



Constitutional Conversations, No. 1 of 6

Constitutions, Referendums and the Family

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INTRODUCTION

The aim of this conversation, the first of the Constitutional Conversations 2016, was to prompt thought and discussion in relation to recent constitutional changes, namely the 31st Amendment concerning children and the 34th Amendment on marriage. The planned structure of the conversation was for 30 minutes of overview of the topic by Dr Fergus Ryan, followed by an hour of open-floor conversation.

DISCUSSION

The focal point of this conversation was recent constitutional reform as it relates to the rights of the child, with emphasis on the 31st Amendment to the Irish Constitution, which guarantees to safeguard the natural rights of the child whether born inside or outside of marriage. The changing parameters of marriage in Irish society were elaborated upon through referencing the recent referendum to put into action the 34th Amendment to the Irish Constitution, which allows couples to marry without distinction as to their gender. Both topics explored the evolving and changing role and shape of the family in modern Irish society.

It was remarked that although change in Ireland in recent years has been revolutionary, it still does not account for all aspects of family diversity. Even in the wake of the marriage referendum, there are still categories of family unrecognised and excluded by the Irish Constitution; for example, Articles 41 and 42 define a family as being based on marriage, therefore excluding cohabiting couples with children and unmarried lone parents, who by default fall outside the constitutional definition of family. It was noted that there may be a discrepancy in principles of equality in relation to Article 40.3, in which the unmarried mother has personal rights in respect of her child whereas an unmarried father has no constitutional rights in respect of his child at all.

Although the marriage referendum on the face of it seemed to promote inclusion and acceptance, the Constitution still does not promote diversity. The institution of marriage, endorsed by Art. 41.3, is still the 'gold standard' in Irish law. The topic of civil partnerships was discussed briefly, and the question was asked whether it was positive or negative that what was viewed as a 'consolation prize' by many is now being phased out. Now that the right to marry is extended to all, having the option of civil partnership may serve to de-incentivise marriage. However, the removal of civil partnerships limits options for couples, particularly those who would prefer its totally egalitarian nature.

A NUMBER OF CENTRAL QUESTIONS WERE POSED

Should marriage be protected at the expense of other familial arrangements? Or is the notion of privileging marriage out of kilter with society and central principles of equality? In the same vein, is the statement in the 31st Amendment as it relates to the rights of children too non-committal to defend their 'natural rights as far as practicable'; is this too subjective? Does this promote the economic and social rights and equality of all children regardless of their wealth or inherited conditions?

ADDITIONAL QUESTIONS AND OBSERVATIONS RAISED DURING OPEN FLOOR DISCUSSION

- What may be next in Ireland for the subject matter at hand? Is there the political will for further reform, and will it be satisfactory?
- If the Irish judiciary took international human rights law into consideration more effectively, might there be a somewhat faster process of broadening the constitutional definition of the Irish family?

- Should the marital family/any family hold a privileged position within Irish law at all?
- Is there a need for Article 41 within the Irish Constitution at all? Has it been useful in any instance?

CONCLUDING REMARKS & KEY POINTS

Towards the latter part of the conversation, the focus of the group turned to children's rights and the best interests of the child, with policy being viewed through a practical lens rather than an academic one. The notion of a two-tier system (arguably removed by the 31st Amendment) that discriminated against children born outside of rather than inside marriage was subject to much criticism. Articles 41.4 and 42A were stated to amount to a positive step forward but could have been more radical. It was discussed that Irish policy needs to be in line with the rhetoric. The government cannot realistically promote marriage and the family while at the same time cutting child benefits and increasing childcare costs.

Notwithstanding the radical change Ireland has seen, particularly in the past 24 months, there is still a tendency to over-constitutionalise and award special privilege to the family based on marriage. Judging by the conversation in this meeting, possible recommendations for reform that members of the group may suggest include early intervention systems in schools that provide for mechanisms to aid hearing and listening to the voice of the child and the effective provision of legal aid and access to it. It was suggested that in many instances, legal representation appointed to children served a role more in line with being an adviser to the court as opposed to representing the best interests of the child. It was also viewed that child protection proceedings require radical reform. The reality for children in the present Irish legal system was thought to be stark. Ireland still has a tendency to romanticise traditional values and promote marriage as an ideal, or the pinnacle of Irish society and unions. The Constitution is a living document with the ability to evolve and stay relevant to the modern Irish family and to copper-fasten instead of providing a barrier to citizens' rights.