’<sup>4</sup>

Power functions. Power is exercised through networks and individuals do not simply circulate in those networks, they are in a position to both submit to and exercise this power. They are never the inert or consenting targets of power; they are always its relays. In other words, power passes through individuals. It is not applied to them.<sup>5</sup>

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<sup>3</sup> Power is a relationship instigated for a purpose, therefore, each individual has a role in determining the effect of attempts to control their behaviour. In the 1976 lecture course “*Society Must Be Defended*,” Foucault summarises his model of power:

Power must, I think, be analysed as something that circulates, or rather as something that functions only when it is part of a chain. It is never localized here or there, it is never in the hands of some and is never appropriated in the way that wealth or a commodity can be appropriated. Power functions. Power is exercised through networks and individuals do not simply circulate in those networks, they are in a position to both submit to and exercise this power. They are never the inert or consenting targets of power; they are always its relays. In other words, power passes through individuals. It is not applied to them.

Michel Foucault, “*Society Must Be Defended*” *Lectures at the College De France, 1975 - 76* (David Macey tr, Picador 2003), 29.

<sup>4</sup> Foucault, “*Society Must be Defended*,” 24.

<sup>5</sup> *ibid*, 29.



Individuals are not subjected by power, they are subjectified within relationships of power, they facilitate its exercise and are essential to its functioning.

### 3.1.2 *The State does not have a monopoly on power*

If power relationships exist throughout the social body, then the State is neither the source of all power, nor does it have a monopoly on power. This is not to deny that relationships of power can coalesce in institutional form, or that the State as a concept is unimportant. In the lecture course *Security, Territory, Population*, Foucault investigates ‘the history of the State and the way in which the institutions of the State actually crystalized.’<sup>6</sup> In undertaking this analysis, he cautions that:

We cannot speak of the State-thing as if it was a being developing on the basis of itself and imposing itself on individuals as if by a spontaneous, automatic mechanism. The State is a practice. The State is inseparable from the set of practices by which the State actually became a way of governing, a way of doing things, and a way too of relating to government.<sup>7</sup>

The State, therefore, is not a source of power, but an effect of power relations. Its very existence relies on a network of power relationships operating at every level of society:

[R]elations of power, and hence the analysis that must be made of them, necessarily extend beyond the limits of the State. In two senses: first of all because the State, for all the omnipotence of its apparatuses is far from being able to occupy the whole field of actual power relations, and further because the State can only operate on the basis of other, already existing power relations. ... I would say that the State consists in the codification of a whole number of power relations which render its functioning possible.<sup>8</sup>

The authority we tend to invest in the State does not emanate from a stockpile of power supporting its institutions. Rather, ‘the State’ is a site at which multiple relationships of power coalesce.

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<sup>6</sup> Foucault, *Security, Territory, Population*, 276.

<sup>7</sup> *ibid*, 276.

<sup>8</sup> Foucault, ‘Truth and Power,’ 122.

### 3.1.3 Power is not repressive but productive.

Power, when thought of as a repressive force, takes on a fundamentally negative character. It acts ‘to say no; [it is] in no condition to produce, capable only of posting limits, it is basically anti-energy.’<sup>9</sup> When reformulated as a relationship, power takes on a completely different character, it becomes productive,<sup>10</sup> and its efficacy depends upon its ability to produce what we accept as reality. In *The Will to Knowledge*, Foucault shows how sexuality, rather than being repressed by a power that forbids, has, since the seventeenth century, been created and defined by multiple relationships of power. For example, we might assume that children’s sexuality was generally unacknowledged until Freud.<sup>11</sup> However, Foucault reports that eighteenth century books on pedagogy and child medicine spoke of children’s sex constantly ‘and in every possible context.’<sup>12</sup> The intention of these texts may have been to quell children’s sexuality, but their effect was to communicate to parents that their child’s sexuality ‘constituted a fundamental problem in terms of their parental educational responsibilities.’<sup>13</sup> Further, children were led to believe that ‘their relationship with their own bodies and their own sex was to be a fundamental problem.’<sup>14</sup> As a result, the bodies of children became sexualised, parents became vigilant in surveillance of the peril of infantile sexuality, and the whole domain of the family and household became sexualised.<sup>15</sup> ‘In appearance, we are dealing with a barrier system; but in fact

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<sup>9</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality, Part I* (Robert Hurley tr, Penguin Books 1998), 85.

<sup>10</sup> As Foucault remarks, ‘the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power.’ Foucault, ‘Truth and Power,’ 115.

<sup>11</sup> Sigmund Freud, 1856 – 1939. Freud identified the existence of a sexual instinct in childhood, claiming to be the first author working in the area of childhood development to consider sexual development. Michael Jacobs, *Sigmund Freud* (Sage Publications 1992), 49.

<sup>12</sup> Foucault, ‘Truth and Power, 120.

<sup>13</sup> *ibid*, 120.

<sup>14</sup> *ibid*, 120.

<sup>15</sup> *ibid*, 120.

all around the child, indefinite *lines of penetration* were exposed.<sup>16</sup> ‘Sexuality’ is, therefore, ‘a far more positive product of power than power was ever a repression of sexuality.’<sup>17</sup> It is not repressed by juridical power, but constructed and controlled within more insidious and effective networks of power.

Viewing power as productive and dispersed focuses attention on how subjects and objects are formed within relationships of power. This is quite a different approach to that based on repressive notions of power that tend to presuppose the existence of social meanings and phenomena. Like childhood sexuality, our affective and relationship lives are not simply repressed by traditional ideology or patriarchy, but are shaped, constructed, and penetrated by a dense network of power relationships, not easily dispersed by unitary claims for liberation.

#### *3.1.4 Power does not stand apart from knowledge*

A central theme of Foucault’s analysis of power relationships is how they are related to, and affected by, scientific knowledge. In his view, mechanisms of power produce forms of knowledge, which, in turn, both produce new mechanisms of power and re-enforce its exercise. He urges rejection of the ‘great myth’ that:

If there is knowledge it must renounce power. Where knowledge and science are found in their pure truth there can no longer be any political power.<sup>18</sup>

Knowledge, from Foucault’s perspective, is never separate from the need that created it; it does not float above as a manifestation of pure reason and never functions separately from power. We must admit, he urges:

that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge

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<sup>16</sup> Foucault, *The Will to Knowledge*, 42.

<sup>17</sup> *ibid*, 42.

<sup>18</sup> Michel Foucault, ‘Truth and Juridical Forms’ in Michel Foucault, *Power: Essential Works of Foucault 1954 - 1984, Volume Three* (J D Faubion ed, Robert Hurley and others trs, The New Press 2000), 32.

directly imply one another; that there is no power relations without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.<sup>19</sup>

Foucault demonstrates in his historical studies that the pursuit of knowledge is always driven by specific aims formulated within power relationships. Once acquired, knowledge is applied for purposes fixed upon by mechanisms of power. For example in *The Will to Knowledge*, Foucault identifies two domains within which knowledge about sex was sought in the nineteenth century, ‘a biology of reproduction’ and ‘a medicine of sex.’<sup>20</sup> Medical practice aimed to ensure ‘the physical vigour and moral cleanliness of the social body’ and ‘to eliminate defective individuals, degenerate and bastardized populations.’<sup>21</sup> In pursuit of this aim, medicine ‘established an entire pornography of the morbid’<sup>22</sup> concerning itself with ‘aberrations, perversions, exceptional oddities.’<sup>23</sup> Under cover of scientific language, medical knowledge linked sex to the transmission of ‘an imaginary dynasty of evils destined to be passed on for generations,’<sup>24</sup> subordinating itself to the imperatives of a dominant morality. Biological explanations of plant and animal reproduction, on the other hand, developed according to scientific normativity, but were ignored by medics. Biology presented one version of reality, but medicine, chose, or constructed a picture of ‘reality’ that reflected the moral concerns of the time. Whilst not disputing that it is possible to produce objective statements about social phenomena, Foucault believes that it is necessary to pay attention to how these facts are both created and deployed within relationships of power. For example, empirical sociology has increasingly been

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<sup>19</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edn, Vintage Books 1977), 27.

<sup>20</sup> Foucault, *The Will to Knowledge*, 53.

<sup>21</sup> *ibid*, 54.

<sup>22</sup> *ibid*, 54.

<sup>23</sup> *ibid*, 53.

<sup>24</sup> *ibid*, 53.

used by lawyers to ground claims for legal change, a number of such studies were discussed in chapter two. These attempt to direct the exercise of political power according to sociological ‘truths,’ but the empirical studies are often carried out with particular aims. For example, questioning married and cohabiting people about whether they are satisfied with their relationships presupposes a politically useful answer.<sup>25</sup>

Reconceptualising law within productive networks of power draws attention to its value as a form of knowledge, which can present itself as objective and beyond power. The judicial reasoning paradigm assumes that an objective outcome is possible to any given legal question,<sup>26</sup> and this veneer of objectivity is often assumed by other forms of legal knowledge, such as the opinions of prominent lawyers, or Law Reform Commissions.<sup>27</sup> Legislators, somewhat paradoxically, often defer to legal expertise. It is important therefore to examine how, why, and by whom legal knowledge is produced, how it asserts its authority, and its potential for disqualifying other forms of knowledge or expertise. In chapter six, I discuss how legal constructions of marriage were formulated in response to political campaigns, and deployed by government in identifying ‘marriage saving’ as a political objective. Legal expertise supported political objectives, and acted to both construct and provide solutions to social problems.

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<sup>25</sup> Margaret Fine-Davis, *Attitudes to Family Formation in Ireland: Findings from the Nationwide Study* (Family Support Agency 2011). At page 8 Fine-Davis reports:

Married people were found to have the highest level of well-being on most measures, including social integration, life satisfaction, positive life experiences, etc.

One might ask why are people being asked about marriage and cohabitation, what relationships of power have produced these categorisations of individuals and relationships?

<sup>26</sup> George Christie, ‘Objectivity in the Law’ (1968-9) 78 Yale L J 1311, 1313.

<sup>27</sup> This presumed objectivity has also been challenged. See for example Gregory Sisk, Michael Heise and Andrew Morriss, ‘Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning’ (1998) 73(5) New York University L J 1377.

### 3.1.5 Power, knowledge and truth.

Knowledge is a claim to truth, psychiatrists claim to speak the truth about mental illness, medicine makes truth claims about human physiology, and religion aims to speak wider truths. Foucault called these types of claim ‘discourses of truth,’<sup>28</sup> noting how power is not limited by social contract or legal limitations, but by these discourses of truth that both produce, and are produced, by power. Relationships of power are entered into and exercised on the basis of a set of common assumptions and beliefs, power cannot function without truth, and truth cannot exist without power:

After all, we are judged, condemned, forced to perform tasks, and destined to live and die in certain ways by discourses that are true, and which bring with them specific truth effects.<sup>29</sup>

In other words, within every relationship of power there must be, at some level, a common understanding of the issues at stake. These common understandings form the boundaries to power that both depend upon and re-inscribe common beliefs and assumptions.

In a society such as ours multiple relations of power traverse, characterise and constitute the social body; they are indissociable from a discourse of truth and they can neither be established nor function unless a true discourse is produced, accumulated, put into circulation and set to work.<sup>30</sup>

Knowledge production thus aims to expand the boundaries to power by adding to the stock of true discourses available to relationships of power, and power seeks to expand discourses on truth by seeking new forms of knowledge. The question of truth, and its pursuit, is therefore the essence of the connection between power and knowledge.

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<sup>28</sup> Foucault, “*Society Must Be Defended*,” 24.

<sup>29</sup> *ibid*, 25.

<sup>30</sup> *ibid*, 24.

## 3.2 Power/Knowledge Configurations

Foucault suggests two specific historical configurations of the relationship between power and knowledge that have acted to produce domains of intervention and methods for exercising power. They emerge in sequence, both in his writing and in historical time, and, he contends, have gradually eclipsed the importance of juridical ‘power-over’ in the modern State. He calls these modes of power, disciplinary power and bio-power, although he sometimes describes the former as a pole or part of the latter.<sup>31</sup>

### 3.2.1 Disciplinary Power

Foucault’s work on the penal system, *Discipline and Punish*, contains his most comprehensive exposition of disciplinary power and the ‘disciplinary society’ it supports.<sup>32</sup> *Discipline and Punish* is an historical investigation of the ‘forms of knowledge from which the power to punish derived its basis, justification and rules.’<sup>33</sup> Rather than explaining the historical movement from punishment by torture and public display to (comparatively) benign imprisonment in terms of the development of a more humane and civilised society,<sup>34</sup> Foucault finds that prison replaced torture because its systems of confinement and discipline corresponded with the relationship between power and knowledge that existed within an emerging ‘disciplinary society.’<sup>35</sup>

With the expansion of scientific knowledge, criminals became more than their crime, and were judged not only on their actions, but ‘by all of those notions that have circulated between medicine and jurisprudence since the nineteenth century.’<sup>36</sup>

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<sup>31</sup> Foucault, *The Will to Knowledge*, 139.

<sup>32</sup> Although the emergence of disciplinary power was also discussed in Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (Vintage Books 1994) first published in 1963.

<sup>33</sup> Foucault, *Discipline and Punish*, 23.

<sup>34</sup> *Discipline and Punish* opens with a gruesome account of torture and execution from 1757, immediately followed by the reproduction of a prison timetable from 1838, *ibid*, 3-6.

<sup>35</sup> *ibid*, 193.

<sup>36</sup> *ibid*, 18.

Clinical diagnoses served to define an individual, to take hold of an offender's soul, transposing a transgression of the legal code into a criminal identity.<sup>37</sup> It was no longer enough to ask whether a criminal act had been committed and was punishable. Rather, the causal process that produced it, the origin of the perpetrator, the appropriate response, and the possibility of rehabilitation all required examination. 'A whole set of assessing (*sic*), diagnostic, prognostic, normative judgments concerning the criminal [became] lodged in the framework of penal judgment.'<sup>38</sup> The result was that:

Today, criminal justice functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-judicial systems. Its fate is to be redefined by knowledge.<sup>39</sup>

As knowledge defined the criminal individual, power sought to re-form him through incarceration and disciplinary techniques, techniques designed by the social and psychological sciences. Similar systems of training and control were deployed by the military, in schools, monasteries, and workplaces, where they aimed to produce efficiency and practised, 'docile' bodies.<sup>40</sup> Disciplinary techniques acted on individuals, requiring them to perform in specific, scientifically determined ways.<sup>41</sup> They were ordered into classrooms, battalions, factory floors; they were time-tabled, marched in rhythm, directed as to correct deportment. Soldiers and schoolchildren, like prisoners were not only required to follow programs of behaviour, they were obliged to internalise specific modes of being.

Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and instruments of its exercise.<sup>42</sup>

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<sup>37</sup> *ibid*, 18. Foucault makes a similar argument at *The Will to Knowledge*, 43, in relation to the transformation of the individual who engages in sodomy into a homosexual 'personage.' Foucault's 1974-74 lecture course *Abnormal* also considers how scientific labels act to define individuals, Foucault, *Abnormal*.

<sup>38</sup> Foucault, *Discipline and Punish*, 19.

<sup>39</sup> *ibid*, 22.

<sup>40</sup> *ibid*, 138.

<sup>41</sup> Foucault, *Security, Territory, Population*, 45.

<sup>42</sup> Foucault, *Discipline and Punish*, 170.



A further important element of power in the disciplinary mode is that it necessitates surveillance, it:

presupposes a mechanism that coerces by means of observation; an apparatus in which the techniques that make it possible to see induce effects of power, and in which, conversely, the means of coercion make those on whom they are applied clearly visible.<sup>43</sup>

The ‘perfect disciplinary apparatus ... would make it possible for a single gaze to see everything constantly.’<sup>44</sup> Jeremy Bentham’s design for a prison in which all prisoners could be observed from a central tower, but would not know whether or not they were being observed (thus ensuring maximum effect with minimum prison manpower) is offered by Foucault as an example of the pursuit of maximum efficiency in observation.<sup>45</sup> It also served as a metaphor for the operation of disciplinary power:

Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power...Bentham laid down the principle that power should be visible and unverifiable. Visible: the inmate will constantly have before his eyes the tall outline of the central tower from which he is spied upon. Unverifiable: the inmate must never know whether he is being looked at any one moment; but he must be sure that he may always be so.<sup>46</sup>

Disciplinary technologies spread throughout society at the end of the eighteenth century, with existing institutions and pre-existing authorities deploying them for particular ends. Eventually, disciplinary mechanisms were adopted ‘by State apparatuses whose major, if not exclusive function is to assure that discipline reigns over society as a whole.’<sup>47</sup> Thus, a ‘disciplinary society’ was formed when disciplinary techniques escaped from enclosed domains into ‘an indefinitely generalizable mechanism of “panopticism”’<sup>48</sup>

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<sup>43</sup> *ibid*, 171.

<sup>44</sup> *ibid*, 173.

<sup>49</sup> *ibid*, 200. Jeremy Bentham’s Panopticon project was conceived in the late eighteenth century but never constructed. Jeremy Bentham, *The Panopticon Writings* (Verso 1995)

<sup>46</sup> Foucault, *Discipline and Punish*, 201.

<sup>47</sup> *ibid*, 216.

<sup>48</sup> *ibid*, 216.

Power in its disciplinary mode is thus productive, informed by expertise and put into effect by specific techniques, themselves informed by, and productive of, scientific knowledge. Methods of social control are designed to achieve specific outcomes, and compliance is ensured through systems of surveillance that aim for automatic docility leading to perfect social order. This disciplinary utopia was never achieved, but neither were disciplinary techniques discarded, and Foucault's observations regarding the dangers of a surveillance society remain relevant today.<sup>49</sup>

### 3.2.2 Bio-power

In *The Will to Knowledge*, Foucault begins to draw connections between mechanisms of power operating on individuals, and those operating at a society-wide level. He uses the term 'bio-power' to describe power relationships that aim both to administer individual bodies, and to strategically manage life itself.<sup>50</sup> Bio-power connects forms of power exercised over individuals to political concerns, drawing attention to how individual conduct is related to issues of national policy.<sup>51</sup> Foucault maintains that with increased scientific knowledge about how life could be optimised using better agricultural techniques, improved public health, and control of sexuality, 'methods of power and knowledge assumed responsibility for the life processes and undertook to control and modify them.'<sup>52</sup> Life itself became the subject of political strategies, and

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<sup>49</sup> Foucault's own work however moved on. He remarked in 1978 in relation to discipline: Well, I think I was wrong. I was not completely wrong, of course, but, in short, it was not exactly this. I think something completely different was at stake.

Foucault, *Security, Territory, Population*, 48.

<sup>50</sup> Foucault, *The Will to Knowledge*, 141.

<sup>51</sup> Colin Gordon, 'Governmental Rationality: An introduction' in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991), 3.

<sup>52</sup> Foucault, *The Will to Knowledge*, 142.

modern man became ‘an animal whose politics places his existence as a living being in question.’<sup>53</sup>

Foucault develops the connection between individual life and the concerns of politics in the lecture course, *Security Territory Population*.<sup>54</sup> He notes that, in the sixteenth century, population was a measure of a State’s strength; a large population produced a large army, busy markets and populated towns. By the eighteenth century, with the increased use of censuses and other forms of statistical information gathering, the population attained a density, no longer a collection of individuals, but a set of phenomena displaying patterns and trends that were responsive to social, economic, and physical circumstance. These phenomena (birth rates, death rates, the occurrence of famines and epidemics), despite a degree of circumstantial variation, were shown through statistical analysis, to have their own regularities or ‘natural’ characteristics. In order to govern populations, as opposed to sovereign territories, it became necessary to manage and optimise this regularity or ‘naturalness:’

If one says to a population ‘do this,’ there is not only no guarantee that it will do it, but also there is quite simply no guarantee that it can do it.<sup>55</sup>

The objective of those responsible for government shifted, from commanding the obedience of individuals in the sixteenth century, to managing the regularity of groups in the eighteenth.

[T]he population no longer appears as a collection of subjects of right, as a collection of subject wills who must obey the sovereign’s will through the intermediary of regulations laws, edicts, and so on. It will be considered as a set of processes to be managed at the level and on the basis of what is natural in these processes.<sup>56</sup>

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<sup>53</sup> *ibid*, 143.

<sup>54</sup> Foucault, *Security, Territory, Population*.

<sup>55</sup> *ibid*, 71.

<sup>56</sup> *ibid*, 70.

Choices must be made regarding how ‘naturalness’ is measured, the type of data gathered and how it is to be analysed; choices that depend on social and scientific knowledge, moral imperatives, and on occasion pure chance. Once information is gathered and analysed, conclusions can be drawn about what is ‘normal’ for the phenomenon in question. The primary objective of government then becomes the maximisation of this normality: ‘[t]he normal comes first and the norm is deduced from it.’<sup>57</sup>

Foucault’s lecture course, *Society Must be Defended*, focuses on this objective: the attainment of ‘an overall equilibrium that protects the security of the whole [population] from internal dangers.’<sup>58</sup> Bio-political mechanisms aim to:

establish an equilibrium, maintain an average, establish a sort of homeostasis, and compensate for variations with this general population and its aleatory field. In a word security mechanisms have to be installed around the random element inherent in a population so as to optimize a state of life.<sup>59</sup>

Bio-politics takes control of life and the biological processes of man, ‘ensuring that they are not disciplined, but regularized.’<sup>60</sup> This is not a straightforward objective: it requires information, a method for identifying ‘normality’ and a set of ‘techniques and procedures for directing human behaviour.’<sup>61</sup> Power and knowledge remain intertwined, as in a disciplinary society, but new methods of control become necessary. Sovereign command is inadequate, so too are spatially limited disciplinary

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<sup>57</sup> *ibid*, 63.

<sup>58</sup> Foucault, “*Society Must be Defended*,” 247.

<sup>59</sup> *ibid*, 247.

<sup>60</sup> *ibid*, 247.

<sup>61</sup> Michel Foucault, ‘On the Government of the Living’ in Michel Foucault, *Ethics, Subjectivity and Truth: The Essential Works of Foucault 1954 – 1984 Volume One* (Paul Rabinow ed, Robert Hurley and others trs, Penguin 1997), 85.

mechanisms.<sup>62</sup> Securing normalising aims within a population requires techniques that are ‘enlightened, reflective, analytical, calculated and calculating.’<sup>63</sup>

### 3.2.3 *Bio-power and marriage*

Marriage is a social practice that has meaning for individuals. This meaning is constructed, not only by the legal concept ‘marriage,’ but also through a network of power relationships involving family, religious, economic, and emotional concerns.<sup>64</sup> Its position at the centre of a network of social power relationships means that when government wants to obtain something from the population, it looks to the marital couple and its correlate, the marriage-based family.<sup>65</sup> The State does not enforce the performance of marriage; rather marriage is a point of transfer between individual and political interests. Thus in Ireland following independence, marriage was used as a relay for government, and social and other government services were mediated through it. Marriage was largely taken for granted as a social institution.

Beginning in the 1960s, following an expansion in social services, problems with marriage began to emerge. Available knowledge that constructed marriage as the foundation of a stable society, led politics to become concerned with protecting it.<sup>66</sup> Later, scientific knowledge was produced which supported this objective, and offered methods for achieving it, such as counselling, mediation, and legal regulation.<sup>67</sup>

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<sup>62</sup> They do not however completely replace these other power mechanisms and, according to Foucault in order to guarantee security one must employ both disciplinary and juridical techniques in support of mechanisms of security. Foucault, *Security, Territory, Population*, 7-8.

<sup>63</sup> Foucault, *Security, Territory, Population*, 91.

<sup>64</sup> The social meaning of marriage and other relationship practices is carefully considered by Alison Diduck in *Law’s Families* (Lexis Nexis 2003), as discussed in chapter two. The connection between social and political meanings of marriage in the Irish context is considered further in chapters five through eight.

<sup>65</sup> The deployment of marriage as a relay for government is discussed further in chapter five.

<sup>66</sup> Discussed further in chapter five.

<sup>67</sup> See chapters six-nine.

Methods of power and knowledge thus assumed responsibility for the relationship practices of the population, and undertook to control and modify them.

Foucault contends that once the population becomes the object of political strategy and human processes its subject, government becomes a process of managing the regularity of groups. In order to achieve this, choices must be made regarding what is natural or normal social behaviour, and the objective of government becomes the maximisation of this normality. Marriage, accepted as normal social behaviour for centuries, and representing the dominant form of family formation in Ireland, therefore became the target of strategies designed to maximise its performance. This required the implementation of techniques at the level of the whole population, and the State apparatus become an inevitable part of its mode of operation. My question in relation to marriage is, what role does law play in this process, how does law further the objectives of politics? Foucault poses the problem of implementation, not in terms of the State, but as a matter for ‘government.’

### **3.3 Securing Bio-political objectives - Government**

In the lecture course *Security, Territory, Population*, Foucault uses the term ‘government,’ as it was understood in the sixteenth century, to describe the ways in which the conduct of individuals or groups might be directed.

There is the general problem of the government of oneself, for example ... There is also the problem of the government of souls and of conduct ... There is the problem of the government of children ... And then, perhaps only the last of these problems, there is that of the government of the State by the prince. How to govern, how to be governed, by whom should we accept to be governed, how to be the best possible governor?<sup>68</sup>

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<sup>68</sup> Foucault, *Security, Territory, Population*, 88.

Foucault synthesises these various forms in his definition of government as ‘the conduct of conducts’<sup>69</sup> using the equivocal nature of the term ‘conduct’ to express the specificity of power relations.<sup>70</sup> ‘Conduct’ is at the same time ‘to lead’ and way of behaving within an open field of possibilities. The exercise of power is both ‘the conduct of conducts’ and the management of possibilities.<sup>71</sup> This notion of government thus encompasses the many ways in which the behaviour of individuals or groups might be directed, and draws attention to the relationship between political government, the regulatory capacities of non-State actors and institutions, and the capacity of individual citizens to govern themselves.<sup>72</sup> Foucault is particularly interested in the relationship between the different levels of government, and in his later work focused on ethics and self-government.<sup>73</sup> Of interest for my purpose, however, is how *political* government directs, leads, or guides the behaviour of those for whom it takes responsibility. I am interested in how our affective lives are managed by political and legal techniques, how our relationship behaviour is conducted by dispersed, yet penetrating, forms of power, and how they connect with our capacity to govern our own behaviour.

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<sup>69</sup> Michel Foucault, ‘The Subject and Power,’ 341. The same phrase is translated as ‘guiding the possibility of conduct and putting in order the possible outcome’ in Hubert Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (2nd edn, University of Chicago Press 1982), 221.

<sup>70</sup> This has particular import in the French language, playing on the verb *conduire* meaning to lead and the reflexive verb, *se conduire* meaning to conduct oneself.

<sup>71</sup> Adapted from, Foucault, ‘The Subject and Power,’ 341.

<sup>72</sup> This represents a development on the notion of surveillance in disciplinary mechanisms of power. In the panopticon prisoners followed the rules because they could not tell whether they were being watched or not. With governmental mechanisms compliance is insured by internalised mechanisms of surveillance, individuals supervise themselves.

<sup>73</sup> See in particular, Michel Foucault, *The Hermeneutics of the Subject; Lectures at the Collège de France, 1981 – 82* (Gordon Burchell tr, Palgrave MacMillan 2005).

### 3.3.1 *The effects of power*

Foucault is not simply concerned with descriptions of how power operates. He seeks, like the authors discussed in chapter two, to critique its exercise. His 1974-75 lecture course, *Abnormal*, focuses on the power effects of discipline and bio-power and their implications for individual lives.<sup>74</sup> These positive forms of power supersede ‘the mode of exclusion’ and its implication of repression:

We pass from a technology of power that drives out, excludes, banishes marginalizes, and represses, to a fundamentally positive power that fashions, observes, knows, and multiplies itself on the basis of its own effects.<sup>75</sup>

‘Repression is only a lateral and secondary effect of this positive power, a power put in place, in its modern form, by apparatuses of “discipline-normalisation.”’<sup>76</sup> Thus, Foucault does not deny that individuals and groups can be oppressed by normalising or bio-political forms of power. Nonetheless, this is not their primary mode of operation.

In *Discipline and Punish*, Foucault shows how expert knowledge created the criminal individual. In *Abnormal* he focuses on how expertise aimed ‘to show how the individual already resembles his crime before he has committed it.’<sup>77</sup> Using the figure of the masturbating child to represent the object of normalising power, Foucault shows how this abnormal individual is constructed and then controlled by relationships of power. Extensive systems of surveillance are required to identify the deviant individual and techniques of power are deployed to contain her deviance. A division is made between normality and abnormality creating, not exclusion, but a justification for intervention.<sup>78</sup> In the domain of relationship behaviour, the deployment of

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<sup>74</sup> He says:

This year, then, instead of considering the mechanics of the disciplinary apparatus, I will be looking at their effects of normalisation, at what they are directed toward, the effects they can achieve and that can be grouped under the rubric of ‘normalisation.’

<sup>75</sup> Michel Foucault, *Abnormal*, 48.

<sup>76</sup> *ibid*, 19.

<sup>77</sup> *ibid*, 19.

<sup>78</sup> *ibid*, 50.



normalising power might therefore be expected to create ‘abnormal’ individuals, generate justifications for intervening in their lives, and techniques intended to identify and modify them. This power effect is exemplified by the history of Irish marriage law. The 1980s and 1990s political aim of ‘marriage saving’ both produced, and was produced by, knowledge identifying (lifetime, heterosexual, monogamous, gendered) marriage as normal relationship behaviour. In identifying normal behaviour, a picture of abnormality also emerged. The abnormal were not excluded, rather their abnormality provided a justification for intervention, and the creation of techniques designed to modify their behaviour. Thus, divorce law was intended to facilitate the rehabilitation of those who failed at marriage, so that they might enter new, more successful, marriages.<sup>79</sup> Counselling and mediation were deployed to assist individuals in difficulty so that they could either save or reconstruct normality following the failure of their interpersonal relationships. Central to these techniques was the facility for individuals to measure and modify their own behaviour, connecting their aspirations with those of government. In constructing a picture of normality, power also installed a network of mechanisms designed, like the panopticon, to facilitate self- regulation in accordance with the objectives of government.

### *3.3.2 Government, bio-power, and the legislative process*

If the State is not a source of power, and power is not a commodity, it follows that legislative instruments, produced by State institutions, are neither a source, nor an instrument, of power. They are, rather, an effect, a manifestation, of the coalescence of relationships of power. Legislative instruments cannot be fully described by reference to juridical theories of power because, although a particular law may act to

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<sup>79</sup> See chapter seven.

oppress a particular category of persons at a particular time, this oppression could not exist without a multitude of power relationships, operating at all levels of society to sustain it. The process by which legislation is produced, and its effects, are the primary focus of this thesis. Foucault's concepts of bio-power and government suggest an analytic strategy focused on diagnosing the power relationships within which law reform occurs. His description of abnormality focuses attention on the potential effects of the deployment of normalising or bio-political forms of power.

Before considering how the process of marriage law reform in Ireland might be analysed through the lens of Foucault's bio-politics and government, I review some literature that discusses the relationship between Foucault's work and 'law,' and some work pointing towards a methodological approach to the analysis of legal phenomena.

### **3.4 'Law' and Foucault.**

Initial attempts to explore the relationship between Foucault's work and law led to the conclusion that he expels the law from modernity. Alan Hunt and Gary Wickham claim that:

the primary theme that emerges from Foucault's treatment of the origins of the modern State and disciplinary society is one which casts law into the role of a pre-modern harbinger of absolutism.<sup>80</sup>

Their view is based on Foucault's use of the word 'law' to describe juridical forms of power. As discussed in chapter two, it was not Foucault's intention to equate the concepts 'juridical' and 'law.' The term 'juridical power' refers to a theory of

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<sup>80</sup> Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press 1994), 59. Hugh Baxter argues that Hunt and Wickham correctly identify substantial inadequacies in Foucault's conception of law but that the difficulty with their book is its failure to identify how, despite the lacunae, Foucault's work can be of relevance to legal studies. He suggest that it would be more fruitful to focus on the connections between aspects of Foucault's work relevant to contemporary legal theory rather than 'the sentences in his work containing the word "law."' Hugh Baxter, 'Bringing Foucault into Law and Law into Foucault' (1996) 48(2) *Stanford Law Review* 449, 464.

law/power approximating to that of John Austin.<sup>81</sup> Although Hunt and Wickham do recognise that Foucault occasionally posits a more complex view of legal mechanisms, drawing ‘attention to the interaction of disciplinary practices and their legal framework,’<sup>82</sup> their analysis is of little assistance in exploring the path of Irish marriage law reform. More recently, there have been two substantive attempts to construct a foucauldian jurisprudence, or theory of law. Francis Ewald defines law in terms of ‘the norm,’<sup>83</sup> and Ben Golder and Peter Fitzpatrick describe a responsive, and ultimately content-less, law.<sup>84</sup>

### 3.4.1 Law and ‘the norm’

Ewald begins with Foucault’s, very brief, equation of law with the norm in *The Will to Knowledge*. Foucault remarks that:

Another consequence of this development of bio-power was the growing importance assumed by the action of the norm, at the expense of the juridical system of the law.<sup>85</sup>

Using this statement as a starting point Ewald asks; ‘what is the place of law? Is a theory or practice of law articulated around the norm possible?’ The norm, he explains, is ‘a measurement and a means of producing a common standard,’<sup>86</sup> and whilst in a disciplinary society it acts locally, with the development of modern forms of social government it operates at the level of the population as a whole.

Ewald explains his understanding of the norm, and the concept of normalisation, by reference to techniques of insurance, or risk-management. Insurance, he notes, is

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<sup>81</sup> See, Victor Tadros, ‘Between Governance and Discipline: The Law and Michel Foucault’ (1998) 18 *Oxford Journal of Legal Studies* 75, 76.

<sup>82</sup> Hunt and Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, 48.

<sup>83</sup> Francois Ewald, ‘Norms, Discipline, and the Law’ (1990) 30 *Representations* 138.

<sup>84</sup> Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (Routledge 2009).

<sup>85</sup> Foucault, *The Will to Knowledge*, 144.

<sup>86</sup> Ewald, ‘Norms, Discipline, and the Law,’ 141.

necessarily concerned with norms; it is only from an appreciation of what is normal that risk can be ascertained. A risk is not simply a specific event that has occurred or might occur, rather, it is a way of dealing with certain events that might affect particular groups of people. Risk is produced by naming it, making it visible and comprehensible where an individual might otherwise only see the hazards of their particular existence. Risk gives objective status to otherwise personally experienced events by giving them a statistical reality. Statistics that plot the normal, and the events outside its parameters, give individual reality to misfortunes that happen to someone else. This reality does not need to call on a more comprehensive system of understanding or interpreting the world; it can rely on its own materiality, and the more often a particular event occurs, the more real it becomes. Thus, Ewald argues, in a statistically measured population the characteristics of a particular individual are lost in the standard measurements that possess a pool of numerically real human qualities.

The average, or normal person, then ‘is not an individual whose place in society is indeterminate or uncertain; rather he is society as it sees itself objectified in the mirror of probability and statistics.’<sup>87</sup> The notion of risk allows a group to make social judgments about itself without reference to metaphysics or morality, judgments that reflect how society is. Risk is a social and calculable phenomenon, and insurance socialises risk, transforming each individual into a part of the whole. Insurance is not simply something that spreads out the cost of misfortune among a large group; it is a justification for such distribution, based not on morality, but on a rule of justice or law. Legal judgments traditionally attempted to discover the cause of damage and attribute it to a particular person who would then be required to pay for it. The concepts of

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<sup>87</sup> *ibid*, 146.

insurance and risk, on the other hand, impose a new rule of justice that refers back to the group, to a social rule that society can determine for itself.

The growth of the insurance industry in the nineteenth century corresponded, in the industrialised world, with the expansion of social insurance and large-scale welfare systems, creating an insurance society in which the norm takes on a function similar to that in the insurance industry. A new relationship of power-knowledge is thus created corresponding to Foucault's description of bio-power, and it operates through a process of normalisation that requires a social understanding of what is normal, a method for measurement of normality and a set of rules of judgment. 'Normalization produces not objects but procedures that will lead to some general consensus regarding the choice of norms and standards,'<sup>88</sup> and is essential for the creation of 'the perfect common language of pure communication required by industrialised society.'<sup>89</sup> This common language is not created by the State, but presupposes the creation of social systems that can create a set of common standards.

Ewald's observation regarding the correspondence between expanding social security systems and the emergence of bio-political modes of power, is reflected in my examination of Irish marriage law reform. Until the 1970s, the social practice of marriage was largely considered outside the domain of politics. With the adoption by the Irish State of a welfarist approach to government, individual risks, such as relationship failure became social risks. As the phenomenon of spousal desertion became statistically measurable, it took on a material reality, and the risk of its occurrence (for women) was socialised through the social insurance system. Desertion was no longer a misfortune that happened to someone else, it was something that could

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<sup>88</sup> Ewald, 'Norms, Discipline and the Law,' 148.

<sup>89</sup> *ibid*, 151.

happen to any married women, and as a result came to be seen as a socially insurable risk. The ‘normal’ status of lifetime marriage, within which women were dependent, was not created by the State, but government intervention in relation to desertion presupposed its existence.<sup>90</sup>

There is one further point of particular interest raised by Ewald regarding how a social norm might operate to influence individual behaviour. He argues that the norm asks us to see ourselves as different from others, yet affirms our equivalence despite infinite individual differences. Normative equality makes us all comparable but also allows us to make claims based on our individuality and to lead our own particular lives:

However, despite the strength of various individual claims, no one of them can escape the common standard. The norm is not the totality of groups forcing constraints on individuals; rather, it is a unit of measurement, a pure relationship without any other supports.<sup>91</sup>

Ewald is echoing Foucault’s definition of government as ‘the conduct of conduct,’ to explain how a social law, drawing its validity from the norm, operates to manage the behaviour of a population. Each individual, although not individually commanded, measures herself against the norm, and although capable of acting outside it, is always drawn to submit to its requirements. A regulatory instrument therefore, in reflecting social judgments, provides a measure against which individuals can judge their own behaviour. It manages their freedom by allowing transgressions that most individuals will actively choose to avoid. This characteristic emerges clearly from my analysis of Irish Marriage Law. Individuals are free to ignore the law, to shun marriage, to abandon relationships at will, but social norms, reflected in legal rules, provide a

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<sup>90</sup> See chapter five,

<sup>91</sup> Ewald ‘Norms, Discipline and the Law,’ 154.

standard against which they can measure their behaviour.<sup>92</sup> The mere existence of these standards means that only the most intransigent will oppose or resist them.

### 3.4.2 Foucault's content-less law

Ben Golder and Peter Fitzpatrick imagine Foucault's law as modern substitute for traditional notions of transcendent power.<sup>93</sup> The task of jurisprudence is to describe both what law is and what it should be, often producing universal descriptions of the phenomenon known as 'law.' Golder and Fitzpatrick adopt this universalist approach setting law apart, outside or antecedent to the operation of power,<sup>94</sup> imputing to Foucault a 'general theory of ethics, alterity, and justice.'<sup>95</sup> Although ostensibly operating within the philosophical register, Golder and Fitzpatrick, like Hunt and Wickham, accept Foucault's work as a sociological description of modernity. In their version of Foucault's modernity, law fills the space left by the modern lack of sacred or transcendent grounds upon which absolute claims to truth and justice can be made.<sup>96</sup> The rules of the modern game are set by law following a process of negotiation, which includes accounting for 'an as yet unimagined and unimaginable future, with new

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<sup>92</sup> In Ireland, marriage rates rose following the introduction of divorce, and the political and legal preferencing of marriage (its position as the normative relationship) meant that relationship recognition laws became the target of human rights and equality claims in the 2000s. See chapter 8.

<sup>93</sup> Golder and Fitzpatrick, *Foucault's Law*. There have been a number of recent critical reviews of *Foucault's Law*. See for example, Marianna Valverde, 'Spectres of Foucault in Law and Society Scholarship' (2010) 6(1) Annual Review of Law and Social Science 45 and Alain Pottage 'Foucault's Law by Ben Golder and Peter Fitzpatrick' (2011) 74(1) MLR 159, and some favourable including, Sarah Burgess, 'Foucault's Rhetorical Challenge to Law' (2012) 8(2) International Journal of Law in Context 297.

<sup>94</sup> Golder and Fitzpatrick's seem to be attempting to construct a justification for a responsive human rights jurisprudence. A quotation from Foucault regarding the changeable content of human rights is used to support their argument that rights are necessary to ensure the sociality of humanity. Golder and Fitzpatrick *Foucault's Law*, 124. Foucault would likely not look to how human rights place limits on power, either in the present or for the future, or how they create the conditions of our living together in society, rather he would ask 'How is a human rights discourse possible, what are the conditions of its existence?'

<sup>95</sup> Valverde, 'Spectres of Foucault in Law and Society Scholarship,' 4556.

<sup>96</sup> Burgess, 'Foucault's Rhetorical Challenge to Law,' 297

ways of being, of being otherwise.<sup>97</sup> Law has become a necessary part of the modern, contingent social world.

Foucault's law, through its futural opening to and for society, through its responsiveness, is the truth of the social bond ... law as the truth of the social bond, or our being-with each other, must be a mobile and contingent truth.<sup>98</sup>

Golder and Fitzpatrick echo Ewald's claim for a social law with no necessary content that is open to the normalising forces at work in society. However, they also touch upon the privileged position of law as a site for social contestation. Law, and in particular the politics of law reform, provides a forum around which juridical oppositions or political positions can be articulated.<sup>99</sup> The potential mobility of law's truth makes its continual contestation both necessary and inevitable, embedding law deep within the politics of truth.

Legal formulations are central to how we contest the conditions of our social existence in the present. Human rights-based claims are the discursive paradigm of choice for most present-day activist campaigns. Law, constitutional and human rights law in particular, is undoubtedly represented as 'the truth of our social bond' at the level of politics.<sup>100</sup> Golder and Fitzpatrick's analysis is therefore useful in its account of the continued importance of the juridical form in the modern State, but like Ewald, in universalising 'law' as a transcendent phenomenon, provide little of assistance in identifying the role of legal rules, institutions, and processes in bio-political systems of governance. Indeed, early in their text they reject the possibility that law takes any

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<sup>97</sup> Hunt and Wickham, *Foucault and Law: Towards a Sociology of Law as Governance*, 102.

<sup>98</sup> Golder and Fitzpatrick, *Foucault's Law*, 130.

<sup>99</sup> *ibid*, 130.

<sup>100</sup> *ibid*, 130.



part in the process of government, stating that such an idea conceptualises law as ‘the pliant instrument of a tactical administration.’<sup>101</sup>

### 3.4.3 Governing through law – focus on method

Nikolas Rose and Mariana Valverde use Foucault’s definition of government, in combination with his methodological approach, to develop potential forms of legal intelligibility outside the juridical framework. They begin by rejecting the notion that ‘law’ has a fixed or identifiable meaning, arguing that there is:

*no such thing as “The Law.” Law, as a unified phenomenon governed by certain principles is a fiction. This fiction is the creation of the legal discipline of legal textbooks, of jurisprudence itself, which is forever seeking the differentia specifica that will unify and rationalize the empirical diversity of legal sites, legal concepts, legal criteria of judgement, legal personnel, legal discourses, legal objects and objectives.*<sup>102</sup>

The place of ‘law’ in Foucault’s work is therefore, in a very foucauldian manner, neatly sidestepped. The question, they contend, is not ‘what is law?’ but ‘*how* is law.’<sup>103</sup> The unity of law cannot be assumed nor can its power or role in society.

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<sup>101</sup> *ibid*, 34. Golder and Fitzpatrick are referring to ‘governmentality studies,’ a branch of legal scholarship that focuses on how government is ‘thought.’ I agree with their critique of this form of analysis, in that it tends to unify the motivations of politics, oscillating between un-critical description and ideology critique. I have purposely avoided use of the word ‘governmentality’ for this reason, preferring to focus on the process of ‘government,’ which acknowledges the productivity and mobility of power relationships. Clare O’Farrell accuses governmentality scholars of ignoring the ethical emphasis in Foucault’s work. She claims that rather than expressing outrage at various forms of social injustice and limitation on people’s freedoms, they often have the opposite effect in drawing attention to loopholes in existing systems with a view to closing them up. They thus ignore the anarchic dynamic in Foucault’s work, which suggests that order is always limited and crumbling at the edges. Clare O’Farrell, *Michel Foucault* (Sage 2005), 55.

<sup>102</sup> Nikolas Rose and Mariana Valverde ‘Governed by Law?’ (1998) (7) *Social and Legal Studies* 541, 544.

<sup>103</sup> Recalling Foucault’s retort to Noam Chomsky’s question, ‘Why are you interested in Politics?’ He replied ‘I refused to answer because it seems evident to me, but perhaps your question was, *how* am I interested in it?’ The exchange took place during a televised debate between the two in 1971. Chomsky has provided a transcription of the debate on his website at <<http://www.chomsky.info/debates/1971xxxx.htm>> Last accessed 8 June 2014. The debate is available at <<https://www.youtube.com/watch?v=3wfNI2L0Gf8>> last accessed 8 June 2014.

Rather, the ‘legal complex’ must be investigated in terms of the role it plays in strategies of regulation.

Rose and Valverde suggest that the concepts of bio-power and government can facilitate an analysis that decentres and fragments law. Focus can then shift to the relationships of power within which the legal complex is embedded, or more precisely it becomes possible to adopt:

an analytical focus upon the formulation and functioning of rationalized and self-conscious strategies that seek to achieve objectives or avert dangers by acting in a calculated manner upon the individual and collective conduct of persons.<sup>104</sup>

They propose the use of history, in particular the history of problematisations - the ways ‘experience is offered to thought in the form of a problem requiring attention,’<sup>105</sup> - to investigate the legal complex from the perspective of government. Such an investigation would analyse the role of legal mechanisms in strategies of regulation, removing law’s privilege and the power attributed to law by constitutional theory.<sup>106</sup> This form of analysis also facilitates exploration of how law functions within a network of normalizing power relationships, and in particular how it produces and re-enforces social rules of inclusion and exclusion.<sup>107</sup>

Focusing their attention on how non-legal forms of knowledge can infiltrate legal processes, Rose and Valverde examine how the ‘plurality of different forms of expertise have attached themselves to the institutions and procedures of the law.’<sup>108</sup> My exploration of Irish marriage law, however, suggests that legal expertise and categories have permeated deep into non-legal domains, influencing social policy, healthcare, employment practices and how we view our own relationships. In 1970s

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<sup>104</sup> Rose and Valverde ‘Governed by Law?’ 544.

<sup>105</sup> *ibid*, 545.

<sup>106</sup> *ibid*, 546.

<sup>107</sup> *ibid*, 548.

<sup>108</sup> *ibid*, 548.

Ireland, the legal status ‘married’ had far-reaching implications and this remains the case today.<sup>109</sup> Marital status affects an individual’s progress through life, but it is also how that progress is measured and translated into expertise by sociologists, government agencies, psychologists and the medical profession. The exercise of power through the ‘legal complex’ therefore involves the assimilation of non-legal knowledge into legal processes, and the deployment of legal knowledge within other modes of social control.

Law is identified as a (privileged) form of knowledge in Carol Smart’s early work. She argues that legal instruments and processes are not challenged by scientific expertise; rather they have a symbiotic relationship. Law is not just a system of rules, but a ‘system of knowledge’ that contributes to the production of culture and truth.<sup>110</sup> This interpretation of law’s role is supported by Daniel Monk’s genealogy of the problematisation of teenage pregnancy.<sup>111</sup> Laws governing children’s education operate in different ways within different domains, incorporating conflicting discursive frameworks.

In the health context, the child is constructed in law as a patient, independent and potentially sexual, while in the education context, the child is a pupil, dependent and, reinforcing the criminal law, non-sexual until adulthood. This conflict demonstrates that contingent nature of the legal objectification of children and explains how law enables conflicting practices to operate simultaneously.<sup>112</sup>

Monk has also drawn on Foucault’s work to explore the connection between the politicisation of social issues and the outcomes of law reform.<sup>113</sup> He notes that despite

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<sup>109</sup> Marriage facilitated the administration of tax and social welfare, but it also resulted in the categorisation of women (but not men) according to marital status, assigning different rights and responsibilities to each. See chapter five.

<sup>110</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989), 162.

<sup>111</sup> Daniel Monk, ‘Sex Education and the Problematization of Teenage Pregnancy: a Genealogy of Law and Governance.’ (1998) 7 *Social & Legal Studies* 239.

<sup>112</sup> *Ibid*, 253.

<sup>113</sup> Daniel Monk, ‘(Re) constructing the Head Teacher: Legal narratives and the Politics of School Exclusion.’ (2005) 32 *Social & Legal Studies* 399.

growing emphasis on the rights of the child, legal and political narratives legitimize the denial of excluded children's civil rights.<sup>114</sup> This, he contends is because the authority invested in head teachers by law depends upon 'prevailing social and political factors.'<sup>115</sup> Law's knowledge is here dependent upon the contextual environment within which it is produced. But it is not simply the passive recipient of social mores, legal rules and processes also act to re-enforce, entrench and legitimise particular socio/cultural understandings.

A methodologically orientated approach to law is also suggested by Hugh Baxter.<sup>116</sup> Like Rose and Valverde, Smart and Monk he draws attention to the importance of expertise in the process of constituting and transforming power relationships, but he also notes that law both produces, and is a product of, power relationships. Of particular interest in Baxter's analysis is his observation that viewing law through a Foucauldian lens facilitates an analysis of legal rules and processes, but also of how law is deployed politically as a form of expertise.<sup>117</sup> This observation is of particular relevance in relation to the deployment of human-rights or constitutionally based, juridical, arguments by those who seek to extend the boundaries of what is considered 'normal' in our society. Baxter does not develop this point, but it is carefully made by Samuel Moyn in relation to international human rights discourse.<sup>118</sup>

Moyn notes that human rights have come to imply 'an agenda for improving the world, and bringing about a new one in which the dignity of each individual will enjoy

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<sup>114</sup> Ibid, 401.

<sup>115</sup> Ibid, 402.

<sup>116</sup> Baxter, 'Bringing Foucault into Law and Law into Foucault.'

<sup>117</sup> The 1975/6 lecture course was first published in English in 2003 as, Foucault, "*Society Must Be Defended*," and although the fourth lecture in the 1977/8 lecture course was published in English in 1991, the complete course was not available in English until 2007, published as Foucault, *Security, Territory, Population*.

<sup>118</sup> Samuel Moyn *The Last Utopia* (Harvard University Press 2012).

secure international protection.<sup>119</sup> This is an unmistakably juridical/legal discourse, a calling in aid of an international legal order that commands the world to provide a better life for the victimised. ‘Human rights in this sense have come to define the most elevated aspirations of both social movements and political entities – State and interstate. They evoke hope and provoke action.’<sup>120</sup> As Moyn points out in relation to the global position, the rights discourse, as we know it today, was born, not at some point in ancient history, but in the 1970s.<sup>121</sup> At a European level, rights were recast as entitlements that might challenge the sovereign nation State, in contrast to their earlier formulation, reflected in the Irish Constitution, as central to the construction of the nation State.<sup>122</sup> The emergence of an understanding of human rights transcending the power of the State emerged in Ireland, as in the rest of the western world, in the 1970s and became one element of the ‘legalisation’ of interpersonal relationships. The imperative to assert the right to equality, to freedom of conscience, the rights of the child, inevitably cast marriage and the family into a legal mould, setting the paradigm for management of relationship behaviour. This privileged legal knowledge created the need for power to attend to women, children, and failed relationships in order to protect individual rights. In this sense law in its internationalised human rights mode, acts as a form of knowledge, like risk in the insurance industry identifying and making real the categories of persons whose rights are liable to violation – the vulnerable

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<sup>119</sup> *ibid*, 1.

<sup>120</sup> *ibid*, 1.

<sup>121</sup> In relation to Irish marriage law, the idea that rights based claims might direct the actions of government emerged in the early 1970s, when women’s groups, acting on foot of the United Nations Declaration on the Elimination of Discrimination against Women, sought the establishment of a Commission on the Status of Women. See chapter five.

<sup>122</sup> Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991), 63-64. Chubb notes that judicial review of political action was ‘foreign to the traditions in which the lawyers of the time had been trained and practised’ and that Eamon de Valera, the Taoiseach largely responsible for the drafting of the 1937 Constitution, saw the role of judges in relation to constitutional rights as a modest one.

dependent woman, or the child victim of marriage breakdown. It also, like risk, provides a justification for intervention, based not on morality but on a rule of justice or law.

#### *3.4.4 Exploding Foucault's law?*

An approach to analysis capable of identifying the various ways in which 'law' is implicated in the government of lives is thus necessary – the category 'law' must be exploded and decentred in order to fully interrogate how our relationships practices are governed and the role played by marriage law. Five principal theoretical precepts or directions can be drawn from Foucault's work and explorations of the relationship between it and 'the legal complex.' First, it is necessary to shift focus from 'the Law' to the history of problems in order that the role of 'the legal complex' in strategies of governmental regulation can be investigated. Foucault holds that power is a relationship instigated for a purpose. If we wish to understand its operation, therefore, we need to focus on how, and for what purpose, its deployment becomes necessary. Law reform is generally a response to social problems. In order to identify how legislation is implicated in relationships of power, we must begin with the impetus for reform. The first move in analysing marriage law, therefore, is to examine how social (marriage) behaviour was categorised as problematic. Once a problem has been identified, those responsible for government will attempt to find solutions. In relation to marriage, the problems were not always legal, but the responses often were. By examining why particular solutions were chosen and the networks of power/knowledge that made them possible, we can begin to identify ways of thinking and knowing about marriage at particular moments in time. The second question for consideration is, therefore, how solutions to social difficulties are formulated at the level of government.

Foucault argues that, in the modern State, social behaviour is controlled, not by command, but through techniques intended to lead or guide the conduct of the population. By focusing on these techniques, including legal techniques, we can begin to see law's role in achieving the bio-political objectives of government. The third focus of investigation is therefore on the techniques, including legal techniques deployed to manage social behaviour. Social policy plays a significant role in shaping the possibilities available to individuals in making choices about how they live. Before 1970, married women were excluded from the workforce, and the regulation of the social domain was mediated through marriage. Women's relationship choices were therefore severely restricted as post-marriage life was, from a practical perspective, impossible. It is important, therefore, to examine other political techniques that shape the choices available to individuals in order to determine the effect of legal rules.

Political techniques, when deployed in pursuit of normalising objectives, operate both to construct normality and to identify abnormality. Foucault contends that in so doing, political mechanisms install a detailed machinery around those unable to conform to the normative position, acting not to compel the performance of 'normal' relationships, but to observe, know, and potentially re-form non-standard behaviours. In ascertaining the political strategies in which marriage law is implicated, therefore, it is necessary to examine the effects of marriage law, both in constructing normality and managing abnormality.

Social and economic context is crucial to understanding how problems arise, solutions are formulated, and how specific operations of government are connected to wider strategies of regulation. The actual effect of marriage law depends on the social context within which it is deployed, and its strategic purpose is often connected to political objectives that are largely unrelated to the problems of individual citizens.

The final, fifth, area of investigation is therefore the contextual environment within which marriage law reform occurred. In the next section I relate these five avenues of investigation to the principal research objectives introduced in chapter one.

### **3.5 Analysing Marriage Law**

#### *3.5.1 Objective one – governed by marriage law?*

Foucault's work offers a potential system of intelligibility for how we are governed by marriage law. One objective of this research is to challenge the systems of thought that assume that the legal regulation of relationship behaviour can bring about social equality and justice. In order to achieve this, Foucault's concepts of bio-power and government are employed to describe how we are, in fact, governed by marriage law.

This involves an examination, as set out above, of:

- (a) How relationship behaviour is identified as a problem for politics.
- (b) How solutions are formulated to these problems at the level of government.
- (c) The techniques deployed in their solution, including legal and other strategies that act upon the self-governing capacities of individuals and groups.
- (d) The power effects of these strategies.
- (e) The social and economic conditions, and policy frameworks, within which legal reforms are enacted and implemented.

The research period (1945 – 2010) is divided into four temporal divisions within which each of these questions are addressed. The choice of temporal divisions and data is explained in chapter four.



### 3.5.2 *Objective two – the role of marriage law*

I also aim to question our taken for granted assumptions about the role of ‘the legal complex’ in our intimate and familial lives by suggesting that marriage law is a political technique that supports the normalising objectives of government by conducting conformity in relationship behaviour. This theoretical position is drawn from Foucault’s work, and the normalising objective of marriage law is well supported by the empirical examination detailed above. Less obvious at the outset, was the connection between the path of marriage law reform and shifts in how the process of government was rationalised over the research period. My conclusions in relation to the second question thus emerged from the broad contextualisation of how the social domain was governed over the research period.

Keynesian economic policy, adopted by Ireland in the late 1950s,<sup>123</sup> aimed to produce economic growth predicated on social stability. European monetarist policies, adopted in the 1990s,<sup>124</sup> had a similar objective, but the accompanying social inclusion policies were more comprehensive and interventionist. As social practice moved away from marriage, government acted to ensure social stability through the promotion of stable, but not necessarily marriage-based, families. Social science supported this objective by identifying other ways of living, and their capacity to form the basis of productive family life. The promotion of social, and hence, economic stability was achieved through the ‘conduct of conduct,’ positing an optimal social outcome and leading or guiding individual citizens toward it. In the Irish context, the normalising strategy of government in respect of marriage was clear throughout the 1970s, 1980s, and 1990s, when the stated political objective of marriage law was to save marriage

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<sup>123</sup> As discussed in chapter five.

<sup>124</sup> As discussed in chapter eight.

(in its Constitutional form). The objective was less clear in the 2000s, but the effect of marriage law was the same – an optimal relationship form was identified and a detailed apparatus installed with the purpose of bringing as many people as possible as close as possible to it. Further, as predicted by Foucault, the existence of a normative form of relationship produced a justification for intervention in the lives of those unable or unwilling to conform, and the development of a set of modification techniques intended to re-form them. The role of marriage law in managing the Irish population over the research period thus emerges as conducting conformity in relationship behaviour for the purpose of promoting social, and hence economic, stability.

### **3.6 Conclusion**

Foucault conceptualises power as a relationship of force instigated for a purpose. He contends that power does not reside in the State but at all levels of society acting to both shape and produce reality. Knowledge, whether legal or scientific, does not stand outside power but is integral to its exercise, acting to create common assumptions and beliefs that facilitate power's operation. This formulation of power has significant implications for how we conceptualise the exercise of political power through legal mechanisms. It is no longer adequate to say that we are oppressed by a stockpile of power residing in the State. We must look at how relationships of power arise, the forms of knowledge sought and deployed, and in particular, how those subjected by power are also implicated in its exercise.

Foucault draws attention to a number of specific historical configurations of the relationship between power and knowledge. His description of bio-power is of most relevance to my investigation of marriage law. Bio-power, the principal form of power exercised in the modern State, aims to take control of life, attempting to regularise it using available knowledge and techniques that are 'enlightened, reflective, analytical,

calculated and calculating.’<sup>125</sup> Marriage as a social practice has existed for millennia, carrying social meaning and acting as a point of transfer between individual interests and those of the State. It is therefore to be expected that power would attempt to regularise its practice. Foucault’s work suggests that this occurs at the level of the State through a process of government understood as ‘the conduct of conduct.’ Individuals are not commanded to behave in particular ways; rather they are directed and guided by techniques that act on their freedom, connecting with their self-governing capacities. This process of government is problematic because it constructs a picture of optimal behaviour in accordance with available knowledge and seeks to bring as many people as possible as close as possible to this optimal or normative position. In so doing, it also constructs abnormal individuals and behaviours, providing justifications for intervention and the installing of mechanisms of control around those unable or unwilling to conform. The ability of individuals to regulate their own social behaviour in accordance with social norms is also implicated.

Using the concepts of bio-power and government to examine legislative reform of the legal rules governing marriage involves consideration of how legal rules and mechanisms are implicated in conducting social behaviour. It is inadequate to say that we are commanded by law to behave in particular ways; rather the relationships of power within which legal rules emerge and are implemented must be examined to ascertain how they operate to govern social behaviour. The next chapter sets out how this is achieved using a genealogical approach to history and foucauldian discourse analysis. As this methodology differs somewhat from that generally adopted within the legal academy, the chapter begins by locating my approach within a wider taxonomy of legal research.

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<sup>125</sup> Foucault, *Security, Territory, Population*, 91.

## Four – Method

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More than thirty years ago, Richard Posner described three main types of legal scholarship.<sup>1</sup> His first classification, doctrinal analysis, involves the clarification of legal doctrine in its own terms. This traditional approach:

involves the careful reading and comparison of appellate opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis.<sup>2</sup>

In order to carry out this form of research, lawyers do not need to know any other discipline, and the research output is valid once well-reasoned, and in accordance with legal doctrine. The second type of scholarship identified by Posner is positive analysis of law according to the methods of social science, including history. This includes economic analysis of law, and the application of methods drawn from sociology, political science, or history to explain features of the legal system.<sup>3</sup> Posner's final

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<sup>1</sup> Richard Posner, 'The Present Situation in Legal Scholarship,' (1980-1981) 90 Yale Law Journal 1113. For a more recent, comprehensive, overview of legal method, see Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Hart 2011). Posner's article has the advantage of simplicity but his typology is largely similar to that identified in van Hoecke, save that Posner did not discuss comparative method.

<sup>2</sup> *ibid*, 1113.

<sup>3</sup> *ibid*, 1120.

category, ‘the new normativism,’<sup>4</sup> uses the social sciences and humanities, particularly philosophy, to evaluate legal doctrine, making suggestions for how it can be improved. Posner surmises that other than doctrinal scholarship, this is perhaps the most comfortable for lawyers, because the identification of anomalies and matters in need of reform is an integral part of the doctrinal system taught at universities.<sup>5</sup> It differs from doctrinal research, however, in that it reaches outside the legal system for new issues to analyse. In this category, Posner places advocates of natural law, Marxists, and those working on:

discrimination, including reverse discrimination, the ethical basis of contract and tort law, just compensation in eminent domain cases, causation and intent in tort and criminal law, and many others (references omitted).<sup>6</sup>

Within Posner’s taxonomy, many of the scholars discussed in chapter two fall into the third category, seeking justifications for legal reform from outside the legal system.<sup>7</sup>

Normative legal arguments based on insights from other disciplines often exploit the ‘scientific’ aspect of social science to support their position. For example, Ann Barlow’s deployment of empirical sociology to argue for more relationship law uses the presumed objectivity of social research.<sup>8</sup> In focusing on the legitimacy of political action by reference to the external truth of sociology, her work converges with political argument, becoming part of how law reform occurs, rather than a way to evaluate it.

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<sup>4</sup> *ibid*, 1125.

<sup>5</sup> *ibid*, 1126.

<sup>6</sup> *ibid*, 1127.

<sup>7</sup> Posner does not admire this type of work:

Some of these scholars belong to what a friend of mine, who must remain nameless here, calls the ‘anti-law’ or anti-society’ bloc in law school faculties. The ‘anti-law’ people do not want to train practicing lawyers, at least no practicing business lawyers; they do not like practicing lawyers. They do not like the traditional modes of legal analysis and training. They do not respect their conventional colleagues ... They are, in short, unassimilable and irritating foreign substances in the body of the law school.

*ibid*, 1128.

<sup>8</sup> Anne Barlow, ‘Cohabiting Relationships, Money and Property: The Legal Backdrop’ (2006) 37 *Journal of Socio-Economics* 502.

In pursuing a normative objective, legal scholars engaging with other disciplines, or ways of thinking about social phenomena, thus, become an integral part of the workings of politics.<sup>9</sup>

My objective is to discover *how* we are governed by marriage law and to identify the role it plays in modern government. This objective falls within Posner's second category: I aim to examine law from the perspective of another discipline.<sup>10</sup> In contemporary language, this is as an objective that might fall within the disciplinary orientation of sociology of law in that I assume law to be a social construct that must be examined contextually.<sup>11</sup> However, the choice of Foucault's work as a theoretical framework, although causing little difficulty for Posner's categories, places my pursuit, at best, in the margins of legal sociology.<sup>12</sup> Sociologists in the main, seek to produce objective findings. Although sociological researchers often hold political perspectives that cause them to see the world differently from one and other, it is usually accepted that the difference arises from their different viewpoints.<sup>13</sup> Foucault's work, on the other hand, questions the potential for objectivity, pointing out that the

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<sup>9</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (2nd edn, Sage 2010), 37.

<sup>10</sup> Which other discipline is a matter of debate. Foucault acknowledges the historical dimension of his work, but was, in general, sceptical about the usefulness of disciplinary divisions. He remarks 'There is no longer any need to consider as valid the lines of demarcation between disciplines or the groups with which we have become familiar.' Michael Foucault, 'On the Archaeology of the Sciences: A Response to the Epistemology Circle' in Paul Rabinow ed, *Ethics Subjectivity and Truth* (Robert Hurley and others trs, Penguin 1994), 303.

<sup>11</sup> Reza Banakar describes the sociology of law, or legal sociology, as: an interdisciplinary field of research consisting of a large number of disparate approaches to the study of law in society. These are brought together by a common epistemology that views law as a social construct and argues that law and all its manifestations should be studied empirically and contextually.

Reza Banakar, 'The Sociology of Law: From Industrialisation to Globalisation' (2011) Sociopedia.isa, 2.

<sup>12</sup> Sociologists tend to see Foucault's work as a sociological description of modernity. As mentioned in chapter three, this understanding led to the conclusion that he had expelled the law from modernity.

<sup>13</sup> Max Travers, *Understanding Law and Society* (Routledge 2010), 141.

categories upon which social science relies are in themselves representative of particular ways of thinking.

In terms of categorising my approach, therefore, I make no claim beyond Posner's second classification. I aim to examine law (in its broadest sense) from a Foucauldian perspective. Foucault, in remaining sceptical about the possibility of absolute truth or objectivity, nonetheless developed a distinctive approach to examination of social phenomena, and in this chapter, I build upon the theoretical framework developed in chapter three to explain his methodological orientation and its relevance to Irish marriage law. I begin by setting out my specific methodological approach in terms of the research objectives, and explain the concepts of genealogy and discourse deployed in analysis of source material. To complete the chapter, I discuss some other work that has used Foucauldian approaches to examine law and other social phenomena.

## **4.1 A Methodological Approach**

### *4.1.1 Research aims and methods*

As already discussed, my research has two principal aims:

1. To unsettle the assumption that the legal regulation of relationship behaviour can bring about social justice and equality in the present.
2. To show that marriage law is a political technique that supports the normalising objectives of modern government, in particular by conducting conformity in relationship behaviour.

The first of these is an empirical objective, involving the use of historical material to challenge present day assumptions. It is achieved by identifying how we have been governed by marriage law in the past, demonstrating the contingent nature of marriage and the law that regulates. I identify four historical periodizations and within each period pose three specific questions:

- (a) How is relationship behaviour identified as a problem for politics?
- (b) How are solutions formulated to those problems at the level of government?
- (c) What strategies are deployed in their solution, including legal and other strategies that act on the self-governing capacities of individuals and groups.

Two methodological tools are employed to answer these questions:

- (d) Genealogy, an approach to history concerned with power.
- (e) Discourse analysis, a methodological approach to research material that determines the choice of data and how it is analysed.

The periodization was determined by the methodology deployed, therefore I explain how the research period was divided into four intervals, following an exposition of the methodological processes of genealogy and discourse analysis.

The second aim is theoretically driven in that it develops the findings from the initial analysis to theorise the role of marriage law in modern forms of government. In order to achieve this, I focus on the social and economic conditions within which law reform took place over the research period, and the specific techniques deployed in governing relationship life, in order to describe the power effects of marriage law. In each historical period, therefore, I outline:

- (f) The power effects of strategies (including legal strategies) deployed by government in formulating solutions to social problems.
- (g) The social and economic conditions, and policy frameworks, within which legal reforms were enacted and implemented.

This aspect of my research is largely interpretative and therefore necessarily subjective. I do not claim that the homogenisation of social behaviour is the sole political rationale for the regulation of relationships, only that it is a possibility to consider. Whilst current political discourse is pre-occupied with the potential



exclusionary effect of heteronormative marriage law, the oppression of women or the privatisation of care, it is worth considering that other ways to exercise control and seek freedom are possible. Marriage law, like so many other regulatory systems, is not inevitably bad, but it is dangerous.<sup>14</sup>

## 4.2 Genealogy, an Historical Methodology

### 4.2.1 Objective

Foucault uses history as a tool with which to question the political relevance of the past to our understanding of the present. We generally assume that the present builds upon the past in a linear and progressive fashion, and that past events shape the potential of the present. Foucault's historical studies, on the other hand, demonstrate the contingency of both past events and present understandings, identifying the present as 'a time like any other time, or rather, a time which is never quite like any other.'<sup>15</sup> Colin Gordon describes the objective of Foucault's historical approach as the placing of our present-day values and taken for granted assumptions on display, opening them up to scrutiny to produce 'a jarring account of our present as seen from elsewhere.'<sup>16</sup> In *The Will to Knowledge* for example, Foucault asks how we have come to think about sexuality in terms of categories of personages creating 'an entire pornography

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<sup>14</sup> Foucault writes:

My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads, not to apathy, but to hyper and pessimistic activism. I think that the ethico-political choice we have to make every day is to determine which is the main danger.

Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress,' in Hubert Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (2nd edn, The University of Chicago Press 1983), 231-232.

<sup>15</sup> Michel Foucault 'Critical Theory/Intellectual History' in Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977 – 1984* (Lawrence Kritzman ed, Routledge 1990), 36.

<sup>16</sup> Colin Gordon, 'Afterword' in Michel Foucault, *Power/Knowledge* (Colin Gordon (ed), Pantheon Books 1972).

of the morbid.<sup>17</sup> He demonstrates that classifications of individuals - the homosexual, the legitimate procreative couple, and the sexual child - have no material reality but are created by the power/knowledge relationships within which we are embedded. History, he contends, can be used to break down the claims to truth of any system of thought, and to demonstrate the limitations of particular ways of thinking or institutional practices.<sup>18</sup>

Foucault uses a number of terms to describe his approach to history, archaeology, genealogy, problematisation, history of the present. It is during his genealogical period that he is most concerned with questions of power. In ‘Nietzsche, Genealogy, History,’ he outlines the aim of genealogy:

Nothing in man, not even his body – is sufficiently stable to serve as a basis of self-recognition or for understanding other men. The traditional devices for constructing a comprehensive view of history and for retracing the past as a patient and continuous development must be systematically dismantled.<sup>19</sup>

Genealogy does not assume that words keep their meaning, that aims point in a single direction or that ideas retain their logic.<sup>20</sup> The focus of the genealogist is not on events or progression through time, but on how meanings are produced and attached to social subjects and objects.

#### *4.2.3 Focus on problems*

A genealogical investigation begins with specific problems that arose in the past and continue to cause difficulties in the present. Foucault uses the term ‘problematisation’ to describe the apparently a-historical phenomena investigated, and employs history

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<sup>17</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality, Part I* (Robert Hurley tr, Penguin Books 1998), 54.

<sup>18</sup> Clare O’Farrell, *Michel Foucault* (Sage 2005), 61.

<sup>19</sup> Michel Foucault, ‘Nietzsche, Genealogy, History’ Michael Foucault, *The Foucault Reader*, (Paul Rabinow ed, Pantheon Books 1984), 380.

<sup>20</sup> *ibid*, 380.

to demonstrate their temporality and contingency. Beginning with their emergence, he investigates how:

an unproblematic field of experience or set of practices which were accepted without question, which were familiar and ‘silent’ out of discussion, becomes a problem, raises discussion and debate, incites new reactions, and induces a crisis in the previously silent behaviour, habits, practices, and institutions.<sup>21</sup>

The emphasis is on how people become anxious about, and seek to act upon, particular areas of life. Connecting this concern to the concept of government as ‘the conduct of conduct’ provides a starting position for analysis.<sup>22</sup> At specific points in time, particular problems are offered to politics for solution. Those responsible for governing the population become aware of a new regulable domain and categories of citizen requiring their attention. The activity of governing is called into question in relation to a specific area of social life.<sup>23</sup>

The problematisation of marriage and the law regulating it forms the starting position for my analysis. As discussed in chapter one, marriage was considered a social practice outside the domain of politics in Ireland until the late 1960s. In beginning with its emergence as a problem for government, its contingency as an object of legal regulation becomes apparent. In 1960s Ireland, married women, despite their separate legal personality,<sup>24</sup> were seen only in terms of their relationship to their husbands. The financial difficulties experienced by women following marriage breakdown were, therefore, assumed to result from their husbands’ acts of desertion. Their dependent role in marriage, exclusion from the workforce, and large families were not considered factors contributing to their indigence. In resolving the problem of female post-

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<sup>21</sup> Michel Foucault, *Fearless Speech* (Joseph Pearson ed, Semiotext(e) 2001), 74. In *The Will to Knowledge* he uses the term to describe his starting position, but it also describes one of his historical methodologies.

<sup>22</sup> See chapter three.

<sup>23</sup> Dean, *Governmentality: Power and Rule in Modern Society*, 38.

<sup>24</sup> The legal personalities of husband and wife were completely severed by the Married Women’s Status Act 1957.

relationship poverty, government focused on a husband's obligation to maintain his wife, and enacted legislation providing for a legally enforceable spousal support obligation. Marriage, therefore, emerged as a problem for the Irish government, and marriage law as the solution to that problem because of how women's role in relationships was conceptualised at that particular moment in time.

#### *4.2.4 Focus on power*

Perhaps the most important element of Foucault's approach to history for my purposes is his concern with power. A genealogical approach to history requires careful examination of the relationships of power that produce reality at specific points in time. By focusing on the power/knowledge relationships that sustain hegemonic truths it is possible to identify 'what we take to be necessary and contingent in the ways in which we think and act with regard to the "conducting" of our lives and those of others.'<sup>25</sup> In clarifying the taken-for-granted relationships of power within which we are embedded, the possibility of re-imagining our present emerges free from the assumption that the present must necessarily build upon the past. Current campaigns, calling for the extension of marriage law to a broader range of relationships, seek to achieve freedom for traditionally marginalised groups by building on existing regulatory paradigms. In making clear the relationships of power that have, historically, acted to offer marriage law as a solution to social problems, a space can be opened within which to consider the efficacy of marriage law in solving problems in the present.

Queer theorists adopt a similar perspective in their analysis of government action in relation to same-sex relationships. Carl Stychin, for example, argues that the British

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<sup>25</sup> Dean, *Governmentality: Power and Rule in Modern Society*, 56.

Civil Partnership Act 2004, in facilitating legal recognition of same-sex relationships, ‘falls back on a traditional conception of relationships, dependence and privatisation,’ and as such is ‘an act of legal violence that delegitimises and shames that which it does not recognise.’<sup>26</sup> By focusing on the specific relationships of power within which the 2004 Act became the solution to the political problem of same-sex relationships, Stychin is able to disrupt the progressive narrative associated with this type of legislation. A similar critical stance is not often adopted in relation to the wider categorisation and regulation of individual relationship behaviour, although the exclusionary effects of legal rules reach beyond the experiences of same-sex couples. Many individuals are disadvantaged, marginalised, excluded, shamed and disciplined by relationship regulation that aims to govern individual lives according to objectives formulated within dominating and dominant power relationships.

### **4.3 Analysing Power Relationships**

#### *4.3.1 Discourse*

The basic tool employed by Foucault is discourse analysis. The term ‘discourse’ in common usage simply means speech or language, and perhaps more specifically, conversation.<sup>27</sup> Discourse in foucauldian terms, however, is any concrete manifestation of the relationship between power and knowledge existing at a particular point in time. In order to identify power relationships it is necessary to engage in an analysis and description of discourse. This raises three specific questions: what does Foucault mean by the term ‘discourse’? What research material or data constitute ‘discourse’? How should collected data be analysed?

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<sup>26</sup> Carl Stychin, ‘Family Friendly? Rights, Responsibilities and Relationship Recognition’ in Alison Diduck and Katherine O’Donovan (eds), *Feminist Perspectives on Family Law* (Routledge-Cavendish 2006), 34.

<sup>27</sup> The Chambers Dictionary (2000, Chambers Harrup), 461.

#### 4.3.2 What is discourse?

Discourse is used in a technical sense within a range of academic traditions. Positivists and empiricists, for example, conceptualise discourse as the way groups present their arguments for change or stasis. Thus, ‘traditionalists’ might frame an argument against divorce in terms of traditional values and the protection of children. In analysing this type of discourse, a researcher looks at how effective the particular discourse has been in shaping social practices and government action. Realists attach material reality to discourses as sources of power, discourse analysis then looks at how language gets its power and transforms the material world. In Marxist theory, discourse is an ideological system of meaning which masks the uneven distribution of wealth and power in capitalist societies, and the aim of analysis becomes the revelation of hidden mechanisms of power. Critical discourse analysis is also concerned with power, examining how discourse is used by the powerful to deceive and oppress the powerless. All of these approaches assume or argue that an objective reality exists and that the purpose of discourse is to affect this reality in some way.<sup>28</sup> Actions and spoken or written words are treated as signifiers of something beyond and it is presumed:

that all that discourse happens to put into words is already found situated in that half silence which precedes it, which continues to run obstinately underneath it, but which it uncovers and renders quiet.<sup>29</sup>

For Foucault discourse does not describe reality, it *produces* reality. Discourse is not simply a linguistic or descriptive phenomenon; it is the set of statements and practices that systematically form the objects around which our experience of reality is built. Discourse can therefore take the form of texts, words and speech, but action

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<sup>28</sup> For a comprehensive discussion of Foucault’s approach to discourse and how it differs from other sociological and critical approaches see David Howarth, *Discourse* (Open University Press 2000).

<sup>29</sup> Foucault ‘On the Archaeology of the Sciences: Response to the Epistemology Circle,’ 306.

is also discursive. How we behave and the acts we perform are concrete manifestations of the relationships of power/knowledge within which we are embedded. In examining the discourse on sexuality or punishment, Foucault did not look at what people said about them in order to diagnose their meaning. Rather, he examined the language and social practices that gave 'sexuality' and 'punishment' meaning at particular historical moments. His aim was to understand and interpret socially produced meaning rather than to produce objective causal explanations for social phenomena. In Foucault's scheme therefore, discourse is something that happens at a particular point in time, it is an event.<sup>30</sup>

#### *4.3.3 What research material or data constitute 'discourse'?*

Discourse is the data from which a genealogical account is constructed. In practical terms, discursive events are texts, speech acts, and social practices that take place within specific, temporally limited economic and political contexts. The objective of foucauldian discourse analysis is the production of novel interpretations of events and practices through clarification of their meaning. It achieves this by analysing how people take decisions and articulate hegemonic projects for change.

The first objective of this research is to describe how we are governed by marriage law. As noted in chapter two, government is 'the conduct of conduct' or as precisely defined by Mitchell Dean:

Government is any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through the desires, aspirations, interests and beliefs of various actors, for definite but shifting ends and with a diverse set of relatively unpredictable consequences, effects and outcomes.<sup>31</sup>

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<sup>30</sup> *ibid*, 306.

<sup>31</sup> Dean, *Governmentality: Power and Rule in Modern Society*, 18.

In order to discover how we are governed, therefore, it is necessary to examine the aims, objectives and practices of those responsible for governing, and to ask how they aim to shape and work through the relationship aspirations and needs of individual citizens. This involves the identification of regulatory categories and how they are deployed in pursuit of political objectives, how problems and solutions are formulated at the level of politics, and the forms of knowledge and expertise sought and utilised in formulating regulatory strategies. The investigation therefore takes place at the level of politics, and the material of relevance is speech acts, documentary sources and practices of government concerned with the construction of regulatory categories, the identification of regulable problems, and the formulation of solutions to those problems.

The material examined, therefore includes, but is not limited to:

- Oireachtas debates relating to the regulation of marriage and other relationships.
- Documents produced by or for the assistance of political government, such as departmental reports, Law Reform Commission reports, and reports by or for government agencies.
- Policy documents produced by Government and individual political parties
- Statutes and statutory instruments directly implicated in the regulation of relationships
- Statutes, statutory instruments and reports for the assistance of government in regulatory domains that use legal relationship categories.
- Government files relating to marriage law and associated domains of government available under the 40 year rule
- Judgments of the Superior Courts on marriage-related issues.



- Court's Service of Ireland, and sociological reports analysing the family business of the lower courts.
- International treaties and conventions.
- Legal textbooks and journals.
- Practitioner manuals.

#### *4.3.4 Analysing discourse.*

Discourse encodes the relationship between power and knowledge that led to the production or performance of a discursive act. For example, a public speech in parliament by a public representative, may communicate a particular message that could be interpreted in ideological terms. It will, however, also communicate what it is politically possible to say at the moment it is spoken. In analysing discourse, the researcher does not focus on the individual, and how they came to hold particular political beliefs, but on the totality of what it is possible to say. By engaging in a pure description of the facts of discourse, it becomes possible to identify how particular statements or practices appear at particular times rather than others in their place.<sup>32</sup>

Discursive events represents a particular relationship between power and knowledge, they are also subject to, and constitutive of, both power and knowledge. The production of discourse is controlled by rules of inclusion and exclusion that define what can be talked about and done, how and by whom. The production of knowledge in turn affects the content of these rules, and discourse, in applying or challenging procedures of inclusion or exclusion, reproduces both knowledge and

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<sup>32</sup> Foucault 'On the Archaeology of the Sciences: Response to the Epistemology Circle,' 306.

power. Foucault refers to a triangle; power, knowledge, discourse in constant motion, now re-inscribing, now effacing, constantly constructing and deconstructing.<sup>33</sup>

For example, in 1970s Ireland, politicians in the Oireachtas spoke, often and continuously, about the deserted wife and her vulnerability. It was both possible and necessary for those responsible for government to conceptualise her as a financially dependent mother in the home. This discourse on deserted wives was made possible by the uncontested cultural knowledge (supported by powerful legal and religious constructions of the marriage relationship) that women whose husbands' deserted and failed to maintain them were vulnerable. As political attention focused on these women, government objectives were formulated using the ways of knowing about marriage and women available at the time. These objectives focused on poverty relief, and in turn, had power effects, re-inscribing women's dependency, men's role in relation to them, and the State's role in relieving female poverty and regulating marriage.

Once relevant materials were assembled for the research period, I reviewed them a number of times for the purpose of identifying themes, objects of discourse, categorisations, problems considered and solutions offered. The relationships between different forms of discourse were noted, how legal and political discourse were related, how categories overlapped or diverged, the extent to which legal knowledge influenced or shaped political concerns. The strategic objectives and practical effects of social policy in general, and marriage law reform in particular, were diagnosed from the speech acts, legal and policy actions of those responsible for government. Absences and silences were also noted - those issues that might be expected to feature

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<sup>33</sup> Michel Foucault 'Politics and the Study of Discourse' in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991), 56.

in discussion but were absent. For example, the position of children was barely considered in the 1970s and 1980s, but became increasingly important, particularly in the 2000s.

Whilst this general direction or intention of analysis was established at the outset and data was viewed through the lens of marriage law, the actual research output is the result of a dynamic process of interpretation, description and reinterpretation. Unexpected linkages emerging from the data were pursued and ideas about marriage, women, men, children, divorce and equality were interrogated as they materialised. The level of connectivity between discourses and the extent to which ideas about objects and people cohered around similar ideas was quite striking. Shifts in the nature of discourse were also relatively dramatic, and following an initial examination of the research data four temporal divisions were made based on significant shifts in how marriage and law's role in regulating it were attended to by politics.

#### *4.3.5 Temporal divisions*

In treating discourse as an event, rather than as a representation of something beyond, the temporality of source material becomes very important. Discourse codes the relationship between power and knowledge at particular points in time and a genealogical investigation acknowledges this element in focusing on change and stasis over time. The Irish government began making specific marriage law in the 1970s and a major piece of marriage law reform has taken place in each of the three successive decades, with further proposed reform mooted for 2015. I initially divided the research data into four decades, each with a major legislative reform. However, it transpired that although a natural division emerged at the end of the 1970s and 1980s, the 1990s were more problematic, as a major conceptual shift occurred following the introduction of divorce. A chapter division is made, therefore, at 1997, and the final

empirical chapter deals with the period to 2010. Chapter five examines the emergence of marriage as a problem for government, focusing on the discursive environment within which the decision to reform marriage law was made, and the form of legislation enacted. Chapter six deals with the 1980s, when an attempt was made to reform the Constitution to facilitate divorce and, following this political failure, the Judicial Separation and Family Law Reform Act 1989 was enacted in order to regulate marital breakdown. Chapter seven, investigates the period from 1990 to 1997, and chapter eight completes the empirical section with the enactment of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act in 2010.

#### *4.3.6 Limitations to Data set.*

I have attempted to examine all publically available documentation produced for or on behalf of the Irish government on the subject of marriage law reform over the research period. This was relatively straightforward for the 1960s and 1970s, when very little was produced, but became considerably more challenging with the proliferation of government agencies and interventions thereafter. I have not consulted documentation produced outside Ireland, save where directly referenced in Irish material.<sup>34</sup> In relation to policy and law-making beyond specific marriage law, I have focused on the areas of employment, social welfare and taxation. Thus, my analysis has an economic emphasis that tends to diminish the effects of other policy areas, as well as the subjective experiences of those availing of, or subject to marriage law.

Marriage and family law adjudication takes place in private,<sup>35</sup> and most disputes are settled without formal adjudication. I have, however, examined all publically

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<sup>34</sup> For example, as referred to in chapter five the United Nations Declaration on the Elimination of Discrimination against Women was relied upon by the Irish Commission on the Status of Women.

<sup>35</sup> The *in camera* rule provides that certain proceedings must be held in private. Section 45 of the Courts (Supplemental Provisions) Act 1961, provided that matrimonial causes or

available marriage law decisions of the Irish Courts between 1970 and 2010. This, of necessity, represents only a tiny fraction of marriage law experience. Nonetheless, my purpose is not to fully describe the process of adjudication but to identify, from these formal documents, intended for public consumption, what could or could not be said or done at particular points in time. I have made significantly more use of newspaper reports in the earlier decades, mainly because of the dearth of other material, but also because some of these reports occurred when the *in camera* rule was either not used or not enforced.<sup>36</sup> In relation to Oireachtas debates, I have read all debates relating to marriage law Bills introduced to both houses of the Oireachtas as well as relevant sections of debates relating to social welfare, taxation and employment law legislation. Marriage, and its potential for creating political and social difficulties, was also discussed in debate in other legislative enactments, and I have used the search facility on the Oireachtas website to identify as many of these as possible within the research period.<sup>37</sup>

It is important to emphasise that my focus is on the actions of political government, those institutions and agencies implicated in the law making process. When I assert,

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matters and cases relating to minors *may* held in private. More recent legislation; the Family Law (Maintenance of Spouses and Children) Act 1976, the Family Home Protection Act 1976, the Status of Children Act 1987, The Judicial Separation and Family Law Reform Act 1989, the Maintenance Act 1994, the Family Law Act 1995, the Family Law (Divorce) Act 1996 and the Domestic Violence Act 1996, required proceedings to be held otherwise than in public. Section 40 of the Civil Liability and Courts Act 2004, relaxed the rule to allow limited reporting by barristers, solicitors and other approved persons, with identifying information redacted. The Courts and Civil Law (Miscellaneous Provisions) Act 2013 allows *bona fide* representatives of the press to attend family law cases and to publish reports, again identifying information must not be reported.

<sup>36</sup> I discovered a number of cases widely reported in newspapers, with names, in the 1960s and early 1970s indicating that the provisions of the Courts (Supplemental Provisions) Act 1961 were either not applied by presiding judges or ignored by the media. For example in 1970, the *Irish Independent* provided regular updates on a divorce *a mensa et thoro* case, with jury, between Mrs Bradley ‘a former B.E.A. air hostess and model’ and her husband Mr Thomas Bradley, ‘a supermarket owner.’ ‘Judgment on divorce case costs reserved’ *Irish Independent* (Dublin, 23 December 1970).

<sup>37</sup> <[www.oireachtas.ie](http://www.oireachtas.ie)>

therefore, that the regulation of marriage was not considered necessary before 1970 or that same-sex marriage/divorce were not considered possible, I am referring to the position among those in a position to effect law reform. I do not mean to deny that political activists or individual members the Oireachtas did not have contrary perspectives. Similarly, I do not mean to say that particular action was not legally or practically possible, only that it was not politically possible.

The research output does not contain a full account of all documentation examined. Often many documents were searched to confirm the silence of Oireachtas debates on particular issues. In other situations, sample sources, representative of the general tenor of debate, are referred to in the narrative when a great deal more sources both exist, and were reviewed. This generally occurs in discussions of specific phenomena. I have, for example, focused on the deserted wife in chapter five, because she appeared in a wide range of political and media discussion during that period. The sources used to illustrate her importance as an object of political attention are those that I have judged to best communicate *how* she was constructed within political discourse. For each period, I consulted all available material, as detailed above, and identified recurring themes within this material. My description of the discourse on marriage law reform over the research period attempts to be comprehensive, but the interpretation of this material is necessarily subjective. I not attempt to state ‘the truth’ about marriage law reform, but to offer one perspective on the Irish case projected through the lens of Foucault’s understanding of the nature of political power. Clearly, if one rejects the validity or usefulness of this perspective, my conclusions will not appear to be convincing.

## 4.4 Doing Genealogy and Discourse analysis

### 4.4.1 Genealogy and social phenomena

The effectiveness of genealogy and discourse analysis in producing novel interpretations of past events is demonstrated by Foucault's own historical work. Others have used his approach to investigate the social phenomena of unemployment,<sup>38</sup> poverty,<sup>39</sup> dependency,<sup>40</sup> empowerment<sup>41</sup> and the family.<sup>42</sup> Jacques Donzelot and William Walters use a case-study method, focusing on specific sub-domains of the phenomena in question in their respective studies of family and unemployment. Donzelot use a number of examples, including the juvenile justice system, to show that the taken for granted place of families in the social domain is not fixed, but has been moulded to specific functions by State intervention.<sup>43</sup> The family, he argues, holds a central position in 'mythical representations that sustain ... hegemonic discourses.'<sup>44</sup> This mythical family is also a practical solution to problems with morality, health and procreation and has been used as a vehicle for the implementation of programmes based on powerful knowledge about public and private hygiene, education and the protection of individuals. Walter's genealogy of

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<sup>38</sup> William Walters, *Unemployment and Government: Genealogies of the Social* (Cambridge, Cambridge University Press 2000).

<sup>39</sup> Mitchel Dean, *The Constitution of Poverty: Towards a Genealogy of Liberal Governance* (London, Routledge 1991).

<sup>40</sup> Nancy Fraser and Linda Gordon, 'A Genealogy of Dependency: Tracing a Keyword of the US Welfare State.' (1994) 19(2) *Signs* 309.

<sup>41</sup> Barbara Cruickshank, 'The Will to Empower: Technologies of Citizenship and the War on Poverty.' (1994) 23(4) *Socialist Review* 29.

<sup>42</sup> Jacques Donzelot, *The Policing of Families: Welfare versus the State* (Random House 1977). For a recent overview of Foucault's observations on Familial power and feminist foucauldian literature on the family which suggest that the family is a continually contested fiction see Chloe Taylor, 'Foucault and Familial Power.'(2012) 27(1) *Hypatia* 201.

<sup>43</sup> Donzelot, *The Policing of Families: Welfare versus the State*.

<sup>44</sup> Donzelot, *The Policing of Families: Welfare versus the State*, xx. Donzelot is in particular referring to Marxism, Feminism and Psychoanalysis, three discourses that he identifies as hegemonic in 1970's French political critique and that converge on the family. This observation resonates with the hegemony of the tradition/modernity debate that surrounds Irish family law.

unemployment challenges the social scientific treatment of unemployment as a self-evident phenomenon. Again using a case-study approach, Walters contends that unemployment is not self-evident or natural, but designates a particular way of acting on populations.<sup>45</sup> Genealogy thus offers a way to call into question the centrality of marriage in particular, and conjugal relationships in general, in regulating the lives of individuals. Irish marriage law offers a particularly useful case study because of the relatively short time-frame during which marriage has been legally regulated in this jurisdiction, representing a telescoping of the changes in law that have occurred in other jurisdictions.

#### 4.4.2 *Genealogy, Foucault and legal topics*

Although Foucault's work is not often used to evaluate legal doctrine or processes,<sup>46</sup> where used it has produced interesting alternative perspectives on doctrinal law. There are two particularly interesting examples, Kendall Thomas's examination of the U.S. Supreme Court decision in *Bowers v Hardwick*,<sup>47</sup> and Reva Siegel's historical account of legislation limiting the availability of abortion in the United States.<sup>48</sup> Interestingly, both use Foucault's work within a largely doctrinal context, using his perspectives on power to suggest alternative interpretations of legal texts. Within Posner's typography, therefore, they sit between type one (doctrinal) and type two (examining law from the

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<sup>45</sup> Walters, *Unemployment and Government: Genealogies of the Social*.

<sup>46</sup> I have consciously omitted literature falling within the domain of 'governmentality studies,' which often focuses on legal and policy issues. This approach might be described as 'post-foucauldian,' in that it builds upon Foucault's work to produce an analytical perspective not directly indicated by him. Mitchell Dean is perhaps the best known proponent of this approach and his text *Governmentality: Power and Rule in Modern Society* a detailed guide to governmentality studies.

<sup>47</sup> [1986] 478 US 186.

<sup>48</sup> Reva Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection.' (1991-2) 44 Stanford Law Review 261.



perspective of another discipline). Both suggest other ways of reasoning *within* the doctrinal paradigm.

Thomas relies on Foucault's description of power networks to argue that anti-sodomy legislation acts to legitimate private (not State ordered) violence against gay men.<sup>49</sup> This being the case, he argues that the legislation impugned in the United States Supreme Court decision in *Bowers v Hardwick* does not violate the constitutional guarantee of privacy, but the Eighth Amendment prohibition against 'cruel and unusual punishment.'<sup>50</sup> He uses insights derived from Foucault's work to describe the power effects produced or supported by powerful (legal) knowledge that identifies sodomy with perversion and illegality. By focusing on the actual experiences of a defendant subject to identification, surveillance and ultimately prosecution under anti-sodomy legislation, Thomas identifies how legal regulation produces, not just a criminal act, but also a criminal individual. This productive aspect of law's power, legitimates the persecution of gay men by non-State actors, and this maltreatment constitutes State-mandated cruel in contravention of the Constitution.

Reva Siegel's history of abortion law focuses on the deployment of medical knowledge about women's bodies in the legal reasoning in the United States Supreme Court decision of *Roe v Wade*.<sup>51</sup> Similar knowledge, she contends, grounded campaigns leading to the abortion-restrictive legislation challenged in *Roe*. Siegel, in a careful historical analysis, identifies the assumptions about gender roles that

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<sup>49</sup> Kendall Thomas, 'Beyond the Privacy Principle' (1992) 92 Columbia Law Review 1431. Thomas demonstrates this by reference to the contextual facts of *Bowers v Hardwick* itself, showing how Bower's homosexual identity resulted in a litany of persecution indirectly legitimated by the impugned legislation.

<sup>50</sup> 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' United States Constitution, amendment VIII.

<sup>51</sup> [1973] 410 US 113. *Roe v Wade* is a decision of the US Supreme Court which, by declaring a Texas Statute prohibiting abortion to be unconstitutional, effectively legalised limited abortion in the United States. The Court held that the legislation infringed the plaintiff's Fourteenth amendment right to privacy.

underpin both abortion-restrictive legislation and constitutional jurisprudence dealing with pregnancy. Her topic and historical approach fit comfortably with Foucault's notions of bio-power and genealogy and her analysis effectively demonstrates the usefulness of a foucauldian framework. Siegel points out the impossibility of objectivity in the judicial reasoning paradigm, and how legal processes are deeply embedded with dense networks of power/knowledge. Both Seigel and Thomas might be criticised for accepting that constitutional provisions act as a juridical limit on State power.<sup>52</sup> Nonetheless, their use of Foucault's work to suggest alternative ways of thinking about constitutional interpretations is effective in challenging the taken-for-granted objectivity of the judicial reasoning paradigm without attributing universalized ideological motivations to the legal process.

A genealogical approach to legal problematisations is adopted by Daniel Monk in his investigation of sex education and teenage pregnancy.<sup>53</sup> Law is decentred, and its role in supporting the objectives of conflicting programs of health and moral education identified. Statutory solutions to social problems are shown to be capable of supporting conflicting processes of normalisation and allowing them to operate simultaneously. Thus in some arenas the views of parents are given statutory authority whilst in others the expertise of teachers and medical professionals is privileged.<sup>54</sup> A genealogical approach is used here to de-construct the various 'common sense' approaches to sex education and identify the role played by law in mediating between them.

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<sup>52</sup> Hugh Baxter, critiques Siegel's work on this basis, Hugh Baxter, 'Bringing Foucault into Law and Law into Foucault' (1992) 48(2) *Stanford Law Review* 449, 476.

<sup>53</sup> Daniel Monk, 'Sex Education and the Problematization of Teenage Pregnancy: A Genealogy of Law and Governance' (1998) 7 *Social & Legal Studies* 239.

<sup>54</sup> *Ibid*, 253.

#### 4.4.3 Problems with genealogy

A specific difficulty with the genealogical approach is the possibility of convergence with critical theory or ideology critique. Mitchell Dean contrasts Fraser and Gordon's genealogy of dependency<sup>55</sup> with Cruickshank's study of empowerment to illustrate this difficulty.<sup>56</sup> Fraser and Gordon, in their analysis of United States social policy, describe how 'dependency' has been used as an ideological keyword masking 'real relations of subordination,'<sup>57</sup> rather than asking what the use of language makes possible at specific points in time. Foucauldian concerns with power and the language of genealogy are employed without sufficient regard to Foucault's understanding that words and actions have the character of events rather than signifiers of hidden power relationships. In contrast, Cruickshank's genealogy of 'empowerment' describes how the language of empowerment allowed the United States Federal government to engage with the self-governing capacities of the population in a programme of regulation.<sup>58</sup> Activists in disadvantaged communities had developed, over a long period, voluntary 'empowerment' programmes designed to support individuals in improving their lives. These programmes proved very successful in accessing individuals who were reluctant to get involved with government services and work-activation programmes. By developing connections with activist groups through the provision of funding, government was able to reach and regulate the individuals participating in the community programmes.

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<sup>55</sup> Fraser and Gordon, 'A Genealogy of Dependency: Tracing a Keyword of the US Welfare State.'

<sup>56</sup> Cruickshank, 'The Will to Empower: Technologies of Citizenship and the War on Poverty.'

<sup>57</sup> Dean, *Governmentality: Power and Rule in Modern Society*, 79.

<sup>58</sup> Cruickshank, 'The Will to Empower: Technologies of Citizenship and the War on Poverty,' 29.

The contrasting approach of these two studies draws attention to the dangers of adopting the language of genealogy without sufficient regard to its critical possibilities. The history of Irish marriage law is closely connected to the history of women's social exclusion and disadvantage. I have therefore been alert to the danger of drawing ideological conclusions from specific, or indeed accumulating, instances of domination. A conclusion that Irish women have been oppressed by both government and law, particularly before the 1990s, is relatively easy to support with the data I have collected. Nonetheless, what might be considered oppressive to women today, was not necessarily seen that way in the past, nor do oppressive effects necessarily correspond with oppressive intention. With regard to the process of government, therefore we need to look at how knowledge about women and other subjects of law is deployed and how it facilitate action, rather than view the vocabulary of government or law as systems of ideological keywords. My investigation is therefore careful to focus on how truths about women and other social categories have been created by mechanisms of power, and the constraints that operate to limit what we take to be true about the categories of persons governed by marriage law.

#### **4.5 Building the Analysis**

As already discussed, my research focuses on two specific questions; how are we governed by marriage law? and what is the role of marriage law in modern forms of government? The purpose of asking these questions is first, to demonstrate the contingency of legal regulation of marriage, and secondly, to challenge contemporary characterisations of marriage law as a route to social justice and equality by demonstrating its role as a political strategy intended to support the economic objectives of government. Whilst in this, and the previous chapter, I have broken down

these objectives into a series of five specific tasks; the research output does not slavishly follow the divisions between these jobs.

The work for each chapter began with an examination of social, political, and economic context, and this therefore appears at the beginning. Social meaning is intimately connected to its historical contexts and it is impossible to fully understand the meaning and import of political discussion without having a grasp of the environment within which it arises. Following collection of the contextual material, I began gathering and analysing political discourse, documents produced for and on behalf of government, and legal materials, in accordance with the precepts of discourse analysis. This analysis, which looks at how government identified relationship behaviour as a problem, how solutions were formulated and the strategies deployed, thus constitutes the second part of each empirical chapter. Next, I examined the effects of the strategies deployed by government in resolving the problems with relationship behaviour. Where issues arose during a particular period that, although discussed, had no political effect until a later period, these are mentioned to avoid an implication that, for example, gender equality was a political unknown.<sup>59</sup> Theoretical considerations are considered where they arise throughout the chapters. Finally, in each chapter, I return to the central questions, drawing together the empirical findings. The question of how we are governed by marriage law, includes the issue of how we are subjectified by, and within, 'the legal complex.' The role of marriage law arises both at the level of how we are governed – it creates social categories, acts upon our self-regulatory capacities and provides expert knowledge - and the level of the population as a whole. Each of these levels is thus dealt with separately, within the analysis and in the

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<sup>59</sup> As was the case in the 1970s where gender equality was relevant political knowledge but was not applied to the relationship between husband and wife.

concluding comments. Chapter five contains an additional section dealing with the transformation of marriage from a fully social practice to an issue of political concern in the 1970s.

#### **4.6 Conclusion.**

This thesis, aims to examine law from a foucauldian perspective in order to discover how we are governed by marriage law. It has two principal avenues of investigation, one mainly empirical and the other building on the empirical output to theorise the role of marriage law in modern government. The research period is divided into four temporal divisions broadly corresponding to major legal reforms, and within each period, political and legal discourse is subjected to analysis. As the primary focus is the power effects of marriage law, Foucault's genealogical approach to history is deployed to examine how relationships of power produce reality at particular points in time. Contextual material relating to social, economic and political conditions is then overlaid, and the two elements are interpreted in terms of Foucault's description of the nature of government in the modern State. In this way, a critical, and necessarily subjective, analysis of the process and effect of Irish marriage law reform over the research period is constructed.

The next chapter begins the empirical section of the thesis with the emergence of marriage law as problem for government, and a solution to problems, at the end of the 1960s in Ireland. It connects the problematisation of marriage with a shift of economic policy that favoured a Keynesian approach to social and economic management. Marriage law was deployed to address the financial problems experienced by married women deserted by their husbands, whilst the expanding welfare system re-enforced the necessity for stable lifetime marriage. Politics took control of the relationship

practices of individual citizens and began to regulate them in accordance with available sources of knowledge, focusing on the social importance of marriage.

# Five – Desertion and Maintenance

## 1945 - 1976

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The need for State institutions and ‘the legal complex’ to regulate relationships in the present is largely uncontested, but marriage was not always considered an appropriate domain for political intervention. In Ireland, between the foundation of the State and the 1960s, politics accepted marriage as ‘an unproblematic field of experience or set of practices ... , which were familiar and ‘silent’ out of discussion.’<sup>1</sup> By the end of the 1960s, however, marriage as a social practice had become a problem. It raised political discussion and debate, incited new reactions, and induced a crisis in previously silent behaviour, habits, and practices.<sup>2</sup> The legal regulation of marriage came to be seen as both a problem in itself, and as a solution to social problems. Those responsible for governing the population became aware of marriage as a regulable domain and began to identify categories of citizen that required their attention. The activity of governing

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<sup>1</sup> Michel Foucault, *Fearless Speech* (Joseph Pearson ed, Semiotext(e) 2001), 74.

<sup>2</sup> Foucault, *Fearless Speech*, 74.



was called into question in relation to the social practice of marriage, and politics became concerned with how it might be directed.<sup>3</sup>

This chapter begins by sketching the social and economic conditions pertaining in Ireland after the Second World War, outlining political understandings of marriage during that period and demonstrating the extent to which the social practice of marriage was considered outside politics. It then identifies a shift in how government was rationalised at the end of the 1950s, the consequent expansion of social services, and the emergence of marriage as a problem for government. Between the foundation of the State and the 1960s, marriage had been considered an unproblematic social institution and a relay for government. Labour market and welfare policies were mediated through marriage, relying on local networks of power that held men responsible for the well-being of their wives and children. With the development of centralised systems of social provision, and a mode of government that began to accept responsibility for the wellbeing of the population, vulnerable individuals in need of assistance were identified and categorised. One particular category, the deserted wife, personified the problems with marriage. Left indigent through the failure of male support, and championed by an emerging feminist movement focused on the promotion of women's interests through the vindication of rights, her needs initiated the program of marriage law reform that began in the 1970s.

Strategies of reform constructed the deserted wife as the embodiment of a social right to be dependent and focused on legal measures to vindicate this right. My analysis of the political discourse surrounding marriage law reform, and the resultant

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<sup>3</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society*, (2nd edn, London, Sage Publications 2010), 38. Dean proposes the analysis of 'regimes of government' as way to deploy Foucault's work in critiquing the actions of political government and his work is central to 'governmentality studies.' Whilst his text is a useful guide to Foucault's work he has little to say on the subject of law reform and I have found it more useful to focus on Foucault's concepts rather than the derivative form they take in Dean's work.

statutory measures reveals their actual power effects. Marriage law did not provide justice for the deserted wife; rather it supported existing social understanding of the nature of marriage, further entrenching her dependency. The chapter ends by identifying two emerging sources of knowledge about relationships and their regulation: equality imperatives emanating from the European Economic Community, and the judicial review jurisdiction of the Superior Courts.

## **5.1 Marriage as an Unproblematic Field of Experience.**

### *5.1.1 Economic conditions after ‘the Emergency’<sup>4</sup> (1945 – 1960)*

Ireland remained neutral during the Second World War, and the bombing of Dublin’s North Strand in 1941 was the only imposition on the country’s relative tranquility.<sup>5</sup> The country was spared military destruction, but self-sufficiency, necessitated by neutrality, eroded its capital reserves.<sup>6</sup> Whilst the rest of Europe enjoyed a post-war economic boom,<sup>7</sup> Ireland was ‘a clear underachiever throughout the post-1950 period.’<sup>8</sup> Ireland in the 1940s and 1950s was a mainly rural economy with more than half of working men, and a quarter of working women employed in agriculture. Total employment declined in the 1950s, and remained on a low plateau through much of the 1960s.<sup>9</sup> Income-earning was largely restricted to men. Male labour force

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<sup>4</sup> ‘The Emergency’ was a political euphemism for the war in Ireland. The country remained neutral throughout but a state of emergency was declared on 2 September 1939, and the Emergency Powers Act 1939 enacted the following day. ‘The Emergency’ was not officially rescinded until 1976.

<sup>5</sup> Diarmaid Ferriter, *The Transformation of Ireland 1900 – 2000* (Profile Books 2004), 387.

<sup>6</sup> Cormac Ó Gráda and Kevin O’Rourke, ‘Irish Economic Growth, 1945 – 1988’ in Nicholas Crafts and Gianni Toniolo, eds, *Economic Growth in Europe since 1945*, 400.

<sup>7</sup> Nicholas Crafts and Gianni Toniolo, ‘Postwar Growth: an Overview’ in Nicholas Crafts and Gianni Toniolo, eds, *Economic Growth in Europe since 1945* (Cambridge University Press 1996), 2.

<sup>8</sup> Cormac Ó Gráda and Kevin O’Rourke, ‘Irish Economic Growth, 1945 – 1988,’ 395.

<sup>9</sup> Central Statistics Office, *That was then and this is now: Change in Ireland 1949 to 1999* (Pn 8084, Stationery Office 2000), 107-8.

participation between 1946 and 1966 was consistently above 80%, the corresponding figure for women was 30%.<sup>10</sup> Poor economic conditions at home combined with rapid improvement in living conditions in neighbouring industrialised countries, led to increasing emigration.<sup>11</sup> In the decade between 1951 and 1961, 412,000 people emigrated,<sup>12</sup> and standards of living for those who remained were low.<sup>13</sup> Diarmaid Ferriter writes of the period:

In 1949, Ireland still had the highest rates of infant and maternal mortality in Europe. Poverty was still endemic; during the great freeze of 1946-7 the Archbishop of Dublin granted a dispensation from Lenten fasting to his diocese owing to its under-nourishment. While Dublin Corporation made efforts to begin housing programmes on the outskirts of the city ... 80,000 people in Ireland still lived in one-roomed dwellings.<sup>14</sup>

#### *5.1.2 The social practice of marriage in the post-war years (1945 – 1960)*

Marriage, in statistical terms, was a minority practice during this period; a Commission on Population reported in 1954 that Ireland had ‘one of the lowest marriage rates in the world.’<sup>15</sup> In 1951, 42.2 percent of urban and 68 percent of rural men were unmarried at age 30 – 34. The corresponding figures for women were 37 percent and 35.9 percent respectively.<sup>16</sup> The low rate of marriage did not imply widespread practice of other forms of intimate relationship, or alternative methods of family formation. Illegitimacy rates were relatively low, with an average of 1,900 non-marital births registered each year between 1923 and 1970, a tiny percentage of the

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<sup>10</sup> Central Statistics Office, *Census 2011, Commentary* (Stationery Office 2011). Comparative table at page 12.

<sup>11</sup> Brian Kennedy, Thomas Giblin and Deirdre Mc Hugh, *The Economic Development of Ireland in the Twentieth Century* (Routledge 1988), 57.

<sup>12</sup> Ferriter, *The Transformation of Ireland 1900 – 2000*, 465.

<sup>13</sup> Partly the result of high unemployment and dependency ratios. Gráda and O’Rourke, ‘Irish Economic Growth, 1945 – 1988,’ 395.

<sup>14</sup> Ferriter, *The Transformation of Ireland 1900 – 2000*, 497.

<sup>15</sup> Commission on Emigration and other Population Problems 1948 - 1954, *Majority Report* (Department of Social Welfare 1954), 63.

<sup>16</sup> *ibid*, 63.

total births.<sup>17</sup> Non-marital births did not suggest the establishment of families; more than 80 percent of unmarried mothers had their babies adopted.<sup>18</sup> Yet people did not live alone, just 13 percent of Irish households consisted of one person in 1966, 20 per cent of two, the remaining two thirds had more than three persons.<sup>19</sup>

Those who did marry tended to adopt gender-based roles. Married women cared for children and the home, and were financially supported by their husbands. Just 6 per cent of married women were employed in 1966.<sup>20</sup> Children were an inevitable consequence of marriage, and large families common.<sup>21</sup> The fertility rate for married women in 1960 was almost four children per woman,<sup>22</sup> and family sizes were ‘extremely large by the standards of virtually all other western countries.’<sup>23</sup> Catriona Clear, in her analysis of public discourse on women in the home in the 1940s and 1950s, notes that women, and in particular wives, were expected to fulfil a domestic role.<sup>24</sup> Clear notes a gathering opposition to this position, but concludes that the generally held view was that ‘the sex-based division of labour was natural.’<sup>25</sup>

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<sup>17</sup> Maria Luddy, ‘Unmarried Mothers in Ireland, 1880 -1973’ (2011) 20(1) *Women’s History Review* 109, 113.

<sup>18</sup> *ibid*, 113.

<sup>19</sup> Central Statistics Office, *Quicktables – Private Households by Size*. Available at <[www.cso.ie/quicktables/GetQuickTables.aspx?FileName=CNA29.asp&TableName=Private+Households+by+size&StatisticalProduct=DB\\_CN](http://www.cso.ie/quicktables/GetQuickTables.aspx?FileName=CNA29.asp&TableName=Private+Households+by+size&StatisticalProduct=DB_CN)> last accessed, 30 December 2013.

<sup>20</sup> Commission on the Status of Women, *Report to the Minister for Finance* (Prl 2760, Stationery Office 1972), 102.

<sup>21</sup> The importation and sale of contraceptives was prohibited by the Criminal Law Amendment Act 1935, s 17 until the section was declared unconstitutional by the Supreme Court in 1973. *McGee v Attorney General* [1974] 1 IR 284.

<sup>22</sup> Tony Fahey and Helen Russell, *Family Formation in Ireland: Trends, Data Needs and Implications. Report to the Family Affairs Unit, Department of Social, Community and Family Affairs* (Policy Research Series Number 43, ESRI 2001), 6.

<sup>23</sup> *ibid*, 10.

<sup>24</sup> Catriona Clear, *Women of the House: Women’s Household Work in Ireland 1922 – 1961* (Irish Academic Press 2000), 66.

<sup>25</sup> *ibid*, 66.

Marriage was also considered a lifetime commitment, a view shaped by the religious beliefs of the vast majority of the Irish population,<sup>26</sup> who accepted Catholicism as the essence of their identity and their county's ethos.<sup>27</sup> The 'Maynooth Catechism' of 1951 set out Catholic teaching on marriage at the time in simple language. This handsomely illustrated text was intended to support rote learning of church doctrine in Catholic primary schools, using a characteristic question and answer format:

**What is Matrimony?**

Matrimony is the sacrament by which man and woman become husband and wife, and receive the graces to live happily together and to fulfil the duties of the married state.

**Can the bond of marriage be ever broken?**

When baptised persons have been validly married and have lived together as husband and wife, the bond of their marriage cannot be broken, except by the death of either party.

**Can the State break the bond of a valid marriage?**

The State has no power to break the bond of a valid marriage and hence civil laws authorising divorce are null and void.<sup>28</sup>

Confirming that marriage, as practiced, fulfilled the Catholic aspirations is a difficult task, largely dependent on how one defines 'marriage.' Validly contracted legal or religious marriages could not be ended,<sup>29</sup> but that did not imply that the interpersonal relationship between spouses lasted for life.<sup>30</sup> Nonetheless, widespread social acceptance of the lifetime nature of the marriage bond can be inferred from the absence of the concepts of 'marital breakdown' and 'divorce' from social, cultural, and

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<sup>26</sup> In 1946, 94% of the Irish population recorded 'Catholic' as their religion on the census return. This rate remained steady until 1991, when it fell to 92%. Central Statistics Office, *That was then and this is now*, 55.

<sup>27</sup> Louise Fuller, *Irish Catholicism Since 1950* (Gill & Macmillan 2002), xiii.

<sup>28</sup> Joannes Carolus (ed), *A Catechism of Catholic Doctrine: Approved by the Archbishops and Bishops of Ireland* (Archbishop of Dublin 1951), 99, 101.

<sup>29</sup> Save in accordance with the legal and religious rule governing nullity. See chapter one.

<sup>30</sup> Although rare, actions for divorce *a mensa et thoro*, restitution of conjugal rights, and guardianship of infants following marital difficulties were initiated in the Irish courts during this period. See chapter one.

political discourse during the period.<sup>31</sup> Further, as discussed in the next section, the lifetime nature of marriage was assumed by public institutions in administering State services, with no provision being made for the support of married women other than through their husbands.

### *5.1.3 Marriage and State administration (1945 – 1960) – social welfare*

In the post-war years, Ireland had a fragmented system of social welfare involving private insurance schemes,<sup>32</sup> locally administered social assistance,<sup>33</sup> and means tested payments intended to address specific contingencies such as unemployment,<sup>34</sup> disability<sup>35</sup> and old age.<sup>36</sup> The Social Welfare Act 1952 initiated limited reform, consolidating the conditions of eligibility for the various welfare schemes into a single piece of legislation.<sup>37</sup> The social insurance and social assistance schemes, governed

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<sup>31</sup> The concept of ‘legal separation’ further complicates the issue in that it indicates the end of the interpersonal relationship, but not the marriage. Marriage breakdown began to emerge as a socio/political issue in the 1960s in the guise of ‘desertion.’

<sup>32</sup> The National Insurance Act 1911 introduced the first compulsory social insurance scheme in both Britain and Ireland. It was financed by contributions from employers, employees, and the State, but was administered by ‘approved societies’ most of whom were trade unions and friendly societies. The legislation made contribution compulsory for some classes of employees and payments were made at a flat rate in the event of unemployment and sickness. Sophia Carey, *Social Security in Ireland, 1939 – 1952* (Irish Academic Press 2007), 248.

<sup>33</sup> Social Assistance or ‘outdoor relief’ was governed by the Public Assistance Act 1939, which built upon Poor Law rules that allowed the payment of assistance outside of the workhouse. The amounts paid were minimal, discretionary, and set by local administrations. Although the Minister for Local Government had an oversight role in relation to public assistance he could not direct that any particular person should receive or qualify for relief, this being a matter entirely for local determination. Section 5, Public Assistance Act 1939. Unemployment Assistance, introduced by the Unemployment Assistance Act 1933, was funded by the exchequer but also administered at local level. For a comprehensive exposition of how the system operated in practice, see Seamus O’Cinnéide, *A Law for the Poor: A Study of Home Assistance in Ireland* (Institute of Public Administration 1971).

<sup>34</sup> Unemployment Assistance Act 1933, the conditions for eligibility are set out at s 15.

<sup>35</sup> The Blind Persons Act 1920 allowed blind people over the age of 50 to receive the means tested old age pension.

<sup>36</sup> Old Age Pension Act 1908.

<sup>37</sup> The long title to the Act describes:

An act to establish a co-ordinated system of social insurance and to provide for the benefits thereunder, to repeal, amend or extend the existing enactments relating to national health insurance, unemployment insurance, old age pensions, widows’ and orphans’ pensions,

by the 1952 Act, assumed a dependency model of marriage in which husbands earned money and wives engaged in home duties. These roles were also encouraged by a substantial ‘marriage benefit’ paid to employed women if they had sufficient contributions,<sup>38</sup> regardless of whether they continued in employment or not. Those who did remain in employment were penalised with higher compulsory rates of contribution, and reduced entitlements.<sup>39</sup>

The qualified dependent rules in social welfare legislation assumed specific roles in marriage. A married man could claim a dependent payment for a cohabiting wife, even if she were working,<sup>40</sup> and a single man or widower could claim a dependent allowance for a woman over 16 ‘having the care of one or more than one qualified child who normally resides with him.’<sup>41</sup> A married woman, on the other hand could only claim a dependent’s increase if her husband was unable, due to infirmity, to support himself.<sup>42</sup> Provision was made for married women to apply for unemployment assistance and benefit,<sup>43</sup> however, I have been unable to locate any data suggesting that married women (whether separated or living with their husbands) actually

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unemployment assistance and intermittent unemployment insurance, and for purposes connected with the matters aforesaid.

<sup>38</sup> Set at £10 in 1952, Social Welfare Act 1952, Third Schedule Part II.

<sup>39</sup> The Commission on the Status of Women, *Report to the Minister for Finance*, 123, 136. Section 30 of the Social Welfare Act 1952 provided that:

Where a woman marries, she shall be disqualified for receiving maternity benefit (by virtue of her own insurance), disability benefit, unemployment benefit and treatment benefit until twenty-six employment contributions have been made in respect of her subsequent to her marriage.

The rate of payment of unemployment and disability benefit for a married woman was 18 shillings per week, contrasted with 24 shillings for single men and women, and married men. Further, no dependent increases were paid to married women.

<sup>40</sup> Social Welfare Act 1952, s 26(a).

<sup>41</sup> Social Welfare Act 1952, s 26(c). There was no similar provision for single women or widows.

<sup>42</sup> Social Welfare Act 1952, s 26(b).

<sup>43</sup> Social Welfare Act 1952, s 15, which provides for unemployment benefit does not specifically exclude married (or single) women but uses the male pronoun throughout. Likewise the Unemployment Assistance Acts 1933 – 40, provided for payments to married women not supported by their husbands or whose husbands were unable due to infirmity to support themselves.

succeeded in obtaining the payments.<sup>44</sup> In a further acknowledgment of defined spousal roles, contributory and non-contributory pensions were available to widows, but not widowers.<sup>45</sup> Children's Allowance, a universal payment made to families with three or more children introduced in 1944, was paid to husbands as the person 'responsible for the maintenance' of children.<sup>46</sup>

#### 5.1.4 Marriage and State administration (1945 – 1960) – labour market and taxation

Married women's domestic role was both reflected in, and re-enforced by, statutory and informal marriage bars that required women to resign their employment upon marriage.<sup>47</sup> Further, civil service rates of pay depended on marital status, with married

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<sup>44</sup> The most notable absence is in Brendan Walsh's detailed account of unemployment in Ireland between 1954 and 1972. Married women are not mentioned in the text, and although estimates of female unemployment are given, the rates are very low and no reference made to marital status. Married and single men are however differentiated throughout his text. Walsh does refer to unemployment among married women in the United States but refers to this as 'a special feature of the US situation.' Brendan Walsh, *The Structure of Unemployment in Ireland, 1954 – 1972* (ESRI 1974), 16.

<sup>45</sup> There was a significant discrepancy between the value of contributory and non-contributory payments. In 1952, the widows' contributory pension was 24 shillings per week with an additional 7 shillings per dependent child. Social Welfare Act 1952, third schedule. The widows' non-contributory pension was 7 shillings and 6 pence per week, with an additional three shillings and 6 pence per week per child, and was capped at 32 shillings per week. Social Welfare Act 1952, s 61(2). The contributory pension was paid irrespective of the means of the widow and was not subject to taxation.

<sup>46</sup> The Children's Allowances Act 1944, was gender neutral and simply referred, at s 3(c) to 'a person maintaining ... three or more qualified children.' Nonetheless, in practice the father of the child applied for and was paid the allowance. The Commission on the Status of Women reported that the reason for this was 'that the husband is the head of the household and that he is responsible in law for the support and maintenance of his children.' Commission on the Status of Women, *Report to the Minister for Finance*, 144.

<sup>47</sup> Female Civil Servants were required to retire from their positions upon marriage. Civil Service Regulation Act 1956 s 10. Informal bars existed in many other employments including local authorities who paid marriage gratuities to women. Social insurance schemes also assumed retirement on marriage; married women who remained in employment were required to have more paid stamps to avail of (lower) benefits than their male counterparts. Commission on the Status of Women, *Report to the Minister for Finance*, 123, 136. Marriage bars were not unusual in international terms. Many European countries excluded women from the labour force. Nor was the exclusion of women always instigated by government. In Britain a marriage bar was enforced jointly by employers and trade unions, effectively excluding all married women from the workforce. It was instigated in the second half of the nineteenth century and abolished in 1946, but continued in the post office until 1963. Catherine Harkin 'Five Feminist Myths about Women's Employment' (1995) 46(3) *British Journal of Sociology* 429, 455.



men being paid considerably more than single men, who in turn were paid more than single women.<sup>48</sup> Married women who continued to work, mainly teachers to whom the marriage bar did not apply, were paid at the single woman rate. Married men, working in the civil service, but not married women, received an additional payment in respect of children under 16, or under 21 if in full time education.<sup>49</sup> Tax-free allowances were also allocated to husbands, and a wife's income was automatically taxed as that of her co-habiting husband.<sup>50</sup> State administration therefore used marriage, understood as a lifetime, heterosexual union in which spouses undertook specific gender-based roles (the dependency model), as a relay in providing welfare services, regulating the labour market, and collecting tax.

#### *5.1.5 Marriage as a fully social domain*

Government accepted the dependency model of marriage as a social institution and an appropriate relay for public administration. The marriage relationship itself, and the internal workings of the family it supported, was, nonetheless, considered outside the remit of State regulation. This purely social understanding of marriage is illustrated by the 1954 Report of the Commission on Emigration and Population Problems. The First Interparty Government appointed the Commission 'a motley group of 16 that included civil servants, workers' and women's organisations, clerics, rural activists and economists,'<sup>51</sup> to investigate the causes and consequences of 'the present level and trend in population.'<sup>52</sup> The principal motivation for the report was the rate of emigration, which, although a way of life since the famine, increased dramatically

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<sup>48</sup> Commission on the Status of Women, *Report to the Minister for Finance*, 55.

<sup>49</sup> Commission on the Status of Women, *Report to the Minister for Finance*, 55.

<sup>50</sup> This position was unsuccessfully challenged on the basis that it conflicted with the terms of the Married Women's Status Act 1957 in *Murphy v Attorney General* [1982] I IR 241.

<sup>51</sup> Ferriter, *The Transformation of Ireland: 1900 – 2000*, 473.

<sup>52</sup> Commission on Emigration and other Population Problems 1948 - 1954, *Majority Report*, ix.

during the 1940s and 1950s. The Commission concluded that, whilst an improvement in economic conditions in Ireland might reduce emigration, the decision to leave was largely a personal one.<sup>53</sup> A similarly non-interventionist conclusion was reached in relation to the low marriage rate in Ireland.<sup>54</sup> Although acknowledged as a grave social problem, few concrete suggestions were made as to how it could be addressed. The overall impression given by the report is that the problems of population were largely social – there was little government could do to either halt emigration or increase the rate of marriage, although improved economic conditions (an issue not necessarily within government control) would help.

Limited reform of the legal effects of marriage, brought about by the Married Women's Status Act 1957, and the Succession Act 1965, had no implications, given the context within which they were enacted, for the actual social practice of marriage.<sup>55</sup> Marriage was, nonetheless, a useful relay for social provision and labour market policy. It signalled interdependency and familial connections, and allowed government services to assume that married men could, and would, support their wives and children. Marriage also signalled social stability, the Commission on Emigration reported that:

Where the proportion of people unmarried is high, there is a risk that the community's sense of responsibility will be insufficiently developed, or that its realisation of the value and importance of the basic unit of society – the family – will be inadequate and that, as a result, its attitude to life may be unprogressive. This may be aggravated by the smaller need for the qualities of hard work and enterprise, Unmarried people are, of course, often active and even leaders in many spheres, but married people generally take a keener interest in the more serious social and economic matters affecting the general well-being.<sup>56</sup>

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<sup>53</sup> *ibid*, 167.

<sup>54</sup> *ibid*, 63.

<sup>55</sup> See chapter one.

<sup>56</sup> Commission on Emigration and other Population Problems 1948 - 1954, *Majority Report*, 74.

### 5.1.6 Marriage as a relay for government

In *Security, Territory, Population*, Foucault argues that a shift from the family as a model of government, to the family as an instrument of government, signals the release of a new art of government focused on managing social behaviour at the level of life itself.<sup>57</sup> In the Irish context, before the 1970s a particular form of marriage and family was assumed by the State in administering social welfare, taxation and labour market policies. The family, in accordance with Foucault's scheme, was a model, rather than an instrument of government. Distribution of welfare and the management of the labour market based on dependency marriage was intended to relieve abject poverty, not to obtain anything beyond basic existence from the population.<sup>58</sup> Local discretion remained in the administration of means-tested schemes, and central government had no oversight role.<sup>59</sup> The proper role of government in relation to poverty is clearly expressed by James MacElligott, a senior Civil Servant in the 1940s and 1950s, in response to a proposal to introduce universal child allowances:

The principle has not been generally accepted that the State has responsibility for the relief of poverty in all its degrees - the principle underlying any social measures undertaken by the State in this country up to the present is that the State's responsibility is limited to the relief of *destitution* i.e. extreme cases where employment and the minimum necessities of existence are lacking<sup>60</sup> (my emphasis).

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<sup>57</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977 - 78* (Michel Sennellart ed, Graham Burchell tr, Palgrave Macmillan 2007), 105.

<sup>58</sup> Marriage bars were designed to distribute employment among the population, ensuring at least one source of income per household, and were common throughout Europe and North America in the 1930s. Eileen Connolly, 'Durability and Change in State Gender Systems: Ireland in the 1950s' (2003) *European Journal of Women's Studies* 65, 73. On the motivation for the Irish bar see, Jennifer Redmond and Judith Harford, "'One Man One Job: The Marriage Bar and the Employment of Women Teachers in Irish Primary Schools' (2010) 56(5) *Paedagogica Historica* 639.

<sup>59</sup> As already mentioned, social assistance schemes prior to the 1970s were based on the Poor-Law system of local dispensaries. Unemployment Assistance, first introduced in 1933, required the production of a 'qualification certificate,' issued locally. Unemployment Assistance Act 1933, s 10.

<sup>60</sup> Department of Finance memo, 2 December 1942, as quoted at Joseph Lee, *Ireland 1912 - 1985* (Cambridge University Press 1989), 281.

Séan MacEntee, the Minister for Industry and Commerce, in a 1940 memo to the Taoiseach, Eamon de Valera, on the subject of child allowances, set out the potential dangers of state intervention in the family:

If the state subsidises parents to have children, it will be but a step to regulate the number of children, then to lay down who shall be permitted to have children and who shall not, how the subsidised children are to be brought up, to what purposes they are to devote their lives, what physical and mental characteristics are to be encouraged by subsidised breeding, who shall be bred to labour and who to govern, etc. etc., until we shall have traversed the whole ground between the initiation of a State system of family allowances and the servile State.<sup>61</sup>

In the early years of the State, therefore, marriage and the family were used to administer government services, but not to obtain anything from the population as a whole. Marriage was neither a problem nor a solution to problems; it was simply a convenient mechanism through which to administer poverty relief. The State relied on relationships of power already existing within society to achieve its objectives, and politics made no attempt to modify them.

## **5.2 Governing the Social – Problematising Marriage**

### *5.2.1 Shifting economic policy.*

Economist Patrick O’Sullivan reports that Irish economic policy took a significant change of direction in 1958 when protectionism gave way to an emphasis on industrialisation through the importation of foreign capital. He writes that:

Beginning in 1958 in an effort to shock the Irish economy from its protracted somnolence, the government shifted its development strategy from a highly protectionist import substitution policy to export-orientated trade policy with foreign direct investment occupying the pivotal role. The aim of this and subsequent economic plans was to use imported private capital and technology to establish an extensive and sophisticated industrial base, having a high export to sales ratio (to minimise competition for domestic market shares with local firms), which would absorb some of the surplus labour, reduce emigration, utilise natural resources more efficiently, augment capital formation, stimulate economic growth, diversify merchandise exports, and more generally, to provide the impetus for the

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<sup>61</sup> Memo on ‘Family Allowances,’ 7 November 1945, 45 as quoted at Lee, *Ireland 1912 – 1985*, 285.

transformation of the Irish economy from its excessive reliance on the agriculture and service sectors to a more vigorous and expanding industrial base.<sup>62</sup>

This change of direction was followed in the 1960s by a sustained period of economic growth, a halting of emigration, a dramatic increase in government revenues, and an expanded system of social provision.<sup>63</sup> Government policy, as recorded in the First and Second Programmes for National Expansion, published in 1958 and 1964 respectively, was to improve social welfare services ‘in line with improvements in national production and prosperity.’<sup>64</sup> The Third Programme for Economic and Social Development, published in 1969, set out an extensive list of promised reforms including the introduction of pay-related social insurance benefits and retirement and invalidity benefits.<sup>65</sup> Mel Cousins notes that ‘this period [1965 – 1979] corresponded with a significant expansion in the social welfare scheme.’<sup>66</sup>

### 5.2.2 Expanding social services - health

A white paper on healthcare, published in 1966, announced the government’s intention to introduce a system of socialised medical care.<sup>67</sup> Although a dedicated Department

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<sup>62</sup> Patrick J O’Sullivan ‘An Assessment of Ireland’s Export-Led Growth Strategy via Foreign Direct Investment: 1960-1980’ (1993) 129 (1) *Weltwirtschaftliches Archv* 139, 140.

<sup>63</sup> This policy shift mirrored the adoption of a Keynesian welfare state in Britain and other western European capitalist countries following the Second World War. Krieger describes Keynesianism as based on:

a central promise: ‘full’ employment through governmental demand management and increased social welfare expenditure in return for social harmony and labour peace. There would be better managed capitalism, with considerable limits placed on private prerogative: a capitalism tilting toward a non-ideological social democracy.

Joel Krieger, *Regan, Thatcher and the Politics of Decline* (Cambridge University Press 1986), 23.

<sup>64</sup> Mel Cousins, *The Irish Social Welfare System: Law and Social Policy* (The Roundhall Press 1995), 21.

<sup>65</sup> Department of the Taoiseach, *Third Program for Economic and Social Development 1969 - 1972* (Prl 431, Stationery Office 1969), 208 – 209.

<sup>66</sup> Cousins, *The Irish Social Welfare System: Law and Social Policy*, 21. For an overview of the shift in economic policy during this period see Kennedy, Giblin and McHugh *The Economic Development of Ireland in the Twentieth Century*. Also Paul Bew and Henry Patterson, *Sean Lemass and the Making of Modern Ireland* (Gill and McMillan 1982).

<sup>67</sup> Department of Health, *The Health Services and their Further Development* (Pr 8653, Stationery Office 1966). A system of regional health boards was established by the Health Act

of Health had been in existence since 1947,<sup>68</sup> health services continued to be delivered locally by private general practitioners, local authority dispensaries, and voluntary hospitals.<sup>69</sup> Hospitals were funded by a hospital sweepstakes,<sup>70</sup> and user charges.<sup>71</sup> General practitioner and public health services were funded equally between the exchequer and local government, and administered at local level.<sup>72</sup> Free services were provided only to the very poor, most of the population paid for care.

The Health Act 1970 introduced a general medical scheme administered by health boards under the direct control of the Department of Health. The Act therefore, moved responsibility for provision of, and access to, healthcare to central government, a dramatic shift from the position in 1954, when an attempt to introduce State-funded, free, maternity and child health services created a political maelstrom.<sup>73</sup> Non-contributory discretionary payments under the Home Assistance scheme were also removed from local control, transferring to Health Boards in 1970, and then to a centralised system in 1975.<sup>74</sup>

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1970 and functions previously vested in local authorities were transferred to the centrally funded health boards.

<sup>68</sup> Established by the Ministers and Secretaries (Amendment) Act 1946.

<sup>69</sup> A complex eligibility system divided the population into high middle and low income groups with different services provided free or at a reduced cost at different levels. Some services were also paid for through a social insurance scheme. Department of Health, *The Health Services and their Further Development*, 16

<sup>70</sup> Lee, *Ireland 1912 – 1985*, 315.

<sup>71</sup> The white paper noted that about 30% of the population was covered by the general medical scheme, that is, general practitioner services. Hospital services were provided free of charge to a broader section of society. Department of Health, *The Health Services and their Further Development*, 15.

<sup>72</sup> *ibid*, 11.

<sup>73</sup> Lee describes the controversy surrounding Minister Noel Browne's Mother and Child Scheme as 'one of the great *cause célèbres* of Irish Politics.' Lee, *Ireland 1912 – 1985*, 313.

<sup>74</sup> Social Welfare (Supplementary Welfare Allowances) Act, 1975. This legislation provided for a legal right to a minimum payment, a right of appeal and a more standardised centralised system for awarding allowances.

### 5.2.3 *Expanding social services – social security.*

In the 1960s, less than 30% of all social welfare payments were means-tested, the balance distributed through a contribution-based social insurance scheme. New social insurance schemes, introduced in the 1960s and 1970s provided enhanced contributory old age pensions,<sup>75</sup> an improved occupational injuries scheme,<sup>76</sup> deserted wives benefits,<sup>77</sup> invalidity pensions,<sup>78</sup> pay related unemployment and disability benefits.<sup>79</sup> Most of these schemes continued to use the dependency model of marriage to determine eligibility and rates of payment. Payments were made to men in respect of dependent wives and children, and the continuing low rate of employment among married women meant that few such women were in a position to make contributions in their own right.<sup>80</sup> Non-contributory, means tested schemes were also expanded to cover unmarried mothers, and deserted wives.<sup>81</sup>

### 5.2.4 *Social practices and government services*

Marriage as practiced in Ireland during the 1960s and 1970s continued to follow the dependency model adopted in earlier decades. In 1960, 5.2 percent of Irish married women worked outside the home, rising to just 7.5 percent in 1970.<sup>82</sup> Fertility rates also remained high, reaching almost four children per woman in 1970,<sup>83</sup> with only four percent of children born to non-married parents in 1978.<sup>84</sup> Marriage also became more

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<sup>75</sup> The Social Welfare Act 1970, s 7 reduced the qualifying age from 70 to 65 for the contributory scheme.

<sup>76</sup> Social Welfare (Occupational Injuries) Act 1966, with improved provision in Social Welfare (No 3) Act 1974 and Social Welfare Act 1975.

<sup>77</sup> Social Welfare Act 1973, s 17.

<sup>78</sup> Social Welfare Act 1970, s 6.

<sup>79</sup> Social Welfare (Pay-Related Benefit Act) 1975

<sup>80</sup> Cousins, *The Irish Social Welfare System: Law and Social Policy*, 21.

<sup>81</sup> Social Welfare Act 1973, s 8 and Social Welfare Act 1970, s 22 respectively.

<sup>82</sup> Tim Callan and Brian Farrell, *Women's Participation in the Irish Labour Market* (PI 8449, National Economic and Social Council 1991), 18. By way of comparison, the rates in Britain were 33.7 percent and 48.8 percent respectively.

<sup>83</sup> Central Statistics Office, *That was then and this is now*, 30.

<sup>84</sup> *ibid*, 30.

popular; the rate of marriage (per 1000 persons per year) increased from 5.4 in 1961 to 7.1 in 1970.<sup>85</sup> In mediating public services through the dependency model of marriage, government was not imposing a particular version of family morality; it was reflecting, and re-enforcing, social practices within the Irish population. When social services amounted to little more than the relief of abject poverty, using marriage as a relay for government caused few difficulties. Expectations were low, and, as suggested by the Commission on Emigration, disgruntled individuals could exercise their personal choice to leave the jurisdiction.<sup>86</sup> As economic conditions in Ireland improved and social services expanded, offering entitlements rather than discretionary payments,<sup>87</sup> the limitations of dependency marriage as a model for social families became apparent.

## **5.3 The Deserted Wife**

### *5.3.1 'Desertion' and poverty*

Women had long had a legal right to financial support from their husbands in the event of 'desertion,' defined in the Married Women (Maintenance in Case of Desertion) Act 1886 as the wilful abandonment and failure to maintain a wife and/or children. Access to the courts was, however, expensive, and the maximum weekly amount that could be awarded in the District Court was £4 per week, making an application to court

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<sup>85</sup> Central Statistics Office, *Report on Vital Statistics 1961* (Stationery Office 1962), 5; Central Statistics Office, *Report on Vital Statistics 1971* (Stationery Office 1972), 5.

<sup>86</sup> Commission on Emigration and other Population Problems 1948 - 1954, *Majority Report*, 167.

<sup>87</sup> The gradual removal of social welfare administration from local authorities was accompanied by greater centralised control and oversight, with clear guidelines as to qualification. The Supplementary Welfare Allowance Act 1977 created an entitlement to a minimum level of social support.



largely futile.<sup>88</sup> Nonetheless, before 1970, court ordered maintenance was the only alternative to home assistance for women whose husbands failed to provide support.<sup>89</sup>

During the 1960's the issue of 'desertion' began to surface in newspaper reports and parliamentary debate. Deputy Eileen Desmond complained about the £4 limit on court ordered maintenance in a question to the Minister for Justice in 1965,<sup>90</sup> and in debate on the 1967 budget, Brigid Hogan O'Higgins highlighted the position of deserted wives:

there are not a large number of them, thanks be to goodness, but they are there ... These people are faced with the mental strain and hardship of being deserted. God knows, it is bad enough to be deserted and left with four or five, or sometimes more, small children, but to have to bear extra financial worries because of this desertion is worse. The State could bring in some scheme whereby these people would be treated as widows. As to all intents and purposes they are widows. They have been deserted and are getting no maintenance and are neglected. As I said, there are not many of them but I have found in my own constituency a couple of cases where there is tremendous hardship. These people are eligible for social welfare assistance but it is very little, and I think if they were considered and treated as widows are, it would relieve a great deal of hardship for this limited number who still are there.<sup>91</sup>

The Irish Society for the Prevention of Cruelty to Children claimed in 1969 that there were over 2,000 cases of desertion in Ireland each year, and reported that a large proportion of these involved men who simply left their families to work in Britain.<sup>92</sup>

Deserted wives were a numerically small<sup>93</sup> but politically significant group.<sup>94</sup> These

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<sup>88</sup> Enforcement of Court Orders Act 1940. By way of comparison, the rate of unemployment assistance for an individual with no dependents in an urban area was £4.4 and for an individual with dependents £4.19. The Commission on the Status of Women, *Report to the Minister for Finance*, used the figure of £1,400 per annum gross or £1,198 net (£23 per week) as sample pay for a manual worker in 1972. Table 14 page 81.

<sup>89</sup> The amount disbursed by the Assistance Officer was discretionary and well below unemployment assistance rates. Seamus Ó'Cinnéide, *A Law for the Poor: A Study of Home Assistance in Ireland*, 11.

<sup>90</sup> Dáil Deb 18 May 1965, vol 215, col 1453.

<sup>91</sup> Dáil Deb 13 April 1967, vol 227, col 1637.

<sup>92</sup> '2,000 Cases of Desertion Each Year' *The Irish Times* (Dublin, November 10 1969).

<sup>93</sup> The Department of Social Welfare's estimated that only 1,000 deserted wives were in receipt of home assistance, communicated to Dáil Eireann by George Colley Dáil Deb 22 July 1970, vol 248 col 1708.

<sup>94</sup> Garret Fitzgerald has commented that politicians generally consider redistributive policies to be electorally counterproductive. Taxpayers don't like to pay for them, and the

unsupported women were presented in political discourse as fully entitled to differentiation from the general mass of indigents who relied on public assistance.<sup>95</sup>

### 5.3.2 *Desertion and social welfare*

The initial response of government to the problem of desertion was to address, not the fact of desertion itself, but the resulting poverty of married women. The Minister for Social Welfare, Seamus Brennan in introducing the Social Welfare Bill 1970 to Dáil Éireann set out the aim of a proposed means-tested deserted wives allowance:

The new social assistance scheme of allowances for deserted wives is designed to deal with one aspect of the problem of deserted wives. Deputies are no doubt aware that this problem has aroused much interest during the past few years and the aspect of it which this Department is attempting to deal with is that of the hardship caused in the long term to the wife and children where the husband has deserted them and has failed to contribute to their maintenance ... it is felt that the long term situation should be dealt with on a more permanent basis.<sup>96</sup>

The allowance was available to married women, deserted by their husbands, under 50 years of age with dependent children, or over the age of 50 without dependent children.<sup>97</sup> Payment was made until the woman reached retirement age, when she could receive the old age pension. It was therefore envisaged that deserted wives without means would be supported by the State for their lifetime. In order to receive the allowance a wife needed to show that she had no means of support, that her husband had deserted her, and that she had made attempts to obtain maintenance from him.<sup>98</sup>

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recipients either do not vote or, in the case of the elderly, continue to vote along historically fixed lines. . Garret Fitzgerald, *Reflections on the Irish State* (Irish Academic Press, 2003), xxiii. Redistributive measures directed towards deserted wives may, however, be more politically productive. Approval among malleable middle aged employed voters is possible at minimal fiscal cost

<sup>95</sup> See for example, 'Twentieth Century Status for Twentieth Century Women,' *Irish Independent* (Dublin, November 25 1969).

<sup>96</sup> Dáil Deb 14 July 1970, vol 248, col 999.

<sup>97</sup> Social Welfare Act 1970, s 22.

<sup>98</sup> Social Welfare (Deserted Wife's Allowance) Regulations 1970, SI 1970/227, reg 4.

A social insurance based deserted wives benefit was introduced in 1973.<sup>99</sup> Again, this payment was potentially lifetime, but payable without the presence of children from the age of 40 rather than 50. There was no restriction on deserted wives in receipt of this payment earning money, and no limit on the capital assets that they could own.<sup>100</sup> A woman was considered as having been deserted if her husband had left ‘of his own volition’ and had wilfully refused or neglected to contribute to the support of his wife and children.<sup>101</sup> The wife was obliged to ‘make reasonable efforts ... to prevail on [her husband] to resume living with her or to contribute to the support and maintenance of her and her children.’<sup>102</sup>

In using the expanding social welfare system to address the difficulties suffered by deserted wives, the Irish government continued its practice of using marriage as a relay for government. In providing a State benefit, government became a substitute husband in a lifetime dependency marriage. The poverty of wives and children was relieved with the same motivation as the imposition of the marriage bar – ensuring an income for families.<sup>103</sup> There was no suggestion that government or politics required anything from these women; no attempt was made to address the causes of their poverty. Although the deserted wives payments adopted and re-enforced the social practice of lifetime dependency marriage, they were directed to the effects of its failure, and not

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<sup>99</sup> Social Welfare Act 1952, s 14, as amended by Social Welfare Act 1973, s 17.

<sup>100</sup> As an insurance-based scheme, the benefit was paid on the occurrence of the insured event (desertion) without reference to the means of the recipient.

<sup>101</sup> Social Welfare (Deserted Wife’s Allowance) Regulations 1970, reg 4.

<sup>102</sup> Social Welfare (Deserted Wife’s Allowance) Regulations 1970, reg 4(1)(c).

<sup>103</sup> Marriage bars were intended to limit households to one income earner, ‘one man one job.’ In a circular announcing the marriage bar to National School teachers in 1932 five reasons for the bar were cited: women could not attend to the duties of home and work; married women teachers restricted opportunities for other women and create social tensions if married to a farmer, shopkeeper or teacher; maternity leave created difficulties for pupils and other staff; women usually marry at 31 or 32 and so the training of women teachers was justified; and finally the new rule would be self-financing. Eoin O’Leary, ‘The Irish National Teachers’ Organisation and the Marriage Bar for Women National Teachers, 1955-1958’ (1987) 12 *Saothar* 47, 50.

the causes (whether social or interpersonal). The relationship practices of the population had become a cause for concern at the level of government only to the extent that they occasionally created hardship for women left without male support. A similar poverty relief impetus can be seen in the introduction of an unmarried mother's allowance in 1973.<sup>104</sup> Like deserted wives, unmarried mothers were women for whom the State would become a substitute husband. The payments were not however, lifetime, lasting only as long as the woman had a dependent child living with her,<sup>105</sup> and removed if 'she and any person are cohabiting as man and wife.'<sup>106</sup> Although morally laden in their definition, lone woman payments did not attempt to shape the contours of marriage, rather they aimed to relieve socio-economic deprivation.

### *5.3.3 Desertion— the role of law.*

As government became involved in providing social assistance to deserted wives and gathered statistics that demonstrated the extent of the problem,<sup>107</sup> it also became concerned with the limitations of existing private law rules, in particular the non-enforceability of Irish maintenance orders in Britain.<sup>108</sup> The potential for collusion between spouses was raised in debate on the Social Welfare Bill 1970. A husband could agree to 'disappear' to Britain in order that his wife could obtain a deserted

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<sup>104</sup> Social Welfare Act 1973, s 8.

<sup>105</sup> Social Welfare Act 1973, s 8(c)

<sup>106</sup> Social Welfare (Social Assistance Allowance) Regulations SI 1973/190, reg 7. A similar disqualification applied to the Deserted Wives payments.

<sup>107</sup> On its introduction, the Department of Social Welfare had estimated that 1,000 women would avail of the deserted wives allowance, within a year 1,635 women with 2,309 dependent children were supported by it. As reported by Joseph Brennan in response to a question from Brendan Corish, Dáil Deb 13 July 1972, vol 262, col 1639.

<sup>108</sup> This issue gained significant traction following the increase of the maintenance jurisdiction of the District Court in the Courts Act 1971. There seems to have been no consideration given to the difficulty in enforcing maintenance orders in general and although the Minister for Justice Mr Cooney refers to the difficulties experienced with attachment of earnings orders in other countries, decides to proceed with their implementation in any event. See Dáil Deb 22 July 1975, vol 284, col 75.

wife's payment.<sup>109</sup> The Minister for Justice George Colley indicated that the Department would take steps to ensure that such collusion did not occur but recognised that difficulties did exist in relation to enforcement of maintenance orders.

As deputies will appreciate, there is a danger of collusion in these cases. In such cases I think it would not be unreasonable that the Department should insist that the wife should obtain a maintenance order and see if it could be enforced. If it cannot, the Department should step in. Where it is quite clear that this would be a useless exercise the Department would not insist on that.<sup>110</sup>

Women's groups also focused on men's legal obligations to their wives. The A.I.M. (Action Information Motivation) group, established in 1972, sought the enactment of a statutory right to family maintenance and effective enforcement mechanisms.<sup>111</sup> Their position was supported by the government-appointed Commission on the Status of Women, which, in 1973, produced a comprehensive report on the disadvantages suffered by Irish women. The Irish Commission was one of a number established throughout Europe following the 1967 United Nations Declaration on the Elimination of Discrimination against Women (DEDAW).<sup>112</sup> The Declaration emphasised the equal status of women and men, called for the removal of distinctions between women based on marital status, and for the promotion of equal status and property rights within marriage.<sup>113</sup> The Irish Commission was rigorous in

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<sup>109</sup> A practice commonly referred to as 'Irish Divorce.' See for example Christina Murphy, 'Divorce Irish style' *The Irish Times* (Dublin, 21 November 1975).

<sup>110</sup> George Colley, *Dáil Deb* 22 July 1970, vol 248, col 1704.

<sup>111</sup> Yvonne Galligan, *Women and Politics in Contemporary Ireland: From the Margins to the Mainstream* (Pinter 1998), 91.

<sup>112</sup> The declaration was made on 7 November 1967 and is available at: <[www.unhcr.org/refworld/docid/3b00f05938.html](http://www.unhcr.org/refworld/docid/3b00f05938.html)> (accessed 23 July 2012).

<sup>113</sup> Article 6 of the Declaration states:

Without prejudice to the safeguarding of the unity and the harmony of the family, which remains the basic unit of any society, all appropriate measures, particularly legislative measures, shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law, and in particular:

- (a) The right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage;
- (b) The right to equality in legal capacity and the exercise thereof;

identifying how the tax and social welfare systems disadvantaged women, and government later implemented many of its recommendations. In relation to married women, however, the Convention's requirement to promote the status of women was subjugated to Article 41 of the Irish Constitution and dominant views on the role of women in marriage, and expressed as a need to protect the dependent status of married women.

Article 41 recognised the family as the fundamental unit group of society, and the Supreme Court had defined this family as that based on marriage.<sup>114</sup> The Constitution also provided that the State 'shall 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.'<sup>115</sup> The Commission, noting that 'a woman should have the right to choose between different life patterns,' and that 'society has a responsibility to support that choice,'<sup>116</sup> constructed from Article 41 a legal right to adopt a dependent role in marriage. Although the Commission couched its spousal support recommendations in gender-neutral terms,<sup>117</sup> it is clear from the general tenor of the report that women, but not men, had a right, and perhaps even an obligation to be dependent.<sup>118</sup> More than

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<sup>114</sup> *State (Nicolau) v An Bord Uchtála* [1966] IR 567.

<sup>115</sup> Article 41.2, the Irish Constitution.

<sup>116</sup> Commission on the Status of Women, *Report to the Minister for Finance*, 13.

<sup>117</sup> The Commission recommended that both husbands and wives should have an obligation to support their family and that the courts should decide, in case of dispute, how household income and assets should be divided between spouses. It also recommended that a non-owing spouse should have a veto right over the sale of the family home and that a system of co-ownership and community of property should be investigated. *ibid*, 237 – 238.

<sup>118</sup> The Commission focused in particular on the position of married women, for example acknowledging that their participation in the public life of society was possible only 'in a "third phase" of ... life when ... responsibilities in the home have lessened.' A woman had 'the right equally with a man to enter employment' but 'there must be a real attempt made to view and provide for a woman's working life as a unit, broken for a time by marriage and childcare.' Women should be encouraged to join trade unions so that 'attention [can be] paid to their special requirements' and the payment of marriage gratuities should continue to be paid to women but not men because they act as an encouragement for married women to stay in employment (13). The Commission expressed sympathy with the view that married women taking up employment displaced jobs for unmarried women and noted that a married woman

poverty-relief for deserted wives was required to secure this right, women were entitled to a share in their husbands' wealth, and legal mechanisms were necessary to ensure effective sharing of marital resources.

#### 5.3.4 *The deployment of legal rights*

Article 41 was rarely raised in political discourse before the 1970s. As discussed in chapter one, when drafted the 'rights' set out in the Constitution were understood as statements of national identity and solidarity, not as justiciable limits to State power. Judicial review was an alien concept that gained currency in Ireland only in the late 1960s.<sup>119</sup> In articulating the position of the dependent housewife in terms of legal rights, the Commission on the Status of Women adopted the rhetoric of an internationalised human rights movement gaining currency throughout Europe at the time. Samuel Moyn refers to this new articulation of rights as:

the central event in human rights history ... the recasting of rights as entitlements that might contradict the sovereign nation state from above and outside, rather than serve as its foundation.<sup>120</sup>

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can set about looking for employment at a 'reasonably leisurely pace' (128). Calling for an increase in employment opportunities for married women, the Commission stated that:

The availability of suitable part-time work, enabling a woman to cope more easily with her home duties and her employment is an important consideration influencing the decision whether or not to work (128).

Child care was a last resort for the married woman; women need childcare as a result of being forced to work due to economic necessity or because they are ill. The Commission was unanimous in the opinion that very young children, at least up to 3 years of age, should, if at all possible, be cared for by the mother at home and that as far as re-entry to employment is concerned the provision of day care for such children must be viewed as a solution to the problems of the mother who has particularly strong reasons to resume employment (130).

<sup>119</sup> Basil Chubb notes that judicial review was 'foreign to the traditions in which the lawyers of the time had been trained and practised,' before the 1960s. He also comments:

It has to be remembered, too, that the Irish State born in Civil war, was continuously plagued by subversive organisations and shortly after Bunreacht na hÉireann was enacted was once again in a period of emergency when war in Europe broke out. It seemed to be a time for strong government rather than enlarging citizens' rights.

Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration 1991), 63-64.

<sup>120</sup> Samuel Moyn, *The Last Utopia* (Harvard University Press 2010), 13.

The rights rhetoric of the Commission, widely supported by politicians and the general public, directed attention away from relief of poverty and towards the act of desertion itself.<sup>121</sup> This did not involve an investigation of the social and economic conditions that prevented women from supporting themselves. Rather, it shifted attention to their husbands. Whereas previously desertion had been dealt with by relieving its effects, the pursuit of legal rights focused attention on its immediate cause - failure of male support.

### *5.3.5 Problematising marriage law.*

On its introduction, the Department of Social Welfare estimated that 1,000 women would avail themselves of the deserted wives allowance. Within a year it was supporting 1,635 women and 2,309 dependent children.<sup>122</sup> The problem of dependent women deserted by their husbands became a statistical reality; a formerly uncounted category took on a material density that could not be ignored. The initial legal response by government was to increase the level of maintenance payable under the Married Women (Maintenance in case of Desertion) Act 1886 from £4 per week to £15 per week for a wife and £5 per week for a child in the District Court.<sup>123</sup> The next step was to make maintenance orders enforceable in Britain, and following negotiations

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<sup>121</sup> Senator Cáit Uí Eachthéirn argued that a charter of rights for married women was necessary so that they might know what their husband's earn and have provision made for their leisure (Seanad Deb 25 July 1971, vol 75, col 626). The role of wife/mother had primary importance according to Dr Noel Browne and should confer property rights (Seanad Deb 25 July 1971, vol 75, col 631 – 636). Dr Martin echo's this view contending that:

There are very few roles in the world of commerce or industry as interesting as the role of rearing a child really well...it would be a pity if in some kind of mad rush towards enlightenment we were to undervalue that traditional role...One matter which has been a little neglected in the Report on the Status of Women is the role which gives women greater status, that is, the role of being really competent, subtle mothers (Seanad Deb 25 July 1971, vol 75, col 694).

<sup>122</sup> Dáil Deb 13 July 1972, vol 262, col 1639.

<sup>123</sup> Courts Act 1971, s 18.



reciprocal legislation was introduced in both jurisdictions.<sup>124</sup> Neither of these measures required substantive law reform, they simply built upon existing pre-independence marriage law framework.

Problematization of marriage law at the level of government, its identification as a problem, and as a solution to the problem of desertion, began in 1973 with the appointment of the Committee on Court Practice and Procedure, an assembly of government appointed lawyers.<sup>125</sup> The Committee was asked to ‘to examine and make recommendations on the substantive law as to the desertion of wives and children, the attachment of wages and the desirability of establishing special family tribunals’ together with a list of other family related issues.<sup>126</sup> However, due to the ‘urgency’ of the situation the Committee focused on the ‘pressing social evil’ of desertion, which was ‘on the increase.’<sup>127</sup>

The Committee identified deserted women as the victims of ‘abandonment,’ and ‘ill treatment,’<sup>128</sup> and existing marriage legislation as inadequate to meet their needs. Following the taking of evidence, the Committee found that there was ‘a real need for radical change in the legal provisions relating to the provision of maintenance for deserted spouses and families,’ and that the District Court ‘should continue to be the

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<sup>124</sup> Maintenance Order’s Act 1974 in Ireland and the Maintenance Orders (Reciprocal Enforcement) Act 1972 in England and Wales. The Committee on Court Practice and Procedure in its 1974 report *Desertion and Maintenance* (Prl 3666, Stationery Office 1974) commented at page 12 that ‘The majority of deserting husbands abscond mainly to Great Britain. Many disappear leaving the families in ignorance of their whereabouts.’

<sup>125</sup> The Committee of 13 members had four judges, three senior counsel and two solicitors.

<sup>126</sup> Committee on Court Practice and Procedure, *Nineteenth Interim Report: Desertion and Maintenance*, 5.

<sup>127</sup> *ibid*, 7.

<sup>128</sup> *ibid*, 14-15. The committee also considered the necessity of holding court hearings relating to maintenance in public. Interestingly its reasons for recommending that the hearings be in private were not to protect the interests of children or other vulnerable individuals, but to ‘avoid the risk of proceeding being brought under the new Act in order to compel a spouse to pay a large sum to avoid the publicity of court proceedings,’ 7.

principal forum to which the complaining spouse may have resort.<sup>129</sup> An action for family default was recommended, providing relief upon proof of abandonment, ill treatment or ‘the failure of the spouse who is responsible for the support of the family to provide a reasonable standard of living for them having regard to the means and earnings of that spouse.’<sup>130</sup> Within a legal framework, the obligation of spouses was extended beyond the problem of desertion to a more general responsibility to provide for one’s family according to one’s means. The committee suggested two further new forms of legal redress. The registration of a maintenance order as a *lis pendens* on the family home to prevent it from being sold without the maintenance creditors consent, and an order prohibiting the defaulting spouse from entering or attempting to enter the family home if the other spouse had reasonable grounds for believing that the safety or welfare of the family required it.<sup>131</sup> Similar recommendations were made by the Commission on the Status of Women and A.I.M, and with the seal of approval by a Committee composed of judges and lawyers seemed certain to be implemented.

### 5.3.6 *The bio-politics of marriage law.*

In the early 1970s, three factors came together to make it both possible and necessary to legally regulate marriage. First, the Irish government adopted a Keynesian model of economic management that identified the welfare of the population as an essential component of political economy. Managing the economy entailed managing the population, ensuring that it could perform its role in creating ‘producers and consumer, owners and non-owners, those who create profit and those who take it.’<sup>132</sup> Secondly, the welfarist aspect of Keynesianism required improved social provision. This was

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<sup>129</sup> *ibid*, 14.

<sup>130</sup> *ibid*, 14-15.

<sup>131</sup> *ibid*, 15.

<sup>132</sup> Foucault, *Security, Territory, Population*, 77.

achieved through programmes to relieve poverty and promote health, and involved the identification of vulnerable subjects in need of assistance. Once identified, these subjects, like the vulnerable dependent wife, became real and countable. Thirdly, the emergence of an internationalised human rights movement, that reconfigured statements of nationalist aspiration as limits to State power, cast the problems with marriage in a legal mould and activated the power-limiting potential of Article 41 of the Constitution. The vulnerable dependent housewife was no longer simply poor, her protected status as a dependent wife had been compromised, and the appropriate means of redress was legal.

The emergence of the problem of desertion indicated that all was not well with lifetime dependency marriage, and this had significant implications for a political system heavily reliant on marriage performance. The Irish government, deeply involved in regulating the social domain, inevitably became concerned with the functioning of marriage. The rights-talk of political campaigners and legal experts offered marriage law as *the* solution to the problem of women's poverty caused by the failure of male support. Juridico/legal formulations focused political attention on marriage law as a solution, despite providing a wholly inadequate description of how the problems associated with desertion arose. The difficulties of desertion came about within a dense network of power relationships operating between State, religion, social practice and individual conscience. Desertion created poverty, not only because men failed to provide support, but because the entire State apparatus was mediated through dependency marriage, and social, legal and religious structures created significant barriers to female self-sufficiency. Arguments in favour of legal change were an easy way to stand on the side of right without having to answer the more complex questions posed by the practice of dependency marriage.

## 5.4 Reforming Marriage Law

### 5.4.1 Parameters for reform – lifetime marriage

Marriage was legally indissoluble in Ireland until 1997,<sup>133</sup> but the impossibility of terminating marriage was not only an issue of law; that marriage could be ended other than through death, and its disabilities and incidents thus removed, was simply not considered politically possible in the 1970s.<sup>134</sup> An all-party Oireachtas Committee on the Constitution did recommend in 1967 that Article 41 of the Constitution be amended to facilitate divorce for those who did not oppose it on religious grounds,<sup>135</sup> but the suggestion was vigorously opposed by the Catholic Church and the government. In response to the Committee's report, Dr Cathal Daly Archbishop of Dublin declared that divorce was not a matter of individual conscience, and that the State had a positive obligation to protect marriage.<sup>136</sup> The Taoiseach, Jack Lynch also responded negatively to the report announcing to the Dáil that 'the Government have no responsibility for that committee, or for its report ... we have no responsibility for its observations.'<sup>137</sup>

The reform of divorce laws taking place in Britain at the end of the 1960s was widely reported in the Irish media.<sup>138</sup> The British parliament enacted divorce reform

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<sup>133</sup> The Family Law (Divorce) Act 1996 facilitated the dissolution of marriage.

<sup>134</sup> Diarmaid Ferriter quotes journalist and women's rights campaigner Nell McCafferty in reference to a campaign for family law reform in 1970 'It is a measure of our utter innocence that we did not include divorce. It just did not occur to us that marriage could or should be legally terminated.' Diarmaid Ferriter, *Ambiguous Republic: Ireland in the 1970s* (Profile Books 2013), 660.

<sup>135</sup> Committee on the Constitution, *Report* (Pr 9817, Stationery Office 1967), 44.

<sup>136</sup> Sermon of Dr. Daly at Athlone reported at 'Divorce not Religious Tenet of Protestants' *The Irish Independent* (Dublin, 21 December 1967) 8.

<sup>137</sup> Dáil Deb 3 April 1968, vol 233, col 1795.

<sup>138</sup> See for example 'Divorce reform an issue of compromise' *The Irish Times* (Dublin, 22 January 1968), 'Pleas for changes in Divorce Bill' *The Irish Times* (Dublin, 17 January 1969), 'Adultery regarded as no ground for divorce' *The Irish Times* (Dublin, 4 April 1968). For an account of the British reform process see Jennifer Levin, 'The Divorce Reform Act 1969' (1970) 33 MLR 632.

legislation in 1969 following prolonged consultation, and eventual compromise, between the Church of England and the British Law Commission.<sup>139</sup> The Catholic Church in Ireland, anxious to respond to these British developments, made its views clear in a 1969 joint Lenten Pastoral of the Archbishops and Bishops of Ireland. Centred on the theme of ‘Christian Marriage,’ the pastoral emphasised the lifetime nature and procreative function of marriage.<sup>140</sup>

The ultimate purpose and the normal effect of Christian marriage is to bring children into the world for the worship of God, in time and in eternity; in other words, the supreme privilege of marriage is to increase the Eucharistic Community ... Indeed, God made marriage indissoluble of its very nature from the beginning ... The doctrine of indissolubility of marriage is the greatest protection of human love against its own inherent weaknesses.<sup>141</sup>

Promoting Christian marriage was presented by the Bishops as imperative; ‘[a]ll those who are working to create economic and social conditions more favourable to marriage ... are performing a Christian and patriotic service of the first importance.’<sup>142</sup>

The principle of indissolubility reflected both political assumptions and the objectives of the principal religious body in the country. The issue of divorce was firmly off the political agenda, and any attempts to address the problem of desertion would take place on the basis that marriage ended only on death.

#### *5.4.2 Marriage as an instrument of government*

By 1975, political discussion of the problems with marriage had been colonised by legal formulations of marriage and its obligations. The Committee on Court Practice and the Commission on the Status of Women formulated proposed solutions in legal

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<sup>139</sup> Divorce Reform Act 1969.

<sup>140</sup> William Cardinal Conway, Archbishop of Armagh, John C. McQuaid, Archbishop of Dublin; Joseph Walsh, Archbishop of Tuam; Thomas Morris, Archbishop of Cashel, *Christian Marriage 1969* available at:

<<http://www.catholicculture.org/culture/library/view.cfm?id=3703>> (accessed 27 July 2012).

<sup>141</sup> *ibid*, paragraphs 35, 38, 43.

<sup>142</sup> *ibid*, paragraph 54.

terms, and Article 41 of the Constitution acquired a new prominence. The Minister for Justice, Patrick Cooney, in introducing a Bill to reform the rules on spousal maintenance therefore felt it necessary to reference Article 41, in particular its marriage protection imperative ('The State pledges itself to guard with special care the institution of Marriage').<sup>143</sup> The Family Law (Maintenance of Spouse and Children) Bill 1975 adopted the Committee on Court Practice's formulation of inter-spousal obligation - an application for maintenance under the Bill did not require proof that either husband or wife had left the marital home; failure to maintain was the only pre-requisite. The Minister reasoned that the Bill would therefore:

strengthen marriages by no longer obliging wives who have been badly neglected by their husbands to leave the home ... the widely held view nowadays is that ... indeed such an action could possibly be a factor that would save a family relationship.<sup>144</sup>

Ideas about the horror of desertion, the legal rights of women and their vulnerability, the obligations of men, and the indissolubility of marriage came together in a political drive to save marriages.

Saving dependency model marriage would at once eradicate desertion, vindicate women's right to be dependent, and remove any possibility of divorce. It was a beautifully simple objective with the capacity to solve a range of social and political difficulties. Furthermore, it reflected the social aspirations and moral code of citizens; no one entered marriage in the 1970s expecting it to fail. In pursuing a marriage-saving agenda, the Irish government had identified relationship practice as a transfer point

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<sup>143</sup> Article 41.3.1.

<sup>144</sup> Dáil Deb 22 July 1975, vol 284, col 54-68. Ruairi Brugha expresses an even more optimistic view of the legislation's ability to save marriages:

I would hope that the existence of this kind of legislation would help to bring about a position where its very existence would make it unnecessary. Fewer and fewer cases would be brought because of one or other partner being in a position to bring a case to court or go to a solicitor who could use the existence of the Act to make an unreasonable husband or wife come to his or her senses.'

Dáil Deb 22 July 1975, vol 284, col 142.

between individual and political interests. It was no longer simply a relay for government, it had become a regulable category; the relationship practices of individuals were now a matter of political concern. Clearly, it was not possible to save marriage through prohibition of failure, it was necessary to deploy methods of power ‘capable of optimising forces, aptitudes, and life in general without at the same time making them more difficult to govern.’<sup>145</sup>

#### *5.4.3 Techniques for managing life.*

Political concern to support the moral concerns of the population is manifest in how the 1975 Bill was presented to the Oireachtas. The mutual support obligation in section 5 was necessary because ‘[s]pouses look naturally to one another for support and the law should underwrite their obligations to each other.’<sup>146</sup> Spousal support was a ‘moral’ duty that ‘most people accept,’ and which must be translated into ‘an enforceable legal obligation.’<sup>147</sup> The jurisdiction of the court in maintenance applications was discretionary, because judicial decisions are ‘in effect value judgments’ and ‘the possibility of differing value judgments must be accepted as inherent in the proposals.’<sup>148</sup> Although expressing some discomfort with the notion that wives could be responsible for maintaining their families, the Minister ultimately accepted that the courts’ obligation (in s 5(4)) to take account of caring responsibilities would prevent a wife from being ‘required to leave her home and take up work.’<sup>149</sup>

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<sup>145</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality, Part I* (Robert Hurley tr, Penguin Books 1998), 141.

<sup>146</sup> Minister for Justice Patrick Cooney, Dáil Deb 22 July 1975, vol 275, col 62.

<sup>147</sup> Minister for Justice Patrick Cooney, Dáil Deb 22 July 1975, vol 275, col 65.

<sup>148</sup> Minister for Justice Patrick Cooney, Dáil Deb 22 July 1975, vol 275, col 68.

<sup>149</sup> Minister for Justice Patrick Cooney, Dáil Deb 22 July 1975, vol 275 col 67. Section 5(4)(b) required the court in deciding whether to make a maintenance order to have regard to ‘the needs of any such dependent children, including the need for care and attention.’ The ‘earning capacity (if any)’ was also a relevant factor, ensuring that women who had been out of the workforce for a long period of time but did not have care of children could also obtain maintenance.

Maintenance orders, reflecting the lifetime nature of marriage, could be granted ‘for such period during the lifetime of the applicant spouse, of such amount and at such times, as the Court may consider proper,’<sup>150</sup> but the court had jurisdiction to refuse an order in the event of the desertion or uncondoned adultery of the applicant spouse.<sup>151</sup> The Family Law (Maintenance of Spouses and Children) Act 1976 (the 1976 Act), as enacted, thus attempted to legally enforce social understandings of the nature of marriage. Marriage, as practiced, was, in the main, a lifetime, dependency relationship. The Catholic Church, whose doctrine mapped out the moral code of the majority of the population, supported dependency marriage, and the moral obligation of men to provide for their wives and children. It was both possible and necessary for politicians formulating legal rules to refer to, and endorse, the moral nature of marriage. The 1976 Act supported and re-inscribed the social construction of marriage as a morally informed, lifetime relationship of dependency, to which monogamy and financial support were central. This picture of marriage not only reflected social understanding, it also supported the assumptions upon which the entire machinery of Irish social policy was built. Government needed to save marriage in order to achieve its regulatory ambitions within the social domain.

#### *5.4.4 Protecting the marital home*

The Commission of the Status of Women identified the vulnerability of married women in relation to homes owned by their husbands. It drew attention to the ability of a husband to dispose of the matrimonial home ‘without his wife’s knowledge or consent and his wife may find, without any notice whatsoever, that she and any children have

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<sup>150</sup> Section 5(1)(a).

<sup>151</sup> Section 5(2) and 5(3).



no longer any place to live.’<sup>152</sup> It recommended that neither spouse should have the power to sell their home without the consent of the other, and this recommendation was put into effect by the Family Home Protection Act 1976 (the FHPA),<sup>153</sup> which gave non-owning spouses a veto over the sale or mortgage of their family home.<sup>154</sup> The legislation was couched in gender-neutral terms but the political objective was to protect dependent wives from ‘vindictive’<sup>155</sup> husbands. The Minister for Justice Patrick Cooney sums up its effect:

Under the Bill, if a man wishes to sell the family home, he will have to obtain the written consent of his wife before doing so.<sup>156</sup>

David Andrews from the opposition benches spells out its objective:

We should not engage in any pretence that spouses, effectively, are the wives of marriages, the women, in the context of this Bill. The Minister, whether intentionally or otherwise, averted to this in his opening speech. This Bill is about the protection of the wives and children in the final analysis.<sup>157</sup>

By removing land registration fees on transfers of family homes between spouses the Act also purported to encourage the placing of homes in joint names.<sup>158</sup> The FHPA

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<sup>152</sup> Commission on Status of Women, *Report to the Minister for Finance*, 175.

<sup>153</sup> Professor Wylie refers to the Act as ‘one of the most litigated statutes of modern times.’ J C W Wylie, *Irish Conveyancing Law* (2nd edn, Butterworths 1996) para 1.25.

<sup>154</sup> Section 3(1) of the Act provides:

Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void.

<sup>155</sup> The word ‘vindictive’ is used to describe the behaviour of husbands who sell the family home ‘over the heads’ of their wives by several deputies in Dáil debate on the Family Home Protection Bill 1976. Dáil Deb 25 May 1976, vol 291, col 56 *et seq.*

<sup>156</sup> Dáil Deb 25 May 1976, vol 291, col 57.

<sup>157</sup> Dáil Deb 25 May 1976, vol 291 col 76.

<sup>158</sup> The accrual of an economic benefit in placing a home in joint names relied upon the common law presumption of advancement applying to prevent a resulting trust arising in favour of the spouse providing the purchase money. The presumption applies only to gifts from husbands to wives and not on gifts from wives to husbands. A husband placing a family home in joint names would be presumed to have made an absolute gift in favour of his wife and she would benefit from the transfer in the event of marital breakdown. The Supreme Court considered the presumption of advancement in *RF v MF* [1995] 2 ILRM 572, finding it rebutted in the circumstances of that case. As recently as 2008, the High Court affirmed the existence and applicability of the presumption, *In the matter of the Partition Acts 1868 and 1876, MC v BS* [2010] 1 IR 107, whilst in the second edition of J.W.C. Wylie, *Irish Land Law* (2nd edn, Professional Books, 1986), 486-7, the author commented: ‘But it has generally been

required a non-owning spouse to consent to the sale or mortgage of a 'family home'<sup>159</sup> and obliged a lending institution or landlord to receive loan or rent payments from a spouse not included in the mortgage or tenancy agreement.<sup>160</sup> There was no mechanism in the Act for the allocation of any proprietary interest to the non-owning spouse.<sup>161</sup> The principal legal technique in the Act was to render void any purported conveyance of an interest in a family home without the prior written consent of the spouse of the registered owner.<sup>162</sup>

The institutional, or sacramental, nature of the marriage relationship propounded by Catholic social teaching formed the conceptual foundation for both the 1976 Act and the FPHA. They assumed that lifetime, dependency marriage reflected the natural order. Women lived in homes owned by their husbands, because it was men's role to provide for women. The grant of a legal right to object to the sale or mortgage of a family home was a vindication of rights, without implication for the interpersonal relationship between the spouses. Applications to court to waive spousal consent would similarly not disturb it.<sup>163</sup> A man's failure to pay rent or mortgage on a home owned by him would impose a financial burden on his wife, but not trouble the spousal relationship. Marriage, in its institutional form, was believed to transcend any interpersonal disputes or difficulties that might arise between the spouses. The

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recognised that the traditional concepts, like the presumption of advancement, look distinctly out-of-date in an era when so many wives go out to work and are financially independent.' The presumption was abolished in England and Wales by s 199 of the Equality Act 2000.

<sup>159</sup> Defined at s 2 as 'a dwelling in which a married couple ordinarily reside.'

<sup>160</sup> Sections 7 and 8.

<sup>161</sup> At s 6. It was of course open to the wife to apply to the court under s 12 of the Married Women's Status Act 1957 for a declaration of her interest the property, however few women in this position would have had the financial resources to do so.

<sup>162</sup> Section 3.

<sup>163</sup> Section 4 allows the court to dispense with consent where a spouse is offered 'alternative accommodation' and in the case of desertion or mental incapacity.

obligation to house and maintain one's spouse was only set aside in the event of moral transgression such as desertion or adultery.<sup>164</sup>

## **5.5 The Power Effects of Marriage Law Reform**

### *5.5.1 Marriage as an instrument of politics*

Marriage, in the years following the foundation of the State was a social practice guided by religious and cultural forces. Among the majority Catholic population it was a religious sacrament, a moral institution that could not be renounced, and dependency marriage with distinct gender roles was assumed to reflect the natural order. Politics had no role in the relationship between husband and wife, and retrospective registration was the only civil requirement.<sup>165</sup> Marriage was a model and relay for government, chiefly used as an administrative convenience.

The enactment of maintenance and family home protection legislation in 1976 marked a transformation in the relationship between politics and marriage. Politics wanted something from the marriage relationship itself. The emerging problem of dependent wives, left unsupported following their husband's departure, created a political and economic difficulty. The Irish government initially chose to address the problem through direct poverty relief, and when this proved inadequate a marriage protection objective that encoded existing socio/moral understandings of the nature of marriage was adopted. The Irish government needed its citizens to perform lifetime dependent marriage because it was central to how social management, a central element of the Keynesian economic model, was achieved.

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<sup>164</sup> 'Desertion' was a ground for dispensing with consent pursuant to s 4. Desertion and was an absolute bar to maintenance pursuant to s 6(2) of the 1976 Act. Adultery was a discretionary bar, s 6(4).

<sup>165</sup> See chapter one.

These two pieces of legislation, within a juridical model of power, are assumed to vindicate the rights of women.<sup>166</sup> Foucault's description of the bio-political process of government as 'the conduct of conducts' provides a more nuanced perspective.<sup>167</sup> By imposing a lifetime mutual support obligation on spouses, those responsible for government aimed to solve the problem of desertion through engagement with existing moral understandings of the nature and social supremacy of marriage. The legal support obligation relied upon, supported, and re-enforced pre-existing social structures and modes of control. Similarly, allowing spouses to veto the sale of their family home did not vindicate the rights of married women; it acted to support their dependency in marriage. A barring order jurisdiction, also introduced by the Family Law (Maintenance of Spouses and Children) Act 1976, likewise emphasised women's vulnerability in the home and their need for protection.<sup>168</sup>

### *5.5.2 Power effects at the level of the population*

The Family Home Protection Act assumed and supported female dependency. It also had significant practical effect in making relationship status and history relevant to the sale or mortgage of all land in Ireland. The status and state of individual marriages became a legitimate subject of title investigation. The Act provided that a purported conveyance of a family home was void without spousal consent. Therefore, every conveyancing transaction since 1976 has necessitated a sworn declaration of marital status (with appropriate certificates of marriage, divorce or nullity appended) to

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<sup>166</sup> The Commission on the Status of Women had sought both on the basis that they would vindicate women's rights. Commission on Status of Women, *Report to the Minister for Finance*, 227.

<sup>167</sup> Michel Foucault, 'The Subject and Power' in Michel Foucault, *Power: Essential Works of Foucault 1954 - 1984, Volume 3*, (J.D. Faubion ed, Robert Hurley and others trs, The New Press 2000), 341.

<sup>168</sup> Family Law (Maintenance of Spouses and Children) Act 1976, s 22.

ascertain, first whether or not the seller has a spouse, and secondly whether the correct person has provided consent.<sup>169</sup>

The legal annexation of the problems of deserted wives, the ‘privatisation’ of the support obligation, masked the structural issues that created and maintained their dependency - systematic exclusion from the workforce, from education, from access to contraception or childcare.<sup>170</sup> Although many women accepted, and indeed coveted a dependent role, others did not have that luxury.<sup>171</sup> Spousal maintenance laws, in practice, are useful only to the relatively well off. A woman whose husband is either unemployed, or in low paid work, will do no better under a maintenance regime, and may be better off receiving welfare and social housing. A middle class woman, on the other hand, will have a better standard of living if she receives weekly maintenance

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<sup>169</sup> It has been standard conveyancing practice to require the endorsement of the written consent of a non-owning spouse on both the contract for sale and deed of conveyance or transfer since 1976. The Law Society of Ireland standard requisitions on title have included a comprehensive section on the family home since 1976. All purchasers and mortgagees of property, together with their spouse, whether owning or non-owning, complete a sworn declaration of marital status exhibiting supporting documentation. Until 2009, these documents were filed with the Land Registry on any transfer or mortgage and in relation to unregistered title remain with the title documents as an integral part of the title to the property. For further details on conveyancing practice see Frank Daly, *The Effect on Conveyancing Practice of the New Law Society Contract for Sale and the Family Home Protection Act, 1976* (Society of Young Solicitors Conference Proceedings 1976), Law Society of Ireland, *Conveyancing Handbook* (Law Society of Ireland 2006), Gabriel Brennan (ed) *Conveyancing* (Law Society of Ireland 2012). In relation to commercial property, later judicial separation and divorce legislation providing for property adjustment orders required the disclosure of information in respect of marital status to rule out the possibility that the land was affected by such an order.

<sup>170</sup> As already noted, the Commission on the Status of Women effectively identified the various structural difficulties suffered by women in the early 1970s. Nonetheless, the Commission separated the needs of married women from those of women in general, and assumed that the difficulties experienced by married women could be solved by enforcement of rights based claims against their husbands.

<sup>171</sup> The Commission on the Status of Women argued that women had a right to choose between dependency and income earning, thus reflecting an understanding that women wanted to fulfil a dependent role in marriage:

In practically all investigations of the status of women the underlying assumption has been that a woman should have the right to choose between different life patterns and that society has the responsibility to provide this freedom of choice.

Commission on Status of Women, *Report to the Minister for Finance*, 13.

payments from her husband, and the right to live in housing provided by him.<sup>172</sup>

Political campaigners sought justice and equality through law reform, but in effect, legal maintenance rules simply perpetuated existing inequalities.<sup>173</sup>

### *5.5.3 Relationship practice as an appropriate domain of political intervention*

Marriage law reforms of the 1970s affirmed law's role in regulating relationship practice. The problems of marriage and female post-relationship poverty were seen only in terms of marriage law, and the provisions of Article 41 acquired the status of political and social truth. The discretion-based paradigm of judicial decision making instigated by the new maintenance provisions was repeated in all subsequent marriage legislation, and the lifetime nature of support obligations accepted without question, even following the grant of a decree of divorce.<sup>174</sup> Marriage law was politically useful because it connected economic concerns with the welfare of the population to individual aspirations for intimate relationships. The marriage-saving doctrine aimed to maintain marriage as the centre of social administration, but it also succeeded in producing techniques of power capable of optimising social behaviour through the support of individual moral beliefs. What it failed to do, however, was address the problem of desertion, which continued to cause political difficulty.

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<sup>172</sup> The Commission on the Status of Women, reporting in 1972 recorded that the clerical grade rate of pay for a married man after ten years' service was £29.25 per week (plus an allowance for children). The rate of unemployment assistance for a married man in 1970 was £6.40 and the deserted wives allowance £4.25. The maximum maintenance that could be awarded in the District Court under the 1886 Act was £4 per week rising to £50 under the 1976 Act (s 23(2)(a)). Reform of maintenance rules allowing greater payments and more easily enforceable orders were therefore of benefit only to the wives of employed men with healthy salaries.

<sup>173</sup> The classed nature of the Irish women's rights movements has received little attention in academic literature. This aspect is also referred to in chapter six but is an issue worthy of further investigation in its own right.

<sup>174</sup> See chapter seven.

#### 5.5.4 *The normalising power of marriage law?*

Foucault, in referring to bio-political mechanisms notes how they act:

as factors of segregation and social hierarchization, exerting their influence ... guaranteeing relations of domination and effects of hegemony.<sup>175</sup>

Later he reflects further on the normalising effects of bio-power:

we have a plotting of the normal and the abnormal, of different curves of normality, and the operation of normalization consists ... [in] acting to bring the most unfavourable in line with the more favourable. ... These distributions will serve as the norm. The norm is an interplay of different normalities.<sup>176</sup>

Francois Ewald argues that Foucault's norm is a means of producing a common standard without reference to transcendent truths about the world. He further claims that law in the modern state is the norm, that is, it is a method of judgment that does not rely on anything outside itself.<sup>177</sup>

However, focusing on Foucault's formulations, the effect and objective of law in systems of normalising power comes to the fore, rather than its ontological characteristics. The effect of the reformed legal rules governing marriage in 1970s Ireland was to support social understandings of 'normal' relationship behaviour and its political objective was to save marriage. Government accepted that marriage had difficulties; the problems with marriage were the motivation for political action. Nonetheless, it also sought to solve those problems by encouraging, but not mandating, 'normal' relationship practice – lifetime dependency model marriage. As time progressed these attempts at normalising a particular form of relationship, practice installed a 'field of visibility' around marriage.<sup>178</sup> In other words, government acted to establish a set of processes around marriage that would measure its

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<sup>175</sup> Foucault, *The Will to Knowledge*, 141.

<sup>176</sup> Foucault, *Security, Territory, Population*, 63.

<sup>177</sup> Francois Ewald, 'Norms, Discipline, and the Law' (1990) 30 *Representations* 138, see page 105 – 107 above.

<sup>178</sup> Michel Foucault, "*Society Must Be Defended*" *Lectures at the College De France, 1975 - 76* (David Macey tr, Picador 2003), 242.

characteristics and intervene to direct its performance. Following observation and investigation, the problem with marriage was no longer desertion, a moral failure that suddenly afflicts, but does not end marriage. Rather, marital difficulties would become something permanent, a constant danger that gnawed at the solidity of marriage, weakening its status as a social institution.<sup>179</sup>

## 5.6 New Sources of Political Knowledge

### 5.6.1 Gender equality

At end of the 1960s, men and women in marriage had separate legal personalities and separate property but were legally bound together for life in gendered marital roles. As demonstrated by the Married Women's Status Act 1957, however, notions of formal equality had begun to permeate the legislative process. The Guardianship of Infants Act 1964 made both parents guardians of marital children and liable for their support.<sup>180</sup> The Succession Act 1965, moving away from common law sex-based rules of curtesy and dower, gave gender-neutral succession rights to spouses.

The equality imperative was accelerated in the early 1970s by Ireland's impending membership of the European Economic Community (EEC)<sup>181</sup> governed by the Treaty of Rome,<sup>182</sup> which required that signatory states ensure that men and women receive

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<sup>179</sup> Foucault contrasts a focus on death seen as an external factor that cannot be controlled with a focus on illness as a phenomena afflicting a population. 'Death was no longer something that suddenly swooped down on life – as in an epidemic. Death was now something permanent, something that slips into life, perpetually gnaws at it, diminishes and weakens it.' Foucault, "*Society Must Be Defended*," 244.

<sup>180</sup> Despite the formal equality of the legislation, Hamilton J in the High Court Case of *O'D v O'D* [1976 – 7] ILRM 142, held that where both parents are equally suitable to have custody, children of 'tender years' should remain in the custody of their mother and removal of them from that custody should only occur where she had failed in her duties to them.

<sup>181</sup> Ireland acceded to the EEC on the 1 January 1973. EEC Official Journal L 73 of 27 March 1973.

<sup>182</sup> The Treaty of Rome was made at Rome on 25 March 1957 with the original signatories of Belgium, Germany, France, Italy, Luxembourg and The Netherlands.



equal pay for equal work.<sup>183</sup> The Commission on the Status of Women's initial report had recommended the phasing-in of equal pay in the public service but made no recommendations regarding equal pay in the private sector, considered outside the remit of government. However, EEC membership meant that equal pay in both public and private employment became a policy imperative. The Anti-discrimination Pay Act 1974 became law on the 31<sup>st</sup> December 1975, and required that men and women carrying out the same work be paid at the same rate. In a remarkable departure from the discourse on marriage law, in relation to equal pay, married women become women workers. The Minister for Labour, Michael O' Leary states that:

It is our objective as an administration to allow women to play a full part in the life of the State and to eliminate those barriers which prevent them from doing so. Whilst it is true that the majority of women may not wish to see their family role basically altered, it must not be forgotten that women are going out to work in far greater numbers or are returning to work at an earlier age after their children have gone to school.<sup>184</sup>

Women were a unified gender in debate on equal pay, with no differentiation based on marital status. Equal pay was an 'honest endeavour towards the improvement of the status of women,'<sup>185</sup> not as wives and mothers but as workers. The marriage bar, which required women to retire from public service on marriage, had been removed

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<sup>183</sup> Article 119 of the Treaty of Rome states that:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.

<sup>184</sup> Dail Deb 5 March 1975, vol 270, col 2031.

<sup>185</sup> Dail Deb 5 March 1975, vol 270, col 2036.

in 1973,<sup>186</sup> and the economic narrative that dominated debate on entry into the EEC had begun to permeate discussion of women in the context of employment.<sup>187</sup>

### 5.6.2 *Equality and marriage law.*

Yvonne Galligan wrote in 1998 that during the 1970s and 1980s family law came to mean the abolition of discrimination against married women.<sup>188</sup> This is not wholly accurate. Certainly family law was very much seen as a women's issue, but it connoted not the eradication of discrimination against married women, but the protection of women's status as dependent home-makers. Economic policy, particularly within the context of the EEC,<sup>189</sup> had begun to shift towards a view of women as potential workers, and although equality and the gender-neutral imposition of obligation were accepted, there was no real expectation that the 1976 Acts would apply equally to both husbands and wives. It was expected, and indeed seen as normal and desirable, that the respective spouses would have clearly defined gender-based roles within their lifetime marriage. Dependency marriage continued to represent dominant social practice until well into the 1990s. Legal equality and employment rights had little impact on other social, economic and religious forces that acted to support the social construction of married women as dependent homemakers.

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<sup>186</sup> The public service marriage bar was removed by the Civil Service (Employment of Married Women) Act 1973.

<sup>187</sup> The Labour Senator, John Jack Harte's, speech on the 1973 Appropriation Bill exemplifies the economic narrative surrounding equal pay. He comments; 'if women are discriminated against and are not allowed the opportunities to which they are entitled, they will become a burden on the economy through having to live off their husbands and the State. Discrimination against women that might make them a burden on the economy is not a very desirable situation.' Seanad Deb 19 December 1973, vol 76, col 569.

<sup>188</sup> Galligan, *Women and Politics in Contemporary Ireland*, 91.

<sup>189</sup> For an account of the effect of EEC policy on Irish women, see Frances Gardener, 'The Impact of EU Equality Legislation on Irish Women' in Yvonne Galligan, Eilis Ward and Rick Wilford (eds), *Contesting Politics: Women in Ireland, North and South* (Westhill Press, 1999).

### 5.6.3 Adjudicating marriage in the courts

Marriages rarely presented themselves to the courts in the 1960s and 1970s, and when they did judicial decision-making tended to reflect the accepted social and political picture of marriage. In 1966, the Supreme Court held that the family referred to in the Constitution was that based on marriage<sup>190</sup> and in 1976, that the wife and mother was the appropriate person to care for children of ‘tender years.’<sup>191</sup> The 1973 Supreme Court decision of *McGee v The Attorney General and The Revenue Commissioners*<sup>192</sup> found that Article 40 of the Constitution protected an unenumerated right to privacy in marriage. Although the identification of a right to privacy was a radical departure in legal terms, it was fully consonant, in relation to marriage, with the subsidiarity doctrine of the Roman Catholic Church and the politics of the 1950s:<sup>193</sup> a decision on family planning should be made at the lowest possible level, the family, and not by the State. Walsh J, in striking down post-independence legislation that prohibited the importation of contraceptives, noted that:

the fact that the use of contraceptives may offend against the moral code of the majority of the citizens of the State would not, *per se*, justify an intervention by the State to prohibit their use within marriage. The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it.<sup>194</sup>

The use of contraceptives did indeed offend against the moral code of the majority; legislation facilitating their sale was not introduced in Ireland until 1978.<sup>195</sup>

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<sup>190</sup> *The State (Nicolaou) v An Bórd Uchtála* [1966] IR 567.

<sup>191</sup> *O’D v O’D* [1976-7] ILRM 142.

<sup>192</sup> [1974] 1 IR 284.

<sup>193</sup> The decision in *McGee*, although generally welcomed, led conservative groups to focus on the absence of a ban on abortion in the Constitution. The right to privacy had been employed by the US Supreme Court to strike down abortion restrictive laws, and it was feared that the demonstrably liberal Irish Court (it condoned contraceptive use) would follow suit. For an account of the Anti-Abortion Campaigns of the 1980s see Brian Girvin, ‘Social Change and Moral Politics: The Irish Constitutional Referendum 1983’ (1986) 34(1) *Political Studies* 61.

<sup>194</sup> [1974] 1 IR 284, 308.

<sup>195</sup> Health (Family Planning) Act 1979.

## **5.7 Conclusion.**

### *5.7.1 Governed by marriage law.*

Between the foundation of the State and the 1960s, the Irish government had accepted dependency marriage as an unproblematic social institution, and used it as a relay for poverty-relief measures and other (limited) social services. The adoption of a Keynesian economic model in the late 1950s focused political attention on the welfare of the Irish population, making social support an essential objective of government. Social services, remade as entitlements rather than discretionary relief of abject poverty, became the focus of campaigning women's groups who sought support for women left indigent by the failure of marriage. The emerging international human rights discourse of the 1970s transformed these women into the embodiment of women's social right to adopt a dependent role in marriage. In seeking vindication of that right, a new mode of governing marriage was identified – the legal regulation of spousal obligations.

There was no question of the State imposing a patriarchal or religious vision of marriage on a resisting population. Rather government relied upon existing social understandings of the nature of marriage in identifying a problematic individual, the deserted wife, and formulating solutions that relied upon the lifetime dependency nature of social marriage. Legal knowledge, in the form of international human rights, re-articulated to reflect Irish sensibilities, supported both political and social objectives. Marriage had long been used as a relay for government and most government services and supports were mediated through the marriage relationships. The labour market was likewise structured around the one income family. This habit of government, building upon existing social practice, contributed to the problems experienced by deserted wives; nonetheless, the solution was seen only in terms of

legal enforcement of the obligations of marriage. Two legislative reforms of marriage law were enacted in 1976, each relying upon and re-enscribing existing understandings of marriage.

The reforms of the 1970s thus demonstrate the productivity of power and its connection to the forms of knowledge available to government at the time. They also illustrate the connection between the objectives of the State and the aspirations of individual citizens. State administration depended on the social practice of marriage and married women, believing that their husbands had a moral obligation to maintain them, claimed the right to be dependent in marriage. During the 1970s, therefore, marriage law governed the Irish population by re-enforcing the necessity of gender-based roles, by subjectifying women as vulnerable dependents and men as morally bound financial providers. Government chose to deploy legal measures to address the problem of desertion without considering other ways to facilitate married women's existence apart from a providing husband. The legal solution also focused only on the problems of a particular social class of women whose husbands were in a position to provide post-relationship maintenance and housing.

#### *5.7.2 The power effects of marriage law*

The Irish government had accepted that lifetime dependency marriage was a necessary social institution in need of protection. It also needed its citizens to perform marriage, because it was central to how social management, an essential element of Keynesianism, was achieved. In Foucault's scheme, the Irish government had begun to deploy bio-political mechanisms that aimed to take control of life processes and modify them. Choices were made regarding what constituted natural or normal relationship behaviour, largely based on social practices and the tenets of dominant morality. In seeking to maximise normality, the Irish government deployed marriage

law as a political technique for the explicit purpose of saving marriage. Marriage was already a point of transfer between the State and individual interests, and the process of law reform both engaged with and re-enforced social understanding of the nature of the marriage relationships. During this decade, the objective of government in regulating marriage was quite specific – it was intended to ensure the performance of lifetime dependency marriage. Of course, this was an objective doomed to failure. That all marriages did not last for life, nor adopt the dependency paradigm, was already apparent, but government accepted the basic moral premise that marriage was a social good, essential to the functioning of society.

## Six – Marriage Breakdown

### 1976 - 1990

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In 1982, the Supreme Court declared marriage to be ‘a permanent, indissoluble union of man and woman,’<sup>1</sup> which the law must protect from attack, thus supporting and re-inscribing the political objective of marriage saving articulated by government in the 1970s. A newly established Law Reform Commission,<sup>2</sup> supported law reform as the appropriate way to achieve this objective by demonstrating law’s efficacy in identifying and managing non-conforming relationship behaviour. As a result, at the end of the decade, a comprehensive legal machinery intended to save marriage and regulate marriage breakdown was established. This chapter discusses how legal expertise both shaped and reflected government objectives during the 1980s, resulting in the further normalisation of lifetime dependency marriage and the installation of a network of mechanisms of surveillance and intervention around those unable to conform to the normative relationship form.

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<sup>1</sup> [1982] 1 IR 241, 286.

<sup>2</sup> Law Reform Commission, *Report on Divorce a Mensa et Thoro and Related Matters* (LRC 8 1983), 32.

## 6.1 Governing the Social through Economic Decline

### 6.1.1 Economic decline in the 1980s

The oil crisis of 1973 put an end to the economic expansion of the 1960s, but the Irish government ‘continued to behave as if nothing had happened.’<sup>3</sup> Assuming the crisis was a temporary difficulty, the government borrowed heavily to fund a major expansion in public expenditure.<sup>4</sup> Government involvement in the economy had increased hugely in the period since independence, but more particularly between 1973 and 1985 when the ratio of public expenditure to Gross National Product rose from 42 percent to 67 percent.<sup>5</sup> In 1981, almost 10 percent of the labour force was unemployed.<sup>6</sup> The situation did not improve:

In early 1987, a sense of crisis prevailed. The most obvious indications of this crisis were the massive unemployment, the resumption of heavy emigration, falling living standards and the intransigent public finance imbalances.<sup>7</sup>

By the end of the decade one fifth of the labour force were unemployed, despite levels of emigration not experienced since the 1950s.<sup>8</sup>

### 6.1.2 Marriage practices in the 1980s

Marriage rates began to fall during the 1980s,<sup>9</sup> but labour market participation by married women rose, increasing from 7.5 percent in 1970 to 16.7 percent in 1980,

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<sup>3</sup> Joseph Lee, *Ireland 1912 – 1985* (Cambridge University Press 1989), 471.

<sup>4</sup> *ibid*, 471 – 472.

<sup>5</sup> Kieran Kennedy, Thomas Giblin and Deirdre McHugh, *The Economic Development of Ireland in the Twentieth Century* (Routledge 1988), 87. Gross National Product is the sum of gross domestic product (value of final goods and services produced within the domestic territory) and net factor income from abroad.

<sup>6</sup> From a labour force of 1,272,000 in 1981, 126,000 were unemployed. The corresponding figures for 1971 were 1,110,000 and 61,000 respectively. *ibid*, 143.

<sup>7</sup> *ibid*, 92.

<sup>8</sup> *ibid*, 93.

<sup>9</sup> Falling to 5.2 per thousand in 1986 and remaining at that level for the rest of the decade. Central Statistics Office, *Statistical Abstract 1993* (PI 9990, Stationery Office 1993), 27.



reaching 23.7 percent in 1989.<sup>10</sup> This was still low in comparison with other European countries; the workforce participation rate for married women in Britain was 57.2 percent and in Sweden 75.6 percent.<sup>11</sup> Fertility rates were also above the European average, despite a decrease from 3.76 children per woman in 1960 to 2.33 children per woman in 1987.<sup>12</sup> The presence of children was the single biggest factor determining whether married women worked, suggesting that social practices continued to reflect an understanding of women's role in marriage as a caring one.<sup>13</sup> This perceived role extended to unmarried mothers. A 1992 National Economic and Social Council sponsored report on the participation of women in the labour market categorised women by marital status,<sup>14</sup> but did not present any statistics in relation to unmarried mother's labour market participation, despite 32 percent of first births in 1991 occurring outside of marriage (16 per cent in 1981).<sup>15</sup>

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<sup>10</sup> Tim Callan and Brian Farrell, *Women's Participation in the Irish Labour Market* (PI 8449, National Economic and Social Council 1992), 18

<sup>11</sup> *ibid*, 31.

<sup>12</sup> *ibid* 19.

<sup>13</sup> Callan and Farrell identify a significant correlation between number and age of children and women's labour market status. They also note that labour market participation rates do not differentiate between full and part-time employment and that many married women with children engaged in part-time work, *ibid* 29 – 36. No statistics were collected on the correlation between men's labour market participation and the number of children in their household.

<sup>14</sup> *ibid*.

<sup>15</sup> Eithne McLaughlin and Paula Rogers in their study of unmarried motherhood in Ireland suggest that the unrestricted nature of the unmarried mother's allowance at this time also reflects a conceptualisation of women with children as non-workers. Eithne McLoughlin and Paula Rogers 'Single Mothers in the Republic of Ireland: Mothers not Workers' in Simon Duncan and Rosalind Edwards, *Single Mothers in an International Context: Mothers not Workers* (UCL Press 1997), 9, 12. By 1991, one in ten families with children under 15 were headed by single parents, and 83 percent of these by women; employment rates for both married and unmarried mothers remained low and as a result there was a high level of poverty and reliance on welfare among single women with children.

### 6.1.3 Governing through marriage – social provision

The Report of a Commission on Social Welfare, published in 1986, illustrates the extent to which marriage remained central to the distributive functions of the State.

The Commission commented that:

the underlying concept was that the husband was the breadwinner and head of the household and the person to whom increases of benefit for his wife and children was paid. Any married woman living with her husband was regarded as his dependent and any children were also regarded as his dependents whether or not the wife was working and contributing to their support.<sup>16</sup>

Married women could receive increases of benefit only for husbands who were incapable of self-support through mental or physical infirmity. Similarly child dependent increases were not payable to a married woman except where her husband was an invalid or where she was living apart from and not being supported by her husband. A married man on the other hand could receive increases for his wife and children regardless of her employment or financial status.<sup>17</sup>

When the 1986 report was published, the position regarding payments for dependents was in the process of amendment, but the general scheme of the social welfare system remained as described.<sup>18</sup> Of the twenty-one social welfare payment types available in 1985, nine were awarded only to women, and for eight of those, marital status was a qualifying condition.<sup>19</sup> Widows contributory pension, deserted wives benefit, widows non-contributory pension, deserted wives allowance and prisoner's wives allowance

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<sup>16</sup> Commission on Social Welfare, *Report* (Stationery Office 1986), 17. The Commission was established in August 1983 by the Minister for Social Welfare, Barry Desmond. It was tasked with reviewing the social welfare system and related social services and making recommendations for development with the aims of producing social equity and relieving poverty through the social welfare system. It was also required to examine the interaction of policy in social welfare, tax, health, education and housing. The commission recommended the establishment of the Combat Poverty Agency, which was set up with an interim board in 1984. In its introductory section, the report notes that 37.4 percent of the population were in receipt of social transfers in 1985, an increase from 20% in 1966.

<sup>17</sup> *ibid*, 27.

<sup>18</sup> Pursuant to an EEC directive on equal treatment of men and women in social welfare (79/7/EEC), the Social Welfare (No 2) Act 1985 provided for the gradual implementation of equality of treatment. However, the Act focused on entitlement to unemployment assistance and the treatment of dependents. Widowhood, maternity and family benefits were specifically excluded from the directive and payments for women using marital status as a qualifying condition were not removed until 1990.

<sup>19</sup> Commission on Social Welfare, *Report*, 17.

compensated for the loss of a breadwinning husband, and single women's and unmarried mothers allowance for the failure to secure one. Only maternity benefit did not require proof of marital status. An extraordinary feature of the contributory payments in today's terms was that they were paid to working age women until they reached pension age, irrespective of the income or assets of the recipient, and often whether or not they had dependent children. Social welfare payments were completely exempt from tax, and maintenance received by spouses amounting to less than the payment rate for unemployment benefit were disregarded for the purpose of deserted wives payments.<sup>20</sup>

The number in receipt of these supports was not insignificant; at the end of 1985. there were 78,815 women in receipt of a contributory widow's pension, a numerical value surpassed only by unemployment payment recipients.<sup>21</sup> Other than payments based on the disruption of a women's marital position, most social welfare payments were made on the basis of the marriage based household, and 'the fact that a woman is working would not affect her husband's entitlement to claim for her as a dependent.'<sup>22</sup> Married women could not qualify in their own right for unemployment assistance until 1986, and where they qualified for social insurance benefits received lower rates and for shorter periods than men did. Women who remained out of the

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<sup>20</sup> *ibid*, 121. SI No 227 of 1970, as amended by SI No 74 of 1972, provided that 'monetary payments and other contributions to the support and maintenance which are inconsiderable may be disregarded.' This provision was generously interpreted by the Department deeming the maximum amount of unemployment assistance, plus and child dependant allowances to be 'inconsiderable.' See Paul Ward *Financial Consequence of Marital Breakdown* (Combat Poverty Agency 1990), 15.

<sup>21</sup> At the end of 1985 there were 89,219 recipients of unemployment benefit and 120,985 receiving unemployment assistance. 3,965 women received the deserted wives allowance, 5,165 the deserted wives benefit and 11,530 the unmarried mother's allowance. Commission on Social Welfare, *Report*, 121

<sup>22</sup> *ibid*, 49.

workforce following marriage were unlikely to have sufficient social insurance contributions to qualify for benefits in their own right.<sup>23</sup>

#### *6.1.4 Governing through marriage - taxation*

Increased social provision required increasing taxation, and this too was achieved through the medium of the dependency model family. A Commission on Taxation was appointed in 1980 to:

enquire generally into the present system of taxation and to recommend such changes as appear desirable and practicable so as to achieve an equitable incidence of taxation, due attention being paid to the need to encourage development of the national economy and to maintain an adequate revenue yield.<sup>24</sup>

It produced five reports during the 1980s reviewing existing tax arrangements and making both specific and broad stroke suggestions for reform. In relation to direct taxation, it concluded that:

the family should be adopted as the unit for all taxes. This means that transfers of wealth within the family, that is between husbands and wives and dependent children should be tax-free.<sup>25</sup>

The family envisaged as the tax unit was that based on marriage, the Commission specifically recommended the exclusion of other family types:

We think that the family unit should only include spouses and children, except where an additional allowance for dependents residing with the taxpayer ... is claimed.<sup>26</sup>

The Commission considered a conceptualisation of family to be essential to the administration of the taxation system, and marriage as the most appropriate proxy for family sharing. The extent to which the administration of both tax and social welfare depended on the tying of spouses together is illustrated by the practice of allocating

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<sup>23</sup> In 1986, the workforce participation rate for married woman was 20.9 percent. Central Statistics office *Labour Force Survey 1986* (PI 5259, Stationery Office 1987), 18.

<sup>24</sup> Commission on Taxation, *First Report: Direct Taxation* (PI 617, Stationery Office 1982), 25

<sup>25</sup> *ibid*, 426.

<sup>26</sup> *ibid*, 230.

new Revenue and Social Insurance numbers to women upon marriage, which consisted of their husbands' numbers with the addition of the letter 'W' a practice that persisted until 1991.<sup>27</sup>

In practical terms, tax policy continued to favour marriage over other relationship practices. The Finance Act 1980 extended significant tax advantages to married couples, substantially reducing liability to income tax, particularly for higher earners.<sup>28</sup> The 1980 Act also allowed married couples to claim double allowances in respect of capital gains, mortgage interest, life assurance premiums and residence related expenditure.<sup>29</sup> A complete exemption from Capital Acquisitions Tax on inheritances between spouses was introduced in 1985,<sup>30</sup> and this was extended to gifts between spouses in 1990.<sup>31</sup>

#### *6.1.5 Governing through marriage – sex*

The expression of sexuality was also regulated through the medium of the marital family: contraception was available only to married couples on prescription until 1985.<sup>32</sup> When seeking to extend availability in 1985, the Minister for Health, Barry

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<sup>27</sup> Revenue and Social Insurance Numbers or RSI numbers were the precursor to the current Personal Public Service or PPS number. They were introduced in 1979 with pay related social insurance, pursuant to the Social Welfare (Amendment) Act 1979 and were based on existing PAYE numbers issued by the Revenue Commissioners. The practice of adding a W for married women was discontinued in 1991. See Minister for Social Protection Joan Burton's response to a parliamentary question on the number of PPS numbers issued. Dáil Deb 14 December 2011, vol 735, col 646. The change of practice in relation to 'W' numbers took place when the responsibility for issue of numbers was transferred from the Revenue Commissioners to the Department of Social Welfare in 1991. Dáil Deb 11 July 1991, vol 410, col 1490.

<sup>28</sup> A system of income splitting was introduced, which continued a process begun in 1978, whereby a married couple received double the tax-free allowances and tax bands of single people, regardless of whether one or both spouses were employed. This change created a significant cost and disproportionately favoured the better off.

<sup>29</sup> Finance Act 1980, s 61, 6, 7, 15.

<sup>30</sup> Finance Act 1985, s 59.

<sup>31</sup> Finance Act 1990, s 127.

<sup>32</sup> Prior to 1979, the importation of contraceptives was banned. The Health (Family Planning) Act 1979, s 4(2) made contraception legally available '*bona fide*, for family

Desmond, argued that wider availability of contraception was necessary to prevent the ‘great tragedy’ of unmarried motherhood.<sup>33</sup> His position was a marked contrast to Charles Haughey’s approach in 1979 when he argued that the Health (Family Planning) Bill 1979 was a measure which:

places family planning firmly in the context in which, I believe, it should be placed, that is, in the context of family medical care provided by the general practitioner. This seems to me to be a wise and sensible way to ensure that the making available of contraceptives will be for family purposes and will be accompanied by advice regarding the merits and the hazards of different forms of contraception. The provision in this, and the preceding sections, should, in my view, ensure the availability in this country of an adequate family planning service under the general direction and control of those who are in the best position to advise about the manner and extent of the provision of such services in individual cases.<sup>34</sup>

Not all doctors were ‘willing or in a position to provide a full family planning service to their patients.’<sup>35</sup> Contraception was in practice, therefore, available only to a limited segment of the married population whose doctors did not oppose its use. The Health (Family Planning)(Amendment) Act 1985<sup>36</sup> facilitated the sale of non-medical contraceptives by pharmacies and family planning clinics to people over the age of 18. Despite legalisation, many pharmacies refused to sell contraceptives and their availability remained limited, particularly outside Dublin.<sup>37</sup>

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planning purposes’ to married couples. The meaning of *bona fide* was not defined in the legislation.

<sup>33</sup> Minister Desmond noted ‘a significant increase in extra-marital sexual activity resulting in an increase in illegitimate births, from the point in 1971 where they constituted 2.7% of all births to the point where they accounted for more than 6.8% in 1983. Furthermore, there has been a two-fold increase between 1962 and 1981 in the proportion of marriages in a calendar year to which a birth is registered in the same year, suggesting a corresponding increase in premarital conceptions.’ Dáil Deb 14 February 1985, vol 355, col 2485.

<sup>34</sup> Dáil Deb 330 28 February 1979, vol 312, col 330.

<sup>35</sup> Minister for Health Barry Desmond on the Second Stage of the Health (Family Planning) (Amendment) Bill, 1985. Dáil Deb 14 February 1985, vol 355, col 2485. He continued ‘[t]his extends in some cases to a refusal to provide authorisations for non-medical contraceptives under the Act.’

<sup>36</sup> The Act came into force on 1 October 1985 (SI 1985/316), and their sale remained subject to the proviso in s 11 of the Health (Family Planning) Act 1979, that noting in the Act could oblige any person to import, manufacture, advertise, display or sell contraceptives.

<sup>37</sup> The availability of contraceptives, in practice, was so limited following the 1985 Act that it was necessary to produce a list of pharmacists stocking condoms in a 1986 book on

## 6.2 The Problem with Marriage

### 6.2.1 Counting marriage failure

The extension of social provision to the female victims of marital failure inevitably led to the production of statistics detailing its prevalence. Despite the enactment of the Family Law (Maintenance of Spouses and Children) Act in 1976, the number of wives and children in receipt of welfare assistance continued to increase. The Commission on Social Welfare reported 3,965 women in receipt of deserted wives allowance and 5,165 receiving deserted wives benefit at the end of 1985.<sup>38</sup> A labour force survey, carried out in 1983, estimated that there were 21,100 separated and deserted persons in the country.<sup>39</sup> The 1986 census, which for the first time included a question designed to measure marriage breakdown, identified 40,000 people who were separated, deserted, or remarried following divorce.<sup>40</sup> The scheme of civil legal aid established in 1980 (following Josephine Airey's successful challenge to the absence of government funded legal assistance in family law cases),<sup>41</sup> provided further evidence of the extent of marital disharmony. Although the scheme's remit extended to landlord and tenant law and consumer law, 80 percent of legal aid cases related to family law during the first 3 months of operation.<sup>42</sup>

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women's health. Anne Roper, *Woman to Woman: A Health Care Handbook for Women* (Attic Press 1986).

<sup>38</sup> Commission on Social Welfare, *Report*, 121.

<sup>39</sup> Referred to by Michael Woods in the Dáil, Dáil Deb 14 May 1986, vol 366, col 804.

<sup>40</sup> The question allowed respondents to identify themselves as separated, divorced or remarried following a previous divorce. The figure of 40,000 represents an approximation of the total of these three categories. Peter Lunn, Tony Fahey and Carmel Hannan, *Family Figures: Family Dynamics and Family Types in Ireland, 1986 – 2006* (ESRI 2009), 45.

<sup>41</sup> The Legal Aid Board was initially set up on an administrative basis in 1980, following a finding by the European Court of Human Rights in *Airey v Ireland* [1979] 2 EHRR on 9 October 1979 that the absence of a scheme of legal aid in family law matters was a breach of Ireland's obligations under Article 6.1 and Article 8 of the European Convention on Human Rights.

<sup>42</sup> John Horgan tabled an oral question in the Dáil on 29 October 1980 regarding the percentage of applicants attending Legal Aid centres with matrimonial cases. The Board had commenced operation in mid-August of that year and the reply, delivered by Sean Doherty

### 6.2.2 *The problem with marriage – marriage breakdown*

Desertion continued to incite political discussion in the 1980s, and the deserted wife remained an object of sympathy. Discussion of the cause of her difficulties, however, began to shift, from the moral failure of men, to the more general phenomenon of ‘marriage breakdown.’ It is difficult to pinpoint the specific moment when marriage breakdown began to displace the deserted wife as an object of political attention,<sup>43</sup> but the first references in the Oireachtas appear in discussion of long-term unemployment. In 1977, Deputy David Andrews refers to marriage breakdown brought about ‘by the spectre and the reality of continuous unemployment’ because:

The father is at home almost 24 hours of the day and the male of the species, whatever about the feminists amongst us, was never intended to be at home for that length of time; he was meant to be out working. ... Frustration begins to grip and uncertainty is there all the time; the husband begins to fret and tensions begin to build up in the home.<sup>44</sup>

By October 1980, the matter had gained enough political attention that Deputy Eileen Desmond of the Labour Party felt justified in presenting a motion to the Oireachtas proposing recognition of ‘the necessity of reviewing the constitutional prohibition on the introduction of legislation to provide for the dissolution of marriages which have irretrievably broken down.’<sup>45</sup> Government did not support her proposal.

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was that 75 – 80 percent of applications in the Dublin area were in relation to family law. Dáil Deb 29 October 1980, vol 323 col 993.

<sup>43</sup> Deputy Nora Owen, speaking in the Dáil, suggested a source for the change of political subject:

This debate started in a uniquely Irish style in the early seventies with the introduction of the deserted wife’s allowance. That was our first formal recognition that marriages break down in Ireland. The debate on this issue did not progress publically for a number of years after that. Although we were acutely aware that more and more people were suffering from marriage breakdown, the debate did not have a public fact. In 1978, a motion calling for a referendum to remove the constitutional ban on divorce was put down at a Fine Gael Ard-Fheis. That opened up the public debate not only at a political level, but also in the wider public arena.

Dáil Deb 26 February 1986, vol 364, col 450.

<sup>44</sup> Dáil Deb 10 March 1977, vol 297, col 1218, during debate on the Social Welfare Bill 1977.

<sup>45</sup> Dáil Deb 29 October 1980, vol 323, col 1086.



The government sponsored Family Law Bill 1981, which sought to abolish actions for criminal conversation,<sup>46</sup> enticement and harbouring of spouses, and enforcement of marriage contracts, further enabled discussion of marriage breakdown.<sup>47</sup> The Bill was criticised by opposition deputies for its minimalist approach, ‘a few mealy-mouthed measures designed to clear up anachronisms on the Statute Books which other countries have got rid of hundreds of years ago.’<sup>48</sup> The real problem, according to Deputy Michael Keating, was the increasing incidence of marriage breakdown; the necessary questions for government were therefore:

Why is it that we do not analyse why this fundamental marital breakdown is becoming increasingly common? Is it just that we are now talking more about it? I believe that it is becoming increasingly common. Why is that happening? How can we help marriages in difficulty? How can we discourage marriages which are likely to founder from taking place – for example, in the case of very young people who may not be fully aware of the rigours and the demands, emotional and financial, and all the circumstances which point towards difficulty in marriage? Why do we not try to prevent the horrific situation arising where a wife, who on one day years before held her husband’s hand on the altar and said ‘I do’ is now being forced to seek the protection of the Garda and the courts against that same man, the father of her children? To deal with the problem only at that level is wrong. It is to deal with it in a simplistic, reactionary manner.<sup>49</sup>

Politics must concern itself, he implied, with the causes of marital difficulties. The institution of marriage must be protected from all those social, personal, and economic forces that might destabilise it. Government must aim, not to solve the problems of women left indigent following the failure of male support, or suffering at the hands of violent husbands, but to prevent these problems arising through the prevention of marriage breakdown.

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<sup>46</sup> The Bill implemented recommendations of the newly established Law Reform Commission.

<sup>47</sup> The Bill became the Family Law Act 1981, which also contained rules relating to the property of, and gifts to and between engaged couples.

<sup>48</sup> Michael Keating, Dáil Deb 7 May 1981, vol 328, col 2456.

<sup>49</sup> Michael Keating, Dáil Deb 7 May 1981, vol 328, col 2395.

### 6.2.3 *Marriage breakdown and marriage-saving*

Marriage-saving as the appropriate response to marriage breakdown was confirmed with the appointment, in 1983, of a Joint Committee on Marital Breakdown ‘to consider the protection of marriage and of family life, and to examine the problems which follow the breakdown of marriage, and to report to the houses of the Oireachtas.’<sup>50</sup> The Committee’s 1985 report began; ‘[t]he committee recognised the pre-eminent desire of all concerned to ensure insofar as possible the preservation and protection of marriage.’<sup>51</sup> It is notable that individual marriage did not require protection; rather the objective was to defend the institution of marriage. A decrease in the *rate* of marriage was a ‘cause for concern’ making it ‘necessary to tackle the problems which give rise to this’ and to ‘make marriage as secure and viable as humanly possible.’ Thus, ‘much of the committee’s deliberations focused on the protection of marriage and family life.’<sup>52</sup>

### 6.2.4 *The political objective of marriage-saving*

The expansion of social provision had led to the production of statistics about the rate of marriage failure, which in turn posed the question of how it could be controlled, minimised, and regulated. The Irish government had already accepted that the relationship behaviour of the population was an issue for which it had responsibility. Furthermore, in seeking to reduce the rate of marriage breakdown, government attention was directed toward the protection of intact marriage. It was assumed that marriage was a social good, and marriage breakdown (or alternative relationship

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<sup>50</sup> The Committee was composed of 11 Dáil deputies and 5 members of the Seanad of which eight were men and eight women. Joint Committee on Marital Breakdown, *Report* (PI 3074, Stationery Office 1985) vii.

<sup>51</sup> *ibid*, 1.

<sup>52</sup> *ibid*, 1.

practices) a social problem. Crucially, the *phenomenon* of marriage breakdown was the problem, not its practical effects.<sup>53</sup>

Two questions arise in relation to how government assumed the social necessity of marriage, and formulated the marriage protection doctrine. First the meaning of ‘marriage’ in this context, and secondly, the forms of knowledge deployed in constructing it as a social good. The Joint Committee on Marital Breakdown deferred to the terms of the Constitution in defining the form of marriage requiring protection:

The pledge [in article 41.3.1] to guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations including the pledge given in Article 41.2.2 as to the position of the mother in the home, will be given special protection, so that it will continue to fulfil its functions as the basis of the family and as a permanent, indissoluble union of man and woman.<sup>54</sup>

With regard to the truth that marriage was a socially privileged relationship, the Joint Committee relied on natural law:

The rights of the family recognised by the Constitution are ‘antecedent and superior to all positive law’ and are firmly based on natural law which is ‘of universal application and applies to all human persons’ *Northants County Council v ABF* [1982] ILRM 164. These rights are also ‘inalienable and imprescriptible.’<sup>55</sup>

Legal articulations of the meaning of marriage and its social importance shaped the views of the Committee, they were also instrumental in determining how government went about the marriage saving project. Article 41 of the Constitution assumed a new political status in the 1980s, but not because government decided to enforce its terms.

Rights-based arguments, suggesting the usefulness of the Constitution as a limiter of

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<sup>53</sup> The Joint Committee on Marital Breakdown, despite producing a report of over 400 pages in length, considered the practical effects of marriage breakdown in three short paragraphs. One noted that marriage breakdown may often result in a decrease in the standard of living of all concerned, the second that the State may incur additional costs in social housing and legal aid, and the third that ‘financial considerations’ might compel couples ‘to subsist in a marriage that is no longer socially or emotionally viable. *ibid* 28 – 29.

<sup>54</sup> *Murphy v AG* [1985] IR 241, as quoted at Joint Committee on Marital Breakdown, *Report*, 5.

<sup>55</sup> Joint Committee on Marital Breakdown, *Report*, 5.

State action, produced a series of politically motivated judicial reviews of legislation that in turn re-enforced the importance of marriage to the maintenance of social order.

### **6.3 Protecting Marriage – A New Reform Imperative.**

#### *6.3.1 The morality of constitutional marriage*

When judicial review of State action by reference to the fundamental rights provisions of the Constitution began in 1965 with the Supreme Court decision in *Ryan v Attorney General*,<sup>56</sup> a papal encyclical provided the source of the unremunerated right to bodily integrity relied upon by the plaintiff.<sup>57</sup> In the 1951 case, *In Re Tilson's Infants* Gavin Duffy J had referred to the moral nature of the marital family:

The cardinal position ascribed to the family by our fundamental law is profoundly significant; the home is the pivot of our plan of life. The confused philosophy of law bequeathed to us by the nineteenth century is superseded by articles which exalt the family by proclaiming and adopting in the text of the Constitution itself the Christian conception of the place of the family in society and in the State.<sup>58</sup>

The Supreme Court adopted similar reasoning in 1964, in rejecting, as not part of natural law, the proposition that the father of an illegitimate child had a 'natural right' to a say in its upbringing.<sup>59</sup> Walsh J invoked natural law in *McGee v Attorney General*, holding that the fundamental rights provisions of the Constitution:

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.<sup>60</sup>

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<sup>56</sup> A challenge to the fluoridation of water supplies which ultimately failed, [1965] IR 294.

<sup>57</sup> *ibid* at 314. Kenny J accepted that there was an unenumerated and justiciable right to bodily integrity. He referred to the Encyclical letter 'Peace on Earth' as supporting his conclusion.

<sup>58</sup> [1951] 1 IR 1, 15.

<sup>59</sup> *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567.

<sup>60</sup> [1975] 109 ILTR 29, 40.

The Irish Courts had begun to adopt the idea that individual claims to justice could limit State action, and that these rights-based claims derived their authority from an antecedent order beyond positive law. Consequently, the political value of rights-claims and the rhetoric of natural law was used in the 1980s, not to challenge the social primacy of marriage, but to re-enforce it.

### 6.3.2 *Producing legal knowledge about marriage*

In 1964, the Supreme Court had confirmed Article 41's textual implication that the 'family' attracting constitutional protection was that based on marriage.<sup>61</sup> In 1982, relying on this interpretation, Francis and Mary Murphy sought judicial review of a number of sections of the Income Tax Act 1967.<sup>62</sup> The Act deemed a married woman's income to be that of her husband for tax purposes,<sup>63</sup> gave a married man a tax-free allowance that was more than, but not double, that allocated to a single person. Further, the incomes of husband and wife were aggregated in determining the rate of tax payable. Tax bands were the same for married couples and single persons. Thus, married couples paid more tax than cohabiting couples whose incomes were not added

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<sup>61</sup> *State (Nicolau) v An Bord Uchtála* [1966] IR 567.

<sup>62</sup> Section 192(1) of the Income Tax Act 1967 stated:

Subject to the provisions of this Chapter, a woman's income chargeable to tax shall, so far as it is income for a year of assessment or part of a year of assessment during which she is a married woman living with her husband, be deemed for income tax (including sur-tax) purposes to be his income and not to be her income, but the question whether there is any income of hers chargeable to tax for any year of assessment and, if so, what is to be taken to be the amount thereof for tax purposes shall not be affected by the provisions of this subsection.

<sup>63</sup> Despite the provisions of the Married Women's Status Act 1957 many government measures continued to assume that husband and wife were the same person for regulatory purposes. The legal imperative to separate property had not yet permeated political discourse. Section 5 of the Act states: 'A husband and wife shall, for all purposes of acquisition of any property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons.'

together. The differential in tax-free allowances disadvantaged all working married couples, the effects of aggregation increased with income.<sup>64</sup>

There were two principal grounds of challenge. First, that the relevant provisions, in disadvantaging married couples *vis a vis* cohabitantes, was a breach of the equality guarantee in Article 40.1 of the Constitution. Secondly, that the financial preferencing of cohabitation over marriage represented a failure to protect with special care the family based on marriage in accordance with Article 41.2.1. In the High Court, Hamilton J rejected that part of the claim that related to tax-free allowances because:

there is a difference of social function between a husband and wife living together and single people living together to which the legislature was entitled to have regard. The husband and wife living together do so as a family recognised by the Constitution. The law or the Constitution does not recognise or have regard to any other union or liaison between single persons.<sup>65</sup>

In other words, government could not equate marriage with cohabitation for any purpose. The judge did accept that the aggregation rules were a breach of the equality guarantee in Article 40.1, 'as they discriminate invidiously against married couples,

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<sup>64</sup> Every worker was allocated a personal allowance, an amount of income that was not subject to tax. Married couples were jointly taxed, and even if both worked, their joint personal allowance was less than double the single allowance. On the other hand, a cohabiting couple who both worked received a single allowance each. Income aggregation related to the rate of tax paid. In the years 1977-1978, to which the claim related, there were four income tax bands: 20 percent, 25 percent, 35 percent, and 45 percent. Income over the personal allowance was taxed in bands at each of these rates. The first £500 at 20 percent, the next £1000 at 25 percent, the next £3000 at 35 percent, and the balance at 45 percent. These bands applied to single taxpayers, but for married persons their incomes were not treated separately for banding purposes. Rather, they were added together. A cohabiting couple were better off than a married couple if their joint taxable income exceed £730 (a working wife's tax free allowance of £230 was given to a married man if his wife worked). The most significant differential between married and co-habiting couples arose on high incomes. Two cohabitantes could each have a taxable income of up to £4,500 before paying tax at the highest rate. A married couple paid the highest rate on a *joint* income of £4,500. The Murphys, both teachers, had a combined taxable income of £5,990 on which they paid tax of £2070.50. A cohabiting couple with similar incomes paid £342.00 less tax (an additional 3% of total income on the Murphys' salaries). The comparative effects are set out at [1982] 1 IR 241, 261. Unemployment assistance for a married couple in 1977 was £17.60 per week, Social Welfare Act 1977 s 4. (£915.20 per year – less than one sixth of the Murphy family income after tax).

<sup>65</sup> [1982] 1 IR 241, 267.

*and the husband in particular*, and cannot be justified on any ground’<sup>66</sup> (my emphasis). He also ruled that aggregation infringed the marriage protection guarantee in Article 41.

On appeal, the Supreme Court again rejected the claim in respect of tax-free allowances, and narrowed the grounds on which the aggregation rules were unconstitutional, declaring them an infringement of Article 41 only. Kenny J accepted that:

[t]here is, admittedly, an inequality for income-tax purposes between, on the one hand, married couples living together and, on the other hand, married couples who are separated or unmarried couples living together. That inequality, however, is justified by the particular social function under the Constitution of married couples living together.<sup>67</sup>

The aggregation rules were declared unconstitutional because;

the nature and potentially progressive extent of the burden created ... is such that, in the opinion of the Court, it is a breach of the pledge by the State to guard with special care the institution of marriage and to protect it against attack.<sup>68</sup>

In other words, the disproportionate increase in tax liability at higher incomes was an attack on marriage.

Kenny J, in the Supreme Court, adopted a natural law perspective on marriage and the family it supported, affording marriage a privileged position in the natural order outside the domain of State regulation:

It is to be noted that Article 41 has three sections. Section 1 recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law. It is because of those fundamental features that the State gives the guarantee in s. 1, sub-section 2.

Section 2 stresses the importance of woman in the home and pledges that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

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<sup>66</sup> [1982] 1 IR 241, 274.

<sup>67</sup> [1982] 1 IR 241, 283.

<sup>68</sup> [1982] 1 IR 241, 287.

Section 3, sub-s. 1, must be read not only in the context of the whole of s. 3 but in that of the whole Article. This means that the pledge given in s. 3, sub-s. 1, to guard with special care the institution of marriage is a guarantee that this institution in all its constitutional connotations, including the pledge given in Article 41, s. 2, sub-s. 2, as to the position of the mother in the home, will be given special protection so that it will continue to fulfil its function as the basis of the family and as a permanent, indissoluble union of man and woman.<sup>69</sup>

This view of the unique social function and moral nature of marriage was endorsed by the Supreme Court in *O'B v S*.<sup>70</sup> In that case, the court refused to interpret the word 'issue' in the Succession Act 1965 to include children born outside marriage. Walsh J accepted that 'in general speech, the word "issue" might well refer to children born within marriage or children born out of marriage,'<sup>71</sup> but this was not the case in the context of succession law. The plaintiff could not inherit her father's estate under the rules on intestacy, because she was 'not the child of a family based upon marriage.'<sup>72</sup>

In *Dennehy v Minister for Social Welfare and Attorney General*,<sup>73</sup> Barron J, in the High Court, held that making a social welfare payment available to a deserted wife, but not a deserted husband, was not, having regard to Article 41.2 of the Constitution, 'unreasonable, unjust or arbitrary.'<sup>74</sup> In *Hyland v Minister for Social Welfare and the Attorney General*,<sup>75</sup> Barrington J, in the High Court, expressed sympathy with a legislator:

attempting to enact social welfare legislation. ... He must be careful that the legislation contains no element of sexual discrimination ... [b]ut he must also guard the institution of marriage and must not ... make the financial position of the working wife, when compared with the financial position of the wife who stays

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<sup>69</sup> [1982] 1 IR 241, 286–287.

<sup>70</sup> [1984] IR 316.

<sup>71</sup> [1984] IR 316, 329.

<sup>72</sup> [1984] IR 316, 329.

<sup>73</sup> Unreported High Court (26 July 1985), Barron J.

<sup>74</sup> [1989] IR 624, 19.

<sup>75</sup> [1989] IR 624.



at home, so attractive as to encourage mothers to take up outside work to the neglect of their work in the home.<sup>76</sup>

At issue in *Hyland*, was the validity of social welfare legislation, the net effect of which was to limit the total social welfare entitlement of a married couple to the maximum amount payable to one spouse plus an adult dependent. The section operated to reduce Mr Hyland's rate of unemployment assistance because his wife was entitled to unemployment benefit in her own right. Barrington J suggested that the central issue in the case was 'whether the State has ... guarded with "special care" the institution of marriage.' A cohabiting, but not married, couple in similar circumstances could potentially receive the total of their separate entitlements without limitation. This case was slightly less clear-cut than *Murphy*, because the department of social welfare could use 'benefit and privilege' rules to limit the entitlements of cohabiting couples, although evidence was adduced that they did not, in practice, do so. Barrington J held, and the Supreme Court confirmed, that the impugned sections of the social welfare code 'penalised the married state' and were therefore unconstitutional.<sup>77</sup>

Article 41, as interpreted by the Superior Courts in the 1980s, therefore endorsed the marriage-saving objective of government. These decisions provided apparently objective authority for the proposition that marriage was self-evidently a social good deserving protection, and that the form of marriage attracting protection was the lifetime, dependency model adopted by the vast majority of the Irish married population. Legal knowledge provided a method for identifying optimal relationship behaviour, but this simply reflected and consolidated all of the notions about marriage

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<sup>76</sup> [1989] IR 624, 631.

<sup>77</sup> Government addressed this difficulty by reducing the payments to all couples rather than increasing those to married couples, indicating that there was a limit to the state's support for marriage, particularly among the working classes. Social Welfare (No 2) Act 1989 s 1(b) limits social assistance payments to 'couples' defined as 'a married couple who are living together or a man and woman who are not married to each other but are cohabiting as man and wife.'

that had circulated between politics, religion, and individual practice since the foundation of the State. Although claiming objectivity, these legal constructions of marriage, and its place in society, reflected the dominant morality of 1980s Ireland.

### 6.3.3 *Marriage protection and legal expertise*

Legal knowledge, in the form of constitutional interpretation, supported the political objective of marriage saving. Legal expertise also demonstrated its utility as a technique for achieving this aim with the establishment of a Law Reform Commission in 1975.<sup>78</sup> Following publication of five working papers relating to marriage law,<sup>79</sup> the Commission published its *First Report on Family Law* in 1981.<sup>80</sup> The theme of the working papers and report was the ‘protection of the family against damage to the continuity and stability of relationships among its members.’<sup>81</sup> Seven further reports on family law were published between 1982 and 1985 dealing with: divorce *a mensa et thoro* and related matters; restitution of conjugal rights, jactitation of marriage<sup>82</sup> and related matters; nullity of marriage, and three separate reports relating to public

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<sup>78</sup> Law Reform Commission (Establishment Day) Order 1975, SI 1975/214. The Commission’s objective was to ‘keep the law under review ... undertake examinations and conduct research with a view to reforming the law and [to] formulate proposals for reform.’ Law Reform Commission Act 1975, s 4.

<sup>79</sup> Law Reform Commission, *Working Paper No 2: The Law Relating to the Age of Majority, the Age for Marriage and some Connected Subjects* (LRC 1977); Law Reform Commission, *Working Paper No 4: The Law Relating to Breach of Promise of Marriage* (LRC 1978); Law Reform Commission, *Working Paper Number 5: The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse* (LRC 1978); Law Reform Commission, *Working Paper No 6: The Law Relating to Seduction and the Enticement and Harboursing of a Child* (LRC 1979); Law Reform Commission, *Working Paper No 7: The Law Relating to Loss of Consortium and Loss of the Services of a Child* (LRC 1979).

<sup>80</sup> Law Reform Commission, *First Report on Family Law* (LRC 1980). The report was completed on the 19 September 1980, and published in March 1981.

<sup>81</sup> *ibid.*, 2.

<sup>82</sup> The action for jactitation of marriage was abolished in Ireland by s 34 of the Family Law Act 1995. Its purpose was to restrain untrue assertions that a marriage existed between the petitioner and the respondent. There were three defences, the denial of the allegation of marriage having been made, that the parties were in fact married and that the petitioner acquiesced in the allegations. Law Reform Commission, *Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters* (LRC 6 1983), 13-14.

international law aspects of marriage, divorce and judicial separation.<sup>83</sup> More than a third of the Commission's output between 1981 and 1985 related to aspects of the legal regulation of marriage.

The Commission's recommendations for new legal techniques, in hindsight, seem hopelessly naïve. For example, in the *First Report on Family Law* the Commission suggested a 'family action for adultery ... available to either spouse for the benefit of the members of the family, comprising each spouse and the children.'<sup>84</sup> Damages would be available to both the 'innocent' and 'adulterous' spouse in an action taken against the third party 'responsible' for spousal adultery.<sup>85</sup> Nonetheless, the Commission's reports on marriage law during this period had two important practical implications. First, they demonstrated the historic importance of law and legal mechanisms in the regulation of marriage,<sup>86</sup> and secondly, they illustrated law's efficacy in identifying and managing abnormal (amoral) marital behaviour.

Law, in the form of constitutional protection, and the imperatives of an antecedent 'natural order' defined the 'normal' marital relationship: lifetime, heterosexual, gendered. Centuries of marital litigation based on the canon law of the established Christian church supported this construction of normality, but it also identified the

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<sup>83</sup> Law Reform Commission, *Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters*; Law Reform Commission, *Report Divorce a Mensa et Thoro and Related Matters* (LRC 8 1983); Law Reform Commission, *Report on Nullity of Marriage* (LRC 9 1984); Law Reform Commission, *Report on Recognition of Foreign Divorces and Legal Separations* (LRC 10 1985); Law Reform Commission, *Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage* (LRC 19 1985); Law Reform Commission, *Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriage* (LRC 20 1985).

<sup>84</sup> Law Reform Commission, *First Report on Family Law*, 4.

<sup>85</sup> *ibid*, 4.

<sup>86</sup> As noted in chapter one, the jurisdiction of the courts in relation to marriage largely derived from the canon law of the established church. The relationship between the Christian technique of confession and the morally grounded jurisdiction of the family courts prior to its comprehensive reform in 1989 warrants additional investigation. For now, it is enough to note that the legal rules recorded by the Law Reform Commission were direct descendants of the Christian canonical tradition.

abnormal. The Law Reform Commission's methodology was to state the existing legal position and then make proposals for reform. Its reports, therefore, contained detailed accounts of historical (often centuries old), case law detailing marital irregularity, individual deviance, and aberration. A 1983 report on Divorce *a mensa et thoro*, for example, began with an examination of the grounds upon which the order should relieve the duty to cohabit.<sup>87</sup> There followed a detailed discussion of the necessity of penetration in the commission of adultery,<sup>88</sup> the level of violence or mental torture that constituted cruelty,<sup>89</sup> the naturalness or otherwise of sodomy, and whether it applied to both men and women.<sup>90</sup> Each of these grounds had its own reference library of cases. Wilful communication by one spouse of venereal disease constituted physical cruelty in the 1854 case of *Chesnut v Chesnut*.<sup>91</sup> In *McA v McA*, the husband's refusal to communicate with his wife other than through notes relayed by their three-year-old daughter constituted mental cruelty.<sup>92</sup> A report on nullity also catalogued marriages doomed to failure by such abnormal behaviours as homosexuality, schizophrenia, impotence, paedophilia and emotional incapacity.<sup>93</sup> Transsexuality, 'a psychological disposition that makes [individuals] believe that they are really members of the other

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<sup>87</sup> The duty to cohabit was enforceable by either spouse through the ecclesiastical remedy of restitution of conjugal rights. The main use of this remedy appears to have been the securing of financial security by either establishing desertion for the purpose of obtaining a divorce (in England), maintenance under the 1888 Act or simply a place to live. The most recent Irish reported case is *Elenora Dunne v Edward Dunne* [1947] 1 IR 227. The wife initiated the action when she gave birth to her husband's child following her voluntary departure from the family home. Dixon J at 235, noted that 'her present desire may be largely motivated by the economic necessity of providing for herself and the child.'

<sup>88</sup> Law Reform Commission, *Report on Divorce a Mensa et Thoro and Related Matters*, 3, citing *Dennis v Dennis* [1955] P 153 (Court of Appeal).

<sup>89</sup> The Commission notes that 'the courts have on several occasions stressed that they will not normally grant a decree on proof of one act of physical violence.' *ibid*, 4-5.

<sup>90</sup> The decree of divorce *a mensa et thoro* was available on the grounds of 'unnatural practices performed by the husband' but the courts were reluctant 'to find it proved on the evidence of the wife alone.' *ibid*, 12 – 13.

<sup>91</sup> (1854) 164 ER 114 as referred to *ibid*, 7.

<sup>92</sup> [1981] ILRM 361 (High Court).

<sup>93</sup> Law Reform Commission, *Report on Nullity of Marriage*, 2.

sex trapped in the body of the wrong sex'<sup>94</sup> was also a threat, and any marriage by “‘a Lunatic by any Inquisition ...” or by a “Lunatic or Person under a Phrenzy, whose Person or Estate by virtue of any Act of Parliament ... shall be committed to the Care and Custody of Particular Trustees”<sup>95</sup> was absolutely void.<sup>96</sup>

As well as demonstrating the horrors of sub-normal relationship practice, the Commission’s reports laid claim to the continuance of legal machinery into the future. Law’s approach to marriage failure in the past - providing a ritualised forum within which warring spouses could apportion blame - had successfully identified and managed many dysfunctional relationships in the past.<sup>97</sup> Speaking from a position of authority, the Commission recorded the long history of law’s intricate apparatus that individualised marital abnormality. Marriage failure, when seen from a legal perspective, was an individual failure. Specific spouses, with particular disadvantages were unable to maintain lifetime marriages – their problems were personal, not social or structural.

#### *6.3.4 Law and the normalising objectives of government.*

The Irish government, in attempting to address the social problem of marriage breakdown had formulated the political objective of marriage saving. This objective, and the form of marriage in need of protection, was supported by superior Court

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<sup>94</sup> *ibid*, 6.

<sup>95</sup> *ibid*, 13, quoting from The Marriage of Lunatics Act 1811.

<sup>96</sup> These cases also illustrate the assimilation of psychiatry into the legal code, a phenomenon observed by Foucault in *Discipline and Punish*. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, 2nd edn, Vintage Books 1977).

<sup>97</sup> Family Law cases were, and are, subject to the *in camera* rule which prohibits identification of the parties to marital disputes and prohibits access to family law cases by the media or general public. Section 45 of the Courts (Supplemental Provisions) Act 1961 provided for the rule in relation to matrimonial causes, and section 25 of the Family Law (Maintenance of Spouses and Children) Act 1976 provided for the hearing of applications under the Act in private. The Civil Liability and Courts Act 2004, s 40, relaxed the rule slightly.

interpretations of Article 41. Lifetime, dependency model marriage was accepted by government as ‘normal’ social behaviour, a position supported, to an extent, by statistical information regarding its preponderance, but principally by cultural, and later, legal understandings of the meaning of marriage. Law also offered itself as a means to identify and control marital abnormality. The legal complex therefore adopted a number of roles that acted (even when purporting to challenge political action) to support the marriage saving objectives of government.

Foucault describes the process of normalisation necessary to secure bio-political objectives. It requires a social understanding of what is normal, a method for measuring normality and a set of rules of judgment.<sup>98</sup> Francois Ewald, in using the insurance industry as an example of this process, argues that law, in an insurance society, imposes a rule that refers back to social understanding of risk rather than transcendent notions of right. He further argues that this is a departure from law’s traditional in apportioning blame.<sup>99</sup> In 1980s Ireland, lifetime, heterosexual, dependency-model marriage represented social understanding of normal relationship behaviour. This ideal of normality emerged from social practice and religious doctrine; however, legal knowledge supported it with the transcendent power of natural law, not ideas about social risk. Furthermore, the traditional role of law in apportioning blame was not apposite to the construction of normal relationships – it supported it. Historically, legal techniques had identified and catalogued abnormal individuals, supporting the idea that identifying, educating and re-forming spouses could save marriage by preventing marriage breakdown. Thus, law does not necessarily have the benign role suggested by Ewald. Bio-political, normalising objectives like marriage-

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<sup>98</sup> Michel Foucault, “*Society Must Be Defended*” *Lectures at the College De France, 1975* - 76 (David Macey tr, Picador 2003), 247.

<sup>99</sup> Francois Ewald, ‘Norms, Discipline, and the Law’ (1990) 30 *Representations* 138, 146.

saving focus on the division between normal and abnormal behaviours and individuals. Although remaining open to the possibility of alternative ways of living (the Irish government did not deny that marriage breakdown and desertion occurred), the formulation of a normalising objective necessarily implies the existence of alternative behaviours inhabiting a curve of abnormalities.<sup>100</sup> More problematically, these abnormalities become the object of political techniques designed to identify, control, and modify them. The abnormal is not excluded and repressed, but becomes the focus of ‘power that fashions, observes, knows, and multiplies itself on the basis of its own effects.’<sup>101</sup>

## **6.4 Implementing the Marriage-Saving Objective**

### *6.4.1 Constitutional reform*

Article 41, as promulgated in 1937, specifically prohibited the enactment of any legislation facilitating the dissolution of marriage, reflecting political and social understanding of marriage as a lifetime commitment. By the mid 1980s, this ban, easily removed should political will and a majority of the electorate support the introduction of some form of dissolution,<sup>102</sup> by the mid-1980s, had become central to political discussion of marriage breakdown. The 1986 census had identified 40,000

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<sup>100</sup> In Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977 - 78* (Michel Sennellart ed, Graham Burchell tr, Palgrave Macmillan 2007, Foucault notes, at 63, that:

we have a plotting of the normal and the abnormal, of different curves of normality, and the operation of normalization consists in establishing and interplay between these different distributions of normality and [in] acting to bring the most unfavourable in line with the more favourable.

<sup>101</sup> Michel Foucault, *Abnormal: Lectures at the College de France 1974 – 1975* (Valerio Marchetti and Antonella Salomoni eds, Graham Burchell trs, Picador 2003), 48.

<sup>102</sup> Amendment of the Irish Constitution requires a simple majority of those voting in a referendum following the passage of a referendum Bill through the Oireachtas. Article 46 and 47, Constitution of Ireland.

separated, divorced (abroad) or deserted individuals,<sup>103</sup> and it had become necessary for government to confront the statistical reality that, at least for some marriages, the commitment did not last for life.

The 1983 report of the Committee on Marriage Breakdown had recommended a referendum on the removal of the ban on divorce in Article 41.3.3 and, if successful, the introduction of legislation to facilitate dissolution. The Committee noted that the simple removal of the ban would not be enough, because legislation enabling divorce would conflict with marriage protection doctrine of Article 41.<sup>104</sup> It would be necessary to include specific authorisation for divorce legislation in the Constitution. The Commission was prepared to accept that marriage breakdown happened, but that this should not detract from the marriage protection objective.

A similar approach was adopted in a 1986 attempt to amend Article 41. The Minister for Justice Alan Dukes in introducing the Tenth Amendment to the Constitution Bill, 1986 to Dáil Éireann commented that:

It is wrong to contend that divorce legislation “defines” all marriages as dissoluble. It does no such thing, rather it defines the circumstances and conditions in which a marriage that has ceased to be a source of happiness and strength to those involved may be brought to an end. The constitutional amendment proposed in this Bill and the further legislation which the Government will propose will, together, provide that a marriage can be dissolved in law only in very restrictive circumstances. There is no compulsive power in this amendment nor will the supporting legislation contain any obligation on those who do not wish to do so to use the mechanism it will set up.<sup>105</sup>

Facilitating divorce, in the minister’s view, did not change the essential nature of marriage as a lifetime commitment.

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<sup>103</sup> Lunn, Fahey, and Hannan, *Family Figures: Family Dynamics and Family Types in Ireland, 1986 – 2006*, 45.

<sup>104</sup> Joint Committee on Marital Breakdown, *Report*, 88.

<sup>105</sup> Dáil Deb 14 May 1986, vol 366, col 793-4.



#### 6.4.2 *The meaning of 'Divorce' in 1986?*

The Taoiseach, Garret Fitzgerald, announced the holding of the 1986 referendum at a press conference in Government buildings on April 23 1986. His statement was broadcast live on RTE television and outlined details of the proposed amendment and the provisions of legislation that would be enacted should the referendum succeed. His statement is notable for how he conceptualised divorce, not as a way to end marriage but as a route to the stabilisation of 'irregular unions:'

In thus providing the people with an opportunity to express themselves on this subject, the parties in government are conscious that diverse views may be held on whether the introduction of divorce on the restrictive basis proposed is for the social good, or is necessary for the relief of cases of marriage breakdown where spouses have entered into or propose to enter into other liaisons. The parties believe that the balance of the social good will be served by making this provision, and while it is accepted that the divorce provision may have a negative effect on some existing marriages, on the other hand, the number people now involved in irregular unions and the number of children adversely affected by the situation is, in the considered view of the parties, more destabilising.<sup>106</sup>

The need to provide a 'second chance' for the victims of marital breakdown was also emphasised in the Dáil by Deputy Alan Shatter, a family lawyer who would later be instrumental in shaping judicial separation legislation.

Divorce does only one thing. It extends the right of remarriage to those whose marriage have collapsed totally. To those who argue we should not have divorce, I ask what social advantage arises in preventing a 28 year old battered wife or a 30 year old deserted husband from remarrying when there is no prospect of them ever again living with the person they first married.<sup>107</sup>

Divorce, therefore, had the capacity to save the institution of marriage by replacing failed relationships with new, and better ones. The social problems associated with marriage breakdown (violence, poverty, social instability) could be solved by saving

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<sup>106</sup> Garret Fitzgerald, 23 April 1986 as transcribed by Michelle Dillon from recordings of the 'Today Tonight' television programme produced by RTE. Michelle Dillon, *Debating Divorce* (University of Kentucky Press 1993), 33.

<sup>107</sup> Dáil Deb 19 February 1986, vol 363, col 3238. In debate on a proposal by the Labour Party to introduce the 10th Amendment to the Constitution (No. 2) Bill 1985. The Bill, which proposed deletion of the divorce ban from the Constitution, did not progress.

existing marriages. For the unsalvageable, a divorce jurisdiction would address the problems of marriage breakdown through the provision of a substitute spouse.

#### *6.4.3 Divorce, remarriage and the protection of marriage.*

The Tenth Amendment to the Constitution Bill 1986 proposed the removal of Article 41.3.2, and its replacement with a restrictive framework within which marriage could be dissolved.<sup>108</sup> Throughout debate on the Bill in the Oireachtas, deputies and senators emphasised the potential for remarriage. Mary Flaherty gave a number of examples of marital breakdown, and the advantages of remarriage for affected women: ‘I should like that woman to have a chance in the future to meet somebody else so that her son will have a different model as a father – and a different model as a family.’<sup>109</sup> Alan Shatter similarly presents divorce as a route to re-marriage:

Currently, 9,353 wives are in receipt of deserted wife's allowance or benefit and for those 9,353 wives, all of whom are deserted and none residing with their husbands, presumably there are 9,353 husbands living somewhere ... [T]hey know that, as our Constitution stands at the moment, the possibility of their ever experiencing a real, happy marriage within the laws of the State is non-existent. How can it be suggested that we are enhancing family life in Ireland, giving dignity to the family, behaving compassionately and humanely, when we say to all of those wives, “We are sorry, we are sacrificing you in the interests of some concept of public good”? How many of those wives wish to remarry-and would have a possibility of remarrying if our Constitution did not prohibit it?<sup>110</sup>

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<sup>108</sup> The proposed new Article 31.2.3 stated:

Where, and only where, such court established under this Constitution as may be prescribed by law is satisfied that:

- (i) The marriage has failed;
- (ii) The failure has continued for a period of, or periods amounting to at least five years;
- (iii) No possibility of reconciliation exists between the two parties to the marriage, and
- (iv) Any other condition prescribed by law has been complied with, the court may in accordance with the law grant a dissolution of the marriage provided that the court is satisfied that adequate and proper provision having regard to the circumstances will be made for any dependent spouse and for any child of, or any child who is dependent on, either spouse.

<sup>109</sup> Dáil Deb 16 May 1986, vol 366, col 957.

<sup>110</sup> Dáil Deb 16 May 1986, vol 366, col 971.

Viewing the principal effect of divorce as a licence to remarry was not only the purview of divorce advocates. Fianna Fail's Padraig Faulker, who opposed divorce, argued that:

If divorce is added to our Constitution, the second marriage will have all the rights prescribed under the Constitution and all the supports that were there for the first family will then pass to the second family.

If, for example, the court allocates a part of the husband's income to his first wife, because the Constitution declares that the family rights are antecedent and superior to all positive law and as this now applies to the second family, the second wife can have a constitutional right to contest the right of the first wife to the allowance and with the full force of the Constitution behind her claim.<sup>111</sup>

The over-riding theme of both the pro and anti-divorce campaigns on the 1986 referendum was the protection of marriage, each side arguing that their position was the best way to achieve this objective.

#### *6.4.4 Social government and lifetime marriage.*

Although the referendum Bill was passed by the Oireachtas, it was rejected by voters.<sup>112</sup> Anti-divorce campaigners focused on the shift of legal protection from first to second families implicit in the government's proposal, and how such shift would impact, in particular on 'discarded' first wives.<sup>113</sup> As the first family would no longer be based on marriage, it would have no entitlement to constitutional protection, and women who entered such marriages in good faith expecting them to last for life would

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<sup>111</sup> Dáil Deb 16 May 1986, vol 366, col 945.

<sup>112</sup> The turnout was 60.8 percent of the electorate, 64.7 percent voted against and 36.3 percent in favour. Percentages calculated from raw data contained in Department of Environment, Community and Local Government, *Referendum Results 1937 – 2012* (Dublin, Department of the Environment, Community and Local Government 2012).

<sup>113</sup> The tenor of the debate is captured by Mary Maher in the Irish Times reporting on Dáil proceedings following the issue of a pastoral letter opposing the referendum:

Mary Harney rose to cry out against the insult to women, poor creatures, waiting to be discarded for younger models the minute the amendment lets husbands 'off the hook.' 'I am interested in the views of the Catholic Church,' deputy Harney commented coolly, 'In one part of the Archdiocese of Armagh, there is divorce legislation, and in the other part, there isn't.' But the old wives on the Northern side aren't being strung out with the dinner leftovers at any appreciable rate.'

Mary Maher, 'Bishops' shadow enlivens debate' *The Irish Times* (Dublin, 16 May 1986).

be left without the incidents of the marriage protection doctrine. William Binchy, a leading anti-divorce campaigner and lawyer, pointed out early in the referendum campaign that many of the financial benefits accruing to women in marriage do so because it is a life-long constitutionally protected union. If it is not for life then entitlements, such as pensions, tax splitting,<sup>114</sup> the Family Home Protection Act and Succession laws make no sense.<sup>115</sup> Binchy made a powerful, and in the end convincing argument: lifetime marriage was central to how government of the social domain was conceived and achieved in 1980s Ireland. The ending of marriage through divorce would cause financial hardship, particularly for women. Whilst Binchy was able to articulate how women would suffer financially upon the introduction of divorce, Fine Gael Deputy, Alice Glen's election slogan was perhaps more memorable: 'Women voting for divorce is like turkeys voting for Christmas.'<sup>116</sup>

Despite the pro-divorce side also emphasising the need to protect marriage, its focus on the relief of suffering caused by inability to remarry meant that it had no effective counter-argument to the allegation that first families would suffer financial hardship. Proinsias de Rossa, leader of the Workers Party, although pro-divorce, was able to point out the inherent weakness in conflating protection of the constitutional family with the introduction of divorce.

There is ... an assumption that the only people who would either have the right to work or be willing to work following the breakdown or marriage are men. There

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<sup>114</sup> Prior to, and immediately following, the Supreme Court decision in *Murphy*, income tax rules were changed to provide double tax-free allowances and bands to all married couples, regardless of whether one or both were in employment. Section 8, Finance Act 1980.

<sup>115</sup> William Binchy, a legal academic had been to the forefront of the pro-life campaign leading the abortion referendum of 1983. He published a book in 1984 entitled *Is Divorce the Answer? An Examination of no-Fault Divorce against the background of the Irish Debate* (Irish Academic Press 1984) focusing on the economic effects of divorce.

<sup>116</sup> Mrs Glen first made this analogy in the Dáil during the debate on the Referendum Bill, remarking 'It occurs to me that any woman voting for divorce is like a turkey voting for Christmas' and repeated it to great effect in her campaign literature. Dáil Deb 14 May 1986, vol 366, col 843. A copy of her election literature is available at: <[irishelectionliterature.wordpress.com](http://irishelectionliterature.wordpress.com)> (accessed 8 January 2013).

is also an assumption that the only people who will get custody of the children following the breakdown of marriage are women. These assumptions underlie many of the attitudes being promoted by those who oppose divorce ... Article 41.2.1 ... refers to women, not wives or mothers ... the assumption there is that a woman's place is in the home and that society cannot survive without the unpaid labour of women in the home. I put it to Deputy Flynn and other deputies who argue similarly about the financial straits in which divorced women may find themselves that that attitude and the assumptions underlying it have more to do with the financial straits of women whether divorced, separated, deserted or indeed married than any legislation which we or any other State would pass.<sup>117</sup>

Deputy De Rossa refers to attitudes and assumptions in relation to divorce, but these same assumptions had formed the basis of social welfare and taxation policy since the foundation of the State. Government relied on, and assumed, not only lifetime marriage, but also a particular form of marriage in which men were breadwinners and women dependent homemakers. Despite employment equality legislation enacted in the 1970s, the vast majority of Irish married women remained financially dependent on their husbands, a position facilitated and assumed by the tax and social welfare systems. Government had created a network of government services that made life outside of marriage increasingly difficult for dependent women. These women were significantly better off if deserted by their husbands through death or departure than they could expect to be following divorce.

Although the 1986 divorce referendum is often characterised as a duel between tradition and modernity, or a victory for conservatism, when seen through the lens of dispersed relationships of power a more nuanced picture emerges. Dominant worldviews, such as that offered by the Catholic Church and supported by the Constitution and rulings of the superior courts, saw lifetime, dependency marriage as representing the natural order. A failure of marriage was a personal tragedy, but it also represented a threat to the stability of society itself. As observed by Foucault, in order

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<sup>117</sup> Speaking in the Dáil on his party's failed Tenth Amendment to the Constitution (No 2) Bill 1986. Dáil Deb 15 May 1984, vol 366, col 2317-2318.

for power to function, there must be, at some level, a common understanding of the issues at stake. These common understandings form the boundaries to power that both depend upon and re-inscribe common beliefs and assumptions.<sup>118</sup> Marriage, as described in the Irish Constitution, was one such common understanding. It facilitated management of the social domain by the State and encapsulated the wishes of individual citizens for their own lives. Divorce was constructed as the right to remarry because there was no available, alternative way of thinking about ending marriage. So intense was the relationship between marriage and the State, that imagining family life outside marriage was politically impossible. Providing the right to remarry was not enough because, as pointed out by anti-divorce campaigners, in 1980s Ireland it would amount to little more than a sanction for polygamy.<sup>119</sup> The limits to power that blocked the way for divorce were not conservatism or tradition, but common understandings of acceptable ways of living. Even for those not ideologically opposed to divorce, the extent of dependency marriage, and the lack of opportunities for women's self-sufficiency in 1980s Ireland, would surely have encouraged them to resist its introduction.

## **6.5 Political Strategies for Protecting Marriage**

### *6.5.1 The privileged role of law.*

The defeat of the divorce referendum meant that the political problem of marriage breakdown remained unresolved. A new Fianna Fail government, elected in February

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<sup>118</sup> Foucault, "Society Must be Defended:" Lectures at the Collège de France 1975 – 76, 24.

<sup>119</sup> Pamela Symes equates the absence of 'clean break' divorce with polygamy in 'Indissolubility and the Clean Break' (1985) 48(1) MLR 44, 60. Interestingly, this article was first published in the 1980s, and focuses on the then unresolved (in England) issues for dependent women post-divorce. She points out that although a potential for clean break had been introduced in England, social policy and practice did not have the capacity to facilitate it.

1987, promised a program of family law reform, and almost immediately following the election introduced the Family Law Bill 1987 to the Oireachtas. The Bill provided for the abolition of the common law action for restitution of conjugal rights, an action rarely commenced in the Irish courts. As Dáil deputy Maurice Manning pointed out, when sought, it was ‘a crude device, not to restore conjugal rights but as a motive for financial gain before the law at a future time.’<sup>120</sup> Fine Gael Senator Phil Hogan commented in favour of the 1987 Bill that, ‘it seems ludicrous to have a law on the Statute Book that compels two people to live together even though they may not be getting on with each other.’<sup>121</sup> However, facilitating their living apart was, in practical terms, more problematic.

The Joint Committee on Marital Breakdown had focused on the role of law in addressing the problem of marriage breakdown:

The committee acknowledges that the present law does not provide adequate protection for those persons whose marriages do not remain viable and that this, in itself is a threat to marriage.<sup>122</sup>

Similarly, the Law Reform Commission offered reformed marriage law as solution to marital difficulties, and the 1986 Divorce referendum emphasised the essential legal quality of the marriage relationship. Seanad debates on the Family Law (Protection of Spouses and Children) (Amendment) Bill 1987 illustrate the extent to which issues within couple relationships were perceived as properly dealt with through a specialised system of private law rules. Attempting to extend the regime of civil protection orders

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<sup>120</sup> Seanad Deb 15 July 1987, vol 116, col 2358. A husband might bring an action for restitution of conjugal rights against a wife in order to prove that she was in desertion and that he therefore had no duty to maintain her. A wife might bring an action hoping to produce evidence of desertion and therefore grounds for divorce *a mensa et thoro* or maintenance. The action had been abolished in England in 1970, and the Law Reform Commission in Ireland recommended its abolition in its 1983 Report *Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters*. The action was abolished in England and Wales by the Matrimonial Proceedings and Property Act 1970, s 20.

<sup>121</sup> Seanad Deb 15 July 1987, vol 116, col 2362.

<sup>122</sup> Joint Committee on Marital Breakdown, *Report*, 5.

‘to protect women against domestic violence,’<sup>123</sup> the Bill assumed that application to court for a restraining order could solve the problem of inter-spousal violence. Senator Nuala Fennell supported the legislation by reporting a recent incidence of ‘domestic’ violence:

In June 1986 a husband brought home three men from the pub and he invited his three friends to have intercourse with his wife. As the husband watched, the men took up the invitation. Neighbours heard the screaming and shouting of this woman and eventually rescued her and called the Garda. The husband and companions were arrested and charges were pressed by the Garda. Within two days that wife was pleading to have the case quashed. However, because of the grievous nature of what they had witnessed the gardaí went ahead with the case in the District Court. The outcome was that the case against the husband was struck out. The three defendants, who were charged with aiding and abetting, breach of the peace, common assault and indecent assault, were fined £500 each. The judge in this case claimed that he would have jailed the three men for a year but for the fact that the husband had been involved in inviting them into the house.<sup>124</sup>

Intending to highlight the extent of victimisation of wives by both their husbands and by (male) judges with no special training in dealing with family relationships, Senator Fennell managed to confirm that the solution to such victimhood lay with specialised family laws, civil protection orders and sympathetic judges. Her portrayal of wives as victims of domestic violence was uncontested, these women throughout the debate were referred to as ‘unfortunate people who live a life of hell,’<sup>125</sup> who are ‘battered’<sup>126</sup> and ‘beleaguered by matrimonial strife and difficulties.’<sup>127</sup>

### *6.5.2 Solving the problem of marriage breakdown – marriage law reform.*

Marriage, as described by the legal truth of the Constitution, was lifetime, heterosexual, and gendered. The courts supported political moves to protect marriage,

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<sup>123</sup> Minister for Justice Gerard Collins Seanad Deb 15 July 1987, vol 116, col 2379. The Bill was, however, couched in gender-neutral terms using the term ‘spouse’ rather than ‘husband’ and ‘wife.’

<sup>124</sup> Seanad Deb 15 July 1987, vol 116, col 2384-5.

<sup>125</sup> Mary Harney, Progressive Democrats, Dáil Deb 19 November 1987, vol 375, col 1416.

<sup>126</sup> Pat McCartan, Workers’ Party, Dáil Deb 19 November 1987, vol 375, col 1402.

<sup>127</sup> Pat McCartan, Workers’ Party, Dáil Deb 19 November 1987, vol 375, col 1402.



and the Law Reform Commission demonstrated the historical link between marital problems and legal processes. The failure of the divorce referendum meant that the problems caused by marriage breakdown could not be solved by divorce, but the only authoritative information available to government in relation to marriage was legal. It was therefore inevitable that the legal complex would have a central role in solving the problem with marriage.

Opposition deputy, Alan Shatter, introduced the Judicial Separation and Family Law Reform Bill 1987 to the Oireachtas in private member's time.<sup>128</sup> The Bill provided for an action for judicial separation, replacing the ecclesiastical remedy of divorce *a mensa et thoro*. The main legal effect of the legislation was to suspend the duty to cohabit, although the obligation had become unenforceable with the passage of the Family Law Act 1987. The Court could also make ancillary orders providing for maintenance, lump sum payments, and property adjustment. Deputy Shatter described the Bill as, 'a social reforming' measure 'which is designed to encourage spouses whose marriages have broken down to reach a civilised agreement about their future arrangements without the necessity of court proceedings.'<sup>129</sup> The ancillary order provisions would benefit women fulfilling their constitutional role:

these provisions will, for the first time in our law, afford a substantive recognition of the work done by the wife in the home and for the first time in legislation give statutory expression to the constitutional duty imposed on the State to recognise the worth of the work done by a wife in the home. Despite all the constitutional rhetoric on this issue we have not, up to now, conferred such recognition on such work or required the courts to take such work into account when determining a wife's interests in family property acquired during the course of a marriage.<sup>130</sup>

With the support of the Government, the Bill passed all stages in the Oireachtas in April 1989, becoming law on 18 October.

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<sup>128</sup> Alan Shatter was a practising solicitor specialising in family law, and Fine Gael front bench spokesperson on law reform between 1987 and 1988.

<sup>129</sup> Dáil Deb 2 February 1988, vol 377, col 890-1.

<sup>130</sup> Dáil Deb 2 February 1988, vol 377, col 890.

## 6.6 Marriage-Saving Law

### 6.6.1 *The Judicial Separation and Family Law Reform Act 1989 (the 1989 Act)*

Protecting marriage as an institution meant the defence of its essential characteristics as understood in 1989. Enacted to protect dependency marriage, the terms of the 1989 Act aimed to maintain women in a dependent role by enforcing their husband's commitment to lifetime financial support. The Bill provided for variation of maintenance orders at any time following the grant of the decree of judicial separation. Deputy Monica Barnes of Fine Gael described this provision as 'one of the most welcome sections' which would allow a wife to 'go back and make a case for an increase in maintenance.'<sup>131</sup> The deputy also refers to a woman's inability to find work after spending many years in the home, anticipating that financial support would be for her life. Due to this on-going dependency, it was necessary to retain a wife's right to a share in her husband's estate following judicial separation, because the termination of such rights would 'leave wives destitute.'<sup>132</sup> Her role as carer gave her an entitlement to stay 'in the family home with the children, she would be given overall ownership under an adjustment order. That would be the reality in 90 per cent of the situations ... that is the situation the general public would require.'<sup>133</sup>

The constitutional family's hold on the conceptual idiom of the legislation is clear. When making financial orders following the grant of judicial separation, the court must take cognisance of a spouse's contribution 'to the welfare of the family,' any 'contribution by looking after the home or caring for the family' and:

the effect on the earning capacity of each spouse of the marital responsibilities assumed by each ... in particular, the degree to which the future earning capacity of

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<sup>131</sup> Dáil Deb 8 February 1988, vol 377, col 1149.

<sup>132</sup> Alan Shatter, Dáil Deb 8 February 1988, vol 377, col 1895.

<sup>133</sup> Henry Abbott, Dáil Debates 23 November 1988, vol 384, col 1638.

a spouse is impaired by reason of having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family.<sup>134</sup>

Section 22 allows for the variation of maintenance without time restriction if the court ‘considers it proper to do so having regard to any change in the circumstances of the case and to any new evidence.’<sup>135</sup> Alan Shatter had opened Dáil debate with a reference to the protection of women in the home, and closed committee debate by commending the property adjustment provisions of the legislation on the basis that they:

will be a full recognition given to the work done by the wife in the home and also a full recognition given to the contribution that the dependent spouse ... makes to the overall family welfare, property ownership and financial resources. This should be a provision that will be of some considerable importance, I think it will be recognised as an historic contribution to our law in the future. It is the first statutory recognition of the role played by the wife who works in the home and who does not have an independent income.<sup>136</sup>

#### *6.6.2 Mechanisms of control.*

This first major piece of Irish legislation addressing the problems associated with marriage breakdown, thus sought to solve them by continuing the financial aspects of marriage after the interpersonal relationship between the parties had ended. The Act, nonetheless, also sought to save marriages. The Act’s sponsor, Alan Shatter, favoured ‘irretrievable breakdown’ as the sole ground for the grant of an order for judicial separation. Government deputies pointed out that irretrievable breakdown connoted

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<sup>134</sup> Section 20(2)(g) Judicial Separation and Family Law Reform Act 1989.

<sup>135</sup> The section allows discharge, suspension and revival of the orders reflecting the legislators concern that orders for judicial separation could be vacated in the event of reconciliation. See Debate of the Special Committee on the Judicial Separation and Family Law Reform Bill, 22 September 1988.

<sup>136</sup> Debate of the Special Committee on the Judicial Separation and Family Law Reform Bill (9 February 1989). Section 20(2)(f) of the 1989 Act provides that when making financial orders on judicial separation the court must take in to account:

the contributions which each of the spouses had made or is likely in the foreseeable future to make to the welfare of the family, including the contribution made by each spouse to the income, earning capacity, property and financial resources of the other and nay contribution by looking after the home or caring for the family.

the end, not the suspension of marriage. The legislation was intended, they argued, to suspend the obligations of marriage, not to terminate them, and provision must be made for the possibility that spouses might reconcile. Brian Cowen commented ‘[i]t (judicial separation) is a right for people to live separate from each other but there is still, within that jurisdiction, the right for those people to come back and live together again.’<sup>137</sup> Mervyn Taylor confirmed, ‘[t]he whole ideal of judicial separation is that there is still a marriage, still a hope that at some future date there may very well be reconciliation.’<sup>138</sup> The 1989 Act was thus seen as a measure that would facilitate the suspension of the cohabitation obligation of marriage until spouses could work through their differences and resume marriage.

### *6.6.3 A role for morality*

The 1989 Act set out specific grounds upon which an order for judicial separation could be granted: adultery; unreasonable behaviour; one year’s desertion; living apart for one year with consent to order; living apart for three years with no consent to order; and the absence of a normal marital relationship for one year.<sup>139</sup> This mix of fault and non-fault grounds reflects the traditional blame-apportioning role of the legal process and the emergence of new ways of thinking about the nature of marriage.

In the Oireachtas, the grounds upon which judicial separation was available were understood as having the potential to ensure conflict-free separation in most situations. Brian Cowen describes the legislation as, ‘designed to keep, in so far as it is humanly possible, these matters out of a court of law,’ however ‘there are certain individual cases where agreement is simply not possible ... difficult complex situations ... very

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<sup>137</sup> Special Committee on the Judicial Separation and Family Law Reform Bill 1987, 23 March 1988.

<sup>138</sup> Dáil Deb 22 November 1988, vol 384, col 1338. Section 8(2) of the 1989 Act provides for rescission of orders for judicial separation.

<sup>139</sup> Judicial Separation and Family Law Reform Act 1989, s 2.

tragic.’<sup>140</sup> In the ordinary course, ‘if it is reasonable for people to want to live apart ... they would live apart for a year.’<sup>141</sup> Likewise, according to Henry Abbott:

a claim for separation based on the three year separation rule would be a very painless, non-controversial application ... there is no doubt that it would be clean, efficient and would not give rise to any great emotional trauma throughout the proceedings.<sup>142</sup>

Non-confrontation is the preferred approach to marriage breakdown:

the essence of marriage is the making of a formal commitment between two people to create and maintain a lasting and stable relationship ... where such relationship collapsed the purpose of separation proceedings was to provide the means whereby the parties to a broken marriage could rearrange their lives for the future with a minimum of bitterness and recrimination.<sup>143</sup>

Marriage was being re-made as an interpersonal relationship in political discourse. The 1989 Act required consideration of reconciliation, mediation and separation by agreement prior to application to the courts,<sup>144</sup> and the Court was obliged to consider the possibility of reconciliation, and to adjourn proceedings, if necessary, in order to afford spouses the opportunity to consider it.<sup>145</sup> The status of marriage as an expression of transcendent authority was diminishing, but this did not mean that its social importance had lessened or that the marriage saving objective of government could be abandoned. Rather, the social significance of marriage was being re-formulated.

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<sup>140</sup> Special Committee on the Judicial Separation and Family Law Reform Bill 1987 (9 March 1988).

<sup>141</sup> John O’Donoghue, Fianna Fail, Special Committee on the Judicial Separation and Family Law Reform Bill 1987, 11 May 1988.

<sup>142</sup> Dáil Debates 22 November 1988, vol 384, col 1359.

<sup>143</sup> Alan Shatter, Dáil Deb 2 February 1988, vol 377, col 880.

<sup>144</sup> Section 6 provides that an advising solicitor, before issuing proceedings, must discuss reconciliation and mediation with their client, providing names and addresses of persons who could provide such services. The solicitor is also required to discuss the possibility of entering into a separation agreement.

<sup>145</sup> Section 7(1).

## 6.7 The Power Effects of Marriage Law

### 6.7.1 *Marriage as a legal domain*

By the end of the 1980s, marriage had become an indisputably legal domain, penetrated by notions about the legal right of women to take on a dependent role, the lifetime nature of marriage, and the constitutional imperative to protect it. The impact of tax, social welfare, education, labour market and other government policies on the choices available to individuals in building their familial lives were marginalised by the dominance of legal expertise. The creation of private law rules that transferred property and income between spouses presupposed the existence of such property and income, a seriously flawed assumption in a country experiencing severe economic difficulties. Furthermore, they re-enforced marriage as a privileged relationship and the role of men in providing for the lifetime, financial well-being of women. References to marital fault, mediation, counselling and reconciliation in the 1989 Act began to suggest a role for individual spouses in the marriage saving project, a role that would continue to be emphasised in the 1990s. Recourse to the courts (although the primary remedy under the Act), was considered by government to be a last resort for only the most intractable of disputes, a perception supported by widespread reporting of a high profile marital dispute at the end of the decade.

### 6.7.2 *Marital litigation and the abnormal relationship.*

As the 1989 Act was making its way through the Oireachtas a marital dispute before the High Court attracted considerable media and political attention.<sup>146</sup> Mr Justice Barr's judgement on the division of assets amassed during a volatile twenty-year

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<sup>146</sup> Making the front page of the Irish Times on 6 October 1988. Noirin Hegarty and Don Buckley, 'Judge says wives entitled to half family property' *The Irish Times* (Dublin, 6 October 1988). The headline was inaccurate; Mr Justice Barr awarded the wife 50 percent of the family home only. The husband had a large portfolio of other property including a valuable farm.

marriage, although overturned on appeal, provided a powerful argument for State-regulation of marriage. It also served to illustrate the horror of dysfunctional marriage and law's role in protecting the victims of marriage breakdown. The wife in *L v L* sought a decree of divorce *a mensa et thoro* and an order under s 12 of the Married Women's Status Act, 1957 declaring the respective interests of the spouses in the family home and farm. She 'had been a devoted full-time homemaker and mother from the beginning.'<sup>147</sup> Although having made no financial contribution to the family, she oversaw the renovation and maintenance of an eighteenth century manor house that became the family home. In the course of his judgment, Barr J recounted the events of 14 February 1988.

[L]ate at night after she had retired to bed the husband returned to the house, having been drinking heavily during the day. He came to her bedroom, turned on the light and started a row. He told her that everything was his, even her clothes.

The conflict escalated:

the husband started to beat his wife severely. The struggle continued through the house and out onto the avenue. ... She then was subjected to great pain when he forced her arm behind her back. She screamed but there was no one to hear as other houses are a long way off. ... Her legs were bleeding from kicking by the husband and her arms were very sore.

The neighbour, a family friend and the local doctor gave evidence of the wife's injuries:

On examination the doctor found that there was extensive bruising and haematomas on her limbs and a few grazings. Among other injuries, he noticed that there were large bruises on the back of the wife's left hand and left forearm and in addition the whole of the distal part of that limb was particularly red and inflamed. She also had large areas of bruising on both lower limbs. She had pain and tenderness on the right side of her jaw and there was some redness on the front and on both sides of the neck which was consistent with an attempt having been made to choke her.<sup>148</sup>

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<sup>147</sup> 'Decision May Improve Women's Rights' *The Irish Times* 8 October 1988.

<sup>148</sup> Barr J, *BL v ML* [1992] 2 IR 77, 88.

Mr Justice Barr catalogued the horrors of marriage breakdown, the deviance and moral failure of the husband and the devotion and fortitude of the wife. Only when her position became truly untenable did the wife seek a remedy against her aberrant husband. Her reward for fulfilling the role of devoted wife and mother in the face of her husband's adultery, indifference and violence was a share of his property.

Referring to Article 41 of the Constitution Mr Justice Barr said:

[I]f the Article is to be given flesh and meaning in practical terms, a mother who adopts that concept and devotes herself entirely to the family after marriage, has a special place in society which should be buttressed and preserved by the State in its laws. ... It is ... in harmony with that philosophy to regard marriage as an equal partnership in which a woman who elects to adopt the full-time role of wife and mother in the home may be obliged to make a sacrifice, both economic and emotional, in doing so. In return for that voluntary sacrifice, which the Constitution recognises as being in the interest of the common good, she should receive some reasonable economic security within the marriage.<sup>149</sup>

The Judge awarded to the wife a 50 percent share in the family home and contents, and the right to live there for life to the exclusion of the husband. The husband appealed to the Supreme Court, and although the appeal was allowed, the Supreme Court expressed sympathy with Barr J's position.

After careful consideration and with a reluctance arising from the desirable objective with the principle outlined in the judgement of Barr J would achieve, I conclude that to identify this right in the circumstances set out in this case is not to develop any known principle of the common law, but is rather to identify a brand new right and to secure it to the plaintiff.<sup>150</sup>

The Court held that it was a matter for the legislature, and not the courts, to introduce such a right. The 1989 Act provided legislative support for Barr J's position, allowing the court to take non-financial contributions to the welfare of the family into account when making financial and property adjustment orders on judicial separation.<sup>151</sup> Despite the legal difficulty identified in *L v L* having been dealt with by

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<sup>149</sup> *BL v ML* [1992] 2 IR 77, 98

<sup>150</sup> Findlay CJ, *L v L* [1992] 2 IR 77, 107.

<sup>151</sup> The 1989 Act was of no assistance to the wife in *L v L*, her proceedings having begun before its enactment.



the 1989 Act, the potential for law to support the position of dependent women within marriage continued to have a significant influence on government in the 1990s.

## **6.8 Conclusion**

### *6.8.1 Governed by marriage law*

In the 1980s, dependency model marriage continued to act as an instrument of government, facilitating the distribution of welfare and the collection of tax. The extension of social provision to the female victims of marital failure in the 1970s inevitably led to the collection of statistics regarding its prevalence and a focus on the more general difficulty of ‘marriage breakdown.’ Marriage was accepted as a self-evident social good, and marriage breakdown as a threat to social well-being. Political interest in marriage breakdown corresponded with the expansion of the judicial review jurisdiction of the Superior Courts who, from a position of presumed neutrality, formulated a marriage protection doctrine based on the provisions of Article 41 of the Constitution. The form of marriage deserving protection, according to the courts, was that described by the Constitution and largely corresponded to dominant social practice and the form of relationship assumed by government in managing the social domain.

Political discussion of marriage focused on constitutional definition and other legal formulations of marriage. When government decided to take action to save marriage, it therefore inevitably turned to legal expertise. An Oireachtas Committee on Marital Breakdown recommended legal reform, and a newly established Law Reform Commission produced detailed accounts of law’s historical role in identifying marital abnormality. An attempt to introduce provision for legal dissolution of marriage by referendum failed, because in focusing on the capacity for remarriage, government was (in a social context where wives depended on their husbands for their means of

existence) recommending a form of polygamy. The referendum, nonetheless, emphasised the essential legal quality of the marriage relationship and the political objective of marriage saving was, at the end of the decade, pursued through reformed marriage law. The problem with marriage thus identified in the 1980s was marriage breakdown, the solution to this difficulty was to save marriage, and the means was legal.

### *6.8.2 The role of marriage law in managing life*

The Judicial Separation and Family Law Reform Act 1989 adopted the traditional role of marriage law in apportioning blame between spouses, however it also indicated a new way of thinking about managing marriage that relied on the self-governing capacities of individual spouses. Reconciliation, mediation and separation by agreement were an integral part of the legislative framework, although their scientific basis was not fully articulated or understood at the level of politics. For those unable to manage the breakdown of their own marriage, a detailed, court-based machinery was available to re-make their post-relationship lives in the image of lifetime marriage. The political objective of the 1989 Act was to save marriage, but there was no attempt to achieve this aim through command, or legal barriers to marriage breakdown. Rather, the self-evident benefit of marriage to the social order provided a justification for intervention in those marriages unable to conform to the lifetime dependency ideal. Around these relationships was installed an extensive system of legal techniques – counselling, mediation, adjudication – intended to identify and modify them. The legal regulation of marriage represented the deployment of ‘a fundamentally positive power that fashions, observes, knows, and multiplies itself on the basis of its own effects.’<sup>152</sup>

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<sup>152</sup> Foucault, *Abnormal*, 48

By the beginning of the 1990s, marriage had become a fully legal matter and the social primacy of lifetime dependency marriage had been accepted and re-enforced by the actions of government. Marriage, in its constitutional form remained central to the administrative function of the State, and legal knowledge, in the form of Superior Court decisions and Law Reform Commission reports, acted to consolidate the ideas about marriage that had circulated between politics, religion and social practice since the foundation of the State.<sup>153</sup>

### *6.8.3 Looking forward*

Despite a movement away from dependency model marriage as a social practice in the early 1990s, the concerns of the middle-class housewife continued to dominate political consideration of marriage law. There were, however some changes in how couple relationships were conceptualised as government came to accept long-term stable (heterosexual) cohabitation as equivalent to marriage for some purposes. A divorce jurisdiction was introduced in 1997, but its conceptual paradigm was largely similar to that proposed in 1986. Foucault equates the development of bio-power and the normalising objectives of government with the availability of scientific knowledge. As we have seen in the context of Irish marriage law up to 1990, government relied on moral/legal knowledge to formulate its political objectives, with sociological or psychological expertise playing a subsidiary role through deployment of mediation and relationship counselling. This begins to change in the 1990s, although a marked departure from moral formulations does not occur until after the introduction of divorce in 1997.

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<sup>153</sup> *ibid*, 48.

# Seven – Marriage-Saving Divorce

## 1991 - 1997

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The Irish general election of 1992 is often seen as marking a decisive movement away from a political culture informed by the morality of the Catholic Church.<sup>1</sup> The election of Mary Robinson as president in November 1990, and the passing of two referenda facilitating the provision of information on abortion and the right to travel abroad for an abortion, further suggest that the 1990s were a decade of political change. Nonetheless, moral politics had not disappeared, and despite successfully campaigning for the introduction of divorce, government continued to accept the moral proposition that stable, lifetime, heterosexual marriage was the basis of social order. The problems with marriage continued to be seen in terms of its potential for failure and the effects of marriage breakdown on dependent women. The solution to these difficulties was again sought in marriage-saving law.

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<sup>1</sup> Brian Girvin 'Church, State and the Irish Constitution' (1996) 49(4) Parliamentary Affairs 599, 603. The Labour Party, the most socially liberal of the three main parties, made significant gains in the election and entered into coalition government with Fine Fail.

One significant change in the 1990s was improved economic conditions, leading to the ending of emigration and the retention of large numbers of married women in the workforce. Social practice began to move away from dependency marriage and government acknowledged that legal marriage and *de facto* co-habitation were functionally equivalent in some circumstances. A shift towards an understanding of marriage as a relationship between individuals, rather than a moral institution occurred in the courts, but not yet at the level of government.

Constitutional reform in 1996 facilitated the introduction of divorce. Enabling legislation adopted a marriage saving objective and acted to support the continuance of marriage after the interpersonal relationship at its core had broken down. Revised tax and welfare rules, intended to facilitate divorce, also operated to continue marriage for the lives (or until remarriage) of former spouses. At the level of practice, the marriage law process supported the objective of marriage-saving, encouraging individuals to save their own marriages through counselling, but also by illustrating the dangers of marriage breakdown and its effect on vulnerable women and children. This chapter details these processes, concluding that reform of marriage law during this period further entrenched lifetime dependency marriage as the normative, most desirable relationship practice, and established mechanisms of self-control and self-surveillance that penetrated deep into the relationships and lives of those individual citizens.

## **7.1 Economic Improvement**

### *7.1.1 Economic conditions in the 1990s*

At the end of the 1980s, economic decline had begun to slow and Ireland took tentative steps toward economic recovery. In 1991, government forecast continued falls in

unemployment,<sup>2</sup> and published a *Programme for Progress* outlining policies intended to stimulate economic growth.<sup>3</sup> Ireland's economic growth during the 1990s was without precedent historically, or in other European Countries. By 2000, the general unemployment rate was just 3.6 percent.<sup>4</sup> Ireland, belatedly, but rapidly, had caught up with the living standards enjoyed in other Western European nations.<sup>5</sup> Tim Callan *et al* calculated that increased prosperity led to an increase in disposable income of 56 percent between 1987 and 1994.<sup>6</sup>

### 7.1.2 *The social practice of marriage*

As the economic outlook improved, so too did the rate of married women's participation in the labour force. *The Irish Times* reported in 1991 that 23.5 percent of married women worked outside the home, up from 16.7 percent in 1981.<sup>7</sup> By 1998, labour market participation rates for working-age married women had reached 48.3 percent.<sup>8</sup> The constitutional picture of marriage and family life began to hold less practical significance as family size fell, and more women took up paid employment

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<sup>2</sup> Cliff Taylor, 'Public sector pay rises rule out major tax cuts' *The Irish Times* (Dublin, 8 December 1991).

<sup>3</sup> 'Sustained growth key objective of government: strategy for the nineties' *The Irish Times* (Dublin, 23 January 1991).

<sup>4</sup> Central Statistics Office, *Statistical Yearbook of Ireland 2002* (Pn 12209) Stationery Office 2002), 29.

<sup>5</sup> Brendan Walsh 'When Unemployment Disappears: Ireland in the 1990s,' (Centre for Economic Research, U C D, Working Paper 02/29, 2004), 4. There is a large volume of economic and social literature describing change in Irish economic governance and performance after 1973. Andy Bielenberg and Raymond Ryan, *An Economic History of Ireland since Independence* (Routledge 2013) contains a good, retrospective overview.

<sup>6</sup> Tim Callan, Brian Nolan, Brendan Whelan, Christopher Whelan, James Williams, *Poverty in the 1990s: Evidence from the 1994 Living in Ireland Study* (Oak Tree Press 1995), 58.

<sup>7</sup> However, in the same year, Tony Fahey of the ESRI challenged calculations of participation rates from earlier in the century, claiming that methodologies excluded those engaged in farm labour, those unemployed but not on the live register and those who worked part-time. He contended that rates were close to 25 percent in the 1950s and not the 5 percent reported in official Statistics. Tony Fahey, 'Measuring the Female Labour Supply: Conceptual and Procedural Problems in Irish official statistics' (1990) 21(2) *Economic and Social Review* 163.

<sup>8</sup> Brendan Walsh 'When Unemployment Disappears: Ireland in the 1990s', 2

outside the home. Brendan Walsh noted that the overall rise in labour-market participation rates in Ireland during this period was due mainly to the retention of married women in the labour force. This expansion was mostly in full-time employment, and women working part-time accounted for only 26 percent of the total growth in employment between 1988 and 2002.<sup>9</sup> Marriage rates, which had dropped significantly during the 1980s, continued to fall, reaching a low of 4.3 per thousand in 1995 and 1997.<sup>10</sup> The birth rate remained well below that pertaining before 1980.<sup>11</sup> One in six births took place outside of marriage in 1991, a proportion that increased as the decade progressed.<sup>12</sup>

### *7.1.3 Marriage and State administration – social welfare.*

In 1985, the High Court had struck down a section of the Social Welfare (No 2) Act 1985 that limited the value of social welfare payments made to married couples to 1.6 times the adult rate.<sup>13</sup> The section did not apply to cohabiting couples, and consequently cohabiting couples could receive a higher payment than married couples in similar circumstances. The government addressed the issue, not by removing the cap, but by extending it to cohabitants.<sup>14</sup> Similar caps applied in other parts of the social welfare code, and government appointed a review group in 1989 to identify them and make recommendations for reform.<sup>15</sup>

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<sup>9</sup> Brendan Walsh 'When Unemployment Disappears: Ireland in the 1990s,' 6.

<sup>10</sup> Central Statistics Office, *Statistical Yearbook of Ireland 2002*, 55

<sup>11</sup> The Birth rate was 21.8 per thousand in 1981, 15.1 in 1990, falling to 14.0 in 1996, *ibid*, 55.

<sup>12</sup> Second Commission on the Status of Women, *Report to Government* (PI 9557, Stationery Office 1993), 67.

<sup>13</sup> *Hyland v Minister for Social Welfare and the Attorney General* [1989] IR 624. See page 201.

<sup>14</sup> Social Welfare (No 2) Act 1989.

<sup>15</sup> The Review Group reported to the Oireachtas in May 1991. In establishing the group, the Minister for Social Welfare stated that it would 'have the task of examining the social welfare code as it affects households (in the context of the Supreme Court decision in the *Hyland* case) with particular regard to the equal treatment provisions.' Review Group on the

The review group's mandate was to examine the treatment of household types under social welfare rules having regard to the requirements of the Constitution, European Economic Community equal treatment directives, the financial means of households, the economies achievable through resource sharing and the containment of exchequer costs.<sup>16</sup> The Review Group had a problematic task. Cohabitation had become more common,<sup>17</sup> and the group were required to contain costs whilst implementing the marriage saving objective mandated by the courts and the government. At the time of review, the social welfare system discriminated against married couples *vis a vis* cohabittees in a number of areas. One of a cohabiting couple could receive a full child dependent allowance, whereas a married couple in similar circumstances received the allowance at half rate. Supplementary welfare allowance did not take account of cohabitation, and therefore a cohabiting couple could receive two payments, whereas a married couple could receive only the lower married rate. The means of an unmarried partner were not taken into account for family income supplement, resulting in a higher payment for a cohabitee than for a married person. The assets of an unmarried partner were excluded from the non-contributory old age pension means test; therefore, a cohabitee could receive a pension when a married person would not.<sup>18</sup>

The review group ultimately followed the government's initial response to *Hyland* in recommending that payments to married and cohabiting couples be equalised

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Treatment of Households in the Social Welfare Code, *Report* (PL8107, Stationery Office 1992), 6.

<sup>16</sup> Review Group on the Treatment of Households in the Social Welfare Code, *Report*, 1-2.

<sup>17</sup> The Review group lists the number of cohabittees as 417 in 1979, 819 in 1981 and 4916 in 1986. Although not specifically stated it must be assumed, because the first two numbers are odd, that these are the numbers of cohabiting couples rather than individual cohabittees. *ibid*, 7.

<sup>18</sup> *ibid*, 56. The Social Welfare Act 1991 removed all of these discriminations, save that affecting the old age pension.



downwards. For reasons of economy and fairness, it was felt that cohabitation should be equivalent to marriage for social welfare purposes. The group argued that resource sharing was more likely to occur in households comprised of married or cohabiting couples and their children than in other households comprised of more than two adults. In non-couple based households, the ‘work and welfare status of individual members ... can change over time giving rise to fluctuations in the payment levels for individuals in that household’ and ‘a greater number of permutations than currently arise in the case of households comprised of married and cohabiting couples.’<sup>19</sup> Despite ‘the obvious difficulties’<sup>20</sup> in identifying cohabiting couples it was considered appropriate to treat them in an equivalent manner to married couples:

the material support which married couples give to each other by virtue of the marriage contract makes their situation fundamentally different from that of other people sharing a household. The situation of cohabiting couples is similar in many ways and mutual financial support can be assumed to exist in their case as well, although not embodied in a formal contract.<sup>21</sup>

The review group decided that marriage and cohabitation were functionally equivalent, and should therefore be treated the same. Government could assume resource sharing in both relationship types, resulting in a reduction in the cost of welfare provision. The marriage-protection doctrine promulgated in *Hyland* had created the new, marriage-equivalent, relationship category of ‘cohabitation.’ Section 48 of the Social Welfare Act 1991 amended the definition of ‘spouse’ in the social welfare code to include ‘each person of a married couple who are living together’ and ‘a man and a woman who are not married to each other but are cohabiting as man and wife.’

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<sup>19</sup> *ibid*, 38.

<sup>20</sup> *ibid*, 37.

<sup>21</sup> *ibid*, 47.

#### 7.1.4 Marriage and state administration – tax

An expert working group examining the tax code also acknowledged the equivalence of cohabitation and marriage. Reporting in 1996, it noted that the welfare system treated cohabitantes as spouses, whereas the taxation system treated them as single people, leading to anomalies in the treatment of households:

The effect of this can be that a non-working partner is debarred from claiming a social assistance payment on the basis of the other partner's income, while the working partner is taxed as a single person.<sup>22</sup>

The working group recommended that cohabitantes with children be treated the same as married couples for tax purposes.<sup>23</sup> A shift in attitude to women working outside the home is apparent in the report, with no reference made to the Constitution or the need for one partner to care for a home or family.<sup>24</sup> The group stated only that care must be taken to 'give a balance between women in paid employment, and women working full-time in the home.'<sup>25</sup> The general tenor of the report reflects an understanding that married women do have paid employment, and that the taxation system should support this:

the tax treatment of married couples ... can result in high marginal tax rates on the second earning in a married couple (usually the wife). Married women's labour market participation is particularly sensitive to incentives. A more individual system of taxation [is] ... one way of increasing incentives to this group ... an alternative approach ... would be to increase the standard rate band.<sup>26</sup>

In the areas of taxation and social welfare, therefore, measurement of the characteristics of the population had led to the conclusion that cohabitation had

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<sup>22</sup> Expert Working Group on the Integration of the Tax and Social Welfare Systems, *Report* (Pn 2755, Stationery Office 1996), 104.

<sup>23</sup> This recommendation has not, to date, been implemented however the individualisation of the tax code has largely eliminated the income tax advantage of marriage where both cohabitantes are employed.

<sup>24</sup> Expert Working Group on the Integration of the Tax and Social Welfare Systems, *Report*, 105.

<sup>25</sup> *ibid*, 102.

<sup>26</sup> *ibid*, 102.

become a significant social practice. Despite the constitutional or moral primacy of marriage, it would be necessary for government to account for these relationships if it was to effectively manage the social domain.

## 7.2 The Persistence of Dependency-Model Marriage

### 7.2.1 *The properties of dependent wives*

In the early 1990s, dependency model marriage, whilst still common, no longer represented dominant social practice. Increasing numbers of women remained in the workforce following marriage, and co-habitation had become more common. Government had begun, for social welfare purposes, to equate marriage with co-habitation re-defining it to include ‘marriage-like relationships’ and to de-emphasise gender-based roles. Nonetheless, the problems of the dependent, middle-class wife continued to form the focus of marriage law reform.

The wife in *L v L* had begun her legal action in 1987 seeking an order of divorce *a mensa et thoro* and a declaration of ownership in relation to the family home.<sup>27</sup> Her action reached the Supreme Court in 1992, almost three years after the commencement of the 1989 Act. The remedies available to her were, therefore, limited to alimony and a declaration confirming pre-existing property rights and, as she had made no financial contribution to the acquisition of the property in question, the court could not declare that she had an interest in it.<sup>28</sup>

Specific provision had been made in the 1989 Act for consideration of the contributions of a non-earning spouse in ‘looking after the home or caring for the family’ when making ancillary orders on judicial separation.<sup>29</sup> Had *L v L* been initiated

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<sup>27</sup> *L v L* [1992] 2 IR 77, Pursuant to s12 of the Married Women’s Status Act 1957.

<sup>28</sup> See chapter one for an account of the legal remedy of divorce *a mensa et thoro*.

<sup>29</sup> Section 20(2)(f).

after the commencement of the 1989 Act, the Court could have ordered a property adjustment in favour of the wife without reference to the Constitution. The perceived injustice of the case was dealt with by the 1989 Act, but government responded to the decision by attempting to further reform marriage law. The Matrimonial Home Bill, introduced to the Dáil on 7 July 1993, purported to create an equitable joint tenancy in any dwelling occupied by a married couple where the dwelling was legally owned by one spouse.<sup>30</sup>

A Second Commission on the Status of Women<sup>31</sup> and a White Paper on Marital Breakdown had recommended legislation of this nature.<sup>32</sup> It was a popular measure among both politicians and the public,<sup>33</sup> welcomed as a necessary and important reform measure contributing to ‘the equal status of women in marriage.’<sup>34</sup> The Bill set a date for vesting of existing homes, and any homes acquired after the commencement of the Act by one of a married couple would automatically vest, in equity, in both. Both Dáil and Seanad passed the Bill, but the Supreme Court declared it unconstitutional, holding that the automatic operation of the Act was an unwarranted and disproportionate interference with the privacy and authority of the constitutional

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<sup>30</sup> Section 4, homes held by spouses as tenants in common would also vest in them as joint tenants on the operative date. An application could be made to the court by the owning spouse for a declaration that section 4 should not apply (s 6) and the non-owning spouse could opt out in writing after obtaining legal advice (s7). If the home was held by one spouse as joint tenant with a third party, the joint tenancy would be severed and the share as tenant in common would be held by the spouses as joint tenants (s 4(7)). If the dwelling to which a spouse becomes entitled was part of another property necessary easements would be created for the benefit of the home and the court could grant compensation to any third party affected by the creation of those easements (s 4(5) and s 17).

<sup>31</sup> Second Commission on the Status of Women, *Report to Government*.

<sup>32</sup> Department of Justice, *Marital Breakdown a Review and Proposed Changes* (Stationery Office 1992).

<sup>33</sup> *The Irish Times* carried a number of positive opinion pieces about the legislation during 1993. See for example Pat Igo, ‘Legal recognition of housework’s value is a long-overdue step.’ *The Irish Times* (Dublin, 18 June 1993) and Mary Cummins ‘Women’s groups hail home equality Bill.’ *The Irish Times* (Dublin, 26 June 1993).

<sup>34</sup> Minister for Equality and Law Reform, Mervyn Taylor, Dáil Deb 7 July 1994, vol 433, col 1552.

family.<sup>35</sup> The decision was unexpected,<sup>36</sup> and although a further attempt to implement the policy of the Bill was made by the Progressive Democrats in a 1994 Private Members Bill, no similar legislation has, to date, been enacted.<sup>37</sup>

The Matrimonial Home Bill was about married women, their role, and their property. Although passed in gender neutral terms, when introduced to the Oireachtas it referred throughout to ‘husbands’ and ‘wives,’ despite being drafted at the behest of the Minister for Equality and Law Reform.<sup>38</sup> In strict practical or economic terms, the Bill would have made little difference to the majority of married couples. Joint ownership in equity would apply only to intact marriages. Marriages that had broken down would remain subject to property adjustment by agreement, or to the discretionary jurisdiction of the 1989 Act. Within intact marriages, wives or husbands occupied one and other’s property and could veto the sale and mortgage of ‘family homes.’<sup>39</sup> Domestic violence legislation facilitated the exclusion of an abusive spouse from a home irrespective of ownership rights,<sup>40</sup> and applications under section 12 of the 1957 Act had ceased to have any practical utility following the introduction of the 1989 Act.<sup>41</sup> One potential practical benefit was the Bill’s interaction with Succession

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<sup>35</sup> *In Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305.

<sup>36</sup> Gerard Hogan, a constitutional lawyer felt that the Bill could potentially fall on property rights grounds but that the obligation to protect marriage would probably trump the protection of property rights. Gerard Hogan, ‘Supreme Court’s decision final’ *The Irish Times* (Dublin, 11 January 1994). Government did not expect the decision; see Geraldine Kennedy, ‘Matrimonial Home Bill ruling severe blow to Government.’ *The Irish Times* (Dublin, 25 January 1994).

<sup>37</sup> Family Law (Property) Bill 1994, introduced to the Dáil on 29<sup>th</sup> March 1994, Dáil Deb vol 440, col 1728.

<sup>38</sup> The Bill was ‘gender proofed’ at committee stage. See Alan Shatter, Debate of Committee on Social Affairs, 15 July 1993; ‘I congratulate the Minister on gender proofing the amendments ... This is the first major Bill to emanate from the Department of Equality and Law Reform. I find it somewhat extraordinary that it is only on Committee Stage that the Bill is gender proofed.’

<sup>39</sup> Family Home Protection Act 1976, s3.

<sup>40</sup> Family Law (Protection of Spouses and Children) Act 1981.

<sup>41</sup> These applications were generally made in tandem with applications for divorce *a mensa et thoro* or applications under the Guardianship of Infants Act 1964. There are no reported cases of applications being made under section 12 by parties to an intact marriage.

Law. A spouse's legal right share or share on intestacy would be in addition to their entitlement to the matrimonial home by way of survivorship, but a similar result could have been achieved by amendment of the Succession Act 1965.<sup>42</sup> Michael McDowell of the Progressive Democrats, despite supporting the legislation, pointed to a number of significant difficulties with it, particularly with regard to debt ('many women stood to lose half their property to their husband's creditors'), and the disadvantaging of children following the remarriage of widowed parent.<sup>43</sup>

Despite the lack of practical utility, the legislation had universal support in the Oireachtas. Although referred to throughout debate as an 'equality' measure, legislative aims were expressed in terms of the protection of wives in a dependent role. Indeed, deputies occasionally appeared to advocate a return to the 'separate property' doctrine of the nineteenth century.<sup>44</sup> Wives, they argued, were entitled to share in the property of marriage, but should not be liable for the debt. Averil Doyle of Fine Gael commented:

The position regarding the liability for any pre-marital debts or any charges on the house that subsequently would become the matrimonial home requires clarification ... It must be made clear that this is a benefit we are conferring on the spouse that will be staying at home, usually the women, rather than a financial noose being put around their necks.<sup>45</sup>

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<sup>42</sup> On an intestacy the surviving spouse takes the whole estate if there were no issue and two thirds if there were issue, see 67 Succession Act 1965. Where there was a will the surviving spouse has a legal right to one half of the estate if there were no issue and one third if there were, s 111 Succession Act 1965. A surviving spouse can appropriate a dwellinghouse and household chattels in satisfaction of their share, s 65 Succession Act 1965. The Matrimonial Home Bill purported to vest the home in spouses as joint tenants, therefore on the death of one of them the home would pass to the other without affecting the legal right share or share on intestacy.

<sup>43</sup> A widow/er in possession of a home inherited from previous spouse would need, on remarriage to have their new spouse waive rights under the Bill in order to preserve property for their children. See Michael McDowell 'A code cannot be imposed on families.' *The Irish Times* (Dublin, 27 January 1994).

<sup>44</sup> See chapter one.

<sup>45</sup> Dáil Deb 7 July 1993, vol 433, col 1619. Protection from a spouse's debt is a recurrent theme in Irish family law. In a case run concurrently with *L v L* [1992] 2 IR 116 the Supreme Court awarded a widow a 50 percent share in her deceased spouse's property despite the High Court having calculated her interest on the basis of monetary contributions at one fifteenth.

Married women were portrayed as weak and vulnerable, suffering ‘a high incidence of depression,’<sup>46</sup> and liable to be bullied into waiving their property rights.<sup>47</sup> They ‘defer to their husbands in matters regarding the purchase and sale of property,’<sup>48</sup> can be ‘bamboozle[d]’<sup>49</sup> and ‘will sign ... documents’ because their husband’s tell them to do so.<sup>50</sup>

Although detrimental to their mental health and a source of vulnerability, the protection of married women’s constitutionally mandated role was considered essential. Labour deputy, Willie Penrose, commented on second stage that ‘[W]omen play a crucial and pivotal role in sustaining the fabric of family life and it is important that this is reflected in the laws of the land.’<sup>51</sup> By supporting, through property, the role of women as homemakers, this Bill would ‘contribute to the stability of marriage, the institution of family and the common good.’<sup>52</sup> Joe Costello, also a labour deputy, contended that ‘this Bill underpins not only the legal entity of marriage but marriage as a desirable relationship and the importance of the security of marriage.’<sup>53</sup>

### *7.2.2 Irish family sociology – a source of knowledge about marriage*

Sociological investigation of marriage and family life was limited prior to the 1990s.

Irish academic sociology had originated in St Patrick’s College, Maynooth at the

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The husband’s estate was insolvent and the principal debtor was the revenue commissioners. The court, by awarding the wife such a large share was effectively providing for her at the expense of her husband’s creditors. *EN v RN & MC* [1992] 2 IR 116. Similarly in *AS v GS & AIB* [1994] 1 IR 407 the High Court held that the issue of judicial separation proceedings acted as a *lis pendens* against all property held by either spouse. This had the effect of allowing the court to make property adjustment orders without reference to a judgment creditor who had not registered their interest prior to the issue of the judicial separation proceedings.

<sup>46</sup> Liz O’ Donnell, Progressive Democrats, Dáil Deb 7 July 1993, vol 433, col 1577.

<sup>47</sup> Liz McManus, Democratic Left, Dáil Deb 7 July 1993, vol 433, col 1592.

<sup>48</sup> Michael McDowell, Committee on Social Affairs Debate 9 September 1993.

<sup>49</sup> Liz McManus, Committee on Social Affairs Debate 9 September 1993.

<sup>50</sup> Mary Flaherty, Committee on Social Affairs Debate 9 September 1993.

<sup>51</sup> Dáil Deb 7 July 1993, vol 433, col 1607.

<sup>52</sup> Willie Penrose, Dáil Deb 7 July 1993, vol 433, col 1607.

<sup>53</sup> Dáil Deb 7 July 1993, vol 433, col 1683.

beginning of the twentieth century.<sup>54</sup> Brian Conway has argued that, profoundly influenced by the doctrine of the Roman Catholic Church, early Irish sociologists did not consider themselves to have a role in shaping the direction of government policy and focused on discussions of Catholic social principles.<sup>55</sup> The first Irish sociological journal, *Christus Rex*, established in 1946, published Bishop's statements and papal encyclicals as well as articles on aspects of Catholic sociology.<sup>56</sup> The renaming of the journal in 1972 (it became *Social Studies*), marked its re-orientation towards an audience outside the Church. The editor wrote in 1972 that the journal would 'seek to gather and present reliable information to assist the public in forming intelligent and accurate judgments.'<sup>57</sup> A lack of funding and instability in university departments hampered this objective, and in 1993, a contributor to the *Bulletin* of the Sociological Association of Ireland claimed that 'there is, I think, a certain sense of demoralization among sociologists in Ireland at the moment. And if there isn't perhaps there should be.'<sup>58</sup>

There was some social research being carried out, principally by the Economic and Social Research Institute (ESRI), which received government funding, and between 1970 and 1979, departments of sociology were established in University College Cork, University College Dublin and Trinity College Dublin. Despite the general malaise, a number of books analysing Irish society were published during the 1980s,<sup>59</sup> and the ESRI, produced a number of empirically driven studies on economic aspects of family

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<sup>54</sup> The national seminary for the education of Roman Catholic priests.

<sup>55</sup> Brian Conway, 'Foreigners, Faith and Fatherland: The Historical Origins, Development and Present Status of Irish Sociology' (2002) 5(1) *Sociological Origins* 5, 13.

<sup>56</sup> *ibid*, 14.

<sup>57</sup> *ibid*, 15

<sup>58</sup> *ibid*, 21.

<sup>59</sup> Mary Kelly, Liam O'Dowd and James Wickham, *Power, Conflict and Inequality* (Turoe Press 1982), Chris Curtin, *Gender in Irish Society* (Galway University Press 1987) and Mike Tomlinson, Tony Varley and Ciaran McCullagh, *Whose Law and Order: Aspects of Crime and Social Control in Irish Society* (Sociological Association of Ireland 1988).



life.<sup>60</sup> Nonetheless, during the 1980s, Irish sociology lacked both credibility and funding.<sup>61</sup> Sociological expertise was, thus, an unlikely source of alternative understandings of the nature of marriage before the 1990s.

One major sociological study of the Irish family was carried out in 1989, but unsurprisingly, given the intellectual heritage of the Irish sociological community, it adopted the definitions of marriage and family provided by the 1937 Constitution.<sup>62</sup> The report noted that economic expansion had tempted more married women into the workforce, and that this had occurred in a way that was ‘incompatible with child raising.’<sup>63</sup> Mothers, the report noted, were being forced due to economic pressures to work outside the home to pay rent and buy food – pressures which the Constitution deplored.<sup>64</sup> The dependency model of marriage was unquestioned:

the basic difference between the sexes remains relevant. No amount of equality legislation or paternity leave will alter the fact that the bearing and breast-feeding of children devolves on the mother.<sup>65</sup>

Further:

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<sup>60</sup> The most well-known and oft cited of which is Finola Kennedy’s *Family, Economy and Government in Ireland* January 1989 (ESRI 143 1989). Other ESRI publications related to families in the 1980’s include: Gary Becker, *An Economic Analysis of the Family* (ESRI 1985), David Rottman, Damian Hannan, Niamh Hardiman, Miriam Wiley, *The Distribution of Income in the Republic of Ireland: A Study in Social Class and Family Cycle Inequalities* (ESRI 109 1982), Denis Conniffe and Gary Keogh *Equivalence Scales and Costs of Children* (ESRI 142 1988).

<sup>61</sup> Conway, ‘Foreigners, Faith and Fatherland: The Historical Origins, Development and Present Status of Irish Sociology,’ 24.

<sup>62</sup> Kennedy, *Family, Economy and Government in Ireland*, 1. Kennedy’s work falls within the structural functionalist tradition of family sociology that sees the family in terms of the function it fulfils. This perspective is associated with Talcott Parsons, a 1950s theorist, who argued that the family’s principal functions were to socialise children and stabilise the adult personality. The differentiation of gender roles was an important aspect of his approach. Talcott Parsons ‘The Social Structure of the Family’ in R Anshen (ed) *The Family: Its Function and Destiny* (New York, Harper 1949), 192. As cited in Alison Diduck and Felicity Kaganas *Family Law, Gender and the State* (2nd edn Hart Publishing 2006), 5-6.

<sup>63</sup> Kennedy, *Family, Economy and Government in Ireland*, 148, quoting with approval a statement of Kingsley Davis.

<sup>64</sup> *ibid*, 138.

<sup>65</sup> *ibid*, 150.

the right of spouse and children to be maintained out of the *husband's* income and property has been more effectively secured both by changes in the law and by providing free legal aid<sup>66</sup> (my emphasis).

A significant theme of the report was the need for government to develop a family policy 'that consists of the establishment of goals for the family itself and devising a framework of policies for the achievement of these goals.'<sup>67</sup> The family requiring attention was that based on marriage. The report acknowledged the existence of cohabiting couples, deserted wives and single mothers, but did not consider them part of the social category 'family.'

### 7.2.3 *Women and marriage*

The Government established a Second Commission on the Status of Women in November 1990, which, like the 1970s Commission, divided women into marriage-based categories and recommended that government 'recognise different categories of women and their roles.'<sup>68</sup> Women's role in relation to family was a caring, dependent one, which required protection: '[w]omen who have made the choice to devote themselves fulltime to their families should be supported and sustained in that choice'<sup>69</sup> (but only if married, single, never married, mothers 'should be encouraged to take up employment.') <sup>70</sup> In the workforce or in education, European anti-discrimination standards applied:

The principle of equal treatment means that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status.<sup>71</sup>

A key objective of the Commission was to ensure that:

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<sup>66</sup> *ibid*, 85.

<sup>67</sup> *ibid*, 8.

<sup>68</sup> Second Commission on the Status of Women, *Report to Government*, 76.

<sup>69</sup> *ibid*, 69.

<sup>70</sup> *ibid*, 82.

<sup>71</sup> *ibid*, 26.

women [are] facilitated to develop economic independence. Without economic independence there is no real choice [whether to work outside or inside the home].<sup>72</sup>

For wives, this choice could be realised through a right to a share in household income, a right to information on a spouse's income and a proprietary interest in the family home.<sup>73</sup> A review of the tax code to remove the disincentive to married women working outside the home would further support choice.<sup>74</sup> Thus, the form of economic independence advocated for married women by the Commission was predicated on male financial support. The State did not need to subsidise dependency in marriage because:

in essence the maintenance of a full-time homemaker, although a benefit to society, is primarily a benefit to the earning partner, and as such could hardly be deemed to warrant a State payment.<sup>75</sup>

Nonetheless, the State could provide 'moral support,' implement measures to raise 'self-esteem,'<sup>76</sup> and improve married women's 'status in society.'<sup>77</sup> Financial support was to come from the men who primarily benefited from women's work through the allocation of tax allowances,<sup>78</sup> and improved private-law rights against husbands backed by better legal enforcement.<sup>79</sup>

In a chapter titled 'Women and Work,' gender distinctions became less important. Flexibility in the workforce was important for 'both men and women,' so that they may 'reconcile their working and domestic responsibilities and have real choice in

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<sup>72</sup> *ibid*, 6.

<sup>73</sup> *ibid*, 8.

<sup>74</sup> *ibid*, 76. The Commission seem to be suggesting that the tax allowance attributable to wives, but allocated to husbands, should be paid directly to wives so that if they go out to work any income which they receive is in addition to this sum.

<sup>75</sup> *ibid*, 71.

<sup>76</sup> *ibid*, 70.

<sup>77</sup> *ibid*, 69.

<sup>78</sup> *ibid*, 75.

<sup>79</sup> *ibid*, 41.

their lives.’<sup>80</sup> Similarly, ‘the Commission fully supports the choice by mothers – and indeed fathers – to care fulltime for their children at home.’<sup>81</sup> Nonetheless, ambivalence regarding workforce equality remained. It was noted that 35 percent of women with children under seven worked outside the home (no corresponding figure is given for men), and that ‘realistically in our society at present the responsibility for childcare devolves on women, whether married or lone parents.’ No suggestions were offered as to how, or whether, this gendered division of labour, adversely affecting women’s ability to attain economic independence within and outside marriage, could be addressed.<sup>82</sup>

#### 7.2.4 *Law and marriage*

In 1992, the Department of Justice published a white paper on marital breakdown that opened with a reference to social expectations for marriage:

The vast majority of people in Ireland who get married go on to live together in life-long unions. There is, however, the unfortunate reality that a minority of those who marry have their hopes and expectations of a permanent union dashed though the breakdown of marriage.<sup>83</sup>

The role of government was also set out:

A primary concern of the Government must be to do what it can to assist the preservation of stable marriage and the avoidance of marriage breakdown. The Government must also ensure that there is in our law and social policies a proper response when marriages break down.<sup>84</sup>

The objective of government was both to promote marriage and to address the problem of marriage breakdown. The report recommended, therefore, that government should reject a suggestion by the Law Reform Commission that the age of marriage be increased, or that parental consent be required before young couples could marry,

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<sup>80</sup> *ibid*, 117.

<sup>81</sup> *ibid*, 138.

<sup>82</sup> *ibid*, 136.

<sup>83</sup> Department of Justice, *Marital Breakdown a Review and Proposed Changes*, 9.

<sup>84</sup> *ibid*, 9.

because ‘it could lead to an increase in the number of co-habiting couples in cases where parental consent was not forthcoming.’<sup>85</sup> Divorce could likewise promote stability by removing the need for ‘people whose marriages have broken down to ... form “second unions.”’<sup>86</sup> Relationship counselling was proposed to prevent marriage breakdown, and mediation and marriage law to deal with its effects.<sup>87</sup>

The white paper identified the principal practical effect of marriage breakdown as poverty among women referring to a number of information sources. Citing a report of the Combat Poverty Agency, the paper noted that 80 percent of District Court maintenance awards to dependent spouses (assumed in the white paper to be wives), were for amounts below social welfare rates.<sup>88</sup> Moreover, these awards were proving difficult to collect and ‘[t]he highest success rate for maintenance orders applies in the category of better paid maintenance creditors.’<sup>89</sup> The white paper reported detailed statistics regarding the extent of marriage breakdown. In 1989/90, 2,273 applications for maintenance were made in the District Court,<sup>90</sup> 132 in the Circuit Court and 115 in the High Court. In the first year of the 1989 Act’s operation, 916 applications for judicial separation were made and 354 decrees granted. A labour force study, carried out in 1991, counted 46,700 separated or divorced individuals, 17,100 men and 29,600 women. Of these 12,900 men and 11,500 women were in the workforce.<sup>91</sup> In the same

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<sup>85</sup> *ibid*, 35.

<sup>86</sup> *ibid*, 24.

<sup>87</sup> *ibid*, 70.

<sup>88</sup> *ibid*, 200.

<sup>89</sup> *ibid*, 200.

<sup>90</sup> *ibid*, 196. This figure included applications by unmarried parents in respect of children, married parents seeking maintenance for children, as well as spousal maintenance applications. It therefore significantly overstates the volume of strictly marriage law applications in the District Court. A figure of 3,474 is given for barring orders, available at the time only to married people. This would suggest that the single biggest difficulty with marriage, at the time, was inter-spousal violence.

<sup>91</sup> *ibid*, 195.

year, there were 12,255 recipients of deserted wife's allowance,<sup>92</sup> and 80 percent of the workload of the Legal Aid Board related to family law.<sup>93</sup>

These statistics, although recording marital distress among a very small percentage of the married population,<sup>94</sup> presented marriage breakdown as a major social danger. They also demonstrated the marginal impact of marriage law in addressing its principal effect – female poverty. The white paper acknowledged that the most likely reason for difficulty in collecting maintenance 'is the inability of the husband to pay.'<sup>95</sup> In addition, it noted that 25 percent of applicants for deserted wives allowance and benefit were married to unemployed men.<sup>96</sup> Women's poverty following marriage breakdown was, in fact, closely related to their dependency and poverty *in* marriage.

Nonetheless, the white paper recommended legal reform as the appropriate political response to the problem of marriage breakdown and subsequent female poverty. In particular, it suggested that a divorce jurisdiction with comprehensive financial reliefs and the capacity for remarriage was the solution. As the overall political objective was to save marriage, relationship counselling and mediation were also important. Government commitment to counselling and mediation was evidenced with a list of service providers funded by government.<sup>97</sup> The aim of counselling was reconciliation, and successful mediation produced 'couples who reached agreement or who returned to marriage.'<sup>98</sup>

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<sup>92</sup> *ibid*, 28.

<sup>93</sup> *ibid*, 68.

<sup>94</sup> Just under 3 percent. There were 1,329,620 married persons in Ireland in 1991 (first marriages). Central Statistics Office, *Census 1991: Volume 2* (Pn 0815, Stationery Office 1994), 30.

<sup>95</sup> Department of Justice, *Marital Breakdown a Review and Proposed Changes*, 200.

<sup>96</sup> *ibid*, 201. Where a husband was unemployed, the family as a whole would receive a higher rate of payment if the wife qualified for a deserted wives payment.

<sup>97</sup> *ibid* 202 – 203. Funding was provided to health boards and to the Catholic Marriage Advisory Service.

<sup>98</sup> *ibid*, 204.

### 7.2.5 *Political imaginings of marriage*

Information available to government in the early 1990s did not challenge the constitutional picture of marriage, and political objectives continued to focus on saving dependency model marriage. Functionalist sociology did little to displace existing political understandings, and although social welfare policy equated marriage with cohabitation, this was not considered in other domains of government. The idea that government and law had a role in managing the relationship behaviour of individuals was similarly uncontested, as was the need for government to fund services that might save marriages, one at a time. The principal practical effect of dependency marriage breakdown was female poverty, but this was seen only in terms of marriage with no attempt made to look at broader social contexts that created both poverty and dependency.

## **7.3 Alternative Ways of Knowing about Marriage**

### 7.3.1 *Moving toward modernity?*

As discussed in chapter two, in the late 1980s and early 1990s family sociologists developed the individualisation theory of interpersonal relationships, arguing that the family had been re-defined in modernity. It was no longer the lifelong legitimated community of father, mother and child but a complex system that had to be individually negotiated rather than follow an existing pattern of roles, rights and responsibilities. Relationship conflicts, these sociologists argued, reflected conflict in wider society brought about by structural instability.<sup>99</sup> According to this theory, shifting relationships practices away from marriage in 1990s Ireland represented a

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<sup>99</sup> Elisabeth Beck-Gernsheim, *Re-inventing the Family: In Search of New Lifestyles* (Polity 2002), 13 and Ulrich Beck and Elisabeth Beck-Gernsheim, *The Normal Chaos of Love* (Polity 1995), 5. See chapter two.

modernisation of society, and the construction of individually negotiated interpersonal relationships. It should therefore be expected that law would follow these social practices in facilitating divorce and recognising alternative relationship forms. As demonstrated in the next section however, in Ireland an individualised perspective on relationships did not spring up at some time in the 1990s, and legal acknowledgement of the interpersonal nature of relationships, in fact, preceded widespread ‘modern’ relationship practice. The law of nullity, and later the judicial review jurisdiction of the superior courts, acknowledged the interpersonal aspect of relationships long before divorce was introduced, or cohabitation became a widespread social practice.

### *7.3.2 Law and scientific expertise*

The Irish Courts had begun, in the 1980s and 1990s, to accept non-institutional ways of rationalising the marriage relationship, initially through the law of nullity, and later within the judicial review jurisdiction. The High Court had jurisdiction, derived from the ecclesiastical law of the established Church of Ireland, to grant a decree of nullity.<sup>100</sup> Although required to act in accordance with ‘the principles and rules’ of Ecclesiastical Courts, the High Court did not accept that the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 had ‘fossilise[d] the law in its state when the Act was passed.’ Rather, according to Henchy J, by 1986, ‘modern psychological, psychiatric and other advances in knowledge and understanding of human affairs’ could act to modify the basic principles referred to in the 1870 Act.<sup>101</sup> Paula Scully and William Duncan wrote in 1990 that ‘[t]he last ten years have seen

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<sup>100</sup> This jurisdiction was transferred to the High Court by the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870, section 13 of which required the court to: proceed and act and give relief on the principles and rules which shall be as nearly as may be conformable to the principles and rules which the Ecclesiastical Court of Ireland have heretofore acted on and given relief.

<sup>101</sup> Henchy J, *N (orise) K v K* [1986] ILRM 75, 82.



the judiciary particularly active in this regard,<sup>102</sup> and Alan Shatter traced the origin of an expanded nullity jurisdiction to the 1982 High Court decision, *RSJ v JSJ*.<sup>103</sup> In that case, Barrington J accepted that a decree of nullity could be granted because a psychiatric illness rendered a spouse ‘unable to maintain and sustain a normal relationship.’<sup>104</sup>

Findlay CJ, in a later Supreme Court decision, voided a procedurally valid marriage based on the respondent’s ‘homosexual nature’ that made him incapable of forming or entering into a ‘normal marital relationship’ with the applicant.<sup>105</sup> A normal marital relationship was, in the Court’s view, a ‘caring and considerate relationship’ not,<sup>106</sup> as under ecclesiastical law, simply a matter of physical consummation. Findlay CJ held that:

Recognition by psychiatrists of the existence of a homosexual nature and inclination, which is not susceptible to being changed [required that] in certain circumstances the existence in one party to a marriage of an inherent and unalterable homosexual nature may form a proper legal ground for annulling the marriage.<sup>107</sup>

A schizophrenic illness rendered the petitioner in *DC v DW*,<sup>108</sup> incapable of ‘entering into a permanent and meaningful relationship with the respondent.’<sup>109</sup> Emotional immaturity could render a marriage voidable,<sup>110</sup> as could non-disclosure of a pre-

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<sup>102</sup> William Duncan and Paula Scully, *Marriage Breakdown in Ireland: Law and Practice* (Butterworths 1990), 11.

<sup>103</sup> [1982] 2 ILRM 263.

<sup>104</sup> Barrington J, *RSJ v JSJ* [1982] 2 ILRM at 264, although the petitioner in this instance was unsuccessful. As cited in Alan Shatter, *Family Law* (3rd edn, Wolfhound Press 1986), 130.

<sup>105</sup> *HF v JC* [1991] 2 IR 330, Findlay CJ at 354.

<sup>106</sup> *HF v JC* [1991] 2 IR 330, Findlay CJ at 356 quoting, with approval, from Barrington J’s judgment in *RSJ v JSJ* [1982] ILRM 263.

<sup>107</sup> *HF v JC* [1991] 2 IR 330, Findlay CJ at 357.

<sup>108</sup> [1987] ILRM 58.

<sup>109</sup> *DC v DW* [1987] ILRM 58, Blaney J at 59.

<sup>110</sup> *PC v VC* [1990] 2 IR 91.

existing mental health difficulty.<sup>111</sup> The courts relied on professional psychiatric evidence where offered, but this was not always necessary particularly with regard to grounds such as ‘immaturity’ or ‘homosexuality.’<sup>112</sup>

The application of psychiatry and psychology in nullity cases was one element of the gradual separation of religious morality and marriage law that began in the 1980s. In cases like *Murphy, O’B v S* and *Hyland*, the courts had emphasised the moral quality of the marriage relationship and the family based on it.<sup>113</sup> By the mid-1990s, however, the application of social, economic and psychological knowledge in the resolution of specific difficulties took precedence over the textual implications of Article 41. A 1995 challenge to the constitutionality of the 1989 Act marked a significant departure from interpretations of Article 41 founded on ‘natural law.’<sup>114</sup> The case originated with an application for judicial separation in the Circuit Court, in response to which the husband challenged the constitutionality of the 1989 Act. When the matter came before Murphy J in the High Court on 28 July 1994, the applicant, relying on the Constitution’s evocation of natural law and Christianity,<sup>115</sup> attempted to call witnesses to testify as to the characteristics of Christian marriage. Murphy J refused to hear the evidence on the basis that:

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<sup>111</sup> In *O’M v O’C*, Unreported Supreme Court April 18 1996, a decree of nullity was granted to a wife whose husband did not inform her prior to the marriage that he had previously attended a psychiatrist for six years.

<sup>112</sup> Kieron Wood, writing in 1999, argued that the transfer of nullity jurisdiction to the Circuit Court by the Family Law Act 1995 and the introduction of a facility for the court to grant a divorce on a nullity application, greatly reduced the relevance of nullity decrees. The number of applications and decrees certainly declined following the introduction of divorce. Kieron Wood ‘Nullity and Divorce – The New Alternatives’ 1999 (2) *IJFL* 12. The remedy continued to have significant advantages for some litigants because, unlike judicial separation or divorce, neither putative spouse could seek financial orders following the grant of a decree of nullity.

<sup>113</sup> As discussed in chapter six.

<sup>114</sup> *TF v Ireland* [1995] 1 IR 321.

<sup>115</sup> Preamble and Article 6.

the obligations of the State and the rights of the parties in relation to marriage are now contained in the Constitution and our law ... and it is not possible for me to abdicate that function to any expert.<sup>116</sup>

The judge went on to describe the legal character and obligations of marriage. Marriage, he stated, is ‘a partnership based on an irrevocable personal consent which establishes a unique and very special lifelong relationship.’<sup>117</sup> It depends on more than physical consummation requiring ‘for its maintenance the creation of an emotional and psychological relationship between the spouses.’<sup>118</sup> The ongoing consent of the parties was essential because ‘the implacable opposition of one or other of the spouses to the continuation of the marriage ... must destroy the fundamental relationship’<sup>119</sup> The husband had specifically challenged section 2(1)(f) of the 1989 Act, which provides for the grant of a judicial separation where:

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.

He argued that this was too low a threshold for granting a decree, and as such infringed his constitutional rights with respect to marriage. Although the Court would not hear evidence from a moral theologian on the nature of marriage, it was prepared to accept the evidence of counselling professionals regarding the success rates of relationship therapy, and the time required by spouses to resolve their difficulties. On the basis of this information Murphy J held that ‘twelve months was a reasonable time to allow the parties to resolve their problems’ and therefore section 2(1)(f) did not unreasonably interfere with the plaintiff’s rights. The contrast between Murphy J’s approach and

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<sup>116</sup> *TF v Ireland* [1995] 1 IR 321, 334.

<sup>117</sup> Murphy J *TF v Ireland* [1995] 1 IR 321, 340 quoting Costello J in *Murray v Ireland* [1985] IR 532, 536.

<sup>118</sup> Murphy J *TF v Ireland* [1995] 1 IR 321, 340.

<sup>119</sup> Murphy J *TF v Ireland* [1995] 1 IR 321, 342.

that of Kenny J in *Murphy v Ireland*<sup>120</sup> is striking. Marriage was no longer seen a socio-moral institution, but as a companionate relationship between individuals that required the active participation of both. Politics, nonetheless, remained focused on institutional marriage and its centrality to the maintenance of social order.

## 7.4 Saving Marriage with Divorce

### 7.4.1 Laying the groundwork

A ‘Programme for a Partnership Government,’ negotiated by a coalition government following the 1992 general election, promised ‘a major programme of family law reform culminating in a referendum on divorce.’<sup>121</sup> An ultimately unsuccessful challenge to the constitutionality of the 1989 Act halted the referendum element of the plan.<sup>122</sup> When the Supreme Court handed down their decision on 14<sup>th</sup> July 1995, the coalition had collapsed and a rainbow government of Labour, Democratic Left and Fine Gael under the stewardship of John Bruton was in power.

Despite not introducing a referendum Bill, the 1992 coalition was successful in implementing a significant reform of the legal rules governing financial provision on judicial separation. The Family Law Bill 1994, as drafted, extended the courts’ powers to deal with the financial implications of marriage breakdown to cases of foreign divorce and nullity. As enacted, it applied only to judicial separation and foreign divorce; the nullity provisions were removed at committee stage on the advice of the Attorney General. The legislation had an ambitious set of aims. The Minister for Equality and Law Reform, Mervyn Taylor, in his second stage introduction refers to

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<sup>120</sup> [1982] 1 IR 241, see page 220.

<sup>121</sup> Fianna Fáil and Labour Parties, *Programme for a Partnership Government 1993 – 1997* (Dublin 1992), 36.

<sup>122</sup> *TF v Ireland, The Attorney General and MF* [1995] 1 IR 321 and see ‘News Review of 1994’ *The Irish Times* (Dublin, 29 December 1994) and Peter Ward, ‘Constitutional Challenge to Judicial Separation Act 1989 Rejected’ (1994) 12 ILTR 219.

the legislation mitigating the hardships that result from a decree of nullity, protecting the institution of marriage, providing a model of future divorce legislation and extending the range of financial orders available on marriage breakdown.<sup>123</sup>

Debate on the 1994 Bill, despite its length and complexity, was limited, perhaps because by committee stage the most controversial aspects of the legislation relating to nullity had been removed. The woman in the home and the symbolic importance of property ownership to her well-being and self-worth featured, with an amendment tabled that would create a presumption of equal sharing of the family home on judicial separation. The Minister rejected the amendment but acknowledged that ‘what is wanted most by spouses who work in the home and do not want to engage in litigation with their partners is some practical recognition of their contributions.’<sup>124</sup> Quietude, in his view, should be rewarded by a simple procedure for placing homes in joint names by agreement. ‘Such provision would enable couples who live in harmony to give full and effective recognition to the contribution made by the spouse who works in the home.’<sup>125</sup> Austin Currie commented:

it must be very galling for any woman to think that the work she had done in the home, sometimes over half a century or more, will not count. ... The contribution of women in the home is often more difficult, complex and valuable than that of those who work outside the home. It requires talents that those who work outside the home do not need.<sup>126</sup>

The 1994 Bill became the Family Law Act 1995, and was intended to form the template for forthcoming divorce legislation. It repealed Part II of 1989 Act replacing it with more comprehensive rules governing ancillary orders on judicial separation. Provision was also made, in Part III, for financial relief following divorce or judicial separation outside the State, and for application to the court for declarations of marital

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<sup>123</sup> Mervyn Taylor, Dáil Deb 23 February 1994, vol 438, col 610 – 624.

<sup>124</sup> Committee on Legislation and Security Debate, 11 May 1994.

<sup>125</sup> Committee on Legislation and Security Debate, 11 May 1994.

<sup>126</sup> Committee on Legislation and Security Debate, 11 May 1994.

status.<sup>127</sup> The minimum age of marriage was raised to 18 for both men and women, and s 12 of the Married Women's Status Act was repealed and replaced with a similar, but more comprehensive provision, governing property questions arising between spouses.<sup>128</sup> A new pension adjustment order was introduced, and variation provisions were updated.<sup>129</sup> The general scheme of the courts' judicial separation jurisdiction remained. The fault and no fault basis of the decree and the factors taken into account in deciding appropriate financial provision were unchanged.<sup>130</sup> More significantly, section 15 of the 1989 Act, which allowed the grant of property adjustment orders 'on one occasion only,' was replaced by section 9 of the 1995 Act, which provided that there would be no limit to the number of occasions on which a property adjustment order could be granted. The lifetime nature of spousal support obligations was enhanced rather than diminished in anticipation of divorce.<sup>131</sup> The division of pension assets under the Act could be achieved only by court order, thus ensuring that marriage breakdowns, where one or both parties had made pension provision, could not be resolved by agreement, unless the non-pensioned spouse was happy to waive all rights to the pension.

#### *7.4.2 Marriage-saving divorce*

A new 'Government of Renewal' took office on 15<sup>th</sup> December 1995 planning to continue the previous government's efforts on divorce.<sup>132</sup> Fine Gael, the largest

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<sup>127</sup> Part IV ss 29-30.

<sup>128</sup> Section 36.

<sup>129</sup> The more comprehensive variation provisions of s 18 of the 1995 Act replaced section 22 of the 1989 Act.

<sup>130</sup> The Family Law Act 1995 seems to have inadvertently omitted the term 'or at any time thereafter' in the financial relief provisions, however it was re-inserted by the Family Law (Divorce) Act 1996.

<sup>131</sup> The Family Law (Divorce) Act 1996 Act repeated the formula of the Family Law Act 1995 rather than that of the Judicial Separation and Family Law Reform Act 1989.

<sup>132</sup> Joe Carroll 'Plan for government takes up where old one left off' *The Irish Times* (Dublin, 15 December 1994).

government party, favoured the simple removal of the constitutional prohibition but the Labour Minister for Equality and Law Reform, Mervyn Taylor, publically announced his intention to include the conditions for divorce in the Constitution without consulting his government partners. Bertie Ahern, the new Fianna Fail leader immediately endorsed this approach, leaving Fine Gael with no option but to support Taylor's proposal.<sup>133</sup> The proposed amendment was drafted and the referendum set for 30 November 1995. Article 41.2.3 would be replaced with a statement of the terms upon which a marriage could be dissolved by the Court:

A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iv. any further conditions prescribed by law are complied with.

The Fifteenth Amendment to the Constitution Bill was introduced to Dáil Éireann in September 1995, and a government information paper on the divorce referendum, with draft legislation, was issued to the public the same month.<sup>134</sup>

Levels of marriage breakdown had continued to increase since the previous referendum on divorce in 1986. The government estimated that some 75,400 individuals were affected by marriage breakdown in 1993, and 'the number of people entering marriage [had] been decreasing steadily.'<sup>135</sup> The government declared in its information paper that it was 'strongly committed to protecting the family and the

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<sup>133</sup> Denis Coughlan 'Ahern upstages FG by agreeing to Taylor's divorce proposal' *The Irish Times* (Dublin, 11 May 1995).

<sup>134</sup> Department of Equality and Law Reform, *The Right to Remarry: A Government Information Paper on the Divorce Referendum* (Pn 1932, Stationery Office 1995).

<sup>135</sup> *ibid*, 5.

institution of marriage,<sup>136</sup> and this commitment was ‘central to government’s position on divorce.’<sup>137</sup> The potential impact of divorce would be minimal; ‘we have legal remedies equivalent to divorce in every respect except one, the right to remarry.’<sup>138</sup> In any event, government had introduced a wide range of measures to ‘support and enrich existing marriages.’<sup>139</sup> Government, in aiming to provide a divorce jurisdiction, had accepted responsibility, not only for promoting and protecting the institution of marriage, but for ensuring the quality of existing marriages.

Debate on the referendum Bill in the Oireachtas was prolonged, attracting comment from a large number of deputies and senators. A variety of arguments were made from a wide range of political positions, yet there was consensus on the notion that lifetime marriage formed the basis of the socially optimal family. Government was required to support and encourage this family type through its laws and social policy, because any significant degradation of the primacy of the marital family would lead to social and moral chaos. Niamh Breathnach, Minister for Education connects the wording of the amendment to government’s marriage protection role: ‘at the centre of the proposed wording is the Government’s support for the family and the institution of marriage.’<sup>140</sup>

There was no easy divorce; spouses would be required live apart for 4 years before being allowed to remarry. The delay would, according to Deputy Michael Woods, facilitate ‘counselling, reconciliation and a period of adjustment.’<sup>141</sup> They would be required to demonstrate, in addition to living apart for four years, that there was no reasonable prospect of reconciliation. Spouses could not be trusted to correctly report

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<sup>136</sup> *ibid*, 5.

<sup>137</sup> *ibid*, 7.

<sup>138</sup> *ibid*, 7.

<sup>139</sup> *ibid*, 7.

<sup>140</sup> Dáil Deb 27 September 1995, vol 456, col 46.

<sup>141</sup> Michael Woods, Dáil Deb 27 September 1995, vol 456, col 24.



that their marriage was at an end; government had a responsibility to ensure that their interpersonal relationship was irreversibly over before sanctioning the ending of the marriage and remarriage of the parties. During this period of adjustment and attempted reconciliation, they must continue to provide for one and other, an obligation that would continue beyond dissolution.<sup>142</sup>

In Oireachtas debate, pro-divorce arguments focused on the right to remarry. The Minister for Equality and Law Reform, Mervyn Taylor in introducing the Bill to the Dáil described divorce as a recognition ‘that unfortunately some marriages can and do irretrievably come to an end’ and that the option must be given to the parties ‘if they so wish, to remarry.’<sup>143</sup> Deputies continually emphasised the difficulties experienced by those who enter second relationships. Liz McManus, then Minister for State at the Department of the Environment, laments the recent:

increase in the number of family units that are not recognised in the tax and social welfare codes and are simply outside the system. We have an expanding tier of second class families.<sup>144</sup>

Although her purpose was to advocate for divorce, Deputy McManus clearly communicated her view that families based on legally sanctioned marriage were superior to other family forms. These non-standard families must be allowed to conform so that they can avail of the advantages that the State endows on married couples. Theresa Ahern argued that ‘because couples are incompatible with each other does not mean they will be incompatible with everyone ... separated, battered wives or abandoned husbands’ must be afforded the ‘possibility of a future second happy

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<sup>142</sup> Existing rules under the 1976, 1989 and 1995 legislation would apply until application for divorce was made.

<sup>143</sup> Dáil Deb 27 September 1995, vol 456, col 23.

<sup>144</sup> Dáil Deb 27 September 1995, vol 456, col 202. Michael D Higgins a Labour deputy recognises the implied reprobation in this perspective: ‘I object to the suggestion that it [divorce] will give respectability to second unions. People in second relationships are respectable by any definition of that word, they are not seeking respectability.’ Dáil Deb 27 September 1995, vol 456, col 233.

marriage.’<sup>145</sup> Alan Shatter described the absence of an ‘opportunity of a second chance’ as an ‘extraordinary cruelty,’<sup>146</sup> whilst Roisin Shorthall designated the right to remarriage as a ‘civil right.’<sup>147</sup>

Fianna Fáil, the main opposition party, supported the government pro-divorce position. Michael Woods claimed that ‘[w]e now have a significant number of people who want to remarry.’<sup>148</sup> Tom Kitt, also Fianna Fail, also focused on the ‘right to remarry:’

Take for instance, the plight of a young woman, the victim of domestic violence and, ultimately, desertion by her husband. If after some time, she meets someone else and enters into a rewarding, stable and loving relationship, are we to deny her the opportunity to remarry, and the right to have her long term and loving relationship recognised by law as marriage.<sup>149</sup>

The implication of this argument is clear; marriage is a desirable status which should be wanted and available to as many (heterosexual) individuals as possible, other family structures are ‘second class.’ Divorce, in allowing separated persons to remarry would, in David Andrew’s view support ‘the pre-eminent role of the family in the social fabric of our nation.’<sup>150</sup>

All of the major parties officially backed the referendum campaign, and dissent in the Oireachtas was relatively muted. Those who did voice opposition concurred with the picture of marriage as the optimal relationship form, but conceptualised divorce as a threat rather than a support to marriage. Michael Noonan was forthright in his

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<sup>145</sup> Dáil Deb 27 September 1995, vol 456, col 354-5.

<sup>146</sup> Dáil Deb 3 October 1995, vol 456, col 781-2.

<sup>147</sup> Dáil Deb 3 October 1995, vol 456, col 807. A number of deputies in the debate described divorce as a ‘civil right’. The nature of civil rights and their distinction from human rights is outside the scope of this work. The choice of the term ‘civil’ as opposed to ‘human’ in describing the right to remarry may, however, be linked to the decision of the European Court of Human Rights in *Johnson v Ireland* [1986] 9 EHRR 330, in which it was held that a right to divorce could not be inferred from Article 8 of European Convention on Human Rights.

<sup>148</sup> Dáil Deb 27 September 1995, vol 456, col 25.

<sup>149</sup> Dáil Deb 27 September 1995, vol 456, col 181.

<sup>150</sup> Dáil Deb 27 September 1995, vol 456, col 52.

opposition: ‘Divorce is basically wrong and will destroy the fabric of family life and values.’<sup>151</sup> Noel Ahern emphasised the affect of divorce on the nature of marriage:

Bringing in divorce abolishes marriage as we know it. Marriage up until now was lifelong, based on a permanent commitment. If divorce is introduced, every marriage in the State is made temporary in the eyes of the law.<sup>152</sup>

Anti-divorce positions also tended to focus on the moral aspects of marriage occasionally referring to the doctrine of the Catholic Church. Senator Joseph Doyle was particularly forthright regarding his membership of the church and his commitment to ‘the permanency of marriage.’<sup>153</sup>

The Minister for Justice drew attention to ‘the authenticity of government support for marriage’ demonstrated by ‘the package of action, involving both laws and services, to prevent marriage breakdown in so far as possible.’ This included ‘Department of Equality and Law Reform funding for marriage counselling organisations which provide pre-marriage counselling and assist marriages under stress.’<sup>154</sup> Michael Woods and Tom Kitt endorsed ‘educational programmes[s] on marriage and what it entails ... as part of the school curriculum.’<sup>155</sup> Successful mediation would help couples to maintain a harmonious relationship post-divorce. Eithne Fitzgerald, the Minister for State at the Department of the Tánaiste, described mediation as ‘much more civilised’ it created more ‘harmony’ than ‘trading accusations and faults.’<sup>156</sup> Phil Hogan argued that the form of divorce proposed by government:

is well balanced ... It enshrines the need for reconciliation. This Government and previous Governments have increased the funding in recent years to many organisations involved in mediation and counselling ... one will not qualify for a

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<sup>151</sup> Dáil Deb 27 September 1995, vol 456, col 194.

<sup>152</sup> Dáil Deb 27 September 1995, vol 456, col 228.

<sup>153</sup> Seanad Deb 12 October 1995, vol 144, col 1466.

<sup>154</sup> Dáil Deb 27 September 1995 vol 456, col 46.

<sup>155</sup> Dáil Deb 27 September 1995 vol 456, Michael Woods, col 18, Tom Kitt col 187.

<sup>156</sup> Dáil Deb 28 September 1995 vol 456, col 534.

divorce unless one can show that a process of reconciliation was undertaken and the needs of children and the other spouse have been dealt with.<sup>157</sup>

The message was clear; marriages must be saved, using professionals paid by the State if necessary. If it was not possible to effect reconciliation through the deployment of expertise over a four year period, then a civilised negotiated arrangement between spouses would be tolerated. Marital disputes so intractable that they required the intervention of the courts did not fall within the zone of behaviour that government wanted to acknowledge or encourage.

### *7.4.3 Legislating for divorce*

The Fifteenth Amendment Bill passed through the Oireachtas without difficulty and was put to the electorate in November 1995, passing by a slim majority.<sup>158</sup> A draft Family Law (Divorce) Bill had been circulated to the general public in advance of the referendum leaving little room for Oireachtas amendment when debate began in June 1996. As enacted, the Family Law (Divorce) Act 1997 provided for divorce without proof of marital fault following the separation of the spouses for a period of four out of the previous five years. Fault was not wholly irrelevant. The conduct of each of the spouses was a factor to be taken into consideration in the making of ancillary financial orders ‘if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.’<sup>159</sup> The Act envisaged financial orders being available following divorce, save in cases where the recipient had remarried, thus ensuring the continuation of the financial obligations of marriage beyond its legal dissolution.

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<sup>157</sup> Dáil Deb 3 October 1995 vol 456, col 549-555, 3 October 1995.

<sup>158</sup> With a 62.15 percent voter turnout, 50.28 percent voted in favour of the amendment. The legislation was not enacted until 17 July 1996 due to a constitutional challenge to the conduct of the government in the referendum campaign. *Hanafin v Minister for the Environment & Others* [1996] 2 ILRM 161.

<sup>159</sup> Family Law (Divorce) Act 1996, s 20(2)(f).

‘Proper provision’ for spouses and children was a constitutional prerequisite to the grant of a decree of divorce, but its content was left to judicial discretion. Neither was any legislative guidance given to the court regarding how it should determine that there is ‘no prospect of reconciliation,’ or whether the parties have indeed lived apart for four out of the previous five years.<sup>160</sup> As with judicial separation, a list of factors to be taken into account by the court in making financial awards was provided but the termination of financial obligation was not one of them.<sup>161</sup> Marriage, as defined by the Act, was a semi-terminable relationship producing unpredictable post-relationship obligations, subject to continual review during the lifetime of former spouses.

## **7.5 The Effects of Marriage Law**

### *7.5.1 Self-governing marriages*

Marriage, over the course of the 1980s and 1990s, had become an intense relay of interests; economic, legal, religious, political and psychological, creating more and more centres of self-perpetuating power installed around the relationship behaviour of individual citizens. The most powerful of these, or the one with the capacity to act as a transfer point for all the others, was legal. Constitutional support for lifetime dependency marriage endorsed religious values. Legally sanctioned marriage facilitated political administration of the social domain. Legal processes assimilated

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<sup>160</sup> Family Law (Divorce) Act 1996

s 5(1) – Subject to the provisions of this Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that –

(a) at the date of the institution of the proceedings, the spouses have lived apart from one and other for a period of, or periods amount to, at least four years during the previous five years,

(b) there is no reasonable prospect of a reconciliation between the spouses, and

(c) such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family, the court may, in the exercise of the jurisdiction conferred by Article 41.3.2 of the Constitution, grant a decree of divorce in respect of the marriage concerned.

<sup>161</sup> Family Law (Divorce) Act 1996, s 20.

scientific knowledge and demonstrated significant institutional experience in the management of problematic relationships. The social and legal danger of marriage breakdown generated a need for counselling and mediation

The centrality of law meant that legal expertise was the major form of knowledge relied upon by government in resolving the problems of marriage. Government acknowledged that the difficulty with marriage was the financial hardship dependency marriage created for wives. It was also aware of the limitations of marriage law in addressing these difficulties. Nevertheless, alternatives to marriage law were not considered. The over-riding aim of government was to save marriage, an objective that seemed doomed to failure from the beginning. Yet, it was never expected that marriage breakdown or cohabitation could be eliminated. Rather, in developing mechanisms to save marriage, government established an ideal relationship and installed mechanisms of control around those who did not conform. Marriage law was presented as a measure to save marriage, but in effect, it established lines of penetration into couple-relationships requiring individuals to pay close attention to their own behaviour. Legal marriage, the optimal relationship form, once entered into, had to be maintained. The desperately abnormal, those with clinical diagnoses, could be released from marriage and all of its obligations.<sup>162</sup> The merely transgressive were required to save their marriages through relationship counselling, or to remake their post relationship lives in the image of lifetime marriage.

The deployment of legal mechanism in addressing the problems of marriage thus inevitably implicated individual lives in the marriage-saving objectives of government. The intense political focus on marriage between 1986 and 1996, and in

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<sup>162</sup> Through the legal nullity jurisdiction, whose effect was to declare that the marriage never existed and thus eliminate the possibility for post-relationship financial provision.

particular two plebiscites on the issue of divorce, could leave no one in any doubt that marriage was essential to the well-being of individuals and the stability of the State. The marriage saving rhetoric of politics, the individualised nature of legal remedies, and the proliferation of State funded of counselling services, intimated that failure at marriage was both a social and an individual failure.

The individualisation thesis of family change posits that relationships became more complex as a result of wider social and structural change. Carol Smart, found a close congruence between Giddens' description of the 'rise of intimacy' and British legal change, suggesting that legal change had reflected social change. 'Clean break' divorce in particular, facilitated the movement of individuals from one relationship to another. Smart also, however, noted a recent regression toward marriage protection as a means to promote social stability.<sup>163</sup> The path of Irish marriage law, leading to the introduction of divorce, does not follow this linear trajectory. It appears, rather, that a series of elements were linked together in a more circular fashion. Government offered dependency marriage as the optimal relationship form. This was supported by religious ideals and the needs of State administrative systems such as tax and social welfare. Value was attached to marriage, it was given an economic and affective worth, and fear was installed around it as a source of danger, to women, to children, to society as a whole.<sup>164</sup> Failure at marriage carried a whole host of difficulties. It created reasons for blame and responsabilisation, justification for intervention and grounds for individuals to police their own relationships. Perhaps individualisation

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<sup>163</sup> Carol Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy' (1997) 26 (3) *Journal of Social Policy*, 301, 311.

<sup>164</sup> This articulation is drawn from Foucault's observations regarding the problematisation of incest. See Michel Foucault, *Abnormal* (Graham Burchell tr, Picador 2003), 263-265.

theories of relationships do not describe individual practice, but are a manifestation of the power effects of the political problematisation of legal marriage.

### *7.5.2 Post-divorce marriage – social provision.*

Increased participation by women in the workforce during the 1990s meant that they had more financial independence from their husbands and, in contributing to the social insurance scheme in their own right, had less need to rely on their husband's contributions, particularly in relation to pensions. Nonetheless, women dependent on their husbands risked losing the substantial tax and welfare advantages of marriage upon divorce. The government information paper circulated prior to the referendum therefore carefully set out how divorce would affect tax and social welfare and many of the measures were already in place prior to the referendum.<sup>165</sup>

The approach taken within the social welfare system was to allow a divorced person, who had not remarried, to claim benefits based on their former spouses contributions. For example, a widow's pension would be available to a woman whose former husband had made the requisite number of contributions prior to his death. If he remarried, then both 'widows' would receive the pension. A woman in receipt of a deserted wives payment would continue to be considered 'deserted' following divorce, and a prisoner's wife could also receive an allowance post-divorce. Social welfare dependent allowances would continue to be paid to a person supporting a former spouse, even if the paying spouse remarried and received a dependent allowance for a second spouse.<sup>166</sup> The objective of social welfare provision was therefore to assume

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<sup>165</sup> The relevant changes were implemented by the Social Welfare (Number 2) Act 1995.

<sup>166</sup> This would primarily apply to women who did not have care of children nor qualify for a means-tested payment in their own right, but were being supported by a man in receipt of a means-tested payment. It is difficult to imagine how such a situation could have arisen in practice.



that marriage and its obligations continued post-divorce. The information paper specifically acknowledged that:

Where a spouse is unwilling or unable to meet maintenance obligations, State intervention may be necessary to provide support for vulnerable dependents.<sup>167</sup>

The Social Welfare (No 2) Act 1995 redefined 'spouse' to include:

- (a) a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State, or
- (b) a man and woman who are not married to each other but are cohabiting as husband and wife.<sup>168</sup>

Taxation policy similarly facilitated the continuation of marriage privileges following divorce, but it also allowed single treatment, which would prove more beneficial to two income couples with children.<sup>169</sup> One significant fiscal implication of divorce was the removal of the exemptions from capital taxes that applied between spouses. These exemptions would be available for property transactions made pursuant to an order for divorce, but not following divorce when the former spouses would be treated as strangers. Nevertheless, if the need for property transfer arose post-divorce, the Family Law (Divorce) Act 1996 facilitated an application for variation of a divorce order for the lifetime of the spouses which would attract the exemption.

The effect of divorce on 'discarded' first wives had been a significant factor in the 1986 divorce referendum, with anti-divorce campaigners able to point to their

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<sup>167</sup> Department of Equality and Law Reform, *The Right to Remarry: A Government Information Paper on the Divorce Referendum*, 22.

<sup>168</sup> Section 9, referring to qualification rules for Family Income Supplement.

<sup>169</sup> Aggregation allowed to married couples could be continued post-divorce, although the spouses would be separately assessed. A married couple with one income and no children could thus retain the full advantages of double tax allowances and credits. For a two-income family with children, separate assessment would be more beneficial because each spouse would have their own tax allowances and bands and, if they shared custody of children, also claim an additional single parent allowance equal to an adult dependent allowance. In this circumstance the couple would be significantly better off post-divorce. These provisions had been introduced for separated couples in the Finance Act 1983 and were extended to divorced couples by the Finance Act 1995.

effective exclusion from State services and the difficulty in supporting two families with one income. Government had pre-empted this objection in 1996 by agreeing to extend marriage-based social provision to former wives (and husbands in some cases). Politics had not yet found a way to imagine that marriage and its obligations could, in fact, end on divorce.

### *7.5.3 Effects of marriage law – apparatus of control*

The Irish government had aimed to construct a set of legal rules that would symbolise its commitment to marriage, save marriages in difficulty and, following the introduction of divorce, create new, better marriages to replace failed attempts. Their efforts, however, attracted significant criticism. Sociologists, Tony Fahey and Maureen Lyons reviewed the operation of pre-divorce rules in 1995, and concluded that legislators and policy makers had made, and changed, the law whilst ‘driving in the dark,’ that is, without regard to the social context or impact of what they were doing.<sup>170</sup> They found that family law operated as a two-tier system, lower income families achieved *de facto* separations by making applications for barring orders. Many maintenance applications were made to fulfil the prerequisites for lone parent welfare payments. Judicial separation or formal legal separation was the experience of only a small, better off, minority.<sup>171</sup>

The Law Reform Commission also criticised the operation of the family law system in a Consultation paper, and subsequent report, on the family law courts, published in advance of the divorce referendum. The Commission found that in aiming to protect marriage through law, government had produced:

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<sup>170</sup> Tony Fahey and Maureen Lyons, *Marital Breakdown and Family Law in Ireland – A Sociological Study* (Oaktree Press 1995), 3.

<sup>171</sup> *ibid*, 121-122.

a system struggling and barely managing to cope with the very great increase in family litigation in recent years. The result is a sad parody of that which might be expected in a State whose Constitution rightly places such emphasis on the protection of family life.<sup>172</sup>

Anticipating further difficulties upon the introduction of divorce the Commission reported that:

There has in the last twenty years been a vast increase in family litigation. While this may be a reflection of an underlying problem of greater instability in family relations, its more direct progenitor has been a series of reforming measures.<sup>173</sup>

Fahey and Lyons and the Law Reform Commission drew attention to the continually increasing number of applications for family law remedies. They also described the dense legal apparatus governing intimate relationships that had developed since the government's program of reform began in 1976. Additional courts and sittings were established and specific family law venues operated in Dublin.<sup>174</sup> The Legal Aid Board<sup>175</sup> and Family Mediation Service<sup>176</sup> expanded their services to cope with demand from troubled relationships. Probation and Welfare Board professionals were involved in domestic violence and child-related cases.<sup>177</sup> Court Clerks, formerly concerned only with the smooth running of their courts, initiated procedures to deal with the large number of litigants in person seeking the assistance of the District Court.<sup>178</sup> Courts collected statistics on family law cases, work not

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<sup>172</sup> Law Reform Commission, *Report on Family Courts* (LRC 52 1996), 8.

<sup>173</sup> *ibid*, 4.

<sup>174</sup> Separate courtrooms were provided in Dublin for District, Circuit and Family Law cases. In the case of the District Court a separate building was provided at Dolphin House. The Law Reform Commission referred to these facilities as being 'more modern and familiar reducing the overall intimidatory effect of the adversarial process.' *ibid*, 26.

<sup>175</sup> Although in operation since 1989, the Legal Aid Board was set up as a statutory body by the Civil Legal Aid Act 1995.

<sup>176</sup> The Family Mediation Service was set up in 1986 on a pilot basis but continued with Department of Justice funding, increased in advance of the 1996 divorce referendum, until transferred to the Legal Aid Board in November 2011.

<sup>177</sup> Law Reform Commission, *Consultation Paper on Family Courts*, 105.

<sup>178</sup> Fahey and Lyons estimated that as many as 50 percent of litigants in the District Court were unrepresented. Fahey and Lyons *Marital Breakdown and Family Law in Ireland – A Sociological Study*, 122.

undertaken or required in other civil law categories.<sup>179</sup> An abundance of Statutory Instruments set out the specialised rules applying to marriage law cases and courts.<sup>180</sup> Professional bodies, governing lawyers, counsellors, and mediators created training and accreditation programs specifically directed to the resolution of relationship disputes.<sup>181</sup> This apparatus was not confined to the regulation of marriage. Fahey and Lyons reported that in the District Court:

just over half of the maintenance cases arose in the context of what we might call ‘pure’ marital separation (i.e. involving wives and husbands where barring proceedings were not being invoked). The balance was made up of maintenance cases which were tied in with barring applications and maintenance cases between non-married partners.<sup>182</sup>

The legal apparatus governing familial relationships had spread far beyond the constitutional family and, according to the Law Reform Commission, was ‘in crisis,’ struggling to respond to demand. At District Court level, where the majority of family litigation occurred, being married attracted no preferential treatment. The Guardianship of Infants Act 1964 facilitated maintenance applications for non-marital children and the barring order jurisdiction was extended to include cohabitants in 1996.<sup>183</sup> Dysfunctional families of all types were dealt with by an ‘ill equipped and

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<sup>179</sup> Law Reform Commission, *Consultation Paper on Family Courts*, 107. The Law Reform Commission also noted that the Court staff were reluctant to collect this information because it was not part of their traditional workload, the courts were already understaffed and the extraction of the information was time-consuming, requiring the clerk to go through each case file individually.

<sup>180</sup> The following statutory instruments dealt only with court rules relating to Marriage Law cases: Rules of Superior Courts (No. 1), SI 1990/97; Rules of the Superior Courts (No. 3), SI 1997/343; District Court (Family Law) Rules, SI 1998/42; District Court (Domestic Violence) Rules SI 1998/201; District Court Rules SI 1997/93; Circuit Court Rules (No 1) SI 1997/84; Circuit Court Rules (No 1) SI 1991/159; Circuit Court Rules (No 1) SI 1994/225.

<sup>181</sup> The Mediators’ Institute of Ireland was established in 1992 as a professional association for mediators in the Republic of Ireland and Northern Ireland <[www.themii.ie](http://www.themii.ie)> accessed 14 June 2013. The Family Law and Legal Aid Committee of the Law Society of Ireland issued a *Family Law in Ireland-Code of Practice*, in 1995.

<sup>182</sup> Fahey and Lyons *Marital Breakdown and Family Law in Ireland – A Sociological Study*, 45.

<sup>183</sup> The Domestic Violence Act 1996 s 3(1)(b) extended the range of applicants to include an application by a non-spouse who had ‘lived with the respondent as husband or wife for a

intimidating' process.<sup>184</sup> Marriage law had, in effect, created an administrative monster.

#### *7.5.4 Marital litigation*

Fahey and Lyons' description of the 'two tier' system pointed to the circumstances in which parties who could not agree would resort to the courts. If there were no assets and little money, or if the parties lived in local authority housing, on welfare payments, a judicial separation was unnecessary. A barring order was a convenient mechanism for removing one spouse from the home, thus effecting a de facto separation.<sup>185</sup> A maintenance order might secure support for children or entitle the beneficiary to a social welfare payment in their own right. Difficult marriages in which there was property, the type of marriage pictured by government in making law, needed more comprehensive remedies.

For the middle classes, suspending marriage was a complex procedure. A solicitor consulted by a spouse was required to discuss the possibility of reconciliation, the availability of mediation and the potential to negotiate an agreement.<sup>186</sup> The possibility of a nullity application also had to be explored, involving a detailed examination of the circumstances in which the marriage was entered into. The formal requirements for a valid marriage had to be confirmed, and the validity of prior marriages and divorces verified. Once litigation was decided upon, the legislative framework for

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period of at least six months in aggregate during the period of nine months immediately prior to the application for the barring order,'

<sup>184</sup> Law Reform Commission, *Consultation Paper on Family Courts*, 30.

<sup>185</sup> An interim barring order could be obtained on the evidence of one party and would remain in place until a full hearing of the matter, which could be several months later. Domestic Violence Act 1996, s 4. An appeal against an interim barring order would not put a stay on the order. Between 1996 and 2001, 12,813 individuals were barred from their homes. Courts Service, 2(1) *Family Law Information Bulletin* February 2001. (The 1996 Act replaced the barring order regime of the Family Law (Protection of Spouses and Children) Act 1981).

<sup>186</sup> Section 5 of the Judicial Separation and Family Law Reform Act 1989 imposed a statutory obligation on solicitors to discuss these options with their client.

judicial separation obliged the court to consider the behaviour of the parties if it would be unjust to ignore, thus creating an incentive to list marital failures in court documents,<sup>187</sup> as conduct not pleaded could not be considered by the court.<sup>188</sup> A judicial separation could be granted on the grounds of ‘adultery,’ ‘unreasonable behaviour’ or ‘lack of a normal marital relationship,’<sup>189</sup> necessitating consideration of all of these issues. In order to claim the absence of a ‘normal marital relationship,’ an investigation of the intimate lives of the spouses was required, and to commence a judicial separation a grounding affidavit was prepared referring ‘to every possible legal and factual permutation’<sup>190</sup> In making an application in the Circuit or High Court details of all remedies sought had to be stated. As the applicant spouse might not, at that stage, have full details of their spouse’s financial position, all possible relief had to be claimed, thus encouraging denial and correspondingly detailed counterclaim. Although divorce legislation did not require proof of fault, the applicant was required to prove that there was ‘no reasonable prospect of reconciliation.’<sup>191</sup> In addition, reconciliation and negotiated separation had to be considered (despite the minimum four year period of separation), and again the lack of financial information at the outset

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<sup>187</sup> Judicial Separation and Family Law Reform Act 1989 s 20(2)(i)

<sup>188</sup> The advising solicitor required considerable information. For example, although a judicial separation could be granted on the grounds of adultery, if the spouses had lived with one and other for more than 1 year after it became known to the application that the respondent had committed adultery, then they could not rely on adultery as a ground for judicial separation, but it could still be considered by the court in constituting unreasonable behaviour. Section 4, Judicial Separation and Family Law Reform Act 1989.

<sup>189</sup> Judicial Separation and Family Law Reform Act 1989, s 2.

<sup>190</sup> Law Reform Commission, *Report on Family Courts*, 74. The Rules of the Superior Courts, SI 1990/97 required the listing of all assets, information regarding the possibility of reconciliation and the basis upon which it might take place and a list of the relief claims. The Law Reform Commission commented that ‘In practice, the result is that the initial documents will tend to plead every relief possible making it difficult for the party receiving the document to know what is realistically sought or expected of him/her.’ Law Reform Commission, *Consultation Paper on Family Courts*, 63.

<sup>191</sup> Section 5 (1)(b) Family Law (Divorce) Act 1996.

of proceedings could lead a spouse to claim all possible reliefs in attempting to ensure the legislatively mandated ‘proper provision.’<sup>192</sup>

The court, in both judicial separation and divorce, had a wide discretion in making ancillary orders. Reporting restrictions and the *in camera* rule meant that the actual outcomes of most family law cases were unknown. This uncertainty further encouraged litigants to plead and contest every aspect of their failed relationship. Once spouses with difficult issues had reached the stage of litigation, their negotiations were inevitably difficult. The stakes were high and adjudicative outcomes unpredictable. According to the Law Reform Commission, the *in camera* rule created ‘an unhealthy atmosphere in which anecdote, rumour and myth inform the public’s understanding of what goes on in the family court.’<sup>193</sup>

A further consequence of the existence of this dense, and high profile, network of marriage law was to construct marriage as a legal relationship carrying enforceable rights and obligations. Nevertheless, the *in camera* rule and the multi-layered, discretionary nature of the marriage law system meant that individual spouses were never entirely sure what precise rights and obligations applied to their marriage. In a difficult interpersonal situation, spouses were free to construct their own image of marital rights and obligations and to seek their vindication through counselling, mediation and the courts. ‘Bargaining in the shadow of the law’ has been offered as a way of thinking about the effect of law in divorce situations. Order, it is argued, is not imposed from above, but rather divorce law provides a framework within which divorcing couples can determine their post-marriage rights and responsibilities themselves. This empowers individuals by facilitating the private ordering of legally

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<sup>192</sup> Section 5(1)(c) and ss 6 and 7 in respect of reconciliation.

<sup>193</sup> Law Reform Commission, *Consultation Paper on Family Courts*, 136.

enforceable commitment.<sup>194</sup> The form of law adopted by the Irish government, focused on marriage-saving, was conducted in private, and was highly discretionary. It provided no shadow. Rather it created a framework within which individuals were free to create their own, highly mobile rights, guaranteeing not empowerment, but seemingly inevitable conflict.

#### *7.5.5 Identifying abnormality in the courts*

In written judgments, Judges often referred to the failure, and blameworthiness, of individuals submitting to marital adjudication, even when not strictly relevant to their decision. In *EP v CP* for example,<sup>195</sup> Mc Guinness J identified the most important aspect of the case to be the ‘maintenance of the children’ and assigned responsibility for their vulnerability to the husband.

Mr P showed no sign of regret for the breakdown of his marriage. I felt very little sign of a real sense of responsibility for the upbringing and financial backing of his children ... It also astounds me that Mr P does not seem willing to make any effort ... to get ordinary employment ... and at least make some payment towards the arrears of maintenance for his children.

In *JD v DD*<sup>196</sup> McGuinness J found that ‘the husband’s adultery put the nail in the coffin of the marriage,’<sup>197</sup> and granted the judicial separation on this ground, despite acknowledging that the marriage had difficulties for a significant period. The Supreme Court in *MW v DW* referred to litigants as ‘a dysfunctional family of parents and children living under one roof.’<sup>198</sup> The wife in *S v S*<sup>199</sup> was condemned by Findlay CJ for ‘enjoying her life to the full,’ and having ‘no proper appreciation of the

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<sup>194</sup> Robert Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law’ (1979) 88(5) Yale Law Journal 950, 950.

<sup>195</sup> [1998] 11 JIC 2706

<sup>196</sup> [1997] 3 IR 64.

<sup>197</sup> *JD v DD* [1997] 3 IR 64, 72.

<sup>198</sup> Unreported Supreme Court, 25 November 1999.

<sup>199</sup> [1992] ILRM 732.



commitments which marriage involves.’<sup>200</sup> A finding that one party was the innocent victim of marriage breakdown could confer considerable advantages. The husband in *S v S* gained full custody of the children of the marriage as a result of his wife’s failures. In *AS v GS & AIB Notice Party*<sup>201</sup> the court protected the family home in which the (‘innocent’) wife and children were living from the husbands debt because it was ‘highly desirable that the property in question, being the family home of the applicant and the children of the marriage, be transferred to the applicant.’<sup>202</sup> The courts, adopting their traditional blame-apportioning role, served to re-enforce the dangers of entering into the legal complex surrounding marriage. Asserting one’s legal rights, or seeking simply to exit a failed relationship, risked judicial censure.

#### *7.5.6 Self government - negotiation*

Couples who reached the end of their relationship were presented with a choice. They could attempt to resolve their own disputes through reconciliation, mediation or agreement, or they could submit to the adjudicative function of the courts, by approaching a solicitor to initiate court proceedings or attending at the District Court as a litigant in person to obtain a barring or maintenance order.<sup>203</sup> This would not be a pleasant experience. The Law Reform Commission described courtroom facilities as ‘a disgrace.’<sup>204</sup> There were often no ‘waiting room facilities sometimes leaves opposing spouses to confront one and other seated on benches in cold and draughty

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<sup>200</sup> *S v S* [1992] ILRM 732, 737-8.

<sup>201</sup> [1994] 1 IR 407.

<sup>202</sup> [1994] 1 IR 407, 410.

<sup>203</sup> Free legal assistance was available through the Legal Aid Board. Obtaining assistance in this was represented a further layer of adjudication requiring an initial assessment and the production of financial information, followed by consideration of the urgency of the matter and finally a long wait for an appointment with a legal aid solicitor. In June 1998, 4,200 people were awaiting legal services from the board. Legal Aid Board, *Annual Report 2000* (Legal Aid Board 2001), 8.

<sup>204</sup> Law Reform Commission, *Consultation Paper on Family Courts*, 30.

corridors.’<sup>205</sup> Not only were the physical conditions in which litigants found themselves difficult. The atmosphere of the courts was adversarial and litigious.

Its ethos and general approach ... is negative. Instead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system with its concentration on adjudication, is on solutions, which take control away from the participant.<sup>206</sup>

In entering into the adjudicative realm of the courts, particularly when seeking the substantive remedies of judicial separation or divorce, litigants were required to reveal every detail of their marital failure. Although their identity was protected from the outside world, they had to justify their behaviour to a series of professionals and eventually to a judge. If unable to prove their vulnerability and need for protection, they risked personal chastisement and material disadvantage. Their ordeal did not end with the grant of a judicial separation or divorce, the on-going nature of support obligations left them tied to a former spouse for life. Whichever route individuals chose to exit their marriage, they could never escape its obligations. Mediated agreements and separations left them tied to their spouse by marriage, post relationship co-operation and financial support created moral and practical ties, even divorce left no escape from the (financial) responsibilities of a failed marriage.

#### *7.5.7 Moving away from marriage*

Fahey and Lyons recorded that most family cases coming before the courts related to the fulfilment of pre-requisites for social welfare payments, protection from violence and disputes regarding guardianship, custody and access to children.<sup>207</sup> None of these are specifically related to marriage and the first two in particular address issues –

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<sup>205</sup> *ibid*, 135.

<sup>206</sup> *ibid*, 136.

<sup>207</sup> In 1993-4 there were 14,156 such applications and 2,806 applications for judicial separation. Fahey and Lyons *Marital Breakdown and Family Law in Ireland – A Sociological Study*, 43-44.

financial need and protection from violence – that are not necessary limited to those involved in intimate relationships.<sup>208</sup> The resolution of specific ‘marriage’ law disputes, the ‘marriage saving’ jurisdiction envisaged by government, therefore, represented only a small portion of the work of the courts. Couples with financial resources, and in agreement, could simply choose to live apart; the revenue commissioners, social welfare and other organs of the State would accept a *defacto* separation for administrative purposes. Without a court order, married parents remained joint guardians of their children and if arrangements in relation to custody could be agreed there was no need for the sanction of the courts. A negotiated separation and distribution of property could be effected without reference to the courts. The only cases requiring a judicial separation were those in which they were necessary. For example, where the parties had significant assets and could not agree on their distribution, where one party refused to leave the family home, or, following the 1995 Act, where one of the parties had a significant employment related pension provision. All other issues, child custody, access or maintenance, spousal maintenance, domestic violence, could be more effectively resolved without recourse to judicial separation.

In this sense, therefore, government rhetoric that divorce was simply the right to remarry was accurate. Divorce legislation mirrored judicial separation legislation in continuing marital obligations. The State would treat divorce and separation similarly for social welfare purposes allowing any individual to accumulate a succession of spousal obligations. For those who had agreed the division of their lives, obtaining a divorce simply involved an administrative procedure following a wait period. For

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<sup>208</sup> The Domestic Violence Act 1996, s 2 extended the barring and protection order jurisdiction to any person ‘residing with another person in a relationship the basis of which is not primarily contractual.’

those who could not agree, however divorce represented another opportunity to revisit the animosity of their relationship failure, another process of examination and division and a re-iteration of the lifetime obligations of Irish marriage.

## 7.6 Shifting knowledge

The decision in *TF v Ireland* illustrates the extent to which judicial opinion had departed from adherence to the textual truth of Article 41. Not only had marriage become a companionate relationship requiring the ongoing effort and consent of the parties, defined gender roles were no longer appropriate to modern social conditions:

The reality is that with improved education and increasing equality of opportunity in all forms of careers and indeed the entitlement to retain employment after marriage, a married woman will have in many cases the possibility to provide for herself independently of her spouse and even where her own earnings are insufficient the vastly improved social welfare arrangements have rendered it unnecessary for a married woman to live in an unacceptable state of bondage.<sup>209</sup>

In a further departure from the position in the 1980s, the courts began to express a reluctance to interfere with policy decisions made by government on the basis of social economy.<sup>210</sup> For example, in *Mhic Mhathuna v Ireland & AG*,<sup>211</sup> a challenge to tax and welfare measures that potentially conferred financial advantages on single parent families *vis a vis* married couples was rejected. The Supreme Court held that ‘these are peculiarly matters within the field of national policy to be decided by a combination of the executive and the legislature that cannot be adjudicated on by the courts.’<sup>212</sup> Similarly, in *Lowth v Minister for Social Welfare*<sup>213</sup> the plaintiff unsuccessfully challenged the scheme of deserted wives benefits from which he was excluded because he was a husband rather than a wife. The High court rejected his

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<sup>209</sup> Murphy J, *TF v Ireland* [1995] 1 IR 321, 337.

<sup>210</sup> *In Re Article 26 and the Matrimonial Home Bill* a notable exception.

<sup>211</sup> [1995] 1 ILTR 69.

<sup>212</sup> Findlay CJ, *Mhic Mhathuna v Ireland & AG* [1995] 1 ILTR 69, 78

<sup>213</sup> [1994] 1 ILRM 378.

claim, finding that the legislature was entitled to differentiate between married men and married women because statistical evidence showed that married women were more likely to be outside the workforce and in need of assistance than married men. This is a marked contrast with Barron J's decision on the same issue in *Dennehy v Minister for Social Welfare and AG*,<sup>214</sup> in which he achieved the same result in reliance on the moral truth of Article 41.2.<sup>215</sup>

## 7.7 Conclusion

### 7.7.1 Governed by marriage law

Economic conditions improved in the 1990s and more women remained in the workforce after marriage. Marriage remained popular and a significant number of couples continued to practice the dependency model. Problematisation of marriage focused on relationship breakdown and its effect on dependent women, Divorce was introduced in 1997 in a restrictive form, with the political objective of saving marriage by facilitating the formation of new and better marriages to replace failed unions. A comprehensive programme of counselling and mediation focused on saving marriage accompanied divorce legislation. Vulnerable dependent women, suffering post-relationship poverty were the intended benefactors of a comprehensive machinery designed to enforce the financial obligations of marriage post-divorce. The State too would see to it that the obligations of husbands to 'discarded' wives were fulfilled, by extending marriage-based social insurance, such as widow's pension, to both former

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<sup>214</sup> [1984] IEHC 27.

<sup>215</sup> Barron J stated at page 19 of the judgment that

'Having regard to the provisions of Article 41(2), it does not seem to me that as a matter of policy it would be unreasonable, unjust or arbitrary of the Oireachtas to protect financially deserted wives who are mothers who have dependent children residing with them.'

and current wives. Marriage law, nonetheless remained the main political strategy for addressing the vulnerability of women and the social danger of marriage breakdown.

By the mid-1990s, marriage was well established as domain of political intervention. Marriage law, intended to save lifetime, dependency marriage and protect vulnerable dependent wives, had created a dense regulatory network around intimate relationships. Marriage was, without doubt, the most valuable relationship and its commitments had to be respected, even after the interpersonal relationship between the spouses had ended. Political support for marriage was largely drawn from the tenets of the dominant morality, supported by an emerging functionalist sociology and decisions of the superior courts. In seeking to save marriage, government did not directly require marriage nor forbid its termination. Rather the marriage saving objective was achieved through a series of techniques that engaged with the population's understanding of, and support for, marriage. The institutional status of marriage was not significantly challenged during this period, but in funding counselling and mediation, government had begun to accept that marriage was an interpersonal relationship between two individuals.

#### *7.7.2 A role for law in conducting the relationship behaviour of individuals*

Construction of the basic form of marriage law as it exists today was completed by the mid-1990s. The form and operation of the statutory framework, when contextualised within social economic and political contexts, reflects Foucault's description of the operation of government in the modern State. The Irish government in attempting to manage the population of the State used marriage law as one technique, among many, to encourage lifetime, monogamous dependency marriage. The will to promote marriage was so pervasive that divorce, the dissolution of marriage, was constructed as a measure to protect marriage in facilitating re-coupling whilst maintaining the

obligations of previous relationships. Government focus on marriage-saving also created a regulatory environment within which marriage conferred financial and social benefits on individual families.

In choosing to address the difficulties created by marriage through legal measures, the Irish government required those whose intimate relationships had broken down to co-operatively continue the relationship in different households, or to acknowledge their failure and pass into law's adjudicative quagmire. They were required to assert their rights and plead their vulnerability in order to extract the remedies of financial support, property ownership and custody of children. Whilst it may not have been the intention of government to create a 'family law system' or increase the volume of inter-spousal litigation, this was the inevitable outcome of its choice to regulate marriage and its breakdown through a discretionary system of marriage law. This was not necessarily a negative from the perspective of politics; individuals unable to perform lifetime relationships were no longer the concern of government. It had provided a comprehensive system of family law remedies requiring consideration of reconciliation and mediation before court adjudication. Government funded counselling and mediation services were available throughout the country. Judges were on hand to adjudicate disputes and free legal aid was provided to assist the indigent and vulnerable. Everything necessary had been done to guide and support spouses in maintaining their relationships, those who were unable to do so were therefore responsible for their own failure.

The political centrality of marriage in tax and social welfare rules and the importance attributed to marriage by two referenda requiring reflection on the nature of marriage by the entire population, also served to direct individual behaviour toward the normative relationship form. Marriage was desirable, a status symbol and indicator

of relationship and familial success. It is not surprising within this environment that the numbers marrying increased following the introduction of divorce. The possibility that marriage could be ended made it seem more desirable that it should continue.



# **Eight – Rationalising Relationships**

## **1997 - 2010**

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Marriage, the lifetime, monogamous, foundation of family life, somewhat paradoxically became more popular as a social practice following the introduction of divorce.<sup>1</sup> Tony Fahey has suggested that this was the result of improved economic conditions, and perhaps this is so,<sup>2</sup> but by the end of the

1990s, marriage was no longer a social pre-requisite to family status, sexual expression, couple formation or parenting. Nonetheless, it experienced a resurgence at the level of social practice, despite the onerous obligations imposed by marriage law.

Campaigns for marriage law reform in the 1970s had focused on its potential to relieve the suffering of dependent housewives abandoned and left indigent by their

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<sup>1</sup> The marriage rate had been falling steadily since the early 1970s, but began to increase in 1997. In 1996, the marriage rate was 4.5 per thousand persons per year and in 2002 it was 5.2, remaining at that level until it began to decline again in 2009 falling to 4.5 in 2010. Central Statistics Office, *Statistical Yearbook of Ireland 2013* (Stationery Office 2013), 73; Central Statistics Office, *Statistical Yearbook of Ireland 2004* (Prn 3509, Stationery Office 2004), 54.

<sup>2</sup> Tony Fahey 'Small Bang? The Impact of Divorce Legislation on Marital Breakdown in Ireland' (2012) 26(2) *Intl Jnl Law Policy Family* 242.

wage-earning husbands. In the 1980s and 1990s, more marriage law was necessary to protect institutional marriage. At the beginning of the twenty-first century, a new role for marriage law emerged. Marriage law, despite its increasingly onerous obligations, its chaotic and often ineffective operation, its punitive effect on those who failed to live up to its expectations, came to be seen as the solution to the problems of social exclusion and discrimination. This final empirical chapter is concerned with the continued problematisation of marriage law following the introduction of divorce. It connects a renewed desire for marriage law reform to a shift in how government was rationalised at the end of the 1980s. Membership of the European Union, and the demands of a globalised market economy, required adoption of a rational, technocratic form of government, and the pursuit of economic growth predicated on social stability. Stable couple relationships were an essential part of the growth imperative because they contributed to social, and consequently, economic stability. Furthermore, by sharing the care of dependents within couple relationships, two workers became available where in the past there had been one.

This chapter begins by identifying the shift in how government was rationalised that occurred during the 1990s, and then discusses how this necessitated a rational, as opposed to institutional, conceptualisation of marriage. The second part of the chapter looks at how marriage law was problematised during this period focusing in particular in the role of human rights and equality discourses in posing marriage law as both a problem and a solution to problems. Finally, the chapter looks at how marriage law operated in the courts, noting an increasingly administrative approach to the judicial decision making process. The marriage law system, however, continued its traditional role in identifying abnormality, and a discursive conflation of marriage and child law acted to emphasise further the deviance of relationship failure.

## **8.1 Ensuring Economic Progress.**

### *8.1.1 Rationality, the European Union (EU) and economic progress.*

Ireland joined the European Economic Community in 1973, and was almost immediately designated a less-developed region. As a result, it received significant ongoing financial transfers from the European regional development fund.<sup>3</sup> Following ratification of the Single European Act in 1988, regional development funds were doubled, and Ireland, designated an ‘Objective One’ region, was once again a significant beneficiary. The Maastricht Treaty, ratified in 1992, emphasised both social and economic cohesion, and the Amsterdam Treaty of 1998 made a direct connection between social and economic development.<sup>4</sup>

The European project, although begun as political and economic initiative, by the late 1990s, had adopted a strong social policy role. A specific link between economic and social development was made in the governing treaties, and closer union was predicated on both economic and social cohesion. The Amsterdam Treaty inserted a new Article 2 in to the EEC treaties stating that:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.<sup>5</sup>

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<sup>3</sup> Between 1989 and 1999 aid flows to Ireland from EU cohesion funds amounted to 3.5 percent of gross domestic product per annum. Frank Barry, John Bradley, and Aoife Hannan, ‘The Single Market, The Structural Funds and Ireland’s Recent Economic Growth’ (2001) 39(2) *Journal of Common Market Studies* 537, 550.

<sup>4</sup> The Amsterdam Treaty was ratified by Ireland following a Constitutional Referendum held on 22 May 1998. It amended the European Economic Community treaties to advance the process of social and economic integration.

<sup>5</sup> Treaty of Amsterdam [1997] OJ C340, Article 2.2.

The European project required a highly rationalised economic approach to management of both market and society. The necessary connection between social and economic government was given further weight in Ireland between 1987 and 2003 by six partnership agreements entered into between government, trade unions, employer groups, and later, representatives of civil society.<sup>6</sup> The strategic purpose of this process was succinctly summarised by the then Taoiseach, Charles Haughey, in his introduction to the second partnership agreement published in 1991:

The strategy is simple. It is to maintain a low-inflation economy with a stable exchange rate which can compete internationally and give us the higher standards of living and improved social services to which we aspire.<sup>7</sup>

Social inclusion was a central element of this aim, particularly in the later agreements, and this was to be achieved ‘through a strengthening of economic capacity and the adoption of a coherent inclusion strategy.’<sup>8</sup> Social inclusion was predicated on workforce participation. *Partnership 2000* stated that:

The single biggest contributor to social exclusion, and poverty, is unemployment. Conversely, access to work, to adequately paid employment, is a major source of participation. Thus, the most effective strategy for the achievement of greater social inclusion is one which focuses, across several fronts, on increasing employment and reducing unemployment.<sup>9</sup>

Direct control over monetary policy was removed from individual States following the currency union adopted under the Maastricht Treaty,<sup>10</sup> but strict controls on inflation and growth were imposed by Europe. The strategy adopted by the Irish

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<sup>6</sup> Department of the Taoiseach, *Program for National Recovery* (PI 5213, Stationery Office 1987), Department of the Taoiseach, *Program for Social and Economic Progress* (PI 7829, Stationery Office 1991), Department of the Taoiseach, *Programme for Competitiveness and Work* (Pn 0513, Stationery Office 1994) Department of the Taoiseach, *Programme for Prosperity and Fairness* (2000) Department of the Taoiseach, *Partnership 2000* (1996 Stationery Office) Department of the Taoiseach, *Sustaining Progress: Social Partnership Agreement 2003 – 2005* (2003).

<sup>7</sup> Department of the Taoiseach, *Program for Social and Economic Progress*, 5.

<sup>8</sup> Department of the Taoiseach, *Partnership 2000*, 4.

<sup>9</sup> *ibid*, 14.

<sup>10</sup> Treaty on European Union [1992] OJ C191.

government maintained economic stability as required by the European Union, and achieved the desired outcome of significant economic growth. By the late 1990s, Ireland's economy was considered one of the best performing in Europe.<sup>11</sup>

### *8.1.2 Economic rationality and social governance.*

The marriage-based family, as the central institution around which social provision orbited, was uniquely placed to mediate the implementation of the social policies necessitated by European integration. Whilst previously, government had formulated its support for families in terms of direct financial transfers, reflecting the view that families should take care of themselves, by the end of the 1990s a much more interventionist approach emerged. It was no longer acceptable to simply subsidise families seen as financially or morally deserving, families needed to be supported in order to 'combat disadvantage and social exclusion by improving the functioning of the family unit.'<sup>12</sup> Such an aim could not be achieved within a technocratic and economically rational approach to government without significant investigation and consideration of the Irish family, and by 2001, Tony Fahey and Helen Russell were able to note a 'considerable policy interest in various aspects of family behaviour.'<sup>13</sup>

### *8.1.3 Securing family stability.*

A Commission on the Family, appointed in response to the United Nations Year of the Family in 1994, and World Summit for Social Development in 1995, produced a

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<sup>11</sup> A useful account of Ireland's economic development between 1992 and 2008 can be found in Seán O'Riain, *The Rise and Fall of Ireland's Celtic Tiger: Liberalism Boom and Bust* (Cambridge University Press 2013), 32-67.

<sup>12</sup> Mary Daly and Sara Clavero referring to the stated objectives of the Family Resource Centres, which received dramatically increased funding in the final years of the 1990s. Mary Daly and Sara Clavero, *Contemporary Family Policy in Ireland and Europe* (Department of Social Welfare 2002), 63.

<sup>13</sup> Tony Fahey and Helen Russell, *Family Formation in Ireland: Trends, Data Needs and Implications. Report to the Family Affairs Unit, Department of Social, Community and Family Affairs* (Policy Research Series No 43, ESRI 2001), 65.

comprehensive report for the assistance of government in 1997.<sup>14</sup> The Commission carried out a review of family policy concluding that:

Marriage as a visible public institution, underpinned by contractual obligations, presents clear advantages from a public policy perspective, in promoting security and stability in family life and in providing continuity in society.<sup>15</sup>

Despite accepting that family existed outside marriage, the Commission maintained that marriage was the best foundation for family from the perspective of government. This conclusion was based, not on moral reasoning or by reference to the Constitution, but on scientific evidence. Marriage, the Commission contended, had significant advantages for the State as it offered a route out of welfare dependency for lone parents,<sup>16</sup> conferred on children the stability and security of a loving two-parent family,<sup>17</sup> was a public institution with a valued role in society,<sup>18</sup> and represented continuity and stability in society.<sup>19</sup> State support was necessary because:

continuity and stability in family relationships has a major, though not over-riding value for individual well-being and social stability, especially, though not solely, as far as children are concerned.<sup>20</sup>

The Commission further noted that:

For many people marriage represents their commitment to long term continuity and stability. In this context, the Commission considers that marriage should be supported in public policy.<sup>21</sup>

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<sup>14</sup> Commission on the Family, *Strengthening Families for Life: Interim Report to the Minister for Social Welfare* (Pn 3290, Stationery Office 1996), 8.

<sup>15</sup> Commission on the Family, *Final Report the Department of Social Community and Family Affairs: Strengthening Families for Life* (Pn 5818, Stationery Office 1998), 183.

<sup>16</sup> The Commission commented that 'it is worth remembering that research, although limited, shows that the most usual reason for unmarried mothers to stop claiming the one-parent family payment from the department of Social Community and Family Affairs is because they marry.' *ibid*, 182.

<sup>17</sup> *ibid*, 184.

<sup>18</sup> *ibid*, 180.

<sup>19</sup> *ibid*, 180.

<sup>20</sup> *ibid*, 400.

<sup>21</sup> *ibid*, 160.

Government policy could, and should, incentivise marriage, prevent marriage breakdown, provide preparation and education for marriage and step-in ‘as soon as difficulties in the family are identified’ with counselling and other social supports.<sup>22</sup>

A number of prominent sociologists contributed to the Commission’s report, giving scientific authority to the link between marriage, society and good government. Gabriel Kiely, in his contribution, noted the importance of stable couple relationships to social stability. Drawing on scientific expertise, he argued that the modern condition had created companionate relationships based on feelings, which were more fragile than relationships with an institutional base, and therefore required effort and professional counselling assistance to survive.<sup>23</sup> The Commission, and later the government, accepted this position, and recommended increased State expenditure on marriage counselling. The role of individual spouses in making their relationship work was also noted by the Commission:

Marriage maintenance courses and personal enrichment programs for men and women offer couples the opportunity to look at their relationship and take time to reflect on what is valuable and what needs attending to, in order to keep the relationship in good working order.<sup>24</sup>

The Commission on the Family’s report had a significant influence on government policy at the end of the 1990s leading to the establishment of a Family Affairs Unit in the Department of Social Community and Family Affairs, a Family Support Agency and a significant increase in funding for relationship counselling.<sup>25</sup> The objectives of the Family Support Agency were to:

bring together the main programmes and pro-family service introduced by the Government in recent years to support families, promote continuity and stability

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<sup>22</sup> *ibid*, 185.

<sup>23</sup> Although not referencing any theorists or academic papers in particular Dr Kiely is clearly referring to the conceptualisations of traditional and modern families current among social scientists. See chapter 2 above for a discussion of this branch of sociological thought.

<sup>24</sup> Commission on the Family, *Strengthening Families for Life*, 205.

<sup>25</sup> Established by the Family Support Agency Act 2001.

in family life and prevent marriage breakdown, and to foster a supportive community environment for families at local level.<sup>26</sup>

The aim of family policy, in the Commission's view, was to promote family functioning in order to ensure social stability. This could be achieved through techniques such as mediation and counselling that would help individual relationships survive the difficulties intrinsic to the modern condition. The role of government was thus to both set standards for relationship behaviour, and to facilitate the attainment of optimal outcomes, not through the imposition of rules, but by engaging with the hopes and desires of individuals for their own familial lives.

The report of the Commission also illustrates the extent to which marriage, children and family had become conflated. Whilst previously marriage was assumed to produce both family and children, the three concepts now had independent, yet mutually supportive meanings. Family was something to which everyone belonged – it was created by the presence of children, and embodied the social values of love and stability. Marriage was the best foundation for a stable family, and the best marker of love and commitment.

## **8.2 Rationalising Marriage**

### *8.2.1 The continuing centrality of marriage.*

Social stability had become the principal objective of family policy, and management of the social domain continued to circulate around institutional marriage. A report produced by John Mee and Kaye Ronayne in 2000, on behalf of the Equality Authority, demonstrated the extent to which the government of family life was

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<sup>26</sup> Minister John O'Donohue introducing the Family Support Agency Bill 2001 to the Dáil, Dáil Deb 11 October 2001, vol 542, col 16.



mediated through marriage.<sup>27</sup> In particular, it illustrated the importance of marital status with regard to the guardianship and custody of children. Mee and Ronayne noted that joint adoption of a child was possible only by a couple married to each other.<sup>28</sup> Similarly, automatic joint guardianship and custody of a child was available only to married parents.<sup>29</sup> People acting as ‘de facto’ parents of children could not acquire custody,<sup>30</sup> access, or guardianship rights to a child whilst its mother was alive, and following her death such rights were available only if designated in the mother’s will.<sup>31</sup> Only married couples could claim support from each other following relationship breakdown,<sup>32</sup> or succeed as of right to one and others estate on death.<sup>33</sup> Civil Service and private pension schemes generally did not provide survivor benefits to non-spouses,<sup>34</sup> and social welfare pension dependant payments were awarded only for spouses.<sup>35</sup> Married people could block the sale or mortgage of their family home,<sup>36</sup> and apply for a share of their spouse’s assets following relationship breakdown.<sup>37</sup> The taxation system substantially benefited married couples,<sup>38</sup> particularly where only one of them was employed (although this was subsequently changed), and capital taxes did not apply to transactions between married couples.<sup>39</sup> Social welfare payments were focused around the marriage based family, calculating the means of one spouse when

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<sup>27</sup> John Mee and Kaye Ronayne, *Partnership Rights of Same-Sex Couples* (Equality Authority 2000).

<sup>28</sup> *ibid*, 6.

<sup>29</sup> *ibid*, 9.

<sup>30</sup> *ibid*, 9.

<sup>31</sup> *ibid*, 9.

<sup>32</sup> *ibid*, 11.

<sup>33</sup> *ibid*, 25.

<sup>34</sup> *ibid*, 18.

<sup>35</sup> *ibid*, 18.

<sup>36</sup> *ibid*, 28.

<sup>37</sup> *ibid*, 28.

<sup>38</sup> *ibid*, 34-38.

<sup>39</sup> *ibid*, 36.

determining the entitlements of the other.<sup>40</sup> Domestic violence legislation applied principally to married couples or those ‘living as husband and wife,’<sup>41</sup> and immigration law privileged marriage over all other forms of relationship.<sup>42</sup>

The privileged position of marriage was also re-enforced by other areas of State regulation. A spouse was a ‘connected person’ for the purposes of a wide range of statutory enactments governing ethics and conflicts of interest.<sup>43</sup> The Mental Health Act 2001 allowed ‘a spouse or relative’ to make an application for involuntary admission under the Act.<sup>44</sup> Marital, but not relationship status, was a prohibited ground under the Employment Equality Act 1998, and the Equal Status Act 2000, and a spouse was a dependent for the purposes of an action for damages under the Civil Liability Act 1961.

### *8.2.2 Recognising marriage-like family practices*

In 1996, for the first time, information on rates of cohabitation was collected in the Irish census, marking the beginning of an understanding of ‘family’ beyond that based on constitutional marriage. The census reported 31,229 households comprised of cohabiting couples with or without children,<sup>45</sup> and by 2006, this had risen to more than 105,000.<sup>46</sup> Marriage rates also rose,<sup>47</sup> and single parent families became more

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<sup>40</sup> *ibid*, 40.

<sup>41</sup> *ibid*, 41.

<sup>42</sup> *ibid*, 45.

<sup>43</sup> For example, the Companies Act 1990 designates spouses as ‘connected persons’ for the purpose of Company Law.

<sup>44</sup> Section 9(1).

<sup>45</sup> Working Group Examining the Treatment of Married, Cohabiting and One-Parent Families under the Tax and Social Welfare Codes, *Report* (Pn 7950, Stationery Office 1999), 21.

<sup>46</sup> Central Statistics Office, *Census 2006: Volume 3* (Prn A7\1020, Stationery Office 2007), 30.

<sup>47</sup> Marriage rates rose from 1997 to 2003 when they levelled off at 5.2 per thousand per year, declining to 2.8 in 2009 and 4.3 in 2010. Central Statistics Office, *Statistical Yearbook of Ireland 2012* (Stationery Office 2012), 63.

common.<sup>48</sup> Taking the three groups together, the Irish population was experiencing a surge in family-formation.

The visibility of family beyond marriage combined with a rational economic approach to the process of government, created an imperative to recognise the potential for family stability outside marriage. As noted in chapter seven, social welfare rules had equated cohabittees with married couples since the Supreme Court decision in *Hyland*.<sup>49</sup> In 1999, a working group on the treatment of married, cohabiting and one-parent households in the tax and social welfare codes, following statistical analysis and a review of sociological reports, concluded that ‘breadwinner marriage’ was no longer an appropriate basis for the tax and social welfare codes. Rather:

the focus should be on support for children rather than on the marital status of their parents. In addition to the advantages for children of such an approach, it is also felt that changing the focus away from the status of the parents should help in surmounting any Constitutional difficulties which may rise in considering the proposals for the treatment of married, cohabiting and one-parent families.<sup>50</sup>

A radical transformation was not, however, envisaged. The advantages of two parent families could not be ignored, and the group was sympathetic to the extension of marriage tax benefits to long term cohabiting couples with children.<sup>51</sup> Marriage was noted to be a significant route out of lone parenthood (45 percent of terminations of one parent family payment in 1996 were the result of marriage),<sup>52</sup> but due to the status-based nature of welfare payments, marriage resulted in a drop in income for most lone parents. The working group could not resolve this conundrum. It was clearly beneficial that lone parents should marry or form long-term relationships, but the cost of

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<sup>48</sup> There were just over 128,000 one-parent families in 1996 and over 215,000 by 2011. Central Statistics Office, *Statistical Yearbook 2002* (Pn 12209, Stationery Office 2002), 19; Central Statistics Office, *Statistical Yearbook of Ireland 2012* (Stationery Office 2012), 20.

<sup>49</sup> *Hyland v Minister for Social Welfare and the Attorney General* [1989] IR 624.

<sup>50</sup> Working Group on the Treatment of Married, Cohabiting and One-Parent Households under the Tax and Social Welfare Codes, *Report*, 83.

<sup>51</sup> *ibid*, 11.

<sup>52</sup> *ibid*, 162.

individualising welfare payments, perhaps focusing them on children's needs rather than adult relationships, was considered prohibitive from a cost perspective.<sup>53</sup> No significant additional progress regarding the manner in which non-marital households should be regulated was made until well into 2000s, but the Working Group's report marked the beginning of governmental acceptance that 'marriage-like' might be good enough.

### 8.2.3 *Bringing marriage fully within the domain of the State.*

Although 'marriage,' had been central to the administration of the social domain since the foundation of the Irish State, it had remained undefined in legislation and entry into marriage was largely governed by the rules of the various churches.<sup>54</sup> A registration requirement was imposed in 1845, and provision made for marriage by a Civil Registrar, yet the vast majority of Irish couples followed their parents in marrying in church according to the rites of the Catholic Church. This began to change in the 1990s, as more and more couples sought civil ceremonies, which allowed them to enjoy the social benefits of marriage without submitting to religious oversight.<sup>55</sup>

In the courts, the judiciary had retained Christian connotations in defining marriage for the purposes of law. In *Murray v Ireland* [1985] IR 532 Costello J stated that:

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

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<sup>53</sup> *ibid*, 165. The One parent family payment had significant advantages. It was means tested, had no work requirement, and although recipients could have a limited amount of income from work disregarded. Upon cohabitation or marriage the means of both members of the couple were aggregated leading to a substantial loss of income for the two adult household when equated with two separate one adult households. The working group sets out a number of worked examples in chapter eleven of their report.

<sup>54</sup> See chapter one.

<sup>55</sup> In 2004, there were a total of 20,979 marriages of which 4,286 were civil ceremonies. In 1996 there were just 928 civil ceremonies out of 16, 174. Information in relation to 2004 was provided directly to the author by the Central Statistics Office by email on 20 February 2014. In relation to 1996, see:

<[www.cso.ie/en/media/csoie/releasespublications/documents/vitalstats/2002/marriages2002.pdf](http://www.cso.ie/en/media/csoie/releasespublications/documents/vitalstats/2002/marriages2002.pdf)> accessed 3 March 2014.

irrevocable, personal consent, given by both spouses which establishes a unique and very special life-long relationship.

A number of years later in *TF v Ireland* [1995] IR 321, the same judge approved a definition of marriage as ‘the voluntary and permanent union of one man and one woman to the exclusion of all others for life.’ The definition of legal marriage remained firmly tied to its theological origins. Costello J’s definitions came under some conceptual pressure with the introduction of divorce, but no attempt was made to review the meaning of marriage until the government decided, in 2003, to overhaul the service provided by the Central Registrar’s Office.

Whilst principally concerned with streamlining the work of the Registrar’s Office, the government also decided to examine the rules governing entry into marriage and appointed an inter-departmental Committee on Reform of Marriage Law to:

review current marriage procedures and to bring forward a universally applicable framework of clear and simple procedures to underpin the solemnity of the marriage contract.<sup>56</sup>

The Committee noted that:

Traditionally, marriage has been characterised as the giving of mutual consent to the public recognition of the union of one man and one woman to the exclusion of all others. Marriage is therefore perceived to be both a social contract and a partnership based on a relationship. Married persons are entitled to legal rights, privileges and duties from which persons who are not married are generally precluded.<sup>57</sup>

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<sup>56</sup> Inter-Departmental Committee on Reform of Marriage Law, *Discussion Paper 5: Definition of Marriage, Who Can Marry, Capacity to Marry* (Stationery Office 2004), 3. The committee’s discussion papers appear to have been published after the Civil Registration Act 2004 passed into law. There is no record of the Committee communicating or laying any documents before the Oireachtas. It would appear therefore that the Committee’s findings were communicated directly to the Taoiseach’s department prior to the drafting of the Bill. The Committee’s findings were made available to the media less than two weeks prior to the Order for Second Stage of the Bill. Paul Cullen, ‘Major Reform of Marriage Law Proposed’ *The Irish Times* (Dublin 17 January 2004).

<sup>57</sup> Inter-Departmental Committee on Reform of Marriage Law, *Discussion Paper 5: Definition of Marriage, Who Can Marry, Capacity to Marry*, 3.

Marriage was thus conceptualised as a legal relationship, a contract creating mutual legal obligations, which required specific definition in legislation. It was also a personal relationship, not an institutional one. The Committee, drawing on Costello J's decisions, recommended that legal marriage be defined as:

the voluntary and permanent union of one man and one women to the exclusion of all others for life.<sup>58</sup>

The Civil Registration Bill 2003, whilst not adopting a definition of marriage, did set out the parameters of the possible and, most significantly, removed marriage fully from the social or spiritual sphere, placing it firmly within the realm of State regulation.

The Civil Registration Act 2004<sup>59</sup> covered a range of civilly registerable events; births, deaths, marriages, stillbirths, divorces, adoptions, divorces and nullities. It set out the detailed requirements and procedures for registering these events and made their registration compulsory.<sup>60</sup> With regard to marriage, the Act set out a series of impediments to marriage, which included a minimum age, consanguinity, pre-existing marriage, mental incapacity and both parties being of the same sex.<sup>61</sup> The ceremony of marriage, the legislation provided, was to be 'solemnised'<sup>62</sup> following a three month notice period during which time both parties were required to attend in person at the registrar's office to sign a declaration that there was no impediment to their marriage.<sup>63</sup>

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<sup>58</sup> *ibid*, 5.

<sup>59</sup> The Committee was appointed in 2002, and published a number of discussion papers and undertook a public consultation. Its proposals for reform were set out in a series of discussion papers and following discussions with interested parties including the main churches proposals for reform were drafted. See Mary Coughlan, Select Committee on Social and Family Affairs Debate 4 February 2003.

<sup>60</sup> Births, Deaths and Marriages were already compulsorily registerable.

<sup>61</sup> Civil Registration Act 2004, s 2 (2)(a).

<sup>62</sup> Civil Registration Act 2004, s 46(1).

<sup>63</sup> Civil Registration Act 2004, s 26(10).

The registrar had to request detailed information from the parties, and might, if required by the Minister, publish details of forthcoming marriages.<sup>64</sup>

Marriage, following the 2004 Act, was no longer a social practice which government recognised and deployed in managing the social domain. It became a fully legal status, available only to those who had complied with the detailed provisions of the Civil Registration Act 2004. The State would replicate the pomp and circumstance of church rituals in ‘solemnising’ marriages - Eamonn Ryan, in debate on the Bill called upon the minister ‘to provide the very best civic space that is available’ in order that there would be a sense that ‘the State was taking the occasion seriously.’<sup>65</sup> Minister for Social and Family Affairs, Mary Coughlan, noted that the three month notice period (originally introduced by the Family Law Act 1995) would ‘give couples intending to marry an opportunity to reflect on the seriousness and importance of the commitment that they are making.’<sup>66</sup> It was clear that marriage, and the long-term commitment it represented, was a matter of significant importance to government.

Despite what could be seen as a major conceptual marker for Irish social politics, little was made of the 2004 Act. The Oireachtas debate on the Bill, unlike previous debates on marriage law, mentioned neither the Constitution nor the moral quality of the marital relationships. Although the 2004 Act was the first codification of the legal rules for entry into marriage since the foundation of the State, there was no discussion of the nature of marriage, in contrast to earlier debates on divorce and judicial separation, which focused almost entirely on its institutional and transcendent characteristics. It now seemed universally accepted among politicians that marriage

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<sup>64</sup> Civil Registration Act 2004, s 46(8).

<sup>65</sup> Dáil Deb 27 January 2004, vol 578, col 906.

<sup>66</sup> Seanad Deb 21 February 2004, vol 174, col 641.

was a committed long-term companionate relationship based on contract, a civil and legal matter fully within the domain of State regulation.

#### 8.2.4 *New family roles in an expanding economy*

As economic growth continued into the first decade of the twenty-first century, the Irish population proved inadequate to support the demands of the ‘Celtic Tiger’ economy.<sup>67</sup> Immigration became a feature of Irish population growth, and domestic policy focused on labour market activation measures. Women, particularly those performing a domestic role, became a particular target. A *Programme for Prosperity and Fairness* negotiated between the government and the social partners in 2000, mirroring the objectives of the Amsterdam Treaty, specifically connected gender equality imperatives to the needs of the expanding economy.

Positive action is permitted to promote equal opportunities geared to remove existing inequalities which affect women’s opportunities to access to employment, vocational training and promotion and working conditions.

The emergence of a tightening labour market and the increased emphasis on human resources as a key competitive element serve to underpin the importance of developing innovative ways of maximising the available labour supply. Similarly, the importance of facilitating equality of opportunity for men and women in the workplace also underscored the desirability of developing policies that can assist parents in reconciling work and family life. Family-friendly policies can serve a dual purpose of contributing to the needs of business as well as meeting the needs of employees with family responsibilities.<sup>68</sup>

The program emphasised that women must be facilitated in their aspirations for equal treatment because it served economic needs. Men were to be encouraged to share with women ‘the caring responsibilities carried out within the home for children and dependent family members,’<sup>69</sup> because this too would facilitate the entry of their life-

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<sup>67</sup> The dramatic nature of Irish economic development during this period was captured by the widely used epithet ‘the Celtic Tiger.’ See for example, O’Riain, *The Rise and Fall of Ireland’s Celtic Tiger*.

<sup>68</sup> Department of the Taoiseach, *Programme for Prosperity and Fairness*, 42, 44.

<sup>69</sup> *ibid*, 120.



partners into the labour market. A society must be created in which access to labour is ‘available to all.’ Supply must be mobilised by ‘tapping into potential pools of labour to support sustainable low inflationary growth.’<sup>70</sup> The terms of the Irish Constitution had not changed, but women were no longer defined by marital status, and wives were not mothers in the home needing protection. Women, wives and mothers, like other ‘disadvantaged groups’<sup>71</sup> were a supply of labour to be called upon in support of the growth objectives of political government.

Family stability was also closely connected to the objective of economic development. Households with children headed by two adults caused considerably less difficulty for labour-market activation measures than those with just one resident parent. As the National Economic and Social Forum reported in 2001, lone parents presented particular difficulties in relation to barriers to employment. The forum noted that ‘lone parents, because they are parenting alone, have very acute needs when it comes to reconciling work and family life.’<sup>72</sup> The historical focus on supporting women *qua* mothers through welfare payments until their children were adults had created a welfare trap for those who wished to work. A lone parent entering the workforce stood to lose her welfare payment, housing support and free medical care, making work un-economic.<sup>73</sup> Similar barriers existed to the formation of two-parent households and this issue was raised in a number of government sponsored research reports.<sup>74</sup> The National Economic and Social Research Forum looked at the

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<sup>70</sup> *ibid*, 116.

<sup>71</sup> *ibid*, 116.

<sup>72</sup> National Economic and Social Forum, *Forum Report No. 20: Lone Parents* (Pn 100074, Stationery Office 2001), 60. The National Economic and Social Forum was abolished in March 2010.

<sup>73</sup> It should be noted that not all lone parents were women, but the system of welfare that had developed to support them largely assumed that they were.

<sup>74</sup> Social welfare inspectors regularly checked the homes of One-Parent-Family Payment for evidence of cohabitation and were required to examine five relationship criteria in deciding

disincentives to work in great detail, examining permutations of welfare payments, and approaches that might reduce the disincentive to cohabitation, but were unable to reach a conclusion beyond the desirability of cohabitation over lone parenthood.<sup>75</sup>

#### 8.2.5 *Getting wives out to work*

The principal objective of the Irish Government during this period was to drive economic growth. The Minister for Finance in making his 'Budget 2000' speech on 6 December 2000 remarked:

Today's budget also re-enforces the basis for progress. It does so by improving the attractiveness of work and enterprise through further reform of the tax system and by ensuring, through a high priority for investment, that infrastructural pressures do not inhibit growth.<sup>76</sup>

The 2001 budget progressed a policy of individualisation of the taxation system that had begun in 1999. This reform rowed back on the doubling of tax bands introduced following *Murphy* by restricting the transferability of tax bands between spouses.<sup>77</sup> In order to achieve this, tax bands were substantially increased for single people so that there was no immediate loss to the net pay of single-earner married couples. The effect was to incentivise non-earning spouses to enter the workforce. As Michael Noonan pointed out from the opposition benches, the measure was 'designed to increase female participation in the labour force by forcing stay-at-home wives out to work rather than allowing them a free choice of whether to work.'<sup>78</sup> It also equalised the tax treatment of married and cohabitating couples where both partners worked, and on a national level redistributed wealth 'decisively in favour of the better off.'<sup>79</sup>

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whether an individual was cohabiting: co-residence, household relationship, stability, social and sexual, National Economic and Social Forum, *Forum Report No. 20: Lone Parents*, 80.

<sup>75</sup> *ibid*, 95.

<sup>76</sup> Dáil Deb 6 December 2000, vol 527 col 875.

<sup>77</sup> *Murphy v Attorney General* [1982] 1 IR 241.

<sup>78</sup> Dáil Deb 22 February 2000, vol 514 col 1130.

<sup>79</sup> Michael Mc Dowell Dáil Deb 22 February 2000, vol 514 col 1317. The process of individualisation involved an increase in the amount of income that would be taxed at 20%

## 8.3 The Problem with Marriage Law.

### 8.3.1 Relationship rights

As public, governmental and sociological concern with the nature of the Irish family continued to expand through the 1990s and 2000s, human rights and equality discourses came to colonise discussion of the regulation of couple relationships. Consideration of intimacy in terms of rights based arguments began quietly and slowly but gradually amplified as the 2000s proceeded. Fine Gael was the first political party to promise reform of marriage law as a solution to human rights and equality difficulties.<sup>80</sup> When a Bill extending marriage law to a greater range of relationships was introduced to the Oireachtas in 2009, the notion that marriage law both transgressed human rights and equality guarantees, and could vindicate them, was politically uncontested and incontestable. As Senator Mary White noted in support of the 2009 Bill ‘securing the civil rights and human rights of gay people is a mainstream goal,’ and one that could be achieved through the reform of marriage law.<sup>81</sup>

The principle of equality or non-discrimination, although reflected in the Irish Constitution, gained discursive vigour in the 2000s via the activities and treaties of the European Union and its institutions. The Amsterdam Treaty had particular influence

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for a single person. This increase also applied to one earner of a married couple with an increase for a non-earning spouse that was less than a full band. When the second of a couple went out to work, they received the balance of the second band. There was therefore no effect on the take home pay of low-income couples who did not earn enough to pay tax at the higher rate. The main beneficiaries were high-income couples who saw, in the initial phase, a massive increase in the amount they could earn without paying tax at the higher rate. The long-term effect was to decrease, but not fully remove, the income tax advantages of marriage. An advantage did remain in that tax credits were transferable between married couples and the standard rate band was widened for one earner married couples. Single income married couples were therefore significantly advantaged over single income co-habiting couples. There was no difference in taxation levels between wealthy dual income married and co-habiting couples and only a marginal difference for dual income couples on the average industrial wage.

<sup>80</sup> Fine Gael, *Civil Partnership* (2004), available at <[www.irishelectionliterature.com](http://www.irishelectionliterature.com)> last accessed 14 February 2014.

<sup>81</sup> Seanad Deb 7 July 2010, vol 204, col 198.

in the Irish context, leading to the enactment of the Employment Equality Act 1998 and Equal Status Act 2000.<sup>82</sup> The deployment of rights based arguments by campaigners for marriage law reform emerged around the same time as these legislative enactments, reflecting the increased influence of European equality imperatives on Irish political discourse. The Good Friday Agreement of 1998,<sup>83</sup> which recorded a settlement agreement in relation to Northern Ireland, pushed the human rights agenda to the fore in the Republic.

### 8.3.2 *The necessity of human rights and equality.*

Ireland ratified the European Convention on Human Rights in 1950, but the Irish Courts consistently held that, pursuant to Article 29.6 of the Constitution, it did not have the force of law within the jurisdiction absent a legislative instrument of incorporation.<sup>84</sup> Following the Good Friday Agreement, which required Ireland to have similar protection for human rights as existed in the United Kingdom, a Human Rights Commission was established, and the European Convention on Human Rights incorporated into Irish Law.<sup>85</sup> Establishing and funding a Human Rights Commission

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<sup>82</sup> As already noted the concept of social equality was closely connected to the objectives of economic growth within the European Union. The Equal Status Act 2000 thus outlawed discrimination on nine grounds; gender, marital status, family status, sexual orientation, religious belief, age, disability, race and membership of the travelling community. The Act had no role in relation to economic inequality.

<sup>83</sup> The term refers to both the Multi-Party Agreement made between the various political parties in Northern Ireland and the British and Irish Governments and the British-Irish Agreement between the States of Ireland and the United Kingdom. The exact legal significance of the agreement is discussed at Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 (3) MLR 317. A copy of the agreement is available at *Agreement Reached in the Multi-Party Negotiations* (CM 383, 1998); 37 ILM 751(1998).

<sup>84</sup> Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Thomson Reuters (Professional) 2010), 24. De Londras and Kelly, note that the Convention was opened to the Courts prior to its incorporation into Irish law and these cases reveal a deep scepticism about the extent to which the Convention and the jurisprudence of the European Court of Human Rights were relevant to domestic legal proceedings.

<sup>85</sup> European Convention on Human Rights Act 2003 and Human Rights Commission Act 2000.

represented an acknowledgement by the Irish government of the political potential of international rights norms. It also provided a forum for discussion, and an expert body ready to identify how government should act to vindicate rights.

The Equality Authority, established in 1999,<sup>86</sup> was tasked with overseeing the implementation of the Employment Equality Act 1998, and later the Equal Status Act 2000. During second stage debate on the 2000 Act, in both Dáil and Seanad, the Minister for Justice, Equality, and Law Reform specifically referred to the connection between the legislation, the Good Friday Agreement, the Amsterdam Treaty and Ireland's United Nations Convention obligations.<sup>87</sup> He particularly emphasised the European Union dimension:

Article 13 of that [Amsterdam] treaty gives the Union a basis to combat discrimination, both in employment and non-workplace areas.<sup>88</sup>

At the beginning of the 2000s, therefore, human rights and equality had been accepted by government as appropriate conceptual frameworks within which to formulate policy. Specific bodies had been established to inform government, and indicating the continued social importance of marriage, directed their attention to the issue of marriage law.

Four of the nine forms of discrimination set out in the Equal Status Act 2000 had application to the area of marriage law: gender, marital status, family status and sexual orientation. It is therefore not surprising that one of the first reports published by the

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<sup>86</sup> Pursuant to the Employment Equality Act 1998. The body's function under the Act was 'to work towards the elimination of discrimination in relation to employment' and 'to promote equality of opportunity in relation to the matters to which this Act applies,' (Section 38). Its role was expanded under the terms of the Equal Status Act 2000, which prohibited discrimination under nine specified grounds including gender, marital status, family status and sexual orientation (Section 3(2)).

<sup>87</sup> John O'Donoghue, Dáil Deb 20 May 1999, col 505, vol 336-7.

<sup>88</sup> John O'Donoghue, Seanad Deb 23 February 2000, vol 162, col 551. In the Dáil he referred to the new powers conferred on the European Union.

Equality Authority related to couple relationships.<sup>89</sup> The report was a measured and careful account of the specifically legal disadvantages suffered by same-sex couples in negotiating their joint lives. Although making no recommendations, the title of the report, *Partnership Rights of Same-sex Couples*, placed the issues clearly within the domain of relationship regulation. It assumed that legal rights should attach to couple relationships, and the comparisons made in the report between the position of married couples and same-sex couples who could not marry clearly suggested that the inequalities identified should be addressed through the extension of marriage law.

In 1999, the Equality Authority appointed an advisory committee on lesbian, gay and bisexual issues to identify international best practice in relation to the promotion of equality on the sexual orientation ground, to develop a perspective to inform policy-making, and using both, to suggest a program for action. The advisory committee published its findings in 2002 as, *Implementing Equality for Lesbians, Gays and Bisexuals*.<sup>90</sup> As with the Equality Authority's previous report, the specific disadvantages of same-sex couples *vis a vis* married couples were carefully identified, but in this instance specific recommendations for reform were made. The recommendations included a facility to identify a 'nominated' person in place of a spouse in relation to taxation, welfare, employment, pensions, succession, and other areas.<sup>91</sup> The report recommended the acknowledgment of a wider range of family forms, households and couple relationships.<sup>92</sup> Although focusing on 'partnership rights' the recommendations in this report were much more holistic, suggesting a comprehensive re-evaluation of how government regulated family life. Nonetheless,

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<sup>89</sup> Mee and Ronayne, *Report on Partnership Rights of Same-Sex Couples*.

<sup>90</sup> Equality Authority, *Implementing Equality for Lesbians, Gays and Bisexuals* (Equality Authority 2002).

<sup>91</sup> *ibid*, 28.

<sup>92</sup> *ibid*, 28.

the exclusion of same-sex couples from marriage law meant that, according to the report, ‘lesbian and gay couples had no guarantee of fair treatment under the law because legally their relationships did not exist.’<sup>93</sup> It was noted that:

Equality should be the core principle underlying any process of reform of the current laws and social provision with the aim of developing a legal and policy framework based on rights and responsibilities. Rights and responsibilities currently conferred on married heterosexual couples in relation to pensions, residency, property, adoption, taxation and welfare entitlements, etc, should be equally conferred on lesbian and gay couples as well as heterosexual unmarried couples. This type of focus might involve an exploration of a legal framework based on individual rights and responsibilities.<sup>94</sup>

This paragraph encapsulates the approach of the Advisory Committee, which although acknowledging the exclusionary effect of marriage law, did not suggest removing the privileges of marriage from heterosexual married couples. It accepted that the legally legitimated conjugal couple should have significant economic and social advantages. The issue for the Equality Authority concerned identifying those categories of person who should be able to avail themselves of marital status, not the social inequalities produced by the preferencing of marriage (or marriage like) relationships over all other modes of living. Furthermore, there was no questioning of the form of marriage law that applied to heterosexual couples, it was simply assumed that legal regulation and access to the discretionary jurisdiction of the family law courts was a desirable adjunct to the legal legitimation of couple relationships.

The growing consensus on the need to reform marriage law in order to remove inequalities arising between married and unmarried couples was further evidenced by a 2006 report commissioned by the Human Rights Commission on the *Rights and Duties of De Facto Couples*. The report aimed to contribute to public debate on *de facto* couples by:

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<sup>93</sup> *ibid*, 20.

<sup>94</sup> *ibid*, 29.

providing clarity and legal certainty, where such is possible, and highlighting areas of doubt, uncertainty or ambiguity with a view to having such issues addressed.<sup>95</sup>

This report focused on international human rights standards, assessing ‘the adequacy of Irish law in the light of that International framework.’<sup>96</sup> Within this conceptual scaffold, it was possible only to see the inequalities between one form of couple relationship and another, no account was taken of wider inequalities produced by the privileging of couple relationships.<sup>97</sup>

Also in 2006, the Department of Justice appointed a working group to examine ‘the categories of partnerships and relationships outside of marriage to which legal recognition might be accorded, consistent with Constitutional provisions.’<sup>98</sup> The Colley Report identified how the incidents of marriage had been gradually extended to cohabitants in matters such as social welfare, domestic violence, parental leave, residential tenancies and European free movement.<sup>99</sup> Differences, nonetheless, remained in areas such as property, financial support, death and succession. In relation to lesbian, gay and bi-sexual couples, the report focuses on ‘key objectives for advancing equality,’ which included not only the eradication of specific material or legislative disadvantage, but also the need to accord ‘visibility and value to diversity.’<sup>100</sup> It was considered important that a visible form of legitimation be available to couples willing and able to commit to long term stable relationships.

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<sup>95</sup>Judy Walsh and Fergus Ryan, *The Rights of de Facto Couples* (Irish Human Rights Commission 2006), vi.

<sup>96</sup> *ibid*, vi.

<sup>97</sup> From a purely economic perspective, only income earning or property owning heterosexual (married) couples were privileged. Those in receipt of social welfare were financially disadvantaged.

<sup>98</sup> Working Group on Domestic Partnership, *Options Paper* (Department of Justice, Equality and Law Reform 2006) also known as ‘the Colley Report.’

<sup>99</sup> *ibid*, 10.

<sup>100</sup> *ibid*, 17.



The addition of the legal concepts of human rights and equality to consideration of marriage law reform did not challenge the supremacy and centrality of marriage in the regulation of the social domain, rather it re-enforced the importance of the legitimate couple to social functioning. In order to implement human rights and equality imperatives government needed to identify and regulate more marriage-like relationships. It needed to investigate, know, and categorise the intimate and familial lives of a greater range of citizens. Legal knowledge had offered, once again, a solution for government to the difficulty presented by changing relationship practices. As new forms of stable partnership became visible, and demanded the advantages conferred on married couples, human rights and equality arguments were deployed to re-enforce the privileges of long-term conjugality. The government objectives of family stability, social stability and economic growth could thus be furthered with more marriage law.

## **8.4 Promoting Equality and Human Rights**

### *8.4.1 Reforming marriage law.*

Political consideration of the possibility that marriage law could be extended to a greater range of relationships began in 2004, when Fine Gael issued a policy document supporting legislation that would allow ‘two people of the same or of opposite sex to formally register their partnership with the State.’<sup>101</sup> The argument in favour of such extension was couched in terms of economic and social practicalities; ‘the State has a vested interest in the promotion of lifelong, stable relationships,’ and should therefore extend practical advantages in the areas of pensions, tax, social welfare benefits and succession to all registered couple relationships.<sup>102</sup> Senator David Norris introduced a

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<sup>101</sup> Fine Gael, *Civil Partnership* (2004). The Equality Authority, established in 1999, published a report in 2002.

<sup>102</sup> Fine Gael, *Civil Partnership* (2004).

Civil Partnership Bill to the Seanad in 2004, which provided for the legal registration and recognition of same or opposite sex couple relationships, their dissolution or annulment, and the conditions for entry.<sup>103</sup> His Bill did not move beyond second stage. Similar attempts were made by the Labour Party in 2006 and 2007, but were not progressed because the government gave a commitment to introduce its own legislation. During the 2007 general election, Fianna Fail, Fine Gael, the Labour Party, the Green Party, Sinn Fein and the Progressive Democrats all called for the legal recognition of same-sex relationships.<sup>104</sup>

It was with some inevitability, therefore, that a government sponsored Civil Partnership Bill was introduced to the Oireachtas in 2008. The Bill provided for the civil registration and recognition of same (but not opposite) sex relationships and extended many of the obligations of marriage law to these relationships.<sup>105</sup> Adopting recommendations of the Law Reform Commission,<sup>106</sup> the Bill also created a presumptive recognition scheme for cohabitants, applying marriage law to same and opposite sex cohabiting couples in some circumstances. Despite apparent political consensus on the objectives of the Bill, there was significant debate on its contents in the Oireachtas, the media and in academic literature.<sup>107</sup>

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<sup>103</sup> Seanad Deb 16 February 2005, vol 179, col 675 *et seq*

<sup>104</sup> Irish Human Rights Commission, *Discussion Document on the Scheme of the Civil Partnership Bill* (IHRC 2008), 63. This document contains a detailed account of the background to the introduction of the Civil Partnership Bill 2008 to the Oireachtas.

<sup>105</sup> There were a number of differences in the treatment of dissolution and succession, with less onerous conditions imposed upon civil partnerships although the lifetime support obligation was applied. Crucially, however, the statuses of marriage and civil partnership were equated in taxation, social welfare and many other functions of government. The Schedule to the Civil Partnership and Certain Rights of Cohabitants Act 2010 notes 120 consequential amendments necessary to apply the consequences of marriage to civil partners.

<sup>106</sup> Law Reform Commission, *Report on the Rights and Duties of Cohabitants* (LRC 82 2006). The report recommendations in relation to cohabitants only and did not deal with civil partnership.

<sup>107</sup> A number of articles discussing the shortcoming of the legislation appeared in Irish academic journals during the Bills gestation and following its enactment. See for example Brian Tobin, 'Relationship Recognition for Same-Sex Couples in Ireland: The Proposed Models Critiqued' (2008) 11(1) *Irish Journal of Family Law* 10; Fergus Ryan, 'The General

Of particular interest in the Oireachtas debates is the resurgence of Article 41 of the Constitution as a potential limiter on State action. The Minister for Justice, Dermot Ahern described the scope of the Bill during second stage debate:

I believe this Bill is as comprehensive as possible consistent with the requirements of the Constitution. The Bill recognises that there are persons who are in committed same-sex relationships who wish to share duties and responsibilities. It affords them an opportunity to register their partnership and to be part of a legal regime that fully protects them in the course of that partnership and, if necessary, on termination of the partnership. The redress scheme is a response in law to a growing need for protection of vulnerable cohabitants.<sup>108</sup>

Throughout debate, the Minister pointed out the care taken to avoid offending the primacy afforded to marriage in the Constitution, and the advice he had received from the Attorney General on the issue.<sup>109</sup> A number of deputies and senators pointed out that, as the Constitution does not specify that marriage is between a man and a woman it could, by legislation, be extended to same-sex couples. The Minister rejected this argument on legal grounds, but also indicated that it was politically impossible to extend the definition of marriage:

My clear advice on this area has consistently been that it would not be constitutionally sound to legislate for same sex marriage without holding a constitutional referendum on the definition of family. Marriage may not be expressly defined in the Constitution, but it has always been understood in common law as being between a man and a woman, ideally for life. *I do not believe the necessary political and social consensus exists to make such a constitutional referendum desirable* (my emphasis).<sup>110</sup>

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Scheme of the Civil Partnership Bill 2008: Brave New Dawn or Missed Opportunity' (2008) 11(3) Irish Journal of Family Law 51; John Mee 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009 (2009) 12(4) Irish Journal of Family Law 83.

<sup>108</sup> Dáil Deb 3 December 2009, vol 697, col 110.

<sup>109</sup> He stated that:

The Attorney General has advised in particular that to comply with the Constitution, it is necessary to differentiate the recognition being accorded to same-sex couples who register their partnership with the special recognition accorded under the Constitution to person of the opposite sex who marry. Whilst there is the need to respect the entitlement to equality that same-sex partners enjoy under Article 40.1 of the Constitution, there is also the need to respect the special protection which Article 41 gives to marriage. The Bill, therefore, has been carefully framed to balance any potential conflict between these two rights.

Dáil Deb 3 December 2009, vol 697 col 108.

<sup>110</sup> Seanad Deb 7 July 2010, vol 204, col 255, emphasis added.

The recognition and regulation of committed relationships beyond marriage was on the other hand, not only desirable, but also essential. Senator Shane Ross reflected the views of many contributors to the debate:

I do not know whether this legislation is based on pluralism, tolerance or human rights, but it seems to me that it represents eminent good sense. All it does is recognise something that should have happened a very long time ago, namely, the granting of straightforward human rights for people who deserve to be treated exactly as everyone else it treated.<sup>111</sup>

The legislation was enacted as the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, becoming law on 1 January 2011.<sup>112</sup>

## 8.5 More Marriage Law

### 8.5.1 *Performing marriage – regulated relationships under the 2010 Act*

The 2010 Act created two new forms of regulated couple relationships, civil partnership and ‘qualified cohabitation.’<sup>113</sup> Civil partnership under the Act mirrored marriage, save in respect of some inelegant attempts to differentiate it for the purposes of constitutional compliance.<sup>114</sup> The main difference between the two was that marriage applied to those of opposite sex, and civil partnership to those of the same-sex. Judicial separation was not provided for civil partners, thus avoiding the need to define ‘adultery’ for same-sex couples,<sup>115</sup> and the minimum period after breakdown, before dissolution, was two years rather than four.<sup>116</sup> Provisions in relation to financial

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<sup>111</sup> Seanad Deb 7 July 2010, vol 204, col 194.

<sup>112</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act (Commencement Order) 2010, SI 648/2010.

<sup>113</sup> Section 172 defines both ‘cohabitant’ and ‘qualified cohabitant.’ Relief under the act is available only to qualified cohabitants.

<sup>114</sup> There are significant consequential differences in relation to children who were notably absent from the Act. For an account of the differences in treatment between civil partners and married couples see John Mee, ‘Marriage, Civil Partnership and the Prohibited Degrees of Relationship’ (2009) 27 *ILT* 259; Sheila Wayman, ‘The forgotten parents,’ *The Irish Times* (Dublin, 19 January 2011).

<sup>115</sup> Adultery is a ground for judicial separation under the 1989 Act.

<sup>116</sup> 2010 Act, s 110(a).

orders and succession were broadly similar to those for married couples, including the need to ensure proper provision,<sup>117</sup> and the potential for lifetime support.<sup>118</sup> In relation to qualified cohabitants, the position was more complex, and regulation applied to both same and opposite sex couples. In order to avail him or herself of the redress scheme under the Act a cohabitant was required to demonstrate that they were involved in a relationship of cohabitation that was intimate and committed, and lasted for five years (or two if the parties were of opposite-sex and had a child together).<sup>119</sup> Additionally, a party seeking to avail him or herself of redress under the Act needed to show financial dependence on their partner. The forms of redress were much less comprehensive than those attaching to civil partnership or marriage, extending to property transfer orders, lump sum and periodic maintenance only.<sup>120</sup> Crucially, however, if a qualified cohabitant demonstrated the seriousness of the relationship in accordance with the Act, and proved financial dependence during or arising from the relationship, he or she could, potentially, continue to seek redress for life.<sup>121</sup>

The 2010 Act, particularly the provisions in relation to cohabitants, was the subject of significant criticism prior to its enactment.<sup>122</sup> The civil partnership scheme was broadly welcomed, although there was concern expressed that it did not amount to full

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<sup>117</sup> 2010 Act, s 120(3).

<sup>118</sup> 2010 Act, s 120(1) provides that:

If the court is of the view that one of the reasons set out in subsection(3) exists, the court, on application to it in that behalf by either of the civil partners, during the lifetime of either of the civil partners, may make, on granting a decree of dissolution or at any time after granting it, one or more of the following [financial] orders.

<sup>119</sup> 2010 Act, s 172(5).

<sup>120</sup> Section 174 facilitates property adjustment orders. Section 175(1) provides for periodic maintenance orders and s 175(2) for lump sum orders.

<sup>121</sup> A qualified cohabitant can make an application for relief within 2 years of the end of the relationship (s 195), once granted an order for financial relief is continually reviewable during the lifetime of the other cohabitant (s 175(1)), subject to the receiving cohabitant not having married, entered a civil partnership or a entered into another relationship in respect of which a financial order has been granted (s 175 (6)).

<sup>122</sup> John Mee provides a particularly good analysis of its shortcomings. Mee, 'A Critique of the Cohabitation Provisions of the Civil Partnership Bill 2009.'

marriage and did not adequately provide for the position of children living with same-sex couples.<sup>123</sup> From the perspective of government, however, it was assumed that the legal inequity between relationship types had been removed. Minister for Justice, remarked at report stage:

The Bill is a fine balance, as is required by the Constitution, between the constitutional provisions that people be equal in the eyes of the law and that marriage be protected.<sup>124</sup>

The 2010 Act applied selected incidents of marriage law to relationships depending on the degree to which they performed marriage, as then understood. Marriage, as evidenced by sociological expertise, was an intimate, companionate, lifetime relationship in which the partners provided one and other with care and support. This type of relationship was useful to government because it was assumed to produce social stability, which in turn was essential to economic stability and growth. In relation to civil partners, a public declaration of lifetime commitment would attract the obligations and advantages of marriage. By entering into a lifetime, monogamous, couple relationship same-sex partners would become an authorised unit, ready to support and maintain one and other in much the same way as a married couple. For cohabitants, the position was more complex, their performance of marriage needed to be more closely monitored to ensure that they were indeed intimate and committed, and that they had a record of accomplishment in mutual support and dependency.<sup>125</sup>

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<sup>123</sup> *The Irish Times* carried a number of opinion pieces on the issue during debate following enactment of the legislation. See for example: Alan Flanagan, 'Civil Partnership Bill is little more than an institutional apartheid' *The Irish Times* (Dublin, 2 August 2010); Dan Keenan, 'Civil Partnership Bill will create second-class marriage – Amnesty' *The Irish Times* (Dublin, July 29 2009); Emily Logan, 'Children overlooked in civil union Bill' *The Irish Times* (Dublin, 8 July 2010).

<sup>124</sup> Dáil Debates 1 July 2010, vol 714, col 353.

<sup>125</sup> Section 172 of the 2010 Act defined a cohabitant as 'one of 2 adults (whether of the same or opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other.' In determining whether two adults are cohabitants the court was required to have regard to the duration of the relationship, the basis upon which the couple live together, the degree of financial dependence of either adult on the other, the degree

In order to avail themselves of redress, a cohabitant needed to show, not only commitment to the relationship, but also a financial investment in it, by demonstrating that they were economically dependent on their partner.<sup>126</sup> Although the legislation did not have the overriding ‘marriage saving’ objective of earlier marriage law reform, it did represent an attempt to secure the performance of marriage among a greater range of relationship types. Political ambivalence to cohabitation is clear in the legislation, with a return to concern for the vulnerable dependent in need of protection. There are also echoes of the moral overtones of early marriage law in the financial redress scheme. Those who adopt constitutional roles without the sanction of marriage, will be made responsible for their actions should they fail to commit to their quasi-spouses for life.<sup>127</sup>

## **8.6 Normalising Lifetime Monogomy**

### *8.6.1 The normalising effects of marriage law*

In 1970s Ireland, cohabitation, marriage breakdown, single parenthood and same-sex relationships were invisible, uncounted and unacknowledged. With the expanded involvement of political government in managing the social domain, relationship practices beyond marriage became facts, impossible to ignore, essential to account for

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and nature of any financial arrangements between the adults, whether there are dependent children, whether one of the adults cares for and supports the children of the other, and the degree to which the adults present themselves to others as a couple (s 172(2)).

<sup>126</sup> Section 173(2) of the 2010 Act requires the cohabitant to demonstrate that ‘he or she is financially dependent on the other cohabitant and that the financial dependency arises from the relationship or the ending of the relationship.’

<sup>127</sup> Great care was taken by the Minister for Justice in describing the cohabitation provisions to adopt gender neutral language, a significant departure from earlier marriage law debate when the terms ‘husband’ and ‘wife’ were used in debate, but did not appear in the legislation. For example, he said at Seanad Deb 7 July 2010, vol 204, col 141.

Alongside civil partnership, the second essential component of the Bill, the cohabitants provisions, gives recognition to the fact that the legal system needs to offer protection to vulnerable persons in long-term same-sex or opposite-sex relationships when that relationship ends.

and govern. Maintenance and judicial separation legislation attempted to preserve conjugality, divorce allowed the replacement of failed relationships. Counselling and mediation services, buttressed by social research, aimed to encourage stability in all couple relationships. As government became a process of rational management, couple relationships became increasingly an issue for the State whose primary concern was the creation and maintenance of social, and consequently economic, stability.

It was an undisputed fact that, in the main, adults formed themselves into couple relationships, which facilitated their social and economic functioning. Formation of a conjugal couple was normal social behaviour, which was also of significant benefit to the State. As social practices shifted away from marriage toward other marriage-like relationships, these relationships, like marriage, also became normal, and politics aimed to support and maintain them in their normality. Whilst the extension of marriage law to same-sex and cohabiting couples might be characterised as a victory for human rights and equality, when viewed in the context of wider relationships of power it becomes clear that it is simply one technique, among many, that aimed to produce social stability and regularity. Relationships were admitted to legal regulation depending on how closely they resembled lifetime conjugality, how well they demonstrated commitment, presented themselves as couples, practiced intimacy and remained monogamous.

The 2010 Act set out the parameters for admission to the domain of social acceptability, requiring exclusivity, permanency and intimacy. Partners must provide each other with financial support, and commit to doing so for their lifetime, regardless of the ending of their interpersonal relationship. They must not be related by blood, must live together in a shared home, provide for one and other on death, share their income, tax allowance, welfare and pension entitlements. They must provide care, and



support the dependency of their partner; they must *perform* lifetime, monogamous marriage.

The extent to which the performance of ‘marriage’ was important to the functioning of the State, to the achievement of good government, is manifest in the schedule to the 2010 Act, which sets out the legislative provisions amended by the creation of the new status of civil partnership. There are 120 statutory amendments listed in the schedule, which are in addition to the changes made to a diverse range of statutes in the main body of the Act. Relationship status was relevant to property transactions, powers of attorney, employment legislation, criminal damage, social welfare, pensions, mental health, ethics and conflicts of interest, inheritance, guardianship of children, company law, housing, banking, food safety, planning and development, sustainable energy, industrial development, private security, consumer protection, policing, harbours, electricity supply and many more.<sup>128</sup> Categorising individuals by relationship status had become an increasingly essential technique of government, but so too had ensuring the performance of the central characteristics of marriage as then understood.

Identifying and recognising relationships requires the categorisation of individual lives. People must identify themselves to the State as male or female, hetero or homosexual, sexually active, psychiatrically healthy, and intellectually capable.<sup>129</sup> They must construct themselves as rights-bearing, and willing to shoulder responsibility, willing to work at their relationships and commit for life to the care and

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<sup>128</sup> First Schedule, Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, consequent amendments. Many of the provisions relate to potential conflicts of interest, remuneration and pensions but act to demonstrate the centrality of marital status to the administration of the state.

<sup>129</sup> The Civil Registration Act 2004 requires that parties to a marriage be of opposite sex, s2(2)(d), the Marriage of Lunatics Act 1811 prevents marriage by ‘any lunatic or person under a phrenzy.’ The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

support of another. The power effects of regulating couple relationships and regulating through couple relationships are both global and local. The centrality of marriage-like relationships to the process of governing makes them desirable, constructs them as normal but it also has negative effects. Those unable or unwilling to perform marriage are excluded from its social and material advantages, but they are also designated as different, abnormal, perhaps even deviant. Single, never married, parents fail to provide the stability their children need, and in caring for their children alone, they deny a worker to the labour market. Formerly married individuals are constructed by marriage law as both personal and social failures, and the more fraught their relationship, the more obvious their failure.

This pursuit of marriage performance by government is therefore problematic in its exclusionary, normalising effect. It requires the supervision of relationships, by the State, by counselling professionals, social scientists and the courts, with all of these mechanisms acting to monitor collective relationship behaviour. These mechanisms however also individualise relationships, particularly those in difficulty, focusing on them, requiring them to confess their difficulty in order that the pathology of an abnormal relationship might be identified, and the risk of its occurrence calculated. Law and legal processes play a particularly important role in this process, as it is within the courts that the most deviant relationships reveal themselves.

#### *8.6.2 Legal domains and the normalisation of marriage.*

During the 1980s and 1990s, the Irish government had created a set of legal rules governing marriage that had as their objective the affirmation of government commitment to marriage, saving marriages in difficulty and, following the introduction of divorce, creating new, better marriages to replace failed attempts. Following the commencement of the Family Law (Divorce) Act 1996, the volume of

marital litigation began to increase, principally in the Circuit and District Courts, but also in the Superior Courts where written judgments were regularly produced. Marriage law cases were subject to the *in camera* rule, which restricted reporting of cases in the media, and as a result little information emanated from the lower courts beyond the statistical and general information produced by the Courts' Service. In 2006, Carol Coulter carried out a study of family law cases in the Circuit Court, which, as with reported decisions of the Superior Courts, indicated that the judiciary had begun to adopt the rational, economic focus of government in managing the relationship disputes that came before them, moving away from the moral considerations of the early 1990s.<sup>130</sup>

### 8.6.3 *A rational approach to the end of relationships.*

The legislature imposed lifetime support obligations on spouses following both divorce and judicial separation, an obligation removed only upon the re-marriage of the receiving spouse. Government focus on the protection of marriage within which spouses performed designated gender-based roles for life had resulted in this obligation, and the courts initially accepted this objective when adjudicating on marital disputes. McGuinness J in *JD vDD*<sup>131</sup> stated that:

The Oireachtas made it clear that a “clean break” situation is not to be sought and that, if anything, financial finality is to be prevented ... finality is not and can never be achieved.<sup>132</sup>

Dunne J in the Supreme Court decision in *DT v CT*,<sup>133</sup> took a similar approach holding that

A ‘clean break’ principle may be found in the law as to financial orders relating to divorce in other jurisdictions. However, such a provision is not part of the Irish

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<sup>130</sup> Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press 2009).

<sup>131</sup> [1997] 3 IR 64.

<sup>132</sup> [1998] 3 IR 64, 89.

<sup>133</sup> [2002] 3 IR 334.

Constitution or legislation. There is no provision providing for a single payment to a spouse to meet all financial obligations. Rather the fundamental principle is one of 'proper provision.'<sup>134</sup>

Fennelly J, also in *DT v CT* opined that the continuation of obligations following dissolution:

reflects the fact that marriage is, in principle, intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce without any continuing obligation to a former spouse it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution.<sup>135</sup>

As the Superior Courts presided over an increasing number of marital disputes, many of which related to couples with 'ample resources,' the advantages of providing financial finality became apparent. Keane CJ, representing the majority in the five-member Supreme Court that decided the divorce application in *DT v CT* elegantly subverted legislative policy when he held that:

It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the 'clean break' approach which are clearly beneficial. As Denham J observed in *F v F* [1995] 2 IR 354, certainty and finality can be as important in this as in any other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties.<sup>136</sup>

As the decade progressed, superior court decisions in judicial separation and divorce cases, adopting the rational attitude of Keane J, took on an increasingly administrative character, seldom referencing legal precedent or providing detailed reasons for the property divisions ordered. Although 'proper provision' was a constitutional pre-requisite to the grant of a divorce decree, it is clear that the decision

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<sup>134</sup> [2002] 3 IR 334, 403.

<sup>135</sup> [2002] 3 IR 334, 426.

<sup>136</sup> [2002] 3 IR 334, 385.

on whether a divorce was to be granted largely centred on the statutory time period having passed, with decisions on provision an ancillary issue. Judicial rumination focused on the appropriate proportions to be allocated to each spouse, and the financial needs created by their individual circumstances. In an acknowledgment of the policy of the legislation, however, the courts did accept that the financial circumstances at the time of divorce should be examined, irrespective of the existence of a prior judicial or agreed separation, or the period of time since the relationship had broken down.

The estranged husband and wife in *MK v JPK*<sup>137</sup> required two hearings in the Supreme Court, and two full trials in the High Court to settle the consequences of their relatively short but fertile marriage that had ended more than twenty years previously.<sup>138</sup> The wife had raised six children (mainly alone), surviving on limited, but regular, maintenance payments from an absent, wealthy, and re-coupled husband. The High Court held that in a situation such as this where there were ‘ample resources ... the applicant should be put in a position akin to that which she would probably be enjoying if she had not forgone the opportunity of a remunerative career;’<sup>139</sup> a situation that included, ‘having an estate of modest proportions to bequeath to her children.’<sup>140</sup> The decision in this case confirmed the implication of the 1996 Act, that an application for divorce following a long period of separation would require a detailed investigation of both the current and historical financial and interpersonal relationship between the spouses.<sup>141</sup>

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<sup>137</sup> The original High Court decision was delivered by Lavan J *extempore* on 20 November 2000. The first Supreme Court appeal is reported at [2001] 3 IR 334, the re-trial at [2003] 1 IR 326, and the second Supreme Court appeal at [2006] 1 IR 283.

<sup>138</sup> The spouses married in 1963 and separated in 1980 following the birth of six children, all of whom remained in the custody of the wife.

<sup>139</sup> [2003] 1 IR 326, 358.

<sup>140</sup> [2003] 1 IR 326, 360.

<sup>141</sup> The applicant wife had initiated her proceedings in the Circuit Court seeking an order for divorce and ancillary orders, she had applied to transfer the proceedings to the High Court, which application was refused, and successfully appealed. Following a full hearing in the High

Poor behaviour on behalf of the spouses was a matter open for consideration by the courts under the 1989 Act and 1996 Act. A court was obliged to consider conduct ‘if that conduct is such that in the opinion of the court it would in all the circumstances be repugnant to justice to disregard it,’<sup>142</sup> and under the 1989 Act adultery, unreasonable behaviour, and desertion were grounds for judicial separation.<sup>143</sup> The courts, however, proved unwilling to adjudicate on the issue, particularly following the Supreme Court decision in *DT v CT*, in which it was held that conduct was relevant only if ‘obvious and gross.’<sup>144</sup> O’Higgins J followed this decision in *C v C*,<sup>145</sup> holding that the husband’s conduct in sending his wife on holiday so that he could install his lover in the family home was irrelevant to the making of ancillary orders. Subsequent to these decisions, there were few references to conduct in the superior courts. Carol Coulter heard conduct pleaded only three times during 62 days observing the work of the Circuit Court in 2006, and in only one of those did the judge take account of it.<sup>146</sup> Despite the judiciary’s reluctance to adjudicate conduct, the legislative framework encouraged individual litigants to plead it.

#### 8.6.4 Adjudicating marriage law.

Responsibility for administration of the courts transferred from the Department of Justice to a new statutory body, the Courts Service, in 1999.<sup>147</sup> The functions of the

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Court, Lavan J granted the order for divorce and divided the husband’s assets based largely on the principle of equality, following the House of Lords decision in *White v White* [2001] 1 AC 596. The respondent husband appealed on the basis that the trial judge had not properly accounted for the matters set out in the 1996 Act. The Supreme Court ordered a re-trial confirming that, despite the existence of a separation agreement, all of the factors set out in the 1996 Act, must be considered upon application for divorce.

<sup>142</sup> 1989 Act s 20(2)(i), 1996 Act s 20(2)(i).

<sup>143</sup> 1989 Act s 2(1).

<sup>144</sup> [2002] 3 IR 334, 391.

<sup>145</sup> [2005] IEHC 276.

<sup>146</sup> Carol Coulter, *Family Law in Practice: A Study of Cases in the Circuit Court* (Clarus Press 2009), 100.

<sup>147</sup> Courts Service Act 1998.

service were to manage the courts, provide information in relation to the courts to the public, provide support for judges, provide, manage and maintain court buildings and provide facilities for the users of the courts.<sup>148</sup> As part of its mandate, the service produced annual reports, beginning in 2000, that provided an overview of how the courts were organised and the type and volume of work processed. From the reports, we learn the volume of marriage law cases adjudicated upon each year in the various courts. Of particular note, is the very small volume of cases that came before the High Court, less than 100 per year, indicating the atypical status of the reported cases discussed in the previous section.<sup>149</sup> In the District and Circuit Courts, marriage law cases were more common, involved substantially smaller sums of money, and were adjudicated upon in chaotic circumstances.<sup>150</sup>

Carol Coulter's study of cases in the Circuit court, undertaken in 2006, precipitated a family law reporting project, which involved the observation and redacted reporting of *in camera* family law cases heard in the District and Circuit Court. Coulter spent a number of months observing court cases previously closed to all but the participants,

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<sup>148</sup> Section 5 Courts Service Act 1998.

<sup>149</sup> There were 39 divorce and 76 judicial separation cases before the High Court in 2000. A tiny amount when compared with other types of action; in the same year, there were 10,480 personal injury actions and 679 judicial review applications.

<sup>150</sup> The 1996, Law Reform Commission, *Report on Family Courts* noted that:

Substantive family law has undergone a transformation [in the last twenty years], with the introduction of a wide range of remedies and rights designed to protect vulnerable or dependent family members in the wake of breakdown, and to secure the fair distribution of family assets. Unfortunately, the means for the delivery of these new rights and remedies have not received the same level of attention. The structures which this society offers for the mediation and resolution of family conflict are inadequate in the extreme.

Law Reform Commission, *Report on Family Courts* (LRC 52 1996), 10.

Carol Coulter, found little improvement in 2006 when she reported that the District court carried out an:

enormous volume of work ... with little or no ancillary resources or support ... Inevitably, cases have to be disposed of quickly. The sheer pressure of numbers of litigants may have an inhibiting effect on the amount of evidence that is heard, compounded by the fact that most litigants are not legally represented. This can lead to some litigants or respondents not being adequately heard.

Carol Coulter, *A Study of Cases in the Circuit Court*, 116-117.

their lawyers and the judge. She focused in particular on a number of contentious cases in relation to children, maintenance and the family home. Although her study covered the full range of ‘family law,’ at Circuit Court level, unless the matter was an appeal from the District Court, the vast majority of cases related to couples who were, at some point, married. Coulter noted:

Some of [the contested cases] were very repetitive in the issues raised and the way in which they were dealt with, with extensive examination of bank accounts which ultimately decided very little, or disputes about custody or access that revealed more about the level of hostility between the parents than any developments in judicial decision making.<sup>151</sup>

The Court Service bulletin *Family Law Matters*, published between 2006 and 2009, similarly records the tedium of repeated, apparently irresolvable personal disputes played out before Circuit Court judges.

The Court’s service in its Annual report, and in *Family Law Matters*, was at pains to point out the ‘volume of work being processed in our family law courts’<sup>152</sup> and the importance of this work:

The impact of these cases not only affects the parties directly, but also has a bearing on society in general. The combination of issues such as relationship, emotional, economic, child rearing and health are unique to family law. The impact they have on people influences their bearing and behaviour as they navigate themselves through the family law system. The emotional impact explains, in some cases, the level of conflict that exists between the parties and the adverse effect this has, particularly on children.<sup>153</sup>

Judicial decision making in the lower courts, as reported in *Family Law Matters*, does not demonstrate any appreciation of the wider social impact it may have, focusing instead on finding workable routes through claims and counterclaims, allegations of misbehaviour and lack of candour in relation to assets. A sample of cases reported by the service illustrates the nature of the cases arising in the lower courts. A reported

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<sup>151</sup> *ibid*, 73.

<sup>152</sup> Terence Agnew ‘Opening a window on Family Law,’ (2008) 2(3) *Family Law Matters*, 1.

<sup>153</sup> *ibid*.



judicial separation case involved an abusive, violent husband who had committed adultery on a number of occasions. His wife had worked throughout the marriage, paid for the family home, and had a substantial pension. The husband worked only casually, and was in receipt of an invalidity pension from the State. Despite facilitating the competing claims of the parties, and a detailed examination of the assets of the family, the Judge advised counsel for both parties that ‘I would think it is probably a third-two-thirds case in favour of the applicant [husband].’<sup>154</sup> Similarly, a judge sitting in Cork heard who had paid for a wedding that had taken place thirty years previously, the extent of the husband’s drinking, the wife’s physical abuse, ‘cans of beer at a confirmation,’ and aspirations for grown up children, but concluded the matter with an even splitting of the only asset, the family home.<sup>155</sup>

These spouses, having prepared for their day in court by attending solicitors, consulting with barristers, collecting financial information and allegations of marital misbehaviour, inevitably sought the honour of a legal victory. They pursued every detail of their claim with vigour hoping for a judicial affirmation that their former partner had proved inadequate to his or her promise of lifetime monogamy. The judge facilitated their disputes, but resolved them on the basis of mathematical portions, without explanation of how he or she reached a conclusion. The judicial process almost seemed designed to produce maximum conflict for the prize of a slight adjustment in a judge’s rule of thumb.

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<sup>154</sup> Courts Service ‘Case conference narrows issues in separation case’ (2008) 2(2) *Family Law Matters*, 14, 15.

<sup>155</sup> Courts Service, ‘Family home and assets to be divided equally’ (2008) 2(2) *Family Law Matters*, 15, 16.

### 8.6.5 Child law and marriage law

Although marriage law, the law that regulates the relationship between adults, is quite a distinct body of law from that dealing with children, the two are regularly conceptually bundled. Whilst it may have been the case in the 1970s and 1980s that marriage and children were largely synonymous in terms of social practice, this was not the case at the end of the 1990s and into the 2000s, when more than one third of births were to women not involved in regulated relationships.<sup>156</sup> At the level of academic investigation, child law was separated from marriage law, but at the level of practice, particularly in the courts, they were often conflated. The result was that difficulties with adult relationships were, at the level of practice and in political debate, discussed within the same conceptual space as issues relating to child custody, maintenance, and Health Service Executive applications for child-care orders.<sup>157</sup> The various court applications also took place within the same physical space, at special ‘family law days’ in the Circuit and District Courts.

During the 2000s, this had two effects. First, it re-enforced the connection between legal marriage, legal family, and legal rights to children, a connection well illustrated by the plaintiffs’ arguments in *Zappone & Anor v Revenue Commissioners & Ors* in which the plaintiffs sought recognition for their Canadian, same-sex, marriage.<sup>158</sup> Although the plaintiffs had no children, a large portion of the evidence in the case was taken up with an attempt to demonstrate that children did not suffer from being raised by a lesbian couple. Dunne J in the High Court considered expert evidence adduced on both sides, but found that she could make no firm conclusion on the issue due to

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<sup>156</sup> Courts Service, (2008) 2(2) *Family Law Matters*, 17.

<sup>157</sup> Child care orders are sought by the Health Service Executive to facilitate the taking of children into State care, or supervision of children in their own homes, pursuant to the Child Care Act 1991.

<sup>158</sup> [2008] 2 IR 417.

the absence of sufficiently comprehensive research.<sup>159</sup> This case was about the recognition of a Canadian marriage in Ireland, and although the courts had long before held that the facility to procreate or parent children was not an essential characteristic of marriage,<sup>160</sup> the plaintiffs felt compelled to address the issue and the judge to rule upon it.

Secondly, the conflation of marriage law and child law in the courts equated the breakdown of adult relationships with a failure to protect children. Relationship breakdown, child neglect and disputes about who should care for, or support children cohered to designate the family courts and their trappings with those who transgress against the most vulnerable members of our society. Ireland had ratified the United Nations Convention on the Rights of the Child in 1992, but it was not until the 2000s that action in respect of the Convention was politically visible. A National Children's Strategy was published in 2000,<sup>161</sup> the National Children's Advisory Council was also established in 2001,<sup>162</sup> and the office of the Ombudsman for Children in 2004.<sup>163</sup> The

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<sup>159</sup> [2008] 2 IR 417, 507.

<sup>160</sup> In *Murray v Ireland* [1985] IR 532 Costello J held that:

A married couple without children can properly be described as a 'unit group' of society such as is referred to in Article 41 .... 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.

<sup>161</sup> Department of Health and Children, *National Children's Strategy: Our Children – Their Lives* (Pn 7837, Stationery Office 2000). The Minister for Health's foreword notes that: 'The Strategy rightly recognised the role of the family primarily and of local communities in caring for children.' The report does not refer to the constitutional definition of family noting instead that:

While marriage still remains the most popular choice for couples, the number of family units not based on the traditional marriage situation has increased. The Labour Force Survey in 1997 revealed that 13.5% of families with children aged under fifteen years were headed by lone parents and that such families accounted for 12% of children under fifteen (17).

<sup>162</sup> The Council was launched on 15 May 2001 by the Minister for Children, Mary Hanafin and was part of the National Children's Strategy. The Council's function was to advise the minister on child related issues and to undertake research in the area. Its initial membership included three teenagers. Department of Health and Children, Press Release, 15 May 2001, available at: < <http://www.dohc.ie/press/releases/2001/20010515.html>> accessed 14 July 2014.

<sup>163</sup> Established pursuant to the Ombudsman for Children Act 2002.

increased visibility of child related issues in the media and politics, leading to a campaign for the insertion by referendum of a provision protecting children's rights in the Constitution, placed further emphasis on the vulnerability of children.<sup>164</sup> This new political focus on children corresponded with increased interest in the operation of the family law courts. The vast majority of the cases coming before the family law courts related to custody, access and maintenance of children, and to domestic violence. These cases were, therefore, also those most regularly reported during the operation of family law reporting project.<sup>165</sup> The family courts increasingly became child courts. Taking 2007 as an example, the Courts service reported 10,002 applications involving custody, maintenance (non-married parents), and access to children made independently from judicial separation and divorce proceedings. In contrast, there were just over 5,000 judicial separation and divorce applications, of which only 886 involved child-related applications.<sup>166</sup> The predominant business of the family courts was thus adjudicating childcare disputes between non or never married couples; child law and marriage law were thus, in reality, quite separate in their operation.

## **8.7 Conclusion.**

### *8.7.1 Governed by marriage law*

The form of divorce introduced in Ireland was restrictive and often required a two stage process of litigation. A number of commentators pointed out the chaotic operation of the adjudicative system and the punitive effect of marriage law on those whose relationships had broken down. Nonetheless, the political problem identified

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<sup>164</sup> Emily O'Reilly 'Strengthening the Rights of Children' *The Irish Times* (Dublin, September 29 2006), refers to the developing campaign for a children's rights referendum.

<sup>165</sup> The project produced reports for 2007, 2008 and 2009.

<sup>166</sup> Courts Service, *Annual Report 2007*, 106-115.

with marriage law at the beginning of the twenty-first century was not its problematic operation, nor its imposition of lifetime support obligations. The political problem with marriage law was its failure to attend to the relationship practices of those falling outside the morally bound Constitutional definition of 'marriage.' The heterosexual exclusivity of marriage was challenged on the basis of human rights and equality imperatives that gained political currency with greater integration of the European Union and the political settlement in Northern Ireland. In seeking to address the exclusionary effect of existing marriage law, the Irish government legally authorised the new relationship statuses of civil partnership and qualified cohabitation and applied the tenets of marriage law to them to the extent that they mimicked lifetime, dependency marriage. Advantages conferred on marriage by social policies, taxation and other functions of government were also extended to civil partners.

The regulatory strategies applied to marriage in the 1980s and 1990s were thus extended to a wider range of relationships in the 2000s. The political conceptualisation of normative relationship behaviour had shifted from morally bound 'marriage' to the more rationalised 'marriage performance.' The emphasis on women and their dependency had, in the main, receded (although vulnerable dependent cohabitants were imagined as women), replaced by the need for relationship stability, whichever form it took. The mechanisms deployed to achieve relationship stability replicated those relating to marriage; State provided counselling and mediation, court based adjudication, lifetime support obligations. Government was thus able to rely on the pre-existing dense network of interests already installed around marriage to regulate a greater range of social relationships.

### *8.7.2 The role of law*

At the end of the 1980s, the Irish government embarked on a new political strategy that involved the promotion of economic growth and stability. This approach was supported by the highly rationalised approach to economic management advocated by the expanding remit of the European Union. The Maastricht and Amsterdam Treaties on European integration emphasised the importance of social stability to economic growth and social stability and provided a non-moral rationale for the marriage-saving objectives of the Irish government. Social inclusion, brought about through workforce participation, was a central element of economic development, both at European and National level. This required the activation of Irish workers, and married women in particular.

The social aspects of the growth imperative led to increasing investigation of the Irish social behaviour, and family practices in particular. Sociologists supported marriage as the optimal foundation for family life, offering politics a way to think about marriage outside of the constitutional paradigm. Marriage was no longer a moral relationship but a route out of dependency for lone parents, a secure environment for children and representative of continuity and stability in society. Social science also emphasised the interpersonal nature of the marriage relationship and the role of individual spouses in maintaining marriage. Their efforts were necessary, not only for social stability, but to ensure the economic success of the country as a whole. Agencies were established and strategies developed with the objectives of setting standards for relationship behaviour and engaging with the lives of individuals in order to sustain and promote stable familial relationships. Although stable relationships outside marriage were recognised, legally sanctioned marriage remained important and legislation was enacted in 2004 setting out, for the first time, the legal pre-requisites

for State-sanctioned marriage. Marriage had become a fully legal matter. The social domain, by now heavily regulated, continued to rely on marriage as a relay and support for a large number of government functions.

During this period, rights based claims derived from European and International agreements began to sculpt a new meaning for marriage, completely effacing the gendered, dependency-based nature of the constitutional paradigm. A government *Programme for Prosperity and Fairness*, negotiated in 2000, following the ratification of the Amsterdam Treaty, connected gender equality to the needs of economic development. Married women were no longer conceptualised as women in the home providing a valuable service to the community; they became potential workers. The stable two-parent family, in which each partner carried their fair share of domestic responsibilities became an essential element of the growth imperative. Legal articulations of rights could produce equal opportunities for women to avail themselves of education and training and to enter the workforce, but they also served the economic objectives of government. The vulnerable dependent housewife was lost to political discourse. She also disappeared from the courts as increasing numbers of women joined the labour market. Applications for spousal maintenance almost disappeared in the lower courts, arising most often in applications for ‘ample resource’ divorce or judicial separation applications.

Human rights based claims for equality precipitated the most recent reform of marriage law. The exclusion of same-sex couples from legal recognition and the advantages of marriage attracted significant political attention during the 2000s. Although the extension of marriage law to same-sex couples in 2010 can be constructed as a victory for human rights and equality, its enactment had seemed inevitable since the early years of the decade, and was politically uncontested. Early

arguments in favour of recognition of same-sex relationships adopted the rationalised economic language of the European Union. The State had a vested interest in stable lifetime relationships because they promoted social, and hence economic stability. There was, however, political resistance to the extension of the definition of ‘marriage’ to same-sex couples. Old morally driven arguments, cloaked in the constitutional marriage protection doctrine, were deployed to confine marriage to heterosexuals. Article 41 was represented as an absolute limit to State action, despite the ‘woman in the home’ element of the Article having been discarded by politics many years previously.

Legal processes continued to exert their jurisdiction over relationship behaviour, providing a forum, but not a remedy for marital misbehaviour. Whilst government acted to normalise the performance of lifetime marriage through direct encouragement, financial and regulatory preferencing, the courts contributed to these normalising aims by demonstrating the distress of marital breakdown. Adjudicating upon disputes involving children within the same conceptual and physical space as those involving adult relationships provided a visible link between marriage failure and the vulnerability of children. Relationship breakdown was not only a tragedy for adults; it also risked significant infringement of the rights of the vulnerable child.

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was enacted at the end of my research period, and I have not investigated its effect at the level of practice. In the first year of operation (2011) 536 civil partnerships were registered.<sup>167</sup> Courts Service statistics for 2013 record no dissolutions of civil partnerships, and do not specifically identify applications made to the courts under the

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<sup>167</sup> Central Statistics Office, *Statistical Release 30 September 2013*, available at: <<http://www.cso.ie/en/releasesandpublications/er/mcp/marriagesandcivilpartnerships2011/#.U-394fldXWE>> last accessed 15 August 2014.



co-habitation provisions of the 2010 Act.<sup>168</sup> The practical effects of the legislation are perhaps less important, given the small number of individuals engaging with the legislation, than the link it represents between the liberation discourse of human rights and the strategic objectives of political government.

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<sup>168</sup> Courts Service *Annual Report 2013* (Courts Service 2014), 50-52.

## Nine – Governed by Marriage Law

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Foucault discusses ancient Greek and Roman marriage practices in the third volume of *The History of Sexuality*, tracing their evolution from a private ceremony, a celebration, to a public institution increasingly subject to legal regulation. He notes how legislative measures reproduced the traditional ethical systems, ‘transferring to public power a sanction previously under familial authority.’<sup>1</sup> The gradual ‘publicizing’ of marriage was accompanied by other transformations. Marriage as a private act had been favoured among the wealthy because it forged allegiances and ensured the transmission of property, but as it became more public it became more popular across the social classes appearing more and more as ‘a voluntary agreement entered into by the partners, who pledged themselves personally.’<sup>2</sup> The economic imperatives that had sustained marriage among the wealthy became less important as trade replaced agriculture, whilst among the less privileged it came to symbolise commitment and mutuality rendered significant, not by economic imperatives, but by law. From this series of transformation arose a number of paradoxes:

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<sup>1</sup> Michel Foucault, *The Care of the Self: The History of Sexuality Part III* (Robert Hurley trs, Pantheon 1986), 73.

<sup>2</sup> Foucault, *The Care of the Self*, 75.

[Marriage] looked to public authority for its guarantees; and it became an increasingly important concern in private life. It threw off the economic and social purposes that had invested it with value; and at the same time, it became a general practice. It became more and more restrictive for spouses, and gave rise at the same time to attitudes that were more and more favourable – as if the more it demanded, the more attractive it became.<sup>3</sup>

Foucault's objective in analysing marriage practices in antiquity was to demonstrate the productivity of power, its dispersion throughout the social body and the link between power exercised at the level of the State and relationships of power within society. Marriage, in antiquity and today, is an ideal object of study because of the connection it forges between the most personal concerns of individuals and the collective administration of lives. Foucault, although referring briefly to the legislative regulation of marriage in Rome, places no great emphasis on how the connection between public authority and individual lives is made through legislative and other legal measures, and it is this aspect of marriage that I have explored using the Irish experience as a case study. The relationship between public authority and marriage, as suggested by Foucault, is not binary; the State does not impose rules on individuals in pursuit of patriarchal or other ideological objectives. Rather, the regulation of marriage, through legislation and other techniques of government acts in a productive way to shape the aspirations and choices of individual citizens.

The main aim of this research was to question the centrality of marriage to the legal and social policy systems of Western States. Using Ireland as a case study, I have attempted to show how marriage law and social policy operate together to govern social behaviour by shaping possibilities, guiding behaviour and engaging with the self-regulatory capacities of individual citizen. Furthermore, I have questioned the articulation of marriage law as a source of liberation by pointing out how it has acted

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<sup>3</sup> Foucault, *The Care of the Self*, 77.

to install a detailed mechanism of surveillance and control around individual relationship practices in an attempt to regularise them. In this final chapter, I draw together the findings from the empirical chapters, specifically addressing the research objectives and exploring the possibility that the overall aim and strategic effect of marriage law is to conduct conformity in relationship behaviour.

## **9.1 Governed by Marriage Law**

Political debate on the issue of marriage law tends to adopt a juridical formulation of power, imagining the State as a unified entity capable of imposing its will on citizens. It also assumes that law can challenge political power by supporting alternative visions of truth. By examining the historical development of Irish marriage law through a Foucauldian lens, I have attempted to show that marriage law acts to govern our affective lives in accordance with mobile imaginings of optimal relationship behaviour. It does not command obedience, but acts with other regulatory frameworks to shape our field of action, and engage our self-regulatory capacities in the interests of social stability.

When marriage presented itself as a difficulty that the Irish government was required to address in the late 1960s, it had already established its usefulness as a marker of interdependence. Marriage, between men and women who produced children and performed specific gender roles, was an established social behaviour, subject to traditional and religious rules to which individuals looked for guidance in building their lives. Until the 1970s, government used the practice of marriage to support its labour policies - married women could be excluded from the workforce because their husbands would support them. With the adoption of a Keynesian economic model in the 1950s, it became necessary to make centralised welfare provision for indigent citizens in order to support economic advancement. The marital

family again presented itself as a convenient instrument, becoming an institutional relationship through which financial support was disbursed. Government assumed that men would support their wives and children; social practice and religious doctrine required it. Thus, government could rely on this social institution to relay State services through the social domain.

The link between government, marriage and the lives of individual citizens was firmly established before reform of marriage law began in the 1970s, making the relationship behaviour of individuals an important issue of national policy. When difficulties consequent on marriage practices became politically visible at the end of the 1960s therefore, it was inevitable that they would be seen as an issue for government. Furthermore, in attempting to address these difficulties government was confined in its objectives by the discourses of truth then revolving around the social practice of marriage. The problem needing attention was the indigence of married women abandoned by their husbands, and the solution was seen only in terms of the regulation of existing marriage practices. Men had a social and moral obligation to support their wives; the solution to the problem of unsupported wives was therefore the legal enforcement of those obligations.

In order to protect the institution of marriage in the form upon which the State had come to rely for administrative purposes, legal mechanisms were deployed to entrench its obligations. This had two effects; first it affirmed the State's interest in a particular relationship practice and secondly, it began the process of transferring the supervision of marriage practices from the moral to the regulatory domain. This process continued in the 1980s when the presumed permanency of marriage was called into question by increasing rates of marital breakdown. The centrality of marriage in administering the social domain led to the activation of legal discourses that required the political

protection of marriage. Article 41 of the Constitution, and its textual support for marriage, was deployed by both government and political activists in creating a political imperative to supervise marriage. Further lines of penetration were established, and the State took a stake, not only in the performance of the financial obligations of marriage, but also in its actual performance as an interpersonal relationship. Information was collected regarding the causes of marriage failure, and expertise sought in respect of methods of protection. Professional services such as counselling and mediation were identified as relevant to the marriage saving project, and judicial separation legislation introduced at the end of the 1980s required individuals to consider bringing their relationship difficulties to experts paid by the State.

Government remained committed to protecting the institution of marriage in the 1990s, introducing measures to support and enrich existing marriages. The primacy afforded to moral concerns led to a divorce jurisdiction that required a four year wait to facilitate ‘counselling, reconciliation and a period of adjustment.’<sup>4</sup> Governmental concern for the welfare of children further intensified the relationship between marriage and the State; children needed stability and this was best achieved within a loving, lifetime, marital relationship entered into by their biological parents. The moral nature of marriage became less important following the introduction of divorce, but the marital form remained central to the process of social government.

With the development of a new, intensely rational approach to government, shaped in large measure by the requirements of closer European integration, marriage came to be seen in rational, sociological terms. Marriage, and marriage-like, relationships became more common, and moral justifications for marriage, both among the

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<sup>4</sup> Michael Woods, Dáil Deb 27 September 1995, vol 456, col 24.

population and within government, receded. Relationship status nonetheless continued to play a central role in social government, with relationships outside marriage attracting regulation according to how closely they resembled the picture of lifetime monogamy represented by traditional marriage. As Ireland became a regulatory State, increasing its legislative output, and expanding the domains within which government had a stake, relationship status became more, rather than less important. Furthermore, stable couple relationships could provide two workers to the labour market and provide protection and support for the rights bearing child.

By the end of the first decade of the twenty-first century, the linkages between marriage as a social practice and the performance of social government had intensified to the extent that the legal status 'married' had become almost fetishised. Marriage had cast off its moral connotations, as well as its connection to gendered relationship practices. It had been identified as the sociologically superior relationship, providing a guarantee of lifetime care to adults and vindication of a child's right to family stability. From the perspective of government, the performance of marriage was more important than its institutional form - promoting social and economic stability required the recognition and regulation of any couple relationship that could perform lifetime monogamy.

Throughout the research period, marriage connected the concerns of the State to those of individual citizens. The Irish government did not seek to control relationship behaviour by juridical command, rather it sought to regulate it in accordance with its normal characteristics, ranging from lifetime, dependency, heterosexual marriage in the 1970s to cohabitation and same-sex monogamy in the 2000s. Although activists sought liberation for women, parties to failed relationships, and alternative relationship practices, the effect of marriage law reform over the research period was

to entrench the necessity of relationship regulation and make lifetime monogamy an individual imperative.

## **9.2 The Effects of Marriage Law**

Over a forty-year period, the Irish government constructed a dense network of regulation around the relationship practices of individuals. The social domain was largely managed through the officially legitimated couple relationship and a complex legal machinery had been installed around it. In the 1970s, the deserted wife was the focus of marriage law and her poverty created a justification for intervention. The failure of male support was the source of her difficulty and the Family Law (Maintenance of Spouses and Children) Act 1976 gave her a legal right to redress against her husband. A right to social support was also provided. Both of these remedies required individual women to identify themselves as parties to a failed marriage and to submit to administrative mechanisms of inquiry. The Family Home Protection Act 1976 supervised marriages by requiring spouses to record their agreement to property transactions, re-enforcing a woman's position of dependency in marriage. A significant intensification of relationship management occurred in the 1980s. The Law Reform Commission illustrated the efficacy of legal process in identifying and containing marital abnormality. It offered solutions that would allow individuals in difficulty to plead their deviance from the normal, lifetime, successful marriage away from public view within the apparatus of the legal system. The Judicial Separation and Family Law Reform Act 1989 built a legal apparatus that required those experiencing marital difficulties to withdraw from public view behind a veil of confidential mediation, counselling, or court based adjudication, provided and supervised by the State. On the face of it, the Act presented a picture of a caring state ready to support citizens through their relationship difficulties; however, the reality of



the family courts was far removed from the rhetoric of politicians. Very quickly, the family courts became ‘a system struggling and barely managing to cope,’ an ‘ill equipped and intimidating process.’<sup>5</sup> The wide discretion afforded to the judiciary required litigants to plead the intimate details of family life in court documents and claim relief under every available heading. Upon the introduction of divorce in 1997, a further layer of judicial discretion was added to the marital exit path, and again there was no escape from the financial obligations of marriage. Those who failed at marriage could remain trapped within an adjudicative quagmire for years, or even decades negotiating courtrooms described by the Law Reform Commission as ‘a disgrace.’<sup>6</sup> The actual operation of marriage law, the requirement to consider counselling and mediation, to allege and disclose marital misbehaviour, the conflation of marriage law with child law, the constant reviewability of marriage law decisions, all acted to both warn individual citizens, and society as a whole, of the evil/irrationality of relationship breakdown and to manage, marginalise and control those who must enter the domain of marriage law.

Marriage law, in its actual effect acted to oppress those required to engage with its rules. Nonetheless, it did not act juridically to marginalise and exclude, rather it created lines of penetration through the relationship practices of individuals, leading, guiding and directing them toward normative relationship behaviour. Those unable to conform were identified and observed, their lives questioned, their desire to comply activated. Marital breakdown was designated as a social risk, by naming, counting and regulating it. It became a danger that could happen to anyone, encouraging self-examination of relationship practices by reference, initially to moral invocations of

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<sup>5</sup> Law Reform Commission, *Consultation Paper on Family Courts* (LRC 1994), 30

<sup>6</sup> Law Reform Commission, *Consultation Paper on Family Courts*, 30.

ideal marriage, and later sociological formulations of optimal couple behaviour. Francois Ewald's notion of social norm helps to explain the particular hold that normative relationship forms have on individuals. Regulatory instruments, by reflecting social norms, provide a way for individuals to measure their own relationship behaviour. In the Irish context, marriage, endorsed by public authority, conferring significant financial and regulatory benefits, set the standard. Ewald argues that the mere existence of such a standard means that only the most intransigent will oppose or resist; most will actively seek to conform.<sup>7</sup>

### **9.3 Conducting Conformity in Relationship Behaviour.**

Foucault's description of the operation of power in the modern State implies that government manages the population in accordance with the regularity of groups, seeking to maximise normality. This involves the making of choices regarding what is natural or normal and the deployment of techniques and strategies intended to maximise its performance. From this formulation, I draw the hypothesis that marriage law both aims to, and has the effect of conducting conformity in relationship behaviour. As noted above, marriage law has acted, over the research period, as political technique. Its political objective until the 2000s was to preserve lifetime, dependency marriage. With a shift in how government was rationalised in the 1990s came acceptance that marriage performance outside the institutional form could contribute to the political objective of social stability. Marriage law reform thus acted to encourage and reward, through recognition, the performance of lifetime monogamy. The actual effects of marriage law in supervising those who failed to conform further emphasised the advantages of relationship harmony. The political aim of marriage law

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<sup>7</sup> Francois Ewald, 'Norms, Discipline, and the Law' (1990) 30 *Representations* 138.

over the period was therefore to produce stability in relationship practice, to encourage relationships that provided lifetime companionship and care. I therefore suggest that the political objective of marriage law over the research period was to encourage and conduct individuals toward conformist lifetime monogamy.

With regard to its effect, the position is more speculative. Until the 2000s, marriage law focused on the traditional institutional relationship between spouses of opposite sex. The notion that other forms of relationship could be ‘good enough’ began with the accommodation of heterosexual cohabitation in social policy, and same-sex relationships achieved ‘normal’ status at the end of the research period. The common features of these relationships, from the perspective of government, was their stability. Relationships were acknowledged, conferred with advantages, and subject to marriage law if they demonstrated the key characteristics of monogamy and longevity. The role of marriage law in conducting conformity before the last decade of the research period seems clear – it posited a normative relationship form and installed detailed mechanism of surveillance and control around those unwilling or unable to reform. The extension of marriage law in 2010 would suggest a political impetus to draw more relationships into the regulatory net and therefore to bring more relationship practices toward the lifetime monogamy ideal. The practical effects of the 2010 reforms have not been investigated in this research, although the absence of disputes involving the newly regulated relationships in the courts would suggest that the legal complex has been less effective in grasping their practice.<sup>8</sup> At this stage, therefore it may be appropriate to conclude that the objective of government in regulating relationships through law is, as suggested by Foucault, the normalisation of relationship practice.

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<sup>8</sup> Most recent Courts Service Reports do not record any applications under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

Law is not special in this regard; it is simply one among many regulatory instruments deployed in pursuit of the political objectives of social, and hence economic, stability.

#### **9.4 The Power of Legal Discourse and Opportunities for Resistance**

Carol Smart has observed that we cannot predict the outcome of any individual law reform, and that once enacted legislation moves beyond the hands of activists. She argues that feminists should focus on how law defines and disqualifies rather than attempting to construct legal policies that legitimate legal methods and forms.<sup>9</sup>

Katherine O'Donovan is similarly sceptical of law's ability to promote justice, particularly for those whom it acts to exclude. She asks whether law needs 'to construct us as objects, as gendered, as stigmatised?'<sup>10</sup> My investigation of the path of Irish marriage law reform confirms that law often has unintended consequences, that it categorises and stigmatises. Despite being driven by juridical or liberation politics, the Irish government does not use law to command compliance with temporally contingent understandings of preferred social practice. Rather, it deploys law, in tandem with other political techniques, to manage the population in accordance with its 'normal' characteristics.

Legal rules and discourse are just one part of a dynamic system that brings together expert knowledge, political expediency, individual aspirations and invocations of morality (including human-rights based claims) in regulating social behaviour. Law adopts different roles in different circumstance in a variety of fora. It acts as a form of expert knowledge that, as noted by Smart, often excludes other ways of knowing. It creates and maintains social categories, and systems of inclusion and exclusion, but it is also infiltrated by sociological, psychological and medical ways of knowing. The

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<sup>9</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989), 164 – 165.

<sup>10</sup> Katherine O'Donovan, *Family Law Matters* (Pluto 1993), 125.

power of law and its social effects vary over time, although the trend appears to be toward the attribution of increasing power to the legal complex. This is most obvious in the deployment of human rights discourses that offer an agenda for improving the world and providing a better life for the victimised. Human rights can be problematic because internationalised anti-discrimination standards act to re-enforce the necessity of social categorisation, and the identification of non-conforming behaviour.<sup>11</sup> They also provide justification for intervention in individual lives, and individualise instances of discrimination absent their wider socio-economic context. Judicial interpretation and political deployment of Article 41 of the Irish Constitution provide an excellent example of the normalising effect of rights-based politics.

Foucault maintains that where there is power, there is resistance. Legal scholars, particularly those working within critical traditions have begun to question how law governs us, and to identify ways of thinking about the relationship between law and society that go beyond the juridical formulations of political debate. Social resistance to the ‘normal’ status of marriage has always existed – if everyone conformed to the ideal relationship, there would be no need to make laws governing its failure or non-constitution. Carol Smart’s sociological work focuses on these individual resistances, bringing the diversity of human experience to the fore and resisting the appearance of order represented by ‘grand theory.’ Queer theorists have recognised the potential for resistance in civil partnership legislation that does not require co-habitation, sexual

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<sup>11</sup> Francesca Ammaturo has carried out an analysis of the discourse of the European Court of Human Rights and the Commissioner for Human Rights of the Council of Europe relating to same-sex marriage. She argues that law is a privileged domain of legitimation and that the court and the commissioner have adopted heteronormative and homonormative standards to create ‘a double-binding system of regimentation of individuals, in a condition of distant synchronicity, with the aim of achieving, by different means, normalisation and uniformity.’ Francesca Ammaturo, ‘The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe’ (2014) 32(2) *Social & Legal Studies* 175, 177,

fidelity nor activity between civil partners.<sup>12</sup> In the face of increasingly well-organised and funded political campaigns seeking rights-driven law reform, the power of individual resistance seems limited. Nonetheless, it is often the personal, individual, act that begins and then accelerates cultural change, which in the end nullifies the effects of law. The potential for resistance to the political management of our relationship lives is only obliquely touched upon in this thesis, but deserves further detailed consideration.

## **9.4 Conclusion**

Marriage law does not liberate relationship practice. Rather, it categorises lives, divides them into authorised and unauthorised forms, supervises, observes and manages interpersonal conflict, and connects relationship failure to social and economic instability. Marriage, when subject to social and religious control between the foundation of the Irish State and the 1970s, constructed women as dependents and those who failed at marriage as social exiles. As the State apparatus gradually moved marriage from social and religious control, making it a political concern, lives were not liberated, they were simply transferred from one network of power relationships to another. Methods of power and knowledge assumed responsibility for the relationship practices of the population, and undertook to control and modify them. The bio-political mechanism of marriage law took control of life, ensuring that it was regularised. The process of marriage law reform in Ireland since the 1970s, coupled with shifts in how government is conceptualised, resulted in a dense network of regulation that requires us to declare publically who we are, who we love, how we

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<sup>12</sup> See for example, Carl Stychin, 'Family Friendly? Rights, Responsibilities and Relationship Recognition' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge 2006).

live. These declarations have significant economic, social and cultural significance, not least because they re-enforce the necessity of the categorisation and act to further re-affirm it. The irony of this deployment is in having us believe that our 'liberation' is in the balance.<sup>13</sup>

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<sup>13</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality Part I* (Robert Hurley tr Penguin Books 1998), 159

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