

# In Pursuit of Marriage Equality in Ireland: A Narrative and Theoretical Reflection

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## 1. Kick-starting the Irish Debate on Marriage Equality

With the introduction of a civil union law in 1989, Denmark became the first country in the world to recognise legally same-sex relationships.<sup>2</sup> Nordic countries followed suit with similar laws and a global debate ensued about same-sex relationship recognition. The Netherlands was the first country to make civil marriage available to same-sex couples in April 2001.<sup>3</sup> While the UK extended the Civil Partnership Act 2004 to Northern Ireland in 2005, the Republic of Ireland continued to ignore same-sex relationships in its laws. When my spouse, Dr. Ann Louise Gilligan, and I sought to have our Canadian marriage recognised through the Irish courts we sprung to international attention and kick-started the domestic debate in Ireland on the legal recognition of same-sex relationships.

Ann Louise, an Irish citizen, and I have shared a partnership for the past 30 years. We met in Boston College when we both started a PhD programme together. She came from Dublin and I came from New York City, though I am originally from Seattle. A year after we met, in 1982, we gathered a small group of friends to celebrate with us a life-partnership ceremony. That day we found our voice to proclaim a promise of fidelity and life-long cherishing of each other into the future. We promised to share our dreams,

our fears, our financial resources, our accomplishments and our failures. We committed ourselves to each other and we discovered unimaginable joy.

We moved to Ireland in 1983 where Ann Louise re-assumed her teaching position at Dublin City University. In 1995 I had the privilege of becoming an Irish citizen and so now hold dual USA and Irish citizenship. The European and global debate on relationship recognition had not reached Ireland at this stage. This lack of debate was a part of the context within which we later made the decision to take what was to become a landmark legal case for the recognition of our relationship.

## 2. Ireland and Homosexuality

Ireland is a constitutional democracy based on its 1937 constitution. This constitution was reflective of the conservative Catholic mind-set of its time and has undergone relevantly little reform since it came into force. In 1977, Senator David Norris initiated a case to decriminalise homosexuality. At the time, homosexual relations between men were prohibited by law.<sup>4</sup> Norris argued that his constitutional right to privacy was violated. In 1980 the Irish High Court ruled against him. In 1983, the Supreme Court, by a three-to-two majority, affirmed that the laws did not contravene the Constitution, having regard to the Christian nature of the state, the immorality of the deliberate prac-

tice of homosexuality, the damage that such practices cause to the health of citizens and the potential harm to the institution of marriage.<sup>5</sup> Senator Norris, with the assistance of future Irish President, Mary Robinson (his senior counsel at the time) then took the case to the European Court of Human Rights. Norris won the case in 1988 with a judgment that Irish laws contravened Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (the right to respect for private and family life).<sup>6</sup> It took five years – largely through the campaigning of a national non-governmental organisation called Gay and Lesbian Equality Network (GLEN) – to get the laws changed to decriminalise homosexual behaviour in 1993.<sup>7</sup>

Coming to a more recent context, Ireland prides itself on its robust equality legislation introduced in the late 1990s and early twenty-first century. In light of effective activity within the civic sphere (lobbying and campaigning by a number of equality groups) and various government-sponsored reports, Ireland enacted comprehensive equality legislation. This focused on equal pay; protection in employment and against harassment; and protection for the equal provision of goods, services, accommodation and education across nine grounds: gender, marital status, family status, sexual orientation, religious belief, age, race, disability and membership of the traveller community.<sup>8</sup>

In 1998 the Good Friday Agreement was signed in Belfast. This established the Northern Ireland Assembly with devolved legislative powers and a power-sharing executive. Under the agreement national human rights institutions were established in both Northern Ireland and the Republic.<sup>9</sup> The government in the Republic is obliged to promote and protect human rights as laid out in the

Irish Constitution as well as those laid out in international treaties that the Irish state is party to. Under the Agreement the government in the Republic is also obliged to take steps to further strengthen the protection of human rights within its jurisdiction. The Agreement stipulates that any measures brought forward “would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.<sup>10</sup> When civil unions were first mooted in the UK and Northern Ireland, at the turn of the millennium, the debate had little impact on discourse in the Republic. Few questions were raised around equivalence of rights south of the border in the context of the Good Friday Agreement.

The explicit issue of partnership rights for same-sex couples first came onto the political agenda with the publication of a report by Ireland’s statutory body, the Equality Authority.<sup>11</sup> The Equality Authority gathered a group of civil servants and representatives of NGOs to produce a report which argued that Irish laws should be amended to extend partnership rights to same-sex couples. This was followed by another report of the National Economic and Social Forum (established by statute) of civil servants, NGOs and politicians, which came to similar conclusions and made similar recommendations.<sup>12</sup> However, neither report went as far as to recommend directly any form of legal recognition of partnership between same-sex couples. While the National Economic and Social Forum’s report did argue that extending rights to same-sex couples such as the right to nominate a partner, pension and next of kin rights would have a profound impact on achieving equality, it also said that:

“It was the strong view of the Team that State recognition of these partnerships was not essential for the Government to make

progress in relation to implementing greater equality for LGB people.”<sup>13</sup>

### 3. Taking a Case for Marriage Equality

This was the context and backdrop, then, against which Ann Louise and I began to contemplate the possibility of taking a legal case to have our relationship recognised. While we were both active within the civic sphere in relation to many human rights issues, especially those related to the poverty and economic inequalities in the lives of Irish people, we had no involvement in LGBT (Lesbian, Gay, Bisexual, Transgender) rights work. The personal origins of our case began late in 2001 – after 19 years of life-partnership – when an impending visit to Chile prompted a visit to our solicitor to update our wills. We jointly owned our home, and we also jointly owned another property together. We thought it would be wise to organise our affairs just in case anything happened to us during our time abroad. What we discovered that day was that, unlike married couples who jointly own property, we could not will half of our property to the other upon death of one of us without major capital acquisition taxation implications. Effectively, the surviving partner would have to sell the property in order to pay the tax; what we thought was financial security was clearly not.

On that day we started on a long road through the valley of fear. One of the primary reasons that we eventually decided to take a case was because of the public silence about partnership recognition between same-sex couples in Ireland. If one were to review the *Irish Times* newspaper archives today, one would discover that the first time there was any mention of rights for Irish same-sex couples was in December 2002. The editorial commented on the fact that the British government intended to extend to gay couples

the property and inheritance rights afforded to married couples and that the Equality Authority’s group had endorsed similar changes in the law.<sup>14</sup>

Over the next two years you could count on one hand the number of articles published in that same newspaper on this topic. With the knowledge we had about the very tenuous relationship between recommendations in policy documents and subsequent, substantive change, we discerned that little was going to happen unless there was a grass-roots mobilisation to bring pressure to bear on lawmakers or some kind of legal challenge within the courts. This is how things had been changed in other jurisdictions and so we assessed that the same would be true for Ireland. In April 2002, we took a decision to find a path to legalise our life-partnership and wrote to the Equality Authority to see if they could help us to discern what might be the best possible route. In the meantime I met a couple of times with members of GLEN who were working on a bill for “domestic partnership” legislation that they hoped the independent senator, David Norris, would bring into our parliament.<sup>15</sup> Unfortunately the bill in question read more like a proposal for a business contract between two people who co-habit, something which did not at all reflect the nature of our life-partnership, nor did there appear to be any mobilisation behind the effort. Further, Norris’ independence as a Senator – as distinct from being a member of government – did not place him in a strong position to get such a bill enacted. Consequently, Ann Louise and I decided to form a legal team in 2002 and in July of 2003 we decided to take a constitutional case. About a week later the miraculous possibility opened up that we could marry in British Columbia, Canada. At the time it was the only place in the world (apart from two other Canadian provinces) where same-sex couples

could marry without being citizens or residents.<sup>16</sup> So in September 2003 we married each other in the presence of our American and Irish families in the great country of Canada with its Charter of Human Rights and Fundamental Freedoms.

Our decision to take a legal case to have our marriage recognised in Ireland was a multifaceted one. We decided to go to court to seek justice for ourselves as is our right to do so within a democracy. The Irish Constitution states that “all the powers of government, legislative, executive, and judicial, derive, under God, from the people”,<sup>17</sup> and proclaims further that “[j]ustice shall be administered in courts established by law by judges appointed”.<sup>18</sup> At a personal level we wanted to ensure that our fundamental rights are protected in the same way as other citizens. The courts structure is there precisely to provide citizens with this way of practicing democracy.

Our senior counsel informed us that the Irish Constitution is not “permafrost” in the period of 1937, when it was written, and that it is a “living document” that requires re-interpretation as society changes and evolves over time. We asked ourselves, how is this foundational document to maintain its life, if “we the people” do not engage with it? We went to court in 2003 because we felt there was a lack of civic and statutory activity and because we believed that the courts played a crucial role in the protection of minorities. We also held an ethical vision that combines a commitment to equality (a substantive, not “incremental” notion), freedom, liberty and love.

Marriage, for us, is not simply about a basket of rights, responsibilities and financial benefits that come in the wake of such a profound life decision. While these are extremely sig-

nificant, they are not the full sum and substance of marriage. We married each other because we wanted to bind ourselves in law, as well as in love, to receive societal support for our commitment and the generativity that flows from it. We married each other because in that one act we were able to exercise our human freedom for the single most important choice of our lives. A psychic well-being accrues when oppression and prejudice lift. That is why we are taking a court case, for ourselves, as well as for others.

We believed that interplay between the judicial, civic and legislative processes in Ireland would have a significant impact on moving the issue forward. In going to court, the fact of our marriage influenced our legal strategy. Instead of seeking a marriage license, we simply wrote to the Irish Revenue Commissioners to ask for a change in our marital status. When they refused (within a very polite letter that addressed us “dear ladies”!) we sought and were granted a judicial review in November 2004, with public coverage both nationally and internationally. That was when the public debate in Ireland ensued. We went to court in October 2006, and in December we lost the case.<sup>19</sup> We also lost our costs because Justice Dunne deemed there to be no exceptional circumstances to justify an order for costs against the state.<sup>20</sup>

Our primary legal arguments included that homosexual identity is a normal way of being human and that as such we have a human right to marry the person we choose to love. We argued that this right is implicit within the Irish Constitution and that the Constitution, which does not define marriage as between a man and a woman, also guarantees us equality before the law.<sup>21</sup> We were of the view that the Constitution could be re-interpreted to recognise our Canadian marriage, otherwise our human rights are not protect-

ed and we are being discriminated against because of our sexual identity.

The High Court ruled against us, finding that while marriage is not defined within the Constitution it is understood to refer to marriage between people of the opposite sex and that this understanding has been reinforced in recent judgments of the Irish courts. Justice Dunne did not engage with the discrimination argument and expressed her concern for the “welfare of the children”, thereby justifying that the state take a cautious approach on the issue. The Court found insufficient evidence of any “emerging consensus” which would support displacement of the opposite sex rule and it pointed to the limited number of jurisdictions in which the ban on marriage for same-sex couples had been lifted. In particular, Justice Dunne took the definition of marriage contained in Ireland’s Civil Registration Act 2004 (CRA 2004) which defines marriage as being between a man and a woman as an indication of the “prevailing view” as to the definition of marriage.

It was only after we received permission to take our case that the CRA 2004, which defines marriage as being between a man and a woman, was quietly passed by parliament.<sup>22</sup> The effective ban on marriage equality within this piece of legislation was added by way of a last minute amendment that was not debated in either house of parliament nor did it appear to come to the notice of NGOs working in the equality sector.<sup>23</sup>

The High Court judgment in our case established that the Constitution does not *require* marriage to be opened to same-sex couples and suggests that the appropriate avenue of reform lies with the legislature which had expressed its will in the CRA 2004. The Court never addressed the question of whether the

Constitution *excludes* the possibility of marriage equality through legislative reform.

Irish Constitutional lawyer, Dr. Conor O’Mahony, posits that the High Court, in our case, effectively reversed the established order of constitutional interpretation.<sup>24</sup> Justice Dunne had accepted that the Constitution is a “living” document and that it should evolve in light of societal change. O’Mahony points out that legislation passed by parliament attracts a presumption of constitutionality but that the Constitution must be interpreted first and the legislation assessed against this interpretation. In our case O’Mahony suggests that the Court subverted this supremacy of laws and held that the constitutional definition could not be extended because of how the legislature defined marriage as being between a man and a woman in the CRA 2004.<sup>25</sup> The Minister for Justice of the time, Brian Lenihan, commented to media that the government could not legislate for marriage for same-sex couples as the legal advice they had received from the Attorney General (the government’s legal advisor) was that any such legislation would be unconstitutional.<sup>26</sup> The Minister also stated that, based on this legal advice, a constitutional referendum would be required to provide for marriage equality and further expressed his view that holding such a “divisive” referendum would be unsuccessful. Therefore, the government refused to hold a supposedly necessary referendum and the courts held that the legislature had expressed the will of the people through legislation which had never even entertained the possibility of marriage equality in its drafting due to the supposed ban. In the absence of leadership from the political realm and with undue deference to the legislature from the courts, where did that leave the question of marriage equality? It seems the answer was very firmly: “Catch 22”.

#### 4. Advocacy Activity for Marriage Equality

Enormous activity has taken place in the last seven years, since we started the case. Soon after we received permission to take the case, an advocacy group, the KAL Initiative, was formed to build public support for the right to marriage for same-sex couples. The then Minister for Justice, Michael McDowell, established an expert group to outline to the state the various options to legalise “domestic partnerships”.<sup>27</sup> This expert group explored various forms of legal recognition for opposite-sex, same-sex and non-conjugal relationships. The group examined the question of civil marriage for same-sex couples as well as a limited civil partnership scheme and a full civil partnership scheme that would be equivalent to marriage. The group was of the view that civil marriage may be vulnerable to constitutional challenge and stated that judgment was awaited in our case.<sup>28</sup> However, the group’s report went on to state that:

“The introduction of civil marriage for same-sex couples would achieve equality of status with opposite-sex couples and such recognition that would underpin a wider equality for gay and lesbian people.”<sup>29</sup>

During this same period (after we had pleaded our case and before judgment) one of the opposition parties put forward a limited civil union bill which was rejected by the government.<sup>30</sup> In each case of discussion of options for same-sex couples, the government has argued, on the basis of advice from the Attorney General, that marriage for same-sex couples is unconstitutional, even though this has not been determined by the Supreme Court.

After our loss in the High Court, the KAL Initiative evolved into the advocacy group Marriage Equality, which has been building public awareness and acceptance for civil

marriage for same-sex couples. A group of younger citizens formed LGBT Noise, and other civic groups are participating in the civic debate – all advocating that marriage is the “full equality” option, though some hold the view that “incremental steps” towards equality, in the form of a civil partnership scheme, were better than none at all.

#### 5. Civil Partnership in Ireland

Central to incremental change was the introduction of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (CPCROCA 2010). Though the measure rightly attracted criticism from within the LGBT community for being inadequate and segregationist, it became law with cross-party support in the Irish Parliament<sup>31</sup>. The CPCROCA 2010 provides for a civil partnership registration scheme for same-sex couples only, as well as a presumptive scheme for cohabitants which can be for either same-sex or opposite-sex couples. It extends a number of rights and duties to same-sex couples including taxation, succession and immigration. It further provides for a redress scheme for “qualified cohabitants” (those who have lived together for three years) to claim from the estate of the deceased partner or for the economically dependent cohabitant to claim maintenance, accommodation and pension rights when the relationship breaks down. While providing for a number of significant rights, the civil partnership envisaged under the CPCROCA 2010 is not equivalent to civil marriage. An audit conducted by Marriage Equality found that there are over 169 differences between the rights available in civil partnership and those accruing in civil marriage (excluding constitutional rights, case-law and social welfare legislation).<sup>32</sup>

The CPCROCA 2010 provides for dissolution of a civil partnership but there is a lower

threshold for dissolution than there is for divorce in the case of civil marriage. Married couples are required to wait for four years in order to divorce whereas civil partners must wait for only two years. This distinction is arguably indicative of the greater value the state places on the institution of marriage compared with civil partnership.

The CPCROCA 2010 creates a new designation for same-sex couples' family homes, calling them "shared homes". The denial of the term "family home" means that same-sex families are not brought within the protection of the Family Home Protection Act which prevents the sale, mortgage or re-mortgage of a property that is defined as a "family home".<sup>33</sup> The definition of a dependent child extends beyond biological or legally adopted children, and includes non-biological children, "where one spouse has knowingly treated a child as a member of the family".<sup>34</sup> Despite this existing broad definition, dependent children in LGBT families are omitted from such protections under the CPCROCA 2010.<sup>35</sup> This differentiation is rooted in the fact that "family" is defined under the Irish Constitution as being based on marriage; therefore a civil partnership is excluded from the constitutional protections afforded to the marital family.<sup>36</sup>

There is little to no provision for same-sex couples with children under the CPCROCA 2010. Joint adoption is not available to same-sex couples in Ireland and guardianship cannot be extended to a non-biological parent. Although same-sex couples cannot apply to adopt jointly, a single LGBT person may apply to be considered as an adoptive parent. The Minister for Justice, Alan Shatter, recently indicated that his department was working on legislation to address the rights of children and parents in separate legislation.<sup>37</sup> While this announcement is welcome,

such legislation is not currently on the official legislative programme and it remains to be seen if marriage equality will be in place before its enactment.

## 6. Civil Partnership and Civil Marriage

In May 2011, I was appointed as an independent Senator to the Irish Senate by An Taoiseach (Prime Minister) Enda Kenny. This immense privilege gave me the opportunity to become, not only a law challenger, but a law maker. This opportunity has allowed me to engage directly in the legislative process and to have an impact on the lives of people and particularly LGBT people.

An opening arose to amend the Irish Nationality and Citizenship Act in order to reduce some of the discriminatory elements between the institutions of civil partnership and civil marriage in July 2011.<sup>38</sup> I put forward three successful amendments to the Act. Under the law as it stood, spouses of Irish citizens seeking naturalisation could avail themselves of more favourable eligibility conditions than applied to civil partners of Irish citizens. For example, spouses needed only to reside in Ireland for three years in order to be eligible for citizenship when the requirement for civil partners was five years. This form of discrimination is no longer the case. My amendments also ensure that the death of an Irish citizen or the loss of his or her citizenship does not impact on the citizenship of his or her civil partner or children. The third amendment makes certain that when an Irish citizen enters into a civil partnership with a non-national, they do not lose their Irish citizenship due to the civil partnership even if they acquire the nationality of the non-national. This amendment, as with the previous amendments, simply mirrors the provisions relating to married couples in the Act.

I also effected significant change in the area of taxation. I put forward a number of recommendations on the Finance Bill No. 3 (2011) to the Minister for Finance, Michael Noonan, in order to achieve parity between same-sex and opposite-sex couples in the tax code. The Minister agreed that I had identified a disparity with regard to tax relief on maintenance payments. Tax relief on maintenance for a spouse in marriage attracted tax relief at the time of a deed of separation or a judicial separation, but, in the case of civil partners, tax relief was not a possibility on maintenance payments until a statutory dissolution or an annulment. The Minister undertook for his department, the Revenue Commissioners and the Attorney General to examine my recommendation. Subsequently, the Finance Act 2012 provides that in cases where a civil partnership breaks down and a legally binding agreement between the parties is drawn up, this agreement will be recognised for tax purposes.<sup>39</sup> The Act also places civil partnerships on the same footing as married relationships, whereby it is accepted that following the break-up of a relationship people may continue to live under the same roof but may be considered separately for income tax purposes.<sup>40</sup>

During the debate on the Finance Act 2012 I identified further areas of inequality between civil partnership and civil marriage and the Minister undertook for remaining gaps to be addressed in as far as constitutionally possible.<sup>41</sup> Meetings between my office and the various departments are on-going with a view to the issues being addressed in forthcoming finance bills.

## **7. A New Case for Marriage Equality**

After the High Court ruled against us in December 2006, we waited five long years to

be given a date for an appeal to the Supreme Court. Our legal team decided that, in light of the High Court judgment, our strategy should incorporate a direct constitutional challenge to the section of the CRA 2004 that defined marriage as being between a man and a woman. In late 2011, the Supreme Court heard our motion to include this challenge but we were turned down. Justice Liam McKechnie suggested that the best thing to do was to return to the High Court and file new proceedings. In June 2012, we initiated a new case in order to challenge directly section 2.2(e) of the CRA 2004 as well as the corresponding ban in the CPCROCA 2010 that prevents same-sex couples from marrying.<sup>42</sup> We will also challenge section 5 of the CPCROCA 2010 that covers recognition of foreign registered relationships and has the effect of downgrading marriages that take place in other jurisdictions by recognising them as civil partnerships in Ireland. My spouse and I are considered to be civil partners whether we want to be or not. In taking this new case and dropping our appeal to the Supreme Court we no longer risked being pursued by the state for its costs, as well as our own, stemming from the original case.

## **8. The Current Climate**

Significant on-going advocacy work by groups such as Marriage Equality and LGBT Noise, together with grass roots mobilisation of the LGBT community and its allies, has reshaped the social and political landscape in Ireland. Successive polling has shown that the general public are very firmly on the side of equality with significant margins in favour of marriage for same-sex couples.<sup>43</sup> At the end of 2012 the majority of parties in Ireland support marriage equality: the Labour Party, Fianna Fail, Sinn Fein, and the United Left Alliance, leaving only the main government party, Fine Gael, to come to a firm policy posi-

tion. All parties appear to be operating under the assumption that a constitutional amendment would be required to make provision for marriage equality. The two government parties, Fine Gael and the junior coalition partner, Labour, reached agreement in the 2011 Programme for Government that the question of provision for same-sex marriage would be put to the Constitutional Convention (a body of politicians and citizens), that would examine various issues designated for reform.<sup>44</sup> The government has committed to addressing the decision of the Constitutional Convention within four months of it reporting but any subsequent action is dependent on cabinet approval.<sup>45</sup> The government has not committed to holding a referendum on the issue despite the Tanaiste (Deputy Prime Minister) Eamon Gilmore indicating that he is in favour of such a vote.<sup>46</sup> Happily, an increasing number of senior politicians, when asked for a view on marriage equality, are voicing their own personal views (in favour) and this is certainly an advance on the default position of pointing to a supposed constitutional impediment.<sup>47</sup>

## 9. European Protections?

In the past, Ireland was helped on the progressive path by efforts at a European Union (EU) level. Arguably Ireland would have taken considerably longer to amend its laws in relation to homosexuality and women's rights if it had not been a member of the EU. However, apart from the areas of employment, health and education there are few binding legal measures at EU level that address discrimination against LGBT people and families.<sup>48</sup> Despite the politically divisive nature of relationship recognition in some member states, the European Court of Human Rights (ECtHR) has recognised that there is an "emerging European consensus towards legal recognition of same-sex cou-

ples" and that the right to marry in Article 12 is not confined to opposite-sex couples.<sup>49</sup> In *Schalk and Kopf v Austria* the ECtHR recognised that a same-sex couple in a *de facto* relationship was entitled to be protected as a family under Article 8. Despite these findings the Court ruled that the ECHR does not oblige member states to provide access to marriage for same-sex couples and that member states have a wide margin of appreciation when it comes to the introduction and nature of other means of relationship recognition.<sup>50</sup>

Currently eight European Economic Area (EEA) countries provide for marriage equality, namely Belgium, Denmark, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden. A further thirteen countries provide for a form of partnership.<sup>51</sup> While civil marriage rights tend to be relatively uniform from country to country, various forms of partnership laws exist which range from equivalence with marriage to a limited selection of rights and responsibilities, for example, the Pacte Civil de Solidarité (PACS, Civil Solidarity Pact) in France.<sup>52</sup> Currently LGBT couples and families experience a disjointed set of laws across the EU. This veritable patchwork of laws gives rise to significant legal uncertainty regarding mutual recognition of civil status and second parent adoption when same-sex couples exercise their right to freedom of movement. The Freedom of Movement Directive<sup>53</sup> provides for the freedom of movement of EEA citizens and their dependents, specifically a spouse or a registered same-sex partner if the host country treats that registered partnership as equivalent to marriage.<sup>54</sup> According to the Freedom of Movement Directive unmarried or unregistered partners in a "durable relationship" can be included by way of national legislation.<sup>55</sup> It would appear that, at a minimum, member states are obliged to "facilitate entry and residence" for a dependent or "member

of a household” of a citizen,<sup>56</sup> however rights group ILGA Europe believes the meaning of the provision to be unclear and the right to freedom of movement to be curtailed.<sup>57</sup> In a 2009 resolution, the European Parliament expressed concern about the restrictive interpretation used by member states of the definition of “family member” and “partner” particularly in relation to same-sex partners.<sup>58</sup> Given that EU secondary legislation is either silent on the rights of same-sex couples or leaves the determination of recognition to member states, the fundamental right of freedom of movement is rendered largely illusory for such families.

Similar issues arise when LGBT families with children relocate to EU Member States which do not recognise second parent adoption. While a durable relationship may exist between all of the family members, the destination country may not recognise the parental rights of non-biological parents.<sup>59</sup> This can lead to numerous difficulties such as denying a non-biological parent the right to make decisions in relation to a child’s education or health. The Family Reunification Directive does little to address the problems facing LGBT families.<sup>60</sup> This Directive applies when both individuals are third country nationals and neither is a citizen of a member state of the EU. It allows spouses who are third country nationals to be united with third country nationals residing lawfully in the territory of a member state. However, member states retain discretion on whether to extend this right to same-sex registered (or unregistered) partnerships. If same-sex couples do not have the option to enter into a legal partnership that will be recognised by the EU country where they are seeking reunification they are indirectly discriminated against.<sup>61</sup>

In 2010 the European Council agreed the EU’s direction on justice issues for the next five years with the Stockholm Programme.<sup>62</sup> Under this plan the European Commission published a Green Paper on the freedom of movement to open a debate on the mutual recognition of civil status records.<sup>63</sup> Proposals on the recognition of certain civil status documents (e.g. filiation and adoption) so that legal status granted in one member state can be recognised and have the same effect in another are expected in 2013.<sup>64</sup> There is more hope for these proposals than the stalled 2008 Anti-Discrimination Directive which would have extended protection from discrimination on the grounds of religion or belief, disability, age, or sexual orientation in the areas of social protection, social advantages, and access to goods and services.<sup>65</sup>

Such measures are indeed promising but the wheels of the EU legislative process grind slowly and it may be some time before ordinary citizens feel the benefit of the Green Paper proposals. As the Court of Justice of the European Union recently reiterated in *Römer v Freie und Hansestadt Hamburg*, “the marital status of persons falls within the competences of the Member States”.<sup>66</sup> While it remains the charge of national governments and domestic courts to protect and vindicate the rights of LGBT people and their families, they must not shirk this duty.

It is hoped that the Zappone/Gilligan legal case, Irish advocacy efforts and the growing social consensus emerging as a result will ensure that Ireland fulfils that duty, and in doing so acts as a catalyst for greater protections of LGBT people throughout all of Europe.

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- 1 Dr. Katherine Zappone currently serves as a Senator in the Irish Senate and is Director of the Centre for Progressive Change, Ltd. She has recently been nominated to the Irish Delegation to the Parliamentary Assembly of the Council of Europe. She was a Commissioner with the Irish Human Rights Commission from 1999 to 2011.
  - 2 Danish Registered Partnership Act D/341- H- ML Act No. 372 of June 1, 1989.
  - 3 Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage).
  - 4 Offences against the Person Act 1861; Criminal Law Amendment Act 1885.
  - 5 *Norris v A.G.* [1983] IESC 3.
  - 6 *Norris v Ireland*, European Court of Human Rights, Application No. 10581/83.
  - 7 Criminal Law (Sexual Offences) Act 1993.
  - 8 Employment Equality Acts 1998-2011, Equal Status Acts 2000-2011, Equality Act 2004.
  - 9 The Good Friday Agreement (also known as the Belfast Agreement), Paragraph 9 of the Rights, Safeguards and Equality of Opportunity.
  - 10 *Ibid.*
  - 11 The Equality Authority, *Partnership Rights of Same Sex Couples*, 2000, available at: <http://www.france.qrd.org/texts/partnership/ie/equality200006.pdf>.
  - 12 National Economic and Social Forum, *Equality Policies for Gay Lesbian and Bisexual People: Implementation Issues*, 2003, available at: <http://www.glen.ie/attachments/458a2d0f-f316-41ab-942c-d0d623a1097b.PDF>.
  - 13 *Ibid.*, p. 7.
  - 14 *The Irish Times*, "Gay Rights", 10 December 2002, p. 17.
  - 15 Civil Partnership Bill 2004.
  - 16 Civil Marriage Act 2003.
  - 17 Bunreacht na hEireann (Constitution of Ireland), Article 6.
  - 18 *Ibid.*, Article 34.1.
  - 19 *Zappone & Anor v Revenue Commissioners & Ors.* [2006] IEHC 404.
  - 20 *The Irish Times*, "Lesbian Couple set to Appeal Marriage issue to Supreme Court", 22 December 2006, p. 4.
  - 21 See above, note 17, Article 41.1.
  - 22 Civil Registration Act 2004, section 2(2)(e).
  - 23 Dáil Select Committee on Social and Family Affairs, February 3, 2004, amendment No. 9.
  - 24 O'Mahony, C., "Societal Change and Constitutional Interpretation", *Irish Journal of Legal Studies*, Vol. 1, No. 2, 2009, pp. 71-115.
  - 25 See above, note 22.
  - 26 O'Brien, C., "Lenihan rules out 'divisive' referendum on gay marriage", *The Irish Times*, 5 December 2007.
  - 27 The Working Group on Domestic Partnership, *Options Paper on Domestic Partnership (The Colley Report)*, 2006, available at: <http://www.justice.ie/en/JELR/OptionsPaper.pdf/Files/OptionsPaper.pdf>.
  - 28 *Ibid.*, p. 49.
  - 29 *Ibid.*, p. 50.
  - 30 Civil Union Bill 2007.
  - 31 Carbery, C., "Dublin Pride celebrations soured by anger over Civil Partnership Bill", *The Irish Times*, 29 June 2009.
  - 32 Marriage Equality, *Missing Pieces Report*, 2011, p. 17.
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