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Ireland's Marriage Referendum: A Constitutional Perspective

**Il referendum sul matrimonio in Irlanda: una
prospettiva costituzionale**

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Abstract

The purpose of this comment is to explore the constitutional dimensions of the recently enacted constitutional reform in Ireland on same-sex marriage. Unlike other nation states, Ireland put the issue directly to the people, thereby entrenching the right of same-sex couples to marry. The aim of this paper is to compare the referendum experiences in recognizing such a fundamental right in Ireland and United States. It also purports to question a popular referendum vote as the best way to determine whether a human right should be extended to a minority.

Tag: Ireland, same-sex, marriage, minority referendum



Ireland's Marriage Referendum: A Constitutional Perspective

di Fergus Ryan

SUMMARY: 1 – Introduction. 2 – Constitutional context. 3 – Social and political context. 4 – Homosexuality and the law. 5 – Law reform. 6 – Recognition of relationships. 7 – Was a referendum necessary?. 8 – The referendum process and outcome. 9 – The Amendment's wording and effect. 10 – A victory for family diversity?. 11 – Referendum challenges. 12 – Conclusion

1 – On the 22nd of May 2015, the people of Ireland voted in a referendum to approve a constitutional amendment permitting couples of the same sex to marry. With 62% voting in favour, on a high turnout (60.5%), the referendum passed comfortably; all but one of 43 national constituencies returned a majority Yes vote. It was the first time that a sovereign nation state extended marriage to same-sex couples by means of a popular referendum, as opposed to by parliamentary legislation or by court decision.

Yet it is not simply the manner in which this change was brought about; the very fact that this has happened *at all* in Ireland is remarkable. When one thinks of typically liberal European states, Ireland does not immediately spring to mind. The passage of the Thirty-Fourth Amendment to the Constitution – and by so comfortable a margin – signals a remarkable shift in Irish politics, culture and society. Indeed, the referendum has had

reverberations outside of Ireland. The outcome has prompted fresh calls for marriage equality as far afield as in Australia and Germany, and seems also to have helped foster renewed discussion of the prospect of civil unions in Italy¹.

2 – The purpose of this comment is to explore and evaluate the constitutional dimensions of this reform. Unlike other nation states that have extended marriage to same sex couples, Ireland put the issue directly to the people, and in doing so has constitutionally entrenched the right of same-sex couples to marry.

The Constitution of Ireland was enacted by popular plebiscite in 1937. The primary aim of the Constitution at the time of enactment was to assert the full sovereignty of the Irish people and State, thereby removing most of the last remaining vestiges of British rule. The Constitution broadly serves to establish the Irish State and its institutions of governance. It distributes the powers and functions of state amongst those institutions. It guarantees respect for various fundamental rights and freedoms. In cases of conflict, the Constitution prevails over all other laws, with the exception of European Union Law and certain laws passed under emergency conditions².

A notable feature of the Irish Constitution is that only the people of Ireland³ may amend it, though solely at the invitation of Parliament (the ‘Oireachtas’). Dáil Éireann (the House of Representatives, the lower House of the Oireachtas) has the exclusive right to initiate a constitutional amendment; there is no facility for popular initiative⁴. A bill to amend the Constitution must also be approved by the Seanad (Senate), though the Dáil may, after a short delay, override the Seanad’s refusal or failure to do so and put the amendment to the people without Seanad approval⁵. Because the Government usually has majority support in the Dáil, it is practically impossible to initiate a constitutional amendment without Government support. Nonetheless, the sole power to give effect to a

¹ See also the recent European Court of Human Rights decision in *Oliari and ors. v. Italy*, applic. nos. 18766/11 and 36030/11, 21 July 2015.

² See Art.15.4 and Art.50, Constitution of Ireland 1937 (henceforth ‘Constitution’). Art.29.4 allows measures of EU law and measures passed by the State which are necessitated by the obligations of EU membership an exemption from compliance with the Constitution. Art. 28.3.3^o creates a similar exemption for certain laws passed during times of war or rebellion, including conflicting taking place outside the State.

³ Specifically, Irish citizens aged 18 or over, who are ordinarily resident in Ireland, and registered to vote.

⁴ Art.46.2, Constitution.

⁵ See Art.23, Constitution.

constitutional amendment lies with the people⁶. No change (however small) may be made to the Constitution otherwise than by popular referendum (obtaining a majority of the votes actually cast is sufficient for the referendum to pass). Correspondingly, there are no restrictions on the types of changes that the people may be invited to make. As sovereign power, the people may approve any amendment they wish (subject to the caveat that it must be proposed by Parliament)⁷.

Since 1937, 38 constitutional amendments have been put to the Irish people; to date 27 have been approved⁸. Additionally, the Oireachtas approved a further two amendments in the early years of the State, at a time when it had a temporary power to make such amendments without reference to the people⁹. The Irish people have been asked to change the Constitution with increasing regularity in recent years; there have been 16 referendums since 2000. Controversial social issues have featured prominently in referendums, most notably the vexed topic of abortion, which has been the subject of 5 referendums to date. Bail, citizenship, the death penalty and judicial salaries have also featured in constitutional votes. EU reform treaties are routinely put to the people for approval.

Arguably, issues of policy that normally should lie within the discretion of the legislature are too readily ‘constitutionalised’ in Ireland. Daly, for instance, criticises what he terms “over-constitutionalisation”, the practice of determining complex social, legal and political problems by reference to constitutional litigation and referendums rather than by parliamentary deliberation¹⁰. Thus the broad, general and often vague framework of the Constitution has become the touchstone for complex issues that should, by rights, be addressed by parliamentary deliberation. For instance, while divorce would typically be treated as solely an ordinary legislative matter elsewhere, in Ireland the Constitution lays down, and indeed locks in, the relatively strict conditions for divorce¹¹. Abortion is also

⁶ Art.47, Constitution.

⁷ *Finn v. Attorney General* [1983] IR 514; *Slattery v. An Taoiseach* 1993 1 IR 286; *In the Matter of Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; and *Riordan v. An Taoiseach (No 2)* [1999] 4 IR 343.

⁸ Although the 34th Amendment is the latest amendment to be approved, 29 amendments have been approved in total since 1937. There is no 12th, 22nd, 24th, 25th or 32nd Amendment.

⁹ Art.51, Constitution, temporarily allowed the Oireachtas to amend the Constitution from 1938 to 1941, without recourse to the people.

¹⁰ Eoin Daly, “Democracy, Citizenship and the Marriage Referendum”, Human Rights Ireland blog, July 8, 2013, <http://humanrights.ie/children-and-the-law/democracy-citizenship-and-the-marriage-referendum/> (consulted 30 July 2015).

¹¹ Art.41.3.2^o of the Constitution, as amended in 1996. More detailed provision is made by the Family Law (Divorce) Act 1996.

constitutionally restricted. A constitutional amendment to safeguard the right to life of the unborn (defeasible only where there is a real and substantial risk to the mother's life)¹² was passed in 1983, spurred in part by a distrust of potentially activist judges and progressive legislatures¹³.

This tendency to constitutionalise matters of social and political sensitivity may reflect nervousness on the part of legislators in tackling controversial issues by ordinary legislation. As Daly argues, the Constitution is too often deployed «to deflect political responsibility»¹⁴. Whatever the motivation, it is submitted that specific and complex issues of social policy are too often addressed by constitutional amendment and constitutional litigation where, arguably, representative democracy through legislative policy-making would, in most cases, be more appropriate. Admittedly, legal change by popular vote attracts a particularly strong claim to democratic legitimacy. It is impossible, for instance, for opponents of equal marriage in Ireland to assert that change was foisted on the Irish people by unaccountable judges or liberal parliamentary élites. Nonetheless, as Daly perceptively argues, the assumption that the referendum process robustly vindicates popular sovereignty may be misplaced: «We should not be so naïve [as to] imagine that the demands of democratic participation are vindicated simply because the people are given the opportunity to passively acquiesce or veto whatever constitutional amendment government deigns to submit. Too often, “popular sovereignty” in the Irish constitutional context is unreflectively conflated with the people's nominal right to amend their constitution (at the Government's prodding)»¹⁵.

3 – Historically, the Roman Catholic Church dominated Irish culture and society. The Church formerly held considerable sway in political life, heavily influencing state law and policies. Mainstream politicians often proved subservient to the will of the Church and were reluctant to go against the bishops' diktat. For example, divorce remained subject to a constitutional ban until 1996, with the ban being lifted in a popular referendum by only the narrowest of margins. Access to contraception was restricted on moral grounds until

¹² See *Attorney General v X* [1992] 1 IR 1 and the Protection of Life During Pregnancy Act 2013.

¹³ The Eighth Amendment to the Constitution, Art.40.3.3°.

¹⁴ Eoin Daly, op. cit.

¹⁵ Eoin Daly, op. cit.

the early 1990s¹⁶. Abortion laws in Ireland remain amongst the most restrictive in Europe¹⁷.

Roman Catholic social theology significantly influenced the development of the current Constitution¹⁸. Strong references to religion remain in the constitutional document. It invokes, in its Preamble, “the Most Holy Trinity” and acknowledges «all our obligations to our Divine Lord Jesus Christ...». The Constitution ends with the affirmation «for the Glory of God and the Honour of Ireland»¹⁹. While in 1972 the people removed a clause affirming the “special position” of the Roman Catholic Church, Article 44.1 still maintains that «...homage of public worship is due to Almighty God. [The State] shall hold His Name in reverence, and shall respect and honour religion». Presidents and judges alike are required to take religious oaths when taking office²⁰. Roman Catholic theology features prominently in the fundamental rights provisions of the Constitution, particularly those concerning the family, education, religion and property.

In the most recent census in 2011, 84.2% of respondents listed themselves as Roman Catholic²¹. Yet this otherwise impressive figure hides a significant shift in the quality of religious adherence. Mass attendance, still high by European standards, has dropped considerably since 1990²². As the marriage referendum arguably demonstrated, even amongst those who attend mass regularly, loyalty to Church dogma cannot be guaranteed. The moral authority and with it the political influence once wielded by the Catholic Church has declined considerably. From the 1990s onwards, a litany of scandals came to light involving widespread and often institutionalised physical, emotional and sexual abuse of children and the serious maltreatment of women, particularly unmarried mothers, by the Church. The exposure of these horrific wrongs coupled with the Church’s attempts to

¹⁶ See the Health (Family Planning) Acts 1979-1992.

¹⁷ Abortion is permitted only in cases where there is a real and substantial risk to the life of the mother. Strict procedural rules apply in cases where a party seeks a termination on the ground of a life-threatening risk. See Art.40.3.3 of the Constitution (inserted by the Eighth Amendment to the Constitution, 1983), *Attorney General v. X* [1992] 1 IR 1 and the Protection of Life During Pregnancy Act 2013. The Thirteenth Amendment to the Constitution (1992) permits women to travel for the purpose of an abortion lawfully available in another state, such that, in practice, most Irish women who wish to terminate a pregnancy travel to the United Kingdom to do so.

¹⁸ See generally Gerard Hogan, *The Origins of the Irish Constitution: 1928-1941*, Royal Irish Academy, Dublin, 2012.

¹⁹ Author’s translation from Irish.

²⁰ Arts.12.8 and 34.5.

²¹ *Profile 7, Religion, Ethnicity and Irish Travellers*, Central Statistics Office, Dublin, 2012, 6.

²² In 2012, Amárach Research found that 35% of Irish Catholics attended mass at least once a week. <http://www.associationofcatholicpriests.ie/wp-content/uploads/2012/04/Contemporary-Catholic-Perspectives.pdf> (consulted 30 July 2015).

cover up these abuses, have significantly dented its authority. Popular confidence and trust in and support for the institutional Church have markedly declined. As Inglis has noted: «The Catholic Church is no longer the major institutional player in social, political and economic life that it once was. The strong ties that used to bind the Church and the state have been severed»²³.

4 – Robson has described the Republic of Ireland in 1988 as «...on paper at least, the worst legal regime in Western Europe for lesbians and gay men. There was no recognition or protection of any sort, and gay men faced a total ban on any type of sexual activity»²⁴ Ireland inherited from its time under British rule various Victorian era laws banning most forms of homosexual sexual conduct between males, even consensual acts between adults carried out in private²⁵. There did not appear to be any great enthusiasm for directly enforcing these laws, at least where private, consensual acts between adults were concerned. Nonetheless, the ban on male homosexual acts was often used *indirectly* to justify the suppression of public discussion and manifestations of homosexuality, and to sanction discriminatory practices²⁶. Thus, notwithstanding the lack of zeal in enforcing the laws directly, homosexuality attracted «...many informal, extra-legal sanctions, for which the formal ban on male homosexual acts provided a justificatory backdrop»²⁷.

A constitutional challenge to these laws failed before the Supreme Court in 1983. In *Norris v. Attorney General*, the plaintiff, a gay man, claimed that the ban on male homosexual conduct infringed the constitutional guarantee of equality as well as his constitutional rights

²³ Tom Inglis, “Catholic Identity, Habitus and Practice in Contemporary Ireland” ISSC Discussion Paper Series; WP2004/13, University College Dublin, Dublin, 2004, 2.

²⁴ Chris Robson, “Anatomy of a Campaign” in Íde O’Carroll and Eoin Collins (eds), *Lesbian and Gay Visions of Ireland in the Twenty-First Century*, Cassell, London/New York, 1995, 47.

²⁵ These were specifically, sections 61 and 62 of the Offences Against the Person Act 1861, banning anal intercourse, even where consensual, and section 11 of the Criminal Law (Amendment) Act 1885, prohibiting ‘gross indecency between men’.

²⁶ Kieran Rose, *Diverse Communities: The Evolution of Lesbian and Gay Politics in Ireland*, Cork University Press, Cork, 1994, 19–20, 22; Fergus Ryan, “‘Queering’ the Criminal Law: Some thoughts on the aftermath of homosexual decriminalization” (1997) 7(1) *Irish Criminal Law Journal* 38-47; Fergus Ryan, “‘We’ll have what they’re having’: Sexual Minorities and the Law in the Republic of Ireland” in Máire Leane and Elizabeth Kiely (eds), *Sexualities and Irish Society; A Reader*, Orpen Press, Dublin, 2014, Ch.3

²⁷ Fergus Ryan, “‘We’ll have what they’re having’”, op cit, 60. For instance, Kieran Rose observes how the investigation into the murder of Charles Self, a gay man, in 1982 led to police questioning 1500 gay men. Much of the questioning addressed the interviewees’ sexual lives, rather than the murder. Kieran Rose, *Diverse Communities: The Evolution of Lesbian and Gay Politics in Ireland*, Cork University Press, Cork, 1994, 19–20.

of privacy, free expression and free association²⁸. By a majority of 3 to 2, the Supreme Court upheld the relevant laws as constitutional. Speaking for the majority, Chief Justice O'Higgins reasoned that the State was entitled to maintain these laws with a view to safeguarding public morality and public health, the institution of the family, and marriage. In support of this conclusion, the Chief Justice claimed that homosexuality and homosexual acts caused injury both to the individual and society: «... [e]xclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide ...»²⁹.

Drawing on discourses of the male homosexual as 'diseased'³⁰ and homosexuality as 'contagious', O'Higgins CJ claimed that if the ban was to be removed, the «congenitally and irreversibly homosexual» could potentially corrupt the «... mildly homosexually orientated person into a way of life from which he may never recover»³¹. The Chief Justice thus concluded that the public interest superseded the plaintiff's right to a private life: «I regard the State as having an interest in the general moral wellbeing of the community and as being entitled, where it is practicable to do so, to discourage conduct which is morally wrong and harmful to a way of life and to values which the State wishes to protect»³².

Notably, the strong religious underpinnings of the Constitution leaned heavily on the minds of the majority. Given the Constitution's strongly Christian tenor, O'Higgins CJ asked, how could the court infer a constitutional right to engage in conduct that Christian teaching had consistently condemned³³?

5 – In 1988, however, the European Court of Human Rights in *Norris v Ireland* found that the comprehensive ban on male homosexual acts infringed the right to respect for private life under Article 8 of the European Convention on Human Rights³⁴. The Court drew particular attention to the disproportionately broad nature of the ban. While it would take another five years for decriminalisation of homosexual acts to occur, in 1988 Department of Finance circular prohibited discrimination on the basis of sexual orientation

²⁸ [1984] IR 36.

²⁹ Ibid 63.

³⁰ Cf Carl Stychin, *Law's Desire: Sexuality and the Limits of Justice*, Routledge, Oxon, 1995, 50–51, 134–138.

³¹ [1984] IR 36, 64.

³² Ibid. 64.

³³ Ibid. 64.

³⁴ (1988) 13 EHRR 186. See also *Dudgeon v. United Kingdom* (1981) 4 EHRR 149.

and HIV status within the public service³⁵. In 1989, sexual orientation was included as a ground upon which incitement to hatred was banned³⁶.

1993 saw consensual sexual acts between males aged 17 or over being decriminalised (17 is also the age of consent for heterosexual intercourse)³⁷. 1993 also witnessed an equally significant reform in the shape of the Unfair Dismissals (Amendment) Act 1993. This made it automatically unlawful to dismiss an employee on the basis of his or her sexual orientation. These two reforms together transformed the legal landscape. No longer could a gay person face criminal sanction or dismissal from employment solely on the basis of his or her sexual orientation. Thus, within the space of a year two major barriers to full and open social participation by LGBT people were removed. This was followed by the Refugee Act 1996, expressly conferring a right to asylum where a person's sexual orientation was likely lead to persecution if he or she returned to their home country. The Employment Equality Act 1998 prohibited discrimination and harassment on the basis (inter alia) of sexual orientation in the employment context. The Equal Status Act 2000 did likewise in the arena of consumer interactions, banning sexual orientation discrimination by those selling goods and providing services and accommodation.

6 – While these reforms placed Ireland in the vanguard of European States when it came to the treatment of LGBT people as individuals, legal recognition and protection for same-sex couples remained deficient. Indeed, until 2011, the law provided only minimal recognition of *any* union not based on marriage.

The constitutional dimensions of this approach are notable. The Constitution, in Article 41, recognises the family as the «natural primary and fundamental unit group of Society». Implicitly invoking natural law, the text acknowledges the family «as a moral institution» with natural rights «antecedent and superior to all positive law». It thus 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».

The courts, however, have consistently ruled that the family to which Article 41 refers is exclusively the *family based on marriage*. For a couple and their children to enjoy rights as a

³⁵ Department of Finance Circular 21/88, June 22, 1988.

³⁶ Prohibition on Incitement to Hatred Act 1989.

³⁷ The Criminal Law (Sexual Offences) Act 1993, since updated by the Criminal Law (Sexual Offences) Act 2006.

family under Article 41, the couple must be married³⁸. Indeed, provided they are married, a couple need not have children in order to be treated as a constitutional family³⁹. By contrast, even a long-term unmarried cohabiting couple with children is not a family under Article 41. It follows that as same-sex couples were excluded from marriage, they were also denied the constitutional protection and recognition afforded to the constitutional family. For instance, in *JMcD v PL and BM* the Supreme Court concluded that a lesbian couple and their child were not a family for constitutional purposes⁴⁰.

Marriage itself is also constitutionally protected. Article 41.3.1° requires the State «to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack». While this does not preclude legislative recognition of other types of union, and does not mandate discrimination, measures that discriminate against non-marital couples and even against children born outside marriage are, in principle, constitutionally permissible⁴¹. Article 41.3.1° has also been interpreted as prohibiting measures that discriminate against or penalise married couples when compared with unmarried couples (in other words, that favour unmarried couples over the married counterparts)⁴². Likewise, it would appear that legislative measures that might discourage or dissuade couples from marrying by making alternative options more attractive may also be unconstitutional⁴³.

This exclusive approach to family recognition was long reflected in legislation. Until 2011, family law generally treated unmarried couples as strangers at law. Comparatively few protections applied to non-marital couples. Those that did often excluded same-sex couples. This placed same-sex couples in a particularly precarious position. While opposite-sex couples could, in general, remedy their lack of legal status by marrying, same-sex couples could not. This meant that the significant benefits flowing from marriage in the context (inter alia) of taxation, immigration, citizenship, property, succession, and

³⁸ *State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, *WO'R v. EH* [1996] 2 IR 248, *GT v. KAO* [2008] 3 IR 567, and *JMcD v. PL* [2010] 2 IR 199.

³⁹ *Murray v. Ireland* [1985] IR 352.

⁴⁰ [2010] 2 IR 199.

⁴¹ *O'B v. S* [1984] IR 316. But see the Status of Children Act 1987, which removed most forms of discrimination against children born outside marriage.

⁴² *Murphy v. Attorney General* [1982] IR 241.

⁴³ *MhicMhathúna v. Ireland* [1989] IR 504, [1995] 1 IR 484. See Oran Doyle, *Constitutional Law: Texts, Cases and Materials*, Clarus Press, Dublin, 2008, 226-230 and John Mee, "Cohabitation, Civil Partnership and the Constitution" in Doyle and Binchy (eds.), *Committed Relationships and the Law*, Four Courts Press, Dublin, 2007, 204-206.

pensions were permanently denied to same-sex couples, no matter how long they had cohabited.

In *Zappone and Gilligan v Revenue Commissioners*, a lesbian couple who had married in Canada sought recognition of their marriage in Ireland⁴⁴. The High Court rejected their claim, concluding that neither the Constitution nor the European Convention on Human Rights afforded a right to marry a person of the same sex. Ms Justice Elizabeth Dunne reasoned that, although the Constitution does not expressly define ‘marriage’, marriage had long been understood in Irish law as a heterosexual union. Although acknowledging that the Constitution was capable of being interpreted in line with modern values and mores (a ‘present day’ interpretation)⁴⁵, Dunne J concluded that there was insufficient evidence of a changed consensus to allow her to redefine the settled legal and constitutional understanding of marriage. In coming to this conclusion, she relied on the express legislative ban on the marriage of parties of the same sex contained in the Civil Registration Act 2004, s.2(2)(e). Although this ban had attracted comparatively little attention when enacted (it arguably was viewed simply as a codification of the well settled common law rule) Dunne J concluded that it negated the plaintiffs’ contention that there was a growing consensus in favour of a right to equal marriage.

The position improved considerably in 2010 with the introduction of civil partnership for same-sex couples together with a more limited redress scheme for long-term cohabitants, same-sex and opposite sex⁴⁶. Civil Partnership is a form of registered union similar in many though not all respects to marriage⁴⁷. Crucially, it is confined to unrelated couples of the *same sex* only. Couples go through a registration process similar in many respects to the process for marriage save that, unlike marriage, civil partnership cannot be formalised by a religious minister or in a religious setting. Civil partners and spouses broadly have the same obligations to support each other financially. Likewise, they have largely the same entitlements as spouses in respect of taxation, social security, property, pensions, inheritance, immigration, citizenship, relief from domestic violence, and relief following dissolution.

⁴⁴ [2008] 2 IR 417.

⁴⁵ The Courts have regularly confirmed that the Constitution can be interpreted in light of current value and circumstances; see for instance Walsh J in *McGee v. Attorney General* [1974] IR 284.

⁴⁶ Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

⁴⁷ See generally Fergus Ryan *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*, Round Hall, Dublin, 2011.

The most notable difference in practical terms is that it is easier to exit a civil partnership than a marriage⁴⁸. While other (largely minor) gaps exist⁴⁹, the general trend has been towards the elimination of differences between civil partnership and marriage. For instance, the Children and Family Relationships Act 2015, once implemented, will lift the ban on civil partners and cohabitants adopting as a couple (a facility formerly reserved to married couples). The Act also enhances the rights and obligations of civil partners in respect of their partners' biological and adopted children.

7 – Civil partnership offered a significant new status and important protections for same-sex couples, similar in most respects to those afforded by marriage. Yet, while some in the LGBT community welcomed civil partnership as a substantial advance, others saw it as formally confirming LGBT people's second-class citizenship⁵⁰. Crucially, the lack of constitutional recognition and the very fact of a distinction in status fuelled the LGBT community to push for full access to marriage. The adoption of equal marriage in other jurisdictions – particularly in Canada, New Zealand and neighbouring England and Wales – added to the impetus for change.

Even in the wake of the adoption of civil partnership, access to marriage remained a live political issue. Several political parties formally adopted policies in favour of marriage equality. The Labour Party, junior partner in the coalition government since 2011, pressed particularly hard for marriage equality. In 2012, its then leader and deputy prime minister called the issue «the civil rights issue of this generation»⁵¹. In April 2013, the Constitutional Convention, a Government-established body consisting of a representative grouping of 66 citizens, 33 members of Parliament, and a Chairperson, recommended by a

⁴⁸ Dissolution of a marriage requires, *inter alia*, that the parties be living apart for four of the previous five years and that there is no reasonable prospect of reconciliation. (Family Law (Divorce) Act 1996, s.5). Civil partners, by contrast, must live apart for only two of the previous three years and do not have to prove they are irreconcilable. (Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.110).

⁴⁹ For a summary of which see Fergus Ryan, "Civil Partnership v Marriage: Some examples of remaining differences" *The Ryan Line Blog*, April 1, 2015. <http://fergryan.blogspot.ie/2015/04/civil-partnership-v-marriage-some.html>? (consulted July 30, 2015).

⁵⁰ On the debate in the LGBT community, see Úna Mullally, *In the Name of Love*, The History Press Ireland, Dublin, 2014, especially chs.15-23.

⁵¹ Christine Bohan, "Eamon Gilmore: "The time has come on gay marriage""", *thejournal.ie*, 1 July 2012, <http://www.thejournal.ie/eamon-gilmore-gay-marriage-same-sex-marriage-government-506078-Jul2012/>(consulted 30 July 2015).

79% majority that an amendment be put to the people to provide equal access to marriage⁵².

Having avoided addressing the topic for some time, in late 2013 the Taoiseach (Prime Minister) Mr Enda Kenny announced that the Government proposed to ask Parliament to hold a referendum on marriage equality in Spring 2015. Several academic commentators have suggested, however, that it was never strictly necessary to amend the Constitution to permit equal marriage⁵³. It is possible that marriage could have been extended to same sex couples by ordinary legislation. The Constitution does not in fact expressly define or delimit marriage. It was, thus, arguably, open to the legislature to do so. In interpreting and applying the Constitution, the courts have tended to defer heavily to the Oireachtas (Parliament) in its role as lawmaker, particularly on matters of social and political controversy⁵⁴. In *Zappone and Gilligan v Revenue Commissioners* Dunne J placed particular emphasis on the legislative ban on same-sex marriage enacted by the Oireachtas in the Civil Registration Act 2004, adding that if change was to be enacted, it was for the Oireachtas rather than the courts to do so: «Ultimately, it is for the legislature to determine the extent to which such changes should be made»⁵⁵. Therefore, if the Oireachtas had legislated for marriage equality, the courts would possibly have deferred to the will of the legislature, and upheld such legislation as constitutional.

On the other hand, the advice of successive Attorney Generals (the Government's chief legal officer) was that marriage could not be extended to same-sex couples without changing the Constitution. The Government could not, it argued, propose ordinary

⁵² See www.constitution.ie for further details about the Convention.

⁵³ Eoin Daly, "Same sex marriage doesn't need a referendum", (Human Rights in Ireland Blog, 15 July 2012), www.humanrights.ie/index.php/2012/07/15/same-sex-marriage-doesnt-need-a-referendum/ (consulted 30 July 2015); Fiona de Londras, "A Referendum on Marriage: Social Costs and Political Choices" (Human Rights in Ireland Blog, 11 November 2013), <http://humanrights.ie/civil-liberties/a-referendum-on-marriage-social-costs-and-political-choices/> (consulted 30 July 2015); Conor O'Mahony, "Constitution is not an obstacle to legalising gay marriage", *Irish Times*, 16 July 2012; Fergus Ryan "Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family" (2012) 48 *Irish Jurist* 201–248; Fergus Ryan, "Are two Irish Mummies (even) Better than One? Heteronormativity, Homosexuality and the 1937 Constitution" in Eoin Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects*, Bloomsbury Professional, Dublin, 2012; and Brian Tobin, "Law, Politics and the Child-Centric Approach to Marriage in Ireland" (2012) 47 *Irish Jurist* 210.

⁵⁴ For instance, in *MD (A minor) v Ireland* [2012] IESC 10. See, also *MhicMhathúna v. Ireland* [1995] 1 IR 484, *T.D. v. Minister for Education*, [2001] 4 IR 259 and the discussion by David Langwallner, "Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual", Ch.14 in Eoin Carolan and Oran Doyle (eds), *The Irish Constitution: Governance and Values*, Round Hall, Dublin, 2008.

⁵⁵ [2008] 2 IR 417, 513.

legislation that it believed to be unconstitutional. Given the conservative tone of Article 41, there was admittedly some legitimate doubt as to whether the Constitution permitted marriage equality. Gender-essentialist references in Article 41 to the position of the life of women within the home, and references in Article 42 to the role of marital parents suggested that it might be unwise to legislate without constitutional change. It is possible, however, that the decision to hold a referendum was largely motivated by the concern, as Daly has put it, to «deflect political responsibility»⁵⁶; that the Oireachtas was simply too scared of the issue to deal with it on its own, and instead bounced the issue to the people. Indeed, in general, the Oireachtas has proven reluctant to tackle controversial social issues, such as surrogacy and, until recently, abortion, a tendency Daly has criticised: «the reluctance of our parliament to independently appraise equal marriage rights – in marked contrast to our neighbours – is, at one level, simply a further sign of dysfunction in our parliamentary democracy, a negation of political choice and possibility»⁵⁷.

Certainly, there are merits in going the referendum route. For LGBT people in Ireland, the Yes vote, and its size and extent, is a huge vote of acceptance and equality that resonates loudly. A referendum carries with it a high level of democratic legitimacy. The 62% majority vote in the referendum (on a higher than average turnout) provides an impressive mandate for reform, with which few can argue. In particular, claims that judges strayed outside the bounds of the judicial role or that legislators overstepped their mandate cannot be levelled in this case. In short, it is hard to argue with a verdict endorsed by 1.2 million citizens.

It is nonetheless submitted that putting the matter to the people was problematic in a number of respects. As Encarnación has argued, «there is something inherently unseemly about putting the civil rights of any group, especially a historically oppressed one, to a popular vote»⁵⁸. Kennedy J pertinently notes in the recent US Supreme Court decision in *Obergefell et al. v. Hodges et al.* that «the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights»⁵⁹. Individuals who are harmed, he added, «need not await legislative action before asserting a fundamental right»⁶⁰. As Jackson J observed (also in the US Supreme Court) in

⁵⁶ Eoin Daly, op. cit.

⁵⁷ Ibid.

⁵⁸ Omar Encarnación, «Ireland's referendum, however inspiring, is not a step forward for gay rights», *Irish Times*, 26 May 2015.

⁵⁹ 576 US ____, June 26, 2015, Kennedy J (opinion of the court), 24.

⁶⁰ Ibid.

West Virginia Board of Education v Barnette: «The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.... [F]undamental rights may not be submitted to a vote; they depend on the outcome of no elections»⁶¹.

In the case of the marriage referendum, putting the matter to a national vote meant that a minority had to mount an extensive, expensive and daunting national campaign, involving considerable anxiety and potentially exacerbating minority stress. De Londras has noted the referendum's potential social costs for LGBT people who had «to debate with neighbours and family members and try to convince them to acknowledge us as equal citizens in our own country»⁶². Claims were made «that we are somehow not deserving of the institutional, legal and social recognitions that come with the right to access marriage»⁶³. Many will argue that the victory was worth it, though the troubling question remains: what if the referendum had failed? The negative impact on LGBT people would have been immense.

8 – The referendum campaign started in earnest in February 2015. The earliest shots in the battle accompanied the passage through Parliament of the Children and Family Relationships Act 2015. Although this measure was designed to address the issue of same-sex parenting (amongst other matters) in advance of the referendum, the timing of the Act's passage rendered it difficult to contain the issue of parenting. The No campaign, largely made up of socially conservative lay Catholic groups, focussed its energies on what it alleged would be the impact of same-sex marriage on children. A key purpose of marriage, it claimed, was the provision of a stable environment in which children could be raised. Children were generally best raised, it asserted, by parents of the opposite sex, ideally their own biological parents. This gender-essentialist perspective emphasised the 'complementarity' of different-sex parents, and the importance to a child of having role models of each gender. The No campaign claimed that the passage of the referendum would prevent the State from favouring opposite-sex over same-sex married parents.

⁶¹ 319 US 624, 638 (1943).

⁶² Fiona de Londras, "A Referendum on Marriage: Social Costs and Political Choices" Human Rights in Ireland blog, 11 November 2013, <http://humanrights.ie/civil-liberties/a-referendum-on-marriage-social-costs-and-political-choices/> (consulted 30 July 2015).

⁶³ Ibid.

Some campaigners even asserted that same-sex couples would have a constitutional right to surrogacy, though several academic commentators⁶⁴, as well as the impartial Referendum Commission⁶⁵ disputed this claim. Indeed, no married couple has a constitutional right to access surrogacy. The Oireachtas would be well within its powers to regulate or indeed ban surrogacy arrangements, notwithstanding the Thirty-Fourth Amendment.

While the Government and all major political parties supported the Amendment, the Yes campaign was spearheaded by Yes Equality: The Campaign for Civil Marriage Equality, an umbrella group led by three NGOs – the Gay and Lesbian Equality Network, the Irish Council for Civil Liberties and Marriage Equality⁶⁶. In a remarkable mobilisation, Yes Equality gathered an immensely effective nationwide network of volunteers, going door to door canvassing for votes. The Yes campaign emphasised the importance of equal treatment under civil law for same-sex couples, and implicitly for LGBT people in general. In response to No campaign claims, it emphasised that marriage did not presuppose an ability or willingness to procreate, and criticised the No campaign’s reductive approach to marriage. The Constitution, after all, treats as a family a married couple even where they have no children⁶⁷. While a marriage may be avoided where a party is unable to consummate it, the inability or unwillingness of a couple to procreate does not in itself invalidate their marriage.

Correspondingly, marriage is not an essential prerequisite to bearing children: approximately one third of children born in Ireland each year since 1999 have been born outside of marriage. Around 42% of the 143,600 cohabiting couples counted in the 2011 census were raising children⁶⁸. Crucially, the passage of the Amendment would not prevent gay couples from raising children. Indeed an increasing number of lesbian and gay couples already raise children in Ireland. An impressive body of robust international research evidence suggests that the outcomes for children being raised in such families are as good as those for children being raised in heterosexual environments⁶⁹.

⁶⁴ See for instance Conor O’Mahony “The Constitution, the Right to Procreate and the Marriage Referendum” April 21, 2015, Constitution Project@UCC, <http://constitutionproject.ie/?p=503> (consulted 30 July 2015).

⁶⁵ See <http://www.refcom.ie/en/>

⁶⁶ See www.yesequality.ie

⁶⁷ *Murray v. Ireland* [1985] IR 352.

⁶⁸ *This is Ireland: Highlights from Census 2011, part 1*, Central Statistics Office, Dublin, 2012, 27.

⁶⁹ See for instance “Sexual Orientation, Parents, & Children”, American Psychological Association, 28 and 30 July 2004, <http://www.apa.org/about/policy/parenting.aspx>, and “APA on Children Raised by Gay and Lesbian Parents”, American Psychological Association, 11 June 11 2012, <http://www.apa.org/news/press/response/gay-parents.aspx> (consulted 30 July 2015).

A notable constitutional feature of the debate was the requirement of balance. Following the decision in *Coughlan v. RTE*, state-owned broadcasters are constitutionally required to give equal airtime to the Yes and No sides of a referendum debate.⁷⁰ Under legislation, broadcasters (both private and public) are required to be neutral and balanced in addressing current affairs, particularly in matters of public controversy.⁷¹ While ensuring equality in television and radio debates, the balance requirements sometimes afforded airtime for extreme views not normally entertained in the Irish media (though most debates were civil, the No campaign emphasising that it was not anti-gay or against equality per se). The Government, moreover, is constitutionally precluded from spending public money promoting one side only of the referendum campaign, an approach that is underpinned by the constitutional equality guarantee⁷². This did not, however, preclude Government Ministers from advocating for a particular result.

The Catholic Church opposed the referendum. While Bishops campaigned for a No vote, some individual priests and nuns nonetheless broke ranks, advocating a Yes. The referendum result ultimately suggests, however, that the Church's ability to influence public opinion, even among mass-going Catholics, is in serious decline. In the final analysis, the Yes side won by 62.1% to 37.9%, with a high turnout of 60.5%. Notably, while urban areas such voted heavily in favour (70%+ in Dublin), the Yes side also won comfortably even in some more rural areas. Every constituency in the State, with one exception, voted in favour. The mobilisation of the youth vote (as evidenced by a highly successful voter registration drive on third level campuses) arguably contributed significantly to the Yes victory, though Elkind et al. claim that the Yes vote would have won even without the surge in youth votes⁷³. Support in working class areas was reported as being particularly strong.

It is beyond the scope of this commentary to delve in great depth into the reasons for the strong Yes vote. The energy and positivity of a strategically impressive Yes campaign clearly played a big part. The greater visibility of LGBT people was a crucial factor; indeed

⁷⁰ [2000] 3 IR 1.

⁷¹ Broadcasting Act 2009, s.39.

⁷² *McKenna v. An Taoiseach (No 2)* [1995] 2 IR 10, *McCrystal v. Minister for Children and Youth Affairs* [2012] IESC 53.

⁷³ Johan Elkind, David Farrell, Jane Suiter, Theresa Reidy, "Young people voted in droves for marriage equality in Ireland. Equality would have won without them" *Washington Post*, June 30, 2015, Monkey Cage, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/30/young-people-voted-in-droves-for-marriage-equality-in-ireland-equality-would-have-won-without-them/> (consulted 30 July 2015).

the referendum saw many prominent figures, including a Government Minister, come out as gay. Many will have seen their vote as implicitly supporting greater family diversity, not just for LGBT people but also for lone parents and cohabiting couples (though, on this point, see the discussion below). Deeper factors may also have played a part. Rose has suggested that Ireland's anti-colonial struggle, and historical experiences of discrimination based on religion and nationality have made the Irish population particularly sensitive and averse to discriminatory practices⁷⁴. It is possible also that in the wake of ongoing church scandals and economic collapse the Irish people wanted to make a clear break with the past; 'out with the old, in with the new.

9 – Once it is brought into force, the Amendment will insert into the Constitution the following succinct clause as a new Article 41.4: «Marriage may be contracted in accordance with law by two persons without distinction as to their sex». Effectively this means that same sex and opposite sex couples alike will equally be entitled to marry as a matter of constitutional law. Marriages, moreover, will be treated the same whether the parties thereto are of the same sex or of the opposite sex. In particular, same sex married couples will have the same constitutional and legal rights and the equivalent constitutional status as opposite sex married couples.

The Constitution is written in both English and Irish. Both are authentic texts, though in cases of conflict, the text in Irish prevails⁷⁵. Some initial concerns around the Irish text of the Amendment were remedied before the referendum bill passed through the Houses of the Oireachtas. It had been contended that the Irish text would inadvertently ban opposite-sex marriage. This contention, it is submitted, reflected an excessively literalist approach to constitutional interpretation, one that it is not in keeping with the broadly purposive approach the courts tend to favour in the realm of constitutional interpretation⁷⁶. Nonetheless, prior to the referendum, the Oireachtas amended the Irish text to reflect better the core intention to open out marriage to same-sex couples while retaining the facility for opposite-sex couples.

⁷⁴ Kieran Rose, *Diverse Communities: The Evolution of Lesbian and Gay Politics in Ireland*, Cork University Press, Cork, 1994.

⁷⁵ Art.25.5.4, Constitution.

⁷⁶ See for instance *Attorney General v. Paperlink* [1984] ILRM 373; *O'Byrne v. Minister for Finance* [1959] IR 1.

The use of the term ‘contracted’ and the phrase ‘in accordance with law’ necessarily imply that the Amendment relates only to civil marriage and does not affect the practice of religious marriage. The Constitution already contains strong clauses guaranteeing «[f]reedom of conscience and the free profession and practice of religion». It also confirms the right of religious denominations to manage their own affairs⁷⁷. Provided certain conditions are met, Ireland recognises as lawful marriages celebrated by representatives of religious bodies⁷⁸. It is clear, however, from the proposed Marriage Bill 2015 that while religious bodies may choose to celebrate same sex marriages, they cannot be compelled to do so. Indeed, a key element of the campaign for a Yes vote was that it was a vote for *civil* marriage equality. Yes campaigners stressed that religious marriage would not be affected.

The reference to ‘in accordance with law’ also makes it clear that, other than restrictions relating to the sex of the persons involved, the law may continue to regulate the conditions and rules of capacity, as well as the formal requirements, for entrance into a marriage. The reference to ‘two persons’, notably, copperfastens the existing ban on polygamy, confirmed both in legislation and in the jurisprudence of the High Court⁷⁹.

In principle, the constitutional amendment is self-executing⁸⁰. It is theoretically possible to contract a marriage based on the Amendment itself, the effect of which is to render unconstitutional any prohibition on marriage between two people of the same sex⁸¹. Nonetheless, the Government has proposed legislation (the Marriage Bill 2015) to remove the current legislative ban on same-sex marriage. The proposed legislation will also extend the ban on marrying close relatives to same-sex couples. The current ‘prohibited degrees’ will apply to relatives of the same-sex in exactly the same way as they currently apply to opposite-sex relatives. As of yet, however, it is unclear how adultery (a ground for judicial separation) and consummation (inability to consummate allows a party to avoid a marriage) – both defined as involving acts of heterosexual intercourse – will be treated once the Amendment comes into force.

The referendum has had another, less obvious outcome. In the wake of the referendum result, the Oireachtas finally passed the long-awaited Gender Recognition Act

⁷⁷ See Art.44, Constitution.

⁷⁸ Civil Registration Act 2004

⁷⁹ Cf Civil Registration Act 2004, s.(2)(b) and *HAH v. SAA* [2010] IEHC 497.

⁸⁰ See Conor O’Mahony, “Same-sex marriage referendum: a legal review”, *Irish Times*, 22 January, 2015.

⁸¹ Cf the Fifteenth Amendment/Divorce referendum of 1995, which was also self-executing: see *RC v. CC* [1997] 1 ILRM 401.

2015, which allows transgender people to be treated for all legal purposes as being of their preferred gender. Currently, applicants for gender recognition must not be in a subsisting marriage or civil partnership (the ‘single status’ requirement) but, once the constitutional amendment comes into force, this requirement will be dropped. The strength of the referendum result, it appears, helped prompt the Government to drop its initial plans to require applicants for gender recognition to obtain a certificate of transition from an endocrinologist or psychiatrist. This means that Ireland has joined Argentina, Denmark and Malta in adopting a self-declaration model for gender recognition, another apparent by-product of the strong Yes vote.

10 – The referendum is rightly viewed as an immense victory for those seeking greater recognition of family diversity in Irish law and society. The Amendment has particular resonance for LGBT people, though its passage sends a powerful implicit signal also to other minorities and those in non-traditional family units. Nonetheless, the Amendment leaves intact and to some extent entrenches the privileged constitutional position enjoyed by marriage. While extending the right to marry to same-sex couples, the constitutional protections afforded to the family remain confined to the family based on marriage. Thus, non-marital cohabiting unions as well as single unmarried persons with children remain excluded from constitutional protection and recognition as families under Article 41. Far from throwing open the doors to family diversity, the Amendment only loosens the lock.

The passage of the referendum will see civil partnership gradually being phased out. Article 41 of the Constitution arguably prevents the creation of incentives not to enter into marriage⁸². For so long as civil partnership was confined to same-sex couples, and same-sex couples were excluded from marriage, civil partnership could not be regarded as dissuading couples who could marry each other from marrying⁸³. With the extension of marriage to same-sex couples, however, the retention of civil partnership could potentially act as a disincentive to marriage in that a couple otherwise inclined to marry (and able to do so) might choose civil partnership instead. This seems to have prompted the Government to propose that, once the Marriage Bill 2015 becomes an Act, no new civil partnerships will

⁸² *MhicMhathúna v. Ireland* [1989] IR 504, [1995] 1 IR 484. See Oran Doyle, *Constitutional Law: Texts, Cases and Materials*, Clarus Press, Dublin, 2008, 226-230 and John Mee, “Cohabitation, Civil Partnership and the Constitution” in Doyle and Binchy (eds.) *Committed Relationships and the Law*, Four Courts Press, Dublin, 2007, 204-206.

⁸³ See John Mee, *op. cit.*

be permitted. Transitional provisions will apply to those who have already given notice of their intention to enter into a civil partnership; they may proceed with the civil partnership or, instead, opt for marriage. Existing civil partners will be able to remain civilly partnered, but may also opt to marry each other, the effect of their marriage being to dissolve the pre-existing civil partnership.

While protections for cohabitants will remain in place, the facility of civil partnership will thus gradually fade into history. Though few will lament its passing, this is potentially a loss to the cause of diversifying options for family recognition. For all its deficiencies, civil partnership has no history of oppression either of women or minorities; it is wholly egalitarian in its origins; it is unashamedly secular, with no trappings of religion attached. At least some couples would possibly prefer civil partnership as an alternative to marriage, with all its historical baggage.

11 – At the time writing, the referendum result was the subject of ongoing court challenges. As permitted by the Referendum Act 1994, two lay litigants sought leave to lodge referendum petitions challenging the outcome of the referendum. They allege that what they consider to be certain technical irregularities in the conduct of the referendum materially affected its outcome. Leave to proceed with the petitions was refused in the High Court, but these refusals have been appealed to the Court of Appeal, and a decision whether to grant leave is now pending. It is, however, notoriously difficult to overturn a referendum result. The Courts are exceptionally reluctant either to impede the progress of a referendum or to strike down the decision of the sovereign people. Similar challenges to the divorce referendum of 1995 and the children’s rights referendum of 2012, which relied on the unconstitutional spending of state funds to promote a Yes vote in the relevant referendums, both failed⁸⁴. The fate of these prior challenges suggests that the prospect of the current cases succeeding is very slim indeed, though for the time being they have delayed the eagerly anticipated first marriage ceremonies.

12 – The passage of the Thirty-Fourth Amendment shows that even the most conservative of states can have a big change of heart. In the space of just over 20 years, Ireland has gone from decriminalising homosexual acts to allowing equal marriage. The change is more remarkable still when one considers that this latter reform was achieved not

⁸⁴ *Hanafin v. Minister for the Environment* [1996] 2 IR 321; *Re the Referendum Act 1994 and Re Jordan*; *Jordan v. Minister for the Environment* [2015] IESC 33.

by court order or legislative action but by popular vote, and by a large margin. The result is an entrenched constitutional right to marry, regardless of whether your chosen partner is of the same sex or opposite sex. While the referendum outcome sends out a powerful signal about social acceptance of LGBT people and same-sex relationships, the question nonetheless remains whether a popular referendum vote is the best way to determine whether a human right – particularly one as intimate as the right to marry - should be extended to a minority. The result also leaves some unfinished business. The privileged position of marriage remains intact and families not based on marriage continue to be denied constitutional recognition. Nonetheless, the people’s verdict conveys a powerful message of inclusion, equality and acceptance of human and family diversity unparalleled in Irish constitutional history.

Abstract: The aim of this paper is to compare the referendum experiences in recognizing the fundamental right of marriage to homosexual persons in Ireland and United States.