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TITLE PAGE

Thesis Title:

Not Thinking Straight? A Critical Discourse Analysis of the 2006 Irish High Court Ruling in *Zappone and Gilligan v. Revenue Commissioners and Attorney General*

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DECLARATION

This thesis is my own work. It has not been submitted for another degree, either at University College Cork or elsewhere.

DEDICATION

To Ann Louise and Katherine
Because You Inspire

INTRODUCTION

What's the Story? Interrogating the Constitutional and Legislative Position on Same-Sex Marriage in Ireland

Let me be clear about one thing. There is nothing visionary in the [civil partnership] legislation, nor is there anything revolutionary about it. ... This [Irish] legislation does not grant equality; it merely improves the second-class status of gay people in some practical ways. ... Opponents of social advance have never allowed logic or reason to cloud the clarity of their prejudice. These are the very same groups which but a few decades ago accused the gay community of being incapable of sustaining relationships and addicted to compulsive promiscuity instead. Now it appears that the plain desire of many within the gay community to settle down and make a commitment in a relationship disturbs them just as much as did their former grievance. ... Gay people cannot marry, ... I, a Member of this House in good standing, have no such right. I find myself in the position that is complained of universally within the gay community of being deprived of full equality. ... There is a nasty, mean-spirited separation between gay people and the rest of the population which militates against their full equality ... Under this law that the Minister thinks generous, we are not to have legal rights to children, even our own children, we are not even to have marriage, and we are not even to have a family home. Everything is to be ... partial and second rate.

Senator Norris, Seanad Éireann, 2010a, paras. 151-153

Once people engaging in homosexual activity are no longer seen as *criminals*, but instead as *citizens*, they can hardly be denied their civil rights, including their right not to be treated differently because of their (criminally irrelevant) sexual orientation. In this way the step of anti-discrimination not only follows, but builds on the step of decriminalisation. Similarly, the very idea of non-discrimination with regard to sexual orientation, simply demands that no one shall be disadvantaged by law because of the gender of the person he or she happens to love. In this way the links between the steps of decriminalisation, anti-discrimination, and partnership legislation are not only sequential (in the European countries that have gone that far), but also morally and politically compelling.

Waaldijk, 2000, p.86

Both of these quotations capture the issues that are at the heart of this thesis, specifically, the principle of equality and its precise meaning, and the Irish State's response to this imperative in the context of same-sex marriage. My thesis centres on one aspect to lesbian and gay inequality in Ireland, i.e. the State's denial of marriage rights to this minority cohort of the population. In that regard, I provide a critical discourse analysis of the 2006 Irish High Court ruling in the matter of *Zappone and Gilligan v. Revenue Commissioners and Attorney General* (see [2008] 2 I.R. pp.417-513).¹

In this introduction, I pose my research questions. I put forward my rationale for conducting this research. I also highlight the circumstances that gave rise to the taking of a High Court action against the Irish State by two women who sought to have their Canadian marriage recognised in this jurisdiction. The *Zappone and Gilligan* case largely centred on different understandings of Articles 40 and 41 of the *Irish Constitution (1937)*, which pertain to the principle of equality, and the institutions of marriage

¹ Hereafter, I refer to this case as *Zappone and Gilligan*.

and family respectively.² So as to contextualise the 2006 High Court ruling, I provide the reader with some sense of the ways in which gay and lesbian activists and advocacy organisations in Ireland, over a period of four decades, conceived of the principle of equality in the context of the wider premise of adult relationship and family recognition. In this regard, I also refer to initiatives that were proposed by committees, conventions or review groups that were established by the State. With regard to lesbianism and homosexuality, this Irish trajectory demonstrates how the imperative of ‘doing’ equality, which is underpinned by Article 40, is so difficult against the backdrop of the dominant understanding of Article 41. I contextualise this Irish trajectory by alluding to some of the ways in which other jurisdictions either moved towards an anti-discrimination and rights-based equality agenda, in the context of adult relationship recognition, or simply reinforced heterosexist norms. In this introduction, I also provide a sense of the structure of this thesis by outlining the subject matter of each of its six chapters and conclusion.

Background to the High Court Ruling

The plaintiffs in this case are Katherine Zappone and Ann Louise Gilligan, who have lived as a couple in Ireland since 1983. Together since 1981, they married each other in British Columbia, Canada, in September 2003. This was possible for two reasons: this Canadian province did not require citizenship or residency as preconditions for issuing a marriage license; marriages between persons of the same sex have been legal there since the ruling in *Barbeau v. British Columbia (Attorney General)*, which the Court of Appeal handed down in May 2003 (see [2003] BCCA 251). In April 2004, the plaintiffs in *Zappone and Gilligan* sought confirmation from the

² See Appendix I for details of the articles in the *Irish Constitution (1937)* that I rely upon throughout this thesis.

Irish Registrar General that their marriage was legally binding in Ireland. In May 2004, that office stated that it was not within its remit to make a declaration on the validity of a marriage that occurred outside this jurisdiction.³ Katherine Zappone and Ann Louise Gilligan also contacted the Revenue Commissioners in Ireland in April 2004 because they wished to be treated as a married couple for taxation purposes. This was refused in July 2004. The plaintiffs then sought leave to apply for a judicial review in respect of that decision. The High Court granted this in November 2004. Their case subsequently came before that court in October 2006. In their pleadings, Katherine Zappone and Ann Louise Gilligan asserted that the refusal to treat them as a married couple breached their constitutional rights under Articles 40 and 41 of the *Irish Constitution (1937)*, and Articles 8, 12 and 14 of the *European Convention on Human Rights (ECHR)*.⁴ Justice Dunne gave her ruling in December 2006.⁵ The plaintiffs lost their High Court action (see [2008] 2 I.R. pp.417-513, at para. 257). They subsequently appealed that decision to the Supreme Court. In 2011, they tried to incorporate additional evidence into their appeal. Specifically, they sought to test the constitutionality of the *Civil Registration Act, 2004*, which bars same-sex couples from marrying in Ireland. However, this was ultimately denied. They subsequently withdrew their Supreme Court appeal. Katherine Zappone and Ann Louise Gilligan have now initiated a new High Court action in which they will challenge the constitutionality of this 2004 legislation.⁶

³ The General Register Office has no function in terms of advising on, or in the registration of, marriages that take place outside the jurisdiction. There is no facility for registering such marriages in Ireland. The civil marriage certificate is normally accepted as legal proof of a marriage. In cases where a serious doubt exists as to whether the marriage is recognised in Irish law, legal advice can be sought, and an application can be made to the Circuit Family Court for a ruling under Section 29 of the *Family Law Act, 1995* as to whether the marriage is recognised under Irish law. I garnered this information from the following link: http://www.groireland.ie/getting_married.htm#section3

⁴ See Appendix IX for relevant details of the ECHR.

⁵ I garnered all of this information from the reported judgment in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at paras. 1-6).

⁶ I garnered information regarding the background to the new High Court challenge through personal communication with the following: the organisation that is known as Marriage Equality, which

Research Questions and Rationale

Given that the principle of equality has both a constitutional and legislative underpinning in Ireland,⁷ how can the intransigence of inequality *vis-à-vis* gender and sexual orientation be explained? Specifically, what accounts for the persistence of gay and lesbian inequality in Ireland with regard to the social institution of marriage, which also has a constitutional and legislative underpinning in this jurisdiction?⁸ My thesis attempts to answer these questions.

I argue that the recognition, protection and vindication of constitutional rights is a fundamental precept, not least because their denial diminishes us all as a society. Personal rights, such as the right to marry, are provided for in the equality provisions of Article 40 of our Constitution, which the majority of the voting electorate ratified in 1937.⁹ Societies, including Ireland, tend to be organised according to social norms that are grounded in assumptions surrounding criteria, such as gender and sexual orientation. Therefore, the imperative to vindicate personal rights in a democracy is particularly acute in the context of minority cohorts of our population, including lesbians and gay men. My belief is that the right to marry denotes

campaigns for the introduction of same-sex marriage in Ireland; Dr. O'Mahony from the Faculty of Law in University College Cork; Dr. Zappone. See also Anon. (2011).

⁷ Article 40 of our Constitution pertains to the principle of equality. Moreover, a substantial body of anti-discrimination and equality legislation has been enacted in this jurisdiction. These include the following: the *Prohibition of Incitement to Hatred Act, 1989*; the *Employment Equality Act, 1998*; and the *Equal Status Act, 2000*.

⁸ Article 41 of our Constitution pertains to marriage and family. See Appendix VI for examples of legislation on marriage that either took effect in Ireland because of our relationship with England over the centuries, or was enacted by legislators in Ireland post Independence in the early 20th century. Some legislation that was enacted in the 19th century in England still prevails in this jurisdiction. Section 57 of the *Offences against the Person Act, 1861*, which makes bigamy a criminal offence in Ireland, is one such example. See Appendix II for details in this regard. See also Barrington (2009, p.57). Another important point here is that 19th century legislation on marriage would have formed part of the official understanding of marriage as a legal institution in Ireland, prior to both achieving Independence and ratifying our Constitution in the early 20th century. I have not made a determination on whether or not the socio-cultural meaning of marriage in Ireland in the 19th century differed from that which obtained in England.

⁹ The right to marry is not expressly provided for in the text of Article 40. Rather, it has been enunciated through case law in our constitutional courts. I will revisit this issue in Chapter Four.

one such right. Therefore, I am opposed to the Irish State's position in the matter of *Zappone and Gilligan*. To some extent, the State's position hinged on a thesis that is implicitly grounded in the concept of difference, which, I argue, is at the core of the routine reproduction of gay and lesbian inequality in Ireland.¹⁰ Firstly, the State implicitly invoked difference in an attempt to posit the notion that the plaintiffs in this 2006 constitutional case relied upon a right to same-sex marriage, rather than a right to marry *per se*. The former was then deemed to be non-existent.¹¹ Secondly, because marriage and family remain inextricably linked in Ireland, difference was implicitly invoked so as to normalise the heterosexist assumption that the issue of child welfare necessarily warranted consideration *vis-à-vis* the introduction of same-sex marriage in Ireland.¹² This 'logic'¹³ in its entirety was also predicated on the dominant understanding of Article 41 of our Constitution, which takes as given a seemingly self-evident rationale for privileging the traditional family in Ireland. My rationale for embarking on this research centres on the unacceptability of these diktats.¹⁴ It is guided by the necessity to unpack these seemingly commonsensical 'truths', so that the denial of the right of lesbians and gay men to marry will no longer be acceptable in Ireland.

¹⁰ I theorise the concept of difference in Chapter Two.

¹¹ These dynamics to the Irish State's position will become apparent as my analysis evolves in Section One of Chapter Five.

¹² This dynamic will become apparent as my analysis evolves in Section Two of Chapter Five.

¹³ I use 'scare quotes' throughout my research to denote a contentious representation of such terms as 'logic' and 'commonsensical' (see Fairclough, 2000a, p.173).

¹⁴ I discuss my politics as part of my methodological orientation in Chapter One.

Relationship and Family Recognition: Irish and International Developments

Introduction to Trajectory

The Irish trajectory helps to explain how the imperatives of relationship and family recognition, in the context of lesbianism and homosexuality, entered public discourse, to the extent that same-sex marriage became an issue for a constitutional court in Ireland in 2006. In this regard, the Irish trajectory denotes an important aspect to what is referred to as a ‘discourse-historical approach’ (DHA), which requires the integration of the historical dimension to the issue that is under investigation, into the analysis of discourse (see Wodak, 1997b; 1999; 2001; 2011).¹⁵ In this jurisdiction, the premise of relationship recognition refers to the underpinning of cohabitation, marriage and partnership regimes through constitutional and / or legislative provisions.¹⁶ These regimes presuppose a level of engagement with the State, in terms of both the rights and responsibilities that they trigger. However, the dominance of the nuclear family paradigm in Ireland, which is informed by the dominant understanding of Article 41 of our Constitution, is such that it officially precludes space for other manifestations of family in this jurisdiction. Therefore, references to the Irish trajectory also incorporate the imperative of family recognition. Referring to activism, advocacy and government initiative, I elaborate on developments that took place in Ireland from the 1980s to the present. This timeline is important in terms of gauging the pace of incremental change in Ireland, both in terms of understandings of lesbian and gay equality in the

¹⁵ I elaborate on this dynamic in Chapter One.

¹⁶ In Ireland, marriage is the only regime that is afforded constitutional recognition and protection under Article 41. Moreover, it is only open to opposite-sex couples. See Appendix VI for examples of legislation *vis-à-vis* marriage that has been enacted in this jurisdiction. Civil partnership, which was legislated for in 2010, is only open to same-sex couples. A presumptive scheme *vis-à-vis* cohabitation, which applies to opposite-sex and same-sex couples under certain conditions, was also legislated for in 2010. See Appendix VII for relevant details of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010*.

context of relationship and family recognition, and when such conceptualisations entered public discourse. In this regard, the Irish trajectory denotes an aspect to the ‘what, when, where, who, why, how, to whom, and with what effect’ questions (see Wodak, 1997b) that can inform critical discourse analysis.¹⁷ Important themes that emerge from this elaboration include the following: the centrality of parity and equal status, which are rooted in the principle of equality;¹⁸ the need to challenge heteronormativity, as evidenced by the demand to repeal the 2004 legislative ban on same-sex marriage in Ireland, for example;¹⁹ and the degree to which Article 41 of our Constitution has been deliberated upon in terms of the debate surrounding relationship and family recognition in Ireland. This latter dynamic denotes a crucial dimension to this trajectory. The dominant understanding of Article 41 conceives of marriage and family as *one* social institution with a constitutional and legislative underpinning. This informed both the outcome of the 2006 High Court case that is at the centre of my critical discourse analysis, and many of the specificities to the civil partnership and cohabitation legislation that was enacted in Ireland in 2010.²⁰

I situate the Irish trajectory within the wider international demand for relationship recognition in the context of lesbianism and homosexuality. I highlight ways in which some European countries, including Belgium and Denmark, embraced this premise through legislative change. I also make reference to the manner in which case law precluded the introduction of same-sex marriage in Britain. The earliest impetus for change that I am aware of in relation to articulating the right of lesbians and gay men to

¹⁷ I discuss this dynamic in the context of my methodological considerations in Chapter One.

¹⁸ I theorise this fundamental principle in Chapter Two.

¹⁹ I discuss aspects to the enactment of this legislation in Chapter Six.

²⁰ In Chapter Six, I refer to the 2010 enactment of civil partnership legislation in Ireland, with a view to fostering a greater understanding of the High Court ruling in *Zappone and Gilligan*, particularly in terms of the dominant conceptualisation of Article 41.

marry harks back to 1971 in the United States. This grounds my rationale for discussing aspects to the American pathway *vis-à-vis* relationship recognition. Similar to the wider European trajectory, it is informed by both case law and legislation.

Here, I wish to make the point that this discussion does not denote an exhaustive listing of all aspects to the Irish, wider European, and American trajectories. Rather, the overriding rationale here is to provide some level of detail that situates the relatively recent framing of marriage rights in Ireland in the language of lesbian and gay equality. Another important aspect to the Irish trajectory is that it provides some sense of the ‘kicking and screaming’ that was required over a number of decades so as to further the wider project of relationship and family recognition in Ireland. Part of that complexity is attributable to the dominant understanding of Article 41, and its attendant impact on the ‘doing’ of equality, which is underpinned by Article 40.²¹

Aspects to the American Trajectory

The earliest impetus for change in relation to same-sex marriage that I unearthed in the literature harks back to 1971 in the United States, where two gay men petitioned the Minnesota Supreme Court to recognise their right to marry (see Anon., 1973, p.573; Eskridge, 1999, pp.134-135; Rivera, 1979, pp.874-876). The following denotes an excerpt from Justice Peterson’s ruling in *Baker v. Nelson*: “The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing

²¹ The imperative to balance the principles that are underpinned by Articles 40 and 41 was a dynamic that arose over the course of parliamentary debates surrounding the instituting of the legislative regime of civil partnership in Ireland in 2010. This will become apparent as my analysis evolves in Chapter Six. Here, I reiterate that the plaintiffs in *Zappone and Gilligan* relied upon Articles 40 and 41 of the *Irish Constitution* (1937) in furtherance of their right to have their Canadian marriage recognised in this jurisdiction.

of children within a family, is as old as the [B]ook of Genesis.” (see [1971] 191 N.W. 2d., pp.185-187, at p.186) In terms of heterosexist opposition to same-sex marriage today, this conceptualisation is important. It suggests that marriage and family have been conceived of as one social institution from the beginning of time. Moreover, it seamlessly intertwines procreation, which relies on biological complementarity, with the social construct of gender, and the seemingly self-evident imperative of gender complementarity with regard to the rearing of children. The plaintiffs in *Baker v. Nelson* lost their case because the relevant legislation regarding marriage was not found to offend the U.S. Constitution (see [1971] 191 N.W. 2d., pp.185-187, at p.187). They appealed this decision to the U.S. Supreme Court, which also dismissed their case (Anon., 1973, p.573). Given that what was known as the ‘crime against nature’ was still on Minnesota’s Statute Books at the time that these plaintiffs filed their lawsuit (see Eskridge, 1999, p.332), their courage is quite profound. Of additional interest here is that counsel for the Irish State in *Zappone and Gilligan* alluded to *Baker v. Nelson* with a view to furthering the claim that other jurisdictions have long rejected same-sex marriage (see [2008] 2 I.R. pp.417-513, at para. 186).

In the early to mid 1970s in the United States, both a lesbian and a gay couple initiated unsuccessful constitutional challenges in Kentucky and Washington respectively (see Eskridge, 1999, p.135; Lambda Law Students Association, 2011; Stoddard, 1997, p.755). Stoddard (1997, p.755) states that each of the courts justified limiting marriage to opposite-sex couples by drawing upon both its historical definition and the imperative of procreation. Here, it is important to make the point that this gendered construction of marriage, which is consistent with Justice Peterson’s ruling in *Baker v. Nelson* (see [1971] 191 N.W. 2d., pp.185-187), denotes a core aspect to contemporary heterosexist opposition to same-sex marriage, not

just in the United States (see Gallagher, 2004), but also in Ireland (see O'Brien, 2006).²² In particular, I draw attention to the manner in which the imperative of procreation, which requires biological complementarity, seamlessly morphs into the imperative of gender complementarity, in the context of marriage and family in Ireland (see O'Brien, 2008a,b,c). All of these issues help to underscore the rootedness of the nuclear family paradigm across time and place. The above attempts in the United States to drive constitutional change with regard to lesbian and gay rights is consistent with Eskridge's (1993, p.1423) thesis that the demand for legal recognition of intimate adult relationships began in the early 1970s. However, Stoddard (1997, p.755) asserts that it was not until the late 1980s that the issue began to emerge as a topic for discussion amongst gay rights organisations in the United States.

Aspects to the Wider European Trajectory

In the 1980s, Europe had a 'first' in terms of relationship recognition for gay men and lesbians when Denmark became the first country to introduce a legislative regime for registered same-sex partnerships in 1989 (see Equality Authority, 2002, p.22). The Netherlands subsequently instituted a partnership regime for same-sex couples in 1998, followed by France in 1999, with both regimes underpinned by legislation (see Equality Authority, 2002, p.21). In terms of the European trajectory, it is worth noting that the Danish initiative occurred at a time when homosexuality was criminalised in Ireland.²³ Moreover, nine years passed before another European country instituted a legislative regime for same-sex couples.

²² These dynamics to heterosexist opposition to same-sex marriage in Ireland will become apparent as my analysis evolves, particularly in Chapter Six.

²³ See Appendix II for details of Sections 61 and 62 of the *Offences against the Person Act, 1861* and Section 11 of the *Criminal Law Amendment Act, 1885*, which criminalised homosexuality in Ireland. This 19th century legislation was repealed in 1993. In this latter regard, see Section 2 of the *Criminal Law (Sexual Offences) Act, 1993*. Please note that lesbianism was never criminalised in Ireland.

Nonetheless, once the Dutch took up the mantle, the pace of incremental change in Europe accelerated, with France following one year later, while registered partnerships for same-sex couples became legal in Germany in 2001 (see Equality Authority, 2002, p.22).

Aspects to the Irish Trajectory

The earliest reference that I unearthed in relation to Ireland pertains to a forum that the Council for the Status of Women organised in 1980 (see Smyth, 1983, p.13). A workshop on Lesbian Feminism formulated demands that were considered necessary to counter the legal difficulties that lesbians faced at that time (Smyth, 1983, p.151). Attendees asserted that legislation should assure lesbian parents of their custody rights, and that eligibility for adoption should include lesbians (Smyth, 1983, p.151). While not couched in the language of family recognition, such demands are consistent with the imperatives of recognition and protection, and the State's role in that regard. There is an added significance here in terms of the equality theory that underpins my research. Smyth (1983, pp.11-13) acknowledged the incremental change that had taken place in Ireland *vis-à-vis* legal rights in the context of gender. "We have gained a degree of legal equality, but socially, economically and politically, Irish women are not equal with men." (Smyth, 1983, p.12) This is an important point in terms of understandings of the principle of equality. It implicitly concedes the complexity of equality, which, I argue derives from its co-existence with inequality. It also underscores the premise that there are different dimensions to equality, which is central to the thesis that Baker *et al* (2004) put forward.²⁴

²⁴ Smyth's (1983) thesis also evokes that sense of the denial of 'full' equality, which Senator Norris alluded to in the context of articulating his perspective on proposals *vis-à-vis* civil partnership legislation in Ireland (see Seanad Éireann, 2010a, paras. 151-153). I elaborate on all of these dynamics in my theorisation of the principle of equality in Chapter Two. Please note that the terms 'Seanad Éireann' or 'Seanad' refer to the upper house of our national parliament in Dublin, members of which are senators.

The principle of equality was deployed in the Irish Council's for Civil Liberties (ICCL, 1990, p.26) call for a common age of consent for heterosexuals and homosexuals. This can be conceived of as politicising the continued criminalisation of homosexuality in Ireland at the time.²⁵ Against the backdrop of the above initiative in Denmark in 1989,²⁶ ICCL (1990, p.33) called for the enactment of legislation that would recognise the right of lesbians and gay men to form domestic partnerships. The council indicated that this partnership regime could provide for a civil status that would be equivalent to that attaching to married spouses, and that it could give same-sex partners equal access to the various benefits that are conferred on married heterosexuals (ICCL, 1990, pp.32-33). In relation to family, ICCL (1990, p.27) was quick to put paid to the idea that lesbians or gay men are necessarily unfit to parent. The council highlighted age-old misconceptions that such parents can be faced with in terms of their children's gender identity, and also their psychological, sexual and social development (see ICCL, 1990, p.27).²⁷ At that time, the criminalisation of homosexuality in Ireland would have denoted a significant barrier in terms of the access, adoption, custody, fostering, and guardianship of children (see ICCL, 1990, pp.33-34). Therefore, the courage and vision that was

²⁵ ICCL (1990, p.26) alluded to the common age of consent that prevailed at the time in a number of European countries, including Denmark, the Netherlands and France. Earlier, I highlighted legislative initiatives that these countries instituted in the context of relationship recognition.

²⁶ ICCL (1990, p.33) asserted that the Danish legislation of 1989 enabled lesbian and gay couples to get *married* [my italics], although the council then discussed aspects to that legislation in terms of partnership. Writing in the *Sunday Tribune*, Burke, J. (2006) consistently relied on the term '*married*' [my italics] in his article on the performing of civil partnership ceremonies in the British embassy in Dublin (prior to the enactment of civil partnership legislation in Ireland). I argue that this general use of language is problematic because it engenders utter confusion amongst some members of the public who are positively disposed to the introduction of same-sex marriage in Ireland. While protesting against the 2004 ban on same-sex marriage outside parliament buildings in Dublin in 2012 and 2013, I met people who genuinely believed that the issue of marriage rights for lesbians and gay men had been settled in Ireland. This derives from the incorrect use of the terms 'marriage' and 'married' in the context of civil partnership, which was legislated for in 2010. This use of language engenders confusion about the 2004 legislative ban because it makes no sense to those who believe that same-sex marriage is now legal in Ireland. This is problematic because it obscures not just the ban, but also the 2006 High Court ruling in *Zappone and Gilligan*, and, indeed, the plaintiffs' new High Court action. I argue that this inhibits public discourse that is so vital in terms of challenging the State's denial of marriage rights to lesbians and gay men in Ireland.

²⁷ Their embeddedness is such that these issues arose over the course of proceedings and deliberations in *Zappone and Gilligan*. I will revisit this issue of child development in the context of the parenting that is done by lesbians and gay men in Section Two of Chapter Five.

required to situate the principle of equality firmly within the realm of relationship and family recognition in Ireland should not be underestimated.

After the decriminalisation of homosexuality in Ireland in 1993, Rose (1994, p.61) identified the recognition of lesbian and gay domestic partnerships, and matters relating to the parenting of children, as areas that could feature in the pursuit of gay and lesbian equality. While he believed that discrimination *vis-à-vis* such issues as taxation, for example, was rooted in the absence of legal recognition for intimate adult relationships, he acknowledged that much debate took place within the gay and lesbian community in Ireland as to whether or not the pursuit of formal partnership recognition denoted an important goal for activists (Rose, 1994, pp.61-62).

International Perspectives on Relationship Recognition

This is an important point that is also applicable to the international debate surrounding relationship recognition, such as that obtaining in the United States and Britain, for example. For activists and theorists, such as Bevacqua (2004), Stoddard (1997), Sullivan (1996), and Vaid (1995), all of whom write with regard to the United States, access to civil marriage is conceived of as being central to the realisation of equality for lesbians and gay men. Furthermore, Vaid (1995, p.376) deems the recognition of other forms of gay and lesbian relationships to be essential to 'full' equality. However, Stoddard (1997, p.756) asserts that other forms of relationship recognition, such as domestic partnerships, for example, cannot assure this. Writing in the British context, Peel and Harding (2004) reject marriage because of its heterosexist and sexist underpinnings. They both conceive of civil partnership as the most appropriate mechanism for the legal recognition of their relationship (see Peel and Harding, 2004). However,

Donovan (2004) and Wise and Stanley (2004), who also write in the British context, reject both marriage and partnership because they conceive of these regimes as reinforcing the inequalities that attach to other forms of living and loving. Some of the above perspectives evoke the sentiments expressed by Senator Norris in relation to civil partnership in Ireland, which I highlighted at the beginning of this thesis (see Seanad Éireann, 2010a). They all implicitly hone in on the tensions that prevail *vis-à-vis* the way forward in terms of affording protection to parties to adult intimate relationships, and reconciling that with the fundamental principle of equality.

Further Aspects to the Irish Trajectory

In 1995 in Ireland, the Gay and Lesbian Equality Network (GLEN) and the Nexus Research Cooperative (NRC) recommended the inclusion of provisions within proposed equal status legislation that would facilitate the registration of non-marital same-sex relationships (GLEN and NRC, 1995, pp.40-41). Therefore, relationship recognition was conceptualised here in terms of equal status on the basis of gender and sexual orientation. It suggests that the legal and moral imperative of decriminalising manifestations of same-sex intimacy in 1993 was so profound that it created a space wherein the unwavering and unequivocal demand for equal status as a citizen, who was no longer a ‘criminal’, could not be ignored. This underscores the salience of Waaldijk’s (2000) thesis, which I highlighted at the beginning of the introduction to this research.

In Ireland in the 1990s, advocates of equality for gay and lesbian persons availed of a consultative process in an effort to further their aims through engagement with the State. The Commission on the Family (CF) was set up in 1995 with a view to examining the needs and priorities of families

against the backdrop of social change (CF, 1996, p.8). It received submissions from three gay / lesbian organisations, including the Gay and Lesbian Equality Network (see CF, 1996, pp.109-111). While the report did not provide details of the submissions, it did state the following: “Submissions from homosexual representative groups sought parity with heterosexual individuals and partnerships.” (CF, 1996, p.64) Here, reliance on the term ‘parity’, so as to encapsulate the general tenor of these submissions, is significant. It demonstrates that invoking and relying upon the principle of equality or the premise of equal status were fundamental to the pursuit and realisation of relationship recognition. Having said that, the commission also received submissions that strongly rejected the idea of relationship parity and / or adoption by gay persons (see CF, 1996, pp.64-108). This suggests that the issues of relationship and family recognition were ‘out there’ (see Parker, 1999, p.3) in public discourse, to the extent that they impelled some opponents of such ideas into voicing their objections to the commission.

Again in 1995, the Irish Government established the Constitution Review Group (CRG), which comprised senior officials and public servants from the realms of law and academia (CRG, 1996, p. ix). This group was charged with reviewing our Constitution with a view to determining areas where change might be warranted (CRG, 1996, p. x). It received submissions from advocacy groups, including the Gay and Lesbian Equality Network (see CRG, 1996, pp.651-654). The CRG (1996) stated that the constitutional recognition and protection of families other than those based on marriage presented significant difficulties, because of the accretion of Irish case law on Article 41 (see CRG, 1996, p.321).²⁸ Nonetheless, it was open to the idea that families headed by same-sex

²⁸ I provide details of this important case law in Chapter Five. The dominant understanding of Article 41 did inform aspects to the Irish regime of civil partnership, which was legislated for in 2010. This dynamic will become apparent in Chapter Six.

couples denoted one of many family types that could warrant consideration *vis-à-vis* change to the definition of family in the Constitution (see CRG, 1996, pp.321-322).²⁹ The CRG (1996) recommended that Articles 41.1.1, 41.1.2, 41.2.1, 41.2.2, and 41.3.1 should be deleted, and that a revised Article 41 should expressly provide for the following: the right to marry and found a family; a guarantee to respect family life, irrespective of whether or not it is based on marriage; confirmation that the State's obligations *vis-à-vis* marriage does not preclude legislating for the benefit of families that are not based on marriage (see CRG, 1996, p.336).³⁰ These recommendations, which derived from the group's mandate, would have signalled to the Irish Government that relationship and family recognition denoted imperatives that needed to be addressed. However, the above recommendations with regard to constitutional change were never implemented.³¹

Further Aspects to the American Trajectory

In the United States, 1996 also proved to be a pivotal year in terms of solidifying heterosexist opposition to the introduction of same-sex marriage. Federal legislation, which defined marriage as a legal union between one man and one woman, was enacted that year (see Alliance Defense Fund, 2008).³² Both Eskridge (1999, p.219) and Hull (2001, p.207) state that it was a decision in the Hawaii Supreme Court on same-sex marriage in 1993 that informed the rationale behind the enactment of the

²⁹ Part of the complexity of Article 41 derives from case law; two Irish Supreme Court justices stated in the 1970s that the term 'family' is not defined in our Constitution. I will revisit this dynamic in Chapters Four and Five.

³⁰ Article 41.3.2 was changed by the will of the majority of the electorate in the 1995 constitutional referendum on divorce, which I discuss in Chapter Four. CRG (1996, p.337) recommended that the remaining clause, i.e. Article 41.3.3, should remain intact.

³¹ Our civil partnership regime, for example, was provided for without constitutional change to Article 41.

³² See Appendix V for relevant details.

Defense of Marriage Act, 1996.³³ While marriage laws come within the purview of each state in the U.S., this federal law permits individual states to refuse to recognise same-sex marriages that are legal in some states (Bonauto, 2010, p.2). Moreover, it prevents married same-sex couples from accessing federal benefits or programmes in which marital status is a criterion for eligibility (Bonauto, 2010, p.2). Therefore, it denotes a reminder of the myriad ways in which heteronormativity is routinely operationalised. An important parallel obtains between the title of this American legislation, which centres on the need to defend marriage, and the text of Article 41.3.1 of the *Irish Constitution (1937)*, which stipulates that the State must guard and protect marriage.³⁴ This imperative to defend marriage, as if it were under attack, suggests unease as to its potential vulnerability, which seems at odds with the rootedness of the nuclear family paradigm over time and place.

Further Aspects to the Irish Trajectory

In 2000, the triggering of rights and responsibilities on the basis of marital status came under scrutiny in Ireland in the context of attempting to chart a way forward *vis-à-vis* civil partnership. The report compiled by Mee and Ronayne (2000) on behalf of the Equality Authority denoted an audit of the myriad ways in which married heterosexual couples were treated differently to same-sex couples in Irish law (see Mee and Ronayne, 2000, pp.1-5). This snap shot in time detailed the rights and responsibilities that are triggered by the status of marriage in such areas as social security, taxation, and family, the latter of which incorporated issues such as adoption, fostering and guardianship (see Mee and Ronayne, 2000, pp.1-5).

³³ See Hull (2001, pp.212-217) for an elaboration on this case, which initially found for the plaintiffs. However, the outcome of a 1998 constitutional referendum on same-sex marriage in Hawaii was such that the court held in 1999 that the plaintiffs' case was without constitutional merit.

³⁴ This dynamic proved to be crucial in terms of the distribution of marriage rights in Ireland. This will become apparent in Chapter Five.

While the report did not make recommendations (see Niall Crowley's foreword in Mee and Ronayne, 2000),³⁵ it created a space wherein a civil partnership regime, which could formalise rights and responsibilities for same-sex couples, could be envisioned.

Two years later, the Equality Authority (2002, p.28) asserted that the principle of equality needed to be at the heart of any process of legal reform in Ireland that might be envisaged in the area of civil partnership. This underpinned its belief that the rights and responsibilities that attached to marriage at the time should be available to lesbian and gay couples (Equality Authority, 2002, p.28). While it did not expressly call for a right to marry, it recommended that Irish law needed to recognise the diversity of family forms by providing for a myriad of rights pertaining to such issues as fostering, guardianship, inheritance, and next-of-kinship (see Equality Authority, 2002, pp.29-30). Again, there is a sense that the logic of the decriminalisation of homosexuality in 1993 helped to foster the idea that enacting equality legislation, firmly based on a now self-evident parity, should incorporate the imperatives of relationship and family recognition in Ireland. Again, this underscores Waaldijk's (2000) thesis, which I highlighted at the beginning of this research.

In Ireland, the continued push for recognition was also evidenced in 2004 in a report that the Dept. of Social and Family Affairs published, following a nation-wide public consultation process regarding family life, and the role of the State in that regard (see Daly, 2004, p.13). While none of its workshop themes were premised on what is perhaps the most important dynamic in terms of policy development, i.e. the definition of family, this issue did concern attendees (see Daly, 2004, p.21). They pointed to the

³⁵ Former Chief Executive of the Equality Authority, Niall Crowley, conceived of equality as a fundamental principle. His ethic of public service was such that, on foot of government action, he felt compelled to resign his position. See Coulter (2008) and Sheridan (2009) in this regard.

need to include families that are headed by lesbian or gay parents within a more inclusive definition of family (see Daly, 2004, pp.24-25). Here however, it is important to make the point that the publication of this report coincided with the enactment of the 2004 legislation that bars same-sex couples from marrying in Ireland.³⁶ This denotes a significant twist in the Irish trajectory *vis-à-vis* relationship and family recognition. The relevant minister's (Dept. of Social and Family Affairs) vote in the Oireachtas,³⁷ and those of her parliamentary party and government colleagues, helped to codify the seemingly self-evident premise that same-sex marriage is antithetical to family.³⁸ This jars with the hope that is engendered by many of the above understandings of parity and equal status in the context of relationship and family recognition and protection in Ireland.

Availing of the consultative process, in order to further the demand for same-sex relationship recognition in Ireland, was also apparent following the establishment of the All-Party Oireachtas Committee on the Constitution (APOCC). Comprising a total of fourteen serving politicians, this committee was charged with identifying aspects to the Constitution *vis-à-vis* the family that might warrant change (APOCC, 2006, pp.3-5). In undertaking its review, the committee resolved to pay heed to the Constitution Review Group's (1996, p.336) recommendations regarding Article 41 (see APOCC, 2006, p.3). It received submissions from many advocacy organisations, including the Gay and Lesbian Equality Network and the Irish Council for Civil Liberties (see APOCC, 2006, pp. A13-A14). These advocates supported both the instituting of a legislative regime for

³⁶ See Select Committee on Social and Family Affairs, 2004b, amendment 9; see line 9, page 10, of the proposed legislation at the time: <http://www.oireachtas.ie/documents/bills28/bills/2003/3503/b35a03d.pdf> ; see Dáil Éireann, 2004l, amendment 5, para. 1009. I will revisit this by elaborating on aspects to the 2004 enactment of this legislation in Section Two of Chapter Six. Please note that the terms 'Dáil Éireann' or 'Dáil' refer to the lower house of our national parliament in Dublin. Comprising deputies, ministers and primeminister, it houses the Government of Ireland.

³⁷ The term 'Oireachtas' refers to our national parliament, which comprises the upper and lower houses, i.e. Seanad Éireann and Dáil Éireann respectively.

³⁸ This will become apparent as my analysis evolves in Chapter Five.

civil partnership, and opening up the institution of marriage to lesbians and gay men (see APOCC, 2006, pp. A95-A96 and pp. A122-A132 respectively).³⁹ However, this committee also received submissions from organisations, such as Muintir na hÉireann and Right Nation, which were opposed to constitutional change regarding marriage and family in the context of lesbianism and homosexuality (see APOCC, 2006, pp. A192-A195 and pp. A238-A245 respectively).⁴⁰ Informed by the general tenor of submissions, which were largely divided into those that were underpinned by the principle of equality, and those that were concerned about a threat to the traditional family, the committee held that a constitutional amendment to broaden the definition of family as understood in Article 41 “... would cause deep and long-lasting division in our society and would not necessarily be passed by a majority.” (APOCC, 2006, pp.121-122) Here, there is no sense that those serving on the committee could provide political leadership with regard to the complexities of Article 41, such that a referendum could be decided, firstly by the Irish Government in terms of the decision to hold one or not, and then by the will of the people in terms of its outcome, rather than pre-empted by the will of fourteen. This point warrants reflection in terms of expectations *vis-à-vis* our constitutional and parliamentary democracy. It is also important to state that this committee did recommend providing for both partnership and cohabitation regimes for same-sex couples through legislation (APOCC, 2006, p.123). These latter recommendations came to fruition with the enactment of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010*.⁴¹

³⁹ See Joint Committee on the Constitution (2005b) for details of the Irish Council’s for Civil Liberties oral submission to the public hearings that were held in relation to the family, and its dominant understanding in our Constitution. I was unable to obtain details of the Gay and Lesbian Equality Network’s oral submission to these public hearings, which took place on 26th May 2005 (see APOCC, 2006, p.16).

⁴⁰ For details of the oral submissions to these public hearings that were made by Muintir na hÉireann and Right Nation, see Joint Committee on the Constitution (2005c,d) respectively.

⁴¹ In Section Three of Chapter Six, I provide a critical discourse analysis of parliamentary debates that took place in 2009 and 2010 as this legislation progressed through both Houses of the Oireachtas. My

The Irish Council's for Civil Liberties (ICCL) above submission regarding the opening up of the institution of marriage to lesbians and gay men (see APOCC, 2006, pp. A122-A132) is consistent with its call for the repeal of the 2004 legislation that bars same-sex couples from marrying in this jurisdiction (ICCL, 2006, p.59). This demand denotes an important step in the Irish trajectory *vis-à-vis* relationship and family recognition. The Irish Council for Civil Liberties remains one of the few advocates that incorporate the marriage ban's repeal within its demands for legislative change.⁴² Furthermore, ten years after the Constitution Review Group's (1996, p.336) recommendation that the right to marry should be expressly enunciated in our Constitution, ICCL (2006, p.6) reiterated this position. Moreover, it conceived of that right as one that inheres in persons, irrespective of their gender and sexual orientation (see ICCL, 2006, p.6). This suggests that the 2004 ban had the effect of placing same-sex marriage on the agenda for change *vis-à-vis* relationship and family recognition in Ireland.

Again in Ireland in 2006, the Dept. of Justice, Equality and Law Reform published a report that was compiled by the Working Group on Domestic Partnership (WGDP). This group was charged with identifying a range of possible options *vis-à-vis* relationship recognition, which could form a template that the department could then work with in terms of developing legislation (see WGDP, 2006, p.2). This step on the Irish trajectory suggests that the State was cognisant of activists' and organisations' demands regarding the imperatives of recognition and protection. However, the difficulty from the outset was that the group's work was circumscribed by the proviso that proposals could not interfere with constitutional

focus will be on the dynamic of civil partnership. Here, I reiterate that our legislative regime *vis-à-vis* cohabitation applies to same-sex and opposite-sex couples.

⁴² Judy Walsh consistently calls for the removal of the legislative ban on same-sex marriage. For example, see her foreword in Fagan (2011, p.5) and Pillinger (2008, pp.3-4). She is one of the authors of Baker *et al* (2004), which is a publication that I rely upon in my theorisation of equality in Chapter Two.

provisions that prevailed at the time (see WGDP, 2006, p.2),⁴³ and that still prevail. This suggests an imperative on the part of the Irish Government to keep Article 41 intact.⁴⁴ This precluded any possible recommendation for constitutional change *vis-à-vis* marriage and family in Ireland, wherein such change tends to be seen as a necessary precursor to the introduction of same-sex marriage. This denotes another significant twist in the relationship and family trajectory. It meant that the creation of a separate and unequal system of recognition, without constitutional status or protection (see WGDP, 2006, p.51), i.e. civil partnership, became a self-fulfilling prophecy. Senator Norris' earlier remarks, about aspects to the Irish manifestation of civil partnership (see Seanad Éireann, 2010a), capture the disappointment that arises out of the Government's inability to fully vindicate the parity of lesbians and gay men in Ireland, because of an overriding imperative to keep Article 41 intact, as if such persons, and their relationships and families, were 'commonsensically' outside its protections.⁴⁵

In 2009, the National Lesbian and Gay Federation (NLGF) conducted a survey to garner some sense of the issues that concerned lesbian, gay, bisexual, and transgender (LGBT) persons in Ireland (see Denyer *et al*, 2009, pp.8-11). An analysis of responses to the survey's open-ended questions indicated that 'full' or 'complete' equality, marriage equality,⁴⁶ and parenting rights emerged as the most important priorities for the majority of respondents (see Denyer *et al*, 2009, pp.24-25). The research also demonstrated that a small number of respondents identified civil

⁴³ See Appendix VIII for details of the group's terms of reference.

⁴⁴ In terms of relationship and family recognition, Article 41 remains intact, notwithstanding the Constitution Review Group's recommendations in 1996, and the All-Party Oireachtas Committee's on the Constitution resolve to heed those recommendations ten years later in 2006. This is perhaps indicative of the complexity of Article 41 of our Constitution, in terms of charting a way forward with regard to the premise of relationship and family recognition. This also raises questions about the general utility of both the consultative process and the establishment of groups or committees, with regard to constitutional change *vis-à-vis* Article 41.

⁴⁵ This will become apparent in Chapter Six.

⁴⁶ I define the term 'marriage equality' in Chapter One.

partnership as a mechanism that could meet their needs (see Denyer *et al*, 2009, p.28). While the research cohort was not statistically representative of the entire LGBT population in Ireland (see Denyer *et al*, 2009, pp.8-11), these findings suggest that same-sex marriage formed an important part of respondents' conceptualisations of relationship and family recognition in the context of the principle of equality.

After the enactment of civil partnership legislation in Ireland in 2010, the organisation that is known as Marriage Equality commissioned a report with a view to challenging the thesis that this legislative regime provides most of the protections that accrue to marriage, as is currently constituted in a raft of legislation (see Fagan, 2011, p.6).⁴⁷ This report denotes an audit of the differences in treatment between opposite-sex married couples and same-sex civil partners in terms of the rights and responsibilities that are triggered by the relevant legislation (Fagan, 2011, p.6). Honing in on issues, such as adoption, guardianship and immigration, the audit demonstrates that there are a myriad of differences between these two legislative regimes (see Fagan, 2011, pp.6-11). These largely derive from the following: not amending some existing legislation that has regard for spouses so as to include civil partners; not always instituting equivalent provisions for civil partners; instituting parallel provision for partners without provision for children; not amending much of the legislation that prevails in relation to dependent children; some lack of clarity because of an absence of express provision; and reliance on policy or ministerial order rather than statutory entitlement (see Fagan, 2011, pp.35-46). Here, it is very important to acknowledge that the enactment of civil partnership legislation in 2010 denotes a significant step on the Irish trajectory, in terms of the recognition of same-sex adult intimate relationships in this country. However, the differences between the two regimes are such that this legislation also

⁴⁷ This organisation was previously known as MarriagEquality.

codifies the second-class status of gay men, lesbians, and their families. This dynamic is at the core of Senator Norris' perspective on the legislation (see Seanad Éireann, 2010a). While it does recognise and protect, it also denies. It implicitly relies on a seemingly self-evident logic of a two-tier system of recognition and protection, which is underpinned by dimensions to the concept of difference. These include the following: 'difference as disadvantage' (see Spicker, 2000); 'difference as social relation' (see Brah, 1991; 1996); and what I refer to as 'difference *to*' and 'difference as deployment', the latter of which derives from Brah (1991). In Chapter Two, I argue that these and other crucial dynamics to the concept of difference are at the core of the routine reproduction of lesbian and gay inequality in Ireland.

Further Aspects to the Wider European Trajectory

With regard to the wider European trajectory, the Netherlands became the first country to open up the institution of civil marriage to same-sex couples in 2001 (Waldijk, 2004, p.572). There, the legislature amended the definition of marriage to a contract that could be entered into by two persons, irrespective of their gender and sexual orientation (Waldijk, 2004, p.572).⁴⁸ Waldijk (2004, pp.577-578) makes the point that such legislative change in that jurisdiction was predicated on both the decriminalisation of homosexuality, which occurred in 1811, and the introduction of comprehensive legislation prohibiting discrimination on the basis of sexual orientation, which was a process that began in 1992. Belgium had a similar trajectory to the Netherlands in that homosexuality was decriminalised in the late 18th century, measures prohibiting sexual orientation discrimination were first introduced in 1999, and the legislature

⁴⁸ In 1996 and 1997, Dr. Waldijk was a member of a Dutch commission of legal experts that was set up to advise government on the opening up of civil marriage to same-sex couples (see Leiden University, 2011). Therefore, this issue was on the Dutch legislature's agenda in the late 1990s.

amended the legal definition of marriage in 2003 (Waaldijk, 2004, pp.581-584). While decriminalisation presupposes that criminalisation ‘made sense’ in Belgium and the Netherlands, for example, it cannot go unnoticed that their legislatures decriminalised homosexuality decades before it was actually criminalised in Ireland in the mid to late 19th century. What is also fascinating about the Belgian trajectory is that once the impetus for change in terms of the logic of enacting anti-discrimination and equality legislation was rationalised, albeit two centuries after decriminalisation, the journey time of four years from ‘there’ to the realisation of marriage equality is quite profound. It suggests that the principles of parity and equal status were so compelling to the Belgian legislature that providing for same-sex marriage denoted a logical initiative and imperative. This premise is at the core of Waaldijk’s (2000) thesis, which I highlighted at the beginning of this research. It offers hope to persons living in countries that have taken steps to redress the ‘logic’ of criminalisation, in that other manifestations of heteronormativity, including the absence of legal protections for families that are headed by gay men or lesbians, will simply be no longer acceptable in those jurisdictions.

The courts are also a mechanism through which rights can be either affirmed or denied, such as in determining the right of lesbians and gay men to marry. As with *Zappone and Gilligan, Wilkinson and Kitzinger v. Attorney General* was a case that was taken by two women who married each other in British Columbia, Canada, in 2003 (see [2006] EWHC 2022, paras. 1-131). Upon their return home to Britain, they initiated legal proceedings in advance of the impending implementation of a legislative regime for civil partnership in 2004 / 2005. Their rationale in this regard was twofold: they sought recognition of their Canadian marriage in Britain; they did not want their marriage to be ‘downgraded’ to a civil partnership, which the legislation proposed in relation to same-sex marriages that took

place in foreign jurisdictions (see [2006] EWHC 2022, at paras. 2-5 and para. 18). The plaintiffs also relied on Articles 8, 12 and 14 of the *European Convention on Human Rights* (ECHR) (see [2006] EWHC 2022, at paras. 26-29). The following denotes an excerpt from Justice Potter's ruling in this case:

Parliament has not called partnerships between persons of the same-sex marriage, not because they are considered inferior to the institution of marriage but because, as a matter of objective fact and common understanding, as well as under the present definition of marriage in English law, and by recognition in European jurisprudence, they are indeed different.

Justice Potter, [2006] EWHC 2022, at para. 121

This is an interesting extract from the judgment, particularly in terms of the reliance on language to underpin the seemingly commonsensical logic of difference. This concept is at the heart of my theorisation of equality and inequality in Chapter Two. I also allude to it in Chapter One in the context of the methodological considerations that underpin my research. The plaintiffs' case was dismissed in 2006, in part because British law was not found to be incompatible with the ECHR (see [2006] EWHC 2022, at paras. 129-131). This is an important point in terms of both the recourse to the protections that are afforded by the ECHR, and the manner in which it is incorporated into domestic law. This dynamic arose in *Zappone and Gilligan*, wherein those plaintiffs also relied on Articles 8, 12 and 14 of the ECHR.⁴⁹

Further Aspects to the American Trajectory

Efforts to further the recognition of same-sex marriage through the courts have also been made in America. Massachusetts became the first state to

⁴⁹ I will revisit this in Chapter Five.

legalise same-sex marriage in the United States on foot of the *Goodridge v. Department of Public Health* ruling in 2003 (see [2003] Mass. 440, paras. 309-395). Counsel for both the plaintiffs and the Irish State in the matter of *Zappone and Gilligan* relied upon different aspects to this ruling in furtherance of their respective positions. Of particular interest to this research is an excerpt from Justice Sosman's dissenting judgment in *Goodridge* (see [2003] Mass. 440, at paras. 358-359).⁵⁰ I discuss it in Chapter Five in relation to the conducting and interpretation of social scientific research regarding the dynamic of child development in the context of lesbian and gay parenting. This excerpt from Justice Sosman's ruling hints at the sheer scale of institutionalised heterosexuality in the United States, in that it has the capacity to prey upon those who seem to be positively disposed to the general realisation of lesbian and gay rights, in a state that is considered to be one of the most liberal in the Union.

Current Aspects to the Irish Trajectory

In July 2012, the Houses of the Oireachtas approved the establishment of the Convention on the Constitution, which is often referred to as the Constitutional Convention. It comprises one hundred people, including parliamentarians from both Houses of the Oireachtas, and Irish citizens who were selected from the electoral register. Its terms of reference are such that it is charged with considering eight specific issues, including same-sex marriage, with a view to making recommendations to the Oireachtas regarding same in terms of possible future amendments to our Constitution. The Constitutional Convention, which intends to complete its work within one year, has invited public submissions on all eight issues. There was an unprecedented public response to the issue of same-sex marriage. Indeed, the Constitutional Convention received over one

⁵⁰ This is reproduced in Appendix XII.

thousand submissions in this regard. In April 2013, it convened with a view to making recommendations to the Oireachtas *vis-à-vis* a constitutional provision for same-sex marriage. The convention overwhelmingly voted in favour of recommending that our Constitution should be changed to allow for civil marriage for same-sex couples. Similarly, the overwhelming majority of delegates recommended that the State should enact attendant legislation *vis-à-vis* the issues of parenthood and the guardianship of children. A report comprising these recommendations will now go to Government, which currently comprises a coalition of Fine Gael and Labour. Upon receipt, the Government is committed to respond within four months by way of a debate in the Oireachtas. If it agrees with the recommendation to amend the Constitution, the Government will also determine a timeframe for that constitutional referendum.⁵¹

In March 2013, the Labour Party published legislation that seeks to remove the legislative prohibition on marriage between persons who are of the same sex (see Labour Party, 2013). Its *Civil Registration (Marriage Equality) Bill, 2013*, which was introduced in Seanad Éireann by Senator Bacik, seeks to repeal Section 2.2(e) of the *Civil Registration Act, 2004*. This initiative is indicative of Labour's commitment, in government, to the realisation of marriage equality in Ireland. It denotes an important aspect to this Irish trajectory in that it implicitly concedes that providing for marriage equality necessitates legislative change. It draws much needed attention to the legislative position, rather than simply focusing on the constitutional dynamic. Having said that, it is important to bear in mind that the enactment of the *Civil Registration (Marriage Equality) Bill, 2013* requires successful negotiation of a number of stages through both Houses of the

⁵¹ I garnered all of this information from the following links: <https://www.constitution.ie/AboutUs.aspx> ; <https://www.constitution.ie/Convention.aspx> ; <https://www.constitution.ie/Meetings.aspx> ; <https://www.constitution.ie/AttachmentDownload.ashx?mid=54833fae-9da3-e211-a5a0-005056a32ee4> ; <https://www.constitution.ie/AttachmentDownload.ashx?mid=b4bee9f7-fda4-e211-a5a0-005056a32ee4>

Oireachtas.⁵² As of May 2013, Senator Bacik is working with the Government with a view to formalising a date for the legislation's 'Second Stage'.⁵³

Conclusion to Trajectory

Most of the above examples that form part of the Irish, wider European, and American trajectories are informed by the imperative of equality, and its realisation through legislation. Many of them situate the relatively recent framing of marriage rights in Ireland in the language of lesbian and gay equality. However, the imperative to define marriage at a federal level in the United States can be conceived of as furthering inequality *vis-à-vis* marriage through a reliance on legislation. Moreover, the *Wilkinson and Kitzing* decision relied on both legislation and case law to further inequality *vis-à-vis* marriage in Britain. What emerges from the above discussion in its entirety is a sense that while some countries, such as Belgium, embraced the principle of relationship recognition through legislative change, Ireland's trajectory is characterised by a lot of 'kicking and screaming'. While Ireland grappled, and still grapples, with the principles of recognition and protection for adult and family relationships, other European countries got on with the business of legislating for marriage and partnership. Important themes emerge from the above elaboration on the Irish trajectory. They include the advocating of the concepts of genuine parity and equal status, which are rooted in the principle of equality. This is important because the plaintiffs in *Zappone and Gilligan* relied on the equality provisions in Article 40 of the *Irish Constitution (1937)* to assert their right to have their marriage recognised and protected in this jurisdiction. Another crucial aspect to the Irish

⁵² For details of these stages, see <http://www.oireachtas.ie/viewdoc.asp?DocID=23209&&CatID=59>

⁵³ Personal communication.

trajectory is the significance of Article 41 of our Constitution to the wider issue of relationship and family recognition and protection. The dominant conceptualisation of Article 41 still informs that debate, as evidenced by the establishment of the Constitutional Convention in 2012, for example, as well as the taking of the High Court action that is at the centre of my research. The significance of the Irish trajectory is that it helps to contextualise the plaintiffs' reliance on both Articles 40 and 41 in the matter of *Zappone and Gilligan*. In that regard, this trajectory denotes an important aspect to my discourse-historical approach to research (see Wodak, 1997b; 1999; 2001; 2011), which I discuss in Chapter One.

Chapter Outline

Introduction: *What's the Story? Interrogating the Constitutional and Legislative Position on Same-Sex Marriage in Ireland*

Chapter One: *Text Messages and Baggage Claim: Method and Methodology*

In this chapter, I discuss the methodological orientation of my research. I am fascinated by the wherewithal of language in terms of its capacity to actively construct, rather than merely reflect, social relations (see Riggins, 1997). What has emerged from research over time is the premise that language use actually denotes social action (see Chilton and Schäffner, 1997; Harré and Gillett, 1994; Wodak, 1999). This breakthrough subsequently gave rise to a mode of study that is known as Discourse Analysis. Within this field, the impetus to challenge the routine reproduction of inequality in society, which is consistent with a critical perspective (see Sarantakos, 1994), led to the emergence of what became known as Critical Discourse Analysis (CDA). This denotes both a method and a methodology (see Phillips and Hardy, 2002) that best suits my

research, in terms of unpacking the discursive processes through which lesbian and gay inequality is routinely reproduced in Ireland. In this regard, I discuss elements in my CDA tool kit that facilitate this research, including the discursive wherewithal of legitimation (see Martín Rojo and van Dijk, 1997). This strategy was to the fore throughout the Irish State's defence of its position *vis-à-vis* same-sex marriage in the matter of *Zappone and Gilligan*. I also discuss the utility of the discourse-historical approach to research (DHA), which I alluded to earlier. This requires the integration of material from as many different genres of discourse as possible (see Wodak, 1997b), as well as the historical dimension to the issues that are under investigation, into the analysis of discourse (see Wodak, 1997b; 1999; 2001; 2011). In Chapter One, I also provide definitions of important terms that I consistently refer to throughout this work, specifically, marriage and family as institution, marriage equality, heteronormativity, and heterosexism. In doing so, I reflect on my understanding of relevant aspects to our Constitution, as well as my evolving perspective on the wider issue of relationship and family recognition and protection. This acknowledges both the importance and utility of researcher reflexivity, which I also discuss in Chapter One as part of my critical orientation.

Chapter Two: *In Theory: Theoretical and Conceptual Considerations*

My theorisation of the fundamental principle of equality first elaborates on its co-existence with inequality. I argue that the crucial dynamic that helps to explain the reproduction of inequality in all its manifestations is the concept of difference and its social significance. In this regard, I discuss the following theses: Spicker's (2000) conceptualisation of difference as disadvantage; Brah's (1991; 1996) theorisation of difference in the context of social relations; Baumrind's (1995) perspective *vis-à-vis* differences as

deficits,⁵⁴ in conjunction with Cameron's and Cameron's (1996) thesis regarding pathology and deviance in the context of homosexuality; and what I refer to as 'difference *to*' and 'difference as deployment', the latter of which derives from Brah (1991). These dynamics tie in with aspects to the routine operationalisation of socio-cultural norms, which are also central to the reproduction of inequality. The complexity that attaches to the co-existence of equality and inequality, which I alluded to in the introduction to this research, is such that I rely on Baker *et al* (2004). Their theorisation establishes a way forward in terms of redressing inequality in society. Of particular interest in terms of my thesis is the principle of equality of respect and recognition (see Baker *et al*, 2004).

Chapter Three: *Nuclear Options: Conceptualisations of Marriage*

In this chapter, I discuss the history of marriage as an institution in the West. In that regard, Chapter Three denotes an important aspect to my discourse-historical approach to research (see Wodak, 1997b; 1999; 2001; 2011). I elaborate on the legal dimensions to marriage that codified and naturalised the dominant social meaning of marriage as an institution. This history is predicated on the imperative of marital procreation as a necessary precursor to family order and stability. I argue that this has morphed into a preoccupation with social order and stability. This history on marriage is steeped in the 'logic' of patriarchy and the attendant reproduction of the worst excesses of sexism. There is a significant body of research available with regard to the wider feminist critique of marriage. This is quite robust in terms of honing in on normative assumptions surrounding the institution of marriage that are underpinned by both gender and sexual orientation. This has proved useful in terms of facilitating an understanding of many of the issues that are at the heart of this thesis, such as the idea that marriage is

⁵⁴ It is important to make the point that Baumrind (1995) does not conceive of differences as necessarily denoting deficits. This will become clear in Chapter Two.

intrinsically heterosexual, for example. While Feminist Theory informs this chapter, it is important to make the point that my thesis does not denote a feminist analysis *per se*. My reliance on Feminist Theory is more in keeping with my critical and discourse-historical approaches to research, particularly in terms of elucidating historical and normative understandings of, as well as discriminatory aspects to, the issues that are under investigation in my work.

Chapter Four: *Irish Ways and Irish Laws: Aspects to Marriage, Family and Sexuality*

In this chapter, I discuss some of the ways in which certain ‘truths’ in relation to the nuclear family paradigm were either challenged or justified in Ireland. To that end, I elaborate on aspects to the legalisation of contraception, which was a process that began in the early 1970s, and the introduction of divorce, which came about as a result of constitutional change to Article 41 in the mid to late 1990s. This discussion highlights some of the ways in which marriage and family were conceptualised, and how such understandings often rationalised the prevailing dominance of the nuclear family paradigm in Ireland. Emphasis is placed on parliamentary debates pertaining to the introduction or rejection of legislative and / or constitutional change. It is important to state that some of the extracts from the Oireachtas record are quite lengthy. However, this is a warranted feature in Chapter Four because the extracts provide a window into the soul of change, in terms of either its support or resistance. Emphasis is also placed on the importance of judicial interpretation of our Constitution, which arises in the context of the *McGee v. Attorney General* ruling on contraception and the right to marital privacy (see [1974] I.R. pp.284-337). This was one of many constitutional cases that were either alluded to, or relied upon, throughout proceedings in the matter of *Zappone and Gilligan* in 2006. In Chapter Four, I include some perspectives of the Catholic

Hierarchy in Ireland on marriage and family as one institution. While I hone in on the interplay between the civil and the canonical, I make no reference to any religious perspective on same-sex marriage in my work. Any such perspective is irrelevant to the 2006 High Court ruling in *Zappone and Gilligan*. Having said that, Chapter Four provides an important socio-cultural and historical dimension to issues pertaining to marriage, family and sexuality in Ireland, all of which help to contextualise my analysis of that 2006 ruling. Therefore, this chapter also denotes an important dimension to the discourse-historical approach that I adopt in this thesis (see Wodak, 1997b; 1999; 2001; 2011).

Chapter Five: *The Love That Dare Now Speak Her Name: Critical Discourse Analysis of the High Court Ruling in Zappone and Gilligan*

This is the most important chapter in my thesis. It denotes a critical discourse analysis of the 2006 High Court ruling on same-sex marriage in Ireland. It requires an elaboration of important research considerations at the outset, many of which pertain to the written text of the judgment. I discuss the relevance of different genres of discourse (see Wodak, 1997b) that I integrate into my thesis, such as Irish and international case law on marriage and family. This integration helps to ground my analysis. After elaborating on these considerations, Chapter Five then comprises two sections, each corresponding to a strand of the hetero-matrix that requires critical analysis. Section One largely hones in on the constitutional position *vis-à-vis* marriage in Ireland, and what I refer to as the ‘marriage as intrinsically or inherently heterosexual’ thesis. This was either challenged or justified over the course of these High Court proceedings by parties to the case. In this regard, the importance of Article 41 of our Constitution cannot be overstated. This underscores the salience of the Irish trajectory *vis-à-vis* relationship and family recognition, particularly in terms of the extent to which Article 41 has been deliberated upon. This suggests a

struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of Article 41, which is precisely what happened in the High Court in 2006. Both Sections One and Two of Chapter Five pertain to the issue of family because it remains inextricably linked to marriage in this jurisdiction. Section Two denotes a critical discourse analysis of the second strand to the hetero-matrix that is under investigation, i.e. the routine pathologisation of gay men and women as parents, and the attendant issue of child development, which seamlessly morphs into the issue of child welfare. It is within this realm that the concept of difference as deficit (see Baumrind, 1995), which I theorise in Chapter Two, is particularly acute. Once the ‘truth’ about a seemingly self-evident pathology is implicitly invoked, and then ‘rationalised’ and operationalised through discourse, the denial of marriage rights becomes entirely ‘logical’. With regard to marriage, these two strands to the hetero-matrix help to explain the intransigence of lesbian and gay inequality in Ireland.

Chapter Six: *Pen Pals, Parish-Pumps, and Putting on an Act: ‘Letters to the Editor’, E-Mails from Politicians, and Oireachtas Debates Pertaining to Civil Partnership*

This chapter comprises three sections, with each pertaining to one genre of discourse (see Wodak, 1997b). These are as follows: ‘Letters to the Editor’, the publication of which coincided with the proceedings and ruling in *Zappone and Gilligan* in 2006; personal communication with politicians / legislators in the Oireachtas *vis-à-vis* the enactment of legislation in 2004 that bars same-sex couples from marrying in Ireland; and Oireachtas debates surrounding the introduction of the legislative regime for same-sex civil partnerships in 2010. Many themes emerge from my analysis of each genre, all of which serve to contextualise the 2006 High Court ruling. With regard to ‘Letters to the Editor’ in Section One, these include the following: the ‘what, when, where, who, why, how, to whom, and with what effect’

(see Wodak, 1997b) dynamics behind the construction of knowledge; the reproduction of heterosexual privilege; and the ‘logic’ of the ‘marriage as intrinsically heterosexual’ thesis, which is informed by the issues of procreation and gender complementarity. In Section Two, my critical analysis of the second genre is such that responses from politicians regarding the 2004 legislative ban on same-sex marriage invariably serve to underscore the routine operationalisation of heteronormativity in Ireland. My analysis in Section Two also points to a malaise within our largely parliamentary party-political system, in terms of the abrogation of personal responsibility for the enactment of legislation, which has profound consequences for a minority cohort of our population. In Section Three of Chapter Six, a recurring theme that emerges in my critical analysis of Oireachtas debates on civil partnership is the significance of the dominant understanding of Article 41 to the wider issue of relationship recognition. This denotes an important theme in this chapter, particularly in terms of the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of family in this country. Conceptualisations of the principle of equality and the concept of difference, and the ‘logic’ of a two-tier system of relationship recognition in Ireland, also arose in some of these Oireachtas debates that took place in 2009 and 2010. The relevance and discursive wherewithal of each genre of discourse (see Wodak, 1997b) is such that they foster a greater understanding of the 2006 High Court ruling in *Zappone and Gilligan*. Therefore, Chapter Six denotes an important aspect to my discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011).

Conclusion: *The Last Word: Concluding Thoughts*

In answering my research questions, I hone in on the two strands to the hetero-matrix of marriage and family as one constitutional, legislative and

social institution in Ireland. The crucial dynamics that inform these strands centre on the social significance that attaches to the concept of difference, which is rooted in the routine reproduction of lesbian and gay inequality in Ireland. To that end, I reflect on my theoretical considerations, which are linked to the methodological orientation of this research. I reflect on my contribution to methodology and theory, and on the utility of critical social research in terms of unmasking the myriad ways in which lesbian and gay inequality is routinely reproduced in Ireland.

CHAPTER ONE

Text Messages and Baggage Claim: Method and Methodology

It would be nice if we could squeeze all we know about discourse into a handy definition. Unfortunately, as is also the case for such related concepts as ‘language’, ‘communication’, ‘interaction’, ‘society’ and ‘culture’, the notion of discourse is essentially fuzzy.

van Dijk, 1997c, p.1

Introduction

This chapter elaborates on both the method and methodological considerations that underpin this research. These inform my critical analysis of text from four genres of discourse (see Wodak, 1997b) in Chapters Five and Six, specifically, a constitutional court ruling, letters to a newspaper editor, personal communication from legislators, and parliamentary debates. In Chapter One, I first highlight the trajectory wherein language use became central to understandings of social phenomena, such as the reproduction of gender inequality. What emerged over time was an understanding of language as denoting social action (see Chilton and Schäffner, 1997; Harré and Gillett, 1994; Wodak, 1999). This gave rise to a mode of study that is known as Discourse Analysis. I draw upon the works of theorists of discourse, including Norman Fairclough, Teun A. van Dijk and Ruth Wodak, because these help to determine the framework that best suits my research, which is Critical Discourse Analysis (CDA). I elaborate on aspects to this framework that facilitate my analysis, including the following: the dynamic that is known as ‘social cognition’ (see van Dijk, 1993; 2006); what is referred to as ‘access to discourse’ (see Fairclough, 1989; van Dijk, 1993; van Dijk, 1996) and a ‘discourse access

profile' (see van Dijk, 1993); Martín Rojo's and van Dijk's (1997) theorisation of legitimation; and what is known as the dynamic of 'us and them' or the 'us / them distinction' (see Brickell, 2001; Martín Rojo and van Dijk, 1997). I also discuss the utility of the discourse-historical approach (DHA) (see Wodak, 1997b; 1999; 2001; 2011). This requires an elaboration on the historical dimension to the research topic that is under investigation, such as that already set out in the introduction to this thesis. The DHA also requires the integration of material from different genres of discourse (see Wodak, 1997b), such as those alluded to above with regard to Chapters Five and Six. In Chapter One, I also discuss the important dynamic of researcher reflexivity, so as to acknowledge those aspects to my presence in the research that invariably impact upon this work. These include my understanding of terms that I consistently refer to in this thesis, specifically, marriage and family as social institution, marriage equality, heteronormativity, and heterosexism. Both my understanding of the *Irish Constitution (1937)* and the role of the State *vis-à-vis* the protection of personal rights are important considerations in this regard. My evolving perspective on the wider premise of relationship and family recognition, which came about as a result of the 'thinking' and 'doing' of reflexivity, denotes another important dynamic in terms of the methodological orientation of this research.

Language, Social Cognition, Discourse, Critical Discourse Analysis

The Linguistic Turn

So as to contextualise the dynamic of discourse and its analysis, it is important to make the point that language does not denote a neutral or descriptive medium (see Gill, 1995, p.166). Rather, it is very much connected to social phenomena, such as the routine reproduction of gender

inequality. For example, Remlinger (2005, pp.120-126) discusses the use of the term 'girl' to denote a female, irrespective of her age or maturity. In instances where the term 'woman' would be appropriate, such language use infantilises women. It also normalises a paternalism that tends to emphasise powerlessness and subordination. Similarly, the 'sexual double standard' is operationalised and sustained through language that either affirms or denigrates heterosexuality on the basis of gender. Such language use is indicative of the power relations that prevail in the context of gender (Fischer, 2007, p.55). This hones in on the central premise that "... language does not simply reflect social reality; it is also constitutive of that reality ..." (Litosseliti, 2006, p.3). It is this connection between language and social inequality that concerns critical discourse analysts.

The 'turn to language' (Fairclough, 2000a, p.164; Gill, 1995, p.166; Parker, 1990, p.2; Peel, 2001, p.542) is largely conceived of as a mid 20th century phenomenon, when a revolution swept across the humanities and social sciences with the realisation that language denoted much more than a reflection of reality (Phillips and Hardy, 2002, p.12). While Linguistics emerged as a discipline that was predicated on the centrality of language, in conceiving of language as an abstract competence, it does not take cognisance of the socio-historical matrix outside of which language cannot exist (see Fairclough, 1989, pp.6-7). This helps to explain the emergence of Sociolinguistics, which was influenced by Sociology (see Fairclough, 1989, p.7). While this discipline is strong on the 'what' questions, its link with the positivist tradition is such that it is weak on the 'why' and 'how' questions (see Fairclough, 1989, pp.7-8). The feminist critique of positivism (Letherby, 2003, pp.63-66), combined with the incorporation of gender as a social variable within sociolinguistic research (Wodak, 1997a, p.8; Wodak and Benke, 1997, p.127), may explain the genesis of Feminist

Linguistics.⁵⁵ Central to this discipline are system-oriented and behaviour-related approaches to language *vis-à-vis* gender (Wodak, 1997a, p.8).

The emergence of Pragmatics was associated with the work of analytical philosophers, including Searle (1969), who theorised what is referred to as ‘speech acts’ (see Fairclough, 1989, p.9). The key insight in Searle (1969, p.17) is that language is a form of action (see Fairclough, 1989, p.9). This is important in that a core theme in discourse analysis is that language *is* action (Chilton and Schäffner, 1997, p.207; Harré and Gillett, 1994, p.28; Wodak, 1999, p.186). However, Pragmatics conceives of action as emanating solely from the individual (Fairclough, 1989, p.9), thereby ignoring its social dynamics. Nonetheless, the establishment of what is also conceived of as the ‘uttering as acting’ principle is important, and it is central to the Discipline of Critical Language Study (Fairclough, 1989, pp.5-9). It seems to be at this juncture that the rich and varied tradition that is associated with the phenomenon of language and its social significance influenced the emergence of a distinct mode of study that centred on language as social practice / social action, i.e. Discourse Analysis (see West *et al*, 1997, p.120). Feminism’s critique of the positivistic and androcentric ways of analysing social phenomena, which developed and fostered a critical understanding of language and gender, may also have been instrumental in this regard. Indeed, two prominent theorists in the field of Discourse Analysis have acknowledged the significance of Feminism to critical understandings of language in society (see Fairclough, 1985, p.742; van Dijk, 1993, p.251).

⁵⁵ Litosseliti (2006, p.23) and Wodak (1997a, p.7) assert that this discipline developed within Linguistics, rather than Feminism *per se*.

Social Cognition

Before elaborating on Discourse Analysis, it is important to be mindful of the dynamic of cognition, which facilitates our listening, speaking, reading, writing, thinking, sense-making, understanding, and interpreting (see van Dijk, 1997c, pp.17-19). Language is a system that is integrated with our knowledge of the social world (de Beaugrande, 1997, p.40). Moreover, language users share a vast repertoire of socio-cultural knowledge, incorporating stereotypes (see White and White, 2006, p.259), attitudes, ideologies, norms, opinions, and values, even if they make different uses of that repertoire in different contexts (see van Dijk, 1997c, pp.17-31). This knowledge is informed by our social positioning as aged, classed, gendered, racialised, and sexualised human beings with cultural, historical, intellectual, and political baggage. This means that there is no hiding place in the neutral or the objective *vis-à-vis* the construction of knowledge or the conducting of research, not least because people can interpret the same event in different ways (see van Dijk, 2006, p.162).⁵⁶ This interplay between the personal, the social and the cognitive implies that there are socially shared representations ‘out there’ (see Parker, 1999, p.3) of social groups, social organisation and social relations, all of which presuppose what is known as ‘social cognition’ (see van Dijk, 1993, p.257; van Dijk, 2006, pp.159-177).⁵⁷ For example, it is possible to discern the ideological affiliations of speakers when they use different words to refer to the same entity, such as black versus nigger, or freedom fighter versus terrorist (Sykes, 1985, p.87). These different uses of language denote lexical choices (Macgilchrist, 2007, p.78; van Dijk, 2006, p.166; Wang, 2009,

⁵⁶ See Cheng (2002, pp.309-317) for an analysis of American and Chinese interpretations of one incident, i.e. the mid-air collision of a U.S. Navy patrol aircraft with a Chinese fighter jet.

⁵⁷ Expressions such as ‘climate of fear’ and ‘public opinion’ implicitly rely upon social cognition. The utility of the genre of discourse (see Wodak, 1997b, p.72) that is known as ‘Letters to the Editor’ can implicitly presuppose the presence of a repertoire of socially shared knowledge (see van Dijk, 1997c, p.17) that is ‘out there’ (see Parker, 1999, p.3) ‘in’ social cognition (see van Dijk, 1993, p.257; van Dijk, 2006, pp.159-177). Indeed, the use of the term ‘implicit’ depends on social cognition because the relevant text cannot make sense without it.

p.755), which signify particular representations of aspects to our social world (Fairclough, 1985, p.742) or particular conceptualisations of social relations at any given time and place (see Parker, 1990, p.12). Some of these terms are more ideologically loaded than others. The use of the term ‘nigger’, for example, can tap into socially shared knowledge (see van Dijk, 1997c, p.17) of morally abhorrent practices, including incitement to hatred and slavery, all of which provoke responses and reactions in polity and society, including my difficulty in committing that word to print. This has its basis in the socio-cognitive. This is not to deny the racially motivated social practice that justifies / justified this use of language. Rather, it demonstrates that there can be other representations ‘out there’ (see Parker, 1999, p.3), including the conceiving of whipping and lynching as somehow integral to a particular social order, while abolitionists conceived of these practices as both morally and socially repugnant. The important point here in terms of my work is that social cognition is fundamental to discourse (see van Dijk, 1997c, p.31).

Discourse

Given that for van Dijk (1997c, p.1), the notion of discourse is ‘essentially fuzzy’, it is no surprise that a two-volume, seven hundred-page, multidisciplinary introduction to discourse studies, of which he is the editor, is required to provide an elaborate answer to a deceptively simple question: “What exactly is discourse, anyway?” (see Phillips and Hardy, 2002, p.3; van Dijk, 1997c, p.1) According to Foucault (2004, p.54),⁵⁸ discourses are “... practices that systematically form the objects of which they speak.” These can include the unmarried mother and the illegitimate child (see Carabine, 2000, pp.78-93; Carabine, 2001, pp.267-310); the

⁵⁸ *L’Archéologie du savoir* was first published in 1969.

‘fake’ refugee or ‘black’ immigration (see van Dijk, 1997a, pp.31-64);⁵⁹ or the dangerous homosexual (see Gouveia, 2005, pp.229-250). Drawing upon Foucault, Carabine (2001, p.268) sees discourse as comprising groups of related statements that cohere to produce both meanings and effects in society. For example, throughout the 19th century in Britain, the discourse of bastardy constructed unmarried mothers as both immoral and undeserving of poor relief, except through the workhouse (see Carabine, 2001). This seemingly commonsensical discourse, which normalised the State’s regulation of sexuality, also prevailed in Ireland for much of the 20th century. It was manifest in what were known as the *Magdalene Laundries* where ‘fallen women’, for example, were incarcerated for transgressing prevailing socio-sexual mores.⁶⁰ The persuasiveness of this discourse relied upon, and codified, both the status of marriage as an institution that denoted the only ‘proper’ mechanism in which legitimate sexual activity could take place, and the imperative of marital procreation.⁶¹ The crucial point here is that discourses actively construct the social reality that they purport to merely reflect (Riggins, 1997, p.2). “In other words, social reality is produced and made real through discourses, and social interactions cannot be fully understood without reference to the discourses that give them meaning. As discourse analysts, then, our task is to explore the relationship between discourse and reality.” (Phillips and Hardy, 2002, p.3)

⁵⁹ Teun A. van Dijk consistently uses ‘scare quotes’ (see Fairclough, 2000a, p.173; Macgilchrist, 2007, p.82) throughout his work. In the above example, my sense is that this is done with a view to critiquing the ideological work (see Brookes, 1995, p.464) that brings into being these seemingly logical manifestations of immigration policy.

⁶⁰ These institutions denoted Ireland’s 20th century manifestation of the workhouse. Ferriter (2009, p.17) makes a rather prescient observation in this regard, i.e. the virtual non-existence of ‘fallen men’ in Ireland. The point that I wish to make here is that it was women who tended to bear the brunt of the social opprobrium that was heaped on such ‘transgressions’ as pregnancy outside wedlock.

⁶¹ I discuss these issues in detail in Chapters Three and Four. The imperative of (marital) procreation is also a dynamic that I alluded to in the introduction to this research.

Critical Discourse Analysis (CDA)

Phillips and Hardy (2002, p.3) state that Discourse Analysis is both a method and a methodology; it is a theory that explains how we know the social world as well as a means for studying it. Similarly, Wood and Kroger (2000, p.x) state that Discourse Analysis "... is not only about method; it is also a perspective on the nature of language and its relationship to the central issues of the social sciences." One such issue is the phenomenon of social inequality in all its manifestations, including those predicated on gender and sexual orientation. Critical Discourse Analysis (CDA) focuses on inequality (van Dijk, 1993, p.252). "The aim of Critical Discourse Analysis is to unmask ideologically permeated and often obscured structures of power, political control, and dominance, as well as strategies of discriminatory inclusion and exclusion in language use." (Wodak *et al*, 1999, p.8) It hones in on the ways in which "... social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context ..." (van Dijk, 2001, p.352). This makes it best placed to facilitate an understanding of the issues that are under investigation in this thesis, i.e. the intransigence of inequality *vis-à-vis* gender and sexual orientation in the realms of marriage and family in Ireland.

Similar to the phenomenon whereby children seem to have a tireless preoccupation with the world 'out there', critical discourse analysts ask a lot of questions. While much can be gleaned from a fascination with the word 'why', a critical orientation *vis-à-vis* discourse analysis is such that our questions can begin with what, when, where, who, why, how, to whom, and with what effect (see Wodak, 1997b, p.65). Such questions find a home in CDA, the key elements of which imply a focus on pressing social issues or problems (see Fairclough, 2001, p.229; Ingulsrud and Allen, 2009, p.80;

Resende, 2009, p. 364; van Dijk, 1997g, p.451; Wodak, 1999, p.185), such as lesbian and gay inequality. There is a substantial body of literature that pertains to CDA, and it includes the work of Norman Fairclough, Teun A. van Dijk and Ruth Wodak. While this mode of study cannot be reduced to a ‘just add critical and stir’ approach to the analysis of discourse, it is important to get a sense of what a critical orientation signifies, as the following extract suggests:

Critical does not mean detecting only the negative sides of social interaction and processes and painting a black and white picture of societies. Quite the contrary: *Critical* means distinguishing complexity and denying easy, dichotomous explanations. It means making contradictions transparent. Moreover, *critical* implies that a researcher is self-reflective while doing research about social problems. Researchers choose objects of investigation, define them, and evaluate them. They do not separate their own values and beliefs from the research they are doing; recognizing ... that researchers’ own interests and knowledge unavoidably shape their research. Taking such a position implies that researchers must be constantly aware of how they are analyzing and interpreting. They also need to keep a distance from their topic; otherwise, their research turns into political action (which is, of course, not in itself a bad thing) or becomes an attempt to prove what the researcher already believes. The data need to be allowed to speak for themselves.

Wodak, 1999, p.186

This is an important quotation, and one that I am mindful of throughout this work. I acknowledge that, at the beginning of this research journey, I did try to prove precisely what I already believed, i.e. that the High Court ruling in *Zappone and Gilligan* was fundamentally flawed. The salience of Wodak (1999) is such that I was impelled to really reflect on my assumptions in that regard. These were invariably informed by my politics, specifically, my unequivocal support for the introduction of same-sex marriage in Ireland. That process of reflection made me acutely aware of

the importance of researcher reflexivity, in terms of the ‘thinking’ and ‘doing’ of critical research. This is not about letting go of my politics or about proving political indifference to the research topic (see Wodak *et al*, 1999, p.8). Rather, the above extract from Wodak (1999) enabled me to negotiate my presence in the research in a meaningful way, without it detracting from the utility of critical thinking and the ‘doing’ of critical analysis. I will revisit the dynamic of researcher reflexivity later in this chapter. Here, I elaborate on those elements of my CDA tool kit that enable me to unpack those discursive processes that routinely reproduce inequality in society.

CDA: Important Considerations

Because I conduct a critical discourse analysis of a constitutional court ruling in Chapter Five, I discuss important aspects to the production of discourse by the judiciary and expert witnesses in Chapter One. My critical orientation is such that the conducting of this research demands reflection on the ways in which such persons can be complicit in the routine reproduction of inequality and / or social norms, irrespective of whether or not they found for, or testified on behalf of, the plaintiffs or the State in *Zappone and Gilligan*. Similarly, my critical discourse analysis in Chapter Six unmasks some of the ways in which politicians / legislators can be complicit in the routine reproduction of gay / lesbian inequality and heteronormativity in Ireland. Again, the ‘doing’ of critical analysis requires reflection on the reproduction of these social phenomena through discourse, irrespective of whether or not individual politicians / legislators either supported or opposed the 2004 legislative ban on same-sex marriage, and either supported or opposed the 2010 civil partnership legislation. In terms of methodological orientation, I refer to judges, expert witnesses, and politicians or legislators as elites. What sets them apart from other

producers of discourse, such as letter writers to newspaper editors, for example, is their range of what is referred to as ‘access to discourse’ (see Fairclough, 1989, p.62; van Dijk, 1993, p.255; van Dijk, 1996, p.84), and the dynamics to what van Dijk (1993, p.256) refers to as a ‘discourse access profile’. I will discuss these momentarily. My analysis in Chapter Six also incorporates material deriving from the genre of discourse (see Wodak, 1997b, p.72) that is known as ‘Letters to the Editor’. Letter writers tend to have quite limited access to the production of discourse in society. Moreover, this is mediated through the discourse access profile (see van Dijk, 1993) of newspaper editors. I will elaborate on these considerations momentarily. In Chapter One, I also discuss other elements of my CDA tool kit that enable me to shed some light on the myriad ways in which inequality and social norms are routinely reproduced. These include Martín Rojo’s and van Dijk’s (1997, pp.523-566) theorisation of legitimation, and the attendant ‘us and them’ thesis (Brickell, 2001, p.223; Martín Rojo and van Dijk, 1997, p.539). The ‘us / them’ distinction is linked to the ideological wherewithal of difference, which is a concept that I theorise in Chapter Two. Because Chapters Three and Four contextualise, in a historical sense, the research topic that is under investigation, I also discuss my reliance on, and the utility of, the discourse-historical approach (Wodak, 1997b, pp.65-87; Wodak, 1999, pp.185-193) in Chapter One.

Discourse Access Profile of Elites: The Judiciary

With regard to the routine production, reproduction and legitimisation of social inequality, all of which are interrogated in this thesis, consideration of what is referred to as ‘access to discourse’ is important (Fairclough, 1989, p.62; van Dijk, 1993, p.255; van Dijk, 1996, p.84). For example, van Dijk (1996, p.90) highlights the judiciary’s range of access, specifically Supreme Court justices, because their decision-making can often denote the

last word on important legal, political and social issues that can affect a nation. This is because their institutionally granted authority, which is derived from the *Irish Constitution (1937)*,⁶² is socially acknowledged and supported (see Bergvall and Remlinger, 1996, p.476). Moreover, "... having access to prestigious sorts of discourse and powerful subject positions enhances publicly acknowledged status and authority." (Fairclough, 1989, p.64) Indeed, there is a striking parallel between social power and discourse access (van Dijk, 1993, p.256). Trappings of the court, such as wigs, gowns, gavels, and benches, which are part of what van Dijk (1993, p.256) refers to as a 'discourse access profile', combined with their institutional authority (see Bergvall and Remlinger, 1996, p.476) and legitimacy, enable the coming into being of the last word on constitutional cases, for example. Because Irish society has valid expectations with regard to the professionalism and independence of the judiciary, it is important to support the integrity of that office. However, "... beyond the scope and the range of their discourse access, the power of judges should especially also be measured by the personal, social and political consequences of such access. Indeed, in the legal domain, their discourse may *be* law." (van Dijk, 1996, p.90) I believe that judges can sometimes fail to recognise the ways in which their text and talk can perpetuate oppression in society. I reflect on all of these dynamics to the discourse access profile of judges (see van Dijk, 1993; 1996) throughout my analysis of the 2006 High Court ruling in *Zappone and Gilligan* in Chapter Five.

Discourse Access Profile of Elites: Expert Witnesses

With regard to the routine reproduction of inequality in society, the discourse access profile (see van Dijk, 1993) of expert witnesses warrants attention. For example, in the matter of *Zappone and Gilligan*, the High

⁶² See Appendix I for details of Articles 34, 35 and 36 of the *Irish Constitution (1937)*.

Court relied on such expertise to the extent that some of it helped to inform the outcome of this constitutional case. Aspects to such profiles can include the following: professional credentials; affiliation with accredited institutions, such as universities or hospitals; professional stature within those institutions; patronage, affiliation or membership of think-tanks; and maintaining a media profile. It is important to make the point that expertise can be independent of these dynamics. Nonetheless, they can presuppose authority and credibility within disciplines, such as Psychiatry, for example. With regard to these High Court proceedings, my initial interest in the testimony of three psychiatrists derived from the manner in which their professional profiles necessarily implied that they denoted expert knowers, thinkers, interpreters, and testifiers in a case pertaining to the right to marry. However, it is the myriad ways in which some expertise facilitates the construction and reification of particular ‘truths’ that largely informs my CDA in Section Two of Chapter Five.

Discourse Access Profile of Elites: Politicians / Legislators

Here, I highlight some considerations with regard to the discourse access profile (see van Dijk, 1993) of politicians, which may impact upon parliamentary debate and communication with their constituency.⁶³ These can include the following dynamics: holding ministerial office; responsibility for a crucial portfolio; membership of the governing party; party-political allegiance; track record in terms of sponsoring, supporting and / or opposing proposed or enacted legislation; maintaining a high-profile position within the Oireachtas; commanding a national or international profile; and maintaining a media profile. What I refer to as a ‘technologisation’ of ‘parish-pump’ politics has occurred in Ireland such that politicians can communicate with a constituency that exceeds its

⁶³ Both of these dynamics are important in terms of the critical analysis of discourse in Chapter Six.

narrow geographical / political boundary. The public can now ‘meet’ politicians in the Oireachtas without ever leaving home or venturing to a constituency office. This has blurred the line between constituency boundary and public representation to the extent that politicians may not know the crucial ‘who’ or ‘where’ behind the ‘what’ in electronic communication that they receive in their professional capacities.⁶⁴ These ‘unknowns’ may inform the decision to respond to such communication in the first instance, as well as the general tenor of that response. Other aspects to response rate and tenor include the following: the extent to which an issue has attracted publicity or gained status within public discourse; the socio-political backdrop against which initial communication took place, such as the looming prospect of a general election; and the discourse access profile (see van Dijk, 1993) of both the politician / legislator and the member of the public who initiated the contact. I reflected on these considerations while conducting critical analyses of the following: some of the responses that I received from politicians / legislators on foot of correspondence to them *vis-à-vis* the 2004 enactment of the legislative ban on same-sex marriage in Ireland; some of the parliamentary debates that took place with regard to the 2010 enactment of civil partnership legislation in Ireland. Sections Two and Three of Chapter Six comprise these analyses.

Access to Discourse: Non-Elites / ‘Ordinary’ People

Bergvall and Remlinger (1996, p.473) critique the preoccupation with the discourse of elites by stating that in order to “... understand the complex and changing nature of our societies, critical discourse analysts must also examine how non-elites struggle against simple reproduction of traditional

⁶⁴ This refers to whether or not the communication comes from an actual constituent. The ‘parish-pump’ nature of Irish parliamentary politics is such that this is a crucial dynamic. I encountered it many times over the course of my communication with politicians regarding their voting record *vis-à-vis* the 2004 ban on same-sex marriage, which I discuss in Chapter Six.

power systems ...”. While Mancini and Rogers (2007, pp.35-50) do not couch their CDA in terms of elites and non-elites, their analysis of patient narratives in the context of mental health treatment and recovery in the United States denotes an important challenge to the dominant discourse of medicalisation.⁶⁵ With regard to my thesis, the important point here is that resistance to the normative wherewithal of institutionalised heterosexuality presupposes a struggle over meaning (see Macgilchrist, 2007, pp.75-76; Taylor, 2004, p.435; Wodak, 1999, p.191) *vis-à-vis* the institutions of marriage and family in Ireland. It is precisely this struggle, combined with my concern about the manner in which heteronormativity and heterosexism are routinely justified, that inform my analysis. While I dislike the term ‘non-elite’ because it suggests a ‘lacking’ that is pathological rather than socio-structural, the interpretation of discourse that emanates from people who have limited access to the production of discourse denotes an important dimension to my work. Here, I refer to the genre of ‘Letters to the Editor.’ The act of writing to the print media represents a manifestation of what could be seen as ‘counter-power’ by ‘ordinary’ people (see van Dijk, 1993, p.256). In that regard, this genre could be conceived of as an example of non-institutional discourse or public discourse, albeit with the caveat that elite groups in society have access to this mode of discourse.⁶⁶

⁶⁵ Their application of CDA captures a poignancy that can strike at the heart of the taken-for-granted assumptions that tend to reify medicalisation. Having said that, their analysis is not meant to negate the efficacy of medicine in the treatment of mental illness. Rather, Mancini and Rogers (2007, p.49) assert that CDA is well suited to advocacy-based research because of its potential to illustrate practices of resistance.

⁶⁶ In Chapter Three, I make reference to Professor Casey’s (2008a,b,c) thesis regarding the institution of marriage and family. She put forward her views in this genre of discourse. See also Casey (2008d,f) and Casey (2008e), the latter of which denotes an ‘Opinion’ piece in a national daily newspaper in Ireland. Professor Casey was an expert witness in the matter of *Zappone and Gilligan*. I discuss important aspects to her expertise in Chapter Five.

Letters to the Editor

Here, I discuss some important considerations with regard to this genre.⁶⁷ Cognisance of the gate-keeping role of newspaper editors is perhaps the most important aspect to the interpretation of text from this genre. It is difficult to discern the percentage of letters that are printed as compared to the total volume that is received by an editor. Therefore, published letters may or may not be representative of those that are received or pertain to a particular topic. It is difficult to determine whether or not an editor's ideological baggage informs the selection of letters for printing. Indeed, the selection criteria themselves that are part of this editorial screening process are unknown. Another problematic aspect *vis-à-vis* critical analysis here is that editors retain the authority to edit text according to editorial demands. This is not meant to suggest that such gatekeepers set out to compromise the general tenor of letters, even in instances where the letter writers' views may be at odds with those of editors. Nonetheless, the mystery surrounding these aspects to their discourse access profile (see van Dijk, 1993) is problematic.

It should be borne in mind that the general tenor of letters might be informed by the publicly perceived ideological leaning of both the newspaper and its reporting staff. The strength and persuasiveness of its 'Opinion' pieces and 'Editorials' are important, both in terms of readership volume, which is integral to getting a letter writer's message 'out there', and the degree to which such readers might be impelled to put pen to paper in the first instance. Another consideration is that letter writers may or may not be representative of the general population, in that the genre might only

⁶⁷ I draw upon Hull (2001, pp.210-212) in setting out the dynamics of this genre of discourse (see Wodak, 1997b, p.72), many of which are attributable to her. The significance of Hull (2001) is not limited to her analysis of 'Letters to the Editor' in the context of generating public debate surrounding same-sex marriage in Hawaii. Reading her article enabled me to conceive of dynamics to the genre that appear to be almost self-evident, but which were, nonetheless, difficult for me to capture and elaborate on heretofore.

impel a cohort that is directly affected by an issue to air their views publicly in the letters' pages. Indeed, civil society groups that were set up with regard to a particular social issue might encourage letter writing to newspapers. A writers' strength of opinion, the degree of controversy surrounding a topic, and whether or not the issue has entered public discourse, are also likely to prompt engagement with an editor and the readership through this genre. In this regard, it can be a persuasive mode of communication if such opinion is accompanied by intellectual rigour, systematic elaboration, and robust argumentation. I was mindful of these considerations throughout my CDA of 'Letters to the Editor' that were published in a national daily newspaper over the course of the proceedings and deliberations in the matter of *Zappone and Gilligan* in 2006.⁶⁸

Legitimation

Martín Rojo's and van Dijk's (1997, pp.523-566) theorisation of legitimation in Spanish parliamentary discourse on 'illegal' immigration proved helpful to my research. The crucial dynamic for them is that elites, such as the State, seek normative approval for policies through a series of strategies, the aim of which is to demonstrate that such actions are consistent with moral order, which is conceived of as the system of laws and norms that have been agreed upon by the majority of citizens (see Martín Rojo and van Dijk, 1997, pp.527-550). One of the principles in their thesis is that legitimation can be accomplished through persuasive discourse that commonsensically hones in on institutional dynamics that are beneficial for society (see Martín Rojo and van Dijk, 1997, pp.527-550). This is applicable to the dominant understanding of marriage and family in Article 41 of the *Irish Constitution (1937)*. The legitimacy of the

⁶⁸ Some of the above dynamics are relevant to the public consultation process that I alluded to in the Irish trajectory *vis-à-vis* relationship and family recognition, wherein advocacy groups engaged with the State with a view to furthering the imperative of gay and lesbian equality in Ireland.

Irish State's position in this regard is derived from this authoritative source, which comes from the people, and the context within which the meaning of Article 41 has been authoritatively interpreted for decades, which is through case law in our constitutional courts. In the struggle over the meaning (see Macgilchrist, 2007, pp.75-76; Taylor, 2004, p.435; Wodak, 1999, p.191) of Article 41, such as that which obtained in the High Court in *Zappone and Gilligan*, the State commonsensically appealed to jurisprudence to both justify its position and sustain its legitimacy.⁶⁹ Martín Rojo's and van Dijk's (1997) theorisation was also helpful in terms of my interpretation of some of the parliamentary debates that took place in 2009 and 2010 with regard to the introduction of a civil partnership regime in Ireland. Of particular interest was the way in which the responsible minister justified aspects to the legislation that proved controversial, because of the dominant understanding of Article 41. He was often at pains to point out that this new legislative initiative was the result of careful and competent consideration of case law, which was crucial for its legitimation. Moreover, the institutional authority (see Bergvall and Remlinger, 1996, p.476) of the Office of the Attorney General furthered the 'truth' that there was no alternative pathway *vis-à-vis* the formal recognition of same-sex relationships. It ultimately proved to be a formulation that was largely acceptable to political elites in Ireland.⁷⁰

Negative Representation of the 'Other'

Over the course of their theorisation on legitimation, Martín Rojo and van Dijk (1997, p.539) also introduce the concept of 'us and them', which necessitates the positive self-presentation of what is deemed to be the 'ingroup', i.e. government and immigration authorities, and the negative

⁶⁹ I will revisit this issue in Chapter Five.

⁷⁰ I will revisit this issue in Chapter Six.

presentation of the ‘outgroup’ or the ‘Other’,⁷¹ i.e. the routinely criminalised ‘illegal aliens’ (Martín Rojo and van Dijk, 1997, p.526). In her critical analysis of the ideological construction of Africa in two British newspapers, Brookes (1995, pp.481-487) provides examples of the ‘negative other’, which corresponds to what is referred to as the ‘unredeemable darkness of the African condition’, and the ‘positive self-representation’ of invariably civilised westerners. Such ‘truths’ are akin to those that routinely justified colonialism, as both ideology and practice. Here, there is a palpable sense of a pathological ‘lacking’ residing in the ‘Other’ (see de Beauvoir, 1988), which is part of a seemingly natural order that is determined by historically dominant groups and their vested interests. van Dijk (1993, p.263) asserts that this strategy of positive and negative representation then serves to justify inequality. The ‘us/them, norm/Other distinction’ (Brickell, 2001, p.223) is also routinely deployed to legitimate social norms, including heteronormativity. For example, Brickell (2001, p.223) remarks on the controversy surrounding the proposal to introduce a ‘queer’ television show in New Zealand. Crucially, he asserts that the ubiquity of televised heterosexuality was never questioned (Brickell, 2001, p.223). While my analysis of the 2006 High Court ruling in *Zappone and Gilligan* partly relies on the ‘logic’ of ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997), my focus is not on a dominant group’s overtly positive self-representation *per se*. Rather, it centres on the idea that difference implicitly denotes deficiency or pathology (see Baumrind, 1995, p.135).⁷² The ‘logic’ of the criminalisation of homosexuality in Ireland in the 19th century is an example of this. Moreover, conceiving of homosexuality as an orientation that the ‘Other’ (see de Beauvoir, 1988) can convert *from*, rather than *to*, is indicative of

⁷¹ I elaborate on this concept in my theorisation of equality and difference in Chapter Two.

⁷² I reiterate that Baumrind (1995) does not conceive of difference as necessarily implying deficiency. I will revisit this important dynamic in Chapters Two and Five respectively, in terms of my theorisation of equality / inequality, and my analysis of the 2006 High Court ruling in *Zappone and Gilligan*.

this seemingly self-evident pathology. Stewart's (2008, pp.63-83) CDA of a series of media advertisements in the United States pertaining to 'reparative therapy' that can 'treat' homosexuality critiques this 'logic'.⁷³ The general point that I wish to make here is that when there is important ideological work to be done (see Brookes, 1995, p.464), such as the 'legitimation' of gay or lesbian inequality and heteronormativity, the 'logic' of 'us and them' (see Brickell, 2001; Martín Rojo and van Dijk, 1997), which requires the routine pathologisation of the gay or lesbian 'Other' (see de Beauvoir, 1988), is particularly acute.⁷⁴

Framing

Here, I highlight Smith's (2007, pp.5-26) analysis of the discursive construction and framing of same-sex marriage as a public policy issue in Canada and the United States. While she does not place her analysis within the realm of CDA, her discussion on framing, which denotes the cognitive schema by which people organise information about the social world (see Smith, 2007, p.7), is pertinent. It facilitates a focus on the 'what, when, where, who, why, how, to whom, and with what effect' questions (see Wodak, 1997b, p.65) that are central to critical analysis in that "... battles over policy are battles over the framing of ideas, especially ideas that define a policy problem and its solution." (Smith, 2007, p.8) For example, Helleiner and Szuchewycz (1997, pp.109-130) provide a critical analysis of how some of the print media in Ireland once framed the '[I]tinerant problem' as a problem that required eradication. Through local print media, part of the problem was constructed and reproduced out of a seemingly

⁷³ Stewart (2008) uses scare quotes (see Fairclough, 2000a; Macgilchrist, 2007) throughout his analysis, perhaps to signify his rejection of the ideology that is at the heart of the idea that gay men and lesbians can be 'cured' of their respective 'afflictions'. Against the backdrop of the criminalisation of homosexuality in Ireland, the Irish Council for Civil Liberties (1990, p.32) categorically stated that gay men and lesbians were not 'sick' and that they did not need to be 'cured'.

⁷⁴ I will revisit this issue in the context of parenting and child development in Section Two of Chapter Five. I reiterate that I will elaborate on the concept of the 'Other' in Chapter Two over the course of my theorisation of equality, inequality and difference.

commonsensical pathology that was associated with the threat of danger, dirt and disease (see Helleiner and Szuchewycz, 1997, pp.113-116). In her critical analysis of an apartment building circular about homeless persons in Brazil, Resende (2009, p.373) finds that "... the real problem is not their street circumstances but 'their remaining near our building'".⁷⁵ A core issue in my thesis is the struggle over the meaning (see Macgilchrist, 2007, pp.75-76; Taylor, 2004, p.435; Wodak, 1999, p.191) of the term 'marriage' in Ireland, and whether or not it can encompass a personal rights frame for lesbians and gay men that is grounded in the principle of equality. There is no statutory definition of the term 'marriage' in Ireland (Inter-Departmental Committee on Reform of Marriage Law, 2004, p.4). Therefore, the courtroom denotes a key site of contestation in this regard. By virtue of their institutional authority (see Bergvall and Remlinger, 1996, p.476), which facilitates their access to the production of discourse, elites have continually provided the 'proper' definition of marriage in Ireland, which helped to bring about the dominant framing of the 'problem' of same-sex marriage in the High Court in 2006 (see van Dijk, 1996, pp.85-86; van Dijk, 1997a, p.34). Here, the almost inevitable conclusion was that there could not be a right to same-sex marriage in Ireland, which was the State's position in *Zappone and Gilligan*. The important point here is that the dominant framing of a problem is invariably linked to its solution. Therefore, asking the 'what, when, where, who, why, how, to whom, and with what effect' questions (see Wodak, 1997b, p.65) is crucial, both in terms of understanding prevailing social relations and the realisation of social change. These dynamics are very much in keeping with a critical approach to social research (see Sarantakos, 1994, p.37).

⁷⁵ Resende (2009) provides a trenchant critique of the normative framing of this latter 'problem'.

Discourse-Historical Approach (DHA)

One way of ensuring that critical analysis is rigorous and systematic (Fairclough and Wodak, 1997, p.259) is to employ a discourse-historical approach or methodology to one's research (Wodak, 1997b, pp.65-87; Wodak, 1999, pp.185-193). As stated earlier, this requires the integration of texts from as many different genres as possible, as well as the historical dimension of the subject matter that is under investigation, into the interpretation of discourse (Wodak, 1999, pp.187-188; Wodak, 2001, p.6). Wodak (1997b) provides an insight into the application of this approach against the backdrop of residual anti-Semitic prejudice in Austria. This enabled her and her colleagues to trace in detail the construction of the 'Jewish Other' as it emerged in public discourse during what became known as the *Waldheim Affair* in the 1980s.⁷⁶ Their attendant analysis incorporates such dynamics as argumentation strategy, which includes the rejection of responsibility and its displacement onto the 'Other', and resorting to scapegoating, which routinely assigns culpability to the victims of prejudice (Wodak, 1997b, pp.73-74). Wodak (1997b, p.74) states: "With the exception of prejudice dealing with sexuality, virtually every imaginable prejudice against Jews appeared somewhere in our material." Their research demonstrates that a rigorous analysis necessitates a contextual, historical and socio-cultural grounding of the issues that are under investigation. The discussion in Chapter Three of my research, which centres on the evolving institution of marriage in the West, is informed by the utility of the DHA. My analysis in Chapter Four, which draws upon the historical controversies surrounding contraception and divorce in Ireland, facilitates an exposition of the dominant understanding of marriage and

⁷⁶ Former Secretary-General of the United Nations, Kurt Waldheim, became President of Austria in 1986. Over the course of the election campaign, allegations emerged about his military record during World War II, specifically, his membership of the Nazi Party and his knowledge of the deportation of Jews (see Wodak, 1997b, pp.65-67). In this article, Ruth Wodak is recounting an earlier study that she conducted with colleagues, which was published in the 1990s.

family that still prevails in this country. Furthermore, the analysis of text from the following genres of discourse (see Wodak, 1997b) in Chapter Six forms part of this approach to critical analysis, which also facilitates an understanding of the dominance of the nuclear family paradigm in Ireland: ‘Letters to the Editor’ that were published against the backdrop of the High Court proceedings and ruling on same-sex marriage in 2006; written communication from politicians / legislators with regard to the 2004 ban on same-sex marriage; and parliamentary debates surrounding the introduction of civil partnership in 2010. These layers of discourse (Wodak, 1997b, p.72) cohere to produce a social, political, legal, and constitutional contextualisation (see van Dijk, 1997g, p.452) of the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage and family in Ireland. This contextualisation is then integrated into my interpretation of the High Court ruling in *Zappone and Gilligan* (see Wodak, 2001, p.6), so as to better understand the myriad ways in which gay and lesbian inequality is routinely ‘justified’ in Ireland.

Other CDA Considerations

An interesting application of CDA is Kahu and Morgan’s (2007, pp.134-146) analysis of the discursive construction of women in a policy document that the New Zealand Government commissioned regarding female participation in the labour market. By asking the ‘who’ and the ‘with what effect’ questions (see Wodak, 1997b), the authors demonstrate the non-obvious ways (see Fairclough, 2001, p.229) in which language use is ideological. Their analysis made me aware of the ways in which seemingly trivial aspects to language, such as preposition use, can reinforce social inequality. Similarly, Resende (2009, p.374) demonstrates how the use of the term ‘just’ can rationalise the actions of an in-group, which compounds an out-group’s marginalisation, and then mitigates the gravity of

homelessness. Her critical analysis highlights the ways in which language use serves to uphold the status quo. Cheng's (2002, pp. 309-317) analysis of the reporting of a spy-plane incident in 2001, and the attendant concern over the possibility of a diplomatic crisis emerging between China and the United States, made me aware of the discursive wherewithal of the term 'if'. While already cognisant of its capacity to justify inequality, I had not conceived of it as a face-saving device (see Cheng, 2002, pp.310-311), or as an instrument that could absolve blame, or one that could give license to what I conceive of as unacceptable. These 'iffy' dynamics are pertinent to my critical analysis of the High Court ruling in *Zappone and Gilligan*.⁷⁷ All of the above examples serve as reminders of the less obvious (see Lazar, 2005a, p.13) and non-obvious ways (see Fairclough, 2001, p.229) in which language use is ideological.

Further Methodological Considerations

Reflexivity

CDA research presupposes that a researcher is self-reflective while conducting analyses of social issues (see Wodak, 1999, p.186). This dynamic is referred to in the relevant literature as 'reflexivity' (see Ramazanoglu and Holland, 2002, p.158). Reflexivity "... covers varying attempts to unpack what knowledge is contingent upon, how the researcher is socially situated, and how the research agenda / process has been constituted." (Ramazanoglu and Holland, 2002, p.118) The following conceptualisation of reflexivity is also pertinent:

⁷⁷ In particular, I make reference to Extract I of the High Court ruling in *Zappone and Gilligan*, which is reproduced at the beginning of Chapter Five.

Often condemned as apolitical, reflexivity, on the contrary, can be seen as opening the way to a more radical consciousness of self in facing the political dimensions of fieldwork and constructing knowledge. Other factors intersecting with gender – such as nationality, race, ethnicity, class and age – also affect the anthropologist's field interactions and textual strategies. Reflexivity becomes a continuing mode of self-analysis and political awareness.

Callaway, 1992, p.33

Both of these conceptualisations resonate with me. Moreover, they fit easily with the requirements for conducting critical analyses of discourse. My age, class, ethnicity, gender, global location, nationality, and sexual orientation all help to shape my repertoire of knowledge (see van Dijk, 1997c). This is also informed by familial, social, professional, and cross-cultural interaction, along with other aspects to social life, such as formal education attainment and religious affiliation. These invariably shape my perspectives on a myriad of concepts and social issues ranging from equality and inequality to marriage and family. All of these dynamics shape my sense of self, both as a citizen and as a researcher. My knowledge, which comprises an awareness of what I know and what I do not know, what I understand and what I do not understand at this point in time, informs me as a researcher of social phenomena. It informs every aspect to this thesis, from the questions that swirl about on its pages, to the answers that are constituted by the research process. It informs both my choice of research topic and my rationale for embarking on this research. Moreover, my perspective on same-sex marriage informs every aspect to this thesis.

Marriage Equality

This research was borne out of my concern about the routine operationalisation of heteronormativity in the context of marriage and family in Ireland. This dictates that lesbians and gay men simply do not

have the right to marry in Ireland. I disagree with this philosophy. I believe that gay men and lesbians do have a right to marry, which is derived from Articles 40 and 41 of our Constitution. My perspective is consistent with the general premise of what is referred to as ‘marriage equality’ (see Herek, 2006, pp.607-621; Pillinger, 2008, pp.1-44), which is that the right of gay men and lesbians to marry is linked to the fundamental principle of equality.

Marriage and Family as Institution

Marriage in Ireland is a civil and social institution that is bound up in a legislative and constitutional framework.⁷⁸ Currently, it is inextricably linked to the dominant understanding of family, such that both denote one heteronormative institution in Ireland, rather than two. The intertwining of the legal with the constitutional provides for the attendant rights and responsibilities that flow from the civil status of marriage. It is conceivable that this constitutional and legislative underpinning may have codified the idea that marriage denoted the only ‘legitimate’ form of adult intimate relationship in Ireland. This status would have been commensurate with the ‘gold standard’. My sense is that the imperative of marital procreation, which codified the seemingly inextricable link between marriage and family in Ireland, also helped to construct an orderly heterosexuality that was regulated through this social institution.

Heteronormativity

Heteronormativity dictates that institutionalised heterosexuality denotes the standard for legitimate social and sexual relations (Ingraham, 2007, p.199). The ‘gold standard’ status of marriage in Ireland, which underscores, and is

⁷⁸ See Appendix VI for examples of marriage laws that prevailed in Ireland over the centuries. See Appendix I for details of Article 41 of our Constitution, which pertains to marriage and family. Here, I wish to state that I am not concerned with religious dimensions to the institution of marriage in this work.

underscored by, the dominant understanding of Article 41, is bound up in this ‘truth’. It ordained an ever so natural and rational hierarchy of relationships that has been continually codified through case law. For decades, there was no official space in Ireland for other committed and intimate adult relationships, irrespective of the core dynamics that defined any of them. Moreover, such relationships could not be deemed to constitute ‘proper’ families because of the constitutional position under Article 41. This remains the case, notwithstanding the instituting of legislative regimes for partnership and cohabitation in 2010. Therefore, a hierarchy of adult intimate and familial relationships inheres in the routine operationalisation of heteronormativity in Ireland. Attendant assumptions about sexual activity, human reproduction, biological and social parenthood, and gender complementarity fuel the seemingly natural link between heterosexuality and marriage, to the extent that marriage at the apex of a hetero-hierarchy (see Donovan, 2004, p.25) is ‘just the way it is’ (see Ingraham, 2007, p.198). My critical orientation challenges the routine operationalisation of heteronormativity in Ireland.

Heterosexism

Heterosexism routinely ‘justifies’ a crucial dimension to heteronormativity, i.e. dominance and subordination. Lorde (1993, p.17) asserts that it denotes “... a belief in the inherent superiority of one pattern of loving over all others and thereby its right to dominance ...”. It is the social ‘ism’ that glosses over or negates egregious practices, such as the 2004 enactment of the legislative ban on same-sex marriage in Ireland. The embeddedness of heterosexuality *vis-à-vis* marriage, and the State’s obligation to protect this institution, which derives from Article 41, is such that the official understanding of the ban holds that it does not denote discrimination on the

basis of gender and sexual orientation. My politics are such that I utterly disagree with this ‘truth’.

My Politics

Ramazanoglu and Holland (2002, p.148) state that social researchers do not conduct research in a state of social isolation, and that we can carry intellectual and political baggage. The above conceptualisations provide clues as to the political dimension to my research. Taken in conjunction with other methodological considerations, they implicitly centre on the importance of unpacking socially constituted knowledge so as to critique the social relations that dictate that ‘this’, i.e. marriage and family as formally and currently constituted in Ireland, is ‘just the way it is’ (see Ingraham, 2007, p.198). Irish society must be predicated on the unequivocal affirmation and protection of constitutional rights. This is a fundamental precept because their denial, in whatever form, diminishes us all. Because societies, including Ireland, tend to be governed according to social norms that relate to assumptions surrounding criteria, including gender and sexual orientation, the imperative of unequivocal vindication is at its most acute in the context of minority rights. My belief is that the Irish State’s refusal to recognise, affirm, protect, and vindicate the right of lesbians and gay men to marry denotes a violation of their personal rights. With regard to the High Court ruling in *Zappone and Gilligan*, I believe that it is inappropriate to assert that the right of gay men and lesbians to marry cannot exist. Moreover, it is simply unacceptable to me, and profoundly offensive, to assert that the welfare of children necessarily denotes an issue that warrants endless attention and consideration *vis-à-vis* the distribution of marriage rights in Ireland (in the context of lesbianism and homosexuality). These two assertions denote ‘truths’ that are at the

heart of this High Court ruling.⁷⁹ This critical discourse analysis will unpack the ‘logic’ that made these ‘truths’ inevitable. This ‘doing’ is very much in keeping with the critical orientation of my research.

Intellectual Baggage

Another aspect to researcher presence could be described as the ‘intellectual bit’. When I reflect upon core tenets of our Constitution, I do so as both a citizen and a researcher with a background in the Discipline of Social Policy, rather than in Law. Therefore, I appreciate that complexities can attach to a social analysis that alludes to constitutional, judicial and legal principles. However, social analyses of Irish jurisprudence, for example, are warranted, not least because rulings in cases that come before our constitutional courts can have a tremendous impact on the fabric of Irish life. I have taken steps to address this dynamic to my formal education background, such as initiating contact with academics who have studied within the Discipline of Law. Moreover, I invited their feedback on Chapter Five of this thesis, which pertains to my analysis of the High Court ruling. Notwithstanding my lack of formal training in constitutional law, such steps help to ensure that this does not detract from my analysis.

The Importance of Our Constitution

... [T]he Constitution is not merely a document to be quoted and misquoted when the electorate is much exercised about personal or family rights, but is also the fundamental law of the State governing our relationships with each other and with the State itself, ...

Justice McCarthy, 1986, cited in Byrne and McCutcheon, 2009⁸⁰

⁷⁹ This will become apparent as my analysis evolves in Chapter Five.

⁸⁰ Supreme Court Justice McCarthy’s foreword initially appeared in the first edition of this textbook.

While it is important to take cognisance of, and reflect upon, the centrality of our Constitution to social life in Ireland, it is also important to state that the absence of a law degree or a voting card does not preclude anyone from interpreting its tenets. I conceive of the Constitution as a living entity that is not consigned to a dusty bookshelf. Previous generations gave it to us, and we will pass it on to future generations of children, women and men in Ireland. It speaks to me as a woman, a citizen and a researcher. Whilst I believe that it is important to respect its fundamental precepts, I struggle with dynamics to the Constitution that either enshrine a narrow understanding of woman or ignore her altogether.⁸¹ For example, a strict or narrow interpretation of Articles 12, 13, 14, 15, 18, 22, 25, 26, 27, 28, 30, 31, 32, 33, 34, and 35 would dictate that women are precluded from assuming crucial posts in the public sphere, such as the presidency or the premiership of this country. Notwithstanding the relentless recourse to male terms of reference in these articles, and while sexism can prevail, gender *per se* does not preclude attainment of high public office in Ireland. This example demonstrates that Ireland has changed in important ways since the ratification of our Constitution in 1937. Normative assumptions surrounding the role of women in the 1930s are simply unacceptable now in the wider society. While I do not support the use of male terms of reference to denote the ‘generic whomever’, the sense that the document can speak to everyone, and not just to men, highlights our Constitution’s capacity to transcend time, in that it is precisely social change that can render strict interpretations of the text to be both reductive and redundant.⁸²

⁸¹ In the 1970s, Irish feminist organisations, such as Irishwomen United, called for a review of the Constitution with a view to examining the role of women and eliminating gender discrimination (see Irishwomen United, n.d.). This organisation’s charter provided a trenchant critique of the inherent assumptions about women that underpin conceptualisations of Article 41.

⁸² Any textual change to our Constitution requires a referendum, which is ultimately decided by the electorate. Another important point here is that the evolving understanding of the dynamic of gender *vis-à-vis* our Constitution did not require constitutional change, precisely because of the Constitution’s capacity to both reflect, and serve as a catalyst for, social change, often through case law.

This is an important consideration *vis-à-vis* the interpretation of Article 41 of our Constitution.⁸³

My Evolving Perspective on Relationship Recognition

I have long believed that marriage denotes the ‘gold standard’ or ‘diamond standard’ in intimate adult relationships. It was not until I began to theorise marriage over the course of this research process, by tracing the historical aspects to the institution in the West, that I finally understood some feminists’ critique of it, which had always eluded me. Reading Vogel (1994) was instrumental in this regard, and this will become clear in Chapter Three. I subsequently read Norrie (2000) and Stoddard (1997), whose elaborations on aspects to the history of marriage crystallised the salience of Vogel (1994). Against the backdrop of an emergent debate on same-sex marriage in the United States,⁸⁴ combined with my unfamiliarity of lesbian and gay politics, one consequence of my initial perspective on marriage was that I had presupposed that lesbians and gay men necessarily wanted to access this institution so as to acquire formal recognition and protection for their intimate relationships. Moreover, I believed that the general premise of civil partnership was a device that simply codified a two-tier system of relationship recognition, because marriage was ‘logically’ at the apex.

It was over the course of my elaboration on the institution of marriage that I began to appreciate some gay and lesbian opposition to it. Reading some of the contributions to a series of articles that comprised three special features on marriage in three volumes of *Feminism and Psychology* denoted an important ‘research moment’. I began to gain a better understanding of the feminist critique of, not just heterosexual marriage,

⁸³ I discuss this dynamic in Chapter Five.

⁸⁴ I lived in Massachusetts for part of my adult life.

but also same-sex marriage.⁸⁵ Donovan (2004), Jeffreys (2004), and Wise and Stanley (2004) helped in this regard, and all are opposed to same-sex marriage. Bevacqua (2004), as another contributor to the series, is a lesbian feminist who supports marriage equality. Her article resonated with me because she alluded to a core dynamic that is at the heart of the routine operationalisation of marital norms in society, i.e. heterosexual privilege. Heretofore, I had never reflected on this, which is precisely the point. Feigenbaum (2007) and Wildman (1996) were instrumental in this regard. It was at that juncture in the research, having reflected on my own privilege as a heterosexual, that my perspective on civil partnership changed. My social position was such that, heretofore, it was easy for me to repudiate this device because it did not affect me directly. Moreover, I was unaware of the positive effects that a civil partnership infrastructure could have on gay men and lesbians who sought formal recognition and protection for their intimate relationships. I now realise that my privilege blinded me to the innovation of civil partnership, which is a mechanism that furthers lesbian and gay equality in Ireland. Having said that, Senator Norris' perspective on the civil partnership legislation of 2010 (see Seanad Éireann, 2010a) does resonate with me. I argue that these dynamics demonstrate that the general premise of relationship and family recognition is well suited to understanding the complexity of equality and inequality, which I theorise in Chapter Two.

This general process of reflection impelled me to rethink my position on marriage. I now believe that it denotes one of many forms of adult intimate relationship that warrants recognition and protection from the State. The difficulty is that, notwithstanding the instituting of a legislative regime for other forms of intimate relationships in Ireland, i.e. partnership and cohabitation, a hetero-hierarchy still prevails. Partnership, as is currently

⁸⁵ See volumes 13(4) in 2003, 14(1) in 2004, and 14(2) in 2004.

constituted in this jurisdiction, is only open to same-sex couples,⁸⁶ while marriage is only open to opposite-sex couples.⁸⁷ Marriage remains at the apex in that relationship hierarchy, partly because of the dominant understanding of Article 41 of our Constitution, and the social positioning of lesbians and gay men, particularly in terms of their roles as parents. For example, the parent – child relationship is largely ignored in our civil partnership infrastructure (see Fagan, 2011, pp.25-28; Ombudsman for Children, 2010, pp.1-11; Ryan, 2009, pp.12-15).⁸⁸ With regard to the High Court ruling in *Zappone and Gilligan*, the dominant understanding of lesbian and gay parenthood is implicitly informed by the ‘logic’ of difference as deficiency or pathology (see Baumrind, 1995, p.135), which I theorise in Chapter Two. Consequently, both the constitutional and pathological dynamics ‘commonsensically’ cohere to dictate that gay men and lesbians do not have the right to marry in Ireland. ‘This’ is at the root of my thesis.

Conclusion

In this chapter, I discussed my research method and methodology. These considerations inform both the theoretical underpinnings of my work, which I discuss in Chapter Two, and my critical analysis of text from four genres of discourse (see Wodak, 1997b) in Chapters Five and Six. My interest in language derives from its wherewithal to actively construct,

⁸⁶ See Appendix VII for details of Sections 3 and 7.3(e) of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010*.

⁸⁷ See Appendix II for details of Section 2.2(e) of the *Civil Registration Act, 2004*. Here, I reiterate that our cohabitation regime is open to all couples, irrespective of sexual orientation.

⁸⁸ Fagan (2011), which I alluded to as part of the Irish trajectory in the introduction to this thesis, denotes a trenchant critique of the State’s failure to recognise the relationship between children and their gay or lesbian parents, particularly in the context of non-biological or social parenthood. It is important to make the point that both of the other studies were written in the context of legislative proposals for civil partnership prior to the eventual enactment of that legislation in 2010. The Ombudsman for Children (2010) report is quite critical of the lack of adequate protections for children of civil partners in these proposals. While Ryan (2009) is quick to make the point that these proposals were not entirely silent with regard to children, his thesis seems to be that what is required is a root and branch review of family law, paying particular attention to determining the rights and responsibilities of non-biological or social parenthood.

rather than simply reflect, social relations (see Litosseliti, 2006; Riggins, 1997), and the premise that language use is central to understandings of social phenomena, including the routine reproduction of inequality. What has emerged over the course of conducting research on language, which began in earnest with the linguistic turn (see Fairclough, 2000a; Gill, 1995), and which then developed through the emergence of a myriad of disciplines (for example, see Fairclough, 1989; Wodak, 1997a; Wodak and Benke, 1997), is the thesis that language use actually denotes social action (see Chilton and Schäffner, 1997; Harré and Gillett, 1994; Wodak, 1999). This breakthrough gave rise to a field of study that is known as Discourse Analysis (see West *et al*, 1997). My interest in the ‘thinking’ and ‘doing’ of such action, particularly in terms of the myriad ways in which the phenomenon of inequality is routinely produced and reproduced in society, is such that the field of Critical Discourse Analysis best suits my work. This centres on the intransigence of gay and lesbian inequality in Ireland. In Chapter One, I elaborated on important dynamics that inform and enable critical analysis, including social cognition (see van Dijk, 1993; 2006), access to discourse (see Fairclough, 1989; van Dijk, 1993; van Dijk, 1996), discourse access profiles (see van Dijk, 1993), and the discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011). I also discussed elements in my CDA tool kit that facilitate my analysis in Chapters Five and Six. These include the strategy of legitimation (see Martín Rojo and van Dijk, 1997), which is particularly important in terms of elite discourses, and the ‘logic’ of the ‘us / them’ distinction (see Brickell, 2001; Martín Rojo and van Dijk, 1997). This latter dynamic is linked to the core concept of difference, which, I argue in Chapter Two, is at the heart of the routine reproduction of inequality in society. In Chapter One, I also drew attention to the important dynamic of researcher reflexivity, with a view to acknowledging those aspects to my presence in the research that invariably impact upon my work. My evolving perspective on marriage is perhaps the

most unexpected ‘finding’ in terms of the ‘thinking’ and ‘doing’ of researcher reflexivity. This ‘finding’ implicitly and invariably informed my understanding of the Irish trajectory *vis-à-vis* relationship and family recognition, which I discussed in the introduction to this research. Indeed, all of the above considerations invariably inform and underpin, not just my critical analysis in Chapters Five and Six, but also my theorisation of the fundamental principle of equality.

CHAPTER TWO

In Theory: Theoretical and Conceptual Considerations

Theory is not a superfluous distraction, but a necessity. It is the problem-identifier and the information-interpreter in the research process. Without it there is no way to explain the facts.

Gagnon and Parker, 1995, p.3

Introduction

This chapter makes plain the conceptual and theoretical framework that underpins this research. Here, I make the point that this framework informs, and is informed by, my methodological considerations that I discussed in Chapter One. Firstly, I tease out understandings of the fundamental principle of equality in the relevant literature. I allude to the complexity of this principle by elaborating on its co-existence with inequality. I identify the relevance and application of theorisations of equality and inequality to this thesis, such as de Beauvoir's (1988)⁸⁹ analysis of the 'Other', which underscores the 'logic' of 'us and them' (see Brickell, 2001; Martín Rojo and van Dijk, 1997), and the Baker *et al* (2004) theorisation of what is known as 'equality of respect and recognition', which I conceive of as fundamental to the premise of marriage equality (see Herek, 2006; Pillinger, 2008). In this chapter, I also capture the ideological wherewithal of the crucial concept of difference, by identifying a number of key strands to it. These are as follows: 'difference as disadvantage' (see Spicker, 2000); 'difference as social relation' (see Brah, 1991; 1996); 'difference *to*'; 'difference as deficit / defect / deviance', which derives from Baumrind (1995) and Cameron and Cameron (1996); and 'difference as deployment', which derives from Brah

⁸⁹ *Le Deuxieme Sexe*, by Simone de Beauvoir, was first published in 1949.

(1991). What emerges is a sense that the social significance that attaches to the concept of difference is bound up with both the routine reproduction of inequality in society, such as that predicated on gender and sexual orientation, and the maintenance of social norms, such as heteronormativity (see Ingraham, 2007). My understanding in this regard is very much rooted in my critical approach to social research.

Theorisation of Equality / Inequality

This thesis centres on the premise that equality is a fundamental principle. One dynamic that helps to underscore this is the extent to which supporters of civil rights for lesbian and gay persons in Ireland use the principle to further their aims and objectives. For example, Zappone (2003) pays particular attention to equality in the context of charting a human rights agenda. The Irish Council for Civil Liberties (ICCL, 2006) highlights the importance of this principle in relation to the development of family policy. Marriage Equality relies on this principle to advocate for lesbian and gay rights *vis-à-vis* marriage and family in Ireland.⁹⁰ This strategy is not unique to the Irish context. Rather, it is one that is adopted in other countries with a view to furthering civil rights for lesbian and gay persons in general, and marriage rights in particular. For example, the Human Rights Campaign is the largest civil rights organisation in the United States that strives to achieve equality for lesbian, gay, bisexual, and transgender persons (see Human Rights Campaign, 2011). Access to the institution of marriage is one of its core objectives. The enunciation of equality in Article 40 of our Constitution, combined with the raft of equality legislation that we have on our Statute Books,⁹¹ imply that this principle is central to the social contract between the State and its citizens. Therefore, it is important to theorise

⁹⁰ See www.marriageequality.ie

⁹¹ For example, the *Employment Equality Act, 1998*, the *Equal Status Act, 2000*, and the *Equality Act, 2004*. See <http://acts.oireachtas.ie>

equality with a view to demonstrating its applicability to this research. That the principle is widely conceptualised suggests that there is something about it that warrants investigation.

Equality is a contested concept. There could be a consensus on the rationale for equality. There could be agreement on which groups to focus on in equality strategies. There could be a shared concern at the persistence of inequalities and agreement on the need for change in the economic, political, cultural and caring domains. Yet alongside all this a contest of ideas could coexist – essentially about how far society needs to go or should go in terms of the level of equality sought and in terms of the mechanisms that can be deployed to achieve this level of equality.

Crowley, 2006, pp.14-15

This statement conveys the complexity of equality in the sense that, notwithstanding its theorisation and application over the centuries, the many ways in which it can be conceptualised and operationalised at local, regional, national, and international levels are such that inequality remains a persistent phenomenon. It underscores the complex and contradictory nature of the concept of equality, in that the articulation of a rationale for it implicitly acknowledges the presence of inequality. Advocating equality for gay men, for example, presupposes that they experience some level of inequality. While manifestations of that inequality are manifold, such as the taint of criminality that still prevails in some jurisdictions (see Bruce-Jones and Itaborahy, 2011), they are all attributable to, and dependent upon, a state's understanding of, and commitment to, equality. Moreover, the act of decriminalisation alone does not guarantee equality for gay men.⁹² Therefore, the rationale for equality consistently operates against the

⁹² The compelling logic of decriminalisation demands and requires the enactment of anti-discrimination and equality legislation that aims to redress the inequalities that derive from the worst excesses of heterosexism and homophobia, including the criminalisation of same-sex intimacy. See Waaldijk (2000; 2004) in this regard.

backdrop of some form of inequality in society. This dynamic of co-existence underscores the complexity of the concept. A pertinent example of this in the Irish context is the enactment of Section 37.1 of the *Employment Equality Act, 1998*, which denotes a religious ethos exemption clause with regard to the hiring, firing or promotion of personnel.⁹³ It is particularly acute in the context of gay men and women as teachers in our public schools, which are almost entirely funded by the State.⁹⁴ Teachers are vulnerable if their sexual orientation is deemed to run counter to the ethos of a school, the vast majority of which remain under the patronage of the Catholic Church. This law implies that such an employee's state of being, doing, thinking, teaching, and mentoring in a professional capacity can necessitate constant caution, regulation and surveillance, because of the risk that is posed by what is referred to as the 'promotion' of homosexuality or lesbianism in schools.⁹⁵ It is one of the most egregious manifestations of heterosexism and homophobia in Ireland today. It furthers the routine pathologisation of a minority cohort of the population because of some overriding imperative that somehow dictates that equality legislation cannot go too far. Apart from the personal and professional fallout from this legislative exemption, the message that equality is a

⁹³ See Appendix II.

⁹⁴ I use the term 'almost' because communities frequently fundraise so as to meet the deficit that arises due to the shortfall in funding from the State, which does not meet the costs that are associated with the running of our schools.

⁹⁵ The following is an extract from a 'Letter to the Editor' of a national daily newspaper regarding Taoiseach Reynolds' announcement of the Irish Government's intention to decriminalise homosexuality in Ireland: "He couched his words in lofty phrases like "equal rights" and "adult responsibility." Do parents realise what these equal rights mean? It means that an active homosexual life style will be presented in our educational system as a so-called "normal alternative life style." After the Government has decriminalise[d] homosexual acts for over-17s, then it will be too late to make an objection to homosexual information being available in our schools. The Minister for Equality will advise the Minister for Education to place homosexual acts on an equal level with heterosexual love. Thus corruption will make its way through our integrated curriculum." Randles (1993) wrote this in her capacity as Honorary Secretary of the Christian Family Movement, five years prior to the enactment of the equality legislation that contains the religious ethos exemption clause. I argue that an implicit reliance on a seemingly commonsensical pathology informs this extract from the letters' page of *The Irish Times*, not least in terms of the inability to conceive of homosexuality as commensurate with love and intimacy, for example. Moreover, it is blindness to the ubiquity of heterosexuality (see Brickell, 2001), and its 'promotion' through children's textbooks, for example, that is so problematic when there is no classroom or staff room for the 'Other' (see de Beauvoir, 1988). Please note that the term 'taoiseach' refers to our primeminister.

principle that can be trifled with is one of its most destructive of socio-cognitive meanings. It begs an immediate question: why is this acceptable?⁹⁶ This throws into sharp focus the phenomenon of inequality and a basis for its persistence in Ireland. It underscores the premise that a conceptualisation of equality also necessitates an analysis of inequality. Both concepts are part of an axis because it is difficult to discuss the former without also making reference to the latter.⁹⁷ This theorisation thus far also demonstrates that the reproduction of inequality in society is bound up with the maintenance of social norms, specifically, heteronormativity. My critical discourse analysis, in terms of asking the ‘what, when, where, who, why, how, to whom, and with what effect’ questions (see Wodak, 1997b), challenges one aspect to the routine operationalisation of heteronormativity in Ireland today, i.e. the denial of lesbian and gay equality in the context of marriage and family.

Theorisation of Difference

Biological Difference

A popular conceptualisation of equality is that all human beings are deemed to be equal and that we all enjoy equal rights (see Barry, 1992, p.322). Indeed, Article 40.1 of our Constitution deems all human beings to be equal before the law. Similarly, Baker *et al* (2004, p.23) define equality

⁹⁶ Here, it is important to make the point that some legislators have given a commitment to remove the threatening wherewithal of this clause from the 1998 legislation. In this regard, see Gay and Lesbian Equality Network (2012) and McGreevy (2012). In 2013, Deputy O’Brien of Sinn Féin and Senator Bacik of Labour introduced Private Member Bills in the Dáil and the Seanad respectively with a view to amending Section 37 of the *Employment Equality Act, 1998*. With regard to Deputy O’Brien’s initiative, i.e. *Employment Equality (Amendment) Bill, 2013*, see the following links: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/1913/b1913d.pdf> and <http://www.oireachtas.ie/viewdoc.asp?DocID=22929&&CatID=59>. With regard to Senator Bacik’s initiative, i.e. *Employment Equality (Amendment) (No. 2) Bill, 2013*, see the following links: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/2313/b2313s.pdf> and <http://www.oireachtas.ie/viewdoc.asp?DocID=23053&&CatID=59>

⁹⁷ Senator Norris’ perspective on our civil partnership legislation also underscores this phenomenon (see Seanad Éireann, 2010a).

in its most basic sense as “... the idea that at some very basic level all human beings have equal worth and importance, and are therefore equally worthy of concern and respect.” However, it can be difficult to translate this somewhat abstract ideal into practical reality in the sense that, while we are all the same, we are also different. While we share common characteristics by virtue of our humanity, there are also many differences that shape it. Some of these differences do not necessitate a theorisation of equality / inequality. Differences in eye colour or hair colour, for example, do not attract attention in the way that other biological differences do. It begs an immediate question: what is different about these differences? I argue that the answer lies in the social significance that attaches to them. This is an important point because the social world tends to be governed by assumptions that are borne out of the social significance that attaches to these differences. Spicker (2000, p.113) underscores this premise in his discussion on social inequality, and the idea that its link to difference is derived from social relationships. For example, gender is premised on the social significance that attaches to biological sex. Wilton (1996, pp.102-121) provides an analysis of the significance that attaches to the sex organs in the human body. These body parts are allocated meaning in society such that, in terms of ‘doing gender’ (see Dryden, 1999), a systematic distinction is made between those who possess male organs and those who possess female organs (see Wilton, 1996, p.104). Wilton’s (1996, p.104) insights into the “... heavy burden of signification borne by the human genital organs ...” strikes a chord with me for two reasons: prior to reading her article, I had never consciously attributed the phenomenon of gender inequality to such differences in the human body;⁹⁸ her thesis regarding the allocation of meaning is significant in terms of the importance that I place on the social significance of difference.

⁹⁸ Gender inequality conjured up images of the ‘glass ceiling’, debates about female participation in the labour market, and gender disparities in wages, for example. However, I had not associated these manifestations of inequality with such differences in the female and male body.

Difference as Disadvantage

This is not the only dimension to biology that attracts attention or allocates meaning in society. For example, assumptions underpinning differences in skin colour are embedded within a framework that governs social relations in a way that differences in eye colour or hair colour are not. Spicker (2000, p.113) states that “... differences imply inequality only if the difference leads to disadvantage. Many differences can cause disadvantage in social relationships.” Some differences are deemed irrelevant in the context of social organisation and social relations, while others are considered to be very significant. Differences in biological sex and skin colour, for example, operate as signifiers at the level of the social. They attract attention in analyses of inequality because such differences are linked to the social phenomena of sexism and racism, which have the ‘logic’ of disadvantage, with its attendant ‘doer’, at the core. Such phenomena denote examples of the ideological wherewithal of difference. The emphasis on difference is important because it focuses attention on the range of inequalities that are experienced by a broad diversity of groups in society (Crowley, 2006, p.4). Indeed, equality legislation in Ireland reflects this emphasis on difference; Section 6.2 of the *Employment Equality Act, 1998* details nine categories, including gender and sexual orientation, which constitute a basis for relying on anti-discrimination protections in this jurisdiction.⁹⁹ However, it is the social significance that attaches to difference, rather than difference *per se*, that requires theorisation.

Difference as Social Relation

Here, it is useful to draw upon Brah (1996, pp.115-127) who asserts that difference is an analytical category that can be conceptualised in four ways: difference as experience, as subjectivity, as identity, and difference as

⁹⁹ See Appendix II.

social relation. My focus throughout this thesis is on the latter dynamic. Brah's (1996, pp.117-119) thesis on difference as social relation refers to the ways in which difference is constituted and organised into systematic relations through cultural and political discourses, for example, as well as institutional practices. Difference operates as a signifier at the level of the social that helps to explain and 'justify' inequality. Here, I draw upon another analysis that Brah put forward in 1991 so as to tease this matter out further:

At the most general level 'difference' may be construed as a social relation constructed within systems of power underlying structures of class, racism, gender and sexuality. At this level of abstraction we are concerned with the ways in which our social position is circumscribed by the broad parameters set by the social structures of a given society.

Brah, 1991, p.171

Here, my understanding is that in a world that is dominated by white male norms, for example, significance attaches to both the difference between whiteness and blackness, and the difference between maleness and femaleness. As a dynamic within an analytical framework, difference is used to legitimate structures that limit the life chances of those who occupy a subordinate position in society. For that position to 'make sense' as a category, there must be a dominant position that is invariably deemed to be the norm. Therefore, a hierarchy inheres in this social organisation. Kimmel (2004, pp.1-17) underscores this by asserting that references to gender necessarily involve a hierarchy wherein one gender is dominant. Similarly, references to gender involve privilege. Carbado (2000, pp.99-104) documents many gender privileges to underscore his thesis on male privilege, which he asserts is neither recognised nor discussed. "We accept present-day social gender arrangements, and ideologies about gender as necessary, pre-political, and inevitable." (Carbado, 2000, p.98) This

denotes a critique of the philosophy that this hierarchical social order is 'just the way it is' (see Ingraham, 2007, p.198) While the prevailing social order is gendered, it also revolves around sexual orientation, as evidenced by the seemingly self-evident denial of marriage rights to lesbians and gay men in Ireland.

Difference *To*

There is another dimension to difference that underscores the significance of difference as disadvantage (see Spicker, 2000) and difference as social relation (see Brah, 1991; 1996), i.e. difference *to*. For example, with regard to gender and its attendant hierarchy (see Kimmel, 2004), it is the idea that women are different to men that legitimates the organisation of a social world that tends to be governed by male terms of reference. While my research pertains to the dynamic of sexual orientation, and the premise that social relations tend to be governed by a heterosexist diktat, much can be gleaned from analyses of gender and the phenomenon whereby social relations tend to be governed by male norms. A particularly cogent analysis in this regard is that put forward by Simone de Beauvoir in *Le Deuxieme Sexe*, which was first published in 1949. de Beauvoir (1988, p.16) states: "She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the Other." This statement conveys the social significance that attaches to difference, which is derived from the normative assumption that women are 'commonsensically' defined in relation to men or according to a male diktat. It implies that gender inequality derives from women's difference to men. Moreover, a hierarchy is embedded within this social framework that is organised along gender lines. More significance attaches to one gender while the other occupies a subordinate position relative to the norm that

prevails. This helps to answer two questions that Kimmel (2004, p.2) poses: “Why does virtually every society divide social, political, and economic resources unequally between the genders? And why is it that men always get more?”¹⁰⁰ With regard to the realm of employment, for example, Wodak (2005, pp.90-95) alludes to the many ways in which men ‘get more’ through such dynamics as organisational culture and gate-keeping procedures.¹⁰¹ The important point here is that the allocation of resources is bound up with who has the wherewithal to define, deem, decide, differentiate, divide, deny, disadvantage, and discriminate on the basis of the social significance that attaches to difference. These are crucial issues in terms of the ‘what, when, where, who, why, how, to whom, and with what effect’ questions (see Wodak, 1997b) that are at the heart of this CDA.

Difference as Deficit / Defect / Deviance

The upcoming theorisation is particularly important in terms of understanding the sheer scope and ideological wherewithal of difference. Baumrind (1995, pp.130-136) denotes a review of twelve journal articles, some of which pertain to the ‘nature v. nurture’ debate in the context of the development of homosexuality and lesbianism, while others relate to child development in the context of the parenting that is done by lesbians and gay men. With regard to whether or not families that are headed by lesbians or gay men compare *with* [my italics] those that are headed by heterosexuals, she makes the really important point that differences in

¹⁰⁰ Whilst I agree with Kimmel’s (2004) overall thesis on gender, I disagree with the definitive use of the term ‘always’ here. For example, the criminalisation of homosexuality in Ireland over the course of two centuries cannot be glossed over. Similarly, O’Connor’s (2009, pp.184-201) analysis of the difficulties that are experienced by unmarried fathers *vis-à-vis* their children underscores another dimension to the routine reproduction of gender inequality in Ireland. Therefore, it is important to acknowledge that men do not always ‘get more’.

¹⁰¹ She provides a cogent analysis of the language that was relied upon in letters of recommendation for female and male applicants to prestigious positions of authority in medical schools and hospitals in the United States.

developmental outcomes for children are not code for deficits (see Baumrind, 1995, p.133).¹⁰² She also states that if sexual orientation were deemed to be genetically determined, gay men and lesbians would be treated not merely as different, but also as deficient or pathological (see Baumrind, 1995, p.135).¹⁰³ There are a number of crucial points that need to be made here in terms of my theorisation of equality and inequality, and the attendant reproduction of social norms. Firstly, it is important to disentangle the concept that I refer to as ‘difference as deficit’ from differences as deficits (in outcomes). While both are very much interlinked, I draw a distinction between difference as a theoretical construct, which applies to the former term, and what I conceive of as the practice of that theory, which is manifest in the idea that differences (in outcomes) are necessarily deficits (with regard to lesbianism and homosexuality). To facilitate a theorisation of difference as deficit, I draw upon both the Irish Council’s for Civil Liberties (1990) position and Stewart’s (2008) perspective regarding the ‘treatment’ and ‘cure’ of lesbianism and homosexuality, as if they were ‘diseases’.¹⁰⁴ Moreover, I draw upon Cameron’s and Cameron’s (1996, pp.1-18) thesis on contagion, which holds that homosexuality is a learned pathology that is passed from adult to minor in a myriad of ways, including socialisation and seduction.¹⁰⁵ Here, the seemingly self-evident and heteronormative association of disease and

¹⁰² Baumrind’s (1995) use of the term ‘with’, rather than ‘to’, is important in terms of the methodological orientation and theoretical underpinning of my work. Her use of language here does not take as given the idea that the parenting that is done by heterosexuals necessarily denotes the norm to which ‘Others’ are compared *to*. This important dynamic, which is consistent with my critical perspective and my politics, evokes much of the discussion in this chapter, including that surrounding difference to, difference as deployment, and the reproduction of social norms.

¹⁰³ The debate surrounding sexual orientation, in terms of whether it is an essence or is socially constructed, is immaterial to my research. However, sexual orientation development in children who are reared by gay or lesbian parents is an important issue that I discuss in detail in Chapter Five *vis-à-vis* the routine reproduction of heteronormativity in society.

¹⁰⁴ I alluded to this issue in Chapter One. It is important to state that both the Irish Council for Civil Liberties (1990) and Stewart (2008) utterly reject this ‘truth’, as do I.

¹⁰⁵ Their thesis *vis-à-vis* the transmission of homosexuality from parent to child seems to rest on the following assumptions: religious parents produce religious children; parents who enjoy alcohol produce disproportionate numbers of beer-drinking children; and parental smoking is strongly associated with childhood smoking (see Cameron and Cameron, 1996, pp.10-11). My politics are such that I utterly reject their thesis *vis-à-vis* homosexuality in its entirety.

contagion with homosexuality and lesbianism signifies the discursive construction of the ‘Other’ (see de Beauvoir, 1988) who is necessarily deficient, defective, and pathological. Cameron’s and Cameron’s (1996) ‘research findings’ ‘commonsensically’ add deviance to the mix in that the term ‘seduction’ raises the spectre of child abuse. While it is difficult to engage with such a thesis, it is useful in terms of theorising a core aspect to the concept of difference. Drawing upon Baumrind (1995) and Cameron and Cameron (1996), in conjunction with the Irish Council for Civil Liberties (1990) and Stewart (2008), I put forward a conceptualisation of difference as deficit / defect / deviance. In Chapter Five, I argue that this denotes a crucial aspect to the continued operationalisation of heteronormativity with regard to particular understandings of the parenting that is done by gay men and lesbians. Moreover, this theoretical construct helps to explain the intransigence of gay and lesbian inequality in Ireland *vis-à-vis* marriage and family.

Difference as Deployment

Here, I draw upon my theorisation of equality and inequality thus far with a view to elaborating on important aspects to social norms. A two-pronged approach is required to maintain norms in society; sustain the idea that the unquestioned dominance of a particular norm is perfectly natural, and deftly manage all instances of deviation from it. The common denominator here with regard to the issues of dominance and deviation is difference, particularly difference as social relation (see Brah, 1991; 1996) and difference to. There is another dimension to difference that hones in on the ‘what, when, where, who, why, how, to whom, and with what effect’ questions (see Wodak, 1997b) that are central to this research, i.e. the deployment of difference. This ‘doing’ can either provide a critique of the status quo or it can reinforce it. “We need to disentangle instances when

‘difference’ is asserted as a mode of contestation against oppression and exploitation, from those where difference becomes the vehicle for hegemonic entrenchment.” (Brah, 1991, p.173) Here, there are two strands to the deployment of difference; one from individuals or organisations that seek to challenge their subordination, which is derived in part from their deviation from the norm and their attendant social positioning, and the other emanates from those who seek to maintain or sustain social norms. Brah’s (1991; 1996) conceptualisation of difference as social relation is helpful here because the organisation of difference into systematic and hierarchical relations through institutional discourses and practices is central to the maintenance of social norms. Those who occupy a privileged social position, or those who are privileged by their compliance with a dominant social norm, can deploy difference to maintain the fiction that privilege is perfectly natural. This process of normalisation can be done by honing in on the difference of others and deeming it to be abnormal, unnatural and / or pathological, thereby legitimating inequality. Those who have the wherewithal to decide on what constitutes abnormal or unnatural sexuality have circumscribed the social position of gay men, for example, through criminalisation. It is conceivable that ‘truths’ surrounding the dangerous homosexual (see Gouveia, 2005) cohered and subsequently legitimated this ‘logic’. Similarly, the denial of marriage rights on the basis of sexual orientation reinforces the ‘logic’ of heteronormativity. This deployment of difference depends on the dominant social position of the doer who has the wherewithal to define, deem, decide, differentiate, divide, deny, disadvantage, and discriminate.

The second strand of deployment comes to the fore when people who occupy a subordinate social position appropriate difference as a mode of contestation against their exploitation and oppression (see Brah, 1991, p.173). It challenges ‘thinkings’ and ‘doings’ that are derived from

dominance, thereby threatening the status quo. Activist organisations in Ireland, such as LGBT Noise, for example, are clamouring for an end to heterosexism, which is derived from normative assumptions surrounding sexuality.¹⁰⁶ Sustaining heterosexual privilege requires effective management of this clamour through continuing social dominance, which is actively sustained through legal and political ‘doings’, for example. The justification of aspects to our civil partnership regime, which left the dominance of the nuclear family paradigm intact, is one example of this.¹⁰⁷ The determination of Irish organisations, such as Marriage Equality, in refusing to settle for civil partnership is a reminder of the ways in which lesbian and gay activists challenge their oppression.¹⁰⁸

Equality of Respect and Recognition

Here, it is helpful to draw upon a theorisation that offers a way forward in terms of redressing inequality in society. Its starting point is the naming of the myriad inequalities that people can face. These can include the following: inequalities of resources; of respect and recognition; of love, care and solidarity; of power; and of working and learning (see Baker *et al*, 2004, pp.3-8).¹⁰⁹ In terms of the applicability of their theorisation to my research, inequality of respect and recognition (Baker *et al*, 2004, pp.5-6) is the most salient of these five dimensions to equality / inequality. It highlights the significance of language, and the way in which the consistent

¹⁰⁶ This organisation campaigns specifically on the issue of marriage equality. See www.lgbtnoise.ie for details.

¹⁰⁷ I refer to the dominant understanding of Article 41 of our Constitution. This dynamic will become clear in Section Three of Chapter Six. Here, it is important to reiterate that I welcome the innovation of civil partnership. What I reject is the two-tiered system of relationship recognition that leaves heteronormativity intact.

¹⁰⁸ See www.marriagequality.ie

¹⁰⁹ In the context of resources, Baker *et al* (2004, pp.4-5) highlight some of the income inequalities that can prevail at an international level. With regard to the third dimension, Baker *et al* (2004, pp.6-7) state that this inequality occurs when the expectation of love and care is disrupted, as in the phenomena of familial and institutional abuse. Baker *et al* (2004, p.7) state that the under-representation of women and minority cohorts of the population in parliaments is indicative of inequality of power. The fifth dimension to their framework focuses on employment and education. The division of labour and the problem of illiteracy are considered to be manifestations of this inequality (Baker *et al*, 2004, pp.7-8).

recourse to male terms of reference, for example, to denote persons in general, is indicative of the power relations that prevail *vis-à-vis* gender.¹¹⁰ They also conceive of the criminalisation of homosexuality as a tangible expression of inequality of respect (see Baker *et al*, 2004, p.5). I argue that one of the issues at the heart of the criminalisation of homosexuality is disrespect for human beings. The general tenor of Randles (1993),¹¹¹ for example, which problematised the imperatives of equality and decriminalisation, would have been quite different if equality of respect prevailed. Difference in sexual orientation could never overshadow all that unites us in our humanity if equality of respect prevailed. While Ireland decriminalised homosexuality in 1993, homosexual acts remain illegal in over seventy countries, and a minority of these carry the death penalty upon conviction (see Bruce-Jones and Itaborahy, 2011, pp.9-10). Whether driven by heterosexism or homophobia, I argue that such egregious practice could never prevail in a country where equality of respect denoted a fundamental precept that informed social relations.

Here, it is important to make the point that respect is a principle that transcends tolerance, which is a dynamic that Baker *et al* (2004, pp.23-27) discuss in the context of the liberal understanding of equality. I argue that the maxim of tolerance is problematic because it is a superficial sensibility. Its operationalisation requires the co-existence of ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997), which I discussed in Chapter One. Its ‘thinking’ and ‘doing’ are invariably directed at the ‘Other’ (see de Beauvoir, 1988) or invariably performed in relation to the ‘Other’. Cloaked in the seemingly natural dominance of ‘us’, it leaves

¹¹⁰ See Letherby (2003, pp.30-34) and Spender (1998, pp.93-99) for analyses of what is known as ‘man-made language’. I alluded to this phenomenon in Chapter One as I reflected on the importance of our Constitution.

¹¹¹ This denoted a ‘Letter to the Editor’ of *The Irish Times*, which was informed by the ‘looming’ prospect of the decriminalisation of homosexuality in Ireland in 1993. *The Irish Times* is Ireland’s oldest national daily newspaper (O’Brien, 2008, p.13).

‘them’ intact. With regard to sexual orientation, while tolerance may have the wherewithal to counter homophobia, it is incapable of redressing heterosexism. I argue that tolerance has to presuppose some level of pathology that must inhere in the gay or lesbian ‘Other’ for it to ‘make sense’. Tolerance underscores the ‘logic’ of ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997), thereby leaving the social phenomena of dominance and subordination intact. The Baker *et al* (2004, pp.34-36) theorisation of equality of respect hones in on this idea that tolerance retains dominance:

[D]ominant cultures can ‘tolerate’ subordinate ones, but not vice versa. The dominant view is still seen as the normal one, while the tolerated view is seen as deviant. There is no suggestion that the dominant view may itself be questionable, or that an appreciation of and interaction with subordinate views could be valuable for both sides.

Baker *et al*, 2004, p.34

This conceptualisation demonstrates that the social practice of tolerance is implicated in the maintenance of dominance and subordination. Conversely, the principle of respect engenders an appreciation and celebration of diversity because difference *to* the norm, for example, is a dynamic that is welcomed and embraced, rather than simply permitted (see Baker *et al*, 2004, p.34). Respect is precisely the sensibility that facilitates the attendant issue of recognition. It is important to make the point that while Baker *et al* (2004) do not include the premise of marriage equality in their elaboration of equality of respect and recognition, I place this issue firmly within this realm of equality. The denial of marriage rights to lesbians and gay men denotes one manifestation of inequality of respect and recognition in Ireland. If equality in this regard were to prevail, the current denial of constitutional recognition and protection for their intimate relationships and families would be unacceptable and unsustainable.

The principle of respect and recognition in the context of marriage equality is about protection and vindication by the State. These are altogether different to such notions as seeking respectability and validation (see Wise and Stanley, 2004, pp.332-343). Similarly, my position is at odds with the belief that relationship recognition denotes a reward for conformity (see Wise and Stanley, 2004, p.338) or a government's regulation of intimacy (see Card, 1996, p.6; Ettelbrick, 1997, p.760; Shantz, 2004, p.181). I argue that these conceptualisations negate the personal agency that is required to actively seek engagement with the State, by choosing a constitutional and / or legislative regime that best suits one's adult relationship and familial considerations.

A Way Forward

The different dimensions to inequality as outlined by Baker *et al* (2004) get at the heart of the complexity of the co-existence of equality with inequality. Their framework implicitly accepts that significant strides have been made in terms of the realisation of equality. Yet, it does not deny that inequalities remain. For example, a woman might not experience inequality in terms of resources, or working and learning, but she may experience inequality of respect and recognition because of the significance that attaches to her sexual orientation. Baker *et al* (2004, pp.33) suggest that the above manifestations of inequality are not inevitable. Moreover, they believe that it is possible to reduce the current scale of inequality (see Baker *et al*, 2004, p.33). Here, the key lies in recognising that inequality is rooted in changing and changeable social structures, and systems of domination and oppression, which reproduce, and are reproduced by, racism and sexism, for example (Baker *et al*, 2004, p.33). Since social structures have changed in the past, it is conceivable that they could be changed in the future (Baker *et al*, 2004, p.33) Therefore, while their

framework acknowledges a status quo that is bound up with many social 'isms', including heterosexism, for example, it recognises the capacity for social change. With regard to the realisation of equality of respect and recognition (see Baker *et al*, 2004, pp.34-36), the important point here in terms of my thesis is that social change requires a critical questioning of heteronormativity and its attendant dominance. My methodological framework is crucial in this regard. Moreover, Baker *et al* (2004) engender the notion that heteronormativity, as currently constituted in Ireland, is not an immutable force. This engenders hope.

Conclusion

This theorisation helps to explain the intransigence of inequality in society, which evokes Crowley's (2006) reference to its persistence against the backdrop of a rationale for equality. In this chapter, I also identified the concept of difference as a dynamic that is at the heart of the reproduction of inequality in society. In this regard, I honed in on Spicker's (2000) conceptualisation of difference as disadvantage, which was instrumental in terms of my coming to grips with the phenomenon of inequality. Brah's (1991; 1996) theses regarding difference as social relation, wherein difference is organised into systematic relations through institutional practices, facilitated my understanding of the ideological wherewithal of difference, in terms of the routine reproduction of inequality and social norms. Also relevant in this regard are what I conceive of as difference to and difference as deployment, the latter of which derives from Brah (1991). These aspects to difference implicitly inform, and are informed by, de Beauvoir's (1988) analysis of the 'Other' and Kimmel's (2004) theorisation of gender and hierarchy. Here, I wish to underscore the importance of what I refer to as difference as deficit / defect / deviance, which derives from Baumrind (1995) and Cameron and Cameron (1996). In Chapter Five, I

argue that this latter theorisation of difference is central to understanding the denial of marriage rights to lesbians and gay men in this jurisdiction. Similarly, inequality of respect and recognition (see Baker *et al*, 2004) is a determining factor in this regard. At this juncture, I also wish to reiterate that my theorisation of equality / inequality is very much linked to my methodological considerations in Chapter One, particularly in terms of my politics and my critical approach to the analysis of discourse.

CHAPTER THREE

Nuclear Options: Conceptualisations of Marriage

We all have been witnesses, willing or not, to a lifelong parade of other people's marriages, from Uncle Harry and Aunt Bernice to the Prince and Princess of Wales. And at one point or another, some nosy relative has inevitably inquired of every gay person when he or she will finally "tie the knot" (an intriguing and probably apt cliché).

Stoddard, 1997, p.754

Introduction

In Ireland, the social institution of marriage has both a constitutional and legislative underpinning. So as to contextualise the dominant understanding of marriage in this jurisdiction, I draw upon wider conceptualisations of it in other Western countries, such as Britain and the United States.¹¹² This first necessitates an elaboration on the general rationale behind the enactment of legislation on marriage, which was largely informed by patriarchal imperatives. While specificities to the prevailing legal position *vis-à-vis* marriage in these countries might differ, and while perspectives from theorists may differ within each country, the literature does provide some sense of both historical and contemporary understandings of marriage in the West.¹¹³ Throughout this chapter, I make reference to the situation

¹¹² By virtue of Ireland's relationship with England over the centuries, legislation that was enacted there often prevailed in this jurisdiction. Similarly, the English system of what is known as 'common law', which denotes the body of rules that has developed over time through case law (see Judy Walsh's foreword in Pillinger, 2008, pp.3-4), was extended to Ireland by the early 1600s (see Hederman, 1980, p.59). Ireland's common law tradition is still relevant today. Indeed, English case law from the 19th century was referred to in *Zappone and Gilligan*. The important point here is that references to Britain in this chapter are relevant to this research, albeit with the caveat that history does not necessarily imply that our regime as regards marriage was / is identical to that which obtained / obtains in Britain. I will revisit the relevance of English case law to Irish constitutional law in Chapter Five.

¹¹³ Such conceptualisations are not necessarily universal or applicable to other parts of the world, such as the Middle East or South East Asia, for example. Because it was important to place a limit on the range of

that prevails in Ireland, in terms of the constitutional and legislative framework that underpins marriage,¹¹⁴ and how this compares to, or contrasts with, other jurisdictions in the West. In Chapter Three, I am not concerned with rudimentary or numerical balance in terms of support for, or opposition to, the institution of marriage in general, or same-sex marriage in particular. Rather, this chapter comprises perspectives on marriage that are important in terms of illuminating the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage, irrespective of whether or not protagonists expressly support or oppose it. However, this does necessitate reflexive awareness of the ways in which my interpretation of the literature is invariably informed by my evolving perspective on marriage and my support for marriage equality. Throughout this work, it is necessary to attach the prefix ‘same-sex’ to the term ‘marriage’ so as to acknowledge the phenomenon of marriage inequality. I accept that this takes opposite-sex marriage as the given norm. However, this is precisely the situation that prevails in this jurisdiction. I also prefer to use the term ‘relationship status’ where appropriate because the default term, i.e. ‘marital status’, is problematic. It serves to reinforce an ‘either or’ scenario (see Sullivan, 1996, p.182), which tends to ground the expectation that marriage is an eventual inevitability for single people who fall in love (see Hunter, 2007, p.203).¹¹⁵

material that I draw upon, I focus on some Western understandings of the institution of marriage in this chapter.

¹¹⁴ In Chapter Five, I discuss the constitutional underpinning to marriage in Ireland in more detail.

¹¹⁵ The embeddedness of the term ‘marital status’ in Ireland is such that the Central Statistics Office did not include the newly created ‘civil status’ in its most recent national census form for 2011. This term formally entered our lexicon following the enactment of civil partnership and cohabitation legislation in 2010. See Appendix VII for details of Section 7.1(a) of this legislation, which defines the term ‘civil status’. Even allowing for administrative delays and deadlines in terms of the legislation coming into force, the printing of forms, and their timely delivery to households in Ireland, *Census 2011* implicitly compelled same-sex partners, for example, to either deem themselves single, precisely because they were not married, or to consider themselves married, which is currently a legal nonsense for same-sex couples. See Appendix IV for details of the Central Statistics Office’s understanding of marital status in Ireland in 2011. This was identical to that which prevailed for *Census 2006* (see Central Statistics Office, 2006; 2011).

Historical Construction of Marriage

Before elaborating on contemporary understandings of marriage, it is important to get some sense of its dominant historical conceptualisation in the West. This can shed some light on the dynamics of opposition to the institution today, be it same-sex or opposite-sex marriage. Marriage is not a natural phenomenon (Norrie, 2000, p.364), but it is one that has evolved over time according to prevailing social mores, norms and values that can differ between countries (see Hunter, 2007, pp.203-207; Norrie, 2000, pp.364-365). While it tends to be conceived of as a social institution, marriage has a legal underpinning (see Bernstein, 2007, pp.330-333; Hunter, 2007, pp.202-203; Norrie, 2000, pp.364-369; Stoddard, 1997, pp.753-756).¹¹⁶ In Ireland, marriage also has constitutional status, which is perhaps indicative of its social standing. Taken in conjunction with each other, Articles 41.1.1, 41.1.2, and 41.3.1 of our Constitution stipulate that the marital family is a moral institution that denotes the necessary basis of social order in Ireland, to the extent that the State is obliged to protect it against attack.¹¹⁷ Vogel's (1994, pp.76-89) understanding of the dominant historical conceptualisation of marriage helps to explain this general preoccupation with marriage as indispensable to socio-moral order (see Gallagher, 2003; Hug, 1999, pp.1-75; Santorum, 2003). Moreover, it forms the basis, and gets to the heart of, much of the opposition to marriage, both as social institution and social practice. Vogel (1994, p.80) states the following:

¹¹⁶ See Appendix VI for a sample listing of 19th, 20th and 21st century legislation on marriage in Ireland.

¹¹⁷ I reiterate that the relevant articles in the *Irish Constitution (1937)* are reproduced in Appendix I. The constitutional underpinning of marriage in Ireland is a crucial dynamic. This will become apparent in Chapter Five.

The emphasis on ‘order’ has little to do with the demands on a wife’s domestic duties. Her subordination is not justified by the need of forcing her to attend to the care of household and children. Rather, the task at hand is to construe a power that will secure the unity of marriage, as well as the tranquillity of civil society, against the adverse consequences of a wife’s independence of will. But why should women be the particular target of this concern with order and disorder? What does the social order have to be protected against? What, indeed, is the meaning of ‘order’ and ‘disorder’? The predominant motif for committing women to the strictest rules of obedience and submission must be sought in the belief that only the coercive sanctions of the law will enable a husband to ensure the sexual fidelity of his wife. This assumption runs as a persistent theme through legal arguments from the seventeenth to the nineteenth centuries.

Vogel, 1994, p.80¹¹⁸

This is quite a profound insight that hones in on the rationale behind the creation of a legal framework that legitimated male dominance and control over women. The spectre of chaos that could be wrought by independent woman was such that man had to be master over the physical space in which she moved (see Hederman, 1980, p.55; Vogel, 1994, p.81).¹¹⁹ By constraining her liberty, the law empowered him to protect his right of exclusive access to her body, thereby guaranteeing female virtue, which was integral to the purity of his bloodline (Vogel, 1994, p.81). The anxiety that could be provoked by the loss of certainty about paternity (Vogel, 1994, p.81), which was integral to the safe and secure bequeathing of property to successive generations, helps to explain the genesis of the following: laws on adultery (Norrie, 2000, p.367)¹²⁰ and the inherent

¹¹⁸ Articles 41.2.1 and 41.2.2 suggest that, at the time of drafting the Constitution, the Irish State did reflect on women’s association with order in the domestic sphere. These articles, which were ratified by the majority of the electorate in 1937, remain intact.

¹¹⁹ Please note that Hederman (1980) writes with regard to the situation that prevailed in Ireland *vis-à-vis* marriage.

¹²⁰ Adultery refers to the adulteration of the male bloodline (Norrie, 2000, p.367; Stoddard, 1997, p.754). In *McGee v. Attorney General*, which I discuss in Chapter Four, Irish judges alluded to the adultery laws that prevailed in the United States in the context of the State’s encroachment into the marital bedroom. As regards the situation in Ireland in the 1970s, Justice Griffin stated: “Adultery and extra-marital sexuality

gender disparity in them (Stoddard, 1997, p.754);¹²¹ laws prohibiting bigamy and polygamy (Bernstein, 2007, p.331);¹²² the bringing into being of illegitimacy (Norrie, 2000, p.367);¹²³ what is known as the ‘marital-rape exemption’ that was codified in law (Finkelhor and Yllo, 1985, pp.1-12; see also Hederman, 1980, p.55; Smyth, 1983, pp.135-136); expectant husbands’ preoccupation with female virginity¹²⁴ and fertility;¹²⁵ the expectation that it is woman who surrenders her family name upon marriage;¹²⁶ and the normalisation of male ownership of woman as if she were a piece of property (see Hederman, 1980, pp.55-59).¹²⁷ The children

are not, as such, crimes here.” (see [1974] I.R. pp.284-337, at p.334) However, adultery constitutes grounds for the granting of a judicial separation, for example, in this jurisdiction (see Ryan, 2009, p.16; Smyth, 1983, p.90; see also Section 2.1(a) of the *Judicial Separation and Family Law Reform Act, 1989*). Adultery constitutes grounds for the dissolution of what is known as a ‘covenant marriage’ in the United States, which denotes a ‘super-sizing’ of the traditional variety, and a reaction to the *blasé* or ‘test-drive’ approach to marriage in the midst of a ‘divorce culture’ in that country (see Fee, 2007, pp.430-436).

¹²¹ A woman who engaged in sexual relations with a man who was not her husband committed adultery, while a man was legally incapable of committing adultery, except as an accomplice to an ‘errant’ wife. Instead, he committed fornication (see Stoddard, 1997, p.754). The ‘errant’ wife, rather than husband, conjures up the notion that it is woman who is at the centre of the male preoccupation with social chaos and disorder, which Vogel (1994) captures so remarkably.

¹²² See Appendix II for details of Section 2.2(b) of the *Civil Registration Act, 2004*, which holds that bigamy denotes an impediment to marriage in Ireland.

¹²³ The status of illegitimacy was abolished in Ireland with the enactment of the *Status of Children Act, 1987* (see Seanad Éireann, 1986a, paras. 2198-2199).

¹²⁴ Marlowe (2008) highlights a recent case in France in which a court granted a civil annulment to a groom on the basis that his bride lied to him about her virgin status. The reader is given no indication as to the man’s status in this regard.

¹²⁵ Writing in the American context, Bernstein (2007, p.331) states that upper-class men who needed legitimate heirs could divorce their wives for their failure to produce children. She makes the rather prescient point that male infertility was not a consideration in the past. Similarly, in rural Ireland, it was woman who necessarily bore the responsibility for a childless marriage (see Arensberg and Kimball, 1968, pp.130-132). The phenomenon that was known as the ‘country divorce’, which came to an end in the 1930s, dictated that it was barren woman as wife who was ‘sent back’ to her parents by her (necessarily fertile) husband (see Arensberg and Kimball, 1968, p.132). This denotes one of the most egregious examples of doing gender in marriage (see Dryden, 1999). That such a practice was somehow deemed to be perfectly acceptable serves to underscore the normative assumptions that underpinned gender in Ireland at the time. It may also be indicative of an internalisation of patriarchal power that wreaked hopelessness in woman due to the embeddedness of that hierarchal social order in which the worst excesses of sexism ‘made sense’.

¹²⁶ Choi and Bird (2003, p.450) and Laennec and Syrotinski (2003, p.455) challenge this assumption. McDonnell (2004) cites an instance in America wherein a man, who sought to assume his wife’s surname upon marriage so as to prevent her family name from dying out, was viewed with suspicion by the relevant authority to the extent that it instigated a criminal investigation to determine whether or not he was a ‘wanted man’! It is a fascinating example of the rootedness of gendered social expectations, which are ‘out there’ ‘in’ social cognition (see van Dijk, 1993; 2006) *vis-à-vis* marriage and family. See Almack (2005, pp.239-254) for an analysis of the decision-making processes that are taken by lesbian couples in relation to their family names / children’s surnames. She highlights the absence of readily available socio-cultural guidelines *vis-à-vis* naming conventions, and the power that is associated with naturalised assumptions about biological motherhood.

¹²⁷ In a trenchant critique of the defence of what is referred to as ‘mistaken belief in consent’ in the context of the perpetration and prosecution of the crime of rape in Britain, Jamieson (1996, p.59) states:

of a marriage were also part of a husband's property portfolio over whom he exercised power (see Hederman, 1980, p.55). The above laws underpinned the overriding imperative to protect male vested interests, in terms of the safe and secure transfer of family finances through legitimate lines of succession, thereby ensuring the stability of the (marital) family (name) for generations (see Norrie, 2000, p.367).¹²⁸

Notwithstanding the role of personal agency, the above dynamics are largely indicative of the gendered relations that prevailed within the institution of marriage. These were necessarily hierarchical, thereby underscoring Kimmel's (2004) thesis. They denoted the seemingly ordered blueprint for doing gender in marriage (see Dryden, 1999), which codified this hierarchy. They required and reinforced the twin imperatives of dominance and subordination, which invariably served to normalise not just the inviolability of the / his family name, and the attendant preoccupation with human reproduction, but also the construction of woman as the conduit for the reproduction of male power and privilege. It helps to explain the phenomenon of arranged marriage, where woman was passed from one family to another so as to secure vested interests.¹²⁹ This seemingly natural gendered order *vis-à-vis* marriage became embedded over time, such that it wrapped up male power and privilege in the guise of tradition (see Barrett and McIntosh, 1990, p.55). It is conceivable that the

"It is as if because a woman has sex with a man on one occasion he can reasonably assume consent on a subsequent occasion. In this sense the law remains close to a view of women as men's sexual property."

¹²⁸ Norrie (2000, p.367) also makes the point that children needed to know that their fathers were not spreading their seeds, and therefore, children's inheritances. It seems that this expectation was also a source of family stability.

¹²⁹ Referring to the situation that prevailed in Ireland up to the 18th century, Inglis (1997, p.9) states the following: "Sexuality was tied into a fixation of reproducing and developing kinship ties, names and possessions. The control of sexuality largely took place through the control of marriage ... It was firmly tied to the transmission and circulation of wealth. It was about setting definite relations and strict regulations about who could get married to whom, when, where and on what basis. [Footnote omitted.] It was an era of arranged marriages, of designated inheriting sons and dowried daughters." See also Curtin *et al* (1992, pp.85-95) in this regard. It is important to make the point that this social practice, insofar as it related to the family farm, lasted well into the 20th century in Ireland. See Arensberg and Kimball (1968, pp.94-117) for an elaboration on matchmaking in Ireland in the 1930s. Here, marriage was the conduit to the reproduction of patriarchy.

following expectations *vis-à-vis* marriage today denote the routine operationalisation of patriarchy through heterosexuality: man proposes; woman promises herself to man in engagement; woman implicitly declares that she is virginal; man walks down the aisle with his daughter; man does not change his family name. The degree to which these ‘gender doings’ are taken for granted and romanticised is perhaps indicative of the sheer breadth of institutionalised patriarchy and heterosexuality in the West.

Order and Stability

Here, drawing upon Norrie (2000, p.367), I wish to make an important point in relation to the twin imperatives of order and stability, which were grounded in many of the above marriage laws. The concept of *family* order and stability appears to have morphed somewhat in that it now tends to be divorced from matters that relate solely to succession. Order and stability are now part of a socio-cognitive repertoire of knowledge (see van Dijk, 1997c) about marriage and family, which dictates that it is the nuclear family paradigm itself that is now the seemingly self-evident precursor to, and guarantor of, *social* order and stability. The dominant understanding of Article 41 of our Constitution both reflects and ordains this. The important point here is that this new repertoire of knowledge about order and stability now constitutes much of the contemporary heterosexist opposition to same-sex marriage in Ireland. This will become clear as my analysis evolves.

Procreation

The dominant historical conceptualisation of marriage shaped, and was shaped by, male privilege, with its attendant legitimisation of women’s

oppression.¹³⁰ This hinged on the imperative of procreation, which helped to codify the logic of gender complementarity with other hierarchically ordered role rules for doing gender in marriage (see Dryden, 1999). This normalised the inherence of heterosexuality to the institution of marriage.¹³¹ “The intended purpose of marriage has historically been for procreation, and so the law regulates the sexual lives of married couples and unmarried individuals with that goal in mind.” (Bernstein, 2007, p.330)¹³² This helps to explain the controversy that was engendered by (artificial) contraception in Ireland and the manner in which it convulsed polity and society for decades.¹³³ However, it was not just the rule of law that regulated sexuality in Ireland. The social opprobrium that was heaped on unmarried women as mothers in Ireland, and the State’s collusion in their enforced displacement from ‘civil’ society by virtue of incarceration, underscored the normative imperative of marital procreation and the attendant assumption that woman was still at the centre of disorder.¹³⁴

Procreation can also inform current understandings of marriage in Ireland. In its submission to the Oireachtas Committee that examined the relevance

¹³⁰ It is important to make the point that children and men can also experience oppression in marriage. For example, Coulter (2010a) and Gallagher (2010) refer to the horrific abuses that were visited on children in nuclear families by their parents, the latter of whom were subsequently arrested, tried, convicted and sentenced for these crimes in Ireland.

¹³¹ I acknowledge and accept the importance of procreation for society. However, I argue that the manner in which this imperative is effortlessly relied upon to underpin the centrality of heterosexuality, marriage and gender complementarity to family is problematic. For example, procreation hinges on biological complementarity, rather than on gender complementarity *per se*. The distinction is important. Gender is a social construct (DeFrancisco and Palczewski, 2007, p.xiv); it refers to the social significance that attaches to biological sex. I will revisit the dynamic of gender complementarity in my analysis of heterosexist opposition to same-sex marriage in Chapter Six.

¹³² Bernstein (2007) writes with regard to the United States where marital status denoted the crucial dynamic *vis-à-vis* controls over access to contraception. See Planned Parenthood Federation of America (2000) for commentary on the Supreme Court rulings that led to the legalisation of contraception in the United States, i.e. *Griswold v. Connecticut* in 1965 and *Eisenstadt v. Baird* in 1972.

¹³³ The distinction between artificial forms of contraception, which were eventually legislated for in Ireland, and natural methods of contraception will become clear in Chapter Four. It derives from the Catholic Church’s opposition to artificial forms of birth control.

¹³⁴ Against the backdrop of the intertwining of Church and State, which I allude to in Chapter Four, *Magdalene Laundries* managed these ‘problem women’ (see Smith, 2009). At the intersection of the legal with the social, Inglis (2002, pp.5-24) provides an analysis of what became known as the *Kerry Babies Case*, which revealed an alarming prejudice towards unmarried woman as mother in Ireland in the 1980s. I will revisit this latter dynamic in Chapter Four.

of the Constitution *vis-à-vis* the family in Ireland, the organisation that is known as Amen¹³⁵ supported the prevailing definition of marriage as a union of man and woman, and stated that the institution exists for the protection of the next generation and for dealing with issues, such as succession rights (see All-Party Oireachtas Committee on the Constitution, 2006, p. A25).¹³⁶ Similarly, the Irish organisation that is known as European Life Network¹³⁷ stated the following *vis-à-vis* its opposition to same-sex marriage and its belief that the marital union of one man and one woman is fundamental to society: “Sexuality exists for the expression of love between husband and wife and for the procreation of children within the covenant of marriage. [...] Procreation is the key to the survival of the human race, and must therefore be protected.” (see All-Party Oireachtas Committee on the Constitution, 2006, pp. A60-A61) Both of these submissions implicitly draw upon the historical understanding of marriage that was codified in many of the laws that I highlighted earlier.

Additional Marriage Laws

Here, I highlight other ways in which family life was regulated through the institution of marriage, such that many social ‘isms’ were continually reproduced in the West. For example, the ‘logic’ of racism informed the enactment of anti-miscegenation laws in the United States because some state governments feared that allowing interracial couples to marry would

¹³⁵ This Irish organisation provides support to male victims of domestic abuse and their children. See <http://www.amen.ie/index.html> in this regard.

¹³⁶ For full details of its written submission to the committee, see All-Party Oireachtas Committee on the Constitution (2006, pp. A21-A27). In the introduction to my thesis, I discussed the work of this committee over the course of my elaboration on the Irish trajectory *vis-à-vis* relationship and family recognition. See Joint Committee on the Constitution (2005a) for details of Amen’s oral submission to the public hearings that were held in relation to the complexities of Article 41 of our Constitution *vis-à-vis* the family today.

¹³⁷ This is a pro-life and pro-family (nuclear / marital family) organisation that is based in Ireland. See www.europeanlifework.org in this regard. As well as a written submission that was published in 2006 (see All-Party Oireachtas Committee on the Constitution, 2006, pp. A59-A64), European Life Network also made an oral submission to the public hearings that were held in 2005 in relation to Article 41 of our Constitution (see Joint Committee on the Constitution, 2005c).

produce mixed-race children, thereby diluting whiteness (Bernstein, 2007, p.331). Female American citizens lost their citizenship upon marriage to a man who was not American, which combined the potent brew of sexism and racism with xenophobia (Bernstein, 2007, p.331). Conversely, American men did not lose their citizenship upon marriage to a woman with a different nationality (Bernstein, 2007, p.331). In Ireland, marriage to an Irish man as citizen meant that a foreign woman was entitled to Irish citizenship (Smyth, 1983, p.87) upon lodging a declaration with the relevant authorities.¹³⁸ However, a foreign man who married an Irish woman as citizen had to first go through the process of naturalisation (Smyth, 1983, p.87).¹³⁹ Prior to the enactment of the *Domicile and Recognition of Foreign Divorces Act, 1986*, a married woman in Ireland was legally deemed to have her husband's domicile, which denied her the right to retain her independent domicile (see Seanad Éireann, 1986b, paras. 212-214; Smyth, 1983, pp.87-88). These examples are indicative of the myriad ways in which gender intersected with marital status in the West.

The Criminalisation of Homosexuality

One of the most destructive of laws that relied upon, and affirmed, the 'logic' of heteronormativity was the criminalisation of homosexuality. Writing in the context of the United States, Eskridge (1999, p.161) makes the point that the rationale behind criminalisation was that sexual acts had to be gendered, heterosexual, marital, and procreative, as well as consensual and mutual. Similar to contraception, sodomy was deemed to undermine marriage because it was, by its nature, antithetical to procreation; it denoted a denial of the imperative of marital procreation (see

¹³⁸ See Section 8 of the *Irish Nationality and Citizenship Act, 1956*.

¹³⁹ See Sections 14, 15 and 16 of the *Irish Nationality and Citizenship Act, 1956*. The relevant sections in the *Irish Nationality and Citizenship Act, 1986* are such that citizenship and naturalisation are now articulated in largely gender-neutral terms. See Sections 3, 4 and 5 of this 1986 legislation.

Eskridge, 1999, p.161). What is interesting about the 19th century legislation that criminalised homosexuality in Ireland is that it did not expressly invoke the heteronormative assumptions that are evident in the first four considerations above. Rather, it implicitly relied upon the seemingly self-evident deviance of gay men by linking bestiality with their sexual orientation.¹⁴⁰ Similarly, a number of states in the U.S. also relied upon the ‘logic’ of bestiality to criminalise homosexuality (see Rivera, 1979, pp.949-951). This is important and relevant in the sense that some of the prevailing opposition to the introduction of same-sex marriage in Ireland and the United States is implicitly informed by the ‘logic’ of bestiality that ‘necessarily’ arises with regard to the ‘suspect’ gay ‘Other’ (see de Beauvoir, 1988).¹⁴¹ Here, the concept of difference as deviance, which I theorised in Chapter Two, ‘legitimises’ the reproduction of both heteronormativity and inequality on the basis of gender and sexual orientation. This suggests that, notwithstanding the decriminalisation of homosexuality in both jurisdictions, in 1993 and 2003 respectively, the destructive wherewithal of a normatively imposed deviance remains.¹⁴² In Chapter Five, I argue that this is one dynamic that is at the root of the intransigence of gay and lesbian inequality in Ireland in the context of marriage and family.

The Evolving Nuclear Family Paradigm

Hunter (2007, p.204) attributes the change in conceiving of marriage as an economic necessity to the rise in individualism, and the development of industry and wage labour in the second half of the 19th century, which meant that people were no longer compelled to marry for survival. It seems at this juncture that love as the dominant paradigm in marriage came into

¹⁴⁰ See Appendix II for details of Sections 61 and 62 of the *Offences Against the Person Act, 1861*.

¹⁴¹ I will revisit this issue later in this chapter.

¹⁴² I make reference to the decriminalisation of homosexuality in the United States later in this chapter.

being (see Bernstein, 2007, p.332; Hunter, 2007, p.204). This transition, coupled with an emergent realisation that children were a labour of love,¹⁴³ rather than a source of labour, may have formalised the separation of spheres into public and private, both of which demanded attention that was predicated on gendered roles and expectations. What I refer to as the ‘constitutionalisation’ of a prescriptive role for woman as wife and mother in the Irish family, against the backdrop of seemingly endless possibilities for men, irrespective of their civil status, is indicative of this separation.¹⁴⁴ This orderly division of labour between husband and wife (Barrett and McIntosh, 1990, p.28) is predicated on the appropriation of woman’s labour as wife and mother in the nuclear family.¹⁴⁵

Children: Care, Development and Welfare

With regard to the wider issue of same-sex marriage, the above reliance on gender complementarity is important. It informs and codifies normative assumptions surrounding marriage and family, particularly in the context of parenthood. I argue that the historical and contemporary preoccupation with the gendered ‘who’ behind the care of children has morphed somewhat into an emphasis on the ‘what’, i.e. child development and child

¹⁴³ There is a gendered dimension to caring labour in that it tends to be largely undertaken by women. See Daly (2004); Drew *et al* (1998); Orme (2001); and Ungerson and Kember (1997) for discussion. O’Connor’s (2009) analysis of the difficulties that are experienced by unmarried fathers *vis-à-vis* their children’s care sheds light on another dimension to gender in the context of family.

¹⁴⁴ Article 45 of our Constitution incorporates women and men within the realm of work, and it seems to acknowledge the importance of this in the context of familial responsibilities. However, as stated in Chapter One, a strict interpretation of Articles 12, 13, 14, 15, 18, 22, 25, 26, 27, 28, 30, 31, 32, 33, 34, and 35 presupposes that important public office holders are men. None of these articles are concerned with the private sphere. Article 41 refers to woman who ‘self-evidently’ morphs into mother in the private sphere. This almost imperceptible sleight of hand *vis-à-vis* woman (Barry, 1984, pp.2-3) serves to constitutionalise the gendered division of labour in Ireland.

¹⁴⁵ The embeddedness of this division is such that it is replicated in today’s formal labour market where women dominate the services or ‘servicing of others’ sector. The Central Statistics Office (2010) provides information with regard to the prevailing situation in Ireland, specifically, women’s over-representation in clerical and secretarial occupations, and under-representation at senior levels in the health and education sectors, notwithstanding the higher participation rates of women in both of these fields. It is also important to make the point that debates about the reconciliation of family life with working life really only came into being when women, *en masse*, began to defy gendered role expectations that were ‘out there’ ‘in’ social cognition (see van Dijk, 1993; 2006).

welfare in the context of the parenting that is done by lesbians and gay men. The prevailing dominance of the nuclear family paradigm, with the attendant rootedness of gender complementarity, are such that the demand for marriage equality has shifted attention away somewhat from gender and childcare *per se*. Instead, the issues of child development and child welfare have now become centre-stage because of the (non-normative) sexual orientation of parents. These have become important issues with regard to the distribution of marriage rights in this jurisdiction. For example, Professor Casey, who testified for the State in the matter of *Zappone and Gilligan* in 2006, asserted in a ‘Letter to the Editor’ of *The Irish Times* in 2008,¹⁴⁶ that there is overwhelming evidence indicating that children tend to do best when raised by a married mother and father (Casey, 2008a). This perspective hones in on the married status of parents. However, her position then turns into one that is grounded in biology when she states that there is a formidable body of research that confirms the common sense intuition that children tend to do best when raised by their two biological parents (see Casey, 2008b,c). This maxim then evolves into an emphasis on the children’s married biological parents (see Casey, 2008c). I argue that these ‘Letters to the Editor’ of *The Irish Times*, which were written in the context of the debate on same-sex marriage in Ireland, presuppose that it is both a particular adult relationship status and biological ties to children that denote the optimal family environment. This then facilitates Casey’s (2008b) belief that marriage in its current form warrants special status and support from the State (see also Iona Institute, 2007; 2010).¹⁴⁷ The subtleties that constitute her emergent position as regards marriage and

¹⁴⁶ *The Irish Times* is our oldest national daily newspaper (O’Brien, 2008, p.13). It holds an important role in public discourse in that some of its columnists have a public profile, such that their views can form part of our national broadcaster’s coverage of current affairs on radio and television. Similarly, contributions to its letters’ pages are often alluded to in this broadcaster’s current affairs programming, particularly in relation to controversial social and political issues. Persons with intellectual capital, such as academics, for example, regularly write ‘Opinion’ pieces and ‘Letters to the Editor’ in *The Irish Times*. For example, see Casey (2008a,b,c,d,e,f) in relation to the debate that is taking place in Ireland in relation to marriage and family in the context of the push for marriage equality.

¹⁴⁷ Professor Casey is a patron of the Iona Institute (see Byrnes, 2007; Ramsay, 2007).

family are pertinent, not least because she testified as an expert witness in *Zappone and Gilligan* with regard to child development research (see Casey, 2008c). This was an issue that ‘commonsensically’ entered the fray in terms of making a determination on the right of two women to have their marriage recognised in this jurisdiction.¹⁴⁸ This is indicative of the extent to which marriage and family are conceived of as one inseparable institution in Ireland.

Slippery Slope Arguments

Here, I elaborate on some of the ‘slippery slope’ arguments that invariably enter the fray in the debate on same-sex marriage. All of them rely on the ‘logic’ of difference as deficit / defect / deviance, which I theorised in Chapter Two by drawing upon Baumrind (1995) and Cameron and Cameron (1996). I reiterate that this strand of difference denotes a key aspect to the routine operationalisation of heteronormativity in Ireland.

Bestiality

The most offensive of the ‘slippery slopes’, and one that really hones in on the reactionary discourse surrounding same-sex marriage, is what I refer to as the ‘what’s next’ thesis. This suggests that the right to marry one’s cat or dog is next on the agenda (see Fee, 2007, p.435; Hull, 2001, p.216; Hunter, 2007, p.204).¹⁴⁹ This ‘whatever it is’, and variants of it, have been repeatedly suggested to me over the course of this research, both in

¹⁴⁸ I will revisit this issue in Chapter Five. Particular attention will be paid to the manner in which the issue of child development seamlessly morphed into the issue of child welfare. I argue that this is extremely problematic.

¹⁴⁹ Commenting on the divisive campaign surrounding the constitutional referendum on marriage in Hawaii in the late 1990s, Hull (2001, p.216) states that one of the media advertisements implied that the right to marry one’s children would be next if the introduction of same-sex marriage was not stopped. Hunter (2007, p.204) states that the historical arguments opposing interracial marriage in the United States in the 1960s mirror those now opposing same-sex marriage, and that the right to marry one’s sibling now appears to constitute the ‘logical’ progression of this agenda.

response to a seminar that I gave in relation to same-sex marriage, and during protests that I initiated outside the Oireachtas, which were informed by the 2004 enactment of the legislative ban on same-sex marriage.¹⁵⁰ Those reactions still manage to engender hopelessness in me with regard to the realisation of equality of respect (see Baker *et al*, 2004) for lesbians and gay men in Ireland. That people could rely on bestiality so as to ground their ‘whatever it is’ instils a pessimism in me that is difficult to counter. It suggests that there is a repertoire of knowledge (see van Dijk, 1997c) ‘out there’ ‘in’ social cognition (see van Dijk, 1993; 2006) *vis-à-vis* lesbians and gay men in Ireland, which implicitly relies on a ‘logical’ pathologisation that gives a seemingly commonsensical coherence to such a perspective. Moreover, it suggests that the articulation of such a sentiment is ‘acceptable’ because it is ‘safe’ to do so. This suggests that the stain and stench of criminalisation, which raised the spectre of bestiality, still lingers in Ireland, twenty years after we decriminalised homosexuality in 1993.

Bigamy

The ‘problem’ of same-sex marriage is such that the Irish organisation, European Life Network, raises the spectre of bigamy if the ‘standard of one-man, one-woman marriage’ is interfered with in Ireland, because there will be ‘no logical stopping point’ in terms of redefining marriage (see All-Party Oireachtas Committee on the Constitution, 2006, p. A62). This organisation relies on the ‘logic’ of ‘slippery slope’ theses in general, and the historical understanding of marriage in particular, to construct a seemingly self-evident threat to the institution of marriage, if its constitutional and legislative underpinning is interfered with. Given my earlier discussion in this chapter about the certainty of a husband’s

¹⁵⁰ The ‘what’s next’ thesis does not countenance a denial of marriage rights to persons on the basis of their (hetero) sexual orientation. The point that I wish to make here is that the ban on same-sex marriage is as ridiculous as the instituting of an opposite-sex ban.

progeny, it is conceivable that monogamy is derived from this patriarchal imperative,¹⁵¹ and that this may have informed the enactment of legislation on bigamy in the West, including Ireland. This 19th century law has stood the test of time in that bigamy is still illegal in Ireland (see Barrington, 2009, p.57).¹⁵² Moreover, I am not aware of any public imperative to repeal it. Therefore, the taint of criminality that is so routinely deployed here, presumably to give ‘commonsensical’ coherence to this organisation’s position, is quite disturbing. It is difficult to understand the network’s rationale for invoking the spectre of bigamy against the backdrop of its support for the State’s position *vis-à-vis* marriage, as is currently constituted in Ireland (see its submission to the All-Party Oireachtas Committee on the Constitution, 2006, pp. A59-A64). Given the State’s obligations under Article 41 of our Constitution,¹⁵³ the ‘logic’ of legislated for, and constitutionally sound, bigamy has to come from a source other than the State. It may hinge on a lesbian / gay demand for a repeal of the law on bigamy, of which I am unaware. It may rely on a socio-cognitive repertoire of knowledge (see van Dijk, 1997c) about the ‘necessarily’ promiscuous ‘Other’ (see de Beauvoir, 1988), which is a dynamic that Senator Norris alluded to in his powerful contribution to the Oireachtas record *vis-à-vis* civil partnership in Ireland (see Seanad Éireann, 2010a).

Polygamy

With regard to her opposition to same-sex marriage in the United States, Gallagher’s (2003) aversion to what she refers to as the ‘new unisex marriage vision’ is such that she deems polygamy to be ‘better’ than gay marriage in that at least polygamy represents “... an attempt to secure

¹⁵¹ I conceive of monogamy as fundamental to an intimate adult relationship. See Jackson and Scott (2004) for a critique of monogamy.

¹⁵² See Appendix II for details of Section 57 of the *Offences against the Person Act, 1861*.

¹⁵³ This will become apparent in Chapter Five.

stable mother-father families for children.”¹⁵⁴ Here, the uncritical acceptance of the necessarily gendered and heterosexualised imperatives of marriage, procreation and parenthood, actively construct the seemingly self-evident instability of families that are headed by married same-sex couples. The sheer ordinariness of this remark is quite extraordinary. It ‘commonsensically’ attaches instability to the latter type of family in a context where it simply cannot attach to polygamists, who have to be in opposite-sex marriages for Gallagher’s (2003) thesis to make sense. The extent to which such broad generalisations may make sense ‘out there’ is a measure of the rootedness and toxicity of heteronormativity, which is at the heart of much of the opposition to same-sex marriage.¹⁵⁵

Conclusion

In this chapter, I contextualised the dominant understanding of marriage in Ireland by drawing upon wider understandings of this social institution, which has evolved over time in the West according to prevailing social mores, norms and values. In this regard, Chapter Three denotes an important aspect to my discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011), which I discussed in Chapter One as part of my methodological considerations. In Chapter Three, I first elaborated on the historical underpinnings of marriage, which derived from deeply embedded patriarchal assumptions. These were implicitly grounded in an irrational

¹⁵⁴ Maggie Gallagher co-wrote a book regarding marriage with Professor Waite, who testified as an expert witness in the matter of *Zappone and Gilligan*. See Waite and Gallagher (2000).

¹⁵⁵ Commenting on *Lawrence v. Texas* two months prior to the U.S. Supreme Court ruling on this case in June 2003, which centred on the criminalisation / decriminalisation of homosexuality, Republican Senator Santorum is reported to have stated that if the court were to endorse a right to consensual gay sex within the home, that would imply a right to bigamy, polygamy, incest, adultery, and anything (see Anon., 2003b). At the time, he was chairman of the Republican Conference in the U.S. Senate and he was third in line for his party’s leadership (see Anon., 2003b). The timing, thrust and tenor of this remark, as if it were perfectly acceptable, betray a characteristic that really does not befit a public representative. His remark suggests a reliance on some understanding of homosexuality that is ‘out there’ ‘in’ social cognition (see van Dijk, 1993; 2006), which may form part of the routine operationalisation of heteronormativity in the United States. It is so repugnant to human dignity that it engenders hopelessness in me with regard to the realisation of equality of respect (see Baker *et al*, 2004).

fear or suspicion of female sexuality, which ‘commonsensically’ produced the discourse of family order and stability. These dynamics ‘justified’ the creation of a legislative framework underpinning marriage, which enshrined male dominance and control over women. It helps to explain the genesis of gendered laws on adultery, for example, and the patriarchal preoccupation with virginity and fertility. It also helps to explain the imperative of marital procreation. The instituting of the status of illegitimacy codified this imperative as ‘truth’ by ‘self-evidently’ producing the antithesis of (marital) family order and stability, i.e. unmarried woman with child. In this chapter, I suggested that what has been conceived of as the general imperative of social order and stability derives from the preoccupation with family order and stability. Indeed, Article 41.1.2 of our Constitution conceives of the marital family as the ‘necessary basis of social order’. This helps to explain why the issues of contraception and divorce engendered such controversy in Ireland in the late 20th century. I now elaborate on these controversies in Chapter Four.

CHAPTER FOUR

Irish Ways and Irish Laws: Aspects to Marriage, Family and Sexuality

As a society we must acknowledge our continuing immaturity in the area of sexuality. How sexuality is acknowledged, expressed, recognised and not celebrated in our society is something with which we must come to terms.

Senator Boyle, Seanad Éireann, 2010a, para. 163

Introduction to Chapter

This chapter elaborates on some of the constitutional and legislative developments that took place in this country with regard to the issues of contraception and divorce. This will shed some light on the normative construction of marriage and family in Ireland. Therefore, my upcoming analysis is in keeping with my discourse-historical approach to research (see Wodak, 1997b; 1999; 2001; 2011). My focus in Chapter Four is on the ways in which such developments were largely conceived of as being either contrary to, or supportive of, the imperative to protect marriage and family, and the imperative to recognise and vindicate personal rights. This chapter denotes an elaboration on events that occurred over a period of three decades, from the 1970s onwards. It relies primarily on text from two genres of discourse (see Wodak, 1997b), i.e. parliamentary debates and court rulings. I also make reference to what could be conceived of as an institutional discourse *vis-à-vis* contraception and divorce emanating from the Catholic Church in Ireland. Identifiable themes emerge throughout the two sections of this chapter, and all are relevant to this research. They include the following: the role and responsibility of the judiciary and the legislature, wherein our constitutional courts and national parliament denote two distinct and independent spheres of governance; the dominant

understanding of family, i.e. the nuclear family paradigm; the preoccupation with social chaos and disorder in the wake of the perceived destruction of the marital family; and the significance of both our Constitution and constitutional court rulings. This elaboration in Chapter Four demonstrates that there are parallels between historical controversies surrounding the issues of contraception and divorce, which centred on marriage, family and sexuality, and the controversy that surrounds same-sex marriage in Ireland today.

Section One: Contraception

Introduction

To say that the issue of contraception convulsed both Irish polity and society for decades is not an overstatement. This section provides the reader with some sense of those dynamics. The focus is not on the merits or otherwise of proposed or enacted legislation on contraception *per se*. I do not provide an exhaustive analysis of the myriad debates that took place on this issue. Similarly, this section does not denote a comprehensive analysis of the landmark Supreme Court ruling in *McGee v. Attorney General*. Rather, I elaborate on aspects to the constitutional and legislative pathways surrounding contraception that characterise the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage and family in Ireland, against the backdrop of determining and realising a constitutional right. These issues are at the heart of Articles 41 and 40 of our Constitution respectively. Much of the controversy surrounding artificial contraception in Ireland stemmed from the vociferous opposition of the Catholic Church, which exercised tremendous influence over Irish polity and society for decades. Because of this dynamic, I include aspects

to the Church's position on the matter so as to contextualise my analysis.¹⁵⁶ This hones in on the seamless interplay between the civil and the canonical, which was informed by a particular conceptualisation of marriage and family. Whilst I rely on rather lengthy quotations at times, particularly with regard to extracts from Oireachtas debates that took place in the 1970s and 1980s, they are all warranted. They serve to contextualise the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of Articles 40 and 41 of our Constitution, which were at the heart of the proceedings, the deliberations and the ruling in *Zappone and Gilligan*.

Perspectives on Contraception

Whyte (1980, p.24) states that after the Civil War in Ireland in the 1920s, the hierarchy was quite pessimistic about the state of the country. While bishops' pastoral letters detailed denunciations of intemperance, violence and other evils, the issue that sparked the most alarm was the decline in sexual morality (Whyte, 1980, p.24). This tended to be attributed to what was deemed the bad book, the indecent paper, foreign dancing, and the immodest fashion of female dress (Whyte, 1980, pp.25-27).¹⁵⁷ While the Government was eager to protect Catholic moral values in the fledgling Free State (Whyte, 1980, p.36),¹⁵⁸ Hug (1999, p.78) asserts that from the 1920s, the hierarchy put pressure on the Government to impose and regulate a Catholic construction of sexuality. In relation to artificial contraception, Church teaching deems it to be immoral because it contravenes the primary purpose of sexual activity within marriage, which

¹⁵⁶ In my discussion, the term 'Church' refers specifically to the Catholic Church. Moreover, references to the hierarchy or bishops infer membership of the Catholic Church.

¹⁵⁷ The latter dynamic implies either an obsession with female sexuality or a deliberate heightening of female sexuality so as to validate a particular canonical standpoint, which could then justify government policy against the backdrop of the intertwining of Church and State. See Cahill (2005, pp.181-182) for a discussion on the manner in which some supporters of traditional family values in the United States heighten the sexuality of lesbians and gay men in an effort to mobilise opposition to anti-discrimination legislation.

¹⁵⁸ The Free State refers to the formation of our own sovereignty after achieving Independence from Britain.

is procreation (see Hug, 1999, p.76; Ranke-Heinemann, 1990, pp.260-261).¹⁵⁹ This philosophy is evident in the following extract:

Artificial methods are equivalent to claiming a dominion over the sources of life that belongs only to God. They can also be seen to diminish the total gift of one partner to the other. The unitive and procreative meanings of the sexual act are divided from each other and so marital intercourse is made less than what God intended it to be. This is contrary to God's will for marriage and the couple.

Archbishop McNamara, cited in O'Toole, 1986, p.32

Because the line between Church and State was often blurred in Ireland, the enactment of aspects to legislation such as the *Censorship of Publications Act, 1929* and the *Criminal Law Amendment Act, 1935* can be seen as denoting government attempts to allay episcopal anxieties about the decline in morality (see Whyte, 1980, p.49). Section 16 of the 1929 legislation prohibited the printing, sale and distribution of publications that advocated contraception, while Section 17 of the 1935 legislation prohibited the importation and sale of contraceptives in Ireland.¹⁶⁰

The publication of two articles in *The Irish Times* in 1971 may have been pivotal in terms of generating public discourse about the role of the State *vis-à-vis* contraception. The first article reported on the proceedings of a conference pertaining to civil law and morality where the following perspective was articulated:

¹⁵⁹ See Hug (1999, pp.85-87) for a discussion on the papal encyclical entitled *Humanae Vitae*, which holds that because sexual acts need to be open to procreation, artificial contraception intrinsically contradicts the moral order.

¹⁶⁰ See <http://www.bailii.org>

Even though the laws do not forbid the practice of contraception – this would be an intolerable invasion of privacy – they do interfere with the provision of contraceptives. ... The question of the contraceptive law cannot be debated on the objective morality or immorality of contraception itself. If the original law took its stand on this it was not entitled to do so. Neither can the question be decided by the private conscience of the legislators because the law must reflect a general consensus of the people to whom it applies.

Anon., 1971a

This extract provides a sense of what could be conceived of as an alternative understanding of the laws on contraception that prevailed in Ireland at the time. It also serves to contextualise an upcoming perspective from a well-known archbishop. The second article in *The Irish Times* attributed the following remarks to Senator Robinson who, along with two colleagues in the Seanad, sought to change the law on contraception:¹⁶¹ “The criminal law, by prohibiting the availability of contraceptives in the country, effectively prevents people from following their own consciences in the matter without the risk of being criminals. This is a Civil Rights issue.” (Anon., 1971b) Here, the senator’s conceptualisation of the issue is clear. Moreover, she implicitly understood that her role as a legislator was important in terms of furthering decriminalisation in this area. These combined rumblings that were aired in *The Irish Times* may have prompted the subsequent publication of a well-known archbishop’s pastoral letter regarding contraception and the law. The following denotes an extract from Archbishop McQuaid’s letter to the faithful in his diocese:

¹⁶¹ Three senators tabled proposals that would have amended / repealed the criminal law on contraception that prevailed in Ireland at the time. However, these were ultimately rejected (see Seanad Éireann, 1971).

By contraception is meant every action which, in anticipation of the marriage act, or in the accomplishment of that act, or in the development of the natural consequences of that act, proposes, either as an end or as a means, to make procreation impossible. ... Any such contraceptive act is always wrong in itself. To speak, then, in this context, of a right to contraception, on the part of an individual ... is to speak of a right that cannot even exist. When one considers the use of marriage by Christians who have received the Sacrament of Marriage, the natural use of marriage is not only a reasonable, responsible and planned action; it is also a sanctified act that can merit an increase of God's grace and a reward in eternal life. This is the authentic teaching of the Church, guardian, by Christ's own appointment, of the Sacrament of Matrimony. ... If they who are elected to legislate for our society should unfortunately decide to pass a disastrous measure of legislation that will allow the public promotion of contraception and an access, hitherto unlawful, to the means of contraception, they ought to know clearly the meaning of their action, when it is judged by the norms of objective morality and the certain consequences of such a law. ... One can conceive no worse fate for Ireland than that it should, by the legislation of our elected representatives, be now made to conform to the patterns of sexual conduct in other countries. ... It may well come to pass that, in the present climate of emotional thinking and pressure, legislation could be enacted that will offend the objective moral law. Such a measure would be an insult to our Faith; it would, without question, prove to be gravely damaging to morality, private and public; it would be, and would remain, a curse upon our country.

Archbishop McQuaid, cited in Anon., 1971c

This extract conveys the breadth and depth of the power of the Catholic Church in Ireland at that time in our history, not least because it normalises the seemingly commonsensical intertwining of Church with State. The effortless conflation of the civil with the canonical instils an arrogance that presumes an authority to speak the 'truth', not just to the huddled masses, but also to the legislature. There is also an interesting parallel here between the positioning of the imperative of marital procreation that then dictates

that a right cannot exist, and the State's framing of the issue of same-sex marriage in *Zappone and Gilligan*.¹⁶²

Pathway from Illegal to Legal: *McGee v. Attorney General*

With regard to contraception, the Irish pathway from the criminal to the constitutional was paved by the actions of Mary McGee. She was a married woman and mother whose pregnancies had been marred by serious difficulties. On the basis of medical advice against future pregnancy, she opted for a contraceptive device that necessitated the importation of a spermicide. When customs officials seized one such order in 1971, she sought recourse through the courts (see Hug, 1999, pp.94-97). Her case came before the High Court in 1972, where Justice O'Keeffe held that the rights that are guaranteed by the Constitution did not include a right to privacy (see [1974] I.R. pp.284-337, at pp.289-293). She appealed this decision to the Supreme Court, where the majority held in *McGee v. Attorney General* that the ban on the importation of contraceptives constituted an unjustified invasion of the personal right to privacy in marriage (Connolly, 2003, p.239; Hug, 1999, p.97).

While Chief Justice FitzGerald dismissed her Supreme Court appeal (see [1974] I.R. pp.284-337, at p.305), he made the following observation: "There is no definition of the word "family" in the Constitution." (see [1974] I.R. at p.302) Similarly, Supreme Court Justice Griffin, who found for the plaintiff (see [1974] I.R. at p.336), stated the following over the course of his deliberations in *McGee*: "The word "family" is not defined in the Constitution but, without attempting a definition, it seems to me that in this case it must necessarily include the plaintiff, her husband and their children." (see [1974] I.R. at p.334) These interpretations of Article 41 of

¹⁶² I will revisit this issue in Section One of Chapter Five.

our Constitution are important, and I will refer to them throughout this thesis. Also of significance here in terms of the production and dissemination of ‘truth’, is that while these two judges deliberated over the same legal facts in the same constitutional case, their rulings were entirely different in terms of the eventual outcome for the plaintiff.¹⁶³ The following extract from these proceedings may shed some light on this phenomenon. For the majority, Justice Walsh stated:

According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.

Justice Walsh, [1974] I.R. at p.319

Here, Justice Walsh makes a crucial point about the relevance of prevailing social mores and norms in the context of judicial interpretation of our Constitution. There is a sense that this is the dynamic that breathes life into, and maintains the relevance of, this important document. Nonetheless, while the plaintiffs in *Zappone and Gilligan* asserted that the Constitution was a living instrument that should be interpreted in line with modern social and legal conditions, the High Court held in 2006 that there were limits to its reinterpretation (Kilkelly, 2006).

Another insight that is garnered from Justice Griffin’s ruling in *McGee* derives from aspects to his interpretation of Article 40.3.1, which pertains to the role of the State *vis-à-vis* the respect, defence and vindication of the

¹⁶³ Similarly, the overturning of the High Court ruling on appeal underscores this phenomenon.

personal rights of Irish citizens.¹⁶⁴ An important background dimension here is that Justice Griffin invoked the High Court ruling in *Ryan v. Attorney General* (see [1965] I.R. pp.294-353), in which Justice Kenny ruled that the right to marry denoted a personal right deriving from Article 40, even though it is not expressly enumerated in our Constitution (see [1965] I.R. at p.313; see also [1974] I.R. at pp.332-333).¹⁶⁵ In *McGee*, Justice Griffin ruled that “... the guarantee of the State in its laws to respect the personal rights of citizens is not subject to the limitation “as far as practicable” nor is it circumscribed in any other way.” (see [1974] I.R. at p.334) This is a profound statement. What could be seen as a classic ‘get off the hook’ clause for the State, which forms part of the English text of Article 40.3.1, was deemed to be unacceptable by a Supreme Court judge. Justice Griffin’s rationale in this regard derived from the Irish language version of Article 40.3.1.¹⁶⁶ Here, there is an implicit reliance on Article 8.1 of our Constitution, which stipulates that the Irish language denotes our national language, and Article 25.5.4, which holds that in case of conflict regarding the text of the Constitution, the text in our national language shall prevail.¹⁶⁷ In the context of determining the right to marital privacy with regard to the issue of contraception, Justice Griffin held that the Irish language text of Article 40.3.1 meant that there was a guarantee to not interfere with citizens’ constitutional rights (see [1974] I.R. at pp.334-335). He subsequently held that invoking the criminal code in the context of contraception constituted “... an unjustifiable invasion of privacy in the conduct of the most intimate of all their personal relationships.” (see [1974]

¹⁶⁴ This is a fundamental precept, and one that I allude to throughout my work. My methodological orientation is consistent with this philosophy.

¹⁶⁵ The Supreme Court accepted Justice Kenny’s interpretation of Article 40 (see [1965] I.R. at pp.344-345). It is an established precept that our personal rights extend beyond those that are expressly stated in Article 40 of our Constitution.

¹⁶⁶ See Appendix III for details.

¹⁶⁷ Here, I acknowledge the significance of de Londras (2006) in terms of my knowledge and understanding of this Irish language dynamic. Justice Griffin did not make express reference to Articles 8 or 25 over the course of his deliberations in *McGee*. Therefore, the importance of this was lost on me when I first read the *McGee* judgment, because I was unaware of the point that de Londras (2006, p.1) had made at that time in the research process.

I.R. at p.335) This extract is important in terms of my upcoming interpretation of two extracts from parliamentary debates surrounding proposed legislation on contraception. There are also some general points that are important in terms of Justice Griffin's ruling in *McGee*. Firstly, the right to marry denotes a constitutional right in this jurisdiction. That this then presupposes that the right to marital privacy also denotes a constitutional right is important because it acknowledges not just the scope of Article 40, but also that of the right to marry. Justice Griffin's perspective on the role of State *vis-à-vis* the vindication of constitutional rights, particularly in the context of the enactment of legislation, is also profound. These dynamics engender hope in terms of the push for marriage equality in Ireland.

The general significance of *McGee* lies in the creation of a public space that validated the detachment of hetero-sex from procreation, albeit with the caveat that this was conceptualised in terms of marital privacy, rather than privacy *per se*. This is important in the context of prevailing social norms in the sense that, prior to the *McGee* ruling, this separation was largely unthinkable. It is conceivable that this Supreme Court ruling contributed to the gradual normalisation of the detachment of sex from marriage and family in contemporary Irish society,¹⁶⁸ not least because it impelled the legislature to confront its justification for prohibition.¹⁶⁹

¹⁶⁸ Here, I refer to the manner in which sexual activity can occur outside marriage and without it being open to procreation.

¹⁶⁹ It is also important to acknowledge the courage of Mary McGee and her counsel, whose actions and determination brought about the Supreme Court case in the first instance.

Oireachtas Debates on Contraception

Extract I

A legislative proposal that the Government put forward in 1974 provided for the sale of contraceptives in pharmacies to married persons (see Dáil Éireann, 1974a, paras. 285-290). Deputy Flanagan, who was a member of the governing party, was a vocal opponent of the *Control of Importation, Sale and Manufacture of Contraceptives Bill, 1974*. He articulated the following during a parliamentary debate on the matter:

This Bill is an attack on the family. It is an attack on society. It means to smash the family to its very foundation. ... This Bill is an attack on the family under the guise of rights of citizens, civil rights, constitutional requirements. [...] Anything that is unnatural damages our society. The Church has the wisdom of ages as well as the authority of God behind all its teachings but what have the other side to show? They have nothing to show only the evil and disastrous consequences that follow from the wrecking of family life and the complete disorganisation of the family as a unit. ... Why should we have to change our laws, to adopt laws that have proved disastrous in other countries in regard to this matter? ... I agree that it is this House which should be the judge of the common good. Interpretation of the law is the duty of the Supreme Court. It was believed and intended that the Legislature should be able by its own judgment to decide—not the courts. The courts are there to interpret the laws but have not the responsibility this House carries. The Legislature have the responsibility of working in the public interest and of seeing in the fashioning of laws that the rights of the individual, as an individual, and the rights of the community do not conflict and are properly co-ordinated. That is the legal position. At no time did this House ever hand over to the Supreme Court the right to legislate. ... I want to tell the Minister for Posts and Telegraphs and every other Minister that the Irish Hierarchy are all busy men who do not dabble in politics. In the numbers of years that I have been a Member of this House I have had no knowledge of the Irish Hierarchy ever telling legislators what should be done or what should not be done. Occasionally

they issue statements as to what the true moral law is in relation to certain aspects of legislation. ... I accept *Humanae Vitae* in all its form, because I accept the advice so readily and freely given by the Holy Father, in relation to the granting and giving of God's greatest gift, the gift of life. ... I would ask the legislators to reply to the one question addressed to them by the Irish Hierarchy and that is whether this legislation, weighing up all circumstances, will do more harm than good to the society in which we live. If they calmly study it, they must conscientiously answer that a Bill of this kind is not in the best interests of our present day Irish society and will not be in the interests of the common good but will be a means of planting the seeds of immorality and will also be encouraging and giving State recognition to what is unnatural. They will be recognising as right what the Church in its wisdom through the ages, has taught to be wrong. That is the responsibility of legislators.

Deputy Flanagan, Dáil Éireann, 1974b, paras. 926-952

It is important to make the point that this extract denotes one of many contributions to Oireachtas debates surrounding contraception at the time. I include it here because it denotes a fascinating framing of a social issue that hones in on relevant aspects to this research. Perhaps the most pertinent in terms of discourse is the seemingly self-evident way in which a particular 'truth' is postulated, verified and justified by an authority that is derived from legislative office. It presumes to speak for a particular constituency through the use of all-inclusive terms such as 'we' and 'our'. This helps to normalise a necessarily unproblematic conflating of the civil with the canonical. Inevitably and ever so rationally, this accords with what is deemed to be the proper functioning of the legislature. Yet, there is an attempt to assuage fear about the intertwining of Church and State. Nonetheless, it is precisely their inextricable linking that enables the above 'truth' regarding familial / social chaos and destruction to come into being. Moreover, it all hinges on the seemingly commonsensical incompatibility between a particular conceptualisation of family, which is derived from Article 41, and the realisation of a constitutional right, which is derived

from Article 40, although reference to these articles is not expressly made in the above extract from the Dáil record.

The ‘commonsensical’ invoking of disorder and destruction is a recurring theme in much of the prevailing heterosexist opposition to same-sex marriage. For example, Representative Barr stated the following with regard to this issue in the United States in 1996: “The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.” (see Congressional Record, 1996, p. H7482; see also Cahill, 2005, p.169) Similarly, Deputy Flanagan’s above reference to ‘State recognition to what is unnatural’ informs some of the discourse surrounding heterosexist opposition to same-sex marriage in Ireland. It arose in two ‘Letters to the Editor’ of *The Irish Times* that were published over the course of the High Court proceedings in *Zappone and Gilligan*, although opposition was framed in terms of the State’s duty to protect marriage because its very nature is procreative. This then produced the ‘truth’ that marriage cannot be redefined and that the State has no role to play *vis-à-vis* the recognition of same-sex relationships (see Larkin, 2006; Mulligan, 2006).

Perhaps the most problematic aspect to the above extract from the Oireachtas record is the effortless way in which it posits ‘truth’ about the workings of the Supreme Court. Here, I reflect upon Justice Griffin’s assertion in *McGee* regarding the role of the State *vis-à-vis* the enactment of legislation and the vindication of constitutional rights. My sense is that the above extract from the Oireachtas record suggests unease about those words and their resonance beyond the Supreme Court. Moreover, there is no sense here that it is precisely the abdication of responsibility with regard to issues that the legislature is reluctant to confront, such as those

pertaining to sexuality, that requires citizens to seek redress through the courts (see Seanad Éireann, 1976, paras. 1077-1078). The Oireachtas ultimately rejected the *Control of Importation, Sale and Manufacture of Contraceptives Bill, 1974*, facilitated, in part, by Deputy Flanagan's and Taoiseach Cosgrave's vote against it as members of the governing party that proposed and drafted the legislation (see Dáil Éireann, 1974c, paras. 1266-1269; Ferriter, 2009, pp.419-420).

Extract II

It took a further five years before legislation was enacted that provided for family planning services with the attendant availability of artificial contraceptives under certain conditions (see Dáil Éireann, 1979, paras. 320-335). As part of his review of the *Health (Family Planning) Act, 1979*, the new minister tabled amendments in 1985 that would go some way towards providing a comprehensive family planning service for those who required it (see Dáil Éireann, 1985a, para. 2582). For instance, the *Health (Family Planning) (Amendment) Bill, 1985*, provided for the sale of non-medical contraceptives without a prescription to persons over the age of eighteen through authorised outlets (see Dáil Éireann, 1985a, paras. 2587-2589). Deputy Flanagan made the following contribution to the debate on this proposed legislation:

... [C]ontraception and divorce constitute the destruction of the family as the fundamental unit of society. ... This is a matter for the legislators, and our fundamental right is to legislate for the common good. ... I am speaking for the people who cherish traditional Christian values, proper upbringing and, above all, the family as a fundamental unit of society. ... Our Constitution guarantees protection for the family as the fundamental unit of society, but I wonder if this contraceptive Bill, as I call it, should not be examined by the Supreme Court to see if this is not an intrusion on the family and if it is not failing to protect the family, because making contraceptives available to young members of a family, in my opinion, is failing to protect the family, the fundamental unit of society. ... It is the duty of men and women in public life to listen to the truth and, when the truth is spoken, to act on it. If churchmen do not give guidance to public representatives and alert their consciences, where else can advice and guidance come from? [...] I say to those who have been critical of some of the statements made by the bishops — passing reference to this was made by the Minister this morning — that the Church has a very clear duty to proclaim the moral law and the official teaching of the Church on these issues and to address legislators and people alike; and when the Church points out what is right and wrong then it is a matter for the legislator as to whether he heeds the warning and the consequences to Irish society. This Bill is solely the responsibility of Parliament. [...] This Bill will hurry the people down the slippery slope of moral decline. I as a legislator will have no hand act or part in speeding up the moral decline of the nation. ... I regard the family as being based on marriage but the family the Minister is referring to in the Bill is the single unmarried teenager, who is being provided with facilities for family planning although he or she is not a family. ... To me a family is the result of a union between man and woman after marriage. ... The Bill before us is part of the overall plan of a small but very powerful group of politicians who are being advised internationally to smash the family.

Deputy Flanagan, Dáil Éireann, 1985a, paras. 2618-2638

This extract evokes the general tenor of Deputy Flanagan's earlier contribution to the Dáil record. Here, the responsibility that attaches to public representation and legislative accountability demands an authority that presumes to speak the 'truth' to a constituency comprising people who

are deemed to necessarily share the same belief system with regard to marriage, family, sexuality, and religion. This authority turns into arrogance when it is informed by a seemingly commonsensical deference to an unelected constituency, i.e. the Church. A particular definition of the family that is deemed to derive from our Constitution ordains the ‘truth’ about the necessarily destructive wherewithal of legislation pertaining to human sexuality, although it is conceived of here in terms of morality. This conflation of sexuality with morality, or more precisely, conflating immorality with the detachment of sex from marriage and family, fosters an arrogance that presumes authority on the unconscionable and the potentially unconstitutional.¹⁷⁰ Nonetheless, the successful passage of this legislation through the Oireachtas, albeit by a slim majority (see Dáil Éireann, 1985b, paras. 452-456; Hug, 1999, p.118), meant that the separation of sexual activity from both marriage and procreation was now reflected in Irish law.

Section One: Concluding Remarks

This discussion focused on aspects to the legalisation of contraception in Ireland. It highlighted important themes, such as what could be conceived of as dominant understandings of marriage and family, the preoccupation with social chaos, and the significance of constitutional court rulings. Moreover, one legislator’s understanding of the marital family implicitly invoked tension between Articles 40 and 41 of our Constitution. This is an important point that recurs in Chapters Five and Six, both in terms of my analysis of the 2006 High Court ruling in *Zappone and Gilligan*, and my

¹⁷⁰ Here, I refer to Deputy Flanagan’s remark about referring the proposed legislation to the Supreme Court. Under Article 26 of our Constitution, the President of Ireland can refer a bill to the Supreme Court so as to ascertain whether the proposed legislation, either in part or in its entirety, is repugnant to the Constitution. If the Supreme Court finds that part or all of the proposed legislation is repugnant to the Constitution, the President must refuse to sign it into law. Therefore, the proposed legislation cannot become law in Ireland. See Barrington (1992, p.169) in this regard. See also Appendix I for details of Article 26 of the *Irish Constitution (1937)*.

analysis of some Oireachtas debates that took place in 2009 and 2010 in relation to the introduction of civil partnership in Ireland. An additional point here relates to two important elements in my CDA tool kit, i.e. access to discourse (see Fairclough, 1989; van Dijk, 1993; van Dijk, 1996) and the discourse access profiles (see van Dijk, 1993) of elites. With regard to the issue of contraception, the above discussion implicitly captured the access and profiles of archbishops, judges and legislators, and how these were implicitly relied upon to posit a myriad of truths about constitutional rights and the role of the State *vis-à-vis* their vindication. Many of the themes that emerged in Section One of Chapter Four are also apparent in the circumstances surrounding the eventual introduction of divorce in Ireland in the 1990s, which is the focus of immediate analysis.

Section Two: Divorce

Introduction

Of the two issues that are the subject of analysis in this chapter, divorce is most aligned to marriage and family because it acknowledges the phenomenon of marital breakdown. While the legislature effectively banned divorce in the 1920s (see Dáil Éireann, 1925), absolute prohibition was not enshrined until the ratification of our Constitution in 1937. In this section, I first outline the circumstances surrounding the coming into being of the constitutional ban on divorce. I then discuss aspects to the constitutional referenda that took place in 1986 and 1995 by honing in on institutional, political and public discourse *vis-à-vis* divorce in this jurisdiction. Similar to my discussion on contraception, this section is not meant to denote a comprehensive analysis of divorce *per se*. Rather, I highlight aspects to Oireachtas debates, for example, surrounding divorce that emphasised the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage and family in Ireland in the 1980s and 1990s. Decades later, this struggle was apparent in the matter of *Zappone and Gilligan*.

The 1937 Constitutional Ban on Divorce

While addressing the Seanad in 1981 about the importance of our Constitution keeping pace with social change, Taoiseach FitzGerald of Fine Gael made reference to former Taoiseach de Valera's drafting of this document amid the hierarchy's hostility towards his ruling Fianna Fáil party (see Seanad Éireann, 1981, paras. 180-181).¹⁷¹ de Valera's dilemma

¹⁷¹ Fianna Fáil was the dominant political party in Ireland for decades. I reiterate that the term 'taoiseach' refers to our primeminister.

was such that if the hierarchy publicly opposed the Constitution, it was assumed that the referendum that was required to ratify it would be defeated. Therefore, compromise with the Church was crucial so as to nullify any opposition. While the legislature did debate the issue (see Dáil Éireann, 1937, paras. 1882-1887), it acquiesced to the hierarchy's insistence that a ban on divorce was warranted. It was subsequently enshrined in our Constitution, thereby furthering the intertwining of the civil with the canonical.

The First Referendum on Divorce in 1986

While constitutional change pertaining to divorce did not take place in Ireland until 1996, following the outcome of the 1995 referendum, the impetus for change began in the 1970s. For instance, one of the country's main political parties, i.e. Fine Gael, called for the removal of the ban at its annual congress in 1978 (see Dáil Éireann, 1986a, para. 450). A referendum to remove the ban was first put to the people in 1986. The most vocal opposition to divorce came from the Catholic Church. It tended to focus on two issues: protection of the institution of marriage and family; and the concept of indissolubility. Archbishop McNamara stated the following in an interview that was published prior to the holding of the first referendum:

Marriage in our Constitution has been understood as a life-long commitment and this understanding was accepted by western society in general until comparatively recently. ... In Irish Constitutional law the institution of marriage is seen as being antecedent to the State and its laws. It is outside the competence of the State to determine the nature of marriage as dissoluble: that would be to completely reverse the whole tradition which recognises that families are not made by the State, that the meaning of marriage is not adjustable to what circumstances at a particular time may seem to some to demand. To suggest that the State has the power to determine the meaning and nature of marriage is something I could not accept. The family, as designed by God, and as understood by the tradition in which western legal systems have their roots, is based on the union of man and woman in marriage for life. This is the family as understood in Articles 41 and 42 of the Irish Constitution. ... If divorce legislation were to be introduced, it would seem to conflict with the whole tenor of what the Constitution has to say in regard to marriage and the family, and not just with the existing Constitutional prohibition on divorce. The introduction of divorce and re-marriage could well lead to increasing pressure that the very notion of marriage and the family as understood by the Constitution should be changed. There is a fundamental question at issue here.

Archbishop McNamara, cited in O'Toole, 1986, p.22

This extract is quite contradictory in that, on one level, there seems to be an imperative to distinguish the civil and the canonical from the constitutional. Making the rather prescient point that marriage existed prior to the drafting and ratification of our Constitution underscores this philosophy. However, his reliance on a particular conceptualisation of constitutional law then seems to create tension between the civil and the canonical. Yet, he relies on the constitutional to conflate the civil with the canonical. In terms of my thesis, a number of important issues emerge from the above extract. Firstly, the Irish State does have the competency to determine in some way the meaning of marriage. The enactment of legislation over three centuries

with regard to this institution is testament to that.¹⁷² That this meaning can be contested in constitutional cases or referenda does not detract from that. Secondly, the mere holding of the referendum on divorce, irrespective of its outcome, was an indication to the people that the State was prepared to concede the notion that the prevailing constitutional position did not necessarily protect the institution of marriage. Moreover, the holding of the referendum implied that the suggested change to Article 41 was intended to be consistent with the State's obligation to protect marriage and family. The following extract from the Oireachtas record underscores all of these points, and all are relevant to my thesis:

Those who support the introduction of divorce risk the accusation of being anti-family and anti-marriage. That glib, facile smear is all pervasive against those who wish to see change. I find it disturbing because it is far from being the truth. It is from a profound sympathy with those families who are trapped in broken marriages and of those families who are forced to exist outside of marriage that I advocate divorce. I do not go for the hypocrisy of annulments, giving a cloak of sanctity to further liaisons. That is theological hypocrisy that I as a Catholic, a legislator and, more particularly as a married person, find patronising, repulsive and unacceptable. Above all else, the annulment process, the criteria used and the ultimate agreement to granting the annulment are, in my view, destructive of marriage. It is the kind of divorce I do not want to see here. All of us would prefer to live in a society in which every family was happy and every marriage a success but we know that, despite good intentions, marriage vows and the force of legal and social sanctions, marriages break down. No amount of theological analyses, the application of social principles or a veneer of compassion can eliminate the fact that marriages break down, irretrievably, irrevocably and in totality. I find it difficult to understand how people cannot accept that simple human reality. ... Marriages have always broken down. They broke down before 1937 and they have broken down since then but in the past economic and social pressures kept the parties in a failed marriage under the same roof. ... The choice is clear. We can continue to do nothing on the basis that the legal concept of

¹⁷² See Appendix VI for some details in this regard.

indissolubility of marriage is more important than giving formal legal protection to an increasing number of families, or we can face the reality of marriage breakdown in our society and provide a mechanism whereby the parties in a failed marriage and involved in second unions can have redress and protection at law. ... The proposed referendum will give the majority of Irish people an opportunity to vote on the kind of political democracy they wish to see develop in this island. The present prohibition on divorce in the Constitution conflicts with what a significant minority of people on this island consider to be a civil right. ... The minority Churches believe in the indissolubility of marriage but yet see no contradiction in allowing divorce as a civil right. Is the legal concept of the indissolubility of marriage more important than the principle of respecting the rights of minorities? [...] It is argued that if divorce is introduced, the legal concept of a permanent, indissoluble marriage and family home will be revoked and marriage will become a temporary arrangement at the mercy of one partner. ... Despite the legal concept of the indissolubility of marriage, marriages are breaking down and increasingly informal families are being formed outside marriage. ... The legal concept of a permanent marriage is not preventing marriage breakdown. The prohibition on divorce is preventing informal families from benefiting from the legal protection which our society affords to families based on marriage. ... I reject — and this is a personal view which I do not propose to impose on everybody — the assertion that divorce will have a devastating effect on the constitutional rights and the protection of every married family in the State. ... Divorce, unlike annulment, does not have the effect of establishing that a marriage never existed. A marriage which ends in divorce was a valid marriage. It does not go through the hypocrisy of annulment which says that the marriage never existed. That is a piece of theological hair-splitting I have never been able to understand. A marriage which ends in divorce was a valid marriage for the period it lasted and therefore is entitled to the continuous protection of the State where necessary.

Deputy Desmond, Dáil Éireann, 1986b, paras. 1320-1329

While this quotation denotes a rather lengthy extract from the Dáil record, it is warranted. It deems proposed constitutional change to Article 41 consistent with the imperatives to affirm and protect marriage, family, and minority rights. Here therefore, there is no invoking of tension between

Articles 40 and 41. Moreover, such change is not deemed to be tantamount to altering the meaning of marriage. While the extract suggests that the notion of family diversity might have been inconceivable at the time, the minister's willingness to confront an important social, legal and constitutional issue is quite apart from what could be seen as sanctimonious hand-wringing regarding the status quo. The above extract from the Oireachtas record is also important in terms of reflecting on the State's role *vis-à-vis* its obligations under Articles 40 and 41 of our Constitution. This was a recurring theme in the 2009 and 2010 parliamentary debates on civil partnership that I allude to in Chapter Six. Indeed, the responsible minister was acutely aware of this imperative. It was also manifest in the struggle over constitutional rights in the context of marriage that was played out in the High Court in 2006. This will become apparent in Chapter Five. Notwithstanding Deputy Desmond's powerful contribution to the Dáil record, the first referendum on divorce was defeated in 1986.

The Second Referendum on Divorce in 1995

Another issue that arose with regard to the enactment of civil partnership legislation in 2010 is the now prevailing text of Article 41.3.2 of our Constitution, which was successfully put to the people in 1995. I refer to the drafting of the constitutional clause on divorce, the wording of which was commensurate with the reform that the Government envisaged. In an effort to assuage fears about what is referred to as a 'quickie divorce culture', which did concern the Oireachtas (see Dáil Éireann, 1995, paras. 18-56), the responsible minister deemed it appropriate to set out the conditions for granting divorce in the proposed clause so that any future changes, post a (successful) second referendum, would have to be put to the people (see Dáil Éireann, 1995, paras. 18-22). It is also important to make the point that the minister deemed the proposed change to Article 41

to be consistent with protecting the institution of marriage and family in Ireland (see Dáil Éireann, 1995, para. 18). Of significance here is that the record shows that he did conceive of one institution, rather than two. This supports the premise that marriage and family are inextricably linked in Ireland. The complexity associated with drafting constitutional amendments on social issues is such that Deputy Keogh, who supported the lifting of the ban on divorce, repeatedly stated in the Oireachtas that it was a mistake to insert the conditions pertaining to the granting of a divorce decree into the Constitution (see Dáil Éireann, 1995, paras. 33-43). “In this case experience has relentlessly shown that the Constitution should not be used when legislative action is more appropriate.” (see Dáil Éireann, 1995, para. 34) This implies that it is inappropriate to enshrine complex amendments pertaining to controversial social issues in our Constitution. While it was necessary for the people to decide on whether or not to remove the ban on divorce in the first instance, Deputy Keogh’s perspective was that the Oireachtas should decide the conditions upon which divorce could be obtained (see Dáil Éireann, 1995, paras. 33-43). Her party’s amendment, which was introduced over the course of this parliamentary debate (see Dáil Éireann, 1995, para. 33), was not accepted. Of interest here is that the clause on divorce that was accepted by the people in 1995 informed the drafting of the section on dissolution that is contained in our civil partnership legislation.¹⁷³

Prior to referendum day, the leader of the Christian Solidarity Party,¹⁷⁴ Dr. Casey,¹⁷⁵ stated the following:

¹⁷³ This will become apparent in Section Three of Chapter Six.

¹⁷⁴ The Christian Solidarity Party, which has its headquarters in Dublin, seeks to inspire and strengthen Irish society with Christian social thinking. One of its aims is to underpin the (marital / nuclear) family as the fundamental unit group of society. For details, see http://comharcristai.org/index.php?option=com_content&view=article&id=1&Itemid=2

¹⁷⁵ Please note that I am not referring to Professor Casey, who testified as an expert witness for the State in *Zappone and Gilligan*.

Marriage, as it currently exists in this country, is a permanent and exclusive union of one man and one woman, constituted by the complete and unconditional gift of each to the other. Once divorce is introduced into a jurisdiction, it has the effect of making all marriages conditional affairs. This has the paradoxical result that, instead of permitting those who are separated from their spouses and cohabiting with another person to achieve the dignified status of marriage, it transforms all existing marriages into a kind of co-habitation!

Casey, 1995

This extract implicitly takes as given the notion that marriage denotes the ‘gold standard’ in terms of adult intimate relationships. This invariably normalises a tiered system of relationship recognition. Moreover, in the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage, his ‘truth’ is quite paternalistic because it presupposes that parties to a marriage lack the personal agency to conceptualise what their relationship actually means to them.

The second referendum on divorce passed by a slim majority of just over nine thousand votes (Hug, 1999, p.73). Writing at a time when the second referendum’s outcome was unknown, O’Toole (1995) made the following observation: “A narrow victory for either side today will leave Irish society in a condition of rather sour stalemate.” He stated that if the ‘yes’ side won by a narrow margin, it would do so in the sobering knowledge that almost half of the electorate did not share its belief about the direction that Irish society was taking (O’Toole, 1995). It is a salient point and one that warrants reflection, given the margin in favour of removing the ban. The issue was such that it literally divided the country. Today, the issue that divides us is the family (see All-Party Oireachtas Committee on the Constitution, 2006, p.122), specifically, the right to access the institutions of marriage and family, which requires unequivocal legislative and constitutional recognition and protection.

Section Two: Concluding Remarks

My discussion regarding the pathway towards the formal recognition of irretrievable marital breakdown highlighted themes that are relevant to this research. The most important of these is the role and responsibility of the Oireachtas *vis-à-vis* its obligations in relation to Articles 40 and 41 of our Constitution. Similarly, it was clear that the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage was a dynamic that prevailed as much in Ireland in the 1980s and 1990s, as it did in 2006, over the course of the High Court proceedings in *Zappone and Gilligan*.

Conclusion to Chapter Four

In this chapter, I focused on two social issues that engendered considerable controversy in Ireland in the context of marriage and family, i.e. contraception and divorce. In drawing upon genres of discourse (see Wodak, 1997b), my analysis shed some light on the normative construction of what has become the dominant conceptualisation of marriage and family as one social institution with both a constitutional and legislative underpinning in Ireland. This dynamic is at the centre of my upcoming analysis in Chapter Five. Therefore, the identifiable themes that emerged from my analysis in Chapter Four are important and relevant. These include the role and responsibility of the legislature in Ireland, which are dynamics that also arise in Chapter Six. The significance of our Constitution, in terms of the principle of interpreting it with regard to prevailing social mores, is another important dynamic. It is a mechanism that makes our Constitution as relevant to the people of Ireland today, as it was at the time of its ratification in 1937. This chapter also links back to important considerations in Chapter Three, by alluding to the social chaos

and disorder that was deemed to derive from the legalisation of contraception and divorce in Ireland. These issues were sometimes framed in terms of the destruction of the (marital) family, which is a dynamic that is antithetical to the general provisions that are contained in Article 41 of our Constitution. Specifically, under Article 41.3.1, the State is obliged to both guard the institution of marriage with special care and to protect it against attack. In 2006 in the High Court, this became a crucial consideration with regard to the distribution of marriage rights in this jurisdiction. I now elaborate on this dynamic in Chapter Five.

CHAPTER FIVE¹⁷⁶

The Love That Dare Now Speak Her Name: Critical Discourse Analysis of the High Court Ruling in Zappone and Gilligan¹⁷⁷

Extract I

The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 248

Introduction

This chapter denotes a critical discourse analysis (CDA) of the 2006 Irish High Court ruling in the matter of *Zappone and Gilligan v. Revenue Commissioners and Attorney General* (see [2008] 2 I.R. pp.417-513). While it draws and builds upon the myriad themes that have been identified and elaborated upon thus far, the unfolding of this chapter is very much reliant on my methodological and theoretical considerations. This chapter demonstrates some of the ways in which lesbian and gay inequality is routinely legitimated through discourse, thereby accounting for its

¹⁷⁶ I am indebted to Dr. Ní Mhuirthile, Dr. O'Mahony, Dr. Parkes, and Professor Kilcommins from the Faculty of Law in University College Cork for their assistance regarding various constitutional, judicial and legal principles that are alluded to in this chapter. Any errors or omissions remain my responsibility.

¹⁷⁷ An excerpt from the poem *Two Loves*, which was written by Lord Alfred Douglas, informs the title of this chapter: "Have thy will, I am the love that dare not speak its name." See Belford (2001, pp.221-222).

intransigence in Ireland. Here, I reiterate my support for the premise of marriage equality (see Herek, 2006; Pillinger, 2008) and my belief that it denotes an important aspect to the principle of equality of respect and recognition (see Baker *et al*, 2004). My politics are such that I do not support the Irish State's position in the matter of *Zappone and Gilligan*. This informs my rationale for critiquing the last word (see van Dijk, 1996) on the issue of marriage inequality in this jurisdiction, which came into being in December 2006 on foot of this High Court ruling.¹⁷⁸ Drawing upon the premise that language *is* social action (see Fairclough, 1989; Wodak, 1999), this CDA demonstrates that this court case denotes a key site in terms of both the routine operationalisation of heteronormativity and the reproduction of gay and lesbian inequality in Ireland. Here, lexical choice (see Macgilchrist, 2007; van Dijk, 2006) constructs the reality that it purports to merely reflect (see Riggins, 1997). It demonstrates how important ideological work (see Brookes, 1995), such as preserving the institution of marriage as a bastion of heterosexual privilege, assumes a seemingly self-evident and commonsensical coherence to the extent that the negative representation of the 'Other' (see de Beauvoir, 1988), which it often necessitates (see Martín Rojo and van Dijk, 1997), is deemed to be acceptable. Given the imperative of reform that underscores the plaintiffs' action in this case, the seemingly benign imperative of heteronormativity requires relentless legitimisation (see Martín Rojo and van Dijk, 1997) in court. This trifles with the fundamental principle of equality because it

¹⁷⁸ In this jurisdiction, it falls upon the judiciary in the High Court and the Supreme Court to formally interpret our Constitution. In this regard, see Justice Walsh's ruling in *McGee v. Attorney General* ([1974] I.R. pp.284-337, at p.318) and Justice McCarthy's ruling in *Norris v. Attorney General* ([1984] I.R. pp.36-104, at p.98). I accept that judges in our constitutional courts can have the last word (see van Dijk, 1996) on matters that come before them, albeit with the caveat that the appeal mechanism is an important principle. It is important to make the point that the electorate can also have the last word (see van Dijk, 1996) on matters pertaining to our Constitution by way of referendum. This can occur following a Supreme Court ruling, for example, as happened in the wake of *Attorney General v. X and Others* (see [1992] 1 I.R. pp.1-93), which pertained to the issue of abortion. It is also important to make the point that the Oireachtas has a responsibility to enact legislation that gives wide effect to Supreme Court rulings and the outcomes of constitutional referenda. Moreover, it is the responsibility of the Irish Government to draft the wording of clauses that are put to the people in such referenda. The general point that I wish to make here is that there are many dimensions to making a determination on the last word.

requires the justification of inequality (see van Dijk, 1993), in this instance, on the basis of gender and sexual orientation with regard to the right to marry.

Justice Dunne's statement at the beginning of this chapter (see [2008] 2 I.R. pp.417-513, at para. 248) captures the essence of this ideological venture in a compelling way. Respect for her institutional authority (see Bergvall and Remlinger, 1996), which derives from Articles 34 and 35 of our Constitution,¹⁷⁹ makes it difficult to countenance the heterosexism and homophobia that dress up the unspeakable as self-evident or commonsensical truth. Extract I of the reported judgment denotes the last word (see van Dijk, 1996) on the matter of marriage inequality in Ireland.¹⁸⁰ The force of this extract from the court record, which fails to take cognisance of the premise of equality of respect and recognition (see Baker *et al*, 2004), compels me to unravel the layers of justification throughout these proceedings, which brought the 'logic' of heteronormativity, with its attendant 'othering' of lesbianism and homosexuality, into being. To that end, there are two crucial and interlocking elements that require critical analysis in this chapter, i.e. (1) the notion that the institution of marriage is inherently heterosexual (see Koppelman, 1997a, pp.51-95),¹⁸¹ and (2) the routine pathologisation of lesbians and gay men. Normative approval (see Martín Rojo and van Dijk, 1997) was sought and accomplished through a series of discursive strategies and institutional practices that were deployed in the High Court, including Justice Dunne's responsibility for upholding our Constitution under Article 34. Her institutional authority (see Bergvall and Remlinger,

¹⁷⁹ See Appendix I for details of all articles to the *Irish Constitution (1937)* that are alluded to in this CDA.

¹⁸⁰ This is not meant to suggest that the High Court ruling is reducible to Extract I, or that the outcome of the case hinged entirely on Extract I. The point that I wish to make here is that I conceive of Extract I as denoting a core element of this chapter.

¹⁸¹ Please note that Koppelman (1997a) unequivocally supports the principle of marriage equality. See also Koppelman (1997b, pp.1-33) and Koppelman (2004, pp.5-32).

1996) facilitated the construction and operationalisation of a justificatory heteronormativity, which conceived of marriage inequality as being not just ‘commonsensical’, but also legal and constitutional. This critical research unpacks layers of discourse (see Wodak, 1997b), which are primarily predicated on constitutional, legal, judicial, and social scientific principles, in an attempt to explain the intransigence of inequality *vis-à-vis* gender and sexual orientation in Ireland.

Important Research Considerations

The Official Court Record / Reported Judgment

Here, I highlight some important research considerations that pertain to this CDA. Firstly, the court record that I am reliant upon, which is also known as the reported judgment, comprises Justice Dunne’s December 2006 recounting of the October 2006 evidence pertaining to both the plaintiffs’ and the State’s positions, and her elaboration on the rationale behind her eventual ruling in this case. This record does not denote a verbatim account of what transpired in the courtroom *vis-à-vis* evidence. For instance, it does not contain Dr. Gilligan’s testimony. Justice Dunne indicated that it was not necessary to set it out because it did not differ in any material respect from that of Dr. Zappone (see [2008] 2 I.R. pp.417-513, at para. 21). Similarly, it omits evidence that was put forward by an American theologian who was based in a university in the United States. Justice Dunne did not recount his testimony on the basis that it did not advance the plaintiffs’ case to any extent (see [2008] 2 I.R. pp.417-513, at para. 29). The important point here is that my reliance on the recounting feature does not preclude me from being mindful of the gaps that are ‘out there’ between the spoken text that constituted the actual proceedings that took place in October 2006, and the court record that was compiled in December

2006. That record was initially made available as an ‘unreported judgment’ through the Courts Service website.¹⁸² In 2008, *The Irish Reports* reported this judgment with the official citation as follows: [2008] 2 I.R. pp.417-513. I rely on this reported judgment throughout this CDA.

Another important consideration is that the recounting feature has a tendency to morph the voices of expert witnesses and lawyers, for example, into one, i.e. Justice Dunne’s. This is not meant to suggest that the reported judgment is necessarily at odds with the actual proceedings by virtue of an incorrect interpretation of testimony on her part. The important point here is that the attribution of text demands constant rigour on my part. It implies that I cannot unequivocally state that the text that was articulated by an expert witness, for example, is identical to the text that was deployed by Justice Dunne in her recounting of that expert testimony. Furthermore, the recounting feature is such that it can, on occasion, be difficult to determine the precise protagonist of an extract from the court record, i.e. whether it emanated from counsel for the State or from an expert witness who testified on behalf of the State, for example. Where applicable, and in keeping with the rigour that this CDA requires, I will make that known to the reader.

While this chapter is quite detailed, I have compiled a number of appendices that contain relevant information that supplements my analysis. The reader can consult these appendices where necessary. Lastly, it is important to bear in mind that while this research does not denote a CDA of the written evidence that was submitted, the testimony that was articulated and recounted, or the case law that was relied upon *per se*, this research often necessitates an analysis of these dynamics.

¹⁸² See the following link:

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a4fe4e30eef23925802572790040d30c?OpenDocument>

Expert Witnesses

Here, I introduce the experts whose testimony I most refer to in my analysis. These are important considerations in terms of their discourse access profiles (see van Dijk, 1993) and their range of access to discourse (see Fairclough, 1989; van Dijk, 1993; van Dijk, 1996).

Professor Casey, who was called as an expert witness for the State, is a well-known psychiatrist in Ireland. She is attached to the *Mater Misericordiae* Hospital in Dublin and University College Dublin (see [2008] 2 I.R. pp.417-513, at para. 46). She is a regular contributor to current affairs programmes in the Irish media and she is a columnist in a national daily newspaper. She is also a patron of the Iona Institute (see Byrnes, 2007; Ramsay, 2007). In Chapter Three, I discussed her contribution to the construction of normative assumptions surrounding the nuclear family paradigm in Ireland (see Casey, 2008a,b,c). Because this took place in the correspondence columns of *The Irish Times*, which is deemed to be the paper of record in Ireland (O'Brien, 2008, p.13), it denotes a layer of discourse (see Wodak, 1997b) that can possibly shed some light on the general tenor of Professor Casey's testimony in *Zappone and Gilligan*.

Professor Green is a psychiatrist and lawyer who testified on behalf of the plaintiffs in this case (see [2008] 2 I.R. pp.417-513, at para. 31). He has conducted research studies pertaining to the parenting that is done by lesbians and gay men, and the issue of child development (for example, see Green, 1978; Green, 1982; Green *et al*, 1986). Since the 1970s, which marked the beginning of the reliance on expert testimony regarding

homosexuality and lesbianism in child custody cases in the United States, Professor Green has testified in this regard (see Rivera, 1979, p.898).¹⁸³

Professor Kennedy is Clinical Director of the Central Mental Hospital in Dublin. He is also attached to the Dept. of Forensic Psychiatry in Trinity College Dublin. He is a regular contributor in the Irish media to discussions pertaining to mental health. He testified for the plaintiffs in this case (see [2008] 2 I.R. pp.417-513, at para. 24).

Professor Nock was a demographer and sociologist who was attached to the University of Virginia in the United States.¹⁸⁴ He was co-founder of the *Center for Children, Families, and the Law* at this university, which fosters collaborative and multidisciplinary research and teaching on issues regarding children and families (see Nock, 2001, p.3). The inclusion of his 2001 affidavit as evidence in *Zappone and Gilligan* is indicative of a growing international trend towards conceiving of expert knowledge regarding lesbian or gay parenting as relevant to determining their right to marry.¹⁸⁵

Professor Waite is a sociologist who is attached to the University of Chicago in the United States. Her research interests pertain to the social institution of marriage and family. She is co-author of Waite and Gallagher (2000), which was briefly alluded to over the course of these High Court proceedings. She testified on behalf of the State in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at paras. 62 and 68).

¹⁸³ I will revisit this issue later in this chapter.

¹⁸⁴ My understanding is that Professor Nock is deceased.

¹⁸⁵ It is important to state that I rely on Professor Nock's sworn testimony in an affidavit, rather than on direct testimony *per se* in the Irish High Court. In Section Two of Chapter Five, I will revisit this wider issue of research on child development being submitted as evidence in court cases pertaining to the right to marry.

Discourse-Historical Approach (DHA)

In this chapter, I integrate evolving Irish case law on marriage and family into this analysis because it is at the core of the dominant understanding of Article 41 of our Constitution. This is a dynamic that I have consistently alluded to throughout this thesis. Normative assumptions surrounding the nuclear family paradigm dictate that marriage is inherently heterosexual. This denotes the first strand in the hetero-matrix that requires critical analysis. I also highlight jurisprudence from international cases that were alluded to throughout these proceedings. This facilitates an understanding of the 2006 High Court ruling. The pathologisation of the lesbian or gay ‘Other’ (see de Beauvoir, 1988) denotes the second strand to the hetero-matrix that requires critical analysis. So as to understand the myriad ways in which this was discursively achieved in an Irish court, I discuss some events that may have precipitated the routine inclusion of evidence pertaining to child development in contemporary court cases pertaining to same-sex marriage. I also elaborate on the primary research material pertaining to child development that was relied upon in *Zappone and Gilligan*. These considerations are consistent with my discourse-historical (see Wodak, 1997b; 1999; 2001; 2011) and critical approaches to research.

DHA: Primary Research Studies

Because reported judgments do not tend to include bibliographies, it proved difficult to source all of the primary research material that was relied upon over the course of these proceedings. Nonetheless, I did locate much of the literature, which can be categorised according to four themes: same-sex relationship recognition (see Herek, 2006; Wintemute and Andenaes,

2001); lesbian and gay parenting¹⁸⁶ (see American Academy of Pediatrics, 2002; Anderssen *et al*, 2002; Brewaeys *et al*, 1997; Golombok *et al*, 1983; Golombok and Tasker, 1996; Green, 1978; Green *et al*, 1986; Nock, 2001; Stacey and Biblarz, 2001a); lesbian and gay mental health (see King *et al*, 2003; Mays and Cochran, 2001; Warner *et al*, 2004); and heterosexual marriage (see Waite and Gallagher, 2000). With the exception of Wintemute and Andenaes (2001), which I refer to momentarily, none of this material specifically alludes to the situation that prevails in Ireland *vis-à-vis* these themes. However, the studies informed the testimony of many of the expert witnesses in this case. Much of the evidence in *Zappone and Gilligan* centred on child development, although Justice Dunne conceived of the issue in terms of child welfare towards the end of her deliberations (see [2008] 2 I.R. pp.417-513, at para. 248). Moreover, she was ultimately persuaded by particular interpretations of these child development studies (for example, see [2008] 2 I.R. pp.417-513, at para. 216), which implicitly relied upon a justificatory heteronormativity. Therefore, these studies are central to this research. In Section Two of Chapter Five, I provide some details of these studies with a view to elaborating on their significance.

Here, I discuss dynamics to the other research studies. At the outset, it is important to state that I do not integrate all of the above research into this CDA. Moreover, as my analysis evolves, it will become clear that some texts are more relevant than others in terms of that integration. Wintemute and Andenaes (2001) denotes an edited collection of writings from academics, activists and legal practitioners in Africa, Asia, Australasia, Europe, Latin America, North America, and the Middle East, regarding relationship and family recognition in the context of lesbians and gay men.

¹⁸⁶ I accept that the terms ‘gay parenting’ and ‘lesbian parenting’ are reductive in that they necessarily posit such sexual orientations as defining characteristics that are somehow relevant to parenthood. However, the heteronormative backdrop, which pathologises such parenting precisely on that basis, necessitates the use of such terms.

While the collection includes a chapter pertaining to Ireland (see Flynn, 2001), this largely focuses on the development of anti-discrimination and pro-equality legislation *vis-à-vis* sexual orientation. Flynn (2001) also alludes to the *Norris v. Attorney General* ruling, and he elaborates on the constitutional position *vis-à-vis* equality (Article 40) and marriage and family (Article 41) in Ireland. Herek's (2006) article is based on research that formed part of the American Psychological Association's *amicus curiae* briefs,¹⁸⁷ which were submitted to courts in the United States in cases that challenged the constitutionality of state laws denying marriage rights to same-sex couples. While this study was put to Professor Casey over the course of her cross-examination as an expert witness for the State, and while she proffered her expertise on part of it, she stated that she was unfamiliar with same (see [2008] 2 I.R. pp.417-513, at paras. 54-55). Therefore, the relevance of Herek (2006) to this thesis is limited to the construction of Professor Casey as an expert knower and testifier, rather than a focus on the study *per se*. The Waite and Gallagher (2000) study, which serves to underscore the 'gold-standard' status of marriage in its traditional sense, is somewhat peripheral in that it was briefly alluded to over the course of Professor Waite's cross-examination as an expert witness for the State (see [2008] 2 I.R. pp.417-513, at para. 68). Its relevance is limited to the way in which it facilitates her stature as an expert knower and testifier on both the conducting of social scientific research and the institution of marriage as is currently constituted.

Mental Health Studies

With regard to the research studies pertaining to mental health, I argue that they are irrelevant to this court case. However, my position does warrant

¹⁸⁷ This term means 'friend of the court'. It is a facility that allows a third party, such as the American Psychological Association, to offer its expertise in an area that is pertinent to a legal proceeding wherein the organisation is not an actual party to the matter that is before the court (see Irish Human Rights Commission, 2011).

some commentary in terms of both my critical and discourse-historical approaches. Under cross-examination, Professor Casey elaborated on research studies that were conducted by King *et al* (2003), Mays and Cochran (2001), and Warner *et al* (2004), which pertain to the dynamic of gay and lesbian mental health in Britain and the United States.¹⁸⁸ However, there is what I refer to as a ‘textual gap’ in the reported judgment in that Justice Dunne does not detail Professor Casey’s evidence regarding same, save to say that a general discussion ensued as to their findings (see [2008] 2 I.R. pp.417-513, at para. 52). Therefore, while the record indicates that there is spoken text ‘out there’, it is ‘not there’ in written form, which is perhaps indicative of its peripheral nature to this case. Nonetheless, I argue that it is the operationalisation of heterosexism and homophobia, with the attendant manifestations of inequality and stigma, for example, that constitute risk factors for lesbian and gay mental health. None of the above three studies explored the premise of relationship and family recognition, specifically, same-sex adult intimate relationships and / or relationships between children and their gay or lesbian parents.¹⁸⁹ It is within these realms that the phenomena of heterosexism and homophobia are particularly acute.¹⁹⁰ This is borne out by particular interpretations of evidence regarding parenting and child development that I will elaborate on in Section Two of Chapter Five. Professor Kennedy did allude to the social perception of homosexuality in his elaboration on the historical conceptualisation of homosexuality in the West, with its attendant legacies of inequality and stigma (see [2008] 2 I.R. pp.417-513, at paras. 24-27). This implicitly relies on the phenomenon of social cognition (see van Dijk,

¹⁸⁸ If the dynamic of mental health were deemed to be of import to these proceedings, the Equality Authority’s (2002, pp.31-39) position paper or the research that was conducted by the Gay and Lesbian Equality Network / Nexus Research Cooperative (1995, pp.72-75), for example, could have warranted attention in the High Court. Both of these are Irish studies that formed part of the Irish trajectory *vis-à-vis* relationship and family recognition that I discussed in the introduction to this research.

¹⁸⁹ Cursory references were made to the issue of adult relationships, but only in terms of identifying the research cohorts, such as respondents who were in cohabiting relationships, for example. In this regard, see Mays and Cochran (2001, p.1871).

¹⁹⁰ See Valiulis *et al* (2008, pp.24-55) for a poignant and potent analysis of the impact of social stigma on lesbian and gay parenting in Ireland.

1993; 2006), which I discussed in Chapter One. It also evokes some of the concepts that I theorised in Chapter Two, including difference as social relation (see Brah, 1991; 1996) and inequality of respect and recognition (see Baker *et al*, 2004). Therefore, Professor Kennedy's testimony could be conceived of as informing public opinion about the coalescence of these social dynamics at the level of the personal. Moreover, it implicitly hones in on the importance of the historical dimension of an issue to the general project of discourse analysis. However, bearing in mind the caveats regarding the recounting feature, neither of these two psychiatrists appeared to posit the notion that the issue that warrants attention is not homosexuality or lesbianism *per se*, but rather the ideological imperative of heteronormativity, which, I argue, is antithetical to gay and lesbian health. Nowhere in the reported judgment is there a sense that either of these psychiatrists utilised their discourse access profiles (see van Dijk, 1993) to call for the conducting of socio-cognitive research that could highlight the range of assumptions, biases and opinions that prevail *vis-à-vis* institutionalised heterosexuality in Ireland. The weight of their professional credentials, which implicitly informed their stature as expert witnesses, seems to have been incapable of providing an elaboration on the phenomenon that I consider to be instrumental to the pathologisation of homosexuality and lesbianism in Ireland today.

DHA: Important Case Law

Irish Case Law

While many court cases were alluded to or relied upon throughout these High Court proceedings, the integration of all of them into my CDA is not feasible. The following cases, some of which I already referred to, comprise important elements of Irish case law that are most pertinent to

this research: *Hyde v. Hyde and Woodmansee* (see [1866] L.R. 1 P. and D., pp.130-138);¹⁹¹ *Ryan v. Attorney General* (see [1965] I.R. pp.294-353); *McGee v. Attorney General and Revenue Commissioners* (see [1974] I.R. pp.284-337); *Murray and Murray v. Ireland and Attorney General* (see [1985] I.R. pp.532-545); *T.F. v. Ireland, Attorney General and M.F.* (see [1995] 1 I.R. pp.321-381); *B. v. R.* (see [1996] 3 I.R. pp.549-555); and *D.T. v. C.T.* (see [2003] 1 I.L.R.M. pp.321-388). It is important to make the point that this CDA does not constitute a legal analysis of these cases *per se*. However, the inclusion of such jurisprudence is important in terms of elucidating core themes that are at the heart of the deliberations in *Zappone and Gilligan*, such as the dominant conceptualisation of marriage and family as one institution in Ireland. This jurisprudence contextualises Justice Dunne's ruling. It is directly relevant to Articles 40 and 41 of our Constitution, the meaning of which both parties to this case struggled over (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) throughout these proceedings. Therefore, the accretion of such case law over time denotes an important part of my discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011). It helps to explain an integral backdrop to the prevailing operationalisation of heteronormativity in Ireland, which routinely 'justifies' lesbian and gay inequality *vis-à-vis* marriage and family.

International Case Law

This CDA also requires some commentary on the phenomenon whereby court rulings, which were handed down in other jurisdictions, were consistently alluded to in the High Court. Where no Irish precedence exists with regard to a matter that comes before an Irish court, such as same-sex marriage, counsel can cite foreign case law, particularly if it emanates from

¹⁹¹ While this case was determined in England prior to achieving Irish Independence, it forms part of Irish case law on marriage. Personal communication with an academic from the Faculty of Law in University College Cork clarified this point.

a jurisdiction with a similar common law heritage. While references to international cases serve to situate the clamour for both the reform and the upholding of current marriage laws in Ireland within international jurisprudence, such case law is not binding in this jurisdiction.¹⁹²

Counsel for both the plaintiffs and the State referred to *Goodridge v. Department of Public Health* (see [2003] Mass. 440, paras. 309-395; see also [2008] 2 I.R. pp.417-513, at paras. 124 and 148, for example), which I already alluded to in the introduction to this thesis. This case led to the legalisation of same-sex marriage in Massachusetts in the United States. In this chapter, I rely on Justice Sosman's dissenting judgment (see [2003] Mass. 440, paras. 309-395, at paras. 357-363) because it captures the weight that is wrought by the 'logic' of heteronormativity. This is an important dynamic in terms of the routine reproduction of lesbian and gay inequality *vis-à-vis* marriage and family.

Another case that formed part of the international trajectory *vis-à-vis* relationship recognition, as well as being referred to in the Irish High Court, was *Wilkinson and Kitzinger v. Attorney General* (see [2006] EWHC 2022, paras. 1-131; see also [2008] 2 I.R. pp.417-513, at paras. 133 and 147, for example). The plaintiffs in this British case, as with the plaintiffs in *Zappone and Gilligan*, relied on the *European Convention on Human Rights* (ECHR). Dr. Zappone's and Dr. Gilligan's reliance on the ECHR implies obligations on the part of the Irish State. These are derived from our ratification of the ECHR in 1953, as well as the premise that it now forms part of Irish law following the enactment of the *European Convention on Human Rights Act, 2003* (see Walsh and Ryan, 2006, pp.38-41; see also [2007] IEHC 470, p.30, para. 93). However, the manner in

¹⁹² I am indebted to one of the reviewers of this chapter for clarification on these aspects to international jurisprudence.

which the ECHR was incorporated into Irish law is such that our Constitution remains a superior source of law (see Hogan, 2004, pp.33-34; Walsh and Ryan, 2006, p.40).¹⁹³ This means that if aspects to the ECHR conflict with principles that are elucidated in our Constitution, the latter will prevail (Walsh and Ryan, 2006, p.40).

This dynamic does raise questions about the ‘what, when, where, who, why, how, to whom, and with what effect’ (see Wodak, 1997b) backdrop. However, it is not possible to integrate all relevant case law into this CDA. Moreover, while international jurisprudence was consistently alluded to in the High Court, I reiterate that it is not binding in this jurisdiction. While I refer to international cases in this chapter, my focus is largely on (some) Irish jurisprudence, particularly if it pertains to Article 41 of our Constitution. This approach is informed by the premise that the dominant understanding of Article 41 is at the core of the routine operationalisation of heteronormativity in Ireland.

Here, I acknowledge that many of these considerations could have been elaborated on in Chapter One. However, given the level of detail, and its immediate relevance to my analysis of the High Court ruling, their consideration is most appropriate here. The remainder of this chapter focuses on the two interlocking elements that require critical analysis, i.e. (1) the premise that the institution of marriage is inherently heterosexual, and (2) the routine pathologisation of gay men and lesbians. Both of these factors helped to bring about Justice Dunne’s ruling in *Zappone and Gilligan*.

¹⁹³ I am indebted to an academic within the Faculty of Law in University College Cork for helping me to understand this principle.

Section One: Marriage as Inherently Heterosexual

One aspect to heteronormativity that requires critical analysis is the premise that marriage is inherently heterosexual. Its rationality tends to be based on the idea that marriage in the West has always constituted the legal, social and sexual union of a man and woman (see Gallagher, 2004, pp.45-46).¹⁹⁴ Justice Peterson's ruling in *Baker v. Nelson* (see [1971] 191 N.W. 2d., pp.185-187), which I discussed earlier in this thesis, underscored what I refer to as the 'since the beginning of time' thesis. This is then taken to mean 'until the end of time'. The timelessness of this paradigm appeals to the seemingly self-evident conceptualisation of marriage as intrinsically heterosexual. The rootedness of this normative assumption helps to codify a lesbian and gay incapacity to marry, which 'commonsensically' brings the legislative apparatus of legitimation into being in Ireland, i.e. the *Civil Registration Act, 2004*. This 'logically' stipulates that incapacity or impediment.¹⁹⁵ This CDA demonstrates how this ideological work (see Brookes, 1995) was accomplished in an Irish courtroom through a reliance on language and case law.

The Definition of Marriage

Extract II

The degree to which the State sought to establish the non-existence of the plaintiffs' right to marry is an interesting aspect to the case. It suggests the taking root of a palpable fear that this right might inhere in lesbian and gay

¹⁹⁴ While Gallagher (2004, p.46) does not conceive of the institution as being incapable of change, the basis of her overall thesis is that marriage is inherently heterosexual. I reiterate that she co-wrote a publication on marriage with Professor Waite. It was in that regard that reference to her perspective on same-sex marriage was made over the course of Professor Waite's cross-examination in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at para. 68).

¹⁹⁵ I elaborate on the ideological wherewithal of this legislation in Chapter Six.

persons.¹⁹⁶ This guided the elaboration of the State's position in the High Court. A manifestation of its 'marriage as inherently heterosexual' thesis is evident in the following extract from the reported judgment:

Counsel argued that the term marriage in the Constitution is emphatically confined to a union of a man and woman and does not encompass a relationship of two persons of the same sex. Accordingly, in applying the established method of interpreting the Constitution it was argued that the plaintiffs do not have a right to marry which is protected either expressly or impliedly by the Constitution, the plaintiffs' relationship does not constitute a marriage within the meaning of the Constitution ...

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 143

Here, the State's position betrays the ease with which inequality of respect and recognition (see Baker *et al*, 2004) can be 'justified'. Its emphatic argumentation is interesting because the text in Article 41 does not expressly confer any such restriction. Firstly, the term 'marriage' is not defined in our Constitution (All-Party Oireachtas Committee on the Constitution, 2006, p.123; Working Group on Domestic Partnership, 2006, p.23). Furthermore, the term 'man' is not evident in Article 41. Given the general tenor of aspects to the document, which I alluded to in Chapter One, this absence is noteworthy. Conducting a purely textual analysis of Article 41 elicits the following details *vis-à-vis* gender: a female tenor can be derived from the terms 'her', 'woman' and 'mothers', which are mentioned once in the relevant sub-clauses; it can also be discerned from the pronoun 'their' because it is written in the context of the gender specific term 'mothers'; each of the three references to 'spouses' are contained in the provision pertaining to divorce, but none are gender specific; there are two references to 'person' that are not gender specific; and the references

¹⁹⁶ Whilst I conceive of the right to marry as one that inheres in Irish citizens, I accept that it is subject to justifiable limitation by the State (see [2008] 2 I.R. pp.417-513, at paras. 72-73), such as on the basis of age and capacity to consent.

to ‘either or both of them’ and ‘other party’ in relation to divorce suggest that there are two persons at the heart of the marriage contract, none of whom are gender specific. This latter point implies that bigamy and polygamy are precluded from the constitutional conceptualisation of marriage in Ireland. This should, but does not, put paid to the utterly spurious claims that are made by organisations, such as the European Life Network, which I highlighted in Chapter Three.

Established Method

Before elaborating further on the dynamic of gender, it is important to explain what is meant by the ‘established method of interpreting the Constitution’ in Extract II above. It is generally accepted that both the past and present are relevant, both in terms of our understanding of the document and determining its meaning. The method of historical interpretation of our Constitution applies to such articles as those pertaining to the scope of the presidency and parliament, for example. Here, the key point is that courts carefully adhere to the text of the Constitution, often with a view to maintaining the integrity of what the framers and ratifiers intended when such matters as power or procedure, for example, are at issue (see Hogan and Whyte, 1994, p. cxiii). It is also the case that the Irish Constitution is not stuck in what is referred to as the ‘permafrost’ of 1937, and that it is a ‘living instrument’. In this regard, the general consensus is that the drafters of the document left some articles deliberately vague, such as those pertaining to equality and personal rights, for example. The rationale behind this was that their ambit could be realised over time through the accretion of case law (see Hogan and Whyte, 1994, p. cxiii).¹⁹⁷ I will revisit this issue in the context of dominant understandings of Articles 40 and 41 of our Constitution.

¹⁹⁷ Please note that I rely on Hogan and Whyte (1994) for this elaboration in its entirety.

Extract III

The myriad of non-gender specific terms in Article 41, against a marked absence of any reference to the gender and marriage specific terms of ‘husband’ and ‘wife’, is significant. It suggests that either the specificities of gender *vis-à-vis* marriage did not preoccupy those who drafted and ratified the Constitution, or that those dynamics were so self-evident that they warranted no elaboration. My earlier reference to some of the idiosyncrasies of the Irish institution of marriage indicates that it was gendered and necessarily hierarchical (see Kimmel, 2004). For example, long before divorce was constitutionalised and legalised in Ireland in the 1990s, the phenomenon of the ‘country divorce’ (see Arensberg and Kimball, 1968), which I alluded to in Chapter Three, honed in on the imperative of marital procreation. This helped to codify the ‘natural’ complementarity of the binaries of male and female, which was implicitly predicated on heterosexuality. This would have been quite pronounced in an age prior to technological advances in fertility treatment and the enactment of legislation on adoption.¹⁹⁸ The following extract from the reported judgment, which was attributed to the State, denotes another attempt to underscore the ‘marriage as inherently heterosexual’ thesis:

It was submitted that in looking at the provisions of Article 41 as a whole there could be no doubt that what is in mind is the family constituting a mother, father and the children of a heterosexual marriage.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 150

Here, the State’s repeated overture with regard to the seemingly self-evident understanding of Article 41 is striking. Lest there be any doubt, the gender specific term ‘father’ does not appear anywhere in Article 41. While

¹⁹⁸ This refers to the *Adoption Act, 1952*.

the term ‘mother’ evokes a relational tie, which comes into being ‘in the home’, it is not expressly articulated in the context of any relational tie with a putative father and / or spouse. Furthermore, the term ‘children’ is enunciated just once in the section on divorce, which did not come into being until 1996, as stated in Chapter Four. Having said that, the sheer scope and rigidity of the discourse surrounding marital procreation in Ireland cannot be underestimated or ignored. It produced not just the ‘sent back’ and ‘fallen’ woman (see Arensberg and Kimball, 1968; Ferriter, 2009, respectively), but also the ‘flaunting it’ woman, ‘superwoman’, and the ‘slut-hunt’.¹⁹⁹ Similarly, the dominance of the male breadwinner / female dependent paradigm needs to be considered. Given this backdrop, Article 41 codified the conflation of marriage and family in Ireland. With its reference to the family that is based on marriage, which is an important point,²⁰⁰ it brought the nuclear paradigm into constitutional being, without expressly articulating a definition for either marriage or family.

¹⁹⁹ See Inglis (2002, p.5-24) for an elaboration on the opprobrium that the State heaped on Joanne Hayes, whose ‘sexual voraciousness’ as an unmarried woman and mother sparked a witch-hunt for similarly transgressive women, following the deaths of babies in Ireland in 1984. (This explains my use of the term ‘slut-hunt’). In what became known as the *Kerry Babies Case*, the dominant socio-cognitive thesis at the time was that she was capable of carrying concurrent pregnancies following sexual intercourse with two men as fathers with different blood types within the space of forty-eight hours. (This explains my use of the term ‘superwoman’). The routine pathologisation of woman as unmarried mother was such that the State seemed incapable of conceiving of any rationale for the conducting of a *man*-hunt in the context of the perpetration of infanticide in Ireland. Eileen Flynn, as an unmarried woman and teacher who ‘flaunted’ her pregnancy, also fell foul of the system in the early 1980s, when her private life was ‘commonsensically’ linked to the terms of her employment in a Catholic school in Ireland (see Cummins, 1984; O’Regan, 1984; see also O’Driscoll, 2010; Slater, 2008). (This explains my use of the term ‘flaunting it’ woman). Both of these relatively recent events are manifestations of the degree to which the imperative of marital procreation operated in Ireland. This is a dynamic that cannot be underestimated, notwithstanding the massive social change that has taken place here since the ratification of our Constitution in 1937. Eileen Flynn’s legal battle is a case in point in that the legislative apparatus that would have ensured that she *lost* her case, i.e. the religious ethos exemption in employment legislation, which I discussed in Chapter Two, was not enacted until 1998 (see O’Driscoll, 2010). That she did lose her case suggests that there was something else ‘out there’ ‘in’ social cognition (see van Dijk, 1993; 2006) that impelled the High Court to dismiss her legal action, which was predicated on the *Unfair Dismissals Act, 1977*. See Justice Costello’s ruling in *Eileen Flynn v. Sister Mary Anna Power and the Sisters of the Holy Faith* ([1985] I.L.R.M., pp.336-343).

²⁰⁰ This helps to explain why families that are not based on marriage, such as those that are headed by cohabiting couples, for example, are not deemed to be ‘proper’ families within the (dominant) meaning of Article 41.

Important Case Law on Marriage: *Hyde v. Hyde*

The ability to impose a definition (see Connell, 1987, p.107) on marriage in the Constitution, where none exists (see All-Party Oireachtas Committee on the Constitution, 2006; Working Group on Domestic Partnership, 2006), denotes an important aspect to the State's case in *Zappone and Gilligan*. It can best be explained by the general tenor of case law on marriage that dates back to the 19th century. The common law definition of marriage (Barrington, 2009, p.44) that prevailed in Ireland at the time indicates that gender and other specificities were at the heart of this legal contract. In *Hyde v. Hyde* (see [1866] L.R. 1 P. and D., pp.130-138), which was alluded to throughout these proceedings (for example, see [2008] 2 I.R. pp.417-513, at paras. 83, 130 and 227), Lord Penzance stated the following with regard to the fundamental characteristics that underscore the universality of marriage as an institution in Christendom: "I conceive 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." (see [1866] L.R. 1 P. and D., pp.130-138, at p.133) The prescience of Lord Penzance's ruling is that he understood that his conceptualisation did not necessarily extend to, or prevail in, other jurisdictions. Moreover, he conceived of this definition against the backdrop of the availability of divorce in England.²⁰¹ However, the *Hyde* formulation also highlights the ease with which the civil could intertwine with the canonical. These latter two points evoke my earlier discussion in Chapter Four with regard to divorce and contraception respectively. I refer to the following: Deputy Desmond's contribution to the Dáil record with regard to his understanding of marriage, notwithstanding the holding of the first referendum on divorce in 1986 (see Dáil Éireann, 1986b); Deputy Flanagan's contributions to the Dáil record in the context of proposals to enact legislation on contraception

²⁰¹ Divorce was available in England since the enactment of the *Matrimonial Causes Act, 1857* (see Norrie, 2000, p.364).

in 1974 and 1985, and the dynamics that informed his opposition to that legislation (see Dáil Éireann, 1974b; 1985a).

Important Irish Case Law on Marriage

Some of the cases that the State relied upon to underscore the specificity of gender to marriage in Ireland are similar to the *Hyde* formulation. They include Justice Costello's ruling in the High Court in *B. v. R.*, which was made prior to the passing of the divorce referendum in 1995: "Marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life." (see [1996] 3 I.R. pp.549-555, at p.554; see also [2008] 2 I.R. pp.417-513, at para. 129) Notwithstanding the premise that marriage is not defined in our Constitution (see APOCC, 2006; WGDG, 2006), this excerpt from *B. v. R.* does underscore the State's 'marriage as inherently heterosexual' thesis, in that it implicitly codifies the common law ban on same-sex marriage that was effectively established in *Hyde* (see Barrington, 2009, p.44).

Excerpts from other constitutional cases are important, notwithstanding the absence of any express reference in them to the specificity of gender as regards marriage and the Constitution. Justice Dunne relied on them over the course of her concluding remarks to underscore the 'since the beginning of time' thesis (see [2008] 2 I.R. pp.417-513, at para. 238). They include the High Court ruling in *Murray and Murray*, which was a case that centred on the right of a husband and wife, both of whom were incarcerated, to beget children (see [1985] I.R. pp.532-545). Justice Costello stated that "... the 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.” (see [1985] I.R., at pp.535-536) Here, it is conceivable that the lack of an express reference to gender in the *Murray* formulation was informed by the self-evident gender of the plaintiffs in that case. This definition of marriage was alluded to throughout proceedings in *Zappone and Gilligan* (for example, see [2008] 2 I.R. pp.417-513, at paras. 84, 118 and 128). Moreover, it was deemed a constituent part of the self-evident ‘truth’ that marriage is confined to persons of the opposite sex (see [2008] 2 I.R. pp.417-513, at para. 238). I am not suggesting that the *Murray* formulation necessarily implied a gender-neutral understanding of marriage at that time. Indeed, the opposite is most likely the case. For instance, homosexuality was still criminalised in Ireland in the 1980s, which denotes the time period that *Murray and Murray* came before the High Court. The point that I wish to make here has more to do with the circularity of the ‘since the beginning of time’ and ‘until the end of time’ theses. This dictates that marriage has always been confined to opposite-sex couples because marriage has always denoted the union of a man and woman (see Ennis, 2010, p.32). This rather pedantic argument, which has somehow acquired coherence, is incapable of acknowledging that, for centuries, legislation and case law has either implicitly or expressly excluded lesbian and gay couples from the institution of marriage (see Ennis, 2010, p.32). This ‘logic’ is precisely the issue that is at the heart of *Zappone and Gilligan*.

The Supreme Court adopted the *Murray* formulation in *T.F. v. Ireland* (see [1995] 1 I.R. pp.321-381, at p.373),²⁰² which serves to codify its importance *vis-à-vis* Irish jurisprudence on marriage. Counsel for the plaintiffs in *Zappone and Gilligan* drew upon this excerpt with a view to furthering their claim that this understanding of marriage could now be

²⁰² The plaintiff in this case sought to test the constitutionality of aspects to the *Judicial Separation and Family Law Reform Act, 1989*.

conceived of as being equally applicable to same-sex couples today (see [2008] 2 I.R. pp.417-513, at paras. 85 and 128). However, Justice Dunne relied on *T.F. v. Ireland* to reiterate the premise that confining the institution to opposite-sex couples has always constituted the definition of marriage (see [2008] 2 I.R. pp.417-513, at para. 238). She underscored this by relying on the Supreme Court decision in *D.T. v. C.T.* (see [2008] 2 I.R. pp.417-513, at para. 238), which pertained to the matter of financial provision after the granting of a divorce decree (see [2003] 1 I.L.R.M. pp.321-388). In that case, Justice Murray stated that “... marriage itself remains a solemn contract of partnership entered into between man and woman with a special status recognised by the Constitution. It is one which is entered into in principle for life.” (see [2003] 1 I.L.R.M., at p.374; see also [2008] 2 I.R. pp.417-513, at para. 86) With regard to evolving Irish case law on marriage, gender expressly re-enters the frame at this juncture.

Extract IV

In keeping with my discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011), it was important to integrate the above excerpts into this CDA because they denote an important cog in the heteronormative wheel that brought about Justice Dunne’s ruling in *Zappone and Gilligan*. Indeed, it is through the accretion of case law from *Murray and Murray v. Ireland*, *T.F. v. Ireland* and *D.T. v. C.T.*, for example,²⁰³ that the seemingly self-evident logic of the ‘since the beginning of time’ thesis on marriage is made plain:

²⁰³ Justice Dunne alluded to these three cases to inform Extract IV of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 238).

Marriage was understood under the Constitution of 1937 to be confined to persons of the opposite sex. That has been reiterated in a number of the decisions which have already been referred to above ... That has always been the definition. The judgment in *D.T. v. C.T.* ... was given as recently as 2003. Thus it cannot be said that this is some kind of fossilised understanding of marriage. ... The definition of marriage to date has always been understood as being opposite sex marriage. How then can it be argued that in the light of prevailing ideas and concepts that definition be changed to encompass same sex marriage?

Justice Dunne, [2008] 2 I.R. pp.417-513, at paras. 238-241

This extract signifies the inexorable pull of the ‘since the beginning of time’ and ‘until the end of time’ theses. Having said that, it is important to acknowledge the definition of marriage that prevailed at the time in Irish case law, as set out in the Supreme Court’s decision in *D.T. v. C.T.*. Justice Dunne’s institutional authority (see Bergvall and Remlinger, 1996) was such that she could not ignore it. She was obliged to take cognisance of Justice Murray’s understanding of marriage in *D.T. v. C.T.* (see [2003] 1 I.L.R.M., at p.374). Nonetheless, she could have chosen to re-work that definition.²⁰⁴ Indeed, counsel for the plaintiffs in *Zappone and Gilligan* asserted the following *vis-à-vis* the conceptualisation of marriage in *D.T. v. C.T.*: “... [W]hile that *dictum* was worthy of respect and deference nonetheless it was simply a *dictum* and is not and could not be binding on this court given that the issue of homosexual marriage was not before the court in that case.” (see [2008] 2 I.R. pp.417-513, at para. 200). With regard to Extract IV above, I am mindful of Brah’s (1996) theorisation of difference as social relation, where difference is constituted and organised into systematic relations through institutional practices. In this instance, such practices can circumscribe the right to marry. I agree with Norrie (2000, p.364) that “[i]t is entirely circular to say that marriage by definition is heterosexual because that is how marriage is defined.” It is as if laws and

²⁰⁴ I am indebted to one of the reviewers of this chapter for informing me of this general principle.

case law on marriage come into being ‘by themselves’. The ‘silver lining’ here is that courts have been known to overturn their own precedence, and judges have been known to change their minds on hitherto dogmatic legal assumptions.²⁰⁵ This fosters hope.

Linking Article 41 with Article 40

My analysis thus far indicates that Article 41 constructs marriage as being implicitly, rather than intrinsically, heterosexual. That shortcoming represents a challenge for the State, which is compounded by the plaintiffs’ assertion of their constitutional right to marry under Article 40. Heretofore, heteronormativity dictated that implicitness sufficed. Indeed, its conclusiveness with regard to marriage was such that the soundness of precluding same-sex couples required no precedential support or logical reasoning (see Walsh and Ryan, 2006, p.91).²⁰⁶ However, this court action brought the tension between the expressly articulated and the implied into being. The fear on the part of the State that is generated by this tension is palpable. It is grounded in the realisation that the act of interpretation can actualise the implicit. This may not be problematic for the State in terms of the accretion of case law on Article 41. However, the pitfall potential *vis-à-vis* judicial interpretation of Article 40 was such that it could not countenance the realisation of either the implicit or the explicit, insofar as the plaintiffs’ rights were concerned. Only a ‘proper’ reading of the Constitution, as evidenced by the State’s overture in Extract II above about

²⁰⁵ Kirby (2009, pp.1-4) shows that a High Court judge can question the taken-for-granted legal dogma that is deemed to derive from *Hyde*. Retired Justice Kirby of the Australian High Court happens to be gay. He is now a supporter of marriage equality. See Ryan (2004, p.18-19) for commentary on the 2002 unanimous decision that was taken by the European Court of Human Rights in *Goodwin v. United Kingdom*. Here, the court overruled its own precedence. Similarly, in relation to *Lawrence v. Texas* in the United States, Denniston (2003) and Robertson (2003) highlight the significance of the Supreme Court’s overturning of the precedence that it set in 1986 in *Bowers v. Hardwick*.

²⁰⁶ It is important to make the point that Walsh and Ryan (2006) was published prior to the High Court proceedings in *Zappone and Gilligan* taking place in 2006.

applying the ‘established method’ (see [2008] 2 I.R. pp.417-513, at para. 143), could yield that unequivocal outcome for the State.

The idea that a ‘proper’ reading cannot possibly validate the plaintiffs’ assertions denotes one aspect to the State’s position. In Extract II above, the implicit appeal to Justice Dunne to fulfil her professional obligation with regard to the interpretation of the Constitution produces the ‘logic’ of the State’s assertion that the plaintiffs do not have a right to marry. Its position is that the right to same-sex marriage does not exist (see [2008] 2 I.R. pp.417-513, at para. 140). Ingenuity inheres in invoking this non-existent right. It rationalises the idea that there is a difference between ascertaining an unenumerated right and redefining a right that is deemed to derive from the Constitution (see [2008] 2 I.R. pp.417-513, at para. 239). This was promulgated by the State and accepted by Justice Dunne (see [2008] 2 I.R. pp.417-513, at para. 239). The coherence of this position implicitly relies on the ‘logic’ of ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997), which I discussed in Chapter One. The following extract from the reported judgment, which was enunciated against the backdrop of established jurisprudence in *B. v. R.* and *D.T. v. C.T.*, demonstrates the manner in which this ideological work (see Brookes, 1995) *vis-à-vis* Articles 40 and 41 was accomplished:

Extract V

Having referred to those decisions, counsel for the defendants submitted that the inescapable fact is that, so far as the plaintiffs are concerned, whatever the principle of interpretation may be the institution of marriage has been repeatedly and consistently interpreted as involving opposite sex couples and not same sex couples. It was urged on the court that the contention of the plaintiffs, that there is *some* [my italics] right to marry distinct from *the* [my italics] right to marry in the context of a marriage recognised by the Constitution, is unsustainable, without any authority whatsoever and inconsistent with the plain wording and meaning of the Constitution. The right to marry is a right to marry in the form recognised by [the] Constitution and given the special protection contained in Article 41. No questions of recognition arise it was submitted and no questions of inequality arise because if the interpretation placed on the right to marry by the defendants is correct it is simply a right to marriage by heterosexual couples and not same sex couples and thus it is submitted the plaintiffs' claim must fail on that ground.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 157

Fear engendered in the State by a potentially untoward interpretation of the Constitution may have taken root here. Therefore, the State needed to affirm the inviolability of marriage as currently constituted by the dominant understanding of Article 41. This is achieved through the 'logic' of difference and 'us and them' (see Brickell, 2001; Martín Rojo and van Dijk, 1997). This constructs an orderly, yet entirely false, dichotomy between cohorts of the population on the basis of sexual orientation. Here, there is no appreciation of the idea that the personal relationships that people strive to form so as to meet their needs for love, intimacy and family, lay at the core of sexual orientation (Herek, 2006, p.617). The strategy is accomplished through the vague and arbitrary 'some' in Extract V above, the potency of which becomes pronounced when it is juxtaposed with 'the' right to marry. It instils the idea that the plaintiffs' right cannot possibly exist because it is clearly unidentifiable from the inescapably

‘plain wording and meaning’ of Articles 40 and 41. That the State can place a cohort of the population outside constitutional protection on the basis of sexual orientation is a measure of the toxicity of heteronormativity in Ireland. That this can be done so effectively with the use of the term ‘some’ is indicative of the ideological wherewithal of discourse.

Extract I

The ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997) thesis, which is predicated on the ‘logic’ of difference, also underscores Extract I of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 248). Here, it is possible to discern fear as regards the potential for a charge of discrimination *vis-à-vis* sexual minorities as a consequence of this High Court ruling.²⁰⁷ To assuage that fear, normative approval must be sought and achieved (see Martín Rojo and van Dijk, 1997). This is done through the ideological wherewithal of difference, specifically, the ‘entirely sensible’ division of cohorts of the population on the basis of sexual orientation. The coherence of the strategy is such that difference ‘necessarily’ constitutes a risk factor as regards the clear intent of Article 41. For example, it grounds the heterosexist assumption that lesbians and gay men will weaken or wreak havoc on the institution if their right to marry is constitutionalised.²⁰⁸ As guardian of the Constitution, Justice Dunne cannot allow this to happen. The term ‘if’ in Extract I operates as a face-saving device (see Cheng, 2002) that gets her off the hook of intolerance. Here, the pathological, rather than the professional, justifies the inequality that may or may not arise as a result of her ruling. The bringing into being of this doubt, as if the perpetration of inequality were inconceivable, is indicative of the vulnerability of minority rights in

²⁰⁷ In relation to marriage, a former justice of the Australian High Court has stated that it is discriminatory to deny a legal civil status to citizens because of their sexual orientation (see Kirby, 2009, p.2).

²⁰⁸ See the written submission of Muintir na hÉireann to the All-Party Oireachtas Committee on the Constitution (2006, pp. A192-A195).

Ireland. The seemingly legitimate preclusion of the ‘Other’ (see de Beauvoir, 1988) from constitutional protection as regards Articles 40 and 41, on a basis that requires no precedential support, logical reasoning (see Walsh and Ryan, 2006, p.91) or empirical evidence (see Irish Council for Civil Liberties, 2006, p.15), underscores the toxicity of heteronormativity in Ireland, and the ease with which inequality of respect and recognition (see Baker *et al*, 2004) is discursively achieved.

Thus far, this CDA has demonstrated the myriad ways in which the ‘marriage as inherently heterosexual’ thesis is underscored through the use of a series of discursive strategies and institutional practices. I argue that these then justify the unjustifiable, i.e. inequality of respect and recognition (see Baker *et al*, 2004) *vis-à-vis* lesbians and gay men as spouses. The remainder of this chapter focuses on the heteronormative pathologisation of lesbians and gay men as parents.

Section Two: Lesbian / Gay Parenting and Child Development

The second element in the hetero-matrix that requires critical analysis is the routine ‘othering’ of lesbian and gay persons as parents. I argue that a presumed deficiency or pathology (see Baumrind, 1995, p.135), which is grounded in deeply embedded heteronormative assumptions about this ‘Other’ (see de Beauvoir, 1988), is at the heart of that aspect to the High Court ruling that centred on the issue of child welfare. Against the backdrop of prevailing jurisprudence on Article 41, the ideological wherewithal of difference creates a space wherein the mere invoking of child welfare (without evidence of adverse impact) was sufficient to ‘justify’ marriage inequality in Ireland, as evidenced in Extract I of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 248). The manner in which this was accomplished is now the focus of critical analysis. It was largely achieved through what I refer to as the ‘we simply do not know’ thesis (about the ‘necessarily suspect’ ‘Other’), the presumed rationality of which was a deciding factor in this case, as evidenced by Justice Dunne’s concluding remarks:

Extract VI

I have to say that based on all of the evidence I heard on this topic I am not convinced that such firm conclusions can be drawn as to the welfare of children at this point in time. It seems to me that further studies will be necessary before a firm conclusion can be reached.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 216

This perspective presupposes that research studies on lesbian and gay parenting will need to be conducted into infinity and beyond until such time as pathological deficiencies (see Baumrind, 1995, p.135) in the gay and lesbian ‘Other’ (see de Beauvoir, 1988) can be unequivocally

disproved. It is symptomatic of the inexorable pull and persuasiveness of the ‘since the beginning of time’ thesis and the rootedness of the nuclear family paradigm. The routine inclusion of child development research, which denotes a body of knowledge that was deemed to be entirely relevant to these proceedings, underscores the normative inseparability of marriage and family as one institution in Ireland. That its interpretation facilitated a deliberation on child welfare is indicative of the toxicity of heteronormativity in Ireland. The morphing of doubt that inheres in the ‘we simply do not know’ in Extract VI above, into the unequivocal conviction that is evident in Extract I of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 248), denotes an important aspect to this CDA.

Important Research Considerations

Here, I elaborate on important issues with regard to research studies pertaining to gay and lesbian parenthood, and child development. I accept that cases that have come before our constitutional courts are socially significant, irrespective of whether or not they have found for the plaintiffs in actions against the State. The social significance of the matter before the court in *Zappone and Gilligan* is such that it cannot be reduced to the particularities of the Registrar General’s or Revenue Commissioners’ responses to the plaintiffs’ concerns in 2004.²⁰⁹ Because the ramifications of this ruling extend beyond the plaintiffs, neither of whom is a parent,²¹⁰ it can be argued that there is a rationale for deeming such studies to be relevant to the matter before the court. At the beginning of this research process, it would have been unthinkable for me to utter such a remark. I

²⁰⁹ I discussed these dynamics in the introduction to this thesis.

²¹⁰ Because of the extent to which evidence pertaining to parenting was relied upon in the High Court, I contacted one of the plaintiffs with a view to determining their status as parents. While I considered this contact to be an invasion of their privacy, I did not want to make an incorrect assumption regarding that status. It was the only way that I could make that determination because the court record is silent on the matter. Personal communication confirmed that neither of the plaintiffs in this case are parents.

firmly believed that their inclusion unquestioningly conflated the right to marry with the right to parent. Against a constitutional and legislative backdrop, this invariably served to underscore the ‘gold standard’ status of the nuclear family paradigm in Ireland. However, upon reading the report that Fagan (2011, pp.1-46) undertook on behalf of Marriage Equality²¹¹ and the report by the Ombudsman for Children (2010, pp.1-11), both of which allude to the difficulties that arise when the right to partner is conceived of in isolation from the right to parent, my perspective changed. I now understand the folly of what amounts to a false dichotomy between cohabitant, partner or spouse on the one hand, and parent and child on the other. It is not a matter of conflating the terms that denote an adult status. Rather, it is about acknowledging that some gay and lesbian persons in Ireland, irrespective of their civil status, are also parents (see Valiulis *et al*, 2008, pp.24-55). I believe that all families, irrespective of the sexual orientation of biological or social parents, have a right to the recognition and protection that can be accorded by our constitutional and legislative regimes.

Having said that, I argue that the preponderance of research studies ‘out there’ that pertain to lesbian and gay parenting is problematic. Against the backdrop of deeply embedded heteronormative assumptions, it presupposes that there is something about this issue that warrants endless attention, analysis, interrogation, and investigation. Research studies tend to be invariably informed by the imperative to either prove or disprove the difference as deficit thesis (see Baumrind, 1995), which derives from the discursive construction of the ‘necessarily pathological’ ‘Other’ (see de Beauvoir, 1988). Some researchers ‘prove’ contagion, i.e. the idea that

²¹¹ In the context of families that are headed by gay men or lesbians in civil partnerships, its audit demonstrates what effectively amounts to the State’s wilful non-recognition of such parent-child relationships. This is grounded in the inability to conceive of the family as anything other than that presupposed in the dominant understanding of Article 41. I referred to this report in my elaboration of the Irish trajectory *vis-à-vis* relationship and family recognition.

homosexuality is a learned pathology that is passed from adult to minor in various ways, including socialisation and seduction (see Cameron and Cameron, 1996, pp.1-18).²¹² Other research studies that compare lesbian or gay parenthood to the norm seem eager to prove either the ‘no differences’ thesis or the idea that any manifestation of difference does not denote deficiency on the part of lesbians or gay men (see Stacey and Biblarz, 2001a, pp.162-164). Against this backdrop, the ‘we simply do not know’ maxim about the ‘suspect’ ‘Other’ takes as given the notion that social research will need to be conducted into perpetuity so as to unequivocally prove that one cohort, i.e. the interrogated lesbian or gay ‘Other’ (see de Beauvoir, 1988), is capable of measuring *up* to the unquestioned norm. This perpetual dynamic may account for the preponderance of such research in the first instance, in that their findings are never enough (because of the seemingly self-evident need for caution). All of this is very problematic in terms of the construction of knowledge and the ‘who’ behind it. Moreover, the quest for answers does not seem to require critical reflection on the great unasked question and unremarked upon phenomenon, i.e. the parenting that is done by heterosexual adults. I am not suggesting that such an orientation necessarily denotes a variable that must be interrogated in the context of the right to parent. Rather, my point is that until such time as the operationalisation of heteronormativity, as it pertains to parenthood, warrants similar attention and analysis, the gay or lesbian ‘Other’ (see de Beauvoir, 1988) will remain perpetually pathological, and always ‘out there’ in the research study or the courtroom, waiting to be proven or unproven.

²¹² In Chapter Two, I drew upon this report with a view to facilitating my theorisation of difference as deficit / defect / deviance. I use scare quotes for the term ‘prove’ because their findings range from the alarmist to the illogical. Here, I reiterate their thesis *vis-à-vis* the transmission of homosexuality from parent to child, which seems to rest on the following assumptions: religious parents produce religious children; parents who enjoy alcohol produce disproportionate numbers of beer-drinking children; and parental smoking is strongly associated with childhood smoking (see Cameron and Cameron, 1996, pp.10-11). Irrespective of the merits or otherwise of any of these hypotheses, it is difficult to engage with, or apply intellectual rigour to, such findings in the context of the development of (non-normative) sexual orientation. The seemingly self-evident association of contagion with the development of a non-normative sexuality signifies the discursive construction of the gay ‘Other’ (see de Beauvoir, 1988).

Here, it is important to make one more point, which pertains to my understanding of child development and child welfare. I associate the term ‘child development’ largely with physical, psychological, cognitive, personal, and social development. Relevant dynamics in this regard include language acquisition, formal education attainment, peer-group relations, and inter-personal skills. The term ‘child welfare’ has a very specific connotation that largely encompasses the protection and safety of children, particularly in relation to the risk or perpetration of abuse, neglect, violence, and / or abandonment. It can demand attention from the State in terms of invoking the criminal code, for example. While child development and child welfare are interlinked, I reject their seemingly self-evident conflation in the High Court. I argue that it denotes a very problematic aspect to the High Court ruling in *Zappone and Gilligan*, and that it is indicative of the utter toxicity of heteronormativity in Ireland.

Historical Backdrop

It is becoming apparent that “... children occupy the symbolic, emotional centerfold in much of the contemporary controversy ...” (Stacey, 2004, p.529) surrounding same-sex marriage. This is particularly acute in the courtroom where the inclusion of research studies pertaining to lesbian or gay parenting in same-sex marriage cases may denote an internationally recognised institutional practice *vis-à-vis* the submission of evidence and its interpretation, as happened in Ireland in 2006. I argue that this is rooted in a perpetual anxiety about the ‘necessarily suspect’ ‘Other’ (see de Beauvoir, 1988), and the need to either affirm or allay it. Here, in keeping with my discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011), I offer a possible explanation for the genesis of this practice.

Beginning in the 1950s in the United States, anxieties about lesbianism and homosexuality came to the fore in courtrooms in the context of custody proceedings in the wake of divorce, where concerns about child welfare largely centred on the sexuality of the non-heterosexual parent (see Rivera, 1979, pp.883-904). This needs to be understood against the backdrop of the criminalisation of same-sex intimacy that prevailed in many states (see Rivera, 1979, pp.949-950), and the rationale behind it, i.e. acts must be gendered, heterosexual, marital, and procreative (see Eskridge, 1999). The imperative of marital procreation and the attendant issue of gender complementarity,²¹³ combined with the embeddedness of prescriptive roles in terms of doing gender in marriage (see Dryden, 1999), would have underscored normative assumptions about the sexual orientation of parents. What happened in the United States in the 1970s is that gay and lesbian persons as parents began to rail against courts' preoccupation with the presumed immorality of same-sex intimacy, and they began to vigorously defend their right to parent (Rivera, 1979, pp.897-898).²¹⁴ This denotes an example of the deployment of difference so as to contest and counter the phenomena of heterosexism and homophobia in society (see Brah, 1991). This sparked a growing trend in the inclusion of expert testimony on homosexuality and lesbianism as evidence in court proceedings, of which Professor Green, who testified in *Zappone and Gilligan*, was at the

²¹³ Here, I wish to reiterate that the normatively imposed seamless coalescence between procreation, which relies on biological complementarity, and gender complementarity, which is a social construct that is relied upon in the context of rearing children, is often at the root of heterosexist opposition to same-sex marriage.

²¹⁴ For some judges, this preoccupation turned into prurience. Rivera (1979, p.898) alludes to a case in Ohio in 1974 involving a lesbian wherein the judge asked an expert witness, i.e. Professor Green, how the sex act between lesbians was accomplished? Such voyeurism in a person who had the institutional authority (see Bergvall and Remlinger, 1996) to decide on the matter before the court is a measure of the toxicity of heteronormativity. Somewhat similarly, Cretney (2006, p.1) alludes to a case that attracted much publicity in Britain in 1953 in which three men were convicted of same-sex intimacy with consenting partners, the latter of whom claimed immunity from prosecution in return for their evidence. Cretney (2006, p.1) makes the point that one of the convicted men was in love with his accuser, and that prosecuting counsel saw fit to read aloud his love letters in open court. Such voyeurism is indicative of the toxicity of heteronormativity, which, in this instance, required an extreme and vulgar public salving. For wider discussion on this case, see Wildeblood (1956).

forefront (see Rivera, 1979, pp.897-904).²¹⁵ Professor Kennedy's testimony in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at paras. 24-28) is indicative of that initial trend and its extension beyond matters of child custody.

In Ireland today, while the issue of child custody might be stereotypically predicated on gender (see Coulter, 2010b; Holmquist, 2010; Reilly, 2004) rather than on sexual orientation *per se*,²¹⁶ Rivera's (1979) thesis as it pertained to the United States is such that the imperative to investigate the (non-hetero) sexual orientation of parents in the context of child custody came into being. It is also at this juncture that Professor Green emerged as both an expert witness and as a medical / social researcher. Indeed, his studies, along with others that he conducted with colleagues, allude to this site of contestation (see Green, 1982, p.7; Green *et al*, 1986, pp.182-183).

²¹⁵ Having said that, Rivera (1979, p.901) makes reference to a custody case in California in 1977 in which the court refused to allow the introduction of evidence regarding the issue of sexual preference, because the judge held that the fitness to parent of both the mother and father denoted the only relevant issue before the court. While I understand the general rationale behind the introduction of expert evidence on homosexuality and lesbianism, albeit with a caveat as to what actually constitutes expert evidence and testimony in the first instance, the prescience of that judge's perspective cannot be overstated, although again with the caveat as to who ultimately decides on such fitness. Rivera (1979, p.900) also makes reference to a custody case in Maine in 1976 in which the court held that the mother was intelligently seeking to minimise, if not totally eliminate, the impact of her lesbian lifestyle on her children, i.e. she did not flaunt her lesbianism. This evokes the idea of contagion (see Cameron and Cameron, 1996) with its attendant fear of the unrepentant and transgressive 'Other' (see de Beauvoir, 1988). In this case, that fear seems to have been allayed by the submission to the court of a highly favourable report by a child psychiatrist (see Rivera, 1979, p.900). This general deference to experts is, to some extent, grounded in heteronormative hysteria about the 'necessarily pathological' 'Other' (see de Beauvoir, 1988), and that sense of 'we simply do not know'.

²¹⁶ I am not suggesting that gender should be a determinant of the fitness to parent. My point is that in the 1970s in Ireland, it would have been inconceivable to conceptualise the issue of child custody in the context of parental sexual orientation. The operationalisation of heteronormativity against the backdrop of an absence of divorce, the rigidity of expectations surrounding gender, and the criminalisation of homosexuality, would have put paid to that. Having said that, Smyth (1983, p.151) does allude to the issue of custody rights in the context of lesbian parents against the backdrop of social prejudice that attached to lesbianism in Ireland in the early 1980s. While Valiulis *et al* (2008, pp.49-51) highlight the vulnerability of gay fathers in Ireland today, they make the point that it is difficult to determine whether this stems from sexual orientation / gay identity or whether that vulnerability is derived from the general position of fathers *vis-à-vis* the family law system. In Ireland, court proceedings pertaining to family matters are held *in camera*, which means that hearings are conducted in private (see Holmquist, 2010), and that details of the proceedings cannot be reported on by the media (see Coulter, 2010b). Therefore, it is difficult to unequivocally determine at a national level the extent, or otherwise, of the operationalisation of heteronormativity within the family law system as regards determining such matters as child access, care, custody, guardianship, and maintenance. See Coulter (2007, pp.48-49; 2010b) for a brief discussion on the operationalisation of gender in the family courts in Ireland. This derives from the embeddedness of the male breadwinner / female dependent paradigm.

Moreover, it was in the late 1970s that both the conducting of research comparing children of lesbian or gay parents with those of heterosexual parents, and the publication of that research in renowned professional journals, first began (Patterson, 1992, p.1029). It is conceivable that all of these elements coalesced, and created a context in which the elaboration of such research findings in courtrooms became inevitable, once the right to marry became as contested a concept as the right to parent.

Notwithstanding the body of knowledge on child development that has emerged over a number of decades, heteronormative anxieties are still rooted in the seemingly rational ‘we simply do not know’ thesis, the ingenuity of which derives from the false, yet very effective, dichotomy between ‘us’ and ‘them’ (see Brickell, 2001; Martín Rojo and van Dijk (1997). Justice Sosman’s dissenting judgment in *Goodridge* (see [2003] Mass. 440, paras. 309-395, at paras. 357-363) is a case in point.²¹⁷ It demonstrates that the rather heavy burden of proof, which is in a perpetual state of being against a normative backdrop, necessitates interminable, yet arguably futile, social scientific endeavour. This is because certain research findings, irrespective of the strength of their methodological and theoretical considerations, are never enough. This ensures the persuasiveness of the false dichotomy between what Justice Sosman referred to as the ‘recent, perhaps promising, but essentially untested alternate family structure’ and the ‘proven successful family structure’ (see [2003] Mass. 440, at para. 361). While this wider body of knowledge continues to resound in courtrooms, the inexorable pull of the ‘we simply do not know’ thesis makes it difficult to conceive of the ‘why do we need to know’ question. It makes it difficult for judges and social scientists to reflect on one fundamental premise, i.e. *we* all belong to *the* (one human) family.

²¹⁷ Most of the excerpt from Justice Sosman’s ruling that is contained in Appendix XII formed part of what denoted the Irish State’s references to American case law in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at paras. 186-193).

Integration of Research Studies

This is the backdrop that helps me make sense of research studies pertaining to lesbian / gay parenting and child development, particularly those that were alluded to, or relied upon, in *Zappone and Gilligan*. These are as follows: American Academy of Pediatrics (2002, pp.341-344); Anderssen *et al* (2002, pp.335-351); Brewaeys *et al* (1997, pp.1349-1359); Golombok *et al* (1983, pp.551-572); Golombok and Tasker (1996, pp.3-11); Green (1978, pp.692-697); Green *et al* (1986, pp.167-184); Herek (2006, pp.607-621);²¹⁸ Nock (2001, pp.1-81); and Stacey and Biblarz (2001a, pp.159-183). These studies in their entirety provide a sense of some of the issues that are ‘out there’ at an international level, which concern social and medical researchers (and judges) who are interested in the dynamic of child development in the context of gay or lesbian parenthood. The issues that arise in these studies are as applicable to Ireland as they are to the experience that prevails in such countries as Britain or the United States. For example, in the context of donor insemination in Belgium and the Netherlands, Brewaeys *et al* (1997) highlight the difficulties that lesbians can face *vis-à-vis* access to fertility treatments, and the dearth of legislation with regard to the regulation of fertility clinics. These were issues that O’Connell (2003, pp.88-100) discussed in the context of the prevailing situation in Ireland.²¹⁹ The salience of Golombok *et al* (1983) and Golombok and Tasker (1996) is that they effectively denote a longitudinal study wherein participating families in the former study, which originated in the late 1970s, were followed up in the latter study in the early 1990s. Therefore, their cumulative findings

²¹⁸ I already made reference to this study in Chapter Five.

²¹⁹ Another example of this arose in the matter of *J. McD. v. P. L. and B. M.*, which pertained to the guardianship of a minor child. The case involved a lesbian couple comprising both the biological and social mothers of the child. The biological father of the child was the other party to the case. The High Court record for this case indicates that an Irish fertility clinic refused its services to the biological mother on the basis that she was not in a heterosexual relationship (see [2008] IEHC 96, at p.4). Please note that this is an unreported judgment.

pertain to child development over a number of decades. This is important in terms of debunking the ‘we simply do not know’ maxim. The timeline of the Green (1978) study suggests that Professor Green, who testified for the plaintiffs in *Zappone and Gilligan*, was at the cutting-edge of this type of research. An important dimension to the interpretation of Green *et al* (1986) in the High Court is that some expert witness testimony for the State misconstrued basic information about its research cohorts. The report that was compiled by Dr. Perrin and other medical doctors and consultants, as part of the Committee on Psychosocial Aspects of Child and Family Health (see American Academy of Pediatrics, 2002), suggests that the Discipline of Medicine acknowledges the importance of child development research. It denotes a brief overview of some of the issues that tend to be investigated in research pertaining to lesbian or gay parenthood and child development, including children’s gender identity, for example. Nock (2001) denotes an affidavit that was initially sworn into evidence in *Halpern et al v. Attorney General of Canada et al* (see [2003] 65 O.R., 3d, 161, paras. 1-158). Its inclusion as evidence in *Zappone and Gilligan* is indicative of a growing international trend towards conceiving of expert knowledge regarding lesbian or gay parenting as relevant to determining the right (of lesbians and gay men) to marry.²²⁰ Nonetheless, Nock’s (2001) review of the Green *et al* (1986) study, part of which makes reference to the research cohorts that took part in the 1986 study, is not consistent with basic information that is contained in that study. Both Anderssen *et al* (2002) and Stacey and Biblarz (2001a) denote reviews of over twenty studies pertaining to families that are headed by gay or lesbian parents.²²¹ Furthermore, the Stacey and Biblarz (2001a) review problematises

²²⁰ See Sack Goldblatt Mitchell LLP (2011) for reference to the myriad affidavits that were filed with the court in *Halpern*, including one that Stacey and Biblarz (2001b) submitted. I will elaborate on the significance of their affidavit later in the chapter.

²²¹ I do not use the terms ‘gay family’ or ‘lesbian family’ because they make assumptions about the sexual orientation of minors who are reared in families that are headed by gay or lesbian parents. See Gabb (2004, pp.175-176) in this regard.

heteronormative assumptions that can pervade research on lesbian or gay parenting.

All of the above research studies and reviews are important because they denote evidence that informed expert testimony in *Zappone and Gilligan*. Most of them were introduced over the course of Professor Green's testimony, cross-examination and re-examination (see [2008] 2 I.R. pp.417-513, at paras. 31-44). Exceptions in this regard were Nock (2001) and Herek (2006), which were introduced as part of Professor Casey's testimony and cross-examination (see [2008] 2 I.R. pp.417-513, at paras. 48 and 54 respectively). It is important to reiterate that my thesis does not denote an analysis of these reviews and studies *per se*. Nonetheless, the High Court ruling in *Zappone and Gilligan* was informed by particular understandings of that research. The task here is to balance the importance of their integration into this CDA, as part of my discourse-historical approach, with the elaboration of core aspects to those reviews and studies that best serve the rationale behind this CDA, which is informed by my critical approach to social research. The dynamics that largely guide the importance and integration of child development studies, or reviews of such research studies, are the extent to which their inclusion as evidence and their interpretation in the High Court did the following: reinforced deeply embedded heteronormative assumptions; either challenged or justified the 'we simply do not know' maxim (about the 'necessarily suspect' gay or lesbian 'Other'). These denote key aspects to the second strand of the hetero-matrix that 'justified' the denial of the right of two women to have their marriage recognised in this jurisdiction. That issue is child welfare, as evidenced in Extract I of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 248).²²²

²²² It is important to acknowledge that the plaintiffs' submissions to the High Court made reference to the issue of child welfare. The backdrop here is that counsel for the plaintiffs sought to determine what justifications the State might possibly advance in terms of the State's own position on the matter that

Extract VII

Notwithstanding the *bona fides* of researchers, I reiterate that part of my concern about the conducting of research pertaining to lesbian or gay parenthood is that it tends to presuppose that there is necessarily a question or a problem that needs to be answered or addressed. It is in the areas of the formation and development of gender identity and sexual orientation in children who are reared by such parents that this is particularly acute (see Stacey and Biblarz, 2001a, p.163). The following extract from the reported judgment denotes a heterosexist preoccupation with gender and sexuality, and an uncritical acceptance of what is deemed to constitute the norm:

None of the children had gender identity confusion, wished to be of the other sex or consistently engaged in cross-gender behaviour. For older children in the study there were no differences in sexual attraction or self-identification as homosexual. The children showed no differences in personality measure, peer group relationship, self-esteem, behavioural difficulties or academic success.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 35

In this extract, Justice Dunne recounts Professor Green's testimony regarding the American Academy of Pediatrics (2002) review. Here however, the recounting feature is problematic because it is difficult to

would eventually come before the High Court. This was unclear from the defence that was initially filed by the State. So as to make that determination, plaintiffs' counsel looked to the international context and the ways in which authorities in other jurisdictions have justified restricting the right to marry to heterosexual couples. Four potential justifications were identified: (1) procreation denotes a central feature of marriage; (2) the welfare of children; (3) the definitional argument; (4) social disapproval of homosexuality / lesbianism by the majority of the population (see [2008] 2 I.R. pp.417-513, at paras. 74-79). On the basis of the evidence that was outlined in court, Justice Dunne asserted that the State did not advance the 'procreation argument' or the 'majority view argument' to support its position *vis-à-vis* the exclusion of same-sex couples from marriage in Ireland (see [2008] 2 I.R. pp.417-513, at para. 80). She then stated the following: "In essence therefore the arguments on behalf of the plaintiffs were narrowed down to the definitional argument and the issue in relation to the welfare of children." (see [2008] 2 I.R. pp.417-513, at para. 81) While my thesis addresses both of these latter issues, the important point here is that it was a particular understanding of what the State might advance, in terms of justifying restrictions on the right to marry, that informed the plaintiffs' counsel's decision to refer to the issue of child welfare in *Zappone and Gilligan*. However, I argue that none of the evidence that was discussed in this case pertained to child welfare. Rather, it centred on the issue of child development.

discern who precisely made reference to what appears to be one research study in Extract VII above. This is misleading because the corresponding text in the 2002 report demonstrates that this extract conflates many research studies that were conducted throughout the 1980s and 1990s by different (teams of) researchers.²²³ Moreover, it is difficult to determine whether the above extract constitutes Professor Green's verbatim evidence or whether it is simply meant to denote a summary of his testimony. Either way, it is problematic because it ignores basic details that are contained in the 2002 report, the inclusion of which was deemed to be pertinent to this High Court case. For example, the silence over the number of children who formed the research cohorts, i.e. over three hundred (see American Academy of Pediatrics, 2002, p.342), combined with the glossing over of the detail that these studies were conducted over a period of two decades, expose the lack of intellectual rigour that can attach to the 'we simply do not know' thesis about the 'suspect' or 'possibly pathological' 'Other'. Nonetheless, the seemingly self-evident rationality of this hypothesis ultimately proved to be a deciding factor in terms of the eventual outcome in *Zappone and Gilligan*. I now provide a critical analysis of each sentence / research finding in the above extract from the reported judgment.

Extract VII

The first sentence in Extract VII of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 35), and the 2002 report that it derives from, implicitly take as given, until proven otherwise, the idea that lesbian and gay parenthood raises the spectre of gender dysphoria / gender identity disorder

²²³ Appendix X contains the abstract of this report, which was reproduced as part of Professor Green's expert testimony on behalf of the plaintiffs in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at para. 35; see also American Academy of Pediatrics, 2002, p.341). This appendix also comprises text pertaining to children's gender, psychological, sexual orientation, and social development as reported by the American Academy of Pediatrics (2002, p.342), and cited in these High Court proceedings. It provides a sense of the overall tenor of the studies' findings that are contained in that 2002 report / review. Please note that footnotes in the original text are omitted in the appendix.

(see *Foy v. An t-Ard Chláraitheoir*, [2007] IEHC 470, paras. 1-118). This tends to conflate or confuse gender and (non normative) sexualities. Moreover, no indication is given as to the prevalence of this condition in children who are reared by heterosexual parents. This is a reasonable expectation because the journal's abstract makes reference to such a cohort. This underscores the idea that 'we do not need to know' about heterosexual parenthood and any link to gender dysphoria in children who are reared by such parents. The general imperative to prove the 'no differences' thesis (see Stacey and Biblarz, 2001a, pp.162-164) leaves this silence intact. Rather than investigate the phenomenon of gender dysphoria, or interrogate the normative assumptions that surround it, all of which I accept are irrelevant to the matter before the Irish High Court, such silence creates a rather murky space where panic can set in. There, a presumed pathological parenthood, which operates as the seemingly natural starting point of scientific endeavour, has to be disproved. In the reported judgment, neither the American Academy of Pediatrics (2002) nor Professor Green offer an explanation as to why this is the case, or why the research finding about *not* finding this condition warranted a research question in the first instance. Yet, the study has to form part of expert testimony and evidence in a courtroom because 'we simply do not know'. Crucially, no explanation is offered in the High Court as to why the non-development of gender identity disorder is relevant to the issue of child welfare. I reiterate that this latter issue denoted the second ground for justifying the ban on same-sex marriage in Ireland, as evidenced by Extract I of the reported judgment.

Here, I refer again to the first sentence / research finding in Extract VII of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 35), and the American Academy of Pediatrics (2002) review that it comes from. The reader is not provided with any explanation as to why children or adolescents who are reared by gay or lesbian parents would wish to be of a

different gender, or would engage in cross-gender behaviour, to the extent that such phenomena would denote research findings deriving from research questions. Such findings about non-findings do nothing to disturb the rootedness of heteronormativity and gender complementarity, which seem to self-evidently denote the blueprint as regards the rearing of children. I argue that it is precisely these dynamics that problematise gay and lesbian parenting in the first instance. The imperative to prove the ‘no differences’ thesis (see Stacey and Biblarz, 2001a) is so persuasive, that no explanation is given as to why these findings about phenomena that do not arise are somehow relevant to the issue of child welfare. The routine morphing of child development issues into a matter of child welfare, in a case that centred on the right of two women to marry, neither of whom is a parent, demonstrates the ease with which heteronormativity is ‘justified’ in this jurisdiction.

Extract VII

The second sentence in Extract VII of the reported judgment in *Zappone and Gilligan* is also problematic. Bearing in mind the difficulties with the recounting feature, I reiterate that this research finding was presented over the course of Professor Green’s testimony (see [2008] 2 I.R. pp.417-513, at para. 35). This research finding from the American Academy of Pediatrics (2002) review presupposes that a person’s self-identification as gay is necessarily of scientific interest in a way that heterosexuality is not. The latter is not remarked upon. That socio-cognitive silence can mean that the onset of teenage homosexuality ‘naturally’ constitutes an issue that requires attention and analysis by medical or social researchers. No indication is given as to why that might be the case. Moreover, there is a failure to interrogate the heteronormative assumptions that are embedded in research questions in the first instance, which then inform such research findings.

Having said that, it must be acknowledged that Professor Green has, elsewhere, challenged the presumption that homosexuality is ‘second best’ (see Green, 1982, p.7). Nonetheless, the research finding from the American Academy of Pediatrics (2002) review does underscore the idea that it is in the formation and development of sexual orientation in teenagers, who are reared by lesbian or gay parents, that heteronormative anxiety is particularly acute (see Stacey and Biblarz, 2001a, p.163). The reported judgment in *Zappone and Gilligan* is silent as to the relevance of this research finding, about ‘no differences’ in issues pertaining to (homo) sexuality, to the issue of child welfare.

Extract VII

The last sentence / research finding that is contained in Extract VII above (see [2008] 2 I.R. pp.417-513, at para. 35) denotes the interpretation of six research studies, including Golombok *et al* (1983), by the American Academy of Pediatrics (2002, p.342). The 1983 study compared two cohorts of parents, as female heads of families, and their children on a range of measures within the areas of parenting and child development. The heterosexual cohort is initially identified by the status of those within it as both single and a parent (see Golombok *et al*, 1983, p.554). Here, women’s sexual orientation does not need to be made plain at the outset. However, it seems to be self-evident that the lesbian cohort of parents in the study needs to be immediately identified through the lens of sexual orientation, i.e. the lesbian group (see Golombok *et al*, 1983, p.554). This grounds the idea that it is a particular sexual orientation, rather than the variable of sexual orientation *per se*, which is at the root of social scientific endeavour *vis-à-vis* parenthood and childhood. Against the backdrop of heteronormativity, where such presumptions ‘make sense’, this aspect to

the research design of Golombok *et al* (1983) warranted no elaboration in the American Academy of Pediatrics (2002) review of same.

My analysis of Extract VII from the reported judgment demonstrates the utility of integrating research material into the analysis of text. My critical analysis unearthed a deafening silence within the reported judgment that transcends a mere textual gap. I problematised the seemingly self-evident rationality of the ‘we simply do not know’ and the ‘we do not need to know’ theses, both of which inform, and are informed by, the relentless and routine operationalisation of heteronormativity in society.

Extract VIII

The following extract from the reported judgment in *Zappone and Gilligan* was largely made with reference to Professor Casey’s testimony about the importance of adhering to standard methodological conventions in the conducting of social scientific studies, and its attendant relevance to the research that formed part of Professor Green’s expert evidence:

Professor Casey explained that in the affidavit sworn by Professor Nock, he detailed in the first part of it the methodological approaches to be used in epidemiological research of the sort that is concerned with gay and lesbian parenting and the second part of his report dealt with individual studies published in that area and he critiqued each one pointing to the strength and weaknesses of the particular reports. A long discussion then ensued as to the methodology involved in carrying out social research. The discussion ranged over probability samples, snowball sampling, cross-sectional studies and longitudinal studies. There was an explanation as to the need for controls in relation to studies in order to avoid confounding factors. Reference was made to the study of which Professor Green was a co-author in 1986 in which it was noted that 78% of the lesbian parents studied were living with a partner at the time and that only 10% of the heterosexual mothers who were studied had partners living with them at the time. Professor Casey commented that this was an obvious potential confounding factor for which one needed to have a control. It was also noted that so far as such studies have been conducted there appeared to be no studies conducted into the role of parenting by gay men. Having referred to all of these matters, Professor Casey commented that the various studies cited by Professor Green do not meet the criteria required for good epidemiological studies. They did not use probability or random sampling, they were of small sample size by and large and there were confounding factors in some of the studies. Only one of the studies referred to was a longitudinal study. As a result she was of the view that one had to be very cautious in making broad generalisations about the findings of these studies in regard to the general population. A reference was made to the affidavit of Professor Nock to that effect and I quote:-

“In my opinion the only *accepted* [my italics] conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence.”

Having regard to the evidence as it now stands, she could not draw the conclusion that children were not affected by the consequences of a same sex partnership. She stated that the only conclusion she could draw is that we do not know and need studies that are more rigorous than those that are available at the moment.

Justice Dunne, [2008] 2 I.R. pp.417-513, at paras. 48-51

In this extract from the reported judgment, emphasis is placed on the importance of conducting rigorous social scientific research. This is a premise that generally recommends itself to researchers who are interested in social phenomena. What this CDA now seeks to demonstrate is how an over thirty-year-old repertoire of social scientific knowledge that is positively disposed to lesbian and gay personhood and parenthood, can somehow be reduced to the ‘coherence’ of ‘we simply do not know’. The seemingly self-evident logic of this ‘truth’, which is grounded in the seemingly self-evident imperative of caution (about the ‘suspect’ ‘Other’), ultimately persuaded Justice Dunne to ‘legitimate’ the exclusion of same-sex couples from the institution of marriage in this jurisdiction (see [2008] 2 I.R. pp.417-513, at para. 221). This will become clear as my critical analysis evolves.

The first cog in the evidential wheel is the repeated reference to ‘confounding factor(s)’. These were made in relation to the interpretation of Professor Green’s testimony as well as the Green *et al* (1986) study, which Professor Green conducted with colleagues in the United States.²²⁴ I argue that the most pressing ‘confounding factor’ informed Professor Kennedy’s testimony in the High Court (see [2008] 2 I.R. pp.417-513, at paras. 24-28), i.e. the historical conceptualisation and criminalisation of same-sex intimacy in the West, with its attendant legacies of inequality and stigma.²²⁵ Against the backdrop of deeply embedded heteronormative assumptions in the United States at the time that Green *et al* (1986) conducted and published their study,²²⁶ a gay or lesbian parent risked not just social opprobrium, but also that of judges whose preoccupations with

²²⁴ Appendix XI contains relevant excerpts of the Green *et al* (1986) study.

²²⁵ While this underscores the salience of Professor Kennedy’s evidence, it is important to question the relevance of mental health to the matter before the court. That three psychiatrists testified in this case is also a dynamic that warrants critical reflection.

²²⁶ For example, decriminalisation at a federal level did not take place until 2003 on foot of the U.S. Supreme Court ruling in *Lawrence v. Texas*. See Denniston (2003) and Robertson (2003) in this regard.

the ‘Other’ (see de Beauvoir, 1988) exposed the vulnerability of some parents in child custody cases. Neither medical nor social research is conducted in a vacuum. Therefore, researching what was effectively a hidden and frightened cohort of the population (see Patterson, 1992, p.1026) may have been difficult in the 1980s. It is unlikely that a research team that was concerned about child development and child custody, against a heteronormative and possibly homophobic backdrop, could have the luxury of employing a large-scale research design, the methods of which satisfied the criteria for ‘good epidemiological studies’. It begs an immediate question: What precisely does the Discipline of Epidemiology have to do with child development in the context of lesbian or gay parenthood?²²⁷ This was neither remarked upon nor addressed in the reported judgment. That does not make it peripheral to this analysis. It is a dynamic that is as important as Professor Casey’s admission under cross-examination that “... she herself had not carried out or published any studies on same sex relationships.” (see [2008] 2 I.R. pp.417-513, at para. 52)²²⁸ It is at this juncture that Stacey’s and Biblarz’s (2001b) affidavit in the matter of *Halpern* (see [2003] 65 O.R., 3d, 161, paras. 1-158) comes to the fore.²²⁹ It denotes a detailed and trenchant rebuttal of Nock (2001), the latter of which informed Professor Casey’s assertions in Extract VIII of the

²²⁷ “Epidemiological studies measure the prevalence and risk factors and outcomes of particular conditions.” (Professor Casey, cited in [2008] 2 I.R. pp.417-513, at para. 46) My understanding is that the Discipline of Epidemiology is concerned with the development and prevention of such illnesses as cancer and diabetes. While there is a social dimension to this, associating medical research regarding disease prevalence and prevention with social research pertaining to lesbian and gay parenthood in the context of child development is problematic. It normalises the seemingly self-evident association between contagion and pathology (see Cameron and Cameron, 1996) with child development and (some) parents. Furthermore, even if (homo) sexual orientation were a ‘condition’, we do not know the specificities of its prevalence in Ireland. The latest census of the population, which took place in 2011, did not ask respondents about their sexual orientation (see Central Statistics Office, 2011). Ticking the ‘marital status’ box in the census form does not enlighten demographers as to the prevalence of any sexual orientation in this country. Therefore, when considering the merits of conducting ‘good epidemiological studies’ on demographically hidden cohorts of the population, it is important to reflect on why demographers do not ask such questions in the context of nationwide surveys in the first instance. Here, I wish to acknowledge the salience of Stacey and Biblarz (2001b) whose thesis informed these considerations. This will become clear momentarily.

²²⁸ Here, the use of the term ‘relationships’ is strange because such research does not necessarily yield any insight into the dynamic of lesbian or gay parenthood.

²²⁹ Please note that this affidavit did not denote evidence in *Zappone and Gilligan*.

reported judgment in *Zappone and Gilligan* (see [2008] 2 I.R. pp.417-513, at paras. 48-51). Stacey and Biblarz (2001b, p.6) make the rather prescient point that Professor Nock, in his 2001 review of research studies pertaining to same-sex parenthood and child development, unquestioningly and inappropriately applied the research model that works best in his discipline, i.e. Demography, to an entirely different discipline, i.e. Developmental Psychology. It is unfortunate that Stacey's and Biblarz's (2001b) affidavit did not denote evidence in *Zappone and Gilligan*. It could have challenged the persuasiveness of Professor Nock's (2001) affidavit and the attendant testimony of Professor Casey, such that Justice Dunne might not have relied on their expertise to the extent that she did (see [2008] 2 I.R. pp.417-513, at paras. 215-221). This will become apparent as my analysis evolves.

Extract VIII

Another cog in the evidential wheel relates to excerpts from Extract VIII of the reported judgment that are incorrect. One of these errors is rooted in misreading, rather than misinterpreting,²³⁰ Green *et al* (1986), relevant excerpts of which are contained in Appendix XI. Specifically, I refer to the reliance on percentages in Extract VIII of the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 49), which misrepresented basic details about the research cohorts that took part in the Green *et al* (1986) study. This would have been obvious from the most cursory reading of the study. Because of the recounting feature, it is difficult to determine who precisely was responsible for these inaccuracies and their articulation in the High Court, over the course of expert testimony *vis-à-vis* an affidavit and a research study.²³¹ Extract VIII fails to show that while fifty-six percent of

²³⁰ Here, I wish to emphasise the dynamic of misreading. The mistake was not derived from multiple interpretations of the 1986 study. Rather, it was a matter of literacy.

²³¹ Because the statement was made over the course of Professor Casey's direct testimony, rather than her cross-examination, I do not attribute it to counsel for the plaintiffs. Neither do I attribute the statement to Justice Dunne because it is inconceivable that her interpretation of Green *et al* (1986) would form part of

the lesbian cohort in the 1986 study did live with their partners, twenty-two percent lived with female roommates (see Green *et al*, 1986, p.172). Moreover, Extract VIII fails to show that the ten percent figure with regard to the heterosexual cohort actually refers to female roommates and relatives, such as a sister or a mother (see Green *et al*, 1986, p.172). The relevant excerpt from Extract VIII of the reported judgment is predicated on the conflation of female lovers with female roommates, and male lovers (who did not exist) with female relatives and female roommates. What is interesting about Professor Nock's (2001) affidavit, which is referenced in Extract VIII above, is that it contains the same incorrect information about the Green *et al* (1986) study (see Nock, 2001, pp.60-61).²³² This is an important point, not least in terms of Professor Nock's discourse access profile (see van Dijk, 1993), which implicitly facilitated the inclusion of his sworn testimony / affidavit as evidence in court cases pertaining to the right to marry, as happened in *Zappone and Gilligan*. This error was repeated in the High Court. Another important point here is that Professor Casey proffered her expertise on the Green *et al* (1986) study in court, as evidenced in Extract VIII above (see [2008] 2 I.R. pp.417-513, at paras. 48-51). Her discourse access profile (see van Dijk, 1993), which implicitly informed her stature as an expert knower, thinker, interpreter, and testifier in a constitutional court, presupposes that she would have apprised herself of that 1986 study prior to commenting on it. The absence of any apparent cross-examination of Professor Casey in this regard may have created a space where caution and doubt prevailed as regards the methodological strength of Green *et al* (1986), and perhaps the rigour of Professor Green's testimony in the High Court. The importance of this dynamic will become clear as my analysis evolves.

the articulation of testimony regarding written evidence. She made plain her adjudication of the evidence in its totality in December 2006. This was partly based on what others articulated in court in October 2006, including expert witnesses and senior counsel. I am grateful to a member of the Faculty of Law in University College Cork for clarifying this principle *vis-à-vis* evidence.

²³² In this regard, see Appendix XVI.

Extract VIII

Here, I discuss another error in Extract VIII of the reported judgment (see [2008] 2 I.R. pp.417-513, at paras. 48-51), specifically, the statement about the possible lack of studies regarding the parenting that is done by gay men. Notwithstanding its tentativeness, the claim is patently false. Its ingenuity derives from its caution and imprecision, which inhere in the phrase ‘there appeared to be’. It manages to chip away at the foundations of the over thirty-year-old repertoire of social scientific knowledge surrounding child development in the context of lesbian and gay parenting. Notwithstanding the difficulty with the recounting feature, the precise ‘who’ behind the statement could have been an expert witness. The precise ‘what’ behind it could have been an affidavit. However, the latter is implausible because Professor Nock reviewed a number of research studies that centred on the parenting that is done by gay men (for example, see Nock, 2001, pp.57-58 and p.66). This critical analysis now requires a brief look at some of the primary research that can reject the persuasiveness and veracity of that caution and imprecision, if it emanated from an expert witness for the State.

Here, I reiterate that most of the research studies that were alluded to over the course of these High Court proceedings were introduced over the course of Professor Green’s direct testimony, cross-examination and re-examination (see [2008] 2 I.R. pp.417-513, at paras. 31-44). One exception in this regard was Nock (2001), which was elaborated on as part of Professor Casey’s direct testimony and re-examination by counsel for the State (see [2008] 2 I.R. pp.417-513, at paras. 48-50 and para. 59 respectively). The reported judgment in *Zappone and Gilligan* also indicates that prior to giving evidence, Professor Casey was furnished with the American Academy of Pediatrics (2002) review, Professor Nock’s

(2001) affidavit, and a statement of Professor Green's evidence (see [2008] 2 I.R. pp.417-513, at para. 52). Each of these sources can contradict the statement regarding the parenting that is done by gay men, which is contained in an excerpt from Extract VIII above (see [2008] 2 I.R. pp.417-513, at para. 49). The following examples ably demonstrate this dynamic.

The most cursory reading of Professor Green's evidence indicates that the American Academy of Pediatrics (2002) reviewed research studies pertaining to gay men and their children (see [2008] 2 I.R. pp.417-513, at para. 35). The abstract to that 2002 review, which contains a reference to gay parents, was read out to Professor Green over the course of his testimony (see [2008] 2 I.R. pp.417-513, at para. 35).²³³ The reported judgment indicates that Professor Casey, under cross-examination, proffered her expertise on the American Academy of Pediatrics (2002) review (see [2008] 2 I.R. pp.417-513, at para. 53). It is a reasonable expectation that she would have apprised herself of the 2002 review, on foot of receiving it, and prior to proffering that expertise. Nonetheless, the inexorable pull of the 'we simply do not know' thesis was such that the persuasiveness of the aforementioned caution and imprecision in Extract VIII prevailed. This will become apparent as my analysis evolves.

The Stacey and Biblarz (2001a) review of research studies denoted part of Professor Green's re-examination by counsel for the plaintiffs (see [2008] 2 I.R. pp.417-513, at paras. 43-44) and Professor Casey's cross-examination by counsel for the plaintiffs (see [2008] 2 I.R. pp.417-513, at paras. 56-57). Over the course of Professor Green's re-examination, reference was made to gay parents (see [2008] 2 I.R. pp.417-513, at para. 43). Moreover, a minority of the studies that comprised this 2001 review (see Stacey and Biblarz, 2001a, p.169) pertained to gay male parenting, including Bailey *et*

²³³ See also Appendix X in this regard.

al (1995, pp.124-129). This particular team of researchers interviewed gay fathers and their adult sons with a view to determining the latter's sexual orientation (see Bailey *et al*, 1995, p.125). Another important point here is that the Bailey *et al* (1995) study also formed part of the American Academy of Pediatrics (2002, p.342) review and Professor Nock's (2001, pp.78-79) review of child development research.

In his affidavit, Professor Nock (2001, p.80) also reviewed a research study pertaining to gay fathers that was conducted in the mid to late 1970s, over a period of three years, in Canada and the United States (see Miller, 1979). Therefore, this study would have been at the cutting-edge of this type of research in North America by virtue of its timeline. Miller (1979, pp.544-545) conducted in-depth interviews with both gay men as fathers whose age range from youngest to oldest spanned forty years, and their minor or adult children who ranged in age from young teenagers to persons in their thirties.²³⁴

The above examples are important in terms of the construction of knowledge and expertise on behalf of the State in *Zappone and Gilligan*. I reiterate that, prior to giving evidence, one such expert witness was furnished with sources of information that problematise the statement regarding gay male parenting that forms part of Extract VIII above (see [2008] 2 I.R. 417, at para. 49). These sources are as follows: the American Academy of Pediatrics (2002) review; Professor Nock's (2001) affidavit; and a statement of Professor Green's evidence (see [2008] 2 I.R. pp.417-513, at para. 52). Therefore, my critical analysis demonstrates the lack of

²³⁴ Other minor children were not interviewed due to the following: ethical considerations regarding their incapacity to consent; their inability to understand the nature of the research; their lack of knowledge about their fathers' sexual orientation; and the attendant issue of such parents' right to confidentiality (see Miller, 1979, p.545). See Appendix XIV for a brief, yet quite potent, excerpt from this study.

intellectual rigour that attaches to the ‘we simply do not know’ thesis.²³⁵ Nonetheless, this informed the eventual outcome of this High Court case. This will become clear presently.

Extract VIII

The final aspect to my critical analysis of Extract VIII above (see [2008] 2 I.R. pp.417-513, at paras. 48-51) concerns the inclusion of, and reliance on, Nock (2001). It is important to state that the text of the relevant excerpt from this affidavit is as follows: “However, in my opinion, the only *acceptable* [my italics] conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence.” (Nock, 2001, p.47) The term ‘accepted’, which forms part of Extract VIII above (see [2008] 2 I.R. pp.417-513, at para. 50), means established or time-honoured, while the term ‘acceptable’ means adequate or satisfactory. Here, the difficulty that attaches to reliance on the recounting feature is particularly acute, because a determination on the precise ‘who’ behind the variance in text cannot be made. It could be any or all of the following persons: judge, lawyer, expert witness, transcriber. However, the excerpt from Nock (2001, p.47) was used to bolster Professor Casey’s critique of Professor Green’s evidence, which pertained to research studies and reviews that were published over a period of four decades, from 1978 to 2002.²³⁶ The term ‘accepted’ in Extract VIII manages to neutralise the caveat that inheres in the phrase ‘at this point’. It creates a gulf between ‘proper’ research that necessarily adheres to time-honoured conventions that are established and

²³⁵ Here, it is important to refer to the Anderssen *et al* (2002) review of research studies, which was discussed over the course of Professor Green’s testimony (see [2008] 2 I.R. pp.417-513, at para. 36). Appendix XIII contains the abstract to this 2002 review. Please note that the reported judgment in *Zappone and Gilligan* is not entirely consistent with this abstract. Bearing in mind the recounting feature, the reported judgment is incomplete in that it omits three studies regarding gay male parenting that this research team in Norway reviewed, including Bailey *et al* (1995) and Miller (1979), which I alluded to in this chapter. A thorough elaboration of Anderssen *et al* (2002) in the High Court, incorporating the scope of Miller (1979), for example, both in terms of its timeline and its research cohort, would have helped to undermine the ‘logic’ of the ‘we simply do not know’ thesis.

²³⁶ In this regard, I refer to Green (1978) and American Academy of Pediatrics (2002).

maintained through a ‘solid body of scientific evidence’, and the ‘never enough’ that informs the ‘we simply do not know’ thesis. The ideological wherewithal of this distinction is such that the seemingly self-evident recourse to the Disciplines of Demography, Epidemiology, Mathematics, and Psychiatry cohered and ‘made sense’ in a constitutional case that centred on the right to marry.

Extract IX

The inexorable pull of the powerfully persuasive percentages in Extract VIII of the reported judgment was such that the misreading of basic information in the Green *et al* (1986) study was repeated again in the High Court. Here, I refer to the recounting of Professor Waite’s testimony as an expert witness for the State. Its significance, in terms of the import that Justice Dunne placed on it, cannot be overstated. This will become clear presently.

She was critical of Professor Green’s 1986 study in relation to the outcome for children in terms of sexual identity and relationship to their peers which involved a comparison between children brought up by gay parents, 78% of whom had a partner, and children brought up by heterosexual parent[s] of whom only 10% had a partner and she commented that one could not do a comparison in such circumstances. She said that it was extremely important to have a full picture of the methodology used for a particular study and the controls used to exclude confounding or biased factors. Her comment was as follows:-
“No one should pay any attention to studies that are poorly done. They are just some stories, they really are not science.”
Finally she indicated that she did not come to her views from any kind of ideological viewpoint in relation to these issues.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 67

Here, the ideological distinction between ‘science’ and ‘stories’ could not be more acute. The repeated error, which initially denoted part of my

critical analysis of Extract VIII of the reported judgment, is utterly spurious. Moreover, it could have been immediately discerned from the most cursory reading of Green *et al* (1986), on which Professor Waite proffered her expertise. In that regard, it is a reasonable expectation that she would have apprised herself of the 1986 study so as to inform her interpretation of it in the High Court. Indeed, her discourse access profile (see van Dijk, 1993), which implicitly informed her stature as an expert witness in a constitutional court, presupposes this. Moreover, I argue that it is precisely at the point when an expert is impelled to assert that her position is not derived from ideology, that the morphing of a study into ‘just some story’ becomes ideological. It is precisely that protagonist’s agenda that is ultimately served by the distinction between science and story in the first instance. The consequence of this repeated error will become apparent momentarily.

Extract X

Perhaps the best way of concluding this critical discourse analysis regarding the second strand to the hetero-matrix is to include the following extract from the reported judgment:

The evidence of Professor Green was somewhat controversial. Certainly he was challenged extensively on the conclusions drawn by him as a result of the studies to which he referred. I think it is important to be clear as to the value and weight to be attached to his evidence. [...] As has been described earlier he was vigorously cross-examined in relation to the methodology of the studies he relied upon and the ability to draw conclusions from those studies having regard to the methodology employed in the studies. That criticism extended not just to the studies he had reviewed but to those he himself had been involved in. [...] Having considered his evidence carefully, taking on board the evidence that I also heard from Professor Casey and from Professor Waite, I think that one must have some reservation in relation to the conclusions drawn by Professor Green. The phenomenon of parenting by same sex couples is one of relatively recent history. [...] [S]o far as the evidence is concerned it seems to me that the research into this topic which is of significant importance is not developed to the extent that one could draw such firm conclusions as Professor Green has expressed. The evidence of Patricia Casey largely dealt with the issue of the methodology employed in the various studies described by Professor Green. As is clear from my comments on the evidence of Professor Green, I accepted her evidence in relation to the question of methodology used for conducting the research relied on by Professor Green and commented upon in the affidavit of Professor Nock. It is not necessary to comment further on that issue.

Justice Dunne, [2008] 2 I.R. pp.417-513, at paras. 215-220

This extract is informed by the persuasiveness of the ‘we simply do not know’ thesis. It implicitly hinges on the ‘logic’ of a possibly deficient and pathological ‘Other’ (see Baumrind, 1995). Against the backdrop of deeply embedded heteronormative assumptions, it seems that this ‘suspect’ ‘Other’ must always be under objective scrutiny in the ‘hard sciences’, such as Demography or Mathematics, for example. Its inexorable pull is derived from the seemingly self-evident rationality of Professor Nock’s affidavit and the expert testimony of Professors Casey and Waite. I reiterate that Nock (2001), which initially denoted sworn testimony in *Halpern*, contains incorrect information about the research cohorts that took part in the Green

et al (1986) study (see Nock, 2001, pp.60-61). This error was repeated in the Irish High Court over the course of expert witness testimony for the State. Yet, their evidence ‘self-evidently’ cohered to raise the spectre of doubt about Professor Green’s evidence, experience and expertise. In this regard, Extract X of the reported judgment in *Zappone and Gilligan* is particularly potent. Against the backdrop of prior critical analysis, it speaks volumes ‘by itself’.

Conclusion

This chapter denoted a critical discourse analysis of the High Court ruling in *Zappone and Gilligan*. Its aim was to explain the intransigence of lesbian and gay inequality in Ireland in the context of marriage and family. I identified two crucial and interlocking elements that required analysis in this regard, i.e. (1) the premise that the institution of marriage is inherently heterosexual and (2) the routine pathologisation of lesbians and gay men. To that end, I integrated case law and primary research into my analysis. This was in keeping with my discourse-historical approach to research (see Wodak, 1997b; 1999; 2001; 2011). Indeed, both the accretion of case law on Article 41 of our Constitution, and the routine inclusion / interpretation of child development research in determining the right to marry, ably demonstrated the salience and utility of the DHA to critical research. It helped to explain the rootedness of deeply embedded heteronormative assumptions that inform the following theses: ‘marriage as inherently heterosexual’; ‘since the beginning of time’; ‘until the end of time’; ‘we simply do not know’; and ‘we do not need to know’. I subjected all theses, and the discourses that underpin them, to critical analysis in an effort to explain the intransigence of gay and lesbian inequality in Ireland. Their toxicity in terms of heteronormativity is derived in part from the extent to which the dominant understanding of marriage is bound up with the

dominant understanding of family in our Constitution. While the plaintiffs relied on Articles 40 and 41, the ‘coherence’ of these theses is such that these were precisely the texts that ‘commonsensically’ placed the plaintiffs outside the realm of constitutional protection *vis-à-vis* Articles 40 and 41.

CHAPTER SIX

Pen Pals, Parish-Pumps, and Putting on an Act: ‘Letters to the Editor’,

E-Mails from Politicians, and Oireachtas Debates Pertaining to Civil

Partnership

This is not about equality alone but about balance in our Constitution, namely, on the one hand the protection of marriage and on the other the issue of equality.

Minister Ahern, Select Committee on Justice, Equality, Defence, and Women’s Rights, 2010b, Section 170

Introduction

Informed by both my methodological and theoretical considerations, this chapter elaborates on some of the ways in which the general public and the political class in Ireland conceptualised different aspects to adult relationship and family recognition. This chapter is organised into three sections, with each comprising one genre of discourse (see Wodak, 1997b). Firstly, I draw upon ‘Letters to the Editor’ of *The Irish Times* that were published over the course of the High Court proceedings in October 2006 and the December 2006 ruling in *Zappone and Gilligan*. The second genre pertains to communication that I received from members of the Oireachtas from April 2009 to December 2009 on foot of correspondence from me regarding the 2004 enactment of the legislative ban on same-sex marriage. Lastly, I elaborate on aspects to some of the Oireachtas debates that took place from December 2009 to July 2010 *vis-à-vis* the proposed introduction of a civil partnership regime for same-sex couples in Ireland. The utility of each genre is such that they all serve to highlight the myriad ways in which equality of respect and recognition (see Baker *et al*, 2004) is either affirmed or denied. While the genres of discourse (see Wodak, 1997b) are all inter-

connected, each of them has a particular focus. In Section One, the material that I garnered from the letters' pages of a national daily newspaper helps to determine how 'ordinary' people, who tend to have limited access to the construction of public discourse, framed the issue of same-sex marriage in Ireland in 2006. In Section Two, I rely on a corpus of material that I garnered from deputies and senators in relation to the 2004 legislative ban on same-sex marriage. My critical analysis in that regard sheds some light on the political culture in Ireland that militates against taking personal responsibility for the enactment of legislation. I argue that this is relevant in terms of the intransigence of lesbian and gay inequality in this jurisdiction. In Section Three of Chapter Six, I focus on the myriad ways in which the new legislative regime of civil partnership for same-sex couples was either legitimated or challenged against the backdrop of heteronormativity in Ireland. Therefore, my attention is drawn to the wider issue of relationship recognition, rather than same-sex marriage *per se*. My analysis of material from each genre adds an important and relevant dimension to this thesis, in that they all invariably serve to contextualise the issue of marriage equality / inequality in Ireland. Furthermore, my critical analysis in Chapter Six helps to ground my analysis in Chapter Five.

One final point that I wish to make here pertains to relevant political party affiliation. Fianna Fáil, which has dominated Irish parliamentary politics for decades, presided over the enactment of the legislative ban on same-sex marriage in 2004. While in coalition with the Green Party, Fianna Fáil was also responsible for the enactment of civil partnership and cohabitation legislation in 2010. Fine Gael, Labour and Sinn Féin were in opposition during these time periods. I make reference to these political parties throughout Chapter Six.

Section One: Letters to the Editor: Important Considerations

The utility of the 'Letters to the Editor' genre of discourse (see Wodak, 1997b) is that it can provide a sense of the socio-cultural repertoire of ideologies, norms, opinions, values (see van Dijk, 1997c), and stereotypes (see White and White, 2006) that are 'out there' 'in' social cognition (see van Dijk, 1993; 2006) at a particular time and place in relation to a myriad of social issues. It manages to catch a glimpse or gauge the temperature of the public mood on controversial issues, which tend to arouse interest and elicit response from readers of national daily newspapers, for example. The genre is of particular interest to discourse analysts in that such letters denote a body of knowledge that is produced by people who tend to have limited access to the production of discourse in the public sphere. *The Irish Times*, which is Ireland's oldest national daily newspaper (O'Brien, 2008, p.13), has long been the main alternative voice in the Irish print media (see Whyte, 1979, p.73). Its letters' pages offer an important and lively forum for the airing of views on matters that have courted controversy (see Gageby, 1979, p.132; Whyte, 1979, p.73). *The Irish Times* is also deemed to be the paper of record in Ireland (Brady, 2005, p.2; O'Brien, 2008, p.13). Such factors steered me in the direction of the 'Letters to the Editor' section of this newspaper with a view to capturing a snapshot in time of the public mood in Ireland in relation to the issue of same-sex marriage in general, and the *Zappone and Gilligan* ruling in particular.

Letters to the Editor: Table

| Name | Yes | No | Unclear | Positive | Negative | Themes |
|--------------------------------|-----|----|---------|----------|----------|--|
| Barrett (2006a) | | | X | P | | Language, Meaning |
| Barrett (2006b) | | | X | P | | Human Reproduction |
| Burke, C. (2006) | | | X | P | | Rearing of Children, Gender |
| Corrigan (2006) | X | | | | | Equality, Role of the State |
| D'Alton (2006) | | | X | P | | Meaning of Marriage |
| Doran and Puri (2006) | | | X | N/A | N/A | Critical of Letter Writers |
| Doyle (2006) | | | X | N/A | N/A | Element of Privilege |
| Drury (2006) | | | X | | N | Use of Language, Irish Constitution |
| Eivers (2006) | | | X | P | | Child Development Research |
| Farrell (2006) | | | X | P | | Child Development Research |
| Fitzgerald (2006) | | | X | P | | Rearing of Children |
| Garrahy (2006) | X | | | | | Irish Constitution, ECHR, Equality |
| Hanifin (2006) | X | | | | | Equality, Children |
| Harty (2006) | | | X | P | | Recognition as Citizen |
| Hayes (2006) | | | X | P | | Civil Partnership, Adoption |
| Hemmens (2006) | X | | | | | Irish Constitution |
| Hughes (2006) | | | X | | N | Familial Relationships |
| Ingoldsby (2007) | | X | | | | Moral Decadence, Civil Partnership |
| Kelleher, I. (2006a) | | | X | P | | Reproduction, Fertility |
| Kelleher, I. (2006b) | X | | | | | Meaning of Marriage, Love |
| Kelleher, I. (2006c) | X | | | | | Meaning of Marriage, Love |
| Kelleher, T. (2006) | | X | | | | Children, Social Cohesion |
| Kelly (2006) | | | X | P | | Irish Constitution, Living Instrument |
| Kenny (2006a) | | | X | P | | Canadian Law |
| Kenny (2006b) | X | | | | | Equality, Civil Partnership |
| Keogh (2006) | | X | | | | Intrinsically Heterosexual |
| Larkin (2006) | | | X | | N | Definition of Marriage, Complementarity |
| Lyon (2006) | X | | | | | Labour Party's Position |
| Maguire (2006) | | | X | | N | Definition of Marriage |
| Mathews-McKay and Keane (2006) | X | | | | | Equality, Irish Constitution, Courage of the Plaintiffs in <i>Zappone and Gilligan</i> |
| McBride (2006) | X | | | | | Equality, Children |
| McCarron and Kenny (2006) | | | X | P | | Child Development Research |
| McCarthy (2006) | | | X | P | | Love, Family |
| McGovern (2006) | X | | | | | Right to Marry, Homosexuality |
| McPhillips (2006) | | | X | N/A | N/A | Element of Privilege |
| Mooney (2006) | | | X | | N | Difference <i>To</i> |
| Mullen (2006) | X | | | | | Legislative Process, Judiciary |
| Mulligan (2006) | | X | | | | Definition of Marriage |
| O'Byrne (2006) | | | X | N/A | N/A | Critical of a Letter Writer |
| O'Callaghan (2006a) | | X | | | | Meaning, Complementarity |
| O'Callaghan (2006b) | | X | | | | Meaning, Complementarity |
| O'Connell (2006) | | | X | P | | Role of the Judiciary |
| O'Driscoll (2007) | | | X | P | | Rearing of Children |
| O'Flanagan (2006) | X | | | | | Equality, Privilege, Irish Government |

| Name | Yes | No | Unclear | Positive | Negative | Themes |
|-----------------|-----|----|---------|----------|----------|---|
| O'Reilly (2006) | | X | | | | Human Reproduction, Marriage / Family |
| Philips (2006) | | X | | | | Irish Constitution, Marriage / Family |
| Reilly (2006) | | | X | P | | Relationship Recognition |
| Wilkins (2006) | X | | | | | Irish Constitution, Equality |
| Windle (2006a) | | X | | | | Difference <i>To</i> , Human Reproduction |
| Windle (2006b) | | X | | | | Difference <i>To</i> , Human Reproduction |

I initially sought to organise the material on the basis of unequivocal support for, and opposition to, same-sex marriage. However, I soon realised that this rather narrow preoccupation with reducing the material to a simplistic ‘yes’ or ‘no’ distracted me from the utility of this genre. Having said that, it is important to provide the reader with some sense of the themes that characterise the material. With this in mind, I compiled a table that is largely organised according to what I perceive as those letters that are firmly in the ‘yes’ and ‘no’ camps as regards marriage equality, together with a column pertaining to those writers whose perspectives are less clear. I do not wish to attribute an incorrect perspective to a letter writer. This helps to explain the volume of letters in this latter column. Nonetheless, so as to enable them to ‘speak’ in some way to the reader, I have organised them into those that I deem to be positively (P) or negatively (N) disposed to marriage equality. It is not possible to categorise the letters from Doran and Puri (2006), Doyle (2006), McPhillips (2006), and O’Byrne (2006), because perspectives on this issue are not discernible. It is important to state that my categorisation of letters is mine alone. Elements to it may be directly at odds with a letter writer’s intent or perspective. Similarly, the themes that I ascribe to the material may be at odds with those of a particular writer’s intent or perspective. These issues will become clear as my analysis evolves.

A letter writer indicated that one of the joys of reading *The Irish Times* was his grounded expectation that it consistently publishes a diverse range of

opinion on social issues (see Murray, 2008).²³⁷ The material that comprises this genre of discourse (see Wodak, 1997b) attests to that. Initially, both the High Court case and a number of ‘Opinion’ pieces in this newspaper, including O’Brien (2006) and Reville (2006a), prompted the airing of views in the letters’ pages. These letters were, for the most part, positively disposed to same-sex marriage and lesbian / gay parenting. These letters then impelled others to put pen to paper. The general tenor of many of these letters was largely supportive of relationship and family recognition. Those who provided a negative critique tended to frame their responses around the dominant understanding of marriage and the imperative of procreation. What is interesting about this ‘public conversation’ thus far is that, for much of October 2006, which coincided with the High Court proceedings in *Zappone and Gilligan*, there was scarcely a mention of the court case. This trend continued throughout November 2006 in the letters’ pages. What characterises this timeline is the extent to which O’Callaghan (2006a) triggered a barrage of responses from letter writers. O’Callaghan (2006a) denoted a response to the most prolific writer in terms of published responses over the entirety of my search, i.e. Kelleher (2006a,b,c). None of the published responses to O’Callaghan (2006a) supported her perspective, which centred on the dominant understanding of marriage and the imperative of gender complementarity. The general tenor of the response to O’Callaghan (2006a) was such that she defended and reiterated her position (see O’Callaghan (2006b). Subsequently, there was a considerable lull in the ‘public conversation’, as mediated through the letters’ pages of *The Irish Times*, which was broken by letter writers who supported or opposed the December 2006 ruling in *Zappone and Gilligan*. What is interesting

²³⁷ Murray’s (2008) letter was prompted by Casey’s (2008e) ‘Opinion’ piece in *The Irish Times*, which pertained to the debate on marriage and family in Ireland. Professor Casey, who was an expert witness for the State in *Zappone and Gilligan*, included her professional credentials in her letter. However, Murray (2008) stated that, in failing to publish her affiliation with the Iona Institute, the newspaper failed to disclose important information to the reader that is directly relevant to interpretations of such opinion and analysis on social issues, including marriage and family.

here is that one letter that supported the ruling, i.e. Philips (2006), triggered a relatively large response from people who criticised her perspective, which alluded to the prevailing struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of marriage. This dynamic, which is very much related to the production of discourse, exercised the minds of many letter writers immediately after the High Court ruling in 2006.

In my upcoming analysis in Section One, my attention is drawn to those letters whose theme(s) and / or tenor are unexpected. I allude to the reproduction of privilege and the complexity of a party-political dimension to the realisation of marriage equality in Ireland. Both of these dynamics help to explain the intransigence of lesbian and gay inequality. The ‘marriage as inherently heterosexual’ thesis, which I discussed in Chapter Five, also emerges in the material, particularly in relation to procreation and gender complementarity. Both of these issues tend to inform heterosexist opposition to marriage equality. The process of legitimation, which denotes part of my methodological considerations that I discussed in Chapter One, is evident in terms of the construction of knowledge. Moreover, many of these themes evoke much of my analysis in Chapter Five.

Theme: Making and Legitimizing Claims

The Labour Party’s Position(s) on Marriage Equality

The legitimating of claims in the context of a party-political dimension to marriage equality denotes one of the most unexpected themes in this analysis. Here, it is important to make the point that letters can be written in personal and professional capacities. However, the reliance on

professional credentials so as to validate an opinion requires some caution. Details supplied by Hanifin (2006), who supports marriage equality, suggest that she was speaking in a professional capacity as a Labour Party official when she responded to an ‘Opinion’ piece by O’Brien (2006), which pertained to the importance of gender complementarity *vis-à-vis* the begetting and rearing of children in the marital family. Hanifin (2006) stated:

To deny same-sex couples the right to marry because together they will not create children would be as wrong as it would be to deny two people who are not going to have children for whatever reasons to marry. ... Opposite-sex couples should not be seen as superior human beings just because they conform to the traditional idea of a union. Same-sex couples are equal and deserve to be treated equally.

Hanifin, 2006

Her party-political credentials as Women and Equality Officer denote a particular discourse access profile (see van Dijk, 1993) with an attendant authority. Their use presupposes familiarity with the Labour Party’s position on important dimensions to the principle of equality, including marriage equality. The difficulty for Hanifin (2006) is that she implicitly sought to articulate this in a context where Labour’s position *per se* was not expressly espoused. In this regard, Lyon (2006) asked the following:

Is Ms Hanifin speaking in an official capacity? And if she is, does this represent a change of party policy since February 2004, when Labour TDs abstained from a vote on a Sinn Féin amendment (to the Civil Registration Bill) which would have allowed for same-sex marriage?

Lyon, 2006

An important backdrop here is a Dáil vote pertaining to a Sinn Féin amendment that sought to remove the proposed ban on same-sex marriage from the *Civil Registration Bill, 2003* as it progressed through the Oireachtas (see Dáil Éireann, 2004l, para. 1009).²³⁸ Section 2.2(e) of the *Civil Registration Act, 2004* denies same-sex couples the right to marry in this jurisdiction. In January 2010, a high-profile member of the Labour Party informed me, on foot of communication to him, that the rationale behind this party's abstention from the Dáil vote derived from legal advice. This advice indicated that passing this amendment would not have made same-sex marriage legally permissible in Ireland. If this response denoted a constituent part of the Labour Party's position on marriage equality at that time, it is conceivable that this would have been supported by documentation. Labour Party officials, including its officers, might have had access to such documentation. Moreover, this seeking of advice on the matter suggests that the party might have been apprised of the possibility that the proposed ban would trigger a vote in the Dáil when it did. This would presuppose prior knowledge of the ban's insertion into the proposed legislation in 2004. The important point here with regard to Hanifin (2006) is that professional credentials that may have been used to validate opposition to the denial of marriage equality, actually served to hone in on the complexity of Labour's position at the time. The legislative ban on same-sex marriage came into being on Labour's watch. Moreover, the Dáil record shows that its deputies did not attempt to stop it at a crucial stage in the legislation's passage through the Oireachtas (see Dáil Éireann, 2004l, para. 1009). The absence of a published response in the letters' pages of *The Irish Times* over the period of my search underscores the complexity of Labour's position, which Lyon (2006) captured. This analysis also

²³⁸ In May 2009, on foot of communication by me to Sinn Féin, Wendy Lyon alerted me to that party's attempt to remove the clause banning same-sex marriage from the 2003 proposed legislation at its Report and Final Stages in 2004. I will revisit this issue in Section Two of Chapter Six.

demonstrates the utility of integrating text from another genre, in that it facilitated a more rigorous analysis of ‘Letters to the Editor’.

It can be argued that a similar fate befell what is otherwise a rather potent letter that Mathews-McKay and Keane (2006) wrote in their capacities as Co-Chairs of Labour LGBT. They drew upon the following themes: our Constitution is a ‘living instrument’ that is not stuck in the ‘permafrost’ of 1937 (see Hogan and Whyte, 1994); the significance of the *Zappone and Gilligan* case extends beyond a taxation code that does not recognise the plaintiffs as a married couple; and the right of gay men and lesbians to marry is bound up with the principle of equality (see Mathews-McKay and Keane, 2006). In the following extract, they set down a marker:

If the Constitution is to be valued as a living document, the onus is on all of us to ensure that legislators do not exclude, divide or commodify us. This groundbreaking case [*Zappone and Gilligan*] has created links and sparked a flame among political, social and queer activists across the country who recognise that now is the time for civil society and those with power to ensure that security and fairness, justice and equality are conceptualised and realised for all of us who are being marginalised.

Mathews-McKay and Keane, 2006

Both Co-Chairs implicitly sought to validate their core arguments and align them with Labour Party policy *vis-à-vis* marriage equality when they used their party-political credentials. This can presuppose symmetry between the Labour Party, its LGBT membership, and party policy on important issues such as the realisation of rights. However, it is difficult to ‘square’ the rallying call that is apparent in the above extract with the ‘circle’ that denotes the Labour Party’s rationale for its action / inaction in the Dáil *vis-à-vis* the 2004 legislative ban on same-sex marriage. This should have been apparent to both of them by virtue of their discourse access profiles (see

van Dijk, 1993). Similar to Hanifin (2006), Mathews-McKay and Keane (2006) underscored the complexity of Labour's position on marriage equality. Moreover, their initiative is at odds with the inertia that inheres in Labour's self-imposed powerlessness in terms of its inability to place the ban on the legislature's agenda at the time, so as to debate it at a crucial stage in the legislative process in February 2004.

The Imperative of Mis/Representation

The following example hones in on the 'who' behind the construction of 'necessarily valid' scientific knowledge. The impetus behind McCarron's and Kenny's (2006) letter was an 'Opinion' piece by Reville (2006a) in *The Irish Times*. At the time of writing, he was Associate Professor of Biochemistry in University College Cork. Reville (2006a) stated that there was very significant scientific evidence available indicating that both parents and children fare best in stable married families. However, in not substantiating his claim, Reville (2006a) implicitly drew upon his discourse access profile (see van Dijk, 1993), which underscores, and is underscored by, his 'Under the Microscope' column in *The Irish Times*. Indeed, he implicitly deemed his assertion to be self-evident.²³⁹ This prompted McCarron and Kenny (2006) to challenge him in their letter, which drew upon the American Academy of Pediatrics (2002) review to substantiate their perspective. This seems to be positively disposed to lesbian / gay parenting and same-sex marriage. The difficulty with McCarron's and Kenny's (2006) letter does not become apparent until one reads Doran and Puri (2006), who were robust in their criticism of the recourse to the professional so as to validate the personal. The contact details provided by

²³⁹ In a subsequent column within this genre, Reville (2006b) sought to redress this oversight in the context of lesbian and gay parenting by drawing upon Nock (2001) and the American Academy of Pediatrics (2002). These denoted reviews of child development research studies. They also denoted written evidence in *Zappone and Gilligan*. I referred to them throughout my critical analysis in Section Two of Chapter Five.

McCarron and Kenny (2006) to the Editor of *The Irish Times* implied that they were associated with the Children's Research Centre in Our Lady's Children's Hospital in Dublin.²⁴⁰ This strategy implicitly relied on social cognition (see van Dijk, 1993; 2006) in terms of a public consensus surrounding the general importance of paediatric research. However, in doing that, they 'crossed a line'. This becomes apparent in the following extract from Doran and Puri (2006), who, at the time of writing, held the positions of Chief Executive and Director of Research at the centre respectively:²⁴¹

A letter in your edition of October 4th appeared to represent viewpoints belonging to or developed in the Children's Research Centre. Nobody here is authorised to express any views, particularly personal views, that purport to represent, come from, or might be construed as somehow being associated with or resulting from any work that is carried out in or from The Children's Research Centre. This centre has done no research or investigative work of any kind on this or any related topic. The letter seemed to indicate that work of that nature has been carried out here and that hypotheses have been formed or conclusions arrived at relating to children and marriage. It may have seemed to have credibility because our address was printed below the authors' names. Moreover, it issued a challenge on a subject of great controversy that could be interpreted as issuing from the Children's Research Centre. We have never discussed this subject and we certainly have no "corporate" view on it.

Doran and Puri, 2006

Here, Doran and Puri (2006) challenged McCarron and Kenny (2006) in a public forum, and unravelled what effectively amounted to a false truth-claim by the latter. That Doran and Puri (2006) 'survived' editorial screening, and were subsequently published in a letters' page, leads me to accept their *bona fides*. The converse is the case for McCarron and Kenny

²⁴⁰ See <http://www.nationalchildrensresearchcentre.ie/>

²⁴¹ Professor Puri is still affiliated with this centre. See National Children's Research Centre (2012).

(2006). Here, the imperative of ‘address-dropping’ was used to further the twin objectives of credibility and validity. McCarron and Kenny (2006) drew upon the American Academy of Pediatrics (2002) review to substantiate their perspective. This was ‘grounded’ in their apparent professional affiliation with the Children’s Research Centre. This implicitly relied on social cognition (see van Dijk, 1993; 2006), and the attendant capacity of *The Irish Times* reader to ‘join the dots’ between Irish and American paediatric research. This constructed a seemingly credible and definitive perspective on child development in the context of marriage. It came into being, even though it does not exist (see Doran and Puri, 2006). Such is the ideological wherewithal of discourse.

Theme: The Reproduction of Privilege

The reproduction of privilege denotes an important theme that emerges from the analysis of text within this genre. One of the most potent reminders of privilege is the extent to which it remains unchecked and unseen by those who benefit from its routine operationalisation in society (see Wildman, 1996). I suspect that neither of the writers of the following two extracts are aware of the privilege that is required to utter such statements in the first instance, which is precisely the point:

Surely same-sex couples have the right to be as miserable as the rest of us.

Doyle, 2006

I really can’t understand all the fuss and debate regarding “same-sex marriage” in your letter pages recently. I’ve been having the same sex, with the same woman, for the past 24 years, and we are very happily married.

McPhillips, 2006

While these statements appear to be ‘tongue-in-cheek’, they are indicative of the phenomenon of privilege and its reproduction in society. Its normalisation is such that advocating marriage equality, for example, which has the capacity to destabilise heterosexual privilege to its core, risks undermining the fundamental principle of equality. Windle (2006a) demonstrated this while attempting to evoke the general tenor of Hanifin (2006) and McBride (2006), both of which denoted responses to O’Brien’s (2006) ‘Opinion’ piece regarding gender complementarity. Windle (2006a) asserted the following with regard to both letters:

[Both letters] were packed full of the usual woolly rubbish on equality that we hear so often these days. While an individual’s sexuality is their own business, the idea that heterosexual couples and homosexual couples should be treated as equals is plain ridiculous.

Windle, 2006a

The kernel of his letter pertained to the imperative of procreation without an expressly articulated reference to marital procreation. The important point here in the context of privilege is that no one on the receiving end of inequality, criminalisation or pathologisation would write such a statement. This is because privilege facilitates unawareness of the resilience of social systems of oppression, such as heterosexism and homophobia. Here, privilege normalises the seemingly self-evident rationality of the ‘us / them’ distinction (see Brickell, 2001; Martín Rojo and van Dijk, 1997) and the concept of difference, which pervade Windle’s (2006a) letter in its entirety.

The general tenor of the response that Windle (2006a) engendered in Harty (2006), McGovern (2006), O’Byrne (2006), and Reilly (2006), impelled him to clarify his position. He stated:

Firstly, I have nothing against homosexuals. ... The problem for me arises when we try to equate fully the idea of a heterosexual relationship with one between homosexuals. Society can continue only if people have children. Heterosexuals in general have the capacity to reproduce. ... I don't have any major objection to a civil union that gives equal rights on certain issues like inheritance. However we cannot make two things equal where they are clearly not in all aspects, even if they are in very many others.

Windle, 2006b

While Windle (2006b) did omit the 'but' in his 'I have nothing against homosexuals' perspective, he does not comprehend the privilege that such a statement commands in the first instance. There is also an inability to appreciate that it is biology, rather than (hetero) sexual orientation *per se*, that triggers procreation. In the above extract, the over-arching imperative of 'heterosexuality-only' reproduction is such that he conflates or confuses the principle of equality with the dynamic of sameness. This facilitates the slippage into the 'logic' of difference as deficit (see Baumrind, 1995) and difference to, thereby codifying 'us and them' (see Brickell, 2001; Martín Rojo and van Dijk, 1997). Indeed, I argue that his use of the all-inclusive 'we' merely compounds the disjuncture between 'us' and 'them'. This general strategy then normalises the instituting of a two-tier system of relationship recognition. Moreover, it is precisely the phenomenon of heterosexual privilege that dictates the 'who' with the wherewithal to set the limits of this tiered infrastructure with its taken-as-given 'diamond standard' that does not need to be named. Windle (2006b) did not trigger a published response in the letters' pages of *The Irish Times* over the course of my search's timeline.

Theme: Marriage as Inherently Heterosexual

Windle (2006a,b) relies on, and underscores, the ‘since the beginning of time’ thesis, which I alluded to in Chapter Five. This was highlighted in another response to Hanifin (2006) in the letters’ page:

[She] would have us believe that the State should recognise same-sex couples as having a “right to marry”... The fact is that it is not within the power of the State to do this; it cannot recognise a right where none exists. Marriage is by nature always an exclusive, and in principle procreative, union between one man and one woman. ... To attempt to redefine marriage in order to “fit everyone in”... is ultimately a move to undermine it completely.

Mulligan, 2006

Here, the manner in which the issue is framed evokes that adopted by Archbishop McQuaid in relation to the ‘looming’ prospect of liberalising our laws on contraception (see Anon., 1971c), as highlighted in Chapter Four. It is also similar to that adopted by counsel for the State in *Zappone and Gilligan*, who asserted that the right to same-sex marriage does not exist (see [2008] 2 I.R. pp.417-513, at para. 140). The above extract implicitly invokes many of the concepts that I have already theorised in this work, including difference as social relation (see Brah, 1991; 1996), difference to, difference as deficit (see Baumrind, 1995), and ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997). Moreover, Mulligan (2006) implicitly presupposes that furthering equality of respect and recognition (see Baker *et al*, 2004) will undermine the institution of marriage. This implicitly relies on a pathological ‘lacking’ in one entire cohort of the population, members of which can never quite measure *up* to the rigours of the normative ‘diamond standard’.

Theme: Gender Complementarity

The references to procreation in the context of the debate on same-sex marriage, including those articulated by Mulligan (2006) and Windle (2006b), highlight an important issue that emerges in this genre of discourse (see Wodak, 1997b), i.e. the rearing of children. This issue is at the heart of the second strand to the hetero-matrix *vis-à-vis* the institution of marriage and family, as evidenced in Chapter Five. In response to Kelleher (2006b), which largely pertained to the meaning of marriage, O’Callaghan (2006a) asserted the following:

Finally, in the debate on same-sex marriage I believe it is time we looked at the rights of the overwhelming majority of fathers and mothers who love and care for their children. For to argue that a child will fare just as well with two mothers or two fathers as with their own parents, as same-sex advocates are forced to argue, is to tell each father and each mother in our society that their role is so insignificant that they can be replaced and that this won’t affect their child in any way. In addition, this replacement is not even by someone of their own sex, but by someone of the opposite sex who assumes their role. Surely this is a great disservice to the overwhelming majority of mothers and fathers who selflessly care for their children?

O’Callaghan, 2006a

Here, the rootedness of gender complementarity is such that O’Callaghan (2006a) assumes an expertise in terms of elaborating on the ‘natural’ division of the population into ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997). Her conflation of marriage and family, as if they denote one social institution, normalises the idea that the terms ‘spouse’, ‘parent’, ‘lesbian’, and ‘gay man’ are mutually exclusive. It facilitates the routine pathologisation of a parent on the basis of gender. The ordinariness of this fosters the presumption that love is tantamount to selfishness when gay men and women ‘set their sights’ on marriage and family. This

dynamic has crept into the discourse surrounding heterosexist opposition to same-sex marriage in Ireland. Professor Casey, who testified in *Zappone and Gilligan*, conceives of this as the ‘adult happiness and fulfilment’ model, which derives from what she refers to as the ‘adult equality’ position (see Casey, 2008e). In a similar vein, it is conceived of as the ‘personal fulfilment’ model, which reflects the ‘my needs are no longer being met’ thesis (see O’Brien, 2006).²⁴² It is important to state that O’Brien (2006) attributes what could be described as a ‘test-drive’ approach to marriage (see Fee, 2007, p.432) to heterosexuals. The difficulty here is that this general diminution of marriage is then necessarily linked to the introduction of same-sex marriage. Both Casey’s (2008e) and O’Brien’s (2006) seemingly relevant theses to the debate on marriage equality are then framed in contra-distinction to a child-centred approach to marriage and family. This ‘logic’ is difficult to counter precisely because of a socio-cognitive awareness of the importance of child development. O’Callaghan (2006a) implicitly draws upon this aspect to social cognition (see van Dijk, 1993; 2006) to support her position, which, I argue, is grounded in deeply embedded assumptions and expectations *vis-à-vis* gender and parenting. She implicitly conceives of the phenomenon of social parenting as a profound vulnerability for advocates of marriage equality. Yet, she is blind to the fundamental flaw in her own argument, i.e. reconciling the issue of (non-biological) ‘replacement’, which is a term that is taken directly from her letter, with the issue of adoption in marital families.

Her letter triggered responses from D’Alton (2006) and Kelleher (2006c), whose letters centred on understandings of marriage, and from Burke (2006) and Fitzgerald (2006), who wrote with regard to the rearing of

²⁴² This ‘Opinion’ piece triggered responses in the letters’ pages from Hanifin (2006) and McBride (2006).

children. The following denotes an extract from Burke (2006) who challenges normative assumptions that are derived from the seemingly self-evident truth of gender complementarity:

Am I to gather from this that Ms O'Callaghan judges ability to nurture purely on the basis of gender? Or that she believes that offending people is what should be taken into account in issues such as this, rather than the good of the child? ... It is ridiculous to think that someone is a good parent because of their gender.

Burke, 2006

I suspect that O'Callaghan (2006a) did not set out to be offensive. Yet, this is the dynamic that she engenders in me. This stems from my belief that such sentiments as those expressed by O'Callaghan (2006a) diminish us all as a society. It also derives from my reading of the Valiulis *et al* (2008) study, which captures the utter despair that is wrought by the destructive force of heteronormativity, which is grounded in the paradigmatic 'truth' of gender complementarity. Moreover, that sense of utter desolation in lesbian and gay parents who took part in the 2008 study is particularly acute precisely because of the extent to which they love their children.²⁴³

The following denotes part of O'Callaghan's (2006b) response to Burke (2006):

²⁴³ I acknowledge that the 2008 study was published after the publication of O'Callaghan (2006a) in the letters' page of *The Irish Times*.

Caitríona Burke (Nov 10th) asks if I judge ability to nurture purely on the basis of gender. On this matter I would agree with Ms. Burke that to do so would be “ridiculous”. However, it would be equally ridiculous to deny the empirically observable influence of gender in nurturing. Men and women are equal but they are different – hence the value of gender studies and social and psychological research on male/female differences.

O’Callaghan, 2006b

Here, O’Callaghan (2006b) makes an important point in relation to gender equality and difference, and the tendency to conflate or confuse equality with sameness. O’Callaghan (2006b) is also supportive of the general imperative of conducting social research on issues pertaining to gender. The difficulty, in terms of the debate on marriage equality and lesbian / gay parenthood, is the way in which difference is constructed as a ‘sound’ basis for inequality. O’Callaghan (2006a,b) implicitly conceives of difference as a fundamental prerequisite for parenthood, but only in the limited context of the binaries of female and male, rather than in terms of differences between two women as mothers, for example. The ‘safety’ of gender complementarity provides respite from such ‘chaos’. However, the rootedness of this paradigm is such that O’Callaghan (2006a,b) is oblivious to the destruction that is wrought by heteronormativity in Ireland, as evidenced in Valiulis *et al* (2008), albeit after the publication of her letters. O’Callaghan (2006b) did not trigger a published response in the letters’ pages.

Section Two: Legislators' Communications: Important Considerations

Notwithstanding the plethora of marriage laws that have been enacted by legislators over the centuries, there is no statutory definition of marriage in Ireland (see Inter-Departmental Committee on Reform of Marriage Law, 2004, p.4; see also [2008] 2 I.R. pp.417-513, at para. 120).²⁴⁴ This effectively means that the responsibility for defining marriage has been left to the courts (Inter-Departmental Committee on Reform of Marriage Law, 2004, p.4). This helps to explain the accretion of case law that constructs the dominant understanding of marriage in our Constitution. Towards the end of her deliberations in *Zappone and Gilligan*, Justice Dunne conceived of the 2004 legislative ban on same-sex marriage as being indicative of what marriage *is* [my italics] and how it should be defined (see [2008] 2 I.R. pp.417-513, at para. 243).²⁴⁵ This conceptualisation influenced my decision to contact politicians in the Oireachtas with a view to determining the impetus behind the ban. Specifically, I sought to discern the general rationale behind the enactment of Section 2.2(e) of the *Civil Registration Act, 2004*. The recourse to communicate with them, and the expectation that they would respond to me, denotes one of the few ways in which 'ordinary' people can be involved in the production of discourse. It presupposes that politicians have a discourse access profile (see van Dijk, 1993) that encompasses their institutionally granted authority (see Bergvall and Remlinger, 1996) as both legislators and public representatives.

²⁴⁴ In March 2012, on foot of a written enquiry from me to the General Register Office, an employee indicated that this situation still prevails in Ireland.

²⁴⁵ I use italics here because my belief is that it is quite extraordinary to define what marriage is in terms of what it is not (officially) or in terms of the 'who' that the institution excludes, rather than those that it currently includes. The legislative impediment to marriage between couples of the same sex does not define what marriage is in Ireland. It is analogous to defining civil partnership simply on the basis that it excludes heterosexuals. The legislative impediment to civil partnership between opposite-sex couples does not define what civil partnership is in Ireland. See Appendix VII for details of Section 7.3(e) of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010*.

It is important to state that I maintain the anonymity of my respondents. Over the course of my contact with them, I did not always identify myself as a researcher. At the time, I had not conceived of their responses as text within a genre of discourse (see Wodak, 1997b) that I could integrate into my thesis. The salience of the discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011) in this regard had not registered with me. Having said that, their profession presupposes a public persona and regular contact with the public. Therefore, relying on their responses to me, which inform my upcoming analysis, does not denote an ethical breach. It is important to make the point that, throughout my communication with legislators in 2009, I provided them with sufficient details about the legislation so as to facilitate informed responses from them. An additional consideration here is that the relevant clause that bars same-sex couples from marrying in Ireland was not debated in either the Dáil or the Seanad prior to the legislation's enactment in 2004.

Here, I elaborate on important themes that emerged from the critical analysis of text from this genre of discourse (see Wodak, 1997b), specifically, a lack of awareness about the ban on same-sex marriage, confusion about the legislation, the imperatives of party-political allegiance and affiliation, and the seemingly self-evident recourse to civil partnership. In Section Two, I demonstrate how these dynamics underscore the routine operationalisation of heteronormativity in Ireland. Firstly, I argue that some Irish legislators might have been unaware of the ban in the proposed legislation as it progressed through the Oireachtas. This dynamic, along with a level of confusion about the legislation, help to explain the relative failure of Irish parliamentary politics at the time to place the issue of marriage equality firmly on the legislature's agenda. This analysis also demonstrates the extent to which the ban, which codifies marriage inequality, was implicitly deemed to be immaterial to other rather narrow

preoccupations, such as party-political allegiance. I argue that this was a device that allowed politicians to get off the ‘hetero-hook’ when enquiries about their voting record on the 2004 ban became unpalatable. The last theme to emerge in Section Two is the imperative to latch on to the device of civil partnership. The attraction to appear at the vanguard of relationship recognition at the time, by situating civil partnership at the top of the legislature’s agenda, was considerable. However, I argue that these politicians merely succeeded in making plain their own vulnerability *vis-à-vis* their voting record. This underscores their complicity in the routine operationalisation of heteronormativity in Ireland.

Theme: Lack of Awareness About the 2004 Legislative Ban

The upcoming response came from one of two senators whom I had initially contacted about the ban and the absence of debate on it in the Oireachtas. His support for marriage equality influenced my decision to contact him in the first instance. His assistant relayed the following response in April 2009:

[Name] as you saw didn’t speak on this Act and doesn’t remember it as being a Bill that related to any kind of gay rights issue. Judging by the text of the debates on the Bill it’s [sic] key purpose seemed to relate to reform of registration of births, deaths etc and as this was clearly something that most people wanted, perhaps this overshadowed the same-sex marriage issue?

Respondent One, 2009a

Here, the general imperative behind the legislation was prioritised. This created a safe space where the issues at the core of my communication could be sidelined. It excused the lack of rigorous legislative scrutiny by appealing to the legislation’s wider remit as if this were a reasonable explanation for the absence of debate on the ban. The general tenor of the

senator's response suggested that he might not have known about the ban. At the time, I found it difficult to come to grips with this possibility, precisely because of his politics regarding the principle of marriage equality, which he supports. This informed my decision to contact his assistant as to the senator's knowledge of the ban. I received the following response from her in May 2009:

With regards to whether or not he was aware of the proposed ban in Section 2.2(e), as I said in the previous email [name] doesn't remember it as being a Bill that related to any kind of gay rights issue. Judging by the text of the debates on the Bill its key purpose seemed to relate to reform of registration of births, deaths etc.

Respondent One, 2009b

It 'speaks' volumes 'by itself'.²⁴⁶

On foot of this correspondence, which suggested a lack of awareness about the 2004 legislative ban, from the office of a supporter of marriage equality, I initiated contact with other senators and deputies. I asked them about their knowledge of the ban and the absence of debate on the ban in the Oireachtas. Arising out of correspondence that I received from the office of a Sinn Féin deputy, which highlighted that party's attempt in the Dáil to delete the ban from the proposed legislation in 2004, I revised my questions to Dáil deputies. I asked them why they voted to keep the ban intact.²⁴⁷

²⁴⁶ It is important to make the point that the extract 'speaks' 'by itself' primarily because of prior critical analysis. I will discuss some of the other senator's correspondence to me in the context of the recourse to civil partnership.

²⁴⁷ I alluded to this in Section One of Chapter Six. See Select Committee on Social and Family Affairs (2004b) for details of amendment 9. It was at Committee Stage that the express ban on same-sex marriage was inserted into the proposed legislation on 3rd February 2004. See line 9, page 10, of the amended *Civil Registration Bill, 2003*: <http://www.oireachtas.ie/documents/bills28/bills/2003/3503/b35a03d.pdf> Dáil deputies would have been provided with copies of this proposed legislation in its entirety prior to the Dáil vote *vis-à-vis* the ban taking place at the Report and Final Stages of the legislation's passage through the Oireachtas. See Dáil Éireann (2004l) at paragraph 1009 for details of the Dáil vote that took place on 10th

The following response from a senator in May 2009 demonstrates her lack of awareness of the ban at the time that the legislation progressed through the Seanad:

I was not aware of this proposed ban prior to voting on this Bill.

Respondent Two, 2009

While her candour is appreciated, I argue that this response is indicative of the extent to which the ban denoted an insignificant dynamic to her as a legislator. She failed to respond to any of my subsequent enquiries that sought an explanation for the seemingly self-evident rationality of her lack of awareness of the ban, which I conceive of as an instrument of inequality.

Theme: Party-Political Affiliation and Allegiance

Candour is also evident in the following response from a Dáil deputy, which I received in November 2009:

Don't recall. I presumed it was the agreed decision at the time[.]

Respondent Three, 2009

This denotes the entirety of the rationale behind his vote to keep the ban intact. An important backdrop here is that he had repeatedly ignored prior correspondence from me. I indicated to him in July 2009 that because the ban denoted a highly discriminatory measure, the decision to expressly ban same-sex marriage warranted a response from him as a legislator in the Oireachtas. This is what makes his response so unexpected, and its honesty so unappealing. I argue that it is indicative of the extent to which minority

February 2004. This vote, which sought to counter Sinn Féin's attempt to remove the ban, ensured that the ban remained in the legislation. This legislation now prevails in this jurisdiction.

rights in Ireland can pale into insignificance when they are implicitly deemed to be immaterial to parliamentary party decision-making. There is no impetus here to get to the heart of his action in the Oireachtas, or to understand its consequences for those who are directly affected by the ban.

The following October 2009 response from a deputy also hones in on what seems to be the litmus test for casting one's vote in the Dáil, i.e. unquestioning and overarching allegiance to the parliamentary party, irrespective of its consequences:

The Government's Civil Registration Bill is scheduled to be published before Christmas when I am sure all matters will be debated again. The amendment that you refer to was proposed by a Sinn Féin T.D. in advance of the Government's proposals and on that basis was opposed by all Government Parties.

Respondent Four, 2009

Here, there is confusion between the legislation that was the subject of my enquiry and what may be the Government's proposals on civil partnership at the time. This then glosses over the absence of debate on the ban as if that non-event came into being 'by itself', rather than by the governing party, of which he was a serving member in the Dáil. His use of the term 'again' demonstrates an inability to understand the substance of my enquiry. It also implies that the ban was so immaterial to him that he either forgot that there was no Dáil debate on it, or that he did not need to check the Dáil record pertaining to the *Report and Final Stages of the Civil Registration Bill, 2003* (see Dáil Éireann, 2004l, para. 1009).

The two upcoming responses came from a former senator who was a serving deputy at the time of our correspondence. An important backdrop here is that while his parliamentary party seems to have abstained from the

Dáil vote on the ban (see Dáil Éireann, 2004l, para. 1009), he voted as a senator on a number of aspects to the legislation as it progressed through the Seanad (see Seanad Éireann, 2004e, para. 877; Seanad Éireann, 2004h, paras. 1011 and 1017; Seanad Éireann, 2004k, para. 1201). In August 2009, I received the following response from him:

Fine Gael arrived at a decision which I, as a member of the Parliamentary Party, supported. I expressed my personal opinion at parliamentary party meetings and being a supporter of the democratic process, I upheld the decision taken by my party.

Respondent Five, 2009a

On foot of receiving the above response, which did not address the substance of my enquiry, I repeatedly asked him to elaborate on his party's position on the issue. I received the following response in December 2009:

Further to your recent correspondence, it is unfortunate that we cannot be of more assistance. As I outlined in my previous email, the decision was made by the parliamentary party and spokesperson at that time. As a democratic party we debate Bills and make collective decisions on them and we do not revisit them thereafter, unless in considerably changed circumstances.

Respondent Five, 2009b

Here, the all-inclusive 'we' endorses a position that is deemed to derive from party-political membership. I argue that the capacity to rely on this so as to resolve the 'problem' of my enquiry, without ever having to actually name the core dynamics to its resolution, is indicative of the wherewithal of party-political allegiance. Both responses fail to elucidate the following: Fine Gael's position, and whether or not it relates to the ban on same-sex marriage; his party's apparent abstention from a vote on the ban in the Dáil in 2004; the absence of debate on the ban in both Houses of the Oireachtas;

his ‘personal opinion’, and whether or not it relates to his votes on aspects to the legislation as it went through the Seanad.²⁴⁸

The following July 2009 response denotes the first of two responses that I received from a deputy’s assistant. I argue that it demonstrates the recourse to the safety of the parliamentary party in a different way:

On behalf of [name], I wish to acknowledge your correspondence regarding the Civil Registration Act 2004. This bill fell within the purview of the Department of Social and Family Affairs and [name] has asked that I forward your comments to the office of Ms Mary Hanafin TD, Minister for Social and Family Affairs in order that she might consider same and reply directly to you with any observations she may have.

Respondent Six, 2009a

Here, reliance on the expectation of ministerial collegiality creates a space where it becomes reasonable to redirect political responsibility to a party colleague. There is a certain safety and arrogance in that. It facilitates the morphing of my communication, which pertained to his vote on the 2004 ban, into something that is incidental to him. It absolves him of any accountability for his own action and inaction in terms of his vote in the Dáil. I subsequently asked him to answer my direct questions. His assistant sent the following response in September 2009:

²⁴⁸ I tried to determine the circumstances surrounding Fine Gael’s apparent abstention from the Dáil vote on the ban, but to no avail. I received the following response from a Fine Gael deputy in April 2010 in this regard: “Further to your recent emails, it is unfortunate that we cannot be of more assistance. This the [sic] decision was made by the parliamentary party and spokesperson at that time. As a democratic party we debate Bills and make collective decisions on them and we do not revisit them thereafter, unless in considerably changed circumstances.” This may denote Fine Gael’s ‘stock-in-trade’ answer to enquiries from the Irish public. It is almost identical to that provided by her parliamentary party colleague in the Seanad. She never responded to my subsequent enquiry, which sought to determine Fine Gael’s position on the 2004 legislative ban on same-sex marriage in Ireland.

[Name] has asked that I advise you that in the instance you have cited he voted in support of the Government.

Respondent Six, 2009b

Here, party allegiance engenders safety. It enables a legislator to absolve himself of political and personal responsibility. The wherewithal to detach oneself from a legislative issue, by attaching oneself to government and party policy, as if these come into being ‘by themselves’, suggests a malaise within our political system. This has social consequences that extend beyond the routine operationalisation of heteronormativity in this jurisdiction. It is a dynamic that warrants critical reflection in terms of our expectations for our constitutional and parliamentary democracy.

Theme: The Recourse to Civil Partnership

While our civil partnership legislation was not signed into law until July 2010, it was presented as a Bill to the Oireachtas in June 2009.²⁴⁹ Moreover, other incarnations of civil partnership were previously proposed in the Oireachtas (for example, see Dáil Éireann, 2006; Dáil Éireann, 2007a,b,c,d).²⁵⁰ Therefore, the general premise of relationship recognition in the context of gay and lesbian couples was already ‘out there’ in the legislative and political air in Ireland, before the current regime was put in place in 2010, and before I contacted politicians in 2009 *vis-à-vis* the 2004 ban on same-sex marriage. This context warrants consideration in terms of the interpretation of the upcoming responses.

²⁴⁹ *Civil Partnership and Certain Rights and Obligations of Cohabitants Bill, 2009*. See [Civil Partnership Bill 2009 \(Number 44 of 2009\)](#) for details.

²⁵⁰ *Bill entitled an Act to provide for the recognition and registration of civil unions, and to provide for related matters*. Deputy Howlin of the Labour Party sponsored this Private Member Bill. See [Civil Unions Bill 2006 \(No 68 of 2006\)](#) for details.

The first response came from the second of two senators whom I initially contacted in April 2009. My decision to contact him was informed by his support for the realisation of gay rights in general, and the premise of relationship recognition for same-sex couples in particular.²⁵¹ I received this response from him in May 2009:

Thank you for your inquiry about the Civil Registration Bill. This is not of course the Civil Partnership Bill and although I tried to introduce questions about the recognition of same sex relationships under this heading this manoeuvre was rejected.

Respondent Seven, 2009

This response immediately muted my enquiry. It rendered its substance, i.e. the 2004 legislative ban on same-sex marriage, to be immaterial. Although I made no reference to civil partnership in my communication, he inferred that I needed to know, but did not know, the difference between these two pieces of legislation. He did not provide me with information as to the ‘who’ and the ‘why’ behind what he implicitly deemed to be the ‘what’ of my enquiry, i.e. civil partnership and the rejection of his attempt to place it on the legislature’s agenda. In attempting to deflect attention away from the particulars of my enquiry, he made apparent his confusion about the legislation.

The following July 2009 response from a senator demonstrates the utter confusion that was engendered by my contact with her:

²⁵¹ I have subsequently determined that he supports marriage equality.

I have received your email concerning the Civil Registration Act 2004. I am aware of the concerns of many in the community regarding the bill and I will endeavour to bring these concerns to the attention of the Minister for Justice Dermot Ahern TD. I am sure you will agree that this bill goes some way towards rectifying the discrimination present in society against members of the gay community.

Respondent Eight, 2009

Her response is quite extraordinary. She seems to confuse the legislation that was the subject of my enquiry, which pertained to marriage, with civil partnership. I cannot unequivocally attest to this point because she never responded to any subsequent correspondence from me that sought clarity on this. Similarly, my repeated requests for confirmation as to whether or not she brought what she deemed to be my concerns to the minister went unanswered. The timing of her response does suggest that civil partnership may have been on her radar as a legislator. However, I argue that the disconnect with regard to the consequence of the 2004 legislative ban on same-sex marriage is profound, particularly since she implicitly alluded to a socio-cognitive awareness of lesbian and gay discrimination in Ireland.

The upcoming example denotes the most curious *vis-à-vis* the imperative to invoke civil partnership. I received identical responses from two deputies in November 2009.

As you will be aware, the Civil Partnership Bill 2009 raises complex legal issues in the context of the special protection which the Constitution guarantees to marriage and in relation to the equality rights protected by Article 40.1 of the Constitution. The Bill has been carefully framed to balance any potential conflict between these two constitutionally guaranteed rights. This Bill is the most radical development in family law since divorce and will deliver many positive, solid changes in the lives of same sex couples.

Respondent Nine, 2009a
Respondent Ten, 2009a

These responses implicitly take as given the seemingly self-evident rationality of ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997), which I discussed as part of my methodological considerations in Chapter One. I argue that this is precisely the dynamic that brings ‘conflict’, and the attendant preoccupation with ‘balance’, into being. Because civil partnership is conceived of here as a device that ingeniously manages any ‘potential conflict’ by keeping the ‘special protection’ for marriage intact, both deputies implicitly support the ‘logical’ implementation of a two-tier system of relationship recognition in Ireland. My position is that there is nothing ‘radical’ about that.

The following extract denotes the second response from one of these deputies, which I received in November 2009:

Bunreacht na h-[É]ireann confers a special status on marriage [sic]. It sets out marriage [sic] as a union between one man and one woman. Section 2.2(e) of the Civil Registration Act 2004 is a reflection of this.

Respondent Ten, 2009b

His response conjures up the idea that the 2004 legislative ban on same-sex marriage came into being ‘by itself’. However, this is at odds with the

Oireachtas record (see Dáil Éireann, 2004l, para. 1009). It also evokes the circularity of the definitional argument in relation to the social institution of marriage, and its sheer inability to acknowledge the systematic exclusion of same-sex couples from marriage in Ireland, i.e. marriage denotes a contract between a woman and man because it has always been confined to woman and man (see Ennis, 2010). The discrimination deriving from the definitional argument, notwithstanding the absence of a constitutional or legislative definition for the term ‘marriage’ in Ireland (see All-Party Oireachtas Committee on the Constitution, 2006; Working Group on Domestic Partnership, 2006; and Inter-Departmental Committee on Reform of Marriage Law, 2004), was precisely the issue that was at the heart of the plaintiffs’ case in *Zappone and Gilligan*, which I discussed in Chapter Five.

In November 2009, I received the following response from the other deputy who initially sent me the other identical response:

The Constitution sets out that marriage is a union between one man and one woman. The Civil Registration Act 2004 takes account of this. ... Any change to the Constitution would require a referendum.

Respondent Nine, 2009b

Here, the ban on same-sex marriage helps to determine what marriage *is*, which may account for the lack of a statutory definition for marriage in Ireland (see Inter-Departmental Committee on Reform of Marriage Law, 2004). Moreover, there is no sense here that change to our Constitution, if necessary, requires action from legislators in terms of the decision to hold a referendum on marriage in the first instance. I argue that invoking the imperative of a constitutional referendum serves to deflect attention away from what I consider to be a real impediment to marriage equality in Ireland, i.e. the legislative position, rather than the constitutional position

per se.²⁵² In taking as given the idea that the converse is the case, i.e. introducing same-sex marriage first necessitates constitutional change, the above legislator seeks to both minimise the consequence of the 2004 legislation, and his role in bringing it about in the first instance.

²⁵² My position is that we will never have marriage equality in Ireland until Section 2.2(e) of the *Civil Registration Act, 2004* is either repealed by the legislature or declared unconstitutional by the courts. O'Mahony (2012) makes the point that the realisation of marriage equality in Ireland does not require a constitutional referendum, and that it is precisely the Oireachtas that can legislate for marriage equality without actually holding a referendum.

Section Three: Civil Partnership Debates: Important Considerations

Section Three draws upon some of the Oireachtas debates that took place between December 2009 and July 2010 in relation to the introduction of civil partnership legislation in Ireland. Given the extent to which the State has largely wrung its hands with regard to matters pertaining to sexuality, the enactment of this legislation does denote a very important milestone in terms of the realisation of gay and lesbian rights *vis-à-vis* the premise of relationship recognition. Reflecting on my privilege, which derives from my normative sexual orientation, combined with my no longer conceiving of marriage as the ‘gold standard’ in adult intimate relationships, enable me to now conceive of civil partnership in this way. This denotes an important methodological consideration as regards the orientation of my upcoming analysis.

It is important to make the point that my analysis in Section Three does not centre on what is contained in, or what is omitted from, the legislation *per se*. Rather, it centres on some legislators’ perspectives on the measure. These were articulated in 2009 and 2010, as the legislation progressed through both Houses of the Oireachtas. Because the legislation largely enjoyed cross party support, most of the upcoming perspectives are positively disposed to the general premise of relationship recognition. The negative perspectives largely derive from the struggle over the meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999) of relationship recognition in general, and civil partnership in particular. All of the upcoming extracts are invariably informed by the dominant understanding of the constitutional position *vis-à-vis* marriage and family in Ireland. This is an indication of the extent to which Article 41 dominates public discourse in Ireland with regard to the general premise of relationship and family recognition. Because of that, it is important to acknowledge the

mammoth task that the minister and his department set in terms of bringing this legislation forward.

All of the extracts from the Oireachtas debates that feature in Section Three provide an interesting backdrop against which the 2006 High Court ruling in *Zappone and Gilligan* can be better understood. The following themes emerge from these extracts: the dominant understanding of Article 41 of our Constitution; understandings of marriage and family; the premise of relationship and family recognition; the premise of marriage equality; the two-tier system of relationship recognition; the principle of equality and the concept of difference; the imperatives of procreation and gender complementarity; what I refer to as the ‘red herring’ in the debate, which is the recognition of relationships such as those of siblings who live together; the implicit reliance on social cognition (see van Dijk, 1993; 2006); and the significance of language. Many of these themes arose elsewhere in my thesis. Moreover, they all inform the wider debate about adult relationship and family recognition in Ireland. Many of the extracts that I rely upon are quite lengthy. However, my critical analysis warrants this feature. While some of the extracts are quite descriptive, they do provide the reader with some sense of the general tenor of the debate, and some of the specificities to the legislation on civil partnership in Ireland.

Theme: The Significance of Language

The following extract from a debate that took place in January 2010 is one of the most extraordinary that I have encountered over the course of this research:

Those in the gay community who are concerned that their relationship is not referred to as marriage should note that in practical terms, the provisions that apply to the celebration of a civil marriage ceremony between a heterosexual couple are exactly the same provisions which apply to the celebration of a civil partnership ceremony between a gay couple. In other words, the relationship is marriage in everything but name. The Bill plays with semantics in the hope it is constitutionally on the right side of Article 41.

Deputy Shatter, Dáil Éireann, 2010a, para. 890

Here, an understanding of the particularities to civil ceremonies is such that it facilitates a rather simplistic conflation of partnership with marriage. This is at odds with the general rationale behind instituting the legislative regime in the first instance, which centred on the creation of a new and distinct form of relationship recognition. In using the term ‘concerned’ in the context of positioning partnership, so as to determine what it can be, or what it may not be, or what it can compare to, the deputy implicitly takes as given the notion that a hierarchical ordering inheres in the now prevailing legislative infrastructure regarding relationship recognition. This is underscored by the idea that civil partnership can somehow lack the necessarily sought after symbolism that inheres in the ‘gold standard’. Deputy Shatter’s comments are quite extraordinary, particularly in view of the upcoming extract. This problematises the legislative response to same-sex adult relationships, which were, immediately heretofore, commensurate with ‘marriage in everything but name’.

In the context of gay couples, the legislation prescribes all sorts of legal protections, extends various important statutory provisions to them and sets out the legal remedies available when the relationship breaks up. ... The Bill is apparently in denial that there are gay couples who have children. One may have a gay couple who has gone through a civil partnership registration and within the relationship there might be a child from a previous relationship that they both parent for many years. An issue arises about whether the non-biological parent has any obligations to that child in the same way as in a marriage a husband may be regarded as having obligations to a child fathered by someone else prior to the marriage taking place. ... I cannot understand the proposed legislation. ... We have had a myriad of family law legislation that recognises that when marriages break up and when the courts are addressing the consequences of the break up, they must not only provide protection for spouses, particularly dependent spouses, but also for dependent children. Why does the legislation ignore the position of dependent children? ... Is there a fear that there would be some public backlash because we acknowledged reality? People engage in a myriad of different relationships of various natures and children in all circumstances should be treated equally. No child should ever be discriminated against because of the circumstances of their parents or because of the nature of the status of their parents or their parents' relationship.

Deputy Shatter, Dáil Éireann, 2010a, paras. 891-892

Here, it is important to invoke an earlier point that I made with regard to associating the right to marry with the right to parent. In terms of my evolving perspective on this issue, I indicated the significance of Fagan (2011) and the Ombudsman for Children (2010), who make plain the short-sightedness of conceptualising the right to partner in isolation from the right to parent. A critique of this phenomenon is to the fore in the above extract. Indeed, Deputy Shatter identifies a lack of forethought in the proposed regime in terms of not establishing responsibilities with regard to children. The point that I wish to make here is that none of 'this' is a game of semantics. The legislation actively constructs and codifies a particular reality precisely because partnership is not marriage. This dynamic, which

is to the fore in the above extract, makes Deputy Shatter's earlier comments all the more perplexing.

Theme: Marriage as the 'Gold Standard'

The following extract from a debate that took place in January 2010 draws upon many themes that I have highlighted in my thesis thus far, including the constitutional position *vis-à-vis* marriage and family, the 'since the beginning of time' maxim, procreation and gender complementarity, difference to, and equality of respect and recognition (see Baker *et al*, 2004):

This is landmark legislation, which I welcome. ... As in 1993, when homosexuality was decriminalised, he [Minister for Justice, Equality and Law Reform] has decided to go the whole way, with the obvious caveat of the status of marriage. Other than that, it is a thorough-going piece of legislation. ... My belief is that this legislation provides the substance of equality, though the status of marriage is missing. There are two groups of critics. On one hand are those from the gay and lesbian community who complain that it does not include conferral of the status of marriage. On the other side critics say the legislation, to all intents and purposes and in substance, amounts to marriage and they oppose it for that reason. There is common ground in our understanding of the Constitution that a constitutional referendum would be required to introduce the status of same-sex marriage. It is better to take this step now. ... A view which has some backing from the wisdom of ages is the one that marriage as we understand it today is probably the best framework for procreating and rearing children. A same-sex marriage or partnership cannot procreate children. I am aware that children of heterosexual marriages may endure appalling circumstances and that children of same-sex partnerships may have a near-ideal upbringing but I am talking about the average situation. It will ultimately be for the people to decide if the differences which exist are vital and overriding factors or whether the status of marriage should be conferred on same-sex couples.

Deputy Mansergh, Dáil Éireann, 2010a, para. 894

Here, the ‘gold standard’ status of marriage, with an attendant hierarchical system of relationship recognition, is codified in many ways. The legislation is initially conceived of as going ‘the whole way’ in terms of relationship recognition. Yet, this conceptualisation, irrespective of what it actually means, is seen in the context of marriage, which is precisely the issue that is not dealt with in the legislation. Deputy Mansergh then conceives of it in terms of realising substantive equality. Yet, he implicitly concedes that this ‘thorough-going piece of legislation’ does not achieve equality of respect and recognition (see Baker *et al*, 2004) by virtue of the symbolism that inheres in the status of marriage, which again, is not provided for in the legislation. While Deputy Mansergh seems to be positively disposed to the idea of securing marriage rights for same-sex couples, I argue that he implicitly relies on the safety of knowing that marriage equality cannot be delivered through this legislation. This will become clear as my analysis evolves.

Similar to the way in which Deputy Shatter drew upon the dynamic of concern in relation to same-sex relationship status and marriage, Deputy Mansergh’s reliance on the term ‘complain’ underscores the idea that there is a necessarily sought after status ‘out there’, which only makes sense against the backdrop of a normalised hierarchical ordering of intimate adult relationships. His reference to the holding of a referendum is interesting for two reasons: firstly, he relies on a safety net that is constructed out of the perceived wisdom of the political class to not hold it now, which makes marriage equality currently unachievable if it can only be attained or delivered by way of a referendum;²⁵³ secondly, he situates difference, rather than equality, as a potentially crucial determinant in a referendum. It

²⁵³ I reiterate that O’Mahony (2012) asserts that the realisation of marriage equality in this jurisdiction does not require a constitutional referendum. I also argue that consistent invoking of the seemingly self-evident constitutional position *vis-à-vis* same-sex marriage serves to deflect attention away from a real impediment to marriage equality in Ireland, i.e. the prevailing legislative position.

underscores the way in which difference is constructed as a basis for inequality and its reproduction. This has a whiff of ‘us and them’ (Brickell, 2001; Martín Rojo and van Dijk, 1997), and its ‘logic’ is firmly predicated on the imperative of procreation.

Here, I refer to a personal perspective of the deputy that is validated by the all-inclusive ‘we’ in the above extract. By drawing upon the seemingly logical ‘no need to define’ ‘average situation’, the sense and meaning of which implicitly relies on social cognition (see van Dijk, 1993; 2006), Deputy Mansergh manages to both explain away a social phenomenon and routinely insult a cohort of parents whose difference operates as a signifier at the level of the social (see Brah, 1991; 1996). In this instance, it necessarily negates their capacity to provide ideal environments in which to rear their children. The ‘logic’ of this perspective hinges on the imperative of procreation. I now rely on the utility of the discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011) to highlight a perspective that is decidedly at odds with that created at the outset in the above extract. In an ‘Opinion’ piece for *The Irish Times*, Senator Mansergh stated the following:²⁵⁴

²⁵⁴ Mr. Mansergh served as a senator prior to becoming a deputy in the last administration, which dissolved in 2011.

While personal happiness and loving relationships are important, it would be difficult to argue that, even if same-sex relationships could be institutionalised, they would have the same social value or utility as a marriage capable of procreation and rearing children, or even that same-sex couples could on average be equally satisfactory as adoptive parents. ... It is another thing to ask people to give formal public sanction, approval and incentives to private relationships in a manner that would put them on, or close, [sic] to, a par with marriage. Much of the problem is created by the modern habit of treating sexuality as the key validation of relationships, and relegating to second place all other aspects and indeed relationships that have no sexual content.

Mansergh, 2004

Deputy Mansergh stated the following in the foreword to an Iona Institute (2007) publication, which detailed the rationale for continuing State support for the institution of marriage in Ireland, along with the importance of instituting a legislative regime that could recognise different forms of caring relationships that were premised on economic dependency, rather than on sexual intimacy:

It is ironic that, whereas in an earlier phase of liberalisation the mantra was that Church and State should stay out of the bedroom, many of the proposals for the recognition of civil partnerships positively invite the State back into the bedroom. Determinants of social and tax status, outside of marriage, should, it is claimed, be based on the evidence of sexual intimacy. It could be argued that it is human companionship that it is in the interest of society to encourage, rather than sexual intimacy unconnected to procreation, which within and as regards the law is surely a private matter.

Deputy Mansergh, cited in Iona Institute, 2007, p.3

Both of these extracts from two genres of discourse (see Wodak, 1997b) 'speak' volumes 'by themselves'. I include them here because they denote a historical and discursive record that establishes a pattern of thought in

relation to the general imperative of relationship recognition. In its entirety, the above extract from the Oireachtas record denotes quite a schizophrenic understanding of marriage and equality. While reading the beginning of that extract, I initially believed that Deputy Mansergh had had an epiphany with regard to marriage equality, because of my familiarity with his 2004 and 2007 comments. Those prior sentiments turn the schizophrenic into crystal clear clarity. Such is the utility and salience of the discourse-historical approach (see Wodak, 1997b; 1999; 2001; 2011) to research.

Theme: Non-Sexual Relationships

I believe that the issue of dependency between persons in non-sexual relationships is entirely peripheral to the issue of civil partnership. Deputy Mansergh now seems to also hold this view, as the following extract from a January 2010 debate suggests:

Like Deputy Flanagan, I would have some regret concerning the matter to which he referred, but I also accept the argument that perhaps this is not the appropriate context to address it. Perhaps another context should be chosen to address issues regarding the situation of siblings, they being a brother and sister who have a certain status. ... When I spoke on this matter on a previous occasion, the Leas-Ceann Comhairle took grave exception to any equation of siblings with same sex partners. So be it, and I respect that argument but that area needs to be examined.

Deputy Mansergh, Dáil Éireann, 2010a, para. 895

It is important to acknowledge this point, not least because it is indicative of an evolving perspective on the part of Deputy Mansergh that I welcome. Having said that, it does not detract from my analysis. It is also important to state that this non-sexual yet familial dynamic did concern some legislators over the course of this legislation's passage through the

Oireachtas. Here, I include one such extract from a debate that also took place in January 2010:

There are many brothers and brothers, brothers and sisters and sisters and sisters living together, especially in rural areas, with property in common. ... It is strange that two strangers who come together through love or whatever and who remain together for three years or more will now be in a position legally to inherit everything, whereas others who have lived together for 30 or 40 years are not.

Deputy Crawford, Dáil Éireann, 2010b, para. 419

I argue that this perspective betrays a baffling understanding of the rationale behind the introduction of this legislation. The seemingly commonsensical conflating of civil partnership with sibling relationships is extraordinary. A measure of this is the extent to which the conceiving of this extract in the context of the coming together of a woman and man in marriage would be deemed utterly bizarre. While the ‘whatever’ in the above extract appears to be quite arbitrary, it denotes a diminution of the coming together of civil partners. Here, there is a whiff of the ‘anything goes’ remark that was attributed to Republican Senator Santorum in the context of a pending U.S. Supreme Court ruling on homosexuality (see Anon., 2003b). I end this particular discussion by including an extract from the Oireachtas record that was articulated in December 2009. It equates with my own view on this issue:

Conjugal relationships are unique. It upsets and annoys me when people blur the distinction between a loving conjugal relationship and that of any pair of people living together for convenience or mutual support. It denies the essence of the relationship, which is fundamental. We should be very clear and not obfuscate on that absolute point.

Deputy Howlin, Dáil Éireann, 2009, para. 121

It ‘speaks’ ‘by itself’.

Theme: The Imperative to Uphold the Constitution

Divorce and Dissolution

The upcoming extract hints at the extraordinary ‘hoops’ that had to be ‘jumped through’ so as to uphold the constitutional imperative that attaches to marriage. In Chapter Four, I highlighted an Oireachtas debate regarding the drafting of the constitutional provisions on divorce that are now codified in Article 41.3.2. One such provision, which relates to the prospect of reconciliation between spouses, was at the heart of the matter that was debated by Minister Ahern and Deputy C. Flanagan.²⁵⁵ The latter sought to include amendments to the civil partnership legislation at Committee Stage. These would have expressly required legal professionals and the courts to be satisfied that no reasonable prospect of reconciliation could obtain between civil partners in the event of their seeking dissolution of their civil partnership. Deputy C. Flanagan stated the following:

What we have done in the judicial separation and divorce legislation should be mirrored or replicated in the Bill before us. It is important that where there is a possibility of a reconciliation, certain measures should be taken without recourse to court proceedings or without embarking on a process that will ultimately lead to an order of dissolution. ... They [the amendments] create a possibility of engaging in mediation of a type that will perhaps give rise to a more harmonious dissolution than the current adversarial option. In the context of public policy formulation, we should reflect options that the law has given in the cases of heterosexual couples.

Deputy C. Flanagan, Select Committee on Justice, Equality, Defence, and Women’s Rights, 2010a, Section 108

²⁵⁵ Please note that this is not the same deputy that I referred to in Chapter Four *vis-à-vis* a perspective on proposed contraception legislation.

This extract serves to contextualise the minister's upcoming response, which is grounded in the constitutional position *vis-à-vis* marriage, its privileged status, and the State's obligation to protect it. The minister stated the following in March 2010:

The amendments would bring civil partnership closer to marriage and risk upsetting the constitutional balance. The Attorney General has advised specifically in this regard. His advice is that, in considering a decree of dissolution, unlike the position on marriage and divorce, the courts should not be required to consider the prospect of reconciliation. ... Given the strong advice provided on maintaining key distinctions between marriage and civil partnership, I cannot accept the amendments. I accept that it is right and proper for legal advisers to advise clients to discuss the possibility of reconciliation or mediation but including it in a Bill potentially might run the risk of attracting a constitutional challenge which would be counterproductive to the purposes of the Bill. We are dealing with the Bill having regard to the constraint of the constitutional imperative to recognise the special protection given to marriage.

Minister Ahern, Select Committee on Justice, Equality, Defence, and Women's Rights, 2010a, Section 108

This extract is fascinating in terms of what can and cannot be done in relation to the instituting of a new legislative regime, because of the dominant understanding of marriage in Article 41. Nonetheless, the distinction that prevails between the two systems of relationship recognition instils the notion that both are quite distinct from other adult relationships, such as those between adult siblings. Given the controversy that surrounded the introduction of divorce in Ireland, which I alluded to in Chapter Four, it is interesting that its provisions in Article 41 are now conceived of as being central to the imperative of protecting marriage. The divorce provisions are now so embedded in the dominant understanding of the institution, that they form part of the apparatus that sets marriage apart from civil partnership.

Marital Status and Civil Status

This imperative to set marriage apart from partnership is to the fore in a debate that took place between a number of senators and the minister in July 2010. It pertained to the setting up of a new civil status in the legislation that would replace that which prevailed at the time, i.e. marital status.²⁵⁶ A minority of senators were of the view that bringing in this new umbrella term, i.e. ‘civil status’, was completely at odds with the rationale behind maintaining a distinction between partnership and marriage. They proposed amendments to the legislation that would retain the term ‘marital status’. The following extract underlines this point:

It is a fact that marriage under our Constitution is regarded as special and to be protected in a particular way. It flows from this that one would seek that any legislation touching on marriage or other relationships would maintain the centrality of marriage as the preferred social norm. That is, if one likes, the elephant in the room — the underlying constitutional position. It is a position which the Government is not ready to deny, at least not yet. ... It [changing ‘civil status’ to ‘marital or civil status’] does not undermine any of what the Bill actually provides for but it selects a kind of nomenclature that sends out a cultural and social message about the centrality of marriage.

Senator Mullen, Seanad Éireann, 2010b, para. 262

Much of this argument is quite persuasive, given the general reluctance of the political class to actually seek to change the ‘underlying constitutional position’, with its attendant necessity of maintaining two distinct regimes of relationship recognition. Having said that, the manner in which the above extract is framed is problematic. It takes as given the seemingly self-evident ‘truth’ of the ‘gold standard’. This dynamic was quite prominent in the overall debate that took place between a small number of senators and

²⁵⁶ See Appendix VII for details of Section 7.1(a) of the legislation, which provides for this new civil status.

the minister in July 2010. Over the course of that debate, I was struck by the extent to which the senators relied on the social significance of language and the phenomenon of social cognition (see van Dijk, 1993; 2006) in order to advance their perspectives, as the following rather lengthy extract demonstrates:

Marriage is not only the foundation stone for the family, but it is also for society. This has been the case for many generations. We need to be extremely careful that we do not jettison an institution that has stood society in good stead for many generations and many centuries. ... We are proposing to delete the paragraph that defines civil status. We feel that putting civil status in is creating the equivalence between marital status and civil partnership status, to which we object. We have replaced it with what we think is a reasonable amendment, which replaces it with marital status and civil partnership status. I do not want to anticipate the Minister's response, but I hope we will not be reducing the importance of marital status to society down to an issue of administrative convenience. The child focus of marriage is the main reason — perhaps the only reason — it enjoys the unique constitutional protection that is specified therein. It puts an onus on the State to protect it in unique ways and to give it the necessary financial and other supports in order to maintain it as the priority that it has for society. It follows obviously from this that the State must respect marriage. We are of the view that this particular amendment, and the change in the wording, is inconsequential for the thrust of the intent of the Bill to bring benefits to civil partnership between people in same sex relationships who commit to each other. However, we think it is very important for the signal that society gets from the Minister, the Government and these legislative Houses. ... I ask that the Minister concede this particular amendment, which does not cause any particular difficulties from the point of view of a genuine distinction, if the intent of this Bill is to recognise clearly the distinction between the marital status and the civil partnership status, and that they are not all left under the same heading of civil status, which insinuates the equivalence we will not and cannot support for reasons I have outlined.

Senator Walsh, Seanad Éireann, 2010b, paras. 256-257

While the extract is quite lengthy, it hones in on the rationale behind the ‘gold standard’, which is at the heart of much of the heterosexist opposition to same-sex marriage in Ireland. Senator Walsh’s perspective also evokes sentiments that were expressed by Deputy Flanagan decades ago regarding his opposition to the enactment of legislation on contraception.²⁵⁷ The seemingly self-evident rationality of difference as social relation (see Brah, 1991; 1996), difference to, and ‘us and them’ (see Brickell, 2001; Martín Rojo and van Dijk, 1997), are also palpable in the above extract. Having said that, I was initially persuaded by Senator Walsh’s position *vis-à-vis* maintaining a distinction between civil status and marital status. It may be indicative of the extent to which marriage is normalised that this seemed plausible to me, albeit with the caveat that I did problematise the term ‘marital status’ in the context of *Census 2011*. The rationale behind the minister’s resolve to not accept the amendments pertaining to reconciliation, in the event of a dissolution of a civil partnership, also led me to believe that he would be amenable to retaining the term ‘marital status’ in addition to inserting the term ‘civil status’ into the legislation. This would maintain the distinction between the two regimes, which was a government imperative. It was not until I read the following extract that I understood the prescience of the minister’s position:

²⁵⁷ This is not the same person who articulated an earlier perspective on civil partnership in this chapter.

What we are dealing with here is terminology. To date, the discussion has revolved around the change from using the term “marital status” to the overarching term “civil status”. This does not in any way constitute a downgrading of marriage in any sense, nor could it, because of the very views we have expressed in regard to the special status of marriage as per the Constitution. As has previously been said, “civil status” means single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner in a civil partnership that has ended by death or being dissolved. Again, I point out it is an overarching term which includes both marital and civil partnership status. ... [I]f we pass this Bill civil partners could be obliged to record themselves on a census form as single under the marital status designation, if we accept the Senator’s suggestion, and as civil partners under the civil partnership status. Therefore, they would be designated on the same form as having both states. Should single people record themselves under both states or only under one status which conforms to their particular sexual orientation?

Minister Ahern, Seanad Éireann, 2010b, paras. 263-264

The minister’s response is quite profound in its simplicity. Although I was aware of Senator Walsh’s earlier reference to ‘administrative convenience’ in the extract that immediately precedes the above extract from the minister, I did not understand the senator’s point at the time. The minister’s position is entirely plausible.

The Family

Another issue that arose during Committee Stage in March 2010 was the dominant understanding of the family in Article 41 of our Constitution. The following rather lengthy extract from the Oireachtas record highlights some of the complexities that can arise when legislating for civil partnership against this backdrop:

In formulating the civil registration scheme for same-sex partners, the Government was mindful of the implications for children. On the advice of the Attorney General, the Government concluded it would not be appropriate that the Civil Partnership Bill should develop principles regarding children that would have implications wider than those in respect of same-sex partners. Apart from constitutional difficulties, issues which arise pertaining to children and their welfare are so significant that it would not be appropriate to address them on a piecemeal basis without a thorough review of all the implications such changes might have for children and for those who might be affected by such changes. To comply with the constitutional imperative to protect the family it is necessary to differentiate the recognition being accorded to same-sex couples who register their partnership with the special recognition that is accorded under the Constitution to persons of the opposite sex who marry. While we need to respect the entitlement to equality that same-sex partners enjoy under Article 40.1 of the Constitution, we also need to respect the special protection that Article 41 gives to marriage. As I have stated many times, the Bill has been carefully drafted to balance any potential conflict between these rights. In particular, the Attorney General has advised that constitutional difficulties arise in respect of children in civil partnerships. His advice is that giving a family unit that is not based on marriage a constitution, that is, two adults who are co-parents of children, and authority, that is, full parental powers, rights and duties to adopt, which are substantially identical to that of the family would probably be viewed as reneging on the guarantee to protect the family.

Minister Ahern, Select Committee on Justice, Equality, Defence, and Women's Rights, 2010a, Section 127

One interesting aspect to this extract is that it evokes some of the identical sentiments that were expressed in November 2009 by two deputies, i.e. Respondent Nine (2009a) and Respondent Ten (2009a), which I critiqued in Section Two of Chapter Six. On one level, I am sympathetic to the minister and the task that he was charged with in terms of instituting this new regime against the backdrop of Article 41. Nonetheless, the 'hoops' that had to be 'jumped through' so as to uphold the Constitution seem extraordinary. It is a dynamic that is at odds with the relative inertia that

has prevailed *vis-à-vis* the holding of a constitutional referendum, if one were deemed necessary to alter the dominant and prevailing understanding of Article 41.²⁵⁸ However, the last two sentences in the above extract disturb my complacency. They make me question the rationale that excuses the seemingly commonsensical creation of arbitrary distinctions between cohorts of the population so as to achieve ‘balance’. The idea that division conquers, or that Articles 40 and 41 could be out of synch, but only in the context of same-sex relationship and family recognition, make me question the entire ‘balancing act’. I accept that there are difficulties that stem from the phenomenon of social parenting, for example. However, this is not a dynamic that is unique to lesbian or gay parenting. To be fair to the minister, I get the sense that he implicitly concedes this point at the beginning of the above extract. However, the idea that this entire ‘balancing act’ produces a ‘truth’ that ‘logically’ dictates when a family is not a family makes me question the edifice that cannot crumble.²⁵⁹ The following extract, which the minister articulated in July 2010, provides the answer:

²⁵⁸ Here, it is important to acknowledge the work of the Constitutional Convention and its April 2013 vote recommending that the Government should hold a referendum *vis-à-vis* marriage equality.

²⁵⁹ It is conceivable that one implication of the dominant understanding of the term ‘family’ in our Constitution is that civil partners cannot live in a ‘family’ home. Rather, our civil partnership regime is such that they live in what is referred to as a ‘shared home’. My sense is that this informs Senator Norris’ comments *vis-à-vis* the ‘family home’ and this legislation, which I highlighted at the beginning of my thesis (see Seanad Éireann, 2010a). See Appendix VII for details of Sections 27(a) and (b) of the civil partnership legislation pertaining to the ‘shared home’.

Public discussion since the Bill was published has concentrated on a number of specific areas of which the most fundamental is why we have not decided to open civil marriage to same-sex couples. My clear legal advice on this area has consistently been that it would not be constitutionally sound to legislate for same-sex marriage without holding a constitutional referendum on the definition of family. Marriage may not be expressly defined in the Constitution, but it has always been understood in common law as being between a man and a woman, ideally for life. I do not believe the necessary political and social consensus exists to make such a constitutional referendum desirable. The all-party Oireachtas Joint Committee on the Constitution concluded that a referendum to change the definition of family would be extremely divisive and would by no means be certain of success. When I was party to the Commission on the Family, its report was unable to define the family as such.

Minister Ahern, Seanad Éireann, 2010b, para. 255

Here, the mechanism that is conceived of as the solution in terms of the introduction of same-sex marriage cannot be called upon because of a perception of what is ‘out there’ (see All-Party Oireachtas Committee on the Constitution, 2006, p.122) ‘in’ social cognition (see van Dijk, 1993; 2006). Yet, in the context of legal advice, the minister implies that the outcome of a referendum could facilitate the enactment of legislation on same-sex marriage. Therefore, he seems to be sending two contradictory messages regarding a referendum outcome. Because the Government decides on the holding of a referendum, and the attendant wording of the proposed clause(s), it is strange that politicians can surmise about an outcome when the language that brings it into being has never been formulated or put to the people. What is also strange in the context of the realisation of marriage equality is that the struggle over meaning (see Macgilchrist, 2007; Taylor, 2004; Wodak, 1999), which is at the heart of any referendum campaign, concerns two words, i.e. marriage and family,

neither of which are defined in our Constitution.²⁶⁰ I argue that this ‘balancing act’ in its entirety helps to explain both the resilience of heteronormativity and the intransigence of lesbian and gay inequality in Ireland.

Conclusion

This chapter relied upon three genres of discourse (see Wodak, 1997b) so as to shed some light on the myriad ways in which the general public and the political class in Ireland framed the premise of relationship recognition. While these genres are inter-connected, each of them had a particular focus. The ‘Letters to the Editor’ genre primarily centred on the 2006 High Court ruling in *Zappone and Gilligan*, and the justifications for the realisation or denial of marriage equality. Core themes that emerged in Section One were the routine reproduction of heterosexual privilege and the extent to which it goes unnoticed, the complexity of the Labour Party’s position on marriage equality, the construction of ‘valid’ knowledge, and the ‘marriage as inherently heterosexual’ thesis, which honed in on the issues of procreation and gender complementarity. What surprised me most about the second genre of discourse was the extent to which deputies and senators did not address the issue that was at the core of my correspondence to them, i.e. the 2004 enactment of the legislative ban on same-sex marriage in Ireland without any debate in the Oireachtas. Some of these legislators seemed to be either unaware of the ban or implicitly held the view that it somehow came into being ‘by itself’. Other politicians implicitly deemed the issue to be immaterial to what appeared to be more important considerations, such as party-political allegiance and alliance. These dynamics served to

²⁶⁰ In relation to the term ‘marriage’, see All-Party Oireachtas Committee on the Constitution (2006, p.123) and the Working Group on Domestic Partnership (2006, p.23). In relation to the term ‘family’, see Chief Justice FitzGerald’s and Justice Griffin’s rulings in *McGee* (see [1974] I.R. pp.284-337, at pages 302 and 334 respectively).

emphasise their involvement in the operationalisation of heteronormativity in Ireland. Some legislators latched on to the device of civil partnership, as if this somehow addressed my enquiries about the 2004 ban on same-sex marriage. Their seemingly commonsensical recourse to a progressive piece of legislation, in the context of enquiries about the enactment of what I conceive of as regressive legislation (in Section Two), makes their responses unacceptable to me. In providing extracts from Oireachtas debates that took place in 2009 and 2010 in relation to civil partnership, I highlighted legislators' perspectives on its proposed introduction in Ireland. Many of the extracts that are contained in Section Three alluded to the principle of equality, and all of them were invariably derived from the prevailing and dominant understanding of marriage and family in our Constitution. These issues were to the fore in my critical discourse analysis of the 2006 High Court ruling in *Zappone and Gilligan*. Indeed, many of the themes that emerged in Section Three highlighted the complexity of the State's position *vis-à-vis* relationship recognition in Ireland. Notwithstanding the advent of civil partnership, the backdrop of Article 41 is such that the State remains rooted to the inevitability of a hierarchical model of relationship recognition in this jurisdiction. What happens on foot of the Constitutional Convention's 2013 recommendations could change that at some point in the near future.

CONCLUSION

The Last Word: Concluding Thoughts

The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare.

Justice Dunne, [2008] 2 I.R. pp.417-513, at para. 248

Introduction

At this juncture in the research, I reflect on my research questions. These are as follows: Given the importance that is placed on the principle of equality, how can the intransigence of lesbian and gay inequality in Ireland be explained? Specifically, what accounts for the persistence of gay and lesbian inequality with regard to the institutions of marriage and family in Ireland? In this regard, I am inexorably drawn to the above extract from the reported judgment in *Zappone and Gilligan*, which I discussed in Chapter Five. I reflect on the two grounds that ‘justify’ the prevailing ban on same-sex marriage, i.e. guarding the family and child welfare. Justice Dunne invoked these imperatives with regard to determining the distribution of marriage rights in this jurisdiction.²⁶¹ Specifically, in the context of same-sex marriage, they legitimate the perpetration of discrimination, as if

²⁶¹ It is important to state that there are other considerations in this regard, such as the accretion of case law on marriage and family in Ireland, which I elaborated on in Chapter Five.

lesbians and gay men somehow remain outside the realm of constitutional protection *vis-à-vis* Articles 40 and 41. At the heart of this manifestation of inequality is the ‘logic’ of the ‘us / them’ distinction (see Brickell, 2001; Martín Rojo and van Dijk, 1997), which is underpinned by the ideological wherewithal of difference, and the attendant reproduction of social norms. This is where theory and methodology coalesce. They cohere with a view to explaining and understanding the routine reproduction of inequality of respect and recognition (see Baker *et al*, 2004) in Ireland.²⁶² What follows in this conclusion is an elaboration of additional methodological and theoretical considerations that came to me as I reflected on my research.

Methodological Discoveries

Reflecting on my presence in this research has led to unexpected findings. Conducting this research impelled me to reflect on my heretofore, unquestioned belief that marriage denoted the ‘gold standard’ *vis-à-vis* intimate adult relationships and family. I no longer hold this view. Researching material for Chapter Three led to this epiphany. Vogel’s (1994) elaboration on the patriarchal underpinnings of the institution of marriage was instrumental in this regard. While researching material for Chapter Three, I also began to appreciate that some gay women and men oppose marriage as an institution, largely because of its heterosexist trappings (for example, see Peel and Harding, 2004). The strength of the marriage equality (see Pillinger, 2008) agenda in Ireland, which is rooted in lesbian and gay activism, is such that, prior to undertaking this research, I was unaware of lesbian or gay opposition to marriage. It is also important to state that my taken-for-granted assumptions about the ‘gold standard’

²⁶² Here, I reiterate that Baker *et al* (2004) do not discuss the premise of marriage equality in their theorisation of equality of respect and recognition. Nonetheless, I place this issue firmly within this dimension to equality.

implicitly informed my presumption that all gay men and women necessarily demand marriage equality.

It is at this juncture in the research that both the ‘thinking’ and ‘doing’ of researcher reflexivity become challenging. As I write this conclusion, totally unexpected ‘would’ questions emerge, which are invariably informed by ‘what’, ‘who’, and ‘why’. These are as follows: Would marriage equality ‘be’ a premise, and would it have anything to do with lesbianism and homosexuality, if the demand for it were not ‘out there’? Would I conceive of same-sex marriage as an equality issue, and would I unequivocally support the premise, if the demand for it did not exist in Ireland? Would my heterosexual privilege be such that marriage equality would not even register in my consciousness, if the demand for it had not reached the High Court in 2006? These questions are disconcerting for two reasons: they disturb both the methodological and theoretical foundations of my thesis; it is difficult to answer them, save to say that it was consistent engagement with the research that brought about these questions in the first instance. The important point here, in terms of my methodological considerations, is that researcher reflexivity, over the course of conducting critical research, can bring with it very unexpected challenges and outcomes.

Theoretical Considerations

In terms of my theorisation of equality, a dynamic that warrants consideration here is whether or not the premise of marriage equality would have anything to do with the principle of equality, if some gay or lesbian persons did not seek the right to marry. What makes it an equality issue? Is it the premise itself, or is it the demand for it? If the latter obtains, does the precise ‘who’ behind the demand inform the answer? In attempting to

answer these questions, I suggest that the 2004 enactment of the legislative ban on same-sex marriage made marriage equality a socio-political issue in Ireland. I accept that the accretion of common law and case law over time largely conceptualised marriage as a heterosexual institution. This then implied that same-sex couples could not marry in Ireland. However, a line was crossed in 2004, and it is one that is simply unacceptable to me as an Irish citizen.

Having said that, on foot of their initial submissions to the court in 2004, the plaintiffs in *Zappone and Gilligan* did not directly challenge this legislation in the High Court in 2006 (see [2008] 2 I.R. pp.417-513, at paras. 74-82 and para. 244).²⁶³ Whilst I do not know the precise rationale behind the enactment of the ban, my position is that the legislation is implicitly predicated on the ideological wherewithal of difference, with its attendant reinforcing of heteronormativity. This helps to explain why same-sex marriage has become an equality issue in Ireland. In Chapter Two, I theorised the principle of equality, largely through core aspects to the concept of difference. These were as follows: difference as disadvantage (see Spicker, 2000); difference as social relation (see Brah, 1991; 1996); difference *to*; difference as deficit / defect / deviance, which derives from Baumrind (1995) and Cameron and Cameron (1996); and difference as deployment, which derives from Brah's (1991) theorisation.²⁶⁴ Here, difference operates as some kind of signifier that triggers the normative and routine operationalisation of practices that might otherwise be socially unacceptable. The denial of marriage equality is an example of this, whether on the basis of gender and sexual orientation, or on the basis of the

²⁶³ One explanation for this is that Section 2.2(e) of the *Civil Registration Act, 2004* did not come into effect until December 2005 (see [2008] 2 I.R. pp.417-513, at para. 244). Here, I reiterate that the plaintiffs in *Zappone and Gilligan* have initiated a new High Court action in which they will challenge the constitutionality of this legislation.

²⁶⁴ As stated in Chapter Two, the 'who' behind the 'thinking' and 'doing' of difference is a key issue. Here, difference as deployment denotes a 'vehicle for hegemonic entrenchment' (see Brah, 1991, p.173), so as to further, rather than challenge, the reproduction of social norms.

imperatives of guarding the family and protecting children (as if marriage and family in Ireland were under attack from two women who married each other in Canada). Here, difference necessarily invokes a social hierarchy that is ‘justified’ by both constitutional and legislative precepts. I argue that the unequivocal demand for ending this egregious practice is rooted in the principle of equality, and the unacceptability of inequality of respect and recognition (see Baker *et al* 2004). This dimension to equality / inequality informs my opposition to the prevailing ban on same-sex marriage in Ireland, and my unequivocal support for marriage equality. This ‘who’ behind the ‘what’ and the ‘why’ underscores the manner in which theory and methodology coalesce in critical research.

Another dimension to the ‘who’ behind the ‘what’ and the ‘why’ is my belief that our society is utterly diminished by such blatant discrimination, as that obtaining in the denial of marriage rights to lesbians and gay men. This ‘why’ is predicated on the idea that it is incumbent upon parliamentary and constitutional democracies, such as ours, to recognise, protect and vindicate the rights of minority cohorts of our population, such as gay men and lesbians. Irrespective of one’s position on the institution of marriage, this is a fundamental imperative, precisely because it is grounded in the principle of equality and the attendant dynamic of respect.

Research Answers

In the extract from the reported judgment that is reproduced at the beginning of this conclusion, heteronormativity implicitly dictates that privilege does not really raise the spectre of discrimination. Here, the ‘logic’ of the ‘us / them’ distinction (see Brickell, 2001; Martín Rojo and van Dijk, 1997) salves the unconscionable, i.e. the deliberate placing of Irish citizens outside the realm of constitutional protection. This is key to

understanding the intransigence of lesbian and gay inequality in Ireland. The seemingly self-evident imperative of protecting both marriage and family from two women who are lesbians and spouses ‘justifies’ this discrimination. But what makes it so? What is the rationale behind it? It is difficult to make an unequivocal determination on this. My critical discourse analysis, particularly in Chapter Five, suggests that the primary trigger that drives this ‘logic’ is a normatively imposed ‘lacking’ that ‘necessarily’ resides in the ‘suspect’ ‘Other’ (see de Beauvoir, 1988). This is evidenced by the rootedness of gender complementarity, for example, which tends to be associated with the issue of child development. Indeed, this dynamic arose throughout my analysis, particularly in relation to the ‘Letters to the Editor’ genre of discourse (see Wodak, 1997b) that I discussed in Chapter Six. The ideological dominance of the nuclear family paradigm in Ireland, which ordains that marriage and family denote one social institution, helps to normalise this phenomenon. However, I am still at a loss as to why the physical, psychological, cognitive, and personal / social development of children is contingent upon gender complementarity, but only in the context of the nuclear family paradigm, and not in a family that is headed by an opposite-sex cohabiting couple, for example.

While child development and child welfare are interlinked, I categorically reject their ‘logical’ conflation in the High Court. I reiterate that child welfare has a very specific connotation, which is quite different to the issue of child development. *None* of the evidence that was submitted to, or interpreted in, the High Court pertained to child welfare. Rather, it pertained to issues that are associated with child development, such as gender and sexual identity. This is clear from my analysis of both the primary research that denoted part of the submitted evidence in *Zappone and Gilligan*, and its interpretation by expert witnesses. In the above extract from the reported judgment (see [2008] 2 I.R. pp.417-513, at para. 248), a

seemingly self-evident link was made to child welfare at precisely the point at which it was not considered to be an issue. Why, therefore, is this link acceptable? Indeed, why is the issue of child welfare linked to the issue of same-sex marriage in the first instance? The current inextricable link between marriage and family in Ireland is a possible factor. Similarly, a preoccupation with the ‘suspect’ gay or lesbian ‘Other’ (see de Beauvoir, 1988), whose capacity to parent must be proven into perpetuity, could be a factor. However, both of these hypotheses could equally apply to the issue of child development. Therefore, there must be something else ‘out there’ ‘in’ social cognition (see van Dijk, 1993; 2006) that explains the seemingly commonsensical linking of child welfare with same-sex marriage. It is an important point in the sense that over the course of my critical analysis of three genres of discourse (see Wodak, 1997b) in Chapter Six, I discerned only one reference to the issue of child welfare.²⁶⁵

It is conceivable that difference as deficit / defect / deviance, which I theorised whilst drawing upon Baumrind (1995) and Cameron and Cameron (1996), could account for this. This dynamic to difference was really only made plain to me in 2012, as I engaged in public protests against the 2004 enactment of the legislative ban on same-sex marriage in Ireland. In that regard, I have encountered a few members of the public who are vehemently opposed to same-sex marriage. The vast majority of this opposition is implicitly informed by the seemingly self-evident deviance of the ‘necessarily suspect’ ‘Other’ (see de Beauvoir, 1988). For example, I have been told that the introduction of same-sex marriage in

²⁶⁵ In this regard, see the extract from Minister Ahern’s interaction with the Select Committee on Justice, Equality, Defence, and Women’s Rights (2010a, Section 127). Please note that in 2012, on foot of correspondence from me to Fianna Fáil deputies and senators in relation to their party leader’s current position on marriage equality, which he supports, one deputy made reference to ‘protecting children’. Child protection does raise the spectre of child welfare. However, this issue never arose in any correspondence from him to me in 2010, on foot of asking him repeatedly to state his rationale for voting to support the enactment of the 2004 legislative ban on same-sex marriage. This deputy’s 2010 responses to me did not form part of my critical analysis in Chapter Six. (The current leader of Fianna Fáil has consistently ignored my repeated correspondence to him in relation to the 2004 ban on same-sex marriage).

Ireland will result in gay men wanting to marry their dogs. This raises the spectre of bestiality, which I discussed in Chapter Three. Difference as deficit / defect / deviance also implicitly informs the equally spurious claim (from one member of the public) that gay marriage equates with paedophilia because of what gay men do to each other sexually.²⁶⁶ It is important to stress that these do not denote social scientific findings. Neither are they generalisable to the cohort of the population in Ireland that is opposed to same-sex marriage. They simply point to an alarming prejudice that I discerned from (some) public opposition to marriage equality in Ireland, after I had conducted most of my discourse analysis. Because it was difficult to engage with persons who hold such views, I did not categorically determine the rationale behind their perspectives. Nonetheless, it is interesting that these claims centre on gay men. Moreover, they implicitly invoke the rationale that led to the criminalisation of homosexuality in Ireland, as evidenced by Sections 61 and 62 of the *Offences against the Person Act, 1861* and Section 11 of the *Criminal Law Amendment Act, 1885*.²⁶⁷ This suggests that the act of decriminalisation in 1993 has not fully dispensed with the routine pathologisation of same-sex intimacy between men in Ireland.

While such perspectives could inform the conducting of future research into heterosexist and homophobic opposition to marriage equality in Ireland, they do not answer my research questions. At this juncture, I find it difficult to answer them.

²⁶⁶ Muintir na hÉireann stated in its written submission to the All-Party Oireachtas Committee on the Constitution (2006, p. A193) that providing for homosexual marriage in Ireland would give homosexual couples the right to adopt minor children. The organisation then ‘commonsensically’ concluded the following: “It would also mean that a sixteen year old, who could be homeless, could be adopted by a homosexual couple for perverted reasons.”

²⁶⁷ See Appendix II for details.

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Personal Communication²⁷²

Respondent One, 9th April 2009(a)

Respondent One, 14th May 2009(b)

Respondent Two, 28th May 2009

Respondent Three, 7th November 2009

Respondent Four, 5th October 2009

Respondent Five, 12th August 2009(a)

Respondent Five, 4th December 2009(b)

Respondent Six, 17th July 2009(a)

Respondent Six, 18th September 2009(b)

Respondent Seven, 6th May 2009

Respondent Eight, 14th July 2009

Respondent Nine, 16th November 2009(a)

Respondent Nine, 24th November 2009(b)

Respondent Ten, 17th November 2009(a)

Respondent Ten, 23rd November 2009(b)

²⁷² Respondents' communication is compiled in numerical order. Other communications are compiled in alphabetical order.

Associate Professor Ivana Bacik, School of Law, Trinity College Dublin
1st October 2009, 12th January 2012, 26th November 2012, 1st May 2013

Brian Barrington, Barrister, 15th June 2011

Professor Patricia Casey, Dept. of Psychiatry, University College Dublin
1st October 2012, 10th October 2012, 17th October 2012

Fianna Fáil Deputy
17th June 2010, 21st June 2010, 30th June 2010, 2nd July 2010, 6th March
2012

Fine Gael Party Spokesperson, 21st April 2010

General Register Office, Legislation Section, Roscommon, Ireland, 16th
March 2012

Professor Richard Green, Faculty of Medicine, Imperial College, London
3rd August 2011, 7th October 2012, 8th October 2012

High Court, Central Office, Dublin, 24th September 2012

Dr. Elizabeth Kiely, School of Applied Social Studies, University College
Cork
19th July 2012

Professor Shane Kilcommins, Faculty of Law, University College Cork
1st December 2011

Labour Party Spokesperson, 22nd January 2010

Wendy Lyon, Assistant to Sinn Féin Spokesperson

21st May 2009, 11th January 2010, 23rd January 2012

Marriage Equality, Dublin, 6th June 2012

Dr. Tanya Ní Mhuirthile, Faculty of Law, University College Cork

29th September 2011, 13th October 2011

Dr. Conor O'Mahony, Faculty of Law, University College Cork

5th March 2012, 7th August 2012, 12th March 2013

Dr. Aisling Parkes, Faculty of Law, University College Cork

1st December 2011, 5th April 2012

Professor Kees Waaldijk, Faculty of Law, Leiden University, The Netherlands

13th May 2011

Professor Linda Waite, Dept. of Sociology, University of Chicago, United States

31st July 2012, 28th August 2012, 30th August 2012

3rd September 2012, 23rd October 2012

Dr. Judy Walsh, School of Social Justice, University College Dublin,

4th June 2008, 1st October 2009

Dr. Katherine Zappone, 16th March 2009, 2nd October 2011

Web Links²⁷³

<http://acts.oireachtas.ie>

<http://www.amen.ie/index.html>

<http://www.bailii.org>

http://www.bailii.org/uk/legis/num_act/1861/ukpga_18610100_en.html

http://comharcristai.org/index.php?option=com_content&view=article&id=1&Itemid=2

<https://www.constitution.ie/AboutUs.aspx>

<https://www.constitution.ie/AttachmentDownload.ashx?mid=54833fae-9da3-e211-a5a0-005056a32ee4>

<https://www.constitution.ie/AttachmentDownload.ashx?mid=b4bee9f7-fda4-e211-a5a0-005056a32ee4>

<https://www.constitution.ie/Convention.aspx>

<https://www.constitution.ie/Meetings.aspx>

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/a4fe4e30eef23925802572790040d30c?OpenDocument>

www.europeanlifefenetwork.org

²⁷³ I have referred to these websites and links throughout this thesis.

http://www.groireland.ie/getting_married.htm#section3

www.lgbtnoise.ie

www.marriagequality.ie

<http://www.nationalchildrensresearchcentre.ie/>

www.oireachtas.ie

<http://www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf>

<http://www.oireachtas.ie/documents/bills28/bills/2003/3503/b35a03d.pdf>

<http://www.oireachtas.ie/viewdoc.asp?DocID=22929&&CatID=59>

<http://www.oireachtas.ie/viewdoc.asp?DocID=23053&&CatID=59>

<http://www.oireachtas.ie/viewdoc.asp?DocID=23209&&CatID=59>

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/1913/b1913d.pdf>

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/2313/b2313s.pdf>

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/3313/b3313s.pdf>

[Civil Partnership Bill 2004 \[PMB\] \(Number 54 of 2004\)](#)

[Civil Partnership Bill 2009 \(Number 44 of 2009\)](#)

[Civil Unions Bill 2006 \(No 68 of 2006\)](#)

Appendix I

Irish Constitution (1937)

Preamble to *Bunreacht na hÉireann*:

“In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.”

Article 8.1 of Bunreacht na hÉireann (1937) stipulates:

“The Irish language as the national language is the first official language.”

Article 8.2 of Bunreacht na hÉireann (1937) stipulates:

“The English language is recognised as a second official language.”

Article 9.1.1 of Bunreacht na hÉireann (1937) stipulates:

“On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.”

Article 9.1.2 of Bunreacht na hÉireann (1937) stipulates:

“The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.”

Article 9.1.3 of Bunreacht na hÉireann (1937) stipulates:

“No person may be excluded from Irish nationality and citizenship by reason of the sex of such person.”

Article 9.2 of Bunreacht na hÉireann (1937) stipulates:

“Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.”

Article 12.3.1 of Bunreacht na hÉireann (1937) stipulates:

“The President shall hold office for seven years from the date upon which he enters upon his office, unless before the expiration of that period he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges.”

Article 12.4.1 of Bunreacht na hÉireann (1937) stipulates:

“Every citizen who has reached his thirty-fifth year of age is eligible for election to the office of President.”

Article 12.6.2 of Bunreacht na hÉireann (1937) stipulates:

“If a member of either House of the Oireachtas be elected President, he shall be deemed to have vacated his seat in that House.”

Article 13.9 of Bunreacht na hÉireann (1937) stipulates:

“The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.”

Article 14.5.1 of Bunreacht na hÉireann (1937) stipulates:

“The provisions of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by or under this Constitution shall subject to the subsequent provisions of this section apply to the exercise and performance of the said powers and functions under this Article.”

Article 15.4.1 of Bunreacht na hÉireann (1937) stipulates:

“The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.”

Article 15.4.2 of Bunreacht na hÉireann (1937) stipulates:

“Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.”

Article 15.14 of Bunreacht na hÉireann (1937) stipulates:

“No person may be at the same time a member of both Houses of the Oireachtas, and, if any person who is already a member of either House becomes a member of the other House, he shall forthwith be deemed to have vacated his first seat.”

Article 16.1.1 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 16.1.2 of Bunreacht na hÉireann (1937) stipulates:

- i. “All citizens, and
- ii. such other persons in the State as may be determined by law,

without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáil Éireann, shall have the right to vote at an election for members of Dáil Éireann.”

Article 16.1.3 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 18.9 of Bunreacht na hÉireann (1937) stipulates:

“Every member of Seanad Éireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination.”

Article 22.2.1 of Bunreacht na hÉireann (1937) stipulates:

“The Chairman of Dáil Éireann shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, be final and conclusive.”

Article 25.1 of Bunreacht na hÉireann (1937) stipulates:

“As soon as any Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution, shall have been passed or deemed to have been passed by both Houses of the Oireachtas, the Taoiseach shall present it to the President for his signature and for promulgation by him as a law in accordance with the provisions of this Article.”

Article 25.4.6 of Bunreacht na hÉireann (1937) stipulates:

“In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail.”

Article 25.5.1 of Bunreacht na hÉireann (1937) stipulates:

“It shall be lawful for the Taoiseach, from time to time as occasion appears to him to require, to cause to be prepared under his supervision a text (in both the official languages) of this Constitution as then in force embodying all amendments theretofore made therein.”

Article 25.5.4 of Bunreacht na hÉireann (1937) stipulates:

“In case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language shall prevail.”

Article 26 of Bunreacht na hÉireann (1937) stipulates:

“This Article applies to any Bill passed or deemed to have been passed by both Houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.”

Article 26.1.1 of Bunreacht na hÉireann (1937) stipulates:

“The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.”

Article 26.1.2 of Bunreacht na hÉireann (1937) stipulates:

“Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature.”

Article 26.1.3 of Bunreacht na hÉireann (1937) stipulates:

“The President shall not sign any Bill the subject of a reference to the Supreme Court under this Article pending the pronouncement of the decision of the Court.”

Article 26.2.1 of Bunreacht na hÉireann (1937) stipulates:

“The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.”

Article 26.2.2 of Bunreacht na hÉireann (1937) stipulates:

“The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.”

Article 26.3.1 of Bunreacht na hÉireann (1937) stipulates:

“In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill.”

Article 26.3.2 of Bunreacht na hÉireann (1937) stipulates:

“If, in the case of a Bill to which Article 27 of this Constitution applies, a petition has been addressed to the President under that Article, that Article shall be complied with.”

Article 26.3.3 of Bunreacht na hÉireann (1937) stipulates:

“In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.”

Article 27.4.1 of Bunreacht na hÉireann (1937) stipulates:

“Upon receipt of a petition addressed to him under this Article, the President shall forthwith consider such petition and shall, after consultation with the Council of State, pronounce his decision thereon not later than ten days after the date on which the Bill to which such petition relates shall have been deemed to have been passed by both Houses of the Oireachtas.”

Article 28.9.1 of Bunreacht na hÉireann (1937) stipulates:

“The Taoiseach may resign from office at any time by placing his resignation in the hands of the President.”

Article 28.9.2 of Bunreacht na hÉireann (1937) stipulates:

“Any other member of the Government may resign from office by placing his resignation in the hands of the Taoiseach for submission to the President.”

Article 29.5.1 of Bunreacht na hÉireann (1937) stipulates:

“Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.”

Article 29.6 of Bunreacht na hÉireann (1937) stipulates:

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

Article 30.1 of Bunreacht na hÉireann (1937) stipulates:

“There shall be an Attorney General who shall be the adviser of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law.”

Article 30.5.1 of Bunreacht na hÉireann (1937) stipulates:

“The Attorney General may at any time resign from office by placing his resignation in the hands of the Taoiseach for submission to the President.”

Article 30.5.2 of Bunreacht na hÉireann (1937) stipulates:

“The Taoiseach may, for reasons which to him seem sufficient, request the resignation of the Attorney General.”

Article 30.5.4 of Bunreacht na hÉireann (1937) stipulates:

“The Attorney General shall retire from office upon the resignation of the Taoiseach, but may continue to carry on his duties until the successor to the Taoiseach shall have been appointed.”

Article 31.6 of Bunreacht na hÉireann (1937) stipulates:

“Any member of the Council of State appointed by the President may resign from office by placing his resignation in the hands of the President.”

Article 32 of Bunreacht na hÉireann (1937) stipulates:

“The President shall not exercise or perform any of the powers or functions which are by this Constitution expressed to be exercisable or performable by him after consultation with the Council of State unless, and on every occasion before so doing, he shall have convened a meeting of the Council of State and the members present at such meeting shall have been heard by him.”

Article 33.5.1 of Bunreacht na hÉireann (1937) stipulates:

“The Comptroller and Auditor General shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.”

Article 33.5.2 of Bunreacht na hÉireann (1937) stipulates:

“The Taoiseach shall duly notify the President of any such resolutions as aforesaid passed by Dáil Éireann and by Seanad Éireann and shall send him a copy of each such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.”

Article 34.3.1 of Bunreacht na hÉireann (1937) stipulates:

“The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.”

Article 34.3.2 of Bunreacht na hÉireann (1937) stipulates:

“Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court.”

Article 34.4.1 of Bunreacht na hÉireann (1937) stipulates:

“The Court of Final Appeal shall be called the Supreme Court.”

Article 34.4.6 of Bunreacht na hÉireann (1937) stipulates:

“The decision of the Supreme Court shall in all cases be final and conclusive.”

Article 34.5.1 of Bunreacht na hÉireann (1937) stipulates:

“Every person appointed a judge under this Constitution shall make and subscribe the following declaration:

“In the presence of Almighty God I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (*or as the case may be*) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.””

Article 34.5.2 of Bunreacht na hÉireann (1937) stipulates:

“This declaration shall be made and subscribed by the Chief Justice in the presence of the President, and by each of the other judges of the Supreme Court, the judges of the High Court and the judges of every other Court in the presence of the Chief Justice or the senior available judge of the Supreme Court in open court.”

Article 34.5.3 of Bunreacht na hÉireann (1937) stipulates:

“The declaration shall be made and subscribed by every judge before entering upon his duties as such judge, and in any case not later than ten days after the date of his appointment or such later date as may be determined by the President.”

Article 35.1 of Bunreacht na hÉireann (1937) stipulates:

“The judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President.”

Article 35.2 of Bunreacht na hÉireann (1937) stipulates:

“All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.”

Article 35.4.1 of Bunreacht na hÉireann (1937) stipulates:

“A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.”

Article 35.5 of Bunreacht na hÉireann (1937) stipulates:

“The remuneration of a judge shall not be reduced during his continuance in office.”

Article 36 of Bunreacht na hÉireann (1937) stipulates:

“Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:—

- i. the number of judges of the Supreme Court, and of the High Court, the remuneration, age of retirement and pensions of such judges,
- ii. the number of the judges of all other Courts, and their terms of appointment, and
- iii. the constitution and organization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.”

Article 40.1 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 40.3.1 of Bunreacht na hÉireann (1937) stipulates:

“The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

Article 40.3.2 of Bunreacht na hÉireann (1937) stipulates:

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

Article 40.3.3 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 41.1.1 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 41.1.2 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 41.2.1 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 41.2.2 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 41.3.1 of Bunreacht na hÉireann (1937) stipulates:

“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.”

Article 41.3.2 of Bunreacht na hÉireann (1937) stipulates:

“A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

- i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
- iv. any further conditions prescribed by law are complied with.”

Article 41.3.3 of Bunreacht na hÉireann (1937) stipulates:

“No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.”

Article 42.1 of Bunreacht na hÉireann (1937) stipulates:

“The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”

Article 43.1.1 of Bunreacht na hÉireann (1937) stipulates:

“The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.”

Article 43.1.2 of Bunreacht na hÉireann (1937) stipulates:

“The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.”

Article 45 of Bunreacht na hÉireann (1937) stipulates:

“The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”

Article 45.1 of Bunreacht na hÉireann (1937) stipulates:

“The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.”

Article 45.2 of Bunreacht na hÉireann (1937) stipulates:

“The State shall, in particular, direct its policy towards securing:–

- i. 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.
- ii. That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
- iii. That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.
- iv. That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.
- v. That there may be established on the land in economic security as many families as in the circumstances shall be practicable.”

Article 45.4.1 of Bunreacht na hÉireann (1937) stipulates:

“The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.”

Article 45.4.2 of Bunreacht na hÉireann (1937) stipulates:

“The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.”

Article 46.1 of Bunreacht na hÉireann (1937) stipulates:

“Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.”

Article 46.2 of Bunreacht na hÉireann (1937) stipulates:

“Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.”

Article 46.3 of Bunreacht na hÉireann (1937) stipulates:

“Every such Bill shall be expressed to be “An Act to amend the Constitution”.”

Article 46.4 of Bunreacht na hÉireann (1937) stipulates:

“A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.”

Article 46.5 of Bunreacht na hÉireann (1937) stipulates:

“A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.”

Article 47.1 of Bunreacht na hÉireann (1937) stipulates:

“Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.”

Article 48 of Bunreacht na hÉireann (1937) stipulates:

“The Constitution of Saorstát Éireann in force immediately prior to the date of the coming into operation of this Constitution and the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922, in so far as that Act or any provision thereof is then in force shall be and are hereby repealed as on and from that date.”

Article 50.1 of Bunreacht na hÉireann (1937) stipulates:

“Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.”

Source: *Bunreacht na hÉireann (1937)*

Appendix II

Miscellaneous Legislation

An Act to consolidate and amend the Statute Law of *England* and *Ireland* relating to Offences against the Person.

Section 57 of the *Offences against the Person Act, 1861* stipulates:

“Whosoever, being married, shall marry any other Person during the Life of the former Husband or Wife, whether the Second Marriage shall have taken place in *England* or *Ireland* or elsewhere, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Seven Years and not less than Three Years, - or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and any such Offence may be dealt with, inquired of, tried, determined, and punished in any County or place in *England* or *Ireland* where the Offender shall be apprehended or be in Custody, in the same Manner in all respects as if the Offence had been actually committed in that County or Place : Provided that nothing in this Section contained shall extend to any Second Marriage contracted elsewhere than in *England* and *Ireland* by any other than a Subject of Her Majesty, or to any Person marrying a Second Time whose Husband or Wife shall have been continually absent from such Person for the Space of Seven Years then last past, and shall not have been known by such Person to be living within that Time, or shall extend to any Person who, at the Time of such Second Marriage, shall have been divorced from the Bond of the First Marriage, or to any Person whose former Marriage shall have been declared void by the Sentence of any Court of competent Jurisdiction.”

Section 61 of the *Offences against the Person Act, 1861* stipulates:

“Whosoever shall be convicted of the abominable Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.”

Section 62 of the *Offences against the Person Act, 1861* stipulates:

“Whosoever shall attempt to commit the said abominable Crime, or shall be guilty of any Assault with Intent to commit the same, or of any indecent Assault upon any Male Person, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Ten Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.”

Available from:

http://www.bailii.org/uk/legis/num_act/1861/ukpga_18610100_en.html

(Accessed 14th May 2011)

An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes.

Section 11 of the *Criminal Law Amendment Act, 1885* stipulates:

“Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.”

An Act to Prohibit Incitement to Hatred on account of Race, Religion, Nationality or Sexual Orientation.

Section 1.1 of the *Prohibition of Incitement to Hatred Act, 1989* stipulates:

“... “hatred” means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation; ...”

An Act to amend and extend the Unfair Dismissals Acts, 1977 and 1991, and to provide for related matters.

Section 1.1 of the *Unfair Dismissals (Amendment) Act, 1993* stipulates:

“In this Act “the Principal Act” means the Unfair Dismissals Act, 1977.”

Section 5 of the *Unfair Dismissals (Amendment) Act, 1993* stipulates:

“Section 6 of the Principal Act is hereby amended by –

(a) the substitution in subsection (2) of the following paragraphs for paragraph (e):

“ (e) the race, colour or sexual orientation of the employee,

(ee) the age of the employee,

(eee) the employee’s membership of the travelling community,”...”

An Act to make further provision for the promotion of equality between employed persons; to make further provision with respect to discrimination in, and in connection with, employment, vocational training and membership of certain bodies; to make further provision in connection with Council Directive No. 75/117/EEC on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women and Council Directive No. 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; to make further provision with respect to harassment in employment and in the workplace; to change the name and constitution of the Employment Equality Agency and provide for the administration by that body of various matters pertaining to this Act; to establish procedures for the investigation and remedying of various matters arising under this Act; to repeal the Anti-discrimination (Pay) Act, 1974, and the Employment Equality Act, 1977, and to provide for related matters.

Section 6.1 of the *Employment Equality Act, 1998* stipulates:

“For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in *subsection (2)* (in this Act referred to as “the discriminatory grounds”), one person is treated less favourably than another is, has been or would be treated.”

Section 6.2 of the *Employment Equality Act, 1998* stipulates:

“As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are –

- (a) that one is a woman and the other is a man (in this Act referred to as “the gender ground”),
- (b) that they are of different marital status (in this Act referred to as “the marital status ground”),
- (c) that one has family status and the other does not (in this Act referred to as “the family status ground”),
- (d) that they are of different sexual orientation (in this Act referred to as “the sexual orientation ground”),
- (e) that one has a different religious belief from the other, or that one has a religious belief and the other has not (in this Act referred to as “the religion ground”),
- (f) that they are of different ages, but subject to *subsection (3)* (in this Act referred to as “the age ground”),
- (g) that one is a person with a disability and the other either is not or is a person with a different disability (in this Act referred to as “the disability ground”),
- (h) that they are of different race, colour, nationality or ethnic or national origins (in this Act referred to as “the ground of race”),
- (i) that one is a member of the traveller community and the other is not (in this Act referred to as “the traveller community ground”).”

Section 37.1 of the *Employment Equality Act, 1998* stipulates:

“A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or *Part II* if –

- (a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
- (b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.”

Section 38.1 of the *Employment Equality Act, 1998* stipulates:

“The Employment Equality Agency established by section 34 of the Employment Equality Act, 1977, shall continue as a body corporate with perpetual succession and power to sue and be sued in its corporate name and to acquire, hold and dispose of land and on and after the coming into operation of this section shall be known as An tÚdarás Comhionannais or, in the English language, the Equality Authority, and references in any enactment or other document to the Employment Equality Agency shall be construed accordingly.”

An Act to provide for the reorganisation, modernisation and naming of the system (to be known as the Civil Registration Service or, in the Irish language, an tSeirbhís um Chlárú Sibhialta) of registration of births, still-births, adoptions, marriages and deaths (including certain births and deaths occurring outside the state), to provide for the extension of the system to decrees of divorce and decrees of nullity of marriage and for those purposes to revise the law relating to the system, to amend the law relating to marriages and to provide for related matters.

Section 2.2 of the *Civil Registration Act, 2004* stipulates:

“For the purposes of this Act there is an impediment to a marriage if –

- (a) the marriage would be void by virtue of the Marriage Act 1835 as amended by the Marriage (Prohibited Degrees of Relationship) Acts 1907 and 1921,
- (b) one of the parties to the marriage is, or both are, already married,
- (c) one or both, of the parties to the intended marriage will be under the age of 18 years on the date of solemnisation of the intended marriage and an exemption from the application of section 31(1)(a) of the Family Law Act 1995 in relation to the marriage was not granted under section 33 of that Act,
- (d) the marriage would be void by virtue of the Marriage of Lunatics Act 1811, or
- (e) both parties are of the same sex.”

Available from: <http://acts.oireachtas.ie> (Accessed 14th May 2011)

Appendix III

Bunreacht na hÉireann (1937)

Airteagal 40.3.1

“Ráthaíonn an Stát gan cur isteach lena dhlíthe ar chearta pearsanta aon saoránaigh, agus ráthaíonn fós na cearta sin a chosaint is a shuíomh lena dhlíthe sa mhéid gur féidir é.”

Airteagal 41.1.1

“Admhaíonn an Stát gurb é an Teaghlach is buíon-aonad príomha bunaidh don chomh-dhaonnacht de réir nádúir, agus gur foras morálta é ag a bhfuil cearta doshannta dochloíte is ársa agus is airde ná aon reacht daonna.”

Airteagal 41.3.1

“Ós ar an bPósadh atá an Teaghlach bunaithe gabhann an Stát air féin coimirce faoi leith a dhéanamh ar ord an phósta agus é a chosaint ar ionsaí.”

Source: *Bunreacht na hÉireann (1937)*

Appendix IV

Central Statistics Office: Census 2011

Question 5: What is your current marital status?

Answer if aged 15 years or over.

Mark one box only.

1. Single (never married)
2. Married (first marriage)
3. Re-married (following widowhood)
4. Re-married (following divorce/annulment)
5. Separated (including deserted)
6. Divorced
7. Widowed

Source: Central Statistics Office (2011)

Appendix V

Defense of Marriage Act, 1996

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.”

Pub. L. 104-199, sec. 1, 100 Stat. 2419 (Sep. 21, 1996), codified at 1 U.S.C. § 7 (1997).

“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”

Pub. L. 104-199, sec. 2, 100 Stat. 2419 (Sep. 21, 1996), codified at 28 U.S.C. § 1738C (1997).

Source: Alliance Defense Fund (2008)

Appendix VI

19th, 20th and 21st Century Marriage Laws

Marriage Act. 31st August 1835.

Marriages (Ireland) Act. 1844.

Marriages (Ireland) Act. 1846.

Marriage Law (Ireland) Amendment Act. 1863.

Registration of Marriages (Ireland) Act. 1863.

Matrimonial Causes and Marriage Law (Ireland) Amendment Act. 1870.

Matrimonial Causes and Marriage Law (Ireland) Amendment Act. 1871.

Marriage Law (Ireland) Amendment Act. 1873.

Marriage (Prohibited Degrees of Relationship) Act. 1907.

Marriage (Prohibited Degrees of Relationship) Act. 1921.

Registration of Marriages Act. No. 35. 24th July 1936.

Marriages Act. No. 47. 27th November 1936.

*Vital Statistics and Births, Deaths and Marriages Registration Act. No. 8.
10th June 1952.*

Births, Deaths and Marriages Registration Act. No. 25. 29th November 1972.

Marriages Act. No. 30. 20th December 1972.

Domicile and Recognition of Foreign Divorces Act. No. 24. 2nd July 1986.

Judicial Separation and Family Law Reform Act. No. 6. 19th April 1989.

Family Law Act. No. 26. 2nd October 1995.

Family Law (Divorce) Act. No. 33. 27th November 1996.

Civil Registration Act. No. 3. 27th February 2004.

Sources:

Select Committee on Social and Family Affairs (2004b)²⁷⁴

Select Committee on Social and Family Affairs (2004c)²⁷⁵

<http://acts.oireachtas.ie> (Accessed 14th May 2011)

<http://www.bailii.org> (Accessed 14th May 2011)

<http://www.oireachtas.ie/documents/bills28/bills/2003/3503/b35a03d.pdf>

(Accessed 28th November 2012)

²⁷⁴ See Amendments 9 and 47.

²⁷⁵ See Amendments 74, 81, 135, 136, and 137.

Appendix VII

***Civil Partnership and Certain Rights and Obligations of Cohabitants Act,* 2010**

An Act to provide for the registration of civil partners and for the consequences of that registration, to provide for the rights and obligations of cohabitants and to provide for connected matters.

Section 3 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

“For the purposes of this Act a civil partner is either of two persons of the same sex who are—

- (a) parties to a civil partnership registration that has not been dissolved or the subject of a decree of nullity, or
- (b) parties to a legal relationship of a class that is the subject of an order made under *section 5* that has not been dissolved or the subject of a decree of nullity.”

Section 5.1 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

“The Minister may, by order, declare that a class of legal relationship entered into by two parties of the same sex is entitled to be recognised as a civil partnership if under the law of the jurisdiction in which the legal relationship was entered into—

- (a) the relationship is exclusive in nature,
- (b) the relationship is permanent unless the parties dissolve it through the courts,
- (c) the relationship has been registered under the law of that jurisdiction, and
- (d) the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be treated comparably to a civil partnership.”

Section 6 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

“In this Part, “Act of 2004” means the Civil Registration Act 2004.”

Section 7.1 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

“Section 2(1) of the Act of 2004 is amended—

(a) by inserting the following definitions:

“ ‘Act of 2010’ means the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*;

‘civil partner’ has the meaning assigned to it by the *Act of 2010*;

‘civil partnership registration’ means registration under section 59D;

‘civil status’ means being single, married, separated, divorced, widowed, in a civil partnership or being a former civil partner in a civil partnership that has ended by death or been dissolved;

‘dissolution’ means dissolution of a civil partnership under *section 110* of the *Act of 2010*;”, ...”

Section 7.3 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

“Section 2 of the Act of 2004 is amended by inserting the following subsection after subsection (2):

“(2A) For the purposes of this Act, there is an impediment to a civil partnership registration if—

- (a) the civil partnership would be void by virtue of the Third Schedule,
- (b) one of the parties to the intended civil partnership is, or both are, already party to a subsisting civil partnership,
- (c) one or both of the parties to the intended civil partnership will be under the age of 18 years on the date of the intended civil partnership registration,
- (d) one or both of the parties to the intended civil partnership does not give free and informed consent,
- (e) the parties are not of the same sex, or
- (f) one of the parties to the intended civil partnership is, or both are, married.”.”

Section 27 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

“... “shared home” means—

- (a) subject to *paragraph (b)*, a dwelling in which the civil partners ordinarily reside; and
- (b) in relation to a civil partner whose protection is in issue, the dwelling in which that civil partner ordinarily resides or, if he or she has left the other civil partner, in which he or she ordinarily resided before leaving.”

Section 172 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010* stipulates:

- “(1) For the purposes of this Part, a cohabitant is one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.
- (2) In determining whether or not 2 adults are cohabitants, the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:
- (a) the duration of the relationship;
 - (b) the basis on which the couple live together;
 - (c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;
 - (d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;
 - (e) whether there are one or more dependent children;
 - (f) whether one of the adults cares for and supports the children of the other; and
 - (g) the degree to which the adults present themselves to others as a couple.
- (3) For the avoidance of doubt a relationship does not cease to be an intimate relationship for the purpose of this section merely because it is no longer sexual in nature.
- (4) For the purposes of this section, 2 adults are within a prohibited degree of relationship if—
- (a) they would be prohibited from marrying each other in the State, or
 - (b) they are in a relationship referred to in the Third Schedule to the Civil Registration Act 2004 inserted by *section 26* of this Act.

- (5) For the purposes of this Part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period—
- (a) of 2 years or more, in the case where they are the parents of one or more dependent children, and
 - (b) of 5 years or more, in any other case.
- (6) Notwithstanding *subsection (5)*, an adult who would otherwise be a qualified cohabitant is not a qualified cohabitant if—
- (a) one or both of the adults is or was, at any time during the relationship concerned, an adult who was married to someone else, and
 - (b) at the time the relationship concerned ends, each adult who is or was married has not lived apart from his or her spouse for a period or periods of at least 4 years during the previous 5 years.”

Appendix VIII

Working Group on Domestic Partnership (2006)

“The Working Group on Domestic Partnership was established by Mr Michael McDowell T.D., Minister for Justice, Equality and Law Reform in late March 2006. In establishing the Working Group, the Minister set down the following challenging task:

“The Group is charged with preparing an Options Paper on Domestic Partnership for presentation to the Minister for Justice, Equality and Law Reform by 20 October 2006, within the following terms of reference:

- (i) to consider the categories of partnerships and relationships outside of marriage to which legal effect and recognition might be accorded, consistent with Constitutional provisions, and
- (ii) to identify options as to how and to what extent legal recognition could be given to those alternative forms of partnership, including partnerships entered into outside the State.

The Group is to take into account models in place in other countries.’”

Source: Working Group on Domestic Partnership (2006, p.2)

Appendix IX

European Convention on Human Rights Act, 2003

An Act to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November 1950 and certain protocols thereto, to amend the Human Rights Commission Act 2000 and to provide for related matters.

Section 2.1 of the *European Convention on Human Rights Act, 2003* stipulates:

“In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.”

Section 2.2 of the *European Convention on Human Rights Act, 2003* stipulates:

“This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.”

Section 4 of the *European Convention on Human Rights Act, 2003* stipulates:

“Judicial notice shall be taken of the Convention provisions and of—

- (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,
- (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
- (c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.”

Section 5.1 of the *European Convention on Human Rights Act, 2003* stipulates:

“In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2*, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as “a declaration of incompatibility”) that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions.”

Section 5.2 of the *European Convention on Human Rights Act, 2003* stipulates:

“A declaration of incompatibility—

- (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and
- (b) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.”

Section 5.3 of the *European Convention on Human Rights Act, 2003* stipulates:

“The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.”

Section 5.4 of the *European Convention on Human Rights Act, 2003* stipulates:

“Where—

- (a) a declaration of incompatibility is made,
- (b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and
- (c) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party (“a payment”),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.”

Section 5.5 of the *European Convention on Human Rights Act, 2003* stipulates:

“In advising the Government on the amount of compensation for the purposes of *subsection (4)*, an adviser shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention.”

Available from:

<http://www.oireachtas.ie/documents/bills28/acts/2003/a2003.pdf>

(Accessed 30th September 2011)

Convention for the Protection of Human Rights and Fundamental Freedoms

Article 8 of the *European Convention on Human Rights* stipulates:

“Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 12 of the *European Convention on Human Rights* stipulates:

“Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

Article 14 of the *European Convention on Human Rights* stipulates:

“Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Source: Registry of the European Court of Human Rights (2010)

Appendix X

American Academy of Pediatrics (2002)

“A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual. Children’s optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes.”

“The gender identity of preadolescent children raised by lesbian mothers has been found consistently to be in line with their biologic sex. None of the more than 300 children studied to date have shown evidence of gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behavior. [...] No differences have been found in the gender identity, social roles, or sexual orientation of adults who had a divorced homosexual parent (or parents), compared with those who had divorced heterosexual parents. Similar proportions of young adults who had homosexual parents and those who had heterosexual parents have reported feelings of attraction toward someone of the same sex. Compared with young adults who had heterosexual mothers, men and women who had lesbian mothers were slightly more likely to consider the possibility of having a same-sex partner, and more of them had been involved in at least a brief relationship with someone of the same sex, but in each group similar proportions of adult men and women identified themselves as homosexual. [...] Several studies comparing children who have a lesbian mother with children who have a heterosexual mother have failed to document any differences between such groups on personality measures, measures of peer group relationships, self-esteem, behavioral difficulties, academic success, or warmth and quality of family relationships.”

Source: American Academy of Pediatrics (2002, pp.341-342)

Appendix XI

Green *et al* (1986)

Excerpt I

“This paper reports results of a study designed to assess aspects of the psychosexual and psychosocial development of prepubescent children living with their mothers, with the independent variable being the mother’s sexual orientation. Data from a group of 50 currently homosexual women and their 56 children, ages 3 to 11, were compared with data from a matched group of 40 heterosexual women and their 48 children. [...] This research project assessed the effects on children’s sexual identity development of living in a father-absent household with either a heterosexual or a homosexual mother. Heterosexual mothers, also divorced, and without adult males living in the home, were selected as a control group for the homosexual mother households so that the effects on children of divorce and/or father absence could be balanced between the two family groups.”

Excerpt II

“The samples were two matched groups of currently unmarried women living with at least one child between the ages of 3 and 11 years. The homosexual sample was recruited from volunteers who contacted the research team after learning about the study from national and local women’s groups or through friendship networks. Research efforts were concentrated in 10 states within reasonable traveling distance for the researchers (Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Wisconsin). All volunteers within a geographic area were accepted if they met the study criteria. The criteria were (1) currently unmarried, (2) legal custodian of at least one child between 3 and 11 years, (3) currently self-identified as a lesbian, and (4) no adult male living in the household for at least 2 years. The heterosexual sample was collected from approximately 900 responses to requests for single-mother subjects. [...] They had been living as single parents for at least 2 years with a mean of 4.0 years. While the majority (82% of homosexuals and 90% of heterosexuals) were separated or divorced, three homosexual women were widowed and 10% of both samples had never married. [...] When asked to describe their present sexual orientation, all women in one group labeled themselves lesbian, while none in the other group were so identified.”

Excerpt III

“Current relationships and living situations differed for the two groups. Thirty-nine lesbian mothers and four heterosexual mothers indicated that other adults were living in their household besides themselves and their children. For 28 of the lesbians, these were partners with whom they had a sexual relationship. For 11 other lesbians these were female roommates who were not sexual partners. One of the heterosexual mothers had a female roommate and three had a relative, usually a sister or mother.”

Excerpt IV

“Some of the lesbian mothers had divorced prior to acknowledging a homosexual preference. In eight of the lesbian mothers’ divorce proceedings sexual preference was an issue, and for seven of the lesbian mothers it was an issue in establishing child custody.”

Source: Green *et al* (1986, p.168, p.169, p.172, and p.173)

Appendix XII

Justice Sosman: *Goodridge v. Department of Public Health*

“Based on our own philosophy of child rearing, and on our observations of the children being raised by same-sex couples to whom we are personally close, we may be of the view that what matters to children is not the gender, or sexual orientation, or even the number of the adults who raise them, but rather whether those adults provide the children with a nurturing, stable, safe, consistent, and supportive environment in which to mature. Same-sex couples can provide their children with the requisite nurturing, stable, safe, consistent, and supportive environment in which to mature, just as opposite-sex couples do. It is therefore understandable that the court might view the traditional definition of marriage as an unnecessary anachronism, rooted in historical prejudices that modern society has in large measure rejected and biological limitations that modern science has overcome.

It is not, however, our assessment that matters. Conspicuously absent from the court’s opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results. Notwithstanding our belief that gender and sexual orientation of parents should not matter to the success of the child rearing venture, studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples. ... Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might

account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: Are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alternation to that institution."

Source: *Goodridge v. Department of Public Health*

(see [2003] Mass. 440, paras. 309-395 at paras. 358-359)

Appendix XIII

Anderssen *et al* (2002)

“Twenty-three empirical studies published between 1978 and 2000 on nonclinical children raised by lesbian mothers or gay fathers were reviewed (one Belgian/Dutch, one Danish, three British, and 18 North American). Twenty reported on offspring of lesbian mothers, and three on offspring of gay fathers. The studies encompassed a total of 615 offspring (age range 1.5 – 44 years) of lesbian mothers or gay fathers and 387 controls, who were assessed by psychological tests, questionnaires or interviews. Seven types of outcomes were found to be typical: emotional functioning, sexual preference, stigmatization, gender role behavior, behavioral adjustment, gender identity, and cognitive functioning. Children raised by lesbian mothers or gay fathers did not systematically differ from other children on any of the outcomes. The studies indicate that children raised by lesbian women do not experience adverse outcomes compared with other children. The same holds for children raised by gay men, but more studies should be done.”

Source: Anderssen *et al* (2002, p.335)

Appendix XIV

Miller (1979)

“Fathers interviewed tended to show little anxiety about their children’s eventual orientation. One openly-gay respondent said:

My straight parents failed to make me straight, so there’s no reason to believe I’d succeed in doing the reverse with [my son] even if I wanted to. He will be whatever he is. Gay or straight is okay as long as he’s happy. I’ll love him. Relatives will blame me if he’s gay and say it’s a miracle if he’s straight. Either way they’ll give me no credit, so I’ve stopped worrying about it.”

Source: Miller (1979, p.547)

Appendix XV

Letters to the Editor of *The Irish Times*: Alphabetical Order

Barrett, S. (2006a) 'Same-sex marriages', The Irish Times, 27th October.

Barrett, S. (2006b) 'Debate on same-sex marriages', The Irish Times, 7th November.

Burke, C. (2006) 'Debate on validity of same-sex marriages', The Irish Times, 10th November.

Corrigan, O. (2006) 'Debate on same-sex marriages', The Irish Times, 20th October.

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Appendix XV

Letters to the Editor of *The Irish Times*: Chronological Order

Mathews-McKay, R. and Keane, R. (2006) 'High court action to have lesbian marriage recognised', The Irish Times, 4th October.

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Appendix XVI

Nock (2001)

“But the authors note that 78% of the lesbians, but only 10% of the heterosexual mothers had partners living in the household. Clearly, even if no other differences existed, this simple and enormous difference invalidates any comparison between the groups without appropriate statistical controls.”

Source: Nock (2001, pp.60-61)