

# A CRITICAL ANALYSIS OF THE PROTECTION OF FAMILIES UNDER THE IRISH CONSTITUTION OF 1937

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## A INTRODUCTION

Since its enactment in 1937, Bunreacht na hÉireann has created a furore of debate within the confines of Irish society. Debate not just reserved to the traditional offices of power or courts of justice, but amongst the everyday man as it champions the rights of her citizens and lays out the sociological beliefs of the nation. As with any element of governance it does not garner absolute approval from every demographic, but it has been instrumental in the creation of the society and island we find ourselves inhabiting.

However, the Constitution remains a product of its time of drafting, and this goes some way toward explaining its somewhat restrained and conservative nature. This is not to say that the Constitution has been a hindrance to the progression of Irish society as the fledgling nation came to terms with the rapidly changing times of the mid 20<sup>th</sup> century. In fact in some instances it has been the stepping stone for progress, exemplified in the *McGee*<sup>1</sup> case where recognition and interpretation of the right to marital privacy allowed for specific sections of a law criminalising the importation of contraceptives into Ireland to be held unconstitutional.

The Constitution places great importance on the family unit as the cornerstone of Irish society calling it 'the natural, primary and fundamental unit group of society'<sup>2</sup> and a 'moral institution that possesses inalienable and imprescriptible rights.'<sup>3</sup> Amongst the praise that it heaps on the family unit one utterance stands tall above the others suggesting the family is 'the necessary basis of social order...indispensible to the welfare of the Nation and the State.'<sup>4</sup> Indeed the level of reverence the Constitution seems to hold for the family is at such a level that Shatter describes the family unit as being 'placed on a constitutional pedestal.'<sup>5</sup> It must be said however that within the Constitution the modern family occupies a grey area whereby it has been given express rights<sup>6</sup> though under a rather narrow and outdated definition.

Throughout this article we will explore the relationship between the family unit and the Constitution looking at the rights it does impart, those it does not, and the types of family it recognises. We will ask whether or not the document drafted seventy four years ago still protects and empowers the institution it so highly regarded at the inception of the state, as the traditional family unit has unquestionably gone through a complete metamorphosis in the last three quarters of a century. These questions shall be asked in the light of comparisons with other jurisdictions and their legislation.

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<sup>1</sup> *McGee v Attorney General* [1974] IR 284.

<sup>2</sup> Bunreacht na hÉireann 1937 Art 41.1.1.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid* Art 41.4.2.

<sup>5</sup> A Shatter *Family Law in the Republic of Ireland* (4<sup>th</sup> edn Butterworths Dublin 1997) 5.

<sup>6</sup> Bunreacht na hÉireann 1937 Art 41-42.

## B THE FAMILY

In order to better understand and analyse the protections the Constitution affords to the family unit, a precise and clear definition of what constitutes the family is essential. The family can be defined as ‘a group of people who are related to each other, such as a mother, a father, and their children.’<sup>7</sup> Unfortunately no such clear cut definition is provided within the confines of the Constitution and this lack of definition has led to the courts having to impose their own definition. They have interpreted the Constitution as only recognising the family unit which is based upon marriage. The leading judgement, which provided us with this definition, was handed down by Walsh J in what has commonly become known as the *Nicolaou*<sup>8</sup> case. In this case the plaintiff, an unmarried father, took an action against the adoption board as the mother of his child had placed the child up for adoption without his consent. He claimed that they were a family as per Article 41 but Walsh J held the view that:

While it is true that unmarried persons co-habiting together and the children of their union may be referred to as a family and have many, if not all, of the outward appearances of a family....nevertheless so far as Article 41 is concerned the guarantees therein contained are confined to families based on marriage.<sup>9</sup>

Walsh J’s words above are interesting not only because they provided one of the first concrete definitions of what a constitutional family is under Irish law but also because he acknowledged the existence of other types of family units and their lack of protection under the Constitution. Inadvertently (or perhaps intentionally) Walsh J has pointed out the Constitution’s failings in regards to other, non-traditional, family units. While at the time of the case a non-marital family may not have been commonplace, it is safe to say that such non-orthodox family units are becoming a more regular occurrence as more and more people choose not to marry but are no less committed to each other or the children they may have.

## C THE RECOGNISED FAMILY UNIT

While the definition outlined above may appear to be narrow, in reality it confers Constitutional protection on a large number of different family units based upon marriage. These include; couples with children, those without children, orphaned children of a married couple, legitimised children, and separated couples.

### 1 Married Couple with Children

This is the primary type of family unit that the Constitution under article 41 seeks to protect. A primary example that highlights the courts ambition to protect this type of family’s rights

<sup>7</sup> Cambridge Dictionary, available at <[http://dictionary.cambridge.org/dictionary/british/family\\_1](http://dictionary.cambridge.org/dictionary/british/family_1)> last accessed 21/01/11

<sup>8</sup> *The State (Nicolaou) v An Bord Uchtala & The Attorney General* [1966] IR 567.

<sup>9</sup> *ibid* 643-644.

comes from the landmark decision in the *Baby Ann*.<sup>10</sup> In this case a young couple who became pregnant put their child up for adoption. The child was placed with a new adoptive family and was in their care for around fourteen months before the natural mother changed her mind in September 2005 and decided to take legal action to regain custody of her child. The natural mother and her partner, with whom she had the child, were married in January 2006 in a registry office in Northern Ireland.<sup>11</sup> In the High Court MacMenamin J ruled that the now 2 year old child would be psychologically damaged if she was taken away from the adoptive parents,<sup>12</sup> a view which many would find hard to disagree with as the child in the two years she was placed with her adoptive parents would have formed a natural familial bond with them. The natural parents appealed MacMenamin J's ruling to the Supreme Court in November 2006 and the five judge Supreme Court took a purely legal standpoint on the issue and decided the case, as per, 'under the Constitution and the law as it now stands.'<sup>13</sup> Fennelly J stated that:

[T]here is a primordial constitutional principle that a child's welfare is best served in the heart of its natural family ... must be compelling reasons to rebut that presumption ... I do not believe that there was sufficient evidence to rebut the presumption in this case.<sup>14</sup>

In keeping with these statements the Supreme Court decided to allow the appeal and Baby Ann was returned to her natural parents, although over a period of time so as to minimise the extent of her psychological distress. One could argue that removing the child from the parents who raised her over what many consider to be the most important stages of a child's formative years so as to satisfy the Constitutional definition of a family might be considered unfair on the child and indeed the adoptive parents who raised her. Máiréad Enright argues that:

As Irish law stands; the child is a mere incident to the controlling question of parental rights, if that at all. If a parent behaves towards his child in a manner which has inevitably terrible and destructive consequences, the State may intervene to put things right. In all other matters, the child appears to be subordinate to his parents' will.<sup>15</sup>

The very fact that the child's birth parents acted on legal advice to marry so as to strengthen their custody chances<sup>16</sup> shows us that within the Irish Legal community there is a recognition of the inadequacies in the protection available under the Constitution for co-habiting couples. This issue will be discussed later.

## 2 Married Couple without Children

<sup>10</sup> *N & Anor v HSE & Others* [2006] 4 IR 374.

<sup>11</sup> *ibid* 481.

<sup>12</sup> *ibid* 465.

<sup>13</sup> *ibid* 498 per McGuinness J.

<sup>14</sup> *ibid* 592.

<sup>15</sup> M Enright *Interrogating the Natural Order: Hierarchies of Rights in Irish Child Law* (2008) 11(1) Irish Journal Family Law 3, 56.

<sup>16</sup> M Devlin 'Baby Ann case shows 'new' Ireland is really only skin deep' *Independent.ie* (16 November 2006) <<http://www.independent.ie/opinion/analysis/baby-ann-case-shows-new-ireland-is-really-only-skin-deep-68940.html>> (07 March 2012).

A couple does not need to produce offspring in order for them to be recognised by the Constitution as a family. All that is needed to be recognised as a constitutional family is to be married and have that marriage recognised by the state. In *Murray v Attorney General*<sup>17</sup> Costello J suggested that the words used in Article 41.1.1 include a married couple without children within the Constitutional definition of a family. In *DT v CT Murray* J described marriage as:

A solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution. ... it is not entered into for a determinate period ... the moment a man and woman marry their bond acquires a legal status. The relationship once formed the law steps in and holds the parties to certain obligations and liabilities.<sup>18</sup>

There are two interesting points to note in this extract. Murray J held once again that married couples not only have legal rights but also legal obligations, confirmation of their being a constitutionally protected family. Secondly, and of more interest, is his acknowledgement that the bond of marriage ‘is not entered into for a determinate period.’<sup>19</sup> This is a clear recognition by the Courts that while marriages do not always last for life (the bond of marriage is one that can be legally broken), the parties had, as per the vows taken in Christian weddings, intended it to last a lifetime.

Further recognition of the family is given in the case of *Murray*<sup>20</sup> where two married prisoners, convicted of the murder of a member of An Garda Síochána, were seeking to have their right to procreate recognised by the courts under Article 40.3.1 of the Constitution. In this case Costello J gave a less socially advanced definition of marriage when he stated that:

[t]he Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship.<sup>21</sup>

He later goes on to state that:

A married couple without children can properly be described as a ‘unit group’ of society such as is referred to in Article 41 ... The words used in Article 41 to describe the ‘Family’ are therefore apt to describe both a married couple with children and a married couple without children.<sup>22</sup>

While this did officially confer the protections of the Constitution onto a family based on marriage but without children it also ruled out the possibility of having those protections conferred on same sex couples as it mentions the Christian notion of a partnership thereby ruling out same sex couples.

### 3 Orphaned children whose parents were married

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<sup>17</sup> [1985] IR 532.

<sup>18</sup> [2002] 3 IR 334 p 405.

<sup>19</sup> *ibid* 405.

<sup>20</sup> *Murray* (n 17).

<sup>21</sup> *ibid* 536.

<sup>22</sup> *ibid* 537.

The Constitution will also confer the status of family upon orphaned children whose parents were married before their death. While this may be a bone of contention that it only confers this status upon orphaned children whose parents were married and does not recognise those whose parents were not married Article 45.4.1 explicitly protects the orphan.

#### 4 Legitimised Children

Under the Legitimacy Act of 1931 children who were born out of wedlock had their rights of succession severely limited compared to those born within the confines of marriage. However in the case of *In Re M, an infant*<sup>23</sup> Gavan Duffy J ruled that a non marital child enjoyed rights similar to that of a marital child under Article 42 as per their own personal rights afforded to them under Article 40.3. These included the right to the care and custody of their mother and the right to an adequate education and upbringing. A child who was born out of wedlock had no rights against his father and was regarded as a *filius nullius*.<sup>24</sup> Nestor states that this treatment of non-marital children was justified on the basis that if equal protection was given to both so-called legitimate and illegitimate children this would promote promiscuity.<sup>25</sup> This once again highlights the conservative Catholic influence that was exerted on Ireland's initial lawmakers. The idea of a child being born out of wedlock was a massive social taboo and there were very few co-habiting couples with children in the early part of the State's life. There are currently 121,000 cohabiting couples in Ireland<sup>26</sup> a figure which probably would have shocked the Ireland of the mid 1900's. Of course a child could be 'legitimised' by virtue of their parents marrying and therefore have conferred on them all the rights of a marital child. This rather archaic practise was itself legitimised by the Supreme Court in *KC and AC v An Bord Uachtala*<sup>27</sup> where it was held that a non-marital child whose parents later married would then be regarded as a constitutional child as per the intentions of Articles 41 and 42 of Bunreacht na hÉireann. Indeed this process of legitimisation remained in operation until the introduction of the *Status of Children Act 1987* which established the principle of equal treatment for all children regardless of whether or not they were deemed to be part of a constitutional family and removed the phrase 'illegitimate child' from the legal lexicon replacing it with 'non-marital child.'

#### 5 Separated Couple

A separated couple are viewed by the Constitution as having all the same rights as a married couple who are still in a relationship as their marriage has not been fully dissolved.<sup>28</sup> This again raises questions as to why two people who are committed to each other cannot avail of the same protections that a separated couple can.

### D THE UNRECOGNISED FAMILY UNIT

<sup>23</sup> [1946] 1 IR 334.

<sup>24</sup> 'Nobody's child'

<sup>25</sup> J Nestor *An Introduction to Irish Family Law* (2<sup>nd</sup> edn Gill and Macmillan Dublin 2003) 162.

<sup>26</sup> Quinn 'Cohabiting couples face a rude awakening when new legislation abolishes living in sin' *The Irish Times* (Dublin Ireland 26 March 2010).

<sup>27</sup> [1985] ILRM 302.

<sup>28</sup> Bunreacht na hÉireann Art 41.3.3.

From the above definitions it follows that co-habitees and same sex couples are not recognised by the Constitution and therefore not privy to its protections.

## 1 Co-habitees

Co-habitees are a couple who live together and may or may not have children. This type of family may have all the hallmarks of a traditional family unit except for the fact that the union is not one that is based on marriage. Due to this lack of marriage, this type of family will not be able to avail of the protections of the Constitution. There are numerous expressed examples in Irish case law where the courts have made this clear. Indeed we can see by Walsh J's judgement in the aforementioned *Nicolaou* case when he stated that co-habitees who may have all the trappings of a marital family but are not married: 'so far as Article 41 is concerned the guarantees therein contained are confined to families based on marriage.'<sup>29</sup>

In the case of *Ennis v Butterly*<sup>30</sup> we can find concrete proof that the law in Ireland discriminates against cohabitation in favour of marriage. In Kelly J's judgement he states:

Given the special place of marriage and the family under the Irish Constitution, it appears to me that the public policy of this State ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage.<sup>31</sup>

Again statistics show us that the number of cohabiting couples has risen from 31,300 in 1996 to 121,800 in 2006. They now account for one in 12 family units.<sup>32</sup> With this number certain to rise it is clear that changes must be made to allow for a greater protection of this sizeable part of our society.

In defence of cohabiting couples who seek constitutional protection but do not wish to marry Eardly has this to say:

One of the charges often levelled at non-marital couples seeking some form of legal recognition for their relationship is that they generally have a choice as to whether to marry or not. Having decided not to accept the obligations of marriage, such persons cannot complain of unequal treatment. There is some merit in this argument, since couples who do not marry have chosen not to do so and should thus be taken not to have accepted legal recognition or regulation of their union. However, this 'freedom of choice' argument is deficient in one fundamental respect, namely, where there is no choice to marry in the first place. In a society where the cohabitation rate is increasing and the marriage rate is falling, one must wonder at how the practice of this State guards with special care the institution of marriage when it denies to loving and committed couples

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<sup>29</sup> *Nicolaou* (n 8) 643-644.

<sup>30</sup> [1997] 1 ILRM 28.

<sup>31</sup> *ibid* 78.

<sup>32</sup> C O'Brien 'Cohabiting couples finally set for a legal embrace' *The Irish Times* (Dublin Ireland 23 March 2010).

the entitlement to enter into civil marriage or have that marriage recognised.<sup>33</sup>

Although the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 allows these couples to enter into civil partnerships it still denies them access to the institution of marriage and the rights specific to it.

## 2 Same Sex Couples

In recent times the social taboos that hung over same sex couples have relaxed somewhat, and as society has developed, these kinds of families have become more commonplace. However the Constitution does not recognise these types of families. Interestingly the report on the Family by the All Party Oireachtas Committee on the Constitution pointed out that there is a possibility of same sex couples being able to marry via judicial interpretation.<sup>34</sup> In 2006 the committee also recommended that legislation be introduced to cater for same-sex and different-sex co-habitees to attempt to afford them some of the same protections enjoyed by the marital family and this led to the introduction of the Civil Partnership Bill 2009,<sup>35</sup> This Bill provided for the registration of co-habitees and same sex couples and sought to improve their right to succession as well as other monetary rights. The Bill is now signed into law<sup>36</sup> but at the time of writing there exists no case law pertaining to the new Act and thus it remains as yet largely untested. Although some same sex couples have entered into civil partnerships,<sup>37</sup> the legislation does not give these types of union full recognition as a constitutional family nor is it ever likely to.<sup>38</sup>

## E OTHER CONSTITUTIONAL RIGHTS

The Constitution does not expressly create any rights for the family unit it does however provide it with protections to ensure its survival as an institution which it sees as 'indispensable to the welfare of the Nation and the State.'<sup>39</sup> This approach was made clear by Finlay CJ in *L v L*<sup>40</sup> when he stated that:

Neither Article 41.1.1-2 purports to create any particular right within the family, or to grant to any individual member of the family rights, whether

<sup>33</sup> J Eardly *The Constitution and Marriage—The Scope of Protection* (2006) 24 Irish Law Times 167, 121.

<sup>34</sup> The All-Party Oireachtas Committee on the Constitution *Tenth Progress Report: The Family* (The Stationery Office Dublin 2006) 123.

<sup>35</sup> Available at <<http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf>> (07 March 2012).

<sup>36</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

<sup>37</sup> Staff Writer 'Ireland's first civil partnerships have taken place early and in secret' *Pinknews.co.uk*, available at <<http://www.pinknews.co.uk/2011/02/20/irelands-first-civil-partnerships-have-taken-place-early-and-in-secret>> (07 March 2012).

<sup>38</sup> The Act was commenced on 23 December 2010 Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Commencement) Order 2010, SI 648/2010).

<sup>39</sup> Bunreacht na hÉireann 1937 Article 41.1.2.

<sup>40</sup> *BL v ML* [1992] 2 IR 77.

property or otherwise, against other members of the family, but rather deals with the protection of the family from external forces.<sup>41</sup>

The rights listed below are rights enjoyed by the family as a unit. The individual rights of family members are protected under Article 40.3 rather than Article 41. Ryan notes that Article 41 protections can only be pleaded for the family as a whole.<sup>42</sup> However in *DPP v JT*<sup>43</sup> the Court of Criminal Appeal suggested that the sexual abuse of a mentally disabled woman by her father also constituted a breach of the family's rights under Article 41. Ryan states that the logic for this decision appears to be that to 'injure one member of the family in that manner, undermined the family as a unit.'<sup>44</sup>

## 1 Marital privacy

In *McGee*<sup>45</sup> the five judge Supreme Court held that the state could not interfere in a married couples decision on how many children to have, resulting in the removal of a prohibition on the importation of contraception being removed from Irish Law but limited to the marital family. They also noted that the state cannot infringe on the privacy of a marriage except in extreme circumstances.

## 2 Procreation

A married couples right to procreate was recognised in the previously mentioned *Murray* case.<sup>46</sup> The High Court ruled that this right could be suspended during their incarceration as constitutional rights were not absolute and could be limited in the interests of the common good.<sup>47</sup> This case also confirmed the Constitutional protection of other rights namely the right of cohabitation, the right of privacy within the marriage, the privacy of communication and association, and finally that the rights of married couples without children are the same as those with children.

## 3 Tax

The right not to be penalised as a married couple in terms of tax was set out in the case of *Murphy v Attorney General*.<sup>48</sup> In this case the plaintiffs who were a married couple challenged the Income Tax Act 1967 on the basis that a married couple who both worked outside of the home would pay more tax than an unmarried couple in the same situation. The Court held that this could be treated as 'a breach of the pledge by the State to guard with special care the institution of marriage.'<sup>49</sup> In *MacMathuna v Ireland*<sup>50</sup> a married plaintiff took an action claiming that certain parts of the tax and social welfare codes favoured single

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<sup>41</sup> *ibid* 108.

<sup>42</sup> FW Ryan *Constitutional Law* (Sweet and Maxwell Dublin 2001) 194.

<sup>43</sup> *DPP v JT* [1988] 3 Frewen 141.

<sup>44</sup> Ryan (n 42).

<sup>45</sup> *McGee* (n 1).

<sup>46</sup> *Murray* (n 17).

<sup>47</sup> J Nestor *An Introduction to Irish Family Law* (2<sup>nd</sup> edn Gill and Macmillan Dublin 2003) 162.

<sup>48</sup> [1982] IR 241.

<sup>49</sup> *ibid* 287.

<sup>50</sup> [1989] IR 504.



mothers. The court held that these aspects of the tax and social welfare codes did not constitute inducements not to marry and such financial support was child centred and therefore not an unmitigated attack on the marital union.

#### 4 Consortium

Consortium is defined in *O'Haran v Devine*<sup>51</sup> as being 'the sum total of the benefits which a husband and wife may be expected to confer on each other such as, help, comfort, companionship, services and all the amenities of family and marriage.'<sup>52</sup> In *Coppinger v Waterford County Council*<sup>53</sup> a wife successfully sued the defendants for loss of consortium of her husband as a result of serious injuries sustained by him in a motor accident.

#### 5 Guardianship

The right to guardianship and custody of their children is an automatic right that is conferred upon married parents via section 6 of the Guardianship of Infants Act 1964. The married mother and father enjoy equal rights regarding the upbringing of the child.<sup>54</sup> Currently, under the Constitution, only the mother of a child born to unmarried parents enjoys automatic guardianship, although an unmarried father can have these rights conferred upon him via statute.<sup>55</sup> Egan and MacNamara point out a child's 'right to know and learn about one's origins which is instinctive in all and should be acknowledged.'<sup>56</sup> At the same time they recognise that grandparents are not afforded any rights under the Constitution in relation to their grandchildren.

### F DISCRIMINATION AND POTENTIAL REFORM

As we can see above the rights of the family are extensive and far reaching. However even though Article 41 describes these rights as 'imprescriptible', they can be curtailed or even taken away. This was upheld in the *Murray* case where Costello J stated they were not absolute and could be curtailed in order to uphold the common good.<sup>57</sup> Furthermore in the *Matrimonial Home Bill*<sup>58</sup> case the Supreme Court noted that the state is entitled to impose rules on the family as long as they can show that the intervention is reasonable and proportionate and with legitimate purpose.

#### 1 Discrimination

<sup>51</sup> *O'Haran and Others v Divine* [1966] 100 ILTR 53.

<sup>52</sup> *ibid* 56.

<sup>53</sup> *Coppinger v Waterford County Council* [1996] 2 ILRM 217.

<sup>54</sup> *Re Tilson, Infants* [1951] 1 IR 1.

<sup>55</sup> Guardianship of Infants Act 1967 s 6(a).

<sup>56</sup> A Egan & R McNamara *Grandparents and the Law in Ireland* (2010) 13(2) Irish Journal of Family Law 27.

<sup>57</sup> *Murray* (n17) 540.

<sup>58</sup> *Re The Matrimonial Home Bill, 1993* [1994] 1 IR 305.

By failing to recognise non marital families the Constitution is not only failing to protect their rights but also discriminating against them. O'Mahony concurs with this view stating:

This discrimination based on marital status would be unwarranted under any circumstances; however, the changing demography of the Irish State has hugely increased the number of families affected by it, thereby heightening the urgency of the need for reform. When contrasted with the generous treatment afforded by the courts to non-citizens, it becomes clear just how absurd and illogical the current situation is.<sup>59</sup>

The All-Party Oireachtas Committee on the Constitution in its *Tenth Progress Report: The Family* concluded by stating that '[I]n the case of the family, the committee takes the view that an amendment to extend the definition of the family would cause deep and long-lasting division in our society and would not necessarily be passed by a majority.'<sup>60</sup>

However it is clear that this is not the case. As has been stated before, there are 121,000 cohabiting couples in Ireland at present<sup>61</sup> with that figure looking likely to rise once the results of census 2011 are published. This is a huge percentage of the population who are living under the same institutional principals as married couples but are not afforded the same rights. The issue should be put to the Irish electorate to decide whether or not they would like to extend the definition of the family, not left up to a committee who believe it would not necessarily pass.<sup>62</sup>

## 2 Guidance from abroad

If reforms are to be introduced there may be issues arising as to how to decide what constitutes whether or not a non-marital family is deserving of the rights afforded by the Constitution. For guidance, the state should look to other jurisdictions. The *Property (Relationships) Amendment Act 1999* (New South Wales) provides guidelines to help decipher what whether a family unit should be worthy of attaining a de facto family status these include:

- a) the duration of the relationship;
- b) the nature and extent of common residence;
- c) whether or not a sexual relationship exists;
- d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- e) the ownership, use and acquisition of property;
- f) the degree of mutual commitment to a shared life;
- g) the care and support of children;
- h) the performance of household duties;
- i) the reputation and public aspects of the relationship.<sup>63</sup>

<sup>59</sup> C O'Mahony *Extra-Marital Families and Education Rights under the Irish Constitution* (2003) 6(2) Irish Journal Family Law 21.

<sup>60</sup> The All-Party Oireachtas Committee on the Constitution *Tenth Progress Report: The Family* (The Stationery Office Dublin 2006) 128.

<sup>61</sup> Quinn *The Irish Times* (n 25).

<sup>62</sup> *Tenth Progress Report: The Family* (n 60).

<sup>63</sup> *Property (Relationships) Amendment Act 1999* (New South Wales) s 2.

### 3 Constitutional Change

While areas of succession may be protected by the new Civil Partnership Act there are large gaping holes in areas needing protection such as; custody, children's rights, education, and consortium. The Act aims to improve the rights of co-habitees but it does not go far enough in its attempts. The introduction of this legislation was a step in the right direction, however for a truly effective protection of rights, and as this issue affects a large proportion of the population,<sup>64</sup> the matter should have been the subject of wider public debate and perhaps even a Constitutional referendum.

Shatter states that Article 41 should be amended to guarantee 'to all individuals a right to respect for their family life.'<sup>65</sup> This would preserve the status of the marital family and recognise the rights of persons living together in a family unit not based on marriage. He goes on to point out that such a change would not only better reflect the complex nature of the family unit in modern Ireland but also harmonise the State's laws with international obligations imposed by The Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>66</sup> It is an interesting point to note that the current position of the Constitution is in contrast to Article 8.1 of the ECHR which states that 'everyone has the right to respect for his private and family life, his home and his correspondence.'<sup>67</sup> We can therefore take this statement to mean that family rights are not recognised by the ECHR based solely on marriage and but also social and emotional connections. As Ireland has ratified the ECHR<sup>68</sup> we can see that the Constitution fails to promote the full extent of Article 8.1 by only recognising families based on marriage. This is evident in *K & T v Finland*<sup>69</sup> when the court held 'that the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties.'

## G CONCLUDING COMMENT

The Constitution, while not perfect, is a fantastic tool that provides citizens of this country with wide ranging protections and guarantees. Clearly, from the arguments outlined above, reform, by way of amendment or insertion, is needed if the Constitution is to continue to protect and serve Irish citizens and their familial rights as they evolve and adapt to life in the 21<sup>st</sup> century. It can thus be concluded that the Constitution does not protect modern Ireland's families to a satisfactory standard, a standard which it has set itself in the dictum of Articles 41 and 42.<sup>70</sup>

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<sup>64</sup> C O'Brien (n 32).

<sup>65</sup> A Shatter *Family Law in the Republic of Ireland* (3<sup>rd</sup> edn Wolfhound Press Dublin 1986) 94.

<sup>66</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (1950) Rome 4 XI.

<sup>67</sup> *ibid* Art 8.1.

<sup>68</sup> European Convention on Human Rights Act 2003.

<sup>69</sup> App no 25702/94 (ECHR, 12 July 2001) 150.

<sup>70</sup> Bunreacht na hÉireann 1937.