



**The Constitution, Gender and Reform:**  
Improving the Position of Women  
in the Irish Constitution

National Women's Council of Ireland  
September 2012

National Women's Council of Ireland  
September 2012

Alan D.P. Brady  
Adjunct Lecturer  
School of Law  
Trinity College Dublin

# Introduction

Since the 1937 Constitution was first drafted women in Ireland have lived under the shadow of its sexist and reductionist language and philosophy. Many attempts have been made to change, reform and improve the Constitution since then. Some of these have been successful, while others, such as the work of the Constitutional Review Group in 1996, made little or no impact on the Constitution itself.

A cautious approach, then, should be taken by anyone who believes that the current Constitutional Convention will be the panacea to our problems. However, imperfect and all as the design and scope of the Convention is, it would be a mistake to ignore or side-line it. Indeed NWCI members recognised this at our 2012 AGM when they passed a motion mandating the National Women’s Council of Ireland to,

“lobby the Government to activate, as a matter of urgency, the Constitutional Convention to review the 1937 Constitution – Bunreacht na hÉireann. We ask that the convention focus on areas specific to women, to be inclusive and include representation from Women’s organisations.”

A clear message was sent by NWCI members that the Constitution – as our most important moral and legal document – needs to be reformed, with equality and women’s rights placed at the heart of the reform.

In deciding on a strategy for dealing with the Convention the NWCI was mindful of, not only the urgent need for reform, and not only the many failed attempts of the past; but also of the wisdom of British novelist and anti-war activist Margaret Drabble that “when nothing is certain, everything is possible.”

The NWCI has commissioned this piece of research from Dr. Alan Brady to inform the basis of our on-going engagement with the Convention and the Constitution. This was done with the generous advice and assistance of Noeline Blackwell, Director of the Free Legal Advice Centres (FLAC) and the Public Interest Law Alliance (PILA), a project of FLAC.

The paper is a *working paper* drafted for consultation with members. After this consultation process the final contents of the text will be broken down in to sub-sections and published as individual policy documents for submission to the Constitutional Convention. Until the consultation process is finished the document does not necessarily reflect or represent NWCI policy.

Three external experts provided guidance and advice to the NWCI during the research:

- Dr. Mary Murphy, lecturer in Irish politics and society, School of Sociology (NUIM);
- Moninne Griffith, Director Marriage Equality and NWCI board member;
- Noeline Blackwell, Director FLAC.

We are grateful for their shared insights, time and experience.

We hope that this document, and the subsequent policy documents produced using its contents, will be a useful resource for women’s civil society organisations in contributing to the Constitutional Convention. The NWCI will be communicating with members on an on-going basis, inviting them to make submissions to the Convention.

The Convention is empowered to make a request of the government that it be allowed to examine other issues. The NWCI will be campaigning to open up the Convention to these other issues, particularly those focused upon in Section II of this document.

Even if the work of the Convention bears no fruit it still represents an important opportunity to open a dialogue with women

in Ireland about citizenship and the values we want the State to embody, and apply. We do what we value. Our willingness to pay the cost of adhering to our values illustrates our commitment far better than words. Our country remains dominated by conservative and patriarchal values; the role of the market is pre-eminent.

The Convention presents us with a chance to re-contextualise our conversations – who are we, what do we value, how do we make sure those values are lived and not merely paid lip-service? This is the challenge presented to women’s groups across Ireland – many struggling to even survive – that our work and our belief in equality and rights become the pre-eminent values of the State.

Orla O’Connor  
Acting CEO  
NWCI

# Table of Contents

<b>Introduction</b> .....	<b>3</b>
<b>Table of Contents</b> .....	<b>5</b>
<b>Executive Summary</b> .....	<b>7</b>
<b>Preface</b> .....	<b>14</b>
The Proposed Constitutional Convention.....	14
Methodology and purpose of this report.....	16
<b>Glossary</b> .....	<b>19</b>
<b>Part I: The Listed Constitutional Convention Topics</b> .....	<b>19</b>
<b>1. Introduction: Gender and reform of the 1937 Constitution</b> .....	<b>19</b>
Summary of main points.....	19
1.1 Gender and the 1937 Constitution .....	19
1.2 The operation of the Constitution and the risks of reform .....	21
1.3 International Standards and Human Rights Mechanisms .....	24
<b>2. Convention Topic (iii): Review of the Dáil electoral system</b> .....	<b>26</b>
Summary of main points.....	26
2.1 The current system .....	26
2.2 The electoral system and women.....	26
2.3 The PR/STV constituency workload .....	27
2.4 Representation of women under alternative systems .....	28
2.5 Reform .....	30
<b>3: Convention Topic (v): Provision for same-sex marriage</b> .....	<b>31</b>
Summary of main points.....	31
3.1 Marriage in the Irish Constitution.....	31
3.2 The High Court’s interpretation of marriage .....	32
3.3 Legislative reform .....	33
3.4 The ECHR view .....	34
3.5 The Canadian approach .....	35
3.6 Reform .....	36
<b>4. Convention Topic (vi): Amending the clause on the role of women in the home and encouraging greater participation of women in public life</b> .....	<b>38</b>
Summary of main points.....	38
4.1 The constitutional recognition of women’s care work in the home .....	38
4.2 Valuing care and sharing care work equally .....	41
4.3 Reform on a constitutional ethic of care .....	42
4.4 Participation in public life .....	43
4.5 Reform on women’s participation in public life .....	45
<b>5. Convention Topic (vii): Increasing the participation of women in politics</b> .....	<b>47</b>
Summary of main points.....	47
5.1 Women in electoral politics in Ireland.....	47
5.2 Candidate gender quotas.....	49

5.3 Constitutionality of gender quotas .....	50
5.4 Reform .....	54
<b>Part II: Women’s rights and further Constitutional reform. ....</b>	<b>55</b>
<b>6. Constitutional Guarantee of Equality.....</b>	<b>55</b>
Summary of main points.....	55
6.1 Procedural equality and substantive equality .....	55
6.2 Interpretation of existing provisions .....	57
6.3 International examples of process vs substantive equality.....	60
6.4 Indirect discrimination .....	64
6.5 A dedicated guarantee of sex equality .....	65
6.6 Reform .....	66
<b>7. The Family .....</b>	<b>68</b>
Summary of main points.....	68
7.1 Existing provisions.....	68
7.2 The rights of the marital family as a unit.....	68
7.3 The rights of non-marital families.....	69
7.4 International and comparative family rights .....	72
7.5 Reform .....	73
<b>8. Abortion .....</b>	<b>75</b>
Summary of main points.....	75
8.1 International standards .....	77
8.2 Legalising abortion .....	80
8.3 Reform .....	81
<b>9. Women’s Socio-Economic Rights. ....</b>	<b>82</b>
Summary of main points.....	82
9.1 Socio-economic rights as a women’s issue.....	82
9.2 Socio-Economic rights and the existing provisions of the 1937 Constitution .....	83
9.3 International Standards and Comparative Approaches .....	84
9.4 Reform .....	86
<b>Appendix 1: How Constitutions Work.....</b>	<b>88</b>
Summary of main points.....	88
A.1. A symbolic statement of national identity and values .....	89
A.2 Establishment of government institutions .....	89
A.3 Protection of fundamental rights .....	90
A.5 What Constitutions require the State to do and what they leave the State free to do .	92
A.6 International Obligations.....	93

## Executive Summary

The 1937 Constitution is one of the oldest written constitutions in Europe. It was drafted exclusively by men and contains a number of provisions which directly or indirectly raise gender concerns. While it could be argued that the 1937 Constitution was a product of its time, it is entirely unrealistic to suggest that the gender norms enshrined in it are appropriate now. The past 75 years have seen substantial and significant change in the position of women in Irish society. The proposed Constitutional Convention gives an opportunity to reflect on the gender issues presented in the 1937 Constitution and to pursue reform where needed.

This working paper is divided into nine chapters and an appendix. The first chapter sets out the historical backdrop and the operation of the 1937 Constitution as well as laying out the institutional issues which much be accounted for in any reform. These issues are expanded on further in the appendix. Of the remaining eight chapters, the first four deal with four of the topics which are specifically listed in current proposals for the Constitutional Convention. There are eight listed topics and these are the four that touch directly on women's issues. The remaining four chapters deal with issues of NWCI policy which are of relevance to the Constitution and which, it is hoped, will be considered by the Constitutional Convention in addition to the specifically listed topics.

### *The operation of the Constitution*

Any programme pursuing reform must be informed by an understanding of how the 1937 Constitution operates. Contemporary

written constitutions generally perform three broad functions:

- 1) The making of broad symbolic statements about the nature of the state and the society
- 2) Providing the legal basis and authority for the institutions of the state and determining how disputes between those institutions are to be resolved
- 3) Providing for certain fundamental personal rights, which can be used to limit State action

The first function is not necessarily of much technical legal significance, but it is of substantial political significance. As a foundational text, the 1937 Constitution says much about how Irish society sees itself and where its values lie. Provisions such as those dealing with women's obligations to home life are at odds with the lived experience of the majority of Irish women. Where the Constitution no longer reflects the values of Irish society, there is a strong argument that it ought to be changed.

The second of these functions may seem a mere technicality, but it is of vital importance to any programme of constitutional reform. The 1937 Constitution gives the courts the last word on what the constitution means. The text of the constitution is relatively short and the principles espoused are extremely broad. The central role of the courts under the Constitution has meant that the story of the Constitution has been primarily a story of judicial interpretation. It is rarely possible to

ascertain the meaning of a constitutional provision based on the text alone. Therefore, any proposed amendment must have one eye on the role of the courts in interpreting the amended text.

The Constitution prohibits the Government and the Oireachtas from doing certain things; it requires them to do other things and it permits them to do a third category of things. Some of these arise from the institutional provisions of the Constitution, but many relate to the personal rights of individuals (the third function). Certain policies to improve the position of women are perhaps better pursued by legislation than direct constitutional amendment (most obviously where they require a large amount of detail). Where legislation is pursued, the constitutional issue presented is whether the legislation is permitted or required (as opposed to prohibited). The line between these three categories of action is often blurry and where the line is to be drawn is decided by the courts.

When advocating reform, it is useful to take account of Ireland's international obligations. Ireland is party to the European Convention on Human Rights (the European Convention) and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). These are international treaties binding in international law. They are not, however, directly binding on the Irish state within the Irish legal system. The obligations under international law are owed to other nation states, not to Irish citizens. These treaties are certainly very persuasive in discussions about constitutional reform in Ireland, but that does not mean they will automatically trump any constitutional provision that conflicts with them. Conversely, as a

member of the EU, the Irish state does have direct obligations to abide by EU law, including, where relevant, the EU Charter on Fundamental Rights (the EU Charter). As the EU is a supra-national (as opposed to inter-national) system these laws can trump the Irish Constitution if there is a conflict.

### *Review of the Dáil electoral system*

The third specific topic before the Constitutional Convention is review of the Dáil electoral system. The 1937 Constitution specifically requires the PR/STV system with multi-member constituencies of at least three seats each. Any change to the system would require constitutional amendment.

The PR/STV system has been recognised as generating an extremely large amount of constituency work. This requires TDs to be available and visible to constituents a very large amount of the time and includes much work outside of normal business hours. This constituency workload is higher than in other systems with constituency links as multi-member constituencies often lead to duplication of work. The nature and timing of constituency work is such that it acts as a barrier to women's entry into elected politics. Women bear a disproportionate responsibility for childcare and other caring work within families in Ireland. The PR/STV system therefore militates against increased women's participation.

Different electoral systems have correlated with different levels of women's participation. Comparatively, national PR list systems have tended to have the highest level of women's participation. Such systems operate on the basis of a single national, or very large regional constituencies, and so there is no local link with a specific politician within a county or



similar sized area. Mixed systems, which include both single seat constituencies and a national party list have also had some success in increasing women's participation, but somewhat less than national list systems. However, it should be borne in mind that the system is only one part of the problem. The role of other factors, most notably political parties, is also an essential ingredient in increasing women's participation. Bearing this in mind, it is of note that Germany, which uses a mixed system has a relatively high level of women's participation. The same is true of New Zealand, which switched from first-past-the-post to a mixed system in the late 1990s and subsequently saw a significant increase in women's participation in elected politics.

Based on previous referenda and recent polling data, it seems that the Irish electorate are very attached to the PR/STV system. It is perhaps unlikely that a system which removed the constituency link entirely would be acceptable here. On that basis, a mixed system along the German or New Zealand model is to be recommended. Used in conjunction with other measures, such as candidate quotas, such a system could be expected to increase the number of women elected to the Dáil.

### ***Same sex marriage***

The fifth specific topic before the Constitutional Convention is provision for same-sex marriage. The 1937 Constitution protects marriage in very strong terms. However, there is no definition of marriage included in the text of the constitution itself. In the 2006 *Zappone* case, the High Court refused to interpret the constitutional institution of marriage to include same-sex marriage. Much of the analysis was based

on the argument that there was no consensus on same-sex marriage. The court noted that two years previously, the Oireachtas had legislated for a definition of marriage that excluded same-sex marriage.

The plaintiffs in *Zappone* have re-launched their High Court case and it seems likely that the 2006 decision will not be the last word on the subject. Given the court's previous reliance on the issue of a 'changed consensus' it seems likely that if there was legislation providing for same-sex marriage, the courts would uphold it. The courts are often quite deferential to the Oireachtas on social issues and, in the absence of a constitutional definition of marriage, it would be quite hard to argue that the constitution does not permit same-sex marriage. However, that is not to suggest that such an argument would not be made. Previous experience of socially conservative groups suggests that litigation is highly likely to ensue. While it may be unlikely that such a constitutional challenge would be successful, the Constitutional Convention gives the opportunity to put the matter beyond doubt, by including a definition of marriage that is gender-neutral.

Aside from pre-empting any possible constitutional challenge to same-sex marriage legislation, a constitutional amendment would also have an important symbolic function. By amending the constitution to include a gender-neutral definition of marriage, the Irish people would be making a powerful statement regarding the equality of same-sex couples.

### ***The role of women in the home and encouraging greater participation of women in public life***

The sixth specific topic before the Constitutional Convention is the role of women in the home and the participation of women in public life. Article 41.2 of the 1937 Constitution recognises the role of women in the home and undertakes not to force them to take up paid work to the neglect of those duties. These provisions are anachronistic and outdated. They do not reflect the lives of Irish women, the majority of whom are in paid employment outside of the home. While the provisions have been the subject of very little litigation, their symbolic power is palpable. The current gendered provision should be removed.

Notwithstanding this, the recognition of the importance of unpaid informal care work in Ireland is of great value. Such work is undertaken disproportionately by women and is increasingly invisible and undervalued as our society moves increasingly to valuing labour market work to the exclusion of all other types of work. With that in mind, the Constitutional Convention gives an opportunity to expressly recognise this type of work in a gender neutral way. Such recognition would be a useful symbolic statement and would ensure that the concepts that were of value within the existing Article 41.2 were retained. However, it would be very difficult to draft a provision recognising the value of this work in such a way that ensured meaningful support for carers. As people who are economically insecure, carers have much to gain from enforceable constitutional socio-economic rights. Any serious attempt to improve the lot of carers

in Ireland must include this option. The introduction of such rights is discussed in chapter 9.

With regard to increasing women's participation in public life, it is of note that civil society groups play a major role bringing women's voices to the fore. Groups such as trades unions, religious organisations and business groups all have a substantial influence on public life through lobbying decision-makers. All of these organisations tend to be dominated by male voices. Express recognition could be made in the constitution of a broader range of civil society groups with a view to improving consultative and participatory democracy in Ireland. Such recognition could be expected to be of substantial benefit to women. It is also advisable to expressly recognise the importance of active citizenship, both individually and through groups. The symbolic value of this would also be useful in increasing women's participation in public life.

### ***Increasing the participation of women in politics***

The seventh specific Constitutional Convention topic concerns increasing the participation of women in politics. The current Dáil has 23 women TDs out of a total of 166, which is just under 14%. This is very low by international standards. Previous analysis and international experience suggests that quotas requiring a minimum percentage of female candidates for election is a successful mechanism for increasing the number of women elected. In some instances, such as Sweden, this has been done voluntarily by political parties. In others, such as France, it has been required by legislation.

Gender quota legislation is currently before the Oireachtas. The Electoral (Amendment) (Political Funding) Bill 2011 was passed by the Dáil in July 2012. The legislation would require a minimum of 30% women candidates. Parties that do not comply will have their public funding cut. Measures of this type are expressly encouraged by Article 4 of CEDAW.

The detail involved is such that this type of policy is probably best pursued by legislation rather than by the Constitution. Furthermore, such measures are usually introduced in the hope that they will eventually become redundant at a time in the future when gender imbalances have been redressed. The constitutional issue is therefore whether or not the 2011 Bill is in compliance with the 1937 Constitution. It seems very likely that it would survive any constitutional challenge, especially since it merely denies funding to private organisations which operate as self-appointed gate-keepers to election in our democracy. Furthermore, the courts have traditionally been very deferential to the Oireachtas on discrimination issues broadly. However, Article 16 does prohibit discrimination as to sex with regard to running for the Dáil. There is a chance that a constitutional challenge would be brought. Although it may be likely to fail, this is never guaranteed, given the power of the courts in constitutional interpretation. The Constitutional Convention presents an opportunity to put the issue beyond doubt. It would therefore be advisable to amend Article 16 to recognise that measures aimed at improving equal representation of men and women are not a breach of Article 16.

### *Constitutional Guarantee of Equality*

The 1937 Constitution guarantees equality before the law in Article 40.1. The interpretation of this provision has been focused exclusively on a procedural model of equality, which is concerned with preventing discriminatory treatment of people based on factors such as the person's sex. This procedural equality is undoubtedly important and it has been a useful protection of women in certain instances. However, procedural equality is not the only model of equality. Substantive equality is concerned with equality of opportunity and equality of outcomes, rather than just equality of treatment. There are many factors in Irish life which place women at a disadvantage relative to men. Procedural equality assumes a level playing field as a starting point, but in many areas of Irish life, this is inaccurate. A substantive model of equality would seek to redress these imbalances.

CEDAW expressly mandates the use of temporary measures to redress these imbalances (for example electoral gender quotas, discussed in the chapter 5). CEDAW also mandates the inclusion of express recognition of equality between men and women. EU law includes provisions regarding equality of treatment between the sexes and the EU Charter expressly recognised the principle of gender equality.

It would be very difficult to use a single constitutional provision to ensure actual substantive equality for women in Ireland. However, experience in Germany suggests that a constitutional amendment on the issue would allow for the introduction of legislative schemes which would increase equality of outcomes for women. Such a measure would also ensure that measures

that sought to improve the position of women relative to men did not fall foul of a constitutional challenge based on the existing formal equality guarantee. The practical detail of substantive equality is arguably better met by a combination of legislative change and the introduction of socio-economic rights. Socio-economic rights are a direct and practical way of redressing social and economic inequality, which generally falls more heavily on women in Irish society.

### *The Family*

The 1937 Constitution places a very high value on marriage and defined the family as solely being the family based on marriage. The rights of the family are group rights, exercisable by the family unit as whole. They are not individual rights. Where families are founded outside of marriage, they enjoy almost no constitutional recognition.

Under the courts continued and consistent interpretation of the 1937 Constitution, unmarried mothers do have some automatic constitutional rights to their children. The exclusion of unmarried fathers from any constitutional recognition of their rights reinforces the idea that unmarried fathers never bear any responsibility for their children. This is a significant issue of constitutional symbolism. The conferring of automatic constitutional recognition on all unmarried fathers may not be appropriate. However, the approach taken by the European Convention has much to recommend it. The ECHR has repeatedly interpreted the European Convention as conferring human rights recognition of the actual family relationship. Where there is in fact a family relationship between an unmarried parent and a child, the 1937

Constitution should provide protection to that relationship. The European Convention approach is far more appropriate than a blanket exclusion and should be adopted in Ireland.

### *Abortion*

The 1937 Constitution provides a right to terminate pregnancy in circumstances where the mother's life is at risk. According to the well-known 'X' case, a threat to life includes a threat of suicide. The Irish people have twice rejected proposals to remove the threat of suicide from this right. Notwithstanding this constitutional right, there is no regulatory mechanism in place in Ireland to allow a pregnant woman whose life is at risk to have the pregnancy terminated. Doctors performing any such termination face potential prosecution under the Offences Against the Person Act 1861. This century-and-a-half old piece of legislation is the current governing statute on abortion on Ireland. This is notwithstanding the fact that Ireland has had two constitutions (1922, and 1937), four referenda and numerous High and Supreme Court cases on the issue since the Act was passed. The ECHR recently criticised Ireland in strong terms for the violation of Article 8 of the European Convention caused by this situation. Ireland's abortion laws have also been criticised by the CEDAW Committee.

The current text of the 1937 Constitution means that it would not be possible for the Oireachtas to allow abortion in situations other than a risk to life of the mother. Many other countries allow for abortion in cases where there is a threat to the health or wellbeing of the mother. If a decision were taken that Ireland should move towards allowing abortion in those situations, then a

constitutional amendment would be necessary. The most appropriate approach would be to add such an exception into the existing text and stipulating that the system introduced must be regulated by law (i.e. by legislation).

### *Women's socio-economic rights*

Socio-economic rights recognise that certain base-line levels of health, education, housing, food and social security are fundamental human rights which ought to be protected for everyone. Women in Ireland earn less than men. They are disproportionately in part-time work. They bear disproportionate responsibility for unpaid informal care work. As such, their social economic position is less secure than that of men and they tend to have less economic independence. Women therefore have much to gain from socio-economic rights and such rights could be expected to go some way towards improving the substantive equality of men and women in Ireland.

It is often glibly suggested that socio-economic rights involve positive duties on the state, whereas other civil and political rights merely require the state to refrain from acting. This is inaccurate. Free elections, fair trials and humane prisons are all very expensive, even though they are at the core of the civil and political rights tradition. Similarly, a right against forced eviction places a negative duty on the state, even though it is a socio-economic right. Both strands of rights involve both positive and negative duties. The real issue in relation to socio-economic rights is one of scale.

The 1937 Constitution already recognises socio-economic rights, most notably the right to education. The Supreme Court has said that others may be found. However, the courts have also taken the view that such rights cannot be enforced in a manner that directs the Government to do specific acts, because this would breach the separation of powers. The 1937 Constitution also contains 'directive principles of social policy' which contain socio-economic guarantees. However, the courts have found that these directive principles are directed solely at the Oireachtas and so the courts do not have any role in enforcing them.

The Indian Constitution contains similar directive principles, which have been used very effectively to interpret other rights, which are directly guaranteed. The South African Constitution contains directly enforceable socio-economic rights to housing, healthcare, food, water and social security. These rights are also guaranteed by the International Covenant on Economic Social and Cultural Rights, to which Ireland is a party.

The 1937 Constitution should be amended to include socio-economic rights. Inevitably, there would be some level of judicial restraint in enforcing those rights and some aspects of them may need to be subject to 'progressive realisation'. However, this does not undermine the case for them. Both symbolically and in terms of their enforcement as personal rights, socio-economic rights would be a timely addition to the 1937 Constitution, which would go some considerable way to improving the position of Irish women.

## Preface

The Constitution of Ireland 1937 ('the 1937 Constitution') was adopted by the Irish people in a referendum seventy-five years ago. Since then it has been amended twenty-seven times. In early 2012, the government proposed the establishment of a Constitutional Convention. This Convention can be expected to provide an opportunity for reflection and debate as to what modification and renewal is required for the 1937 Constitution.

### *The Proposed Constitutional Convention*

The current government proposal is for a 100 member Constitutional Convention comprised of 66 ordinary citizens, 33 parliamentarians from both jurisdictions on the island of Ireland and a chairperson of 'exceptional ability with a high degree of public acceptability'.<sup>1</sup> There are also plans for an 'Expert Advisory Group' made up of academics, political scientists and constitutional lawyers, but this group as currently proposed will be separate from the actual membership. The Constitutional Convention has been invited to address eight specific topics, on which it should report within twelve months. On 10 July 2012, the Taoiseach and Táiniste proposed the following motion to the Dáil which was passed by the house.

*That Dáil Éireann:*

---

<sup>1</sup> Irish Government News Service 'Constitutional Convention – Government Proposals' 28 February 2012 (available at [www.merrionstreet.ie](http://www.merrionstreet.ie)).

*approves the calling of a Convention on the Constitution to consider the following matters and to make such recommendations as it sees fit and report to the Houses of the Oireachtas:*

*(i) reducing the Presidential term of office to five years and aligning it with the local and European elections;*

*(ii) reducing the voting age to 17;*

*(iii) review of the Dáil electoral system;*

*(iv) giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;*

*(v) provision for same-sex marriage;*

*(vi) amending the clause on the role of women in the home and encouraging greater participation of women in public life;(associational democracy)*

*(vii) increasing the participation of women in politics;*

*(viii) removal of the offence of blasphemy from the Constitution; and*

*(ix) following completion of the above reports, such other relevant constitutional amendments that may be recommended by it; and*

*notes that:*

*— membership of the Convention will consist of 100 persons as follows:*

*— a Chairperson to be appointed by the Government;*

- 66 citizens entitled to vote at a referendum, randomly selected so as to be broadly representative of Irish society;
- a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government; and
- members of the Houses of the Oireachtas, so as to be impartially representative of the Houses;
- substitutes may be appointed subject to the selection criteria above, who will be entitled to contribute to the proceedings and vote in their own name;
- the Convention will agree its own rules of procedure for the effective conduct of its business in as economical manner as possible;
- the Convention will have appropriate regard to the Good Friday Agreement and the St. Andrews Agreement;
- not later than two months from the date of the first public hearing held by the Convention, the Convention will make a report and recommendation to the Houses of the Oireachtas on each of the matters set out at (i) and (ii) above;
- the Convention will report and make recommendations to the Houses of the Oireachtas on each remaining matter as soon as it has completed its deliberations, but in any event not later than one year from the date of the first public hearing;
- the Convention may invite and accept submissions from interested bodies and will seek such expert advice as it considers desirable;

- all matters before the Convention will be determined by a majority of the votes of members present and voting, other than the Chairperson who will have a casting vote in the case of an equality of votes; and
- the Government will provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, will indicate the timeframe it envisages for the holding of any related referendum.<sup>2</sup>

Civil society groups have been expressly excluded from membership of the Constitutional Convention, but it will be able to call on such groups to make presentations. They are also permitted to make submissions in writing. The merits and disadvantages of such a model are outside the scope of this research paper, which is primarily concerned with exploring possible substantive changes to the 1937 Constitution. However, it is of note that there has been some controversy on the process to be followed.

The NWCI requested that the government change the format of the Convention, applying three principles:

- All constituent parts of the Convention should be gender balanced.
- Civil society should be given a special and recognised role in the Convention.
- The outcomes of the Convention should be subject to an equality or gender audit before any referenda.

---

<sup>2</sup> *Dáil Debates* Volume 755, No 5, 10 July 2012.

These principles, and other arguments made by civil society, were elaborated in a statement of principles developed in a document called “Hear our Voices” where 60 civil society organisations called for the government to develop a Convention which is participative, meaningful and inclusive. At the time of writing, the Government’s format does not allow for this.

The NWCI has adopted a strategy of seeking to influence those elements of the Convention which are directly relevant to women while also seeking to have the scope of the Convention broadened. Of the eight specific topics listed for consideration, the National Women’s Council of Ireland has a particular interest in

- topic (iii) (the electoral system);
- topic (v) (marriage equality);
- topic (vi) (the place of women in the home and women in public life);
- and, topic (vii) (increasing women’s participation in politics).

The issue of women’s involvement in public life and politics provides considerable overlap between topics (iii), (vi) and (vii).

Part I of this working paper is concerned with these four topics.

There is also a general ‘catch all’ topic (ix) which allows the Constitutional Convention to recommend other reforms once the initial eight topics have been dealt with. There are four other areas of NWCI interest which it is hoped may be addressed by the Constitutional Convention under the general heading (ix). Those four areas are:

- 1) The constitutional guarantee of equality;
- 2) The definition and role of the family in society;

- 3) Abortion;
- 4) Women’s economic social and cultural rights

Part II of this working paper is concerned with these four policy areas and the constitutional reforms that may be required in relation to each.

### *Methodology and purpose of this report*

The broad purpose of this report is to provide a gender analysis of the existing constitutional provisions in each of the above areas of policy and discuss how reform can be achieved. The methodology is exclusively desk-based, as is standard in most legal research. The objectives of the report are to:

- Inform and mobilise NWCI members and other civil society organisations by providing an increased level of knowledge and understanding of the women’s rights and gender dimension of the Irish constitution.
- Assess, analyse and critique the existing Irish Constitution in relation to standards of international human rights legal instruments, in particular the Convention on the Elimination of Discrimination Against Women and the European Convention on Human Rights.
- Introduce appropriate constitutional models, including those based on comparisons with other states, which can be adapted to the Irish context.
- Shape discussions and influence policy decisions in relation to the 1937 Constitution, both inside the



process of the Constitutional Convention and outside.

- Put forth a strong rights-based framework on the shape of the 1937 Constitution, to be used to influence policy makers.
- Recommend constitutional reforms which are most likely to support the NWCI's policies in the areas under consideration and which can be used for shaping policy decisions,

following consultation with members.

The issues considered in this report involve constitutional law and theory, international human rights law as well as political theory relating to constitutional design. While all efforts have been made to keep jargon to a minimum, it is in the nature of such research, that some specialised language will be inevitable.

## Glossary

**1937 Constitution:** Bunreacht na hÉireann, the Constitution of Ireland, adopted by referendum 1 July 1937, entered into force 29 December 1937.

**CEDAW:** Convention on the Elimination of all forms of Discrimination Against Women.

**CEDAW Committee:** Committee on the Elimination of Discrimination Against Women

**Citation of constitutional provisions:** (e.g.: Article 40.1, Article 40.3.3<sup>o</sup>, Article 40.1.6<sup>o</sup>.i). The constitution is divided into Articles, which are sometimes divided down into sections, subsections and paragraphs. These are usually numbered with standard western numerals for articles, sections and subsections. After each subsection's numeral there is a 'o'. If an Article is divided further, into paragraphs, then roman numerals are used for the numbers of the paragraphs. Full stops with no spaces are used to separate the numerals.

**EU Charter:** The European Union Charter of Fundamental Rights

**ECJ:** Court of Justice of the European Union

**European Convention:** The European Convention on Human Rights

**ECHR:** The European Court of Human Rights

**ICCPR:** International Covenant on Civil and Political Rights

**ICESCR:** International Covenant on Economic, Social and Cultural Rights

**The Constitution Review Group:** An expert panel appointed by the Government which reviewed the Constitution in 1995 and produced a 700 page report in 1996.

# Part I: The Listed Constitutional Convention Topics

## 1. Introduction: Gender and reform of the 1937 Constitution

### *Summary of main points*

- The Irish Constitution was originally drafted with minimal input from women. Some of its provisions contain narrow and outdated definitions of the role of women.
- Constitutions do three things: 1) symbolic statements about the nation; 2) establish institutions and decide priority between them 3) guarantee fundamental rights.
- Constitutions require the government to do certain things; prohibit the government from doing certain other things and permit the government to do still more things. Whether a constitutional provision is a requirement, a prohibition or a permission is of significance for its operation and for any planned reform.
- Any change to the Irish Constitution will be subject to interpretation by the courts. This must always be borne in mind when suggesting reform.
- Ireland is a State Party to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the European Convention on Human Rights (European Convention). These are international law treaties, which cannot be directly enforced in Ireland. Ireland *should* do what

these treaties say. Ireland is a member of the EU. EU law can be directly enforced and Ireland *must* do what EU law says.

### *1.1 Gender and the 1937 Constitution*

There are five Articles in the 1937 Constitution which make specific statements regarding gender:

- Article 9.1.3<sup>o</sup> states that nobody can be excluded from Irish citizenship based on their sex
- Article 16.1 provides for running for the Dáil and voting in Dáil elections; it prohibits any distinction as to sex
- Article 40.3.3<sup>o</sup> provides for the right to life of the unborn with due regard to the life of the mother.
- Article 41.2 recognises a woman's life in the home and requires the state to endeavour to ensure that mothers are not forced by economic necessity to engage in labour to the neglect of their duties in the home.
- 45.4.2<sup>o</sup> provides that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.

To a large extent, these provisions, especially the latter two are concerned with the symbolic function of the constitution and have provided little in the way of

enforceable law. However, the symbolic function is nonetheless of great importance. As Flynn puts it:

Law is one of the sites at which the self is formed and shaped, along with education, religion, medicine and the other constituents of culture. ... In this sense, law operates as a social contract in which identities are assumed, altered and traded. This process is particularly powerful in the realm of constitutional law because, in defining the boundaries of public power, the nature of the State and the role of the citizen, a constitution claims to be the base from which public power is constituted and, implicitly, on which key aspects of legal personhood are constructed.<sup>1</sup>

The symbolism of Article 41.2 is significant as a statement of how gender stereotypes are perpetuated in the 1937 Constitution. Doorley describes the content of the 1937 Constitution as containing ‘the false universal “woman”’<sup>2</sup> She also noted the ‘radical asymmetry in only stipulating role assignments for women.’<sup>3</sup> In this sense, some of the current text assumes that all women are the same. This form of gender

---

<sup>1</sup> Flynn, L. ‘To be an Irish Man– Constructions of Masculinity within the Constitution’ in Murphy, T. and Twomey, P. (eds.) *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) at p.137.

<sup>2</sup> Doorley, D. ‘Gendered Citizenship in the Irish Constitution’ in Murphy, T. And Twomey, P. (eds.) *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 124.

<sup>3</sup> Doorley, D. ‘Gendered Citizenship in the Irish Constitution’ in Murphy, T. And Twomey, P. (eds.) *Ireland’s Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 124.

stereotyping was most unfortunate at the time of drafting. In 2012, it is completely at odds with the lived experience of huge numbers of Irish women.

---

**This gender stereotyping is completely at odds with the lived experience of huge numbers of Irish women in 2012.**

---

The drafters of the 1937 Constitution were all men. De Valera took the lead; he was supported by an all-male civil service committee and then sought external advice from influential experts of the day, such as the Chief Justice and the President of the High Court, both men. The influence of the Catholic Church was strong – particularly that of John Charles McQuaid (De Valera’s former teacher and in 1937 Archbishop of Dublin) McQuaid and De Valera corresponded regularly and McQuaid had a strong influence on the definition of the family.

The 1937 Constitution actually removed article 3 of the earlier 1922 Constitution of the Irish Free State, which declared that every citizen was “free from discrimination without distinction of sex.” It also rolled back on the commitments made in the 1916 Proclamation. De Valera received deputations from the Standing Committee on Legislation affecting Women and Women Graduates of the National University all seeking higher representation of women in the judiciary, Gardaí, Senate

and the restoration of jury service.<sup>4</sup> It is of note that not a single woman participated in the drafting of the 1937 Constitution and the three women TDs at the time 'known sorrowfully as the "Silent Sisters", made no meaningful contribution whatever to the debate on the draft.'<sup>5</sup>

The Constitution passed only by a small minority (56.5% of the electorate who voted) and only 38.5% of the electorate actually voted for it. There was significant opposition to the constitution from women because of some of the gendered elements of the text.<sup>6</sup> The margin of victory in the 1937 referendum which adopted the Constitution was 685,105 votes to 526,945 votes. It is likely that at least some of this opposition came from women.

The 1937 Constitution is arguably a statement of the values of the time. It has also been interpreted as generally quite permissive with regard to gender roles, particularly Article 41.2, which has been the source of very little litigation. In 1937, the position of women in Irish life, both public and private was one which unquestionably involved subordination to men. This situation continued, relatively unhindered, up to the 1960s and 1970s, when attitudes began to be challenged and began to change. The situation has continued to improve, but there is still, even in 2012, undoubtedly significant work to be done.

---

<sup>4</sup> Kissane, B *New Beginnings: Constitutionalism and Democracy in Modern Ireland*. (Dublin: UCD Press, 2011) at pp. 57 - 90.

<sup>5</sup> Scannell, Y. 'The Constitution and the Role of Women' in Farrell, B. (ed.) *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan, 1988), at p.123.

<sup>6</sup> See Hogan, G. *The Origins of the Irish Constitution 1928-1941* (Dublin: Royal Irish Academy, 2012), at pp. 561-593.

The role of the 1937 Constitution in establishing and perpetuating the subjugation of women is an open question. Patriarchal attitudes were already rife in Irish society before the 1937 Constitution. However, by crystallising those attitudes in a symbolic text, the 1937 Constitution at best impeded their reversal and at worst actively entrenched them. Subjugation of women in Ireland has been perpetrated by the Government directly, such as the ban on married women working in the civil service.<sup>7</sup> In some instances extreme oppression has been left unchecked such as occurred with the human rights abuses perpetrated by the practices of the Magdalen Laundries. The 1937 Constitution did not itself cause this subjugation. However, the Constitution did little to prevent these discriminatory male-centred practices either. Often the 1937 Constitution has protected women least at times when they were arguably in need of protection the most.

By infusing the nation's sense of itself with archetypal gendered roles, the Constitution arguably played its part in perpetuating those roles, even after they had been debunked. It was not always that these roles could be enforced directly in the courts like a piece of statute law. The contribution is more conceptual than that, but undoubtedly as important.

## ***1.2 The operation of the Constitution and the risks of reform***

In order to argue for constitutional change, it is important to know how the 1937 Constitution operates. A more detailed

---

<sup>7</sup> Civil Service Regulation Act 1956, Section 10

explanation of this is contained in Appendix A 'How Constitutions Work'. At this point it is important to understand that written constitutions essentially serve three different purposes.

---

**Written constitutions are a symbolic statement about who we are as a nation; they set up the institutions of government; and, they protect certain fundamental rights.**

---

First, they are a symbolic statement about who we are as a nation and how we understand ourselves. Secondly, they set up the institutions of government and *very importantly* they decide which institution has the last say if there is a disagreement. Under the 1937 Constitution, the courts have the final say on whether a law passed by the Oireachtas is constitutional. If the courts say that it is not constitutional, then they can strike it down. Thirdly, a written constitution will usually protect certain fundamental rights. We usually refer to these as 'constitutional rights' but they contain very similar ideas to the body of rights generally referred to as 'human rights' and are broadly drawn from the same philosophical tradition.

The 1937 Constitution can affect the way the Government and the Oireachtas work in three different ways:

- It requires them to do some things;
- it prohibits them from doing some things; and
- it allows them a choice about some things.

Some policy goals are best pursued by ordinary legislation passed by the Oireachtas, for example gender quotas for candidates in elections. The policy itself is actually pursued by the relevant legislation, not by changing the 1937 Constitution. Where this is the case, the only constitutional concern is to make sure that the 1937 Constitution either *requires* the Oireachtas to pass a gender quota law or *allows* the Oireachtas to pass that law. If the 1937 Constitution says that a gender quota law is not permitted, then the Constitution would need to be changed before the law can be passed.

Some policy goals may not be well suited to legislation. In such circumstances, the issue tends not to involve whether the 1937 Constitution allows or prohibits something. These constitutional policy goals usually seek to bring in some new requirement into the Constitution itself. For example, there may be a desire to include a new constitutional right or set of constitutional rights, such as a set of rights for children. Such rights could be protected at the level of legislation, but including them in the Constitution takes them out of the realm of electoral politics and makes an important symbolic statement.

In examining existing constitutional provisions and in recommending change, it is essential to be aware of whether the reform being sought requires the constitution to actively mandate that something be done or merely permit that it be done.

### 1.2.1 Judicial interpretation

Whether or not the 1937 Constitution requires, prohibits or allows something to be done by the Government or the Oireachtas is not always clear cut. Where this happens, the 1937 Constitution gives the last word to the courts. This fact is of *exceptional importance* for any reform of the 1937 Constitution. A group or individual concerned about a particular issue may seek to insert a particular sentence or paragraph into the constitution. The meaning of the insertion may seem very clear to those arguing for (or even against) the item, for example during a referendum campaign. They might think they know what that sentence or paragraph means. However, what they think it means *does not matter* for legal purposes. It is what the High Court, and ultimately the Supreme Court, think it means that counts. Any argument for reform must bear this in mind. It is perhaps the most important note of caution for any organisation working on constitutional reform.

For example, in 1983, the Eight Amendment to the Constitution was added after a referendum. The amendment inserted the right to life of the unborn child into Article 40.3.3<sup>o</sup>. The supporters of the Eighth Amendment seemed to think it would resolve the issue in their favour and provide an absolute ban on abortion in Ireland. However, while they may have thought that the language was unambiguous, what subsequently transpired showed that the Eight Amendment actually lacked precise legal language or medically relevant language. The emotive language of the Eighth Amendment provides a strong symbolic element. However, the provision did not expressly ban abortion or define the circumstances in which abortion would be

permitted. It introduced a conflicting right to life of the unborn which would have to be balanced with that of the mother. This approach did not provide legal certainty with regard to abortion, nor does it recognise or express any scientific certainty. This meant that the task of deciding where to draw the line would ultimately fall to the courts, which took it out of the hands of the supporters of the amendment.

In 1992 the Supreme Court engaged in a balancing exercise as between the right to life of the unborn and the right to life of the mother.<sup>8</sup> The outcome of the decision was that a woman whose life is at risk (including from suicide) has a constitutional right to have an abortion.

Even though the advocates of the Eighth Amendment thought they were securing the ban on abortion at the constitutional level, the subsequent interpretation actually had the effect of watering down the absolute prohibition in the Offences Against the Person Act 1861. It is clear from the submissions of various pro-life groups to the Fifth Progress Report of the All Party Oireachtas Select Committee on the Constitution, that this outcome was not envisaged, or endorsed [by them], and that a subsequent amendment was being sought by some of these groups to change the position.<sup>9</sup> The open wording of the right to life of the unborn provided a strong example of the symbolic function of written constitutions. However, it was imprecise as to the hierarchy of fundamental rights or the factors to be considered in balancing

---

<sup>8</sup> *Attorney General v X* [1992] 1 IR 1.

<sup>9</sup> All Party Oireachtas Committee on the Constitution *Fifth Progress Report: Abortion* (Dublin: Houses of the Oireachtas, 2000), at pp. 27-29 and 35-37.

those rights. Given the fact that the Irish courts have the last word on constitutional interpretation, this was arguably an oversight on the part of the advocates of the Eighth Amendment. It is difficult to be reductionist or categorical about the Irish Courts in respect of predicting what they will do. Reformers of the Constitution should be mindful of that. Changes should be carefully tailored to the goal they seek to pursue.

---

**A group may seek to insert a sentence into the constitution. The meaning of the insertion may seem very clear during a referendum campaign. However, it is what the High Court, and ultimately the Supreme Court think it means that counts.**

---

Judges in Ireland are appointed from among experienced senior lawyers. They have all had a high level of formal education and by the time they come to be appointed as judges they will have had very successful (and often very lucrative) practices as barristers or solicitors. Judges of the Superior Courts (i.e. the High Court and Supreme Court) have tended to be former barristers, although since 2004, there have been some solicitors. The vast majority of judges in the history of the Irish state have been men. The first woman High Court Judge, Mella Carroll, was appointed in 1990. The first woman Supreme Court Judge, Susan Denham, was appointed in 1992 (having served as a High Court Judge since 1991). Ms Justice Denham is currently the Chief Justice of Ireland. Although the growing number of women judges is certainly to be welcomed, the majority of

judges in Ireland are men. Women make up 27% of the total number of judges. Women make up just 16% of judges of the Superior Courts, who have primary responsibility for interpreting the 1937 Constitution. This fact has consequences for how the Constitution, and laws, are interpreted.

### ***1.3 International Standards and Human Rights Mechanisms***

There are three international sources of law on human rights which are of particular relevance to constitutional reform in Ireland. They are: the Convention on the Elimination of all forms of Discrimination Against Women ('CEDAW'), the European Convention on Human Rights ('the European Convention') and the European Union law, including the Charter of Fundamental Rights ('the EU Charter').

The first two sources have a different legal status to the third. Both CEDAW and the European Convention are international treaties, binding in international law. However, the fact that they are binding in international law does not mean that they are superior to domestic law and can be enforced directly. It is commonly thought that international law is some sort of 'higher law' which trumps domestic law. This is not really accurate. International law is a distinct legal order which operates separately from domestic legal systems. Furthermore, the subjects of international law are States, not individuals and so it is not, generally, possible, as a matter of international law for an individual to seek redress in international law. International law is binding on and between states. If international law is binding inside the domestic legal system of a state, it is only



because that state has chosen to make that the case. Some countries do this by way of a general recognition of all treaties entered into. The 1937 Constitution takes the opposite approach. Article 29.6 states that:

No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

The nature of treaty obligations is of significance for the purposes of arguing for constitutional change. Ireland has voluntarily committed to CEDAW and the European Convention. If, and when, Ireland is in breach of international law, it is not the case that there is some international police force that will ensure compliance; nor does it necessarily mean that the Irish Government or the Oireachtas have acted in breach of any Irish law. However, the voluntary commitment nature of international treaties is such that it gives great weight to any *political* argument based on them. If the Irish State did not wish to meet these standards, then it should not have signed up to them. Beyond that, Ireland's international reputation and its treatment by other states is heavily influenced by the extent to which it abides by its treaty obligations. For this reason, there is substantial moral force in arguments based on international treaties.

EU law is different from international law. It is a 'supra-national' legal order which is binding both on and within member states. Individuals can rely on EU law directly in the Irish Courts in a manner that is not possible with other international treaties. Where a law is made by the EU institutions within EU competence, then that law is superior to any domestic law with which it conflicts.

The ECJ has confirmed that this includes domestic constitutions.<sup>10</sup> The ramifications of this finding (which was already in place prior to Irish membership of the EEC) are profound. Within its own competences, EU law trumps all domestic law including the constitution. It is therefore of great importance when considering Irish constitutional reform to be conscious of any potential EU Law dimension. It might be that the 1937 Constitution was amended in relation to an issue that falls within shared EU competence. If a subsequent EU law was passed which conflicted with the 1937 Constitution, then the constitutional provision would have to give way to the EU law.<sup>11</sup>

---

<sup>10</sup> See *Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>11</sup> If the area fell within an 'exclusive' competence, the Irish State is considered to have conceded all law-making power to the EU and so it would arguably not be permitted to even include a constitutional provision in that area in the first place. See Chalmers, D. and Tomkins, A. *European Public Law* (Cambridge: Cambridge University Press, 2007), at p. 188.

## 2. Convention Topic (iii): Review of the Dáil electoral system

### *Summary of main points*

- PR/STV places particular demands on TDs that exclude women from politics because of the high volume of constituency work. A PR list system or a mixed system would reduce the levels of constituency work for all politicians and also give women a choice to opt for a national list.
- PR list systems and mixed systems correlate with a greater level of women being elected but there is no such thing as the perfect system.
- Changing the electoral system is just one part of the puzzle.

### *2.1 The current system*

The current Dáil electoral system is based on multi-member regional constituencies tied closely to county boundaries (where possible) with TDs elected on the single transferrable vote (STV). The basic elements of this system are required by the 1937 Constitution, which mandates both STV (Article 16.2.5°) and multi-member constituencies of at least three seats each (Article 16.2.6°). In addition to this, Article 16.2.2° requires that the ratio of population per TD cannot be below 20,000 people and cannot be above 30,000 people. Any change in the current electoral system would require constitutional amendment. This has been attempted twice before. In 1959 and 1968 two different Fianna Fáil Governments proposed to change the electoral system to

the ‘first past the post’ system.<sup>1</sup> The proposal was rejected by referendum on both occasions.

### *2.2 The electoral system and women*

Currently, the Dáil contains 25 women TDs out of 166 (13.8%). This is very low by European standards and fails adequately to represent half the population of the State. The issue of women in politics more broadly is a separate Constitutional Convention topic and is discussed further below in Chapter 5. However, it is important to examine the extent to which the current electoral system affects the number of women successfully seeking election to the Dáil.

---

**PR/STV affects women’s representation because of the work-pattern associated with it; some alternative electoral systems correlate with a higher level of women’s participation.**

---

The Irish electoral system affects women’s representation in two ways. First, there is the work-pattern that is associated with elected representatives under different systems and the extent to which this presents a barrier to women entering politics. Secondly, there is the extent to

---

<sup>1</sup> See the Third Amendment to the Constitution Bill 1958 and the Third Amendment to the Constitution Bill 1968.

which alternative electoral systems correlate with a higher level of women's participation. When the Constitutional Convention considers the issue of reform of the electoral system, it is essential that these two aspects be addressed, as they are central to improving the level of women's participation in politics.

### ***2.3 The PR/STV constituency workload***

One of the most significant factors discouraging and preventing women from seeking elected office is the time dedicated to unpaid care work.<sup>2</sup> Women bear a disproportionate share of care

---

**“Women are disproportionately responsible for care which means they have less time for activities outside of the family than male counterparts. The current electoral system involves extremely large time commitments outside of normal business hours. This is not an inevitable feature of electoral systems; the outside time commitments vary between systems.**

---

commitments, particularly childcare: 86% of supervision of children is done by women.<sup>3</sup> This means that women have less time to dedicate to activities outside of the family and the home than their male counterparts. This is significant because the current Dáil electoral system entails extremely large

---

<sup>2</sup> Joint Committee on Justice, Equality Defence and Women's Rights *Second Report: Women's Participation in Politics* (Houses of the Oireachtas, 2009), at p.11.

<sup>3</sup> See *Who Cares? Challenging the myths about gender and care in Ireland* (National Women's Council, 2009)

time commitments outside of normal business hours. This is not an inevitable feature of electoral systems; the outside time commitments vary between various systems.

While some of these out-of-hours commitments are caused by Dáil sitting times, much of the difficulty is caused by the extreme volume of constituency work and constituency visibility that is a feature of the Irish system.

Any electoral system that involves a constituency link (rather than on some sort of national or regional list system) will require some element of this, but the Irish system is far more heavily skewed towards constituency work than other systems. The Constitution Review Group noted that in the Irish multi-member system, constituents will often approach multiple TDs to deal with a single issue, which increases the workload overall.<sup>4</sup> There is also some research which suggests that women TDs actually have a greater constituency workload than men TDs as they are sometimes approached on some issues specifically because the constituent wishes to consult with a woman.<sup>5</sup>

The extraordinary constituency workload created by the current electoral system place huge demands on a TD's time. TDs are expected to be available to their constituents at all times. Where male TDs have an established family support network, this can be gruelling. For a female TD who bears a substantial amount of

---

<sup>4</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp. 56-57.

<sup>5</sup> See National Women's Council of Ireland *Submission to the Constituency Commission* January 2012.

childcare responsibility, it is an exceptional burden.

*For as long as childcare and family responsibilities are borne disproportionately by women, the current electoral system will be a barrier to women's entry into politics, because of the excessive and anti-social time commitments involved.*

#### **2.4 Representation of women under alternative systems**

One model of electoral system that is used commonly in other European states is the proportional representation list system. A list system uses national or large multi-seat regional constituencies in which voters cast their vote for the party of their choice. The seats in the legislature are then divided among the parties according to their share of the vote. In a closed list system, the political parties decide the priority of their candidates for the seats the party wins. In an open list system, the voter is able to express a preference among the party's candidates. Comparative international research indicates that PR list systems correlate with higher participation of women in elected politics.<sup>6</sup> However, the system *of itself* does not necessarily lead to this without other factors and some states with PR list systems have very low rates of female participation. In closed list systems, a technique known as 'zipping' can be used to ensure greater women's representation. It requires that every second candidate on

---

<sup>6</sup> Norris, P. 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *International Political Science Review* 297. It should be noted that in some countries where PR systems bring high levels of female representation, other factors, such as candidate quotas are also in use.

each party's list be a woman, to ensure that a sizable share of the party's elected representatives are women. This is a form of candidate gender quota that has proven successful in PR list systems.

One difficulty with introducing a closed party list system in Ireland is that it would essentially remove the constituency link between voter and TD. If regional lists were used, there may be some connection with a discrete geographical area, but it would be tenuous, because the number of representatives for each region would necessarily be very large and because TDs' future prospects (and so their electoral motivations) would be bound up far more with their party than with their local electorate. As was noted above, the extent of constituency work in Ireland is excessive; however, as the Constitution Review Group noted, the current system has popular support.<sup>7</sup> The Irish political culture is such that it seems unlikely that the electorate would endorse a system which removed the constituency link entirely. Government commissioned research on the reasons for voter behaviour in the Oireachtas enquiry referendum in 2011 found that most people were not in favour of changing the PR STV system.<sup>8</sup> While some variation on the current system may be palatable, a wholesale shift to a system with no constituency link at all seems unlikely to pass a referendum.

The extent to which multi-seat constituencies exacerbate the workload

---

<sup>7</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at p.60.

<sup>8</sup> *Report on Reasons Behind Voter Behaviour in the Oireachtas Inquiry Referendum 2011* (Department of Public Expenditure and Reform, January 2012), at p. 26

should not be discounted. A middle route between retaining the current system and a full national closed list system might be some form of mixed constituency and list system. In such systems, there are single-seat geographically based constituencies which make up a majority of the seats in the legislature and the remaining seats are made up from a national list system. These systems retain the constituency link, but because they are single-seat constituencies, the constituency workload can be expected to be lower overall, as there are not multiple TDs dealing with the same issue for a single constituent. Similarly, the portion of the seats accounted for by the list would (if the list was closed) eliminate any constituency work for those TDs. This type of system is currently in use in Germany, where women's representation is considerably higher than in Ireland.<sup>9</sup>

Smaller parties will tend to do less well in single seat constituency systems, unless their support is narrowly geographically concentrated. Even minority parties with very substantial support, such as the Liberal Democrats in the UK, do very badly in a single seat first-past the post system.<sup>10</sup> Conversely, a national PR list system will apportion each party a number of seats that very closely represents its share of the vote.<sup>11</sup> In a mixed system, the minority of seats allocated on the list system ensure

that there is an overall proportionality between vote share and seat share and so smaller parties are still likely to have some voice.

An example of a country which recently reformed its system is New Zealand, which in 1999 moved to the Mixed Member Proportional (MMP) system. MMP includes both single-seat first past the post constituencies and a closed party list system. New Zealand had previously had a first past the post system and had relatively low female participation in Parliament, despite being the first country in the world to legislate for women to vote. The shift in approach is credited with increasing women's membership in Parliament to around 30% in the elections in 1996, 1999 and 2002.<sup>12</sup> Interestingly, in the 2002 election, women won more of the constituency seats than the party list seats. This suggests that reform of the electoral system can improve women's participation. The MMP system is very similar to the Alternative Member System (AMS) considered by the Constitution Review Group. While the comparison is imprecise, this certainly suggests that a system of this type would improve gender equality in the Dáil.

---

<sup>9</sup> Norris, P. 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *International Political Science Review* 297, at pp.309-310.

<sup>10</sup> Norris, P. 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *International Political Science Review* 297, at p.305.

<sup>11</sup> Although it is worth noting that in order to be eligible to run in a PR list system, a party must ordinarily be already established to some extent.

---

<sup>12</sup> McLeay, E. 'Climbing On: Rules, values and women's representation in the New Zealand Parliament' in Sawyer, M Tremblay, M and Trimble, L (eds.) 'Introduction: Patterns and practice in the parliamentary representation of women' in Sawyer, M Tremblay, M and Trimble, L. *Representing Women in Parliament: A Comparative Study* (London: Routledge, 2006), at pp.74-76.

Comparison of relevant factors for electoral systems			
	Closed PR List	PR/STV	Mixed System
Constituency link and workload	None No link with any geographical constituency	Yes Excessive levels of work as TDs in same constituency duplicate work	Yes Not clear how much if introduced in Ireland but would be less than PR/STV
Role of Party	High Candidates rely entirely on party for selection and position of priority on party list	Medium Party has substantial role in selection, but constituency support valuable also	High for list seats Medium for constituency seats
Position of independent candidates	Weak	Strong	Medium
Position of smaller parties	Strong If party can get onto the ballot, it can expect vote share to correspond to seat share	Quite strong Larger parties get some seat bonus, but smaller parties can obtain seats with some geographical concentration of their vote	Weak for constituency seats Strong for list seats

### 2.5 Reform

A closed party list system has the potential to increase women’s representation very considerably, especially if combined with gender quota requirements. However, such a system would remove the constituency link and so may not be a feasible reform option given the Irish political culture. An alternative system would be one which includes both a single-seat constituency element and a closed list element. Experience in Germany and New Zealand suggests that this system would be able to increase women’s representation without severing the constituency link. However, the introduction of such a system would not, of itself, be sufficient. Experience of

party nominations in Ireland suggests that the nominations to the list would not necessarily be gender balanced. Therefore some additional measure, such as candidate gender quotas (considered below in Chapter 5) would also be required.

The NWCI does not yet have a clear policy on the question of electoral system reform. There are clear pros and cons to each system. However, a mixed system seems the most likely system to both increase the representation of women in politics but also ensure diversity of voices within the political system, by securing a space for smaller parties.

## 3: Convention Topic (v): Provision for same-sex marriage

### *Summary of main points*

- The Irish Constitution protects marriage but does not define it.
- In December 2006, the High Court refused to interpret the constitution as protecting same sex-marriage.
- If the Oireachtas were to legislate for same-sex marriage, it seems likely that the courts would defer to that decision as evidence of a changed consensus on the meaning of marriage in Irish society.
- Legislation for same-sex marriage could still feasibly be subject to a constitutional challenge by a conservative group. Such a challenge would seem quite likely to fail. However, a constitutional amendment defining marriage as including same-sex marriage should put the issue beyond doubt.

### **3.1 Marriage in the Irish Constitution**

Marriage holds a privileged place in the Irish constitutional order. Article 41 guarantees the rights of the family, which is specifically defined as the family based on marriage. Article 41.3.1° states:

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.

Although the Constitution gives this high priority to marriage, it does not include any definition of marriage. Section 2(2)(e) of the

Civil Registration Act 2004 states that it is an impediment to marriage for both parties to be of the same sex. While this does not provide a full definition of what marriage *is*, it does establish that marriage *is not*: same-sex union. Irish law therefore simultaneously provides a strong constitutional protection for marriage as well as a legislative scheme which excludes same-sex couples from getting married.

---

**“Civil partnership still falls short of full equality between same-sex and opposite-sex couples - only full civil marriage will achieve that equality.”**

---

It is clear that same-sex relationships have a lesser status in Irish law than opposite-sex relationships. As was discussed in some detail in the Colley Report commissioned by the Department of Justice,<sup>1</sup> this presents substantial impediments to same-sex couples and perpetuates discriminatory attitudes towards them. The same report noted that civil partnership would still fall short of full equality between same-sex and opposite-sex couples and so only full civil marriage would achieve that equality.<sup>2</sup> Subsequently, the Oireachtas passed the

---

<sup>1</sup> Colley, A. *Options Paper Presented to the Working Group on Domestic Partnership* (Dublin: Department of Justice, 2006)

<sup>2</sup> Colley, A. *Options Paper Presented to the Working Group on Domestic Partnership* (Dublin: Department of Justice, 2006) at pp. 50-52.

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. The Act does not provide all of the benefits of marriage and goes considerably less far in recognising same-sex couples than the equivalent legislation in the UK. The 2010 Act leaves 169 discriminatory differences between civil partnerships and marriage.<sup>3</sup>

In 2006, the All Party Oireachtas Committee on the Constitution considered the proposal of changing the definition of the family. The Committee considered changing the constitutional status of the non-marital family as well as whether or not to allow for same-sex marriage. It ultimately decided not to recommend any amendment extending the definition of the family on the basis that it would cause 'deep and long lasting division in our society'.<sup>4</sup> In doing so it acknowledged that this would mean that same-sex couples would not have constitutional protection for their family life, unless the courts were to interpret marriage as including same-sex couples. While it accepted that this was perhaps unlikely, it suggested that a 'contemporary interpretation' by the courts might expand constitutional marriage to include same-sex couples.<sup>5</sup>

---

<sup>3</sup> See generally: Fagan, P. *Missing Pieces: A comparison of the rights and responsibilities gained from civil partnership compared to the rights and responsibilities gained through civil marriage in Ireland* (Dublin: Marriage Equality, 2011).

<sup>4</sup> All Party Oireachtas Committee on the Constitution *Tenth Progress Report: The Family* (Dublin: Houses of the Oireachtas, 2006), at p. 122.

<sup>5</sup> All Party Oireachtas Committee on the Constitution *Tenth Progress Report: The Family* (Dublin: Houses of the Oireachtas, 2006), at p. 123.

### ***3.2 The High Court's interpretation of marriage***

In 2008, the High Court had an opportunity to consider this point in the case of *Zappone and Gilligan v. Revenue Commissioners*.<sup>6</sup> The plaintiffs had been in a committed same-sex relationship since the early 1980s and had been married in Canada after same-sex marriage had been legislated for in that country. They had sought married couple tax status from the Revenue Commissioners. This was refused on the basis that the married tax status was limited to opposite-sex couples. They sought a declaration from the High Court that their Canadian marriage was legally valid in Ireland.

Ms Justice Dunne in the High Court found that the courts' long-standing understanding of the definition of marriage has been exclusively opposite-sex marriage. She rejected the 'living instrument' approach to the constitution which was advanced as requiring a 'contemporary interpretation' of marriage which would include same-sex couples. She was of the view that '[i]n this case the court is being asked to redefine marriage to mean something which it has never done to date.'<sup>7</sup> While she recognised that some countries had introduced same-sex marriage, she was not prepared to accept that a consensus had developed that marriage was now to include same-sex marriage. In support of the view that there was not a sufficiently changed consensus, she noted specifically that the Civil Registration Act 2004 had very recently re-affirmed that marriage in Ireland excluded same-sex marriage. This is significant as it

---

<sup>6</sup> [2008] 2 IR 417.

<sup>7</sup> [2008] 2 IR 417, 505.



shows the court being reluctant to overturn the Oireachtas position on an issue where the public consensus on a controversial point was a relevant factor. If the Oireachtas were to legislate for same-sex marriage, then the same reluctance could be expected to defer to that legislation as the new consensus.

It is of note that the 2004 Act was not itself challenged in the *Zappone* case as it was only passed at around the same time that the Plaintiffs were instituting their proceedings. The Case was due to be appealed to the Supreme Court, but this has now been dropped and a fresh High Court action is being brought to allow for a challenge to the constitutionality of the relevant provisions of the 2004 Act. It is therefore apparent that Ms Justice Dunne's judgment will not be the final word on the issue. This subsequent case and any Supreme Court appeal arising from it, could feasibly lead to a finding that the constitutional definition of marriage includes same-sex marriage, if a different approach were taken to the 'living instrument' and consensus points.

### **3.3 Legislative reform**

In other countries, full civil marriage has been afforded to same-sex couples through legislation, for example, Canada. This presents the possibility that the Oireachtas could, if it chose to, legislate for full marriage for same-sex couples in Ireland. As in the Canadian example (discussed below) such legislation would be relatively straightforward: the institution of civil marriage already exists, it is merely a question of extending its reach to include same sex couples.

At first glance, this could be argued to be at odds with the *Zappone* decision, since the 1937 Constitution is currently interpreted as protecting opposite sex marriage, the constitutional protection is limited to marriage of that type. However, it seems likely that such legislation would survive constitutional challenge for two main reasons.

First, as was discussed above, Ms Justice Dunne placed a heavy emphasis on the lack of changed consensus that marriage should include same-sex couples. If legislation were passed by the democratically elected Oireachtas, then this would be the quintessential statement of a changed consensus. It could easily be argued that the contemporary interpretation approach to marriage must be applied in light of such a substantial legislative step. Courts are often keen to defer to legislatures on sensitive issues affecting social policy and this is likely to be one such area.

Secondly, even if a group seeking to challenge marriage equality legislation were to overcome the 'changed consensus' argument, they would need to satisfy a court that extending marriage to same-sex couples constituted an 'unjust attack' within the meaning of Article 41.3. Legislation providing for same-sex marriage would give certain statutory rights to same-sex couples. It would not, of itself, seek to change the existing constitutional status of marriage (although the courts could feasibly use a 'changed consensus' argument to do so). The 'unjust attack' argument would therefore need to establish that giving something by statute to one group is an attack on that same thing being enjoyed by another group under the constitution. Conservative groups made numerous

submissions to the All Party Oireachtas Committee on the Constitution. They were concerned primarily with retaining the special privileged status of traditional marriage.<sup>8</sup> The strongest ‘unjust attack’ argument that could be expected, would be the assertion that extending this privileged status beyond opposite-sex couples somehow reduces the level of that privilege. This is a difficult argument to sustain. No opposite-sex married couple would be any less married if same-sex couples can also marry. Previous court decisions concerning ‘unjust attack’ have been mainly concerned with discrimination against married couples.<sup>9</sup> It is also worth noting that the Judicial Separation and Family Law Reform Act 1989 survived a constitutional challenge (prior to the divorce referendum).<sup>10</sup> If controversial social legislation allowing for the (limited) break-up of a married couple is not an ‘unjust attack’ then it is hard to see how a law allowing for additional people to get married could be seen as such an attack.

Although the position of a legislative reform providing for same-sex marriage does seem to be quite strong, it is nonetheless well worth considering the option of a constitutional reform, particularly since this is one of the stated topics for the Constitutional Convention. There is a strong argument that a constitutional amendment is not necessary, but that does not mean that it is not desirable.

---

<sup>8</sup> All Party Oireachtas Committee on the Constitution *Tenth Progress Report: The Family* (Dublin: Houses of the Oireachtas, 2006), at pp. 56-62.

<sup>9</sup> See for example *Murphy v Attorney General* [1982] IR 241.

<sup>10</sup> See *TF v Ireland* [1995] 1 IR 321.

If a solely legislative approach to marriage equality were taken, then the legislation would probably be upheld; the argument against ‘changed consensus’ and the argument that it is an ‘unjust attack’ may well be weak, but that does not mean that they would not be pursued through the courts. There are enough groups with strong enough convictions on this point that a constitutional challenge seems inevitable, regardless of its chances. Furthermore, the story of the 1937 Constitution is in many ways the story of judicial interpretation, which is notoriously difficult to predict. It cannot be stated with absolute certainty that a court would not strike down legislation providing for same-sex marriage. The Constitutional Convention presents the opportunity to change the Constitution itself to allow for same-sex marriage, which would exclude the possibility of a challenge based on the current interpretation of the 1937 Constitution. Furthermore, a constitutional reform would also allow for a valuable symbolic recognition of equality for LGBTQ people in Ireland.

---

**A court could strike down legislation providing for same-sex marriage. The Constitutional Convention presents the opportunity to exclude the possibility of a challenge.**

---

### **3.4 The ECHR view**

The ECHR has recently considered the issue of same sex marriage in the case of *Schalk and Kopf v Austria*.<sup>11</sup> The court found that the right to marry in Article 12 of the

---

<sup>11</sup> (2011) 53 EHRR 20.

European Convention does not include a right to same-sex marriage. It noted the fact that the text of Article 12 makes reference to 'men and women' and the lack of a Europe-wide consensus. However, the court did find that same-sex relationships came within the meaning of 'family life' in Article 8 of the European Convention. It had been accepted for some time that such relationships came within the 'private life' guarantee, but the ECHR took the view that the time had come to recognise that these relationships also constituted family relationships. This is not sufficient to require the Irish state to legislate for same-sex marriage, but it does require some concrete recognition of same-sex relationships. It is certainly arguable that if enough Member States of the Council of Europe (which is the international organisation associated with the ECHR) were to legislate for same-sex marriage, then the ECHR might at some later point find that there was a Europe-wide consensus. However, this seems unlikely to happen in advance of Ireland's Constitutional Convention.

### **3.5 The Canadian approach**

In 2004, the Supreme Court of Canada considered the constitutionality of a proposed Bill extending civil marriage to same-sex couples.<sup>12</sup> The Bill, entitled 'Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes' contained a very short and direct, gender-neutral definition of civil marriage. Section 1 of the Bill stated: 'Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.' The Supreme Court found that the proposal was constitutionally valid and was in

---

<sup>12</sup> *Reference Re Same Sex Marriage* [2004] 3 SCR 698.

keeping with the Charter of Rights and Freedoms (which is a bill of rights annexed to the Canadian Constitution). The court noted that the definition was an amended version of the existing common law definition of marriage, which is taken from the case of *Hyde v Hyde*<sup>13</sup> in which it was held that 'marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.'<sup>14</sup>

It is worth noting that the thrust of this definition has also been affirmed in Ireland. In *B v R (Validity of Marriage)*,<sup>15</sup> Costello J used the definition 'the voluntary and permanent union of one man and one woman to the exclusion of all others for life'<sup>16</sup> However, the decision in *B v R* was given in January 1995, and so it predates the introduction of divorce in Ireland. For that reason, the word 'permanent' would no longer be appropriate (it is also of note that 'for life' in the *Hyde v Hyde* definition was not used in the Canadian legislation).

Much of the discussion in the Canadian Supreme Court in the *Marriage Reference* case was whether the Canadian government was exceeding its federal powers, which the Court held that it was not. The Supreme Court had previously found that the equality provisions of the Charter prevented discrimination on the basis of sexual orientation.<sup>17</sup> In respect of the equality provision, the Court held that the proposed Bill:

---

<sup>13</sup> (1866) LR 1 P&D 130.

<sup>14</sup> (1866) LR 1 P&D 130, at p. 133.

<sup>15</sup> [1996] 3 IR 549.

<sup>16</sup> [1996] 3 IR 549, at p. 554.

<sup>17</sup> See for example: *Vriend v Alberta* [1998] 1 SCR 493.

[E]mbodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the *Proposed Act* and with the preamble thereto, points unequivocally to a purpose which, far from violating the *Charter*, flows from it.<sup>18</sup>

The court rejected the argument that there was a fixed definition of marriage which was confined to opposite-sex couples. Unlike the Irish High Court in *Zappone*, the Canadian Supreme Court expressly endorsed the contemporary interpretation approach.

It is of note that the Canadian approach of simply defining marriage in gender neutral terms obviates the need for complex civil partnership legislation, since it extends the existing legal institution to same-sex couples.

---

**“The Canadian approach of simply defining marriage in gender neutral terms obviates the need for complex civil partnership legislation, since it extends the existing legal institution to same-sex couples.”**

---

An additional point of note when comparing the Canadian and Irish examples is that, despite the different stance taken on the definition of marriage, in *both cases*, the court found that the definition of marriage used by the legislature was constitutionally

---

<sup>18</sup> *Reference Re Same Sex Marriage* [2004] 3 SCR 698, at para. 43.

permitted. Neither court took issue with a position taken by the legislature. This reinforces the proposition that where the legislature takes a position on same-sex marriage, the courts are likely to defer to it.

### **3.6 Reform**

The Constitutional Convention is charged with considering a constitutional amendment relating to same-sex marriage. As was discussed above, a constitutional amendment would put the matter beyond doubt in a way that goes beyond a legislative reform and would be a strong statement in favour of equality. The constitutional amendment itself can be done in one of two ways. First, a gender-neutral definition of marriage could be written into the Constitution. Secondly, the Constitution could be amended to clarify that the reference to marriage in Article 41 includes same-sex marriage.

The benefits of the former are that it provides a concise understanding of the issue and, symbolically, raises the status of same-sex unions within the constitutional order. The drawback is that such a definition would need to be interpreted by the courts, which runs the risk of unintended consequences. A clarification that Article 41 does not exclude same-sex marriage would ensure that the Oireachtas could legislate for same-sex marriage without any fear of a subsequent constitutional challenge, but would not leave interpretation in the hands of the courts.

On balance, the Canadian experience suggests that it is possible to have a very short and concise definition of marriage which allows for full marriage equality. The

existing common law definition from *Hyde v Hyde* as recognised in Ireland in *B v R* would be the most obvious template. Some Irish cases have also made reference to 'partnership' in the context of constitutional marriage. In *Murray v Ireland* (which also predated divorce), Costello J referred to marriage as a 'partnership based on an irrevocable personal consent'.<sup>19</sup> More recently, in *DT v CT Murray* J referred to marriage as a 'solemn contract of partnership'.<sup>20</sup> This wording could usefully be included in order to embed the new definition in the existing constitutional tradition. By relying on language that has already been used by the courts, it is feasible to construct a wording which fits in with the existing law on civil marriage.

The most straightforward approach would be to insert an additional subsection, which would become Article 41.3.4<sup>o</sup>. The wording advised would be as follows:

*The civil institution of Marriage as regulated by law is the voluntary union of two persons, based on a solemn contract of partnership and to the exclusion of all others.*

This wording clarifies that the definition is limited to the legal, civil institution of marriage and not to any related religious practice. It also clarifies that the reference is to the institution as regulated by legislation and so would lead to the extension of existing legal protections. The wording is drawn from existing case law on marriage and so is less likely to give rise to unexpected interpretations by the courts.

---

<sup>19</sup> [1985] IR 532, at p. 536.

<sup>20</sup> [2002] 3 IR 334, at p. 405

## 4. Convention Topic (vi): Amending the clause on the role of women in the home and encouraging greater participation of women in public life

### *Summary of main points*

- The gendered care-giver reference to the role of women in the home does not reflect the lives of many women and should be removed.
- It should be replaced with a provision which gives symbolic recognition which values of all forms of care work, especially unpaid informal care work.
- Civil society groups help to ensure that women's voices are heard. The contribution of civil society should be reflected in the Constitution by recognising the role of associational and participatory democracy and recognising the need for active citizenship. Electoral reform and gender quotas will remove some barriers to women's participation in politics life, but others will persist.
- A greater involvement of women in public life, more broadly understood, will assist in the development of greater political representation of, for and by women.

### *4.1 The constitutional recognition of women's care work in the home*

The 1937 Constitution, unlike its 1922 predecessor, expressly recognizes the role of care-giving. However, in so doing, it ascribes that role exclusively to women. Article 41.2 states:

1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

This is a problematic and controversial provision. Much of the controversy relates to the symbolism of making this generalised statement about a single universal concept of what women should be and should do, which fails to recognise the vast diversity of women and of women's experiences. Reductionist even in 1937, it is clearly anachronistic and inaccurate in 2012.

The provision has actually resulted in very little litigation and so there has not been significant interpretation by the courts. On one occasion the High Court used Article 41.2 as a justification for upholding a law that treated men less favourably under the social welfare system.<sup>1</sup> On another occasion, the Supreme Court decided that Article 41.2 could not be used to grant a wife who worked in the home an equal

---

<sup>1</sup> *Dennehy v Minister for Social Welfare*, Unreported, High Court, 1984 Barron J

share in the family home.<sup>2</sup> Aside from these cases, there have been very few decisions of the courts which turned on Article 41.2.

While the provision has not been a significant factor in litigation, it does serve a symbolic role, which, as was discussed in chapter 1, is an important function of constitutions. It is worth examining the positive and negative aspects of that recognition. On the one hand, the majority of unpaid caring work done in Irish society is done by women. For example, women do 86% of child supervision and 82% of care of adults in Ireland.<sup>3</sup> Some recognition of that work at a constitutional level suggests an importance is being put on such work; albeit not so important that it is construed as legally enforceable in the vein of a socio-economic right. In the case of *Sinnott v Minister for Education*<sup>4</sup> Ms Justice Denham (who subsequently became the Chief Justice) gave a general observation as to the meaning of Article 41.2 in the 21<sup>st</sup> Century. She said:

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

---

<sup>2</sup> *L v L* [1992] 2 IR 77.

<sup>3</sup> See *Who Cares? Challenging the myths about gender and care in Ireland* (Dublin: National Women's Council, 2009)

<sup>4</sup> [2001] 2 IR 545.

with other Articles of the Constitution when a combination of Articles fall to be analysed.<sup>5</sup>

She also commented that 'The undefined and valuable role of the father was presumed and remained unenumerated by the drafters of the Constitution.'<sup>6</sup> This is a very charitable interpretation of the provision. Nonetheless, it is worth noting that Ms Justice Denham does not have the power to amend the text and so was perhaps giving it as up-to-date a reading as possible, which seeks to highlight the benefits of care work while minimising the gender prescriptive language. However, from a symbolic point of view, the gendered language is very difficult to defend by any contemporary standard. A far less charitable interpretation is given by Doorley, who mounts a scathing critique of the gendering contained in Article 41.2:

In this Article, the Constitution adopts most explicitly a dualism of private and public spheres, with women's citizenship mandated for the realm of domestic management, nurturing, education of the young and a plethora of complex and demanding tasks. Woman's "life" is in her home and a strong implication can be drawn that this is where her primary citizen commitments should be contained.<sup>7</sup>

She also points out that the wording excludes the possibility that some women

---

<sup>5</sup> [2001] 2 IR 545, at p. 665.

<sup>6</sup> [2001] 2 IR 545, at p. 664.

<sup>7</sup> Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. And Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 127.

may not choose to subscribe to the homemaker lifestyle and that these women's choices are undermined. She argues that:

The life given to important realities of home and family may not be the choice of some women. Where is their diversity valued in the universalizing thrust of the reference to "woman"? Are these diverse women who choose not to marry, not to mother, either legitimated or valued under the normative simplicity in the concept "woman"?<sup>8</sup>

This is the crux of the problem with the current wording. However much we might, as a society, generally accept that care work in the home is a positive and beneficial thing, the language used suggests both that this is exclusively women's work and that it is the only work that women should do. The CEDAW Committee has criticised Ireland's retention of Article 41.2 in its current form:

The Committee is concerned at the persistence of traditional stereotypical views of the social roles and responsibilities of women and men in the family and in society at large which are reflected in article 41.2 of the Constitution and its male-oriented language

...

The Committee also suggests that the State party consider replacing male-oriented language with gender-sensitive language in the

---

<sup>8</sup> Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. And Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 127.

Constitution to convey the concept of gender equality more clearly.<sup>9</sup>

The current wording of Article 41.2 is conceptually limiting of the diversity of women's lives. It is also completely inaccurate. In 2011, 56% of women aged 15-64 were in employment outside the home.<sup>10</sup> If the goal of Article 41.2 was to prevent women from being forced to enter the workforce, then it has been an unmitigated failure. Notwithstanding this, women remain primarily responsible for care work in Irish society.<sup>11</sup>

In recognising women as primary care giver and validating that role, an implicit rejection is made of women as economically independent. Similarly, the definition of woman also implies a corresponding vision of man as breadwinner. This vision of gender is of significance both for the validation of private sphere citizenship and our economic system. These roles, if they ever were reflective of Irish society, are certainly not reflective of it now. Women face the choice of rejecting the role outright and joining the workforce (contrary to the guarantees of the constitution that she would not be obliged to do so) or attempting to play up to it. No constitutional space is made for men as caregivers. As Connelly puts it:

---

<sup>9</sup> Committee on the Elimination of Discrimination Against Women, Thirty Third Session, *Concluding Comments: Ireland* CEDAW/C/IRL/CO/4-5 at paras. 24-25.

<sup>10</sup> *Women and Men in Ireland* (Dublin: Central Statistics Office, 2011), at p. 16.

<sup>11</sup> See *Who Cares? Challenging the myths about gender and care in Ireland* (Dublin: National Women's Council, 2009).



Specific mention is made of the role of women in the home and as mothers (Article 40.3.3 and 41.2.1 & 2). Nowhere in the Constitution is the word father to be found; nor is the role of men in the domestic sphere specifically addressed. Furthermore, it is clear from the tenor of the relevant constitutional provisions that it is in their role as wives and mothers that women are especially valued.<sup>12</sup>

#### **4.2 Valuing care and sharing care work equally**

Society is highly interdependent. Every member of the society is dependent on the care of others at some stage of their life: every adult was once a child and many will require care during their adult life too, particularly in the later stages of it. This mutual dependency gives rise to a strong moral obligation to care for one another.<sup>13</sup> This care work is essential to the common good and performs vital social and economic functions. In Irish society most of this care work is done on an informal and unpaid basis.<sup>14</sup> Care work is not easily commodified or monetised, but it is clear that without the substantial amount of unpaid care work done in Irish society, the country would be unable to function socially or economically. Care is not a luxury of private family life; it is essential to the

---

<sup>12</sup> Connelly, A 'The Constitution' in Connelly, A (ed.) *Gender and the Law in Ireland* (Dublin: Oak Tree Press, 1993), at p. 5.

<sup>13</sup> Engster, D. 'Rethinking Care Theory: The Practice of Caring and the Obligation to Care' (2005) 20 *Hypatia* 50 at pp. 63-64.

<sup>14</sup> See *Who Cares? Challenging the myths about gender and care in Ireland* (Dublin: National Women's Council, 2009).

continued survival of our society and presents a strong moral imperative for the State to recognise and support care. Notwithstanding this, informal unpaid care work is increasingly invisible.

---

**“Care work is not easily commodified but without the substantial amount of unpaid care work done the country would be unable to function socially or economically.”**

---

Women perform the lion's share of unpaid informal care work in Irish society.<sup>15</sup> Women do 82% of caring for adults and 86% of supervision of children. 70% of people in their thirties providing full time care are women. This unequal distribution of informal unpaid care work places women at a considerable disadvantage relative to men; they are shouldering significantly more responsibility with minimal recognition. It is imperative that men's equal responsibility for care work be emphasised and that all care work be made more visible.

The reality of Irish life is that, even within the traditional heterosexual marriage, the majority of women are in paid work outside the home. In 2011, 56% of women were in paid employment and over half of all women with children were in paid

---

<sup>15</sup> See Lynch, K. and Lyons, M. 'The Gendered Order of Caring' in Ursula, B. (ed.) *Where Are We Now? New feminist perspectives on women in contemporary Ireland* (Dublin: TASC, 2008)

employment of some form.<sup>16</sup> The constitutional presumption is still that care work is done on a full-time basis by married women who did not work outside the home. This model is clearly outdated and yet there is little provision for, or recognition of, what this change means for care work. The dominant approach is to value paid employment and to treat unpaid informal care work as some form of private choice.

The mass entry of women into the workplace has led to one of the largest single increases in the economically productive workforce in history. This has ramifications for increases in both economic growth and income tax revenues. Despite all of this, the State has been remarkably hesitant to create any new space for protecting the important work of informal unpaid caring. This is particularly problematic since women, who are responsible for the huge boost in the labour force, continue to bear primary responsibility for care.

If anything, women in the workforce are held back from making the contribution that they might wish to because of the wholly unequal distribution of care work. Those who engage in unpaid informal care work are in a far more precarious position than those without similar responsibilities. They earn less and are more likely to be in part-time work<sup>17</sup>. Smith argues that:

Reduced attachment to the labour market and loss of opportunity

---

<sup>16</sup> *Women and Men in Ireland* (Dublin: Central Statistics Office, 2011), at pp. 16-22.

<sup>17</sup> *Who Cares? Challenging the myths about gender and care in Ireland* (Dublin: National Women's Council, 2009), at pp 14-15.

within the labour market are also risk factors, as those who juggle care-giving work and labour market participation may be at risk of discrimination where they are constructed as "inauthentic workers" by the labour market.<sup>18</sup>

Care work is an essential function in Irish society. Article 41.2 made some effort to recognise this, but it did so clumsily and without any recognition of the responsibility of men to engage in such work. A reformed Article 41.2 can go some way towards building an equal and visible model of care work in Ireland.

#### ***4.3 Reform on a constitutional ethic of care***

The current wording of this provision is unjustifiably gendered in a manner which limits the space for the diversity of women's experience. It has drawn criticism from the CEDAW Committee as conflicting with Ireland's commitments under CEDAW. The gendered aspect of the provision must be changed. The Constitution Review Group recommended the adoption of a gender-neutral provision on the value of care within the home and family. Their proposed version was:

The State recognises that home and family life give society a support without which the common good cannot be achieved. The State shall

---

<sup>18</sup> Smith, O. 'How far from a "right to care"? Reconciling care work and labour market work in Ireland' (2012) *XLVII Irish Jurist* 143, at pp. 146-147.

endeavour to support persons caring for others within the home<sup>19</sup>

This wording provides symbolic recognition for care work without assigning specific gender roles. To this end, it resolves the immediate and obvious problem of the existing wording. However, the reference to 'within the home' is somewhat problematic as it excludes care for family members outside of the home and unpaid care work in the community more broadly, all of which are of significant benefit to the society as a whole. Engster endorses a broad definition of caring:

[C]aring may be said to include everything we do directly to help others to meet their basic needs, develop or sustain their basic capabilities, and alleviate or avoid pain or suffering, in an attentive, responsive and respectful manner.<sup>20</sup>

This broader model could be accommodated within a slightly amended wording of the Constitution Review Group proposal as follows:

*The State recognises that home, family and community life give society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others.*

This change in the text would shift the symbolic function of this provision to reflect an appropriate and gender-neutral vision of

the value of care work as well as how we as a nation see ourselves. Given the courts approach to Article 41.2 in the past, it is unlikely that this text would, of itself, provide a constitutional requirement that caregivers receive certain levels of financial or other concrete support. Its function is likely to be primarily symbolic, but that is undoubtedly a valuable function. It seems unlikely that the courts would develop a body of concrete constitutional benefits for care workers through this provision without some separate express endorsement of socio-economic rights. Such a move is *essential* if the position of unpaid informal care work is to receive meaningful recognition in Irish society. Unpaid care workers are at greater risk of poverty and, on average, face considerably more insecurity in relation to meeting their basic needs than those who can dedicate all of their time to paid employment. A meaningful guarantee of socio-economic rights would give unpaid carers the recognition and support that they deserve. Socio-economic rights are considered further in Chapter 9.

#### **4.4 Participation in public life**

The second aspect of topic (vi) for the Constitutional Convention concerns increasing women's participation in public life. This issue is closely connected to the constitutional reference to the place of women being in the home. As was discussed above, the current wording of Article 41.2 seeks to relegate women to the private sphere only and denies the diversity of women's choices and experience in the labour market and in how they form and organise their family lives.

<sup>19</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp.333-334.

<sup>20</sup> Engster, D. 'Rethinking Care Theory: The Practice of Caring and the Obligation to Care' (2005) 20 *Hypatia* 50, at p. 55.

Aside from the symbolic denial of women's place in the workforce, the existing provision also denies women's place in public life more broadly. The specific issues of the electoral system and participation in elected politics have been assigned separate topics for the Constitutional Convention and are discussed elsewhere in this paper. However, the wider concept of 'public life' also requires some consideration.

As is discussed in relation to convention topic (iii) (above) and convention topic (vii) (below), the Irish electoral system and practice actively discourage women from contributing as elected officials. Many of the factors which discourage women from entering into professional elected politics also discourage women generally from participation in the public life of the State generally. The CEDAW Committee has expressed concern regarding women's low participation in political and public life in Ireland.<sup>21</sup>

The public life of the nation and of the state extends beyond the realm of the elected political representative. The concept of citizenship is of greater symbolic weight than merely voting in general elections. Contribution to national discourse is an essential aspect of citizenship and yet, making such a contribution is easiest for those who already hold privileged positions in the society. Much of Irish public policy is devised in government departments and pursued by ministers. It cannot be assumed that these decisions are made on the basis

---

<sup>21</sup> Committee on the Elimination of Discrimination Against Women, Thirty Third Session, *Concluding Comments: Ireland* CEDAW/C/IRL/CO/4-5 at para. 24.

of the expression of the views of a full cross-section of the community. The influence of trade unions, the corporate sector and professional lobbyists is often hidden from view in this process.<sup>22</sup> These institutions are for the most part male-dominated and so continue to function through a male prism.

---

**“Associational democracy already plays a role in increasing women’s participation in public life more generally. Non-profit organisations, such as the National Women’s Council of Ireland and its member organisations work to give women a voice.”**

---

Women's limited opportunity to influence existing male-dominated decision-making processes could be improved through recognition of civil society groups. To this end, associational democracy already plays a role in increasing women's participation in public life more generally. Non-profit organisations, such as the National Women's Council of Ireland and its member organisations, work to give women a voice and make women's issues more prominent in public discourse.

Article 15.3.1° currently provides a limited mechanism for improving consultative democracy. It states:

---

<sup>22</sup> It is of note that the Department of Public Expenditure and Reform is currently engaged in a consultation process with regard to the registration of lobbyists to improve transparency in relation to the decision-making process.

The Oireachtas may provide for the establishment or recognition of functional or vocational councils representing branches of the social and economic life of the people.

The Constitution Review Group recognised that there has been a shift in recent years to include more groups in planning and organising policy development. The Group noted that:

The purpose of these initiatives has been to expand and improve the system of democratic participation, particularly for those segments of society which are distanced from effective involvement in the traditional systems of representative democracy, including working-class communities, women's groups, travellers and disabled people.

The fact that so many new participatory structures have been established is itself an indication of the weaknesses of the existing systems of representation and the lack of flexibility within them to allow for change.<sup>23</sup>

Mechanisms such as these can be expected to increase women's participation in public life generally. Reform of this aspect of the Constitution would also provide an opportunity to expressly recognise the need for active participatory citizenship. This is likely to be primarily a symbolic recognition, since it would be difficult to place constitutional duties on all citizens to engage at a particular level. Nonetheless, as

has repeatedly been noted, the symbolic aspect of the constitution is of considerable importance. A recognition of participatory democracy in the constitution would be one piece of the puzzle. An ethos of active citizenship would also need to be reinforced in the public sphere, particularly through education.

#### *4.5 Reform on women's participation in public life*

The Constitution Review Group recommended that the existing text of Article 15.3.1<sup>o</sup> be replaced with the following:

The Oireachtas may provide for the establishment or recognition of advisory or consultative bodies representing branches of the social, community, voluntary and economic life of the people, with a view to improving participation in, and the efficiency of, the democratic process.

Such a provision would not mandate a greater degree of participatory democracy, but would permit the Oireachtas to legislate to establish these consultative bodies. It would be worth altering this wording to ensure that the goal of participatory democracy is not shelved and to ensure that marginalised groups are included.

In addition to this, it should go beyond giving technical permission to the Oireachtas to establish consultative bodies. Reform of this provision also provides an opportunity to include a reference to active citizenship. Such a provision would

---

<sup>23</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at p.42.

recognise the contribution that individuals can make to public life. It should also account for associations of individuals. As was noted above, such associations are often a more useful way of ensuring that women's voices are heard than relying on individual action. However, it is important that the wording be restricted to actual associations of individual citizens, so as to exclude commercial companies from the definition. Otherwise the door would be opened for a corporate constitutional right to lobby the Government. An appropriate wording would be a two part section as follows:

*All citizens, both as individuals and in associations of individual citizens, shall have the opportunity to participate fully and actively in the public life of the State, with a view to enhancing the democratic process and such participation shall be supported by the State.*

*The Oireachtas shall provide for the establishment or recognition of advisory or consultative bodies representing branches of the social, community, voluntary and economic life of the people, in particular those branches which have been historically underrepresented, with a view to maximising participation in democratic life.*

## 5. Convention Topic (vii): Increasing the participation of women in politics

### *Summary of main points*

- Electoral candidate quota systems are one of the most effective ways of improving women’s participation in politics.
- An argument can be made that the current text of the constitution could be interpreted as a ban on candidate quotas. While this argument seems unlikely to succeed in court, the Constitutional Convention presents an opportunity to put the issue beyond doubt. This would be done by amending the Constitution to permit (but not necessarily require) the use of gender quotas.

### *5.1 Women in electoral politics in Ireland*

Ireland has historically had a low level of women’s participation in elected politics. Currently, the Dáil contains 25 women TDs out of 166 (13.8%). While this is high compared to previous Irish elections, it is low by international standards (especially European standards) and comes nowhere close to reflecting the actual percentage of women in Irish society, which is just over 50%.<sup>1</sup> This discrepancy has drawn criticism from the CEDAW Committee which has said that it ‘is concerned at the significant underrepresentation of women in elected

political structures, particularly in the Oireachtas.<sup>2</sup>

A comprehensive analysis of the ways in which women can be brought into political life is beyond the scope of this paper and is beyond the scope of the Constitutional Convention. The concern here is with the ways in which the 1937 Constitution itself impedes or can potentially impede women’s participation in politics and to find appropriate ways in which the Constitution can be used to maximise women’s participation in politics. At present, the only reference to gender and elected office in the Constitution is contained in Article 16.1.1° and Article 16.1.3° which state:

1° Every citizen without distinction of sex who has reached the age of twenty-one years, and who is not placed under disability or incapacity by this Constitution or by law, shall be eligible for membership of Dáil Éireann.

...

3° No law shall be enacted placing any citizen under disability or incapacity for membership of Dáil Éireann on the ground of sex or disqualifying any citizen or other person from voting at an election for members of Dáil Éireann on that ground.

---

<sup>1</sup> *Census of Population 2011: Preliminary Results* (Dublin: Central Statistics Office, 2011)

---

<sup>2</sup> Committee on the Elimination of Discrimination Against Women, Thirty Third Session, *Concluding Comments: Ireland CEDAW/C/IRL/CO/4-5* at para 32.

The inclusion of ‘without distinction as to sex’ is an important protection against any attempt to prevent women from standing for election. However, the problems faced by women seeking to enter politics in 2012 are more nuanced than was the case in 1937, when the removal of the ban on women standing for election was mere decades old.

The reasons for low women’s participation in elected politics are intricate and complex. For example, Sawyer and Trimble refer to the problem of ‘supply factors’ in increasing women’s representation in parliaments. They note that US research has shown that women candidates who run are as likely to win as male candidates, but they are less likely to run in the first place. They suggest that ‘[d]etermining why women eschew political careers is key to understanding why the supply of women candidates remains low.’<sup>3</sup> They went on to state that:

[W]here we can assume a high level of women’s education and workforce participation ... factors that are significant in explaining variations in women’s political representation include the electoral system, the existence of quotas, a “contagion” effect where one party significantly increased its women candidates, the nature of political parties and the party system and background factors such as religion

---

<sup>3</sup> Sawyer, M Tremblay, M and Trimble, L ‘Introduction: Patterns and practice in the parliamentary representation of women’ in Sawyer, M Tremblay, M and Trimble, L. *Representing Women in Parliament: A Comparative Study* (London: Routledge, 2006), at p. 11.

and the nature of women’s movement strategies.’<sup>4</sup>

A 2009 report of the Oireachtas Joint Committee on Justice, Equality Defence and Women’s Rights summarised the obstacles to women’s participation: ‘International research shows that the same or similar challenges face women in entering into politics throughout the world, summarised as follows:

- *Childcare* – women are more likely to have this responsibility<sup>5</sup>
- *Cash* – women have less access to resources than men
- *Confidence* – women are less likely to go forward for selection
- *Culture* – a gendered culture is prevalent even within left-wing parties
- *Candidate selection procedures* – the processes by which political parties select candidates has been identified as posing a significant obstacle to women’s political participation’<sup>6</sup>

Some research suggests that once women become more established in political life in greater numbers, many of these challenges are likely to be significantly alleviated. A key

---

<sup>4</sup> Sawyer, M Tremblay, M and Trimble, L ‘Introduction: Patterns and practice in the parliamentary representation of women’ in Sawyer, M Tremblay, M and Trimble, L. *Representing Women in Parliament: A Comparative Study* (London: Routledge, 2006), at p. 10.

<sup>5</sup> This is borne out by the findings of *Who Cares? Challenging the myths about gender and care in Ireland* (National Women’s Council, 2009).

<sup>6</sup> Joint Committee on Justice, Equality Defence and Women’s Rights *Second Report: Women’s Participation in Politics* (Houses of the Oireachtas, 2009), at p.11.



difficulty is with getting that initial ‘critical mass’ of women into elected office in the first place. In addition a number of motions have been passed at NWCI AGMs reflecting the idea of ‘critical actors’: not only is the number of women involved in politics important, but the kind of policies pursued by women politicians is equally important.

Feminist policies focus particularly on marginalised and socially excluded women. To this end ensuring political participation of women from socially excluded backgrounds - who face additional barriers - is also a key policy goal of the NWCI.

## **5.2 Candidate gender quotas**

The mechanism recommended by the 2009 Joint Oireachtas Committee report was the use of gender quotas for candidates standing for election. The recommendation is solely concerned with the number of women running for election; it does not require any specific number of women to actually be elected. It is possible to go further than merely requiring a certain number of women candidates and to reserve a certain number of seats for women; however, this would be a much more substantial restriction on democratic choice as it requires specific outcomes, rather than that people be offered balanced choices. In any event, it is very unlikely that a quota of actual seats for women would be permitted by EU law. The Joint Oireachtas Committee Report notes that ‘the European Commission for Democracy Through Law has recently stated that “Reserved seats for women are not considered as a viable and legitimate option in Europe.”’<sup>7</sup> And, further,

---

<sup>7</sup> Joint Committee on Justice, Equality Defence and Women’s Rights *Second Report: Women’s*

that a model of reserving seats for women in parliament is not used in European countries, and might be problematic under EU gender equality laws.<sup>8</sup>

Experience in other European states suggests that gender quotas can be very effective for improving the level of women’s parliamentary representation.<sup>9</sup> The effectiveness of gender quotas is borne out in social science research and international practice. The Oireachtas Joint Committee report stated that ‘[p]olitical party selection procedures have been identified as the single most important obstacle to women’s political participation.’<sup>10</sup> The vast majority of TDs are elected through political parties. This means that the parties are the gatekeepers of access to a political career. Candidate selection procedures are notoriously opaque and without access to existing power networks, women are likely to be excluded. Parties therefore play an essential role in increasing women’s participation.<sup>11</sup> International experience suggests that it is only where parties take

---

*Participation in Politics* (Houses of the Oireachtas, 2009), at p.20.

<sup>8</sup> Joint Committee on Justice, Equality Defence and Women’s Rights *Second Report: Women’s Participation in Politics* (Houses of the Oireachtas, 2009), at p.31.

<sup>9</sup> See generally Russell, M. and O’Cinneide, C. ‘Positive Action to Promote Women in Politics: Some European Comparisons’ [2003] *International and Comparative Law Quarterly* 587.

<sup>10</sup> Joint Committee on Justice, Equality Defence and Women’s Rights *Second Report: Women’s Participation in Politics* (Houses of the Oireachtas, 2009), at p.17.

<sup>11</sup> Sawyer, M Tremblay, M and Trimble, L ‘Introduction: Patterns and practice in the parliamentary representation of women’ in Sawyer, M Tremblay, M and Trimble, L. *Representing Women in Parliament: A Comparative Study* (London: Routledge, 2006), at p. 11.

positive steps to increase the number of women candidates that the number of women representatives increases perceptibly. In some instances, such as Sweden, this was done voluntarily by all parties. In others, laws were introduced to require it.

---

**“International experience suggests that it is only where parties take positive steps to increase the number of women candidates that the number of women representatives increases perceptibly.”**

---

Measures of this sort are expressly countenanced by Article 4(1) of CEDAW which states:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The CEDAW Committee has recently encouraged Ireland to adopt measures under this Article to increase the representation of women in elected bodies.<sup>12</sup>

---

<sup>12</sup> Committee on the Elimination of Discrimination Against Women, Thirty Third Session, *Concluding Comments: Ireland* CEDAW/C/IRL/CO/4-5 at para 33.

Legislation for this purpose is already before the Oireachtas. The Electoral (Amendment) (Political Funding) Bill 2011 was passed by the Dáil in July 2012 and can be expected to become law well in advance of the next local elections in 2014. The Bill proposes a system of electoral gender quotas. The system would amend previous electoral legislation such that all parties would have their public funding reduced by 50% if they failed to field a minimum of 30% of candidates of each sex for the first seven years. After seven years, this requirement would increase to 40% of candidates of each sex. Measures of this type are common throughout Europe. France, Belgium, Portugal and Spain all have mandatory laws requiring minimum numbers of women candidates.<sup>13</sup>

### ***5.3 Constitutionality of gender quotas***

Given the seeming political support for this measure, the main constitutional concern is whether the measure would be struck down by the courts. If any challenge were brought to the measure, it would presumably be based primarily on Article 16.1.1° and Article 16.1.3°. The problem is caused by a potential conflict between equality of treatment (formal equality) and equality of outcomes (substantive equality). In order to achieve substantive equality, sometimes formal equality must give way. A group that has traditionally been dominant may have to suffer some discrimination in order to improve the position of marginalised groups. In the case of gender quotas, some male candidates for the Dáil will find that

---

<sup>13</sup> Russell, M. and O’Cinneide, C. ‘Positive Action to Promote Women in Politics: Some European Comparisons’ [2003] *International and Comparative Law Quarterly* 587.

they are unable to stand for election solely for the reason that they are men.

Proponents of gender quotas can plausibly argue that reducing party funding for failing to have sufficient representation of women does not prevent citizens from running for the Dáil based on sex. However, it is not beyond the bounds of possibility that the constitutionality would be challenged in the courts. Former Attorney General and Minister for Justice, Michael McDowell came out publicly at the time of the introduction of the 2011 Bill and asserted that it would be unconstitutional.<sup>14</sup>

---

**“Former Attorney General and Minister for Justice, Michael McDowell came out publicly at the time of the introduction of the 2011 Bill and asserted that it would be unconstitutional.”**

---

If a constitutional challenge were launched in the courts *and* if it were successful, then the gender quotas legislation would be struck down. The basis of any such challenge could be expected to assert some or all of the three following arguments:

1. A differential in funding between parties that comply and parties that do not can be characterised as the denial of a privilege rather than the removal of a right, but this distinction is ultimately meaningless. The law puts gender balanced parties in a better position than non-gender balanced parties and so its effects are as discriminatory as if

---

<sup>14</sup> ‘Dáil Gender Law Unconstitutional’ *Sunday Independent* 20 November 2011.

specific men were denied the opportunity to run for the Dáil, since this would be its effect.

2. Political parties are associations and so are protected by the constitutional right to freedom of association. To single out and penalise specific associations is a denial of that constitutional right.
3. Once the precedent is set that the State can dictate who runs for office, then other quotas will inevitably ensure and could be skewed to suit the purposes of a given government, thus undermining the free choice in a free democracy. The Supreme Court has already banned the Government from expending public money promoting a particular side in referenda; to do so in an election is a breach of the constitutional right to equality.<sup>15</sup>

There are many problems with these arguments. The most obvious is that political parties are private organisations and yet they have a near monopoly on deciding who is put forward for election to the Dáil. This means that the parties’ own opaque power structures serve as private gate-keepers to the democratic choices available to the electorate. As the proposed gender quota law only affects political parties, this argument could be made in response to any challenge. Also the courts have generally been quite deferential to legislative measures touching on the issue of equality.<sup>16</sup> With that in mind, it seems

---

<sup>15</sup> See *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

<sup>16</sup> See generally: Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004).

quite likely that the courts would defer to the legislative choice in a gender quotas bill and uphold it as a legitimate restriction. However, this is not absolutely guaranteed. As with all matters relating to the Constitution, judicial interpretation is the determining factor. It would be naive to assume that a constitutional challenge to the gender quota legislation would be guaranteed to fail. Since the Constitutional Convention offers the opportunity to insert a provision permitting electoral gender quotas, that opportunity should be availed of in order to put the matter beyond doubt.

---

**“It would be naive to assume that a constitutional challenge to the quota legislation would fail. The Constitutional Convention offers the opportunity to permit electoral gender quotas, this would put the matter beyond doubt.”**

---

In addition to recommending electoral quotas, the Joint Committee on Justice, Equality Defence and Women’s Rights also recommended that there should be dedicated state funding ‘earmarked for women candidates until a certain representation is reached’<sup>17</sup> This suggestion also runs the risk of a constitutional challenge, particularly in light of the *McKenna* judgment which banned the expenditure of public money to promote one side in a referendum campaign.<sup>18</sup> However, if a constitutional permission were introduced allowing gender imbalance

---

<sup>17</sup> Joint Committee on Justice, Equality Defence and Women’s Rights *Second Report: Women’s Participation in Politics* (Houses of the Oireachtas, 2009), at p.30.

<sup>18</sup> *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

redressing measures, then, again, such a challenge could be pre-empted by constitutional amendment.

To provide the highest degree of certainty that the gender quota law is constitutionally sound, it would be advisable to insert a constitutional proviso which would ensure that electoral quotas were not found unconstitutional. CEDAW and a number of other States’ constitutions contain general provisions for temporary imbalance redressing measures. The inclusion of such measures generally in Irish law has much to recommend it and such a general proviso is considered in detail in chapter 6, which looks at the 1937 Constitution’s guarantee of equality before the law. However, distinct from the general equality guarantee issue, the fact that Article 16 contains a specific prohibition on sex discrimination means that in order to be sure that gender quotas would not fall foul of a constitutional challenge, an additional proviso would need to be added into Article 16. Such a proviso could ultimately prove unnecessary if the courts were to uphold the 2011 Bill. However, such an outcome is not certain and the specific listed topics for the Constitutional Convention provide a unique opportunity to solve that problem before it has occurred.

The proviso should be in the vein of Article 4(1) of CEDAW in that it should clarify that a measure which discriminates between men and women for the purposes of redressing an historic imbalance is not a breach of any anti-discrimination or equality provisions in the constitution.

As was noted, a number of other States include such provisos generally for their equality guarantees. The purpose is to

ensure that the pursuit of substantive equality (equality of outcomes) for previously marginalised groups cannot be found unconstitutional because it breaches formal equality (equality of treatment) guarantees. For example, The Swedish Instrument of Government (which is one of the four parts of the Swedish Constitution) Guarantees a right to equality and freedom from discrimination in Chapter 1, Article 2. Significantly, it also includes a separate guarantee against gender discrimination which includes a proviso relating to measures to promote equality:

No act of law or other provision may imply the unfavourable treatment of anyone on grounds of gender, unless the provision forms part of efforts to promote equality between men and women or relates to compulsory military service or other equivalent official duties.

A similar provision appears in Section 15 of the Canadian Charter of Rights and Freedoms, which states:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

---

**“A provision recognising the need for laws to level the playing field is essential if women are to take their full and rightful place in Irish society.”**

---

While these are generalised constitutional permissions for measures which seek to redress gender imbalances, they also provide a template for a proviso for Article 16. For the purpose of the electoral gender quota, the primary constitutional concern relates to the specific gender equality provision regarding standing for election set out in Article 16. Even if a substantive equality provision were to be included in Article 40.1, this would not automatically apply to Article 16. This is because the prohibition on discrimination based on sex in Article 16 is separate from Article 40.1 and could be used to challenge gender quotas even if there were a proviso in Article 40.1. However, adding a proviso of this type to Article 40.1 is an important part of the picture if more women are to be brought into public life generally and politics specifically. Historical imbalances in Irish society have meant that the opportunities and outcomes from women are generally considerably less than those of men. A provision recognising the need for laws to tackle these anachronisms and to level the playing field are essential if women are to take their full and rightful place in Irish society. The use and importance of general provisions of this type are discussed in more detail in Chapter 6 of this working paper.

#### **5.4 Reform**

A proviso should be included in Article 16 along the lines of the Swedish model to clarify that temporary measures aimed at improving equality between men and women in the Dáil are permissible. A strong argument can be made that this is not strictly necessary. However, in order to put

the matter beyond doubt, the opportunity provided by the Constitutional Convention should be availed of. This would be done by adding a new subsection at the end of Article 16.1. The subsection, which would be Article 16.1.5<sup>o</sup> would read:

*This section shall not prevent the adoption of temporary measures provided for by law, which are designed to improve the equal representation of women and men in Dáil Éireann.*

## Part II: Women’s rights and further Constitutional reform.

### 6. Constitutional Guarantee of Equality

#### *Summary of main points*

- The existing constitutional equality guarantee is limited to formal notions of equality of treatment.
- Substantive equality, through equality of opportunity and outcome, would help to combat the historical and structural imbalances which impede women’s progress in Irish society.
- A provision which permitted substantive equality would give less control to the courts than one which gave an enforceable right to substantive equality.
- EU law on substantive equality supersedes Irish law, including the Constitution.
- Indirect discrimination should be prohibited.
- There should be a dedicated provision guaranteeing equality between men and women.

#### **6.1 Procedural equality and substantive equality**

There are two models which can be used for developing constitutional equality guarantees. Both systems have different approaches to what equality is ‘for’. The first system is usually called ‘procedural equality’. This is the system the Irish courts

have tended to use. The second system is usually called substantive equality.<sup>1</sup>

---

“Procedural equality is focused on achieving equality of treatment. Substantive equality is geared towards ensuring equality of opportunity and equality of outcomes.”

---

A procedural equality guarantee requires the Oireachtas and the Government to treat people in a neutral and objective way. It is focused on achieving equality of treatment. Procedural equality does acknowledge differences in treatment but only in circumstances where the difference in treatment is based on some actual difference between the groups being treated differently.<sup>2</sup> Conversely, substantive equality is concerned with the effects of a

---

<sup>1</sup> Majury, D. ‘The Charter, Equality Rights and Women: Equivocation and Celebration’ (2002) 40 *Osgoode Hall Law Journal* 297. See also Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004), at pp. 214-217. Doyle concepts of equality into four groups: formal, left process, right process and substantive. While these classifications are very instructive, they provide more detail than is required here. For the purpose of this paper, formal, left process and right process can be grouped together within the broader concept of ‘formal equality’.

<sup>2</sup> Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004), at pp. 67-77.

law and whether it causes or entrenches inequality. Substantive equality is concerned mainly with trying to stop the law from continuing existing social practices which prioritise a dominant group. It is less concerned with whether law-makers are sufficiently neutral and objective. Substantive equality is geared towards ensuring equality of opportunity and equality of outcomes rather than with equality of treatment.

Procedural equality is concerned to ensure that equals are treated equally. Treating women differently to men, merely because they are women, is precisely the type of activity that procedural equality seeks to prevent. However, substantive equality recognises that the way society is structured stops women from playing an equal role in society. This causes a conflict between the two understandings of equality. Substantive equality supports the introduction of laws which treat women more favourably just because they are women. Process equality opposes this, because such a law is not, in and of itself neutral; even though it is trying to bring about a neutral state of affairs. Process equality imagines a level playing field and sets out to keep it level. Substantive equality says that the playing field is not level and sets out to even it out.

The successful campaign run by women's organisations for electoral quotas is a good illustration of this. The campaign recognised that Irish women face unique barriers to entering political life. It further recognised that the consequence of this was that women have not been represented in equal numbers in politics. To address this civil society argued that

quotas should be introduced to re-dress the barriers faced by women. Effectively it applied a theory of substantive equality to how the problem should be solved by recognising difference and seeking to intervene to produce a different outcome. The policy is set out in the Electoral (Amendment) (Political Funding) Bill 2011 (discussed in Chapter 5). The bill treats men and women differently. It uses the system of funding for political parties to put financial pressure on parties to select more women candidates. A formal equality model would be opposed to this, simply because men and women are being treated differently. A substantive equality model would support this, because it is working towards improving actual equality between men and women in the longer term.

---

**“Process equality imagines a level playing field and sets out to keep it level. Substantive equality says that the playing field is not level and sets out to even it out.”**

---

Critics of gender quotas tend to argue that men also face barriers to entry into politics and that the differences are not as significant as imagined. Effectively they were saying that women and men are equal, face an equal choice to enter politics and that women choose not to. They think it is unfair to men who do enter politics to give additional help to women. They also argue that it is unfair to women to suggest that they need help.<sup>3</sup>

---

<sup>3</sup> For an example of these arguments see Deputy Joanna Tuffy's argument against quotas during the Dáil debate on the issue, on the 22<sup>nd</sup> of March 2012, <http://www.labour.ie/joannatuffy/blogarchive/2012/03/>.



While improvements have undoubtedly been made, women's position in Irish society continues to be weaker than that of their male counterparts. They earn less, are less economically independent and are under-represented in decision-making.<sup>4</sup> A guarantee of substantive equality would potentially be of great assistance to women in redressing these imbalances.

---

**“The electoral quotas bill applies a theory of substantive equality by recognising difference and seeking to intervene to produce a different outcome. The bill treats men and women differently.”**

---

The Constitution can and should guarantee both procedural and substantive equality; however, there would inevitably be conflicts between the two versions of equality in certain cases, which would need to be resolved. This is a difficult problem theoretically. It is clear that some order of priority would be needed as between substantive and formal equality.

At one extreme, formal equality could be removed from the constitution; however, this is not advisable, as it would permit different treatment of women relative to their male counterparts by the state without any justification. Many of the improvements in the law relating to women's rights have come about because of a formal equality approach. For example, the abolition of the ban on married women working in the civil service came about because of a realisation that women

---

<sup>4</sup> See *Women and Men in Ireland* (Dublin: Central Statistics Office, 2011).

deserved to be treated in the same way as men in these situations.<sup>5</sup> Rather than trying to remove the formal equality approach, what would be more desirable would be to ensure that the basic equality of treatment inherent in formal equality remains as a general proposition, but that laws which seek to improve the position of women would not be struck down as violating formal equality.

## ***6.2 Interpretation of existing provisions***

The 1937 Constitution guarantees equality before the law in Article 40.1, which states:

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

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

The wording of Article 40.1 is itself relatively progressive, particularly by the standards of 1937. It is certainly capable of being interpreted in a manner which provides a high degree of gender equality. However, this is utterly dependent on the approach taken by the courts, who have the final say on what the 1937 Constitution means.<sup>6</sup>

The courts have generally used Article 40.1 as a forthright guarantee of formal equality to women and on questions of direct

---

<sup>5</sup> Civil Service Regulation Act 1956, Section 10

<sup>6</sup> Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. And Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p.125.

discrimination against women, have often been quite progressive. For example, in the celebrated 1975 case of *de Búrca v Attorney General*<sup>7</sup> Máirín de Burca and Mary Anderson were charged with obstructing the Gardaí and were due to be tried by jury. Section 3 of the Juries Act 1927 restricted jury service to the owners of land over a certain value. Section 5 of the same Act provided a general exemption for women from jury service, but allowed women to apply to be called for jury service. De Burca and Anderson had previously publicly expressed political opinions regarding the institution of private property and argued that they would not get a fair trial from a jury made up of people above a certain level of wealth. They also argued that the general exemption of women meant that they were extremely unlikely to face any female jurors at their trial.

The Supreme Court struck down the law as being unconstitutional. Much of the reasoning from the Court was based on the constitutional right to fair trial. However, Mr Justice Walsh based his reasoning on the Article 40.1 guarantee of equality. He described the effect of Article 40.1 and held that distinguishing between sex without reference to any actual difference of social function was unconstitutional.<sup>8</sup> In looking at this issue, Mr Justice Walsh was dealing with the question of whether differences between men and women are relevant to whether or not they should be required to serve on juries. The answer to the question was 'no'. In this example the courts decided that although there were differences they were not relevant to the way in which women should be treated.

---

<sup>7</sup> [1976] 1 IR 38

<sup>8</sup> [1976] 1 IR 38, at p. 71 *per* Walsh J.

While formal equality for women has often been quite positively protected by the Courts, issues around gender generally have not always been so progressively dealt with. The 'differences in social function' proviso has led to some notorious laws being deemed not to breach the formal equality guarantee. For example in, *State (Nicolaou) v An Bord Uchtála*<sup>9</sup> an unmarried father's child was given up for adoption without his consent. The law required the mother's consent, but not the father's where the parents were not married. The Supreme Court upheld the law and in so doing made reference to a very narrow and stereotypical view of the position of children born outside of marriage; the approach reinforced the idea that all unmarried mothers are the same and all unmarried fathers are the same and so unmarried parents can be treated differently on the basis of sex. Flynn notes that the Court's analysis was based on negative assumptions of the selfishness and unreliability of unmarried fathers and on positive assumptions of altruism on the part of unmarried mothers.<sup>10</sup> The fact that a positive view was taken of women in this instance is beside the point: generalised assumptions regarding the universality of certain innate characteristics in all men or all women should set alarm bells ringing for any gender-sensitive approach to equality law.

---

<sup>9</sup> [1966] IR 567.

<sup>10</sup> Flynn, L. 'To be an Irish Man— Constructions of Masculinity within the Constitution' in Murphy, T. and Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998) at p. 139.

Another example of gendered stereotyping in interpreting the equality guarantee took place in *Norris v Attorney General*.<sup>11</sup> David Norris brought a case to the High Court and subsequently the Supreme Court on appeal challenging the constitutionality of the criminal offence of buggery. He was unsuccessful. One of the arguments made by Mr Norris's legal team was that to criminalise male homosexual behaviour and not female homosexual behaviour was a breach of the equality guarantee. This was rejected. The Chief Justice listed a number of factors which justified the criminalising of homosexuality and with regard to men, asserted specifically that male homosexuality led to public health problems.<sup>12</sup>

---

**“Generalised assumptions regarding the universality of certain innate characteristics in all men or all women should set alarm bells ringing for any gender-sensitive approach to equality law.”**

---

In this way, the equality guarantee has been used to reinforce universalist stereotypes rather than ensure meaningful equality. It should be noted, that in both of these cases the source of the discrimination was the legislation in question; but in both the Supreme Court found that the legislature was permitted to pass such laws. The Supreme Court was both taking a permissive approach to legislation which intruded upon ideas of equality and endorsing the restrictive vision of equality which the legislation was based upon. In

---

<sup>11</sup> [1984] IR 36.

<sup>12</sup> [1984] IR 36, at p.63 *per* O'Higgins CJ.

doing this, the Supreme Court was making a powerful statement about what it means to be an unmarried father or a gay man, which feeds into the symbolic function of constitutionalism.

It is arguable that the current wording of Article 40.1 supposes a formal equality model only. The phrase 'equality before the law' is strongly a formal equality type of phrase. It could be argued that it would not be possible to interpret the current text of Article 40.1 on a substantive equality model. Doyle disputes this. He argues that it would have been possible to use the text of Article 40.1 to develop a strong substantive equality model. He points out the phrase 'as human persons' which he thinks could have been used to do this.<sup>13</sup> However, while this may have been plausible in 1937, the history of High Court and Supreme Court interpretation of Article 40.1 has meant that it now functions solely as a formal equality guarantee.<sup>14</sup> This highlights one of the difficulties of constitutional text and a risk of reform: if a problem with a provision is caused by the way the text has been interpreted by the courts, rather than the text itself, then changing the text may not address the problem. If a guarantee of substantive equality is to be introduced, then it must be carefully drafted with this in mind.

There are examples of the courts upholding laws which could be argued as pursuing substantive equality measures. For example, in *Lowth v Minister for Social Welfare*<sup>15</sup> the plaintiff, Mr Lowth argued

---

<sup>13</sup> Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004), at pp. 253-255.

<sup>14</sup> Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004), at pp. 255-256.

<sup>15</sup> [1998] 4 IR 321.

that as a deserted husband, he should be entitled to get the deserted wives benefit. The benefit (as the name suggests) was only available to women who had been left by their spouses and not to men. The High Court and the Supreme Court both found that Mr Lowth was not entitled to the benefit and that the Oireachtas was entitled to distinguish between men and women in this way.

The High Court upheld the law on a purely formal equality basis. The Court found that the Oireachtas was entitled to decide that married women performed a different social function to married men and that it was therefore a relevant difference which justified different treatment. This is very unsatisfactory reasoning from a gender perspective. The Court could have recognised that women are more financially vulnerable in Irish society and used this as a substantive equality justification for the law. Instead, the Court found that women perform a different social function to men and so the law passed a formal equality test.

The Supreme Court's analysis was somewhat more encouraging. The Court did make reference to the Constitution's reference to a woman's place being in the home as some justification for the differential treatment, which suggests a formal equality standard justified by different social function. However, the Supreme Court did also note the fact that women generally earn less than men and so the difference in treatment might be justified by this fact. This hints at the Supreme Court being prepared to let substantive equality laws slip through the formal equality net. However, it is far from a ringing endorsement of substantive

equality and it certainly is not a finding that substantive equality should be guaranteed by Article 40.1.

The approach of the Irish courts to the equality guarantee has been very deferential to the Oireachtas and gives legislators a lot of freedom.<sup>16</sup> This deference is evident in the *Lowth* case; the Court said that a high threshold had to be met to prove a law was unconstitutional on the basis of Article 40.1. It is certainly possible that any prospective substantive equality laws passed by the Oireachtas would be let stand by the Supreme Court. However as was discussed in relation to the Electoral (Amendment) (Political Funding) Bill 2011, there is no guarantee of this. In order to permit substantive equality laws, it may be necessary to amend the constitution to clarify that laws which seek to redress historical imbalances between men and women are permitted. Even if it were not necessary, constitutional recognition of substantive equality as an important value in Irish society has merit in and of itself.

### ***6.3 International examples of process vs substantive equality***

A number of examples from outside of Ireland show the way in which substantive equality policies can be allowed to take priority over formal equality guarantees in certain circumstances.

These approaches give permission and encouragement to legislators to pursue substantive equality and protect those policies from breaching formal equality guarantees.

---

<sup>16</sup> Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004), at pp. 104-105.

### 6.3.1 CEDAW

The CEDAW Committee has endorsed a general substantive equality approach to improving the status of women. It has stated that:

[i]n the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.<sup>17</sup>

It is of note that Article 4(1) of CEDAW expressly provides for a substantive equality to take priority over formal equality

---

<sup>17</sup> Committee on the Elimination of Discrimination Against Women *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* Thirtieth Session, 2004, at para. 8.

provided the measures involved are temporary:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The CEDAW Committee has lamented the lack of uptake of these temporary special measures.<sup>18</sup>

A Constitutional guarantee of substantive equality would significantly advance women in Ireland by directly redressing these imbalances.

### 6.3.2 Canada and Germany

A number of countries set out explicit allowance for substantive equality measures to be protected from a formal equality challenge. Section 15 of the Canadian Charter of Rights and Freedoms, which states:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on

---

<sup>18</sup> Committee on the Elimination of Discrimination Against Women *General recommendation No.5: Temporary Special Measures*, Seventh Session, 1988.

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Article 3 of the German Constitution (the Basic Law) contains a similar proviso:

(1) All persons shall be equal before the law

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.<sup>19</sup>

Article 3(2) of the German Constitution was introduced by amendment in 1994, 46 years after the Constitution itself was adopted.<sup>20</sup>

---

<sup>19</sup> *German Basic Law* translated by Tomuschat, Currie and Kommers in cooperation with the Language Service of the German Bundestag. The text of 3(2) was inserted by amendment in 1994.

<sup>20</sup> See Stock A.J., 'Affirmative Action: A German Perspective on the Promotion of Women's Rights with Regard to Employment' (2006) 33 *Journal of Law and Society* 59, at pp. 63-64.

At first glance, the Canadian section 15(2) appears to merely *permit* substantive equality measures, whereas the German Article 3(2) appears to *require* substantive equality measures. There has not been much court interpretation of either provision at this stage, but it would seem that the distinction is less acute than that. A decade after the introduction of the 1994 German amendment, Totten assessed the application of Article 3(2) of the German Constitution by the federal courts. He concluded that it has been applied as permitting the use of affirmative action programmes when introduced by legislation, rather than requiring that such legislation be passed. He argues that:

while the notion of substantive equality finds some support in German constitutional jurisprudence, and lower courts have upheld gender affirmative action programs in the form of quotas, German women presently do not have a constitutional right to demand affirmative action in the face of inequality allowed to exist by the government.<sup>21</sup>

It seems that, notwithstanding the language of the German Article 3(2), the provision has been treated more like a permission, or declaratory principle than a hard enforceable right which can be availed of by individuals in court.

There may be good reasons for introducing a permission rather than a requirement for

---

<sup>21</sup> Totten, C.D. 'Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach' (2003) 21 *Berkley Journal of International Law* 27, at p. 44.

substantive equality. A constitutional provision could symbolically endorse substantive equality (which is important in and of itself), but function primarily as a permission to the Oireachtas to introduce substantive equality measures rather than mandating substantive equality as a directly enforceable constitutional right. Substantive equality requires the taking of positive steps, there will inevitably be significant detail involved. Courts are not necessarily well suited to ironing out such details. Similarly, as has been discussed above, the courts' interpretation may not be in line with what supporters of substantive equality wish to see. At least with an Oireachtas measure there remains the option of seeking amendment to the legislation through the usual democratic channels.

If a directly enforceable requirement of substantive equality were introduced, it would inevitably be couched in very general terms, which would leave massive leeway to the courts. The text of the German provision could, for example, be interpreted by a court as requiring gender quotas in politics and on boards, as requiring access to affordable childcare and maternity leave or as requiring minimum numbers of women in the professions. It could also be interpreted as requiring none of these things. If specific, concrete benefits such as these are to be sought, then they can be controlled far more effectively if they are sought in legislation. The inclusion of a substantive equality provision which permitted such legislation would ensure that there could not be any formal equality challenge.

It may be that this is not sufficient to ensure substantive equality if the Oireachtas does

not take action to pursue substantive equality measures. Many of the concrete benefits of substantive equality involve improving the economic and social position of women. The inclusion of socio-economic rights in the Constitution could be used to pursue this goal with far greater specificity than a generalised substantive equality guarantee. As women often suffer from economic and social marginalisation, they would have much to gain from socio-economic rights guarantees. Such guarantees are discussed further in chapter 9.

### **6.3.3 EU Equality Law**

As was noted in chapter 1, EU law takes priority over Irish domestic law in the areas where the EU has competence. This includes most areas of trade and economic activity, including employment. Article 157 of the Treaty on the Functioning of the European Union guarantees the principle of equal pay for men and women and gives the EU institutions the power to make laws in this area. Article 157(3) states *inter alia* that the European Parliament and the Council of Ministers 'shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'. Article 157(4) states:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for

disadvantages in professional careers.

This is also recognised in Article 3 of the EU Equal Treatment Directive<sup>22</sup> which states:

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

The effect of these provisions is that the Oireachtas already has the power to enact substantive equality legislation for men and women if that legislation is directed towards employment. The EU Treaties take priority over all Irish law within the areas to which they apply. This includes the 1937 Constitution.<sup>23</sup> Therefore, if the Oireachtas were to introduce a substantive equality measure in relation to employment, it would not be possible to challenge it as a breach of the formal equality requirement of Article 40.1.<sup>24</sup>

The EU also has a specific power to enact such legislation itself in certain circumstances. Article 19 of the Treaty on

---

<sup>22</sup> Directive 2006/54/EC of The European Parliament and of The Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

<sup>23</sup> The ECJ has previously ruled that EU laws cannot be invalidated by national constitutional provisions. See *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide* [1970] ECR 1125.

<sup>24</sup> For an analysis of the ECJ case law considering national positive discrimination measures, see Tridimas, T *The General Principles of EU Law* (2<sup>nd</sup> ed, Oxford: Oxford University Press, 2006) at pp. 111-118.

the Functioning of the European Union states:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This provision requires unanimity, rather than qualified majority voting, so any one member state can prevent the passage of legislation. Nonetheless, this provision allows the passing of EU substantive equality measures outside of the field of employment and the free market, which would supersede domestic Irish law.<sup>25</sup>

#### **6.4 Indirect discrimination**

Discriminatory laws may not always single out a particular group directly. It may be that by focusing on some feature which tends to be common to a particular group, that group will be affected, without necessarily mentioning the group at all. For example, if a measure discriminates against part-time workers, it would indirectly

---

<sup>25</sup> Prior to the entry into force this Article was Article 13, but changed to Article 19 with the new numbering. Examples of EU legislation passed under this Article include Directive 2000/78 Establishing a General Framework for Equal Treatment in Employment and Occupation and Directive 2000/43 Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin.



discriminate against women, since the majority of part-time workers are women. Women in Ireland tend to be disproportionately represented in the public sector work force and in part time work, are lower paid and tend to be less likely to be economically independent.<sup>26</sup> Therefore, significant shifts to the law relating to part time work, the public sector or social welfare will have a greater effect on women than on men. Even though such a law may not mention women directly, it will have the indirect effect of having a bigger impact on women than on men.

Indirect discrimination in employment and employment related social security is expressly prohibited by EU Law.<sup>27</sup> The Constitution Review Group report in 1996 recommended that the equality guarantee be changed so that it expressly recognised indirect discrimination and listed grounds on which discrimination was prohibited.

No person shall be unfairly discriminated against, directly or indirectly, on any ground such as sex, race, age, disability, sexual orientation, colour, language, culture, religion, political or other opinion, national, social or ethnic origin, membership of the travelling community, property, birth or other status.<sup>28</sup>

---

<sup>26</sup> See *Women and Men in Ireland* (Dublin: Central Statistics Office, 2011).

<sup>27</sup> Directive 2006/54/EC of The European Parliament and of The Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). See in particular articles 2 and 4.

<sup>28</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp.229-230.

The Irish Courts have not always been as sensitive to indirect discrimination as the ECJ.<sup>29</sup> Such a change would ensure that all forms of discrimination against women were prohibited, not merely measures that discriminate against women on their face.

### ***6.5 A dedicated guarantee of sex equality***

The existing Article 40.1 has been repeatedly interpreted as relating to formal equality between men and women (for example in the *de Burca* case discussed above). However, the text itself does not state the principle of equality between the sexes, nor is there a separate dedicated provision relating to equality between the sexes.

CEDAW includes a number of provisions which require the progressive realisation of the elimination of gender discrimination through positive changes to the legal system. Article 2(a) of CEDAW provides that States Parties undertake:

To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle

In its concluding comments on Ireland's combined fourth and fifth Report, the CEDAW Committee recommended that

---

<sup>29</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp. 229-230; and Doyle, O. *Constitutional Equality Law* (Dublin: Round Hall, 2004), at pp. 77-81.

Ireland should include the CEDAW definition of discrimination and the principle of equality between men and women 'in the Constitution or other appropriate legislation'<sup>30</sup> The Constitution Review Group specifically rejected the inclusion of a separate recognition of equality between men and women.<sup>31</sup>

Such separate provisions are included in other states constitutions and international human rights documents. For example, the EU Charter contains both a general non-discrimination guarantee and a specific sex equality guarantee. Article 21(1) states:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited

Article 23 states:

Equality between women and men must be ensured in all areas, including employment, work and pay.  
The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

---

<sup>30</sup> Committee on the Elimination of Discrimination Against Women, Thirty Third Session, *Concluding Comments: Ireland* CEDAW/C/IRL/CO/4-5 at para. 23.

<sup>31</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp.230-232.

Arguably Article 21 would be sufficient to establish the principle, providing that there was an additional substantive equality proviso as set out in Article 23. The Canadian Charter, also contains a separate guarantee of equality between men and women in section 28, which states:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Majury's analysis of the case law on section 28 suggests that it has been sparsely used by the Canadian courts and interpreted very narrowly, despite high hopes from feminist scholars at the time of the introduction of the Charter.<sup>32</sup> Where it has been used by the courts, it has been generally applied in conjunction with the general equality guarantee in section 15.

## 6.6 Reform

The existing judicial interpretation of Article 40.1 has been solely based on a procedural equality model and has been very deferential to the Oireachtas. In light of the difficulties of judicial interpretation, it may be that significant change to Article 40.1 is not desirable. The Constitution Review Group also recommended slight alterations to the existing text of Article 40.1. (In addition to recommending a dedicated anti-discrimination clause, discussed above) The revised text proposed by the Group is:

All individuals shall be held equal before the law

---

<sup>32</sup> Majury, D. 'The Charter, Equality Rights and Women: Equivocation and Celebration' (2002) 40 *Osgoode Hall Law Journal* 297 at pp. 307-308.

This shall not be taken to mean that the state may not have due regard to relevant differences.<sup>33</sup>

symbolic value should not be underestimated.

The text would retain the guarantee of formal equality in the current text, but without reference to concepts such as 'moral capacity or social function'. While these phrases have grounded some of the more troubling Supreme Court decisions, such as *Norris*, the revised wording would still be open to judicial interpretation of what was a 'relevant difference' which could have the same effect.

Absent a wholesale culture change in the Irish Courts, it may be very difficult to shift the deferential approach to legislation. Article 40.1 does little to prevent equality pursuing legislation and it may be that this is an area where a permissive approach from the constitution is to be preferred. A dedicated provision providing for substantive equality measures would be a significant and positive amendment. Such a provision should be along the lines of the German or Canadian wording. It would have the dual effect of ensuring that substantive equality legislation was immune from constitutional challenge and of making an important symbolic statement about the State's commitment to substantive equality.

A dedicated provision recognising the principle of equality between men and women would be in keeping with the State's obligations under CEDAW. While the Canadian experience suggests that a separate provision of this type may not ultimately be the source of much case law independent of the general guarantee, its

---

<sup>33</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp. 222-229

## 7. The Family

### *Summary of main points*

- The existing constitutional text places a very high value on marriage.
- The rights of the married family are group rights of the unit as a whole; they are not individual rights.
- The interpretation of the existing text has given extremely limited recognition to family rights outside of marriage.

### *7.1 Existing provisions*

The existing definition of the family in Article 41 of the 1937 Constitution places a very high value on the rights of the family. Article 41.1 states:

1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

It also defines the family strictly in terms of the family founded on marriage. Article 41.3.1° states:

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

The language of Article 41 remains some of the most controversial in the 1937 Constitution; as was discussed in Chapter 1 it was also very controversial at the time.<sup>1</sup> Much of the current controversy relates to the inferior position of the non-marital family. For practical purposes the burden of this inferior status tends to be borne mostly by unmarried fathers. What is significant from the point of view of women is the symbolic function of this inferior status. The current interpretation of these provisions relies on outdated gendered stereotypes of unmarried parents. This reinforces the idea that childcare is somehow solely a task for women and denies that men have inherent responsibilities to their children. It also implies a lesser status for lone parent families, most of which are headed by women.

---

**“Article 41 remains one of the most controversial in the Constitution because of the inferior position of the non-marital family. It reinforces the idea that childcare is solely a task for women and denies that men have responsibilities to their children. It also implies a lesser status for lone parent families.”**

---

### *7.2 The rights of the marital family as a unit*

The Constitution distinguishes between the rights of the family as a unit and the rights

---

<sup>1</sup> See Hogan, G. *The Origins of the Irish Constitution 1928-1941* (Dublin: Royal Irish Academy, 2012).

of individual family members. The rights in Article 41.1.1<sup>9</sup> are the rights of the unit and, so, are a form of group right exercised for the unit as a whole.<sup>2</sup> Conversely, the individuals within the family have separate individual rights such as their right to life, bodily integrity freedom of expression etc. The rights of the family group are generally exercised on the group's behalf by the adult members of the group, i.e. the parents. This gives rise to a potential conflict between the rights of the family group and the individual rights of specific members of the family, most obviously the children. For example, a child who is being ill-treated within a family may be having their individual rights infringed. However to remove the child from that family would infringe upon the rights of the Family.

This is not to suggest that the rights of the family group will always win out over the individual rights of the members. The 1937 Constitution makes specific provision for circumstances in which children need to be removed from the family.<sup>3</sup> The Supreme Court has taken the view that a high threshold must be met in order for this to occur<sup>4</sup> and the case law suggests that the welfare of children may need to be balanced against the rights of the unit, rather than the welfare of children always being the paramount consideration.<sup>5</sup> The

---

<sup>2</sup> See *Murray v Ireland* [1985] IR 532.

<sup>3</sup> Article 42.5 states: *In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

<sup>4</sup> *North Western Health Board v HW* [2001] 3 IR 622.

<sup>5</sup> *N v Health Service Executive* [2006] 4 IR 374 ('the *Baby Ann* case'); see also *In Re JH (An Infant)* [1985] 1 IR 375. Former Chief Justice Ronan Keane has

proposed children's rights amendment is expected to deal with this issue to some extent.

It is important to stress that the courts' understanding of these cases was not that the parents as individuals had some exceptionally strong rights to the children which could not be breached. It was the rights of the family unit that were in issue. Once the courts had found that a family unit within the meaning of the 1937 Constitution existed, then the state was prohibited from interfering with that unit save in the most exceptional circumstances.

---

**"Once the courts had found that a family unit within the meaning of the 1937 Constitution existed, then the state was prohibited from interfering with that unit save in the most exceptional circumstances."**

---

### ***7.3 The rights of non-marital families***

The heavy focus on marriage in the 1937 Constitution is no longer reflective of the entire picture of Irish family life. In 2011, 34% of children born in Ireland were born to unmarried parents. 19% of the total number of children born in 2011 were born to unmarried parents who live together.<sup>6</sup> It

---

argued that the analysis of the court in the *Baby Ann* case indicates that a majority of the judges were genuinely of the view that this particular child's welfare would be best served by returning her to her birth parents. See Keane, R. 'The Constitution and the Family, the Case for a New Approach' in Doyle, O. and Carolan, E. (eds.) *The Irish Constitution: Governance and Values* (Dublin: Round Hall, 2008), at p. 354.

<sup>6</sup> *Vital Statistics: Yearly Summary* (Dublin: Central Statistics Office, 2011), at p.37.

is clear that increasing numbers of people in Ireland choose to pursue their family life outside of the institution of marriage.

---

**“19% of the children born in 2011 had unmarried parents, living together. Increasing numbers of people in Ireland choose to pursue their family life outside of the institution of marriage.”**

---

In some instances, this is based on a unit of interaction which is similar in all respects to the marital family, but without the formal legal title. Some recognition of this was made by the co-habitation provisions of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. In other instances, the unit is distinct from the marital family model, such as with lone parents. Extending the family rights of the married unit to co-habiting couples may seem appealing, but it is important to allow for the possibility that some people may not wish to take on all of the rights and responsibilities of marriage. The problem with the current provision is not that non-marital families do not get the same recognition as marital families. The problem is that the level of recognition they get is close to zero.

In the case of *McD v L*<sup>7</sup> a female same-sex couple were parenting the biological child of one of the couple. The child had been conceived with the assistance of a male friend of the couple. A dispute arose between the couple and the male friend as to the level of involvement that he would have in the child’s life. The couple planned to spend a year in Australia with the child.

---

<sup>7</sup> [2010] 2 IR 199.

The biological father sought to prevent this and wanted to be made a legal guardian of the child and to have access to the child. In considering the case, the courts had to consider the status of the same-sex couple and the child as a family unit.

Mr Justice Hedigan in the High Court had found that a female same-sex couple who were parenting the biological child of one of the couple constituted a *de facto* family within the meaning of the European Convention. This finding was overturned on appeal to the Supreme Court. Ms Justice Denham took the view that, while the Article 8 definition of the family goes beyond a nuclear family, it is fact dependent and the ECHR has not yet found same-sex relationships to be ‘family life.’<sup>8</sup> She went on to state that:

The term "de facto family" has arisen as a shorthand method of describing circumstances where a couple have lived together in a settled relationship for some time with a child. Such a set of relationships are relevant in considering the welfare of the child. There is no institution of a *de facto* family.<sup>9</sup>

This rejection of the *de facto* family perpetuates (in 2009) the distinction between married and unmarried families that has been so prevalent in Irish law. It is a specific instance of the lesser status afforded to same-sex parents, but is also a general instance of the lack of constitutional recognition of families that do not meet the established heterosexual,

---

<sup>8</sup> [2010] 2 IR 199 at p. 274, *per* Denham J.

<sup>9</sup> [2010] 2 IR 199 at p. 275 *per* Denham J.

married archetype. It is arguable that in light of the ECHR decision in *Schalk and Kopf v Austria*<sup>10</sup> (discussed above in chapter 3) the Irish courts would need to revisit the status of same-sex couples under Article 8 of the European Convention. However, it is doubtful that such a shift would, of itself, reverse the analysis in *McD v L*, since it draws its conclusions in terms that go beyond same-sex couples and include non-marital opposite-sex couples.

---

**“Unmarried mothers have an individual personal right to the custody and care of her child, but this arises under the unenumerated personal rights guarantee of Article 40.3, not under Article 41.”**

---

The one non-marital family relationship that does achieve concrete constitutional recognition is the right of an unmarried mother to her children. The courts have expressly excluded unmarried mothers from enjoying any rights under Article 41. However, unmarried mothers have an individual personal right to the custody and care of her child, but this arises under the unenumerated personal rights guarantee of Article 40.3.<sup>11</sup> Unmarried fathers have no constitutional rights at all in relation to their children, with the exception of the right to apply to be made a guardian.<sup>12</sup> The right is only a right to apply and there are no automatic legal guardianship rights for unmarried fathers in Irish law.

---

<sup>10</sup> (2011) 53 EHRR 20.

<sup>11</sup> See Hogan, G.W. and Whyte, G.F. *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed., Dublin: Tottel Publishing, 2003) at paras. 7.3.190-7.3.192.

<sup>12</sup> See *State (Nicolaou) v An Bord Uchtála* [1966] IR 567 and *O’R v EH* [1996] 2 IR 248. This position was recently reaffirmed in *McD v L* [2010] 2 IR 199.

At first glance, this may seem to be a positive position for unmarried mothers, since their constitutional status as parents is higher than that of fathers. However, from the perspective of the symbolic function of the Constitution, this is a very unhelpful state of affairs. By assuming no constitutional link with the child, the 1937 Constitution as currently interpreted goes some way to perpetuating the notion that unmarried fathers do not have inherent responsibilities and duties to their children. This is symbolically important and practically unhelpful for lone parent mothers.

Admittedly, the extension of a group right for a family unit to unmarried parents is problematic, particularly where the parents are not living together and so do not function as a unit. However, some constitutional recognition of the relationship between a child and an unmarried father gives strength to the idea that the child is entitled to the care and support of her father and that the father should play an active role in maintaining the child. This could be done by recognising personal rights of the child and the father to their relationship with one another in the manner that is already done by Article 8 of the European Convention. Such recognition would depend on the actual status of the relationship and the real level of involvement of the father in the child’s life. It would therefore make a statement about the value of paternal responsibility without necessarily giving automatic parental rights to fathers who have not, in fact, built a relationship with their child.

---

“The 1937 Constitution as currently interpreted goes some way to perpetuating the notion that unmarried fathers do not have inherent responsibilities and duties to their children.”

---

#### ***7.4 International and comparative family rights***

The single most important and influential source of international law family rights in Ireland is the European Convention. Article 8 of the European Convention guarantees the right to respect for family life. As was noted by the Constitution Review Group, the Article 8 guarantee is a guarantee of an individual’s right to their family life, not a right of the family as a unit.<sup>13</sup> This allows for a more broad interpretation since the court does not need to concern itself with defining a group right. The ECHR has for decades taken an expansive and purposive view of the definition of the family. In the case of *Lebbink v Netherlands*<sup>14</sup> the applicant had a child with a woman with whom he was in a serious relationship for three years. The couple had never lived together, but he had been present at the birth of the child and had seen her regularly and cared for her during the period of the relationship. When the relationship ended, Mr Lebbink applied for access to the child, but the courts in the Netherlands deemed his application inadmissible. The ECHR found that there had been a violation of Article 8 and that Mr Lebbink did have a

family relationship with his child that gave rise to a duty on the state to respect that relationship by allowing him to apply for access. The ECHR summarised the Court’s long-standing position with regard to *de facto* families:

The Court recalls that the notion of “family life” under Art.8 of the Convention is not confined to marriage-based relationships and may encompass other *de facto* “family” ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso iure* part of that “family” unit from the moment and by the very fact of its birth. Thus there exists between the child and the parents a relationship amounting to family life.

Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* “family ties”. The existence or non-existence of “family life” for the purposes of Art.8 is essentially a question of fact depending upon the real existence in practice of close personal ties. 24 Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the

---

<sup>13</sup> *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at p.322.

<sup>14</sup> (2005) 40 EHRR 18.



child both before and after its birth.<sup>15</sup>

This approach reflects a very practical approach to determining whether individual personal rights to respect for family relationships are engaged in a given case. The European Convention's definition of family rights is reflective of actual personal links, rather than formal legal status. The ECHR has not required that non-marital families receive the same recognition as marital families, but it has indicated that recognition of the rights within those families comes within Article 8.

Article 7 of the EU Charter on Fundamental Rights of the European Union imports the definition of the family from the European Convention, word for word. This was done on the understanding that the same approach taken by the European Convention would be essentially imported into the EU Charter. EU law and national governments giving effect to EU law are therefore bound by the de facto family rights which are recognised by Article 7. This is likely to arise in relation to areas such as immigration, extradition, free movement of workers etc. Regardless of any protection given by the 1937 Constitution, the Charter will be binding on the Irish State when acting in these areas through EU mechanisms.

Most common law systems do not provide express constitutional protection for the family. For example the Canadian Charter of Rights and Freedoms makes no mention of the family and neither does the US Bill of Rights, the Indian Constitution or the New Zealand Bill of Rights Act. CEDAW makes

reference to the status of women within the family and marriage,<sup>16</sup> but does not define the family or the rights to be enjoyed within

---

**“The European Convention’s definition of family rights is reflective of actual personal links, rather than formal legal status. The ECHR has indicated that recognition of the rights within these families comes within Article 8.”**

---

it.

The ECHR approach highlights the fact-sensitive way in which individual rights to family relationships can be protected. Introducing this type of model in parallel with the existing marital family rights would ensure that unmarried fathers are called upon to play their role in raising their children and that they are legally supported when doing so.

### **7.5 Reform**

As was set out in chapter 3, Article 41 should be amended to include an express gender-neutral definition of marriage. This would allow any couple wishing to avail of civil marriage to enjoy the privileged status that marriage enjoys in the Irish legal order and the rights of a family unit contained in Article 41. The following should be read in light of that recommendation.

In addition to this, express recognition is needed of individual rights of family members to respect for their relationship with one another. The methodology of the ECHR is to be recommended, in that it examines the actual status of the

---

<sup>15</sup> (2005) 40 EHRR 18, at paras. 35-36.

---

<sup>16</sup> CEDAW, Article 16.

relationships involved and allows the legal protection to reflect the social fact of a family link (rather than granting automatic rights to family members who do not engage meaningfully in their familial responsibilities). An individual right to respect for family life should be included in Article 41. If similar wording is used to Article 8 of the European Convention, then

a harmonious court approach could be expected to the Irish provision, the European Convention provision and the EU Charter provision. This would entail inserting a provision into Article 41 which would expressly guarantee all individuals the right to respect for their family life whether that family was based on marriage or not.

## 8. Abortion

### *Summary of main points*

- Irish law technically allows abortion where there is a threat to the life of the mother, but there is no regulatory mechanism in place to make this work properly. Ireland must introduce legislation for the X case.
- It would not be possible to legalise abortion in cases where there is no threat to the life of the mother without changing the constitution.

---

“The Irish legislative ban on abortion derives from 1861: predating the foundation of the state by six decades. Since then Ireland has had two constitutions, five proposed constitutional amendments on abortion (three passed) and a series of court decisions. Despite all of this law-making activity, there has been no legislation regulating abortion in Ireland for over a century and a half.”

---

The Irish constitutional position with regard to abortion is unusual when compared to other states. The existing legislative ban on abortion derives from section 58 of the Offences Against the Person Act 1861: a piece of legislation which predates the foundation of the state by some six decades. Since that time, Ireland has had two constitutions, five proposed constitutional amendments on abortion (of which three passed) and a series of high profile court decisions. Notwithstanding all of this lawmaking activity, there has been

no legislation regulating abortion in Ireland for over a century and a half.

Much of the difficulty with Irish abortion law stems from this inactivity by the legislature, but the constitutional framing of the abortion issue is of significance. The Eight Amendment to the constitution inserted a right to life of the unborn into the 1937 Constitution. The Thirteenth and Fourteenth Amendments recognised the right to travel and the right to information on abortion. These three amendments are combined in the current text of Article 40.3.3°:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

The inclusion of a right to life for the unborn raises a potential conflict with the rights of the mother, which is countenanced in the wording of the Article. Dworkin analyses the bestowing of a constitutional right to life on the unborn:

'[T]he suggestion that the Constitution allows states to bestow personhood on fetuses assumes more than this benign use of the language of personhood. It assumes that a state *can* curtail constitutional rights by adding new persons to the constitutional population, to the list of those whose constitutional rights are competitive with one another. The constitutional rights any citizen has are of course very much affected by who or what else is also deemed to have constitutional rights, because their rights compete with his.<sup>1</sup>

If the specific right to life of the unborn had not been inserted into the 1937 Constitution, then any analysis of the constitutionality of abortion would have necessarily been framed in terms of whether or not it was legitimate for the State to ban abortion, since the only constitutional rights in play would have been those of the mother. This is precisely what occurred in the (in)famous US case of *Roe v Wade*<sup>2</sup> in which the analysis was framed in terms of whether criminalisation of abortion was an unjust interference with the privacy rights of the mother. However, as Dworkin recognises, by bestowing constitutional personhood on the unborn, the legality of any measures on abortion are now seen through an entirely different lens.

At the time of the introduction of the Eight Amendment, there was no law in Ireland permitting abortion. It is worth remembering that contraception was not

permitted within the Irish State until the Supreme Court's 1973 decision in *McGee v Attorney General*.<sup>3</sup> Doorley comments: 'the creation of citizenship status for the unborn was pre-emptive curtailment of possible moves of the much feared "liberal" populous.'<sup>4</sup> She notes that the rights of unborn have had a dominant effect on the manner in which abortion has come to be discussed in Ireland. She notes that

'[a] strong pro-natal philosophy governs this debate, which simplifies to distortion the realities of women's lives that lead them to choose abortion. The respect for the unborn, voiced from all perspectives in the debate, is never thought compatible with the endorsement of abortion as essentially a woman's choice.'<sup>5</sup>

As regards the symbolic function of the constitution, it is clear that Article 40.3.3<sup>o</sup> endorses a particular understanding of reproductive ethics for Ireland. As to the state-limiting function, it would have hampered legislative attempts to legalise abortion if there had ever been any.

The determination of the Supreme Court in *Attorney General v X*<sup>6</sup> subsequent cases<sup>7</sup> has affirmed that where the life of the

---

<sup>3</sup> [1974] IR 284.

<sup>4</sup> Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. And Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 132.

<sup>5</sup> Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. And Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at p. 132.

<sup>6</sup> [1992] 1 IR 1

<sup>7</sup> See for example *A and B v Eastern Health Board* [1998] 1 IR 464.

---

<sup>1</sup> Dworkin, R. *Life's Dominion* (New York: Knopf, 1993) at p. 113.

<sup>2</sup> (1973) 410 US 959.

mother is threatened by the continuation of the pregnancy, then the mother is entitled to have an abortion. The threat to the life of the mother includes a risk of suicide. Treating the risk of suicide as a threat to life has been a bone of contention for many of those who wish to see an absolute ban on abortion in Ireland. However, it is worth noting that there have been two attempts to amend the constitution to remove the risk of suicide as a threat to life and both of these have failed.<sup>8</sup>

---

**“There have been two attempts to amend the constitution to remove the risk of suicide as a threat to life and both of these have failed.”**

---

Twenty years after the *X* case, there is still no legislative system for determining when an abortion is permitted in a given case. This presents a particular legal problem. The criminal prohibition in the 1861 Act is still valid law generally. However, because of the ruling in the *X* case, it does not apply if there is a risk to the right to life of the mother. But the *X* case, as an interpretation of the broad norms in the 1937 Constitution, does not provide any detail on how to determine whether there is a risk to the life of the mother. An application could be made on a case by case basis to the High Court to determine whether or not a specific woman’s life was at risk within the meaning of the Constitution, but this approach has been rejected by the High Court which has stated that it does not

---

<sup>8</sup> See the Twelfth Amendment to the Constitution Bill 1992 and the Twenty-Fifth Amendment to the Constitution Bill 2002.

want to become a ‘licensing authority for abortions’.<sup>9</sup>

This gap in the law creates a second issue for abortion law and Ireland, separate and distinct from the issue of what constitutional change would be needed in order to provide for legalised abortion.

### ***8.1 International standards***

It has been suggested in some quarters that international human rights law should be interpreted as providing a general right to an abortion. However, this is somewhat controversial. There is undoubtedly an international law human right to abortion in certain limited circumstances, but it is difficult to establish that this is a general across-the-board right.

For example, Human Rights Watch has argued in relation to Ireland<sup>10</sup> and generally<sup>11</sup> that there is such a right. However, the argument presented could be difficult to sustain. Human Rights Watch rely very heavily on the interpretation of international human rights treaties, such as CEDAW and the International Covenant on Civil and Political Rights (‘ICCPR’) and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’). Each of these bodies has a committee, such as the CEDAW Committee. Various country-specific findings have been made in relation to abortion. However, the vast majority of these relate to situations where there is an

---

<sup>9</sup> *A and B v Eastern Health Board* [1998] 1 IR 464, at p. 477 per Geoghegan J.

<sup>10</sup> *A State of Isolation Access to Abortion for Women in Ireland* (New York: Human Rights Watch, 2010)

<sup>11</sup> *International Human Rights Law and Abortion in Latin America* (New York: Human Rights Watch, 2005)

absolute ban on abortion notwithstanding a threat to the life of the mother or other potentially harmful situations such as rape or incest. The findings also relate to countries where there is a large amount of unsafe illegal abortion which leads to substantial maternal mortality.

It does seem clear that international human rights law requires access to safe legal abortion in circumstances where the mother's life is at risk. However, the Irish obligation as regards *de jure* availability is arguably met by the *X* case standard: a threat to life of the mother, including a threat of suicide.

The CEDAW Committee has consistently expressed concerns about abortion laws that stigmatise or oppress women who have had abortion or which lead to unsafe medical treatment. The Committee has recommended that States:

[p]rioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion<sup>12</sup>

The CEDAW Committee has considered Irish abortion law specifically and commented that

---

<sup>12</sup> Committee on the Elimination of Discrimination Against Women, Twentieth Session (1999) *General Recommendation 24: Article 12: Women's Health* at para. 31(c).

[t]he Committee reiterates its concern about the consequences of the very restrictive abortion laws under which abortion is prohibited except where it is established as a matter of probability that there is a real and substantial risk to the life of the mother that can be averted only by the termination of her pregnancy.<sup>13</sup>

---

**“There is undoubtedly an international law human right to abortion in certain limited circumstances, but it is difficult to establish that this is a general across-the-board right.”**

---

Where the Irish regime unquestionably falls foul of international standards is in the lack of any meaningful transparent regulation of when an abortion can be performed. As was noted above, the current Irish law involves the interaction of an absolute criminal prohibition and a judicial interpretation of a constitutional provision. In combination, these two legal sources provide minimal certainty on when an abortion can actually be performed. Doctors are, understandably, wary of performing abortions in circumstances where they could find themselves liable for a serious criminal offence.

The ECHR addressed this issue in the case of *A, B and C v Ireland*.<sup>14</sup> The first two applicants, ‘A’ and ‘B’ were unsuccessful.

---

<sup>13</sup> Committee on the Elimination of Discrimination Against Women, Thirty Third Session (2005) *Concluding Comments: Ireland* CEDAW/C/IRL/CO/4-5 at para. 38.

<sup>14</sup> (2011) 53 EHRR 13.

However, the third applicant 'C' won her case. She had suffered from a rare form of cancer. She subsequently became pregnant unexpectedly. She was unable to obtain adequate information on whether the pregnancy posed a threat to her life. She maintained that this was caused by the chilling effect that Irish abortion law had on the position of doctors. The ECHR agreed with 'C' and stated that:

the uncertainty generated by the lack of legislative implementation of art.40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation.<sup>15</sup>

The Court found that the Irish authorities had

failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with art.40.3.3 of the Constitution.<sup>16</sup>

The ECHR finding in this case is in line with the Irish Supreme Court's finding in the *X* case that the failure to enact legislation to clarify the circumstances in which lawful abortion was possible was 'inexcusable'.<sup>17</sup>

The current EU law position on abortion in Ireland effectively insulates the Article 40.3.3<sup>o</sup> of the 1937 Constitution from any intrusion by EU law. Protocol 35 to the Treaty on European Union states:

The High Contracting Parties, have agreed upon the following provision, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community:

Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.<sup>18</sup>

For as long as this provision remains in force, EU law will essentially have nothing to say about abortion in Ireland.

---

<sup>15</sup> (2011) 53 EHRR 13, at para. 264.

<sup>16</sup> (2011) 53 EHRR 13, at para. 267.

---

<sup>17</sup> [1992] 1 IR 1, at p. 82 *per* McCarthy J.

<sup>18</sup> The provision was originally included as Protocol 17 to the Maastricht Treaty in 1992, but was renumbered by the Lisbon Treaty.

## 8.2 Legalising abortion

It may be that there is a consensus that abortion should be legal in cases other than solely those where there is a threat to the life of the mother. Any attempt to provide for legalised abortion in Ireland that went beyond a case where the mother's life was in danger would require constitutional change. Most European states provide for abortion where there is a threat to the mother's health (as opposed to solely a threat to her life) and a large number allow for abortion where there is a threat to the mother's well-being. The construction of Article 40.3.3<sup>o</sup> would almost certainly render legislation seeking to introduce abortion on either of these two bases unconstitutional.

---

**“Any attempt to provide for legalised abortion in Ireland that went beyond a case where the mother's life was in danger would require constitutional change.”**

---

If health or wellbeing abortions were to be introduced, then it would be necessary to either remove Article 40.3.3<sup>o</sup> or to add a further caveat to it which broadened the circumstances in which abortion would be permitted beyond those found in the *X* case. Both of these options carry with them the usual risk of judicial interpretation and so great care would need to be taken.

If Article 40.3.3<sup>o</sup> were simply removed, then it would create space for the legislature to pass a law legalising abortion for health or wellbeing reasons. A challenge to such legislation would be very likely to fail. It could be argued that because Article 40.3.2<sup>o</sup> protects the right to life, this should

be extended to the unborn. However if Article 40.3.3<sup>o</sup> had been removed by referendum, then it would be very hard to sustain an argument that the popular will was for the unborn to have a right to life.

Simple removal of Article 40.3.3<sup>o</sup> could seem like a relatively simple way of allowing for the legalisation of abortion if the Oireachtas was clearly planning to pass a law doing so. However, if Article 40.3.3<sup>o</sup> were removed, it could also leave space for the legislature to pass laws restricting abortion. In the event that such laws were passed and the right to life of the unborn had been removed from the constitution, then the constitutional issue would be whether the restriction was a denial of the constitutional rights of women seeking abortions, most notably the right to privacy. This was the issue in the major abortion cases in most other common law jurisdictions.<sup>19</sup> It is difficult to predict how a privacy rights challenge to such legislation would fare. The fact that the right to life of the unborn had been removed from the 1937 Constitution would certainly be of assistance in indicating that abortion restrictions were no longer to be countenanced by the Constitution, however it is not inconceivable that the Courts would uphold a ban.

If Article 40.3.3<sup>o</sup> were left in the constitutional text but amended to allow for health or wellbeing abortions, then the potential for unforeseen consequences would be narrowed. The interpretation and definition of the terms 'health' and 'wellbeing' would inevitably be left to the courts. This carries with it certain risks and may ultimately lead to a legislative scheme

---

<sup>19</sup> Most famously *Roe v Wade* (1973) 410 US 959.



which provided for abortion being struck down because it went beyond the courts' view of what health or wellbeing meant. However, there would be less scope for judicial interpretation than if the Constitution was merely silent on the issue of abortion. Furthermore, an amendment of this type may be more politically tenable than outright removal of the right to life of the unborn from the constitution.

### **8.3 Reform**

As a bare minimum, the Oireachtas must prioritise the passage of legislation which provides a transparent decision making mechanism with clear lines of responsibility for circumstances where a woman needs an abortion in Ireland because of a risk to her life. The current lack of legislation was described as 'inexcusable' by the Supreme Court twenty years ago, and still nothing has been done.

On the broader issue of introducing abortion in Ireland in circumstances other than a threat to the life of the mother, this will not be possible without constitutional change. There are two options for doing this. The first is to remove the right to life of the unborn from the 1937 Constitution. If this were done, then the text of the Constitution would essentially say nothing about abortion. That is not to say that the Constitution would not be interpreted to say things about abortion at a later stage by the courts. This option carries very heavy risks of unintended consequences arising from judicial interpretation. As was noted above, the courts could feasibly determine that the right to life in Article 40.3.2 extends to the

unborn, which would return matters to the current situation.

---

**“Removing the right to life of the unborn carries very heavy risks of unintended consequences, from judicial interpretation.”**

---

The second option is to insert a proviso allowing for abortion for health or wellbeing reasons. A proposed text would be inserted into Article 40.3.3<sup>o</sup> and would state that the subsection does not limit the provision of medical termination to terminate pregnancy for certain specified reasons; most obviously the health or wellbeing of the mother, but a more nuanced basis for permitting termination could also be included. Such a proviso should also very clearly state that such medical terminations must be regulated by law in order to come within the exception to the right to life of the unborn. Without legislation setting out the decision-making process involved for the medical professionals, this proviso would be totally unworkable.

## 9. Women's Socio-Economic Rights.

### *Summary of main points*

- Women tend to suffer greater economic and social insecurity than men and are more likely to be engaged in care work. Constitutional guarantees of economic social and cultural rights would improve the position of women in these positions.
- The constitutional currently guarantees some socio-economic rights, but the courts have developed a very restrictive interpretation of the enforceability of socio-economic rights.
- Constitutional socio-economic rights have had some successes elsewhere, such as in South Africa.

### *9.1 Socio-economic rights as a women's issue*

Civil and political rights are generally concerned with freedom from state intervention in how you live your life. They include freedom from arbitrary arrest, freedom of expression, the right to privacy etc. By contrast socio-economic rights are concerned with substantive equality.

---

**“Socio-economic rights are a gender issue: women in Ireland are disproportionately engaged in part-time employment, are poorer, have lower incomes and less access to financial resources than men do. They are more likely to face insecurity in relation to the provision of housing, food or healthcare.”**

---

Examples of socio-economic rights include the right to housing, food, social security or the right to an adequate standard of healthcare.

Socio-economic rights are a gender issue in Ireland as they are in most countries. Women in Ireland are disproportionately engaged in part-time employment, are poorer, have lower incomes and less access to financial resources than men do.<sup>1</sup> They are therefore more likely to face insecurity in relation to the provision of housing, food or healthcare. Meaningful constitutional provisions which provide a clear rights-based framework for the availability of basic minimum standards in these areas are likely to improve the position of a great many women in Ireland and to increase their economic independence. An increased provision for economic social and cultural rights on a gender-neutral basis, could be expected to contribute significantly to improving substantive equality between men and women in Ireland.

Women are responsible for the bulk of care work in Ireland.<sup>2</sup> The Irish politico-legal order currently values labour market work over all other forms of work. Care work is neither prioritised nor sufficiently supported.<sup>3</sup> The current approach, prioritises work done on the basis of arms-length contractual relationships which is

---

<sup>1</sup> See *Women and Men in Ireland* (Dublin: Central Statistics Office, 2011).

<sup>2</sup> *Who Cares? Challenging the myths about gender and care in Ireland* (National Women's Council, 2009).

<sup>3</sup> Smith, O. 'How far from a "right to care"? Reconciling care work and labour market work in Ireland' (2012) XLVII *Irish Jurist* 143.

immediately remunerative. Care work is vital to the social life of the nation, but it is also vital to the economy. Smith argues that:

the care functions and roles of individuals in society should be conceptualised to include collective and public elements as opposed to being conceptualised in predominantly individualised and private terms.<sup>4</sup>

If care work was not carried out without charge based on ties of love and affection, then much of it would need to be paid for. It is important to prioritise this work by ensuring that the fruits of the nation's collective endeavours are shared by those who prioritise care work over labour market work. If the Constitution recognises enforceable socio-economic rights, this will bring considerable security to care workers.

---

**“By taking a rights based approach to issues such as health, the Constitution would be recognising the importance of being cared for well as providing care.”**

---

As was discussed in Chapter 4, it is important that the Constitution provide some symbolic recognition of the ethic of care. This recognition would be further supported by endorsing socio-economic rights. This would occur in two ways. In the first instance, women engaged in caring work would face less economic insecurity. Secondly, by taking a rights based approach

---

<sup>4</sup> Smith, O. 'How far from a "right to care"? Reconciling care work and labour market work in Ireland' (2012) XLVII *Irish Jurist* 143, at p. 144.

to issues such as health, the Constitution would be recognising the importance of being cared for well as providing care.

## ***9.2 Socio-Economic rights and the existing provisions of the 1937 Constitution***

Most of the rights in the 1937 Constitution come within the broad definition of 'civil and political right'. That is to say that they are rights connected with the civil and political life of the nation and ensuring strong freedoms within a liberal democracy. For example, 'freedom of expression' guaranteed in Article 40.6.1<sup>o</sup> (i) conceptually implies that the state must leave the individual to express their views as they wish. This places a negative obligation on the state requiring that something (interfering with expression) not be done. Conversely, the right to free primary education in Article 42.4 of the 1937 Constitution places a positive duty on the State to provide children with schooling. Whereas negative rights attempt to keep the State out of individual's lives, positive rights require the state to improve their lives.

The distinction between positive and negative aspects of rights is not always clear cut and can be more fluid than people sometimes think. For example, it could be argued that the right to trial by jury in Article 38.1 is a negative right prohibiting the state from trying a person for an offense unless there is a jury. However, it also involves a positive requirement, mandating that the State provide a jury court when prosecuting an individual for an offence.

The current text of the Constitution provides very little in the way of economic social and cultural rights. Free primary education in Article 42.4 has proven quite effective. In the case of *TD v Minister for Education*<sup>5</sup> the Supreme Court recognised that some socio-economic rights may be possible under the constitution, but took the view that it would be a breach of the constitutional separation of powers for the Supreme Court to dictate to the Government how to enforce them. This decision presents a real challenge: There may be socio-economic rights in the 1937 Constitution, but if there are, they cannot be enforced through the courts.

A similarly weak approach is given by Article 45 which sets out the 'directive principles of social policy', which provide general guidelines regarding egalitarian economic policy, such as ensuring that free markets do not result in too much concentration of wealth and ensuring that everyone may through their occupation make reasonable provision for their livelihood. Article 45 has been found to be directed only to the Oireachtas and so cannot be used by the courts to enforce socio-economic rights. However, it has been used for interpretive purposes. Article 45.2.i states that 'the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.' In the case of *Murtagh Properties v Cleary*<sup>6</sup> the Supreme Court accepted that this provision, read in conjunction with the unenumerated right to earn a livelihood

---

<sup>5</sup> [2001] 4 IR 259

<sup>6</sup> [1972] IR 330

under Article 40.3, meant that it was not permissible to exclude a woman from employment because of her sex.

Article 45.4.2° states that 'citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.' This gendered language suggests that women ought not to be engaged in certain professions. This appeal to universal gender stereotypes has a solely symbolic function in the 1937 constitution and should be removed.

The 1937 Constitution generally and Article 45 in particular provide little that is concrete by way of socio-economic rights, with the exception of primary education. However, much of the difficulty has arisen because of a lack of enforceability, rather than a lack of recognition of rights. Article 45 could provide the venue for a renewed guarantee of socio-economic rights by allowing the courts to review the actions of the Government and the Oireachtas for compliance.

### ***9.3 International Standards and Comparative Approaches***

The main international treaty dealing with these rights is the International Covenant on Economic Social and Cultural Rights ('the ICESCR'). The Covenant sets out rights such as an adequate standard of living including housing,<sup>7</sup> enjoyment of the highest attainable standard of health<sup>8</sup> and education.<sup>9</sup> Ireland ratified the ICESCR in 1989.

---

<sup>7</sup> ICESCR Article 11.

<sup>8</sup> ICESCR Article 12.

<sup>9</sup> ICESCR Article 1.

The ICESCR commits the States Parties to 'progressive realisation' to the 'maximum of available resources'.<sup>10</sup> This arises because of a particular problem with economic social and cultural rights which does not present itself to the same extent as with civil and political rights.

Ireland is also a State Party to the Council of Europe's European Social Charter. Ireland ratified it in 1964 and it entered into force in 1965. Like the ICESCR, the Social Charter lacks an effective enforcement mechanism; however it is nonetheless an international obligation to which the State has signed up.

Both civil and political rights and socio-economic rights involve a combination of positive and negative duties on the state. The right to fair trial requires a working justice system, which costs money. The right to vote requires elections, which cost money. Both of these civil and political rights place both a negative duty on the State not to interfere and a positive duty to provide certain basic services. Similarly, the right to adequate housing involves both a positive duty to provide housing and a negative duty not to remove a person from a house they currently have. It is often argued that civil and political rights involve only negative duties and economic social and cultural rights involve only positive duties, but this is clearly not the case.<sup>11</sup>

However, the potential scale of the positive duties involved in economic social and cultural rights is much greater.<sup>12</sup> It would be

difficult to guarantee everyone a right to a three-bedroom semi-detached house with a garden that they could have enforced by the courts. It is easy to see how that approach would very quickly lead to a huge number of court cases and court orders that would lead to the expenditure of huge sums of public money. However, that does not mean that a positive obligation of some form cannot be enforced. In addition to this, negative obligations cost no money and so pose no difficulty.

Part IV of the Indian Constitution contains 'directive principles of state action', which are modelled to some extent on the provisions of Article 45 of the Irish Constitution.<sup>13</sup> Like the Irish principles, they are expressly non-enforceable by the courts. However, unlike the Irish principles, the Indian principles have been used to interpret the meaning of other rights which are enforceable. For example, in the case of *Olga Tellis v Bombay Municipal Corporation*<sup>14</sup> the applicants were living on the streets and in slums in Bombay. The Corporation sought to forcibly evict them and they argued that this deprived them of their livelihood, since many of them were engaged in street trading of one form or another. The directive principles of the Indian constitution include a right to an adequate means of livelihood. However, as the directive principles are not enforceable, the applicants could not rely on this provision. However, the Supreme Court held that the right to life must be interpreted in light of the directive

---

<sup>10</sup> ICESCR Article 2.

<sup>11</sup> See Fabre, C. 'Constitutionalising Social Rights' (1998) 6 *Journal of Political Philosophy* 263.

<sup>12</sup> See Tushnet, M. 'Social Welfare Rights and the forms of Judicial Review' (2004) 82 *Texas Law Review* 1895.

---

<sup>13</sup> See Hogan, G. 'Directive Principles, socio-economic rights and the Constitution' (2001) XXXVI *Irish Jurist* 174.

<sup>14</sup> [1985] SCC (3) 545.

principles and so interpreted the right to life as including the right to a livelihood.

Unlike the Indian Constitution, the South African Constitution contains substantial, directly enforceable guarantees of socio-economic rights. The most significant provisions are contained in sections 26 and 27 which state:

26. Housing.– (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. Health care, food, water and social security.–(1) Everyone has the right to have access to -

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

In leading cases, the South African Constitutional Court has interpreted these rights as requiring the Government to devise and implement programmes within available resources. In *Government of the Republic of South Africa v Grootboom*<sup>15</sup> the court ordered that a programme be devised to provide basic shelter for a group of people who had been living in a shanty town and had subsequently been evicted from private land. In *Minister for Health v Treatment Action Campaign* the government was required to come up with a programme to give HIV medication to pregnant women to combat mother to child transmission of HIV.<sup>16</sup> In neither case did the court order the expenditure of very specific sums, but in both cases, the existence of a right and a court order requiring some level of realisation was present.

It is in the nature of socio-economic rights that it is more difficult to enforce them with a single court order than is the case with civil and political rights. However, 'progressive realisation' can provide a role for the courts. In some of the South African cases, the courts have required the government to report back at specific intervals to indicate progress on the realisation of socio-economic rights in a given case.

#### 9.4 Reform

The inclusion of economic social and cultural rights in the 1937 Constitution

---

<sup>15</sup> (2000) 11 BCLR 1169

<sup>16</sup> (2002) 10 BCLR 1033 (CC)

would be a major step, but it is undoubtedly workable, with sufficient will. By including rights to health, housing, social welfare, adequate standard of living and expanding the right to education, the Constitution would provide a mechanism for the courts to drive a rights-based approach to social policy without necessarily dictating specific measures. The obvious place for an amendment would be Article 45. The provision which specifies that Article 45 is directed solely at the Oireachtas would need to be removed and it should be made

clear that the rights are justiciable in the courts. This would allow the type of judicial interpretation that has occurred in the Indian Supreme Court. However, it would not guarantee such an approach and the Irish Courts may be hesitant to enforce the principles. Therefore, in addition to this expanding the application of Article 45, it should also be expanded to include a list of specific economic social and cultural rights. The South African example set out above would provide the most obvious template for such reform.

# Appendix 1: How Constitutions Work

## Summary of main points

- A written constitution:
  - Makes symbolic statements about who we are as a nation
  - Establishes the institutions of government (courts, Oireachtas etc.) and decides which institution has the last word on certain issues
  - Provides protection for certain fundamental rights
- Written constitutions are interpreted by the courts. Their interpretation may be different to yours, but theirs is the one that will count
- Some parts of the Constitution say that the State must do certain things. Other parts of the Constitution allow the State to do things if it wants to

Most written constitutions, including the 1937 Constitution, are relatively short documents. This suggests that they are straightforward and easily applied. However, this is rarely the case. The text itself is only part of the equation and sometimes quite a small part.

All functioning nation states are legally 'constituted' regardless of whether or not they have a single written constitution. They have systems of governance and law-making. They have rules about what types of state action are legitimate and about the hierarchy of power as between different branches of government. The United Kingdom, for example, does not have a single written constitution. Notwithstanding this, it has one of the oldest and most stable systems of

governance in Europe.<sup>1</sup> The Swedish written constitution is actually comprised of four separate documents.<sup>2</sup> Written constitutions as we currently understand them are a relatively recent creation, having entered into use in the late 18<sup>th</sup> Century.<sup>3</sup>

As a starting point, it is important to understand what a written constitution such as the 1937 Constitution does. There is some academic disagreement on precisely what constitutions can and should do, but the functions broadly fall into three categories:

1. A symbolic statement of national identity and values
2. The establishment of a particular set of government institutions and a delineation of the power relationships between them
3. The limitation of State action and the protection of fundamental rights

These functions are not sealed off from each other and some constitutional provisions will involve some of all three. For example, take a constitutional right to freedom of expression that can be enforced in the courts. Such a right makes a statement that the free exchange of ideas is important to the society; it states which government institution (i.e. the courts) have the final say on what the

---

<sup>1</sup> See generally, Loughlin, M. *The Idea of Public Law* (Oxford: Oxford University Press, 2003).

<sup>2</sup> Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.

<sup>3</sup> See Canny, N. 'The Birth of the Modern Constitution' in Farrell, B. (ed.) *De Valera's Constitution and Ours* (Dublin: Gill & Macmillan, 1988).



right involves; and it acts as a mechanism for preventing the State from restricting expression.

### ***A.1. A symbolic statement of national identity and values***

The articulation of some form of national vision is a common theme in written constitutions. The other two functions of a written constitution will have an equivalent in systems of government without a written constitution. However, the task of writing down of a basic law provides an opportunity for a statement of national identity. This function is the least legal of the three functions, but it is of great importance. It informs how a society sees itself. For example, Article 5 of the 1937 Constitution states: 'Ireland is a sovereign, independent, democratic state.' There are some points of legal significance to this provision, regarding the legal personality of the state etc. However, there is also a powerful expression of how Ireland understands itself. The three adjectives used have considerable rhetorical force as well as specific legal meanings.

The abstract and broad nature of the language used is significant. Sometimes big concepts need big words. However, the language can also be used to disguise disagreement. Concepts such as 'independent' and 'democratic' are vague enough to ensure general support, but their precise meaning can be the subject of great controversy. This is particularly so with the language of fundamental rights. The symbolic function in relation to rights can suggest a simplicity and an agreement as to meaning which is often absent.<sup>4</sup>

---

<sup>4</sup> Waldron argues that where rights-disagreements are recognized at the time of drafting, the words chosen are likely to be used to finesse those disagreements. See Waldron Waldron, J. 'The Core

On a more practical level, written constitutions also endorse the grounding political philosophy of the State in the way in which the institutions of the State are designed.<sup>5</sup> In most western constitutions, including the 1937 constitution, this is some form of liberal democracy with a greater or lesser emphasis on social democracy.

### ***A.2 Establishment of government institutions***

The second function of a constitution is arguably the most practical. It is also a function that will be necessary for any stable nation state, regardless of whether it has a written constitution. The institutions that are to be charged with governing the State are formally established in a written constitution and, particularly where the constitution is endorsed by a popular mandate, the institutions derive their legitimacy from that constitution.

This institution-establishing function of a written constitution may seem relatively uncontroversial. However, it is important to remember that the institutions of government are responsible for making decisions that are complex, important and

---

of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, at 1381. Loughlin argues that the ambiguities in constitutions are designed to keep certain issues of political authority from being finally resolved and so the 'obscurities are functional'; see Loughlin, M. *The Idea of Public Law* (Oxford: Oxford University Press, 2003), at 50.

<sup>5</sup> McWhinney contends that constitutions are based on a prior question, which is a political decision. Once this prior '*Grundnorm*' is established, then the primary and secondary principles of the legal order are deduced from that '*Grundnorm*'. See McWhinney, E. *Constitution-Making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981), at p. 13.

often very controversial. Disagreement and conflict are inevitable in any human society. The practice of politics is a way of tackling those disagreements and conflicts. Constitutional law, by establishing the priorities of legitimacy between political institutions is the legal mechanism for mediating the way in which the practice of politics does this.<sup>6</sup> Understood in this way, the division of labour between institutions of government can take on considerable significance. It is important to know who has the final say on any controversial question.<sup>7</sup>

Under Article 15 of the 1937 Constitution, the Oireachtas has the sole power for making law. However, Article 15.4 states that the Oireachtas may not pass a law which is repugnant to the Constitution and any such law will be invalid. Whether or a law is repugnant to the Constitution is often a complex question. Article 34.3.2<sup>o</sup> states that the High Court and the Supreme Court have the power to decide whether a law is repugnant to the Constitution. This means that the Courts have the last word on whether or not a law is constitutional. This is often described as ‘strong-form’ judicial review of legislation.<sup>8</sup> It can be distinguished from ‘weak-form’ judicial review of legislation, such as under the Human Rights Act in the UK. The Human Rights Act allows the British courts to decide

whether or not legislation is compatible with the European Convention on Human Rights (‘the European Convention’), but the legislation remains in force until the Parliament decides to change it. Giving the last word on the constitutionality of laws to the Courts is a choice of constitutional design and it is fundamental to the Irish constitutional system.

Any proposal for reform of the 1937 constitution needs to take account of Ireland’s ‘strong-form’ system of judicial review of legislation. The definition and interpretation of any amended constitutional provision is ultimately to be decided by the Supreme Court. Also, constitutional provisions are generally more abstract and vague than ordinary legislation, and so there will be more scope for interpretation than with other types of law. Therefore, great care needs to be taken in proposing constitutional amendments. A proponent of a particular view may well have a very clear understanding of what the wording of the amendment means. For most Irish legal purposes, the understanding of the proposer of the amendment is functionally irrelevant. Once the wording is in the constitution, it falls to the senior judiciary to interpret the wording as it applies to specific cases. This often leads to unintended consequences for those supporting a particular amendment.

### ***A.3 Protection of fundamental rights***

The third function of a modern written constitution is to provide legal protection for certain fundamental rights. These rights are stated in broad abstract terms and by being written into the constitution, they have a superior place in the legal order to other types of law, such as ordinary legislation.

---

<sup>6</sup> Loughlin calls constitutional law in this sense ‘the Third Order of the Political’. See Loughlin, M. *The Idea of Public Law* (Oxford: Oxford University Press, 2003), at 42.

<sup>7</sup> Alexander, L. ‘What are Constitutions, and What Should (and Can) They Do?’ in Paul, E.F., Miller, F.D. and Paul, J. *What Should Constitutions Do?* (Cambridge: Cambridge University Press, 2011).

<sup>8</sup> See Tushnet, M. ‘New Forms of Judicial Review and the Persistence of Rights - and Democracy - Based Worries’ (2003) 38 *Wake Forest Law Review* 813.

The types of rights that are entrenched in constitutions in this way include many of the rights protected by international human rights law, especially the International Covenant on Civil and Political Rights. Indeed, the history of the international human rights movement owes a great deal to early bills of rights contained in written constitutions, especially the US Bill of Rights and the French Declaration of the Rights of Man and of the Citizen. There is large scope for harmony between a State's international human rights law commitments and its own constitutional rights system. For example, the European Convention has often been used as a guide by the Irish courts when interpreting the meaning of Irish constitutional rights.<sup>9</sup>

Two features of constitutional rights protection are of particular importance for this report. First, many constitutional systems provide for what are called 'unenumerated rights'. This means that the constitution guarantees human rights as an abstract concept and gives a list of rights, but allows the courts to 'find' other rights. This is done in Article 40.3 of the 1937 Constitution which guarantees that the State will respect, defend and vindicate the rights of the citizen before going on to list some rights which will 'in particular' be protected from unjust attack. This has been read as meaning that there are rights that are protected by the constitution which are not stated in it.<sup>10</sup> Irish courts have historically been strong advocates of this approach relative to other countries (although this has

dropped off somewhat in recent years<sup>11</sup>). Unenumerated rights allow the courts to even more power to have the final say relative to the legislature than other systems. The courts, having found a right, can strike down a law even though the right is not actually written into the constitution. For example, this occurred in the famous case of *McGee v Attorney General*<sup>12</sup> in which the Supreme Court decided that the constitution guaranteed the right to marital privacy.

Secondly, constitutional rights (and for that matter international human rights) are drafted in very broad and abstract terms. There are many good reasons why this is so, but it presents a practical legal problem of definition and application, particularly in difficult cases. There is little doubt that torture is a breach of the constitutional right to bodily integrity.<sup>13</sup> However, putting fluoride in the general drinking water supply is not.<sup>14</sup> Neither of these outcomes are expressly stated in the constitution. In fact, the right to bodily integrity itself is not stated in the constitution. Despite this, these are the answers that the courts have come up with. It is possible and even likely that reasonable people will disagree on the precise content of constitutional rights, without necessarily lacking a deep commitment to those rights. This puts the courts in the position of final arbiters of the meaning of rights.

Amendment of the constitution is a tricky business. Proponents of an amendment may expect it to have a particular effect, but this may not be the result. As was

---

<sup>9</sup> See de Londras, F. and Kelly, C. *European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall, 2010) at pp. 34-36.

<sup>10</sup> See *Ryan v Attorney General* [1965] IR 294.

---

<sup>11</sup> See *TD v Minister for Education* [2001] 5 IR 259, at p. 369-370 *per* Keane CJ.

<sup>12</sup> [1974] IR 284

<sup>13</sup> The right to freedom from torture was recognised in *State (C) v Frawley* [1976] IR 365.

<sup>14</sup> See *Ryan v Attorney General* [1965] IR 294.

discussed in Chapter 1, a good example of this is the Eighth Amendment to the Constitution which introduced an express recognition of a right to life for the unborn in a new Article 40.3.3<sup>9</sup>. Proponents of the amendment thought that the amendment would ensure that abortion could never be lawfully carried out in the Irish State.<sup>15</sup> At the time of its introduction, abortion was (and remains) a criminal offence punishable by life imprisonment under section 58 of the Offences Against the Person Act 1861, and so unambiguous legislative prohibition through the criminal law was already in force. Nonetheless, proponents of the amendment wished to see the prohibition of abortion raised to the level of constitutional principle so that it could not be amended by ordinary legislation. What ultimately transpired in *Attorney General v X*<sup>16</sup> was that the Eighth Amendment was actually interpreted as giving rise to a constitutional right to have an abortion in circumstances where the life of the mother is at risk.

### ***A.5 What Constitutions require the State to do and what they leave the State free to do***

The limitation of state power is not solely covered by constitutional rights. Constitutional provisions generally can be either permissive or mandatory with respect to state action. They can state that it is open to the Government and/or the Oireachtas to do certain things or they can require that those things be done. For example, Article 16.5 of the 1937 Constitution provides that Dáil elections must be held at least every seven years. This is mandatory and requires that an

upper limit be observed. However, the same section also states that a shorter period may be fixed by law. This is permissive and allows the Oireachtas to pass a law to put a shorter time limit on the Dáil term. The Oireachtas has done this and section 33 of the Electoral Act 1992 provides that the Dáil term is capped at five years.

This distinction may seem relatively academic, but it is very important for any reform of the constitution. A great many (arguably most) policies can readily be pursued by ordinary legislation without any need to worry about the 1937 Constitution because the it either says nothing of relevance about them or because what it does say leaves the issue open to the Oireachtas or the Government to decide. Where the Constitution does currently provide for a particular issue, it may be that there is a mandatory provision that needs to be removed in order to implement a particular policy. Alternatively, it may be that a particular policy is seen as being of such importance that it needs a constitutional mandate. This could be because it is related to fundamental rights or because it is concerned with the making of an important statement.

Again, the Eighth Amendment on the right to life of the unborn is a good illustration. As things stand it would not be permissible for the Oireachtas to pass a law allowing for abortion in any circumstances other than where the life of the mother was in danger. If the goal of legalising abortion in Ireland were to be pursued, then the right to life of the unborn as currently stated would either need to be removed from the Constitution or substantially amended. If, for example, it were simply removed, then it would arguably be open to the Oireachtas to

---

<sup>15</sup> See Spreng, J.E. *Abortion and Divorce Law in Ireland* (Jefferson NC: McFarland & Co, 2004) at pp. 84-93.

<sup>16</sup> [1992] 1 IR 1

pass whatever law it deemed appropriate to regulate the provision of abortion in Ireland (provided it did not intrude on any other constitutional provision). It would not be necessary to put a constitutional right to have an abortion into the 1937 Constitution in order for abortion to be legal. It would only be necessary to remove the current constitutional limitation. Alternatively, it may be that the policy being pursued is not merely to permit abortion, but to ensure a strong recognition of women's reproductive autonomy. In those circumstances, a mandatory provision providing a right to have an abortion could be inserted. However, as discussed above, the determination of the meaning of that right would be in the hands of the Courts, not in the hands of those proposing it.

However, where the Constitution is permissive, it is obviously capable of leaving the door open to the passing of laws that may go against a particular policy position. The 1922 Constitution of the Irish Free State was arguably less gender-prescriptive than the 1937 Constitution, or at least more gender neutral.<sup>17</sup> However, a large amount of gender discriminatory legislation was passed under the 1922 Constitution. For example, the Civil Service (Amendment) Act 1925 limited the positions that were available to women in the civil service and the juries Act 1927 limited the circumstance in which women could sit on juries. It is arguable that the approach of the courts to women's rights under the 1922 Constitution (provided for in Article 3) was influenced by a less active

---

<sup>17</sup> Doorley, D. 'Gendered Citizenship in the Irish Constitution' in Murphy, T. and Twomey, P. (eds.) *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), at pp.122-124.

approach to rights generally, but the example is illustrative.

The distinction between mandatory and permissive constitutional provisions is clearly of great relevance to any proposal for constitutional reform and should be a central factor in the analysis for any such proposal.

## ***A.6 International Obligations***

CEDAW, the European Convention and EU law all affect the Irish legal system in different ways. It is important to be aware of these distinctions when arguing for reform.

### ***A6.1 Convention on the Elimination of all forms of Discrimination Against Women***

CEDAW is a UN sponsored Convention which entered into force in 1981 and which Ireland ratified in 1985. CEDAW was adopted to 'draw specific attention to the entrenched nature of women's inequality and the need for significant affirmative measures to address it.'<sup>18</sup> CEDAW places positive obligations on States Parties to ensure that their legal system actively protects women from discrimination. At the time of ratification of CEDAW, the Irish State made a number of reservations to its commitment, relating to citizenship and marriage, access to credit freedom of contract and employment equality.<sup>19</sup> Between 1986 and 2004 all of these reservations were withdrawn.

Part I deals with general guarantees of equal human rights and freedom from

---

<sup>18</sup> Otto, D. 'Women's Rights' in Moeckli, D. Shah, S. and Sivakumaran S. (eds.) *International Human Rights Law* (Oxford: Oxford University Press, 2010), at p. 346.

<sup>19</sup> The complete text of the reservations is published in United Nations *Treaty Series*, Volume 1413, p. 415.

discrimination as well as requiring policy measures to be taken to that end and allowing for temporary measures to be used to increase equality between men and women. Part II deals with political and public life. Part III deals with access to services such as health and education. Part IV deals with law and marriage. Part V establishes an expert committee, the Committee on the Elimination of all forms of Discrimination Against Women ('the CEDAW Committee') and Part VI deals with certain administrative and technical matters.

Article 18 requires States Parties to submit periodic reports to the CEDAW Committee setting out the measures that the State has adopted to give effect to CEDAW. This has been done by Ireland on three previous occasions, 1987, 1997 and 2003. Article 18 requires that the reporting be done every four years. The 1997 report was a combined 'second and third' report and the 2003 report was a combined 'fourth and fifth' report. Subsequent to the submission of state reports, the CEDAW Committee gives comments to the State Party outlining the steps which ought to be adopted to ensure that the State gives full effect to its commitments under CEDAW.

CEDAW has an optional protocol which entered into force in 2000 and was ratified by Ireland the same year. The optional protocol allows for individuals to directly complain to the CEDAW Committee where they are of the view that the State is in breach of some provision of CEDAW. A finding of the CEDAW Committee is not binding in the same way an order of an Irish court would be. Also, the investigation is conducted confidentially. However, the process does place additional pressure on governments to ensure compliance.

## ***A6.2 European Convention on Human Rights***

The European Convention is an international treaty adopted by the members of the Council of Europe. The Council of Europe was set up in response to the human rights violations of the Second World War and it currently has 47 members. It is not a body of the European Union.

The European Convention guarantees a series of civil and political rights, including the right to respect for private and family life, the right to freedom of religion, and the right to marry. It also requires, in Article 14, that there be no discrimination between people's enjoyment of the rights guaranteed under the convention on the basis of specified grounds, including race, religion and sex.

Like CEDAW, the European Convention is an international treaty and so essentially it is a set of mutual commitments made by states to each other concerning how they will treat their own citizens. Like CEDAW, the European Convention has a mechanism for individuals to make complaints. Unlike CEDAW, the European Convention complaints mechanism involves an international court with public hearings. The European Court of Human Rights (ECHR) has established itself as one of the most successful international courts in the world. Its rulings are not binding in the same sense that a ruling from a domestic court would be, but there is a very high degree of compliance with its rulings from most of its member states, including Ireland.

In 2003 the Oireachtas passed the European Convention on Human Rights Act ('the 2003 Act'). It provides for the

European Convention to be used in Irish law in certain circumstances on a 'sub-constitutional' and 'indirect' basis. The legal authority for the use of European Convention law in Irish courts comes from the 2003 Act, not from the European Convention itself. While the 2003 Act does allow for the use of the European Convention in challenges to certain types of government action, it does not place any requirements on Ireland with regard to amendment of the Constitution; nor could it. It is ordinary legislation passed by the Oireachtas. The Oireachtas does not have the power to amend the Constitution without a referendum.

### ***A.6.3 EU law and the Charter of Fundamental Rights.***

The Law of the European Union is unlike other types of international law. CEDAW and the European Convention essentially consist of a series of mutual promises. If those promises are broken, a state may face the condemnation of other states, but other than international pressure of various forms, there is little to enforce compliance. Conversely, membership of the European Union requires a state to give up its own law-making power in certain specified areas, known as 'competences' of the EU. Where the EU institutions legislate within those competences then those laws are capable of being directly enforced within the member states' own legal systems and by the Court of Justice of the European Union (ECJ). The line between what is an EU competence, what is a member state competence and what is a 'shared competence' has become somewhat blurred.<sup>20</sup> The areas of exclusive competence include commercial policy,

---

<sup>20</sup> Craig, P. *The Lisbon Treaty: Law Politics and Treaty Reform* (Oxford: Oxford University Press, 2010), at p155-158.

the Euro and the customs union.<sup>21</sup> Shared competence includes areas such as social policy, energy, and the environment.<sup>22</sup>

It is often acknowledged that a large amount of the improvement of the legal position of women in Ireland was caused by membership of the EU. For example, the legal requirement of equal pay for equal work<sup>23</sup> is a product of EU law. The supremacy of EU law has arguably served the women or Ireland well. There is some scope for the further development of this through the Charter of Fundamental Rights of the EU ('the EU Charter'), it has become part of the founding law of the EU since the adoption of the Lisbon Treaty in 2009. The Charter applies to the EU itself and to member states when implementing EU law. As the EU continues to exercise its lawmaking power through shared competence in areas such as social policy, this can be expected to be of relevance to the position of women in Ireland. Article 23 expressly recognises the equality of men and women and requires that it be ensured in all areas, including employment, work and pay. It also provides that the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex. While it was already the case that Irish law and the 1937 Constitution were constrained by EU law within the areas of EU competence, this provision means that when making law, the EU must ensure gender equality. The EU Charter has not been in force for very long and so it is difficult to expand on its

---

<sup>21</sup> Treaty on the Functioning of the European Union, Article 3.

<sup>22</sup> Treaty on the Functioning of the European Union, Article 4.

<sup>23</sup> Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (75/117/EEC).

requirements, but it is an important factor to consider in examining Irish

constitutional

change.