

2016

Governed by Marriage Law

Deirdre McGowan

Technological University Dublin, deirdre.mcgowan@tudublin.ie

Follow this and additional works at: <https://arrow.tudublin.ie/aaschlawbk>



Part of the [Family Law Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

McGovern, D. (2016) Governed by Marriage Law in 25(3) *Social and Legal Studies*pp. 311-331.

This Article is brought to you for free and open access by the Law at ARROW@TU Dublin. It has been accepted for inclusion in Books/Book Chapters by an authorized administrator of ARROW@TU Dublin. For more information, please contact arrow.admin@tudublin.ie, aisling.coyne@tudublin.ie.



This work is licensed under a [Creative Commons Attribution-NonCommercial-Share Alike 4.0 License](#)
Funder: John & Pat Hume Fellowship Maynooth University

Governed by Marriage Law: An Irish Genealogy.

Introduction.

In recent years, European governments have used marriage law reform to signal their commitment to the principles of equality and social diversity. Equality for gays and lesbians will be achieved, it is claimed, through admission to the privileged status of marriage, allowing access to specific legal and fiscal privileges, and providing public endorsement of same-sex love and commitment. This movement toward 'marriage equality' assumes that marriage law, if applied equally to same and opposite sex couples, can solve the social problems of homophobia and heterosexism (Barker, 2013: 126). The expectation that reform of marriage law can solve social problems is not unique to the present. Historically, marriage law has been offered as a solution to female poverty and sex-based discrimination, relationship breakdown and post-relationship financial vulnerability (Stone, 1990; Glendon, 1989).

The progressive potential of more marriage law is often assumed by government and political campaigners, despite significant difficulties with existing legal rules. Scholars describe how marriage law epitomises patriarchy (Firestone, 1970; Pateman, 1988); constructs women as vulnerable and necessarily dependent (Smart, 1984); privatises the social cost of inevitable human dependency (Fineman, 2004; O'Donovan, 1985;

Ferguson, 2007); imposes traditional values on modern relationships (Smart, 1997; Ryan 2007); is veiled in secrecy making outcomes unpredictable (Coulter, 2009); and fails to produce justice for real, lived relationships (Diduck, 2003). How then has marriage law maintained its position as a valued instrument of social reform both at the level of the population and from the perspective of government?

In this essay, I reflect on the governmental or political aspect of relationship regulation, identifying how marriage law has both created problems for government and, simultaneously, offered solutions to social and regulatory problems. Using Ireland as a case study example, I describe the history of marriage law reform from the perspective of government, how it has been deployed in furthering political objectives, and the role it plays in fulfilling political aspirations for more complete governance of the social domain.

Governed by marriage law.

Political regulation of marriage began in England in the 1750s, and one of the first pieces of social legislation enacted by the newly unified German was an act to regulate marriage.¹ In France, marriage has been considered a matter for state regulation since the 1600s (Hanley, 1989). All western nations now regulate entry to and exit from marriage, and the legal consequences of relationship status are so far reaching as to be virtually impossible to catalogue (Barker, 2013: 28). Yet, the legal implications do not

begin to capture the full extent of its regulatory influence. The officially legitimated family can be relied upon to meet its own needs before calling on the state (Fineman, 2004: 40-44). Marriage and family iconography contributes to the construction and maintenance of gender roles (Diduck, 2003), promoting unpaid care work and legitimating discriminatory employment practices (Gittins, 1993). The family can offer practical solutions to problems with morality, health and procreation, and has been used throughout history to implement programs of social reform (Donzelot, 1977).

Marriage law forges a powerful link between the personal and the political, connecting the aspirations of individuals to the regulatory ambitions of the state (Smart, 1984). The process of marriage law reform, in itself, has effects at the level of individual relationships, translating personal experience into legal discourse and shaping people's understanding of their own lives (Smart, 1984, 2004). Political debate around marriage law reform builds images of the good life that both reflects and shapes individual aspirations, and legal authorisation of relationship practices has come to signal socio-cultural authorisation, re-enforcing both cultural practices and the necessity of law (Cherlin 2009, 66). The central importance of the authorised, conjugal couple to the process of social government means that the state has a significant stake in how relationships are performed, and legal rules regulating and authorising marriage and

other familial relationships are now central to the political administration of our collective lives.

Foucault's description of the process of government in the modern liberal democratic state as 'the conduct of conducts' (Foucault, 2000: 341), suggests a way to understand how, and for what purpose, the personal, familial practices of individuals have become matters of concern for the state. He maintains that the modern state, in governing the population for which it is responsible, aims not to command obedience, but to take control of lives and to regularise them using techniques that are 'enlightened, reflective, analytical, calculated and calculating' (Foucault, 2007: 91). These techniques are deployed in order to direct, lead and guide individuals toward social behaviours considered 'natural' by government, working through their freedom to act and capacity to self-govern (van Krieken, 2001: 6). This notion of government thus encompasses the many ways in which the behaviour of individuals or groups might be directed, and draws attention to the relationship between political government, the regulatory capacities of non-state actors and institutions, and the capacities of individual citizens to govern themselves. It also invites reflection on how the process of government is rationalised, the conceptual frameworks within which those responsible

for government identify particular social behaviours as optimal and how this is connected to social understandings of normal or natural behaviour.

Locating the role of law in general, and marriage law in particular, in the process of government is not straightforward, and from the outset requires rejection of jurisprudential notions of 'law' as a unified regulatory structure that solves social and political difficulties (Walby, 2007: 556). Rather, law must be fragmented and decentred, and focus shifted to how particular difficulties come to be seen as a target for government and how 'the legal complex' is implicated in strategies of regulation (Rose and Valverde, 1998: 546). Legal expertise and techniques must take their place among more general apparatuses of governmental control that intervene in the lives of individuals in response to information collected about those lives (Tadros, 1998: 93.). Viewing law in this way facilitates an analysis of the potentially diverse roles legal rules and processes play in the implementation of political strategies, but also of how legal expertise displaces other ways of thinking about and solving political difficulties (Baxter 1992). The path of Irish marriage law reform, in particular, demonstrates how, in the domain of family life, legal discourse can colonise identification of social problems and efforts to solve them. Women's post-relationship poverty, seen in terms of men's legal obligations, is removed from its structural context, leaving barriers to self-sufficiency intact (Smart, 1984: 191). Rationalising judicial separation or divorce law as a way to

save marriage means that no realistic attempt is made to enable the construction of post-relationship lives. Adding more categories of couple to the category 'authorised' avoids engagement with the complexity of lived families (Boyd, 1999; Richardson 2004). Alternative ways of knowing about, and addressing, social difficulties are elided by the dominance of legal expertise.

In order to diagnose the role of marriage law in the process of government I adopt a genealogical approach to history (Foucault, 1984), focusing on how meanings are produced and attached to social subjects and objects over time. I consider how, over a discrete historical period, in one exemplary jurisdiction, social relationship practices were identified as problematic, and how solutions to those problems were formulated at the level of government. A fully contextualised analysis within a governance framework removes law's privilege, but it also facilitates the mapping of programs of marriage law reform onto the shifting conceptual frameworks within which modern government aims to manage, optimize, and normalise the lives of its citizens (Foucault 2003: 247). The meaning of 'marriage' has shifted over time as the Irish government re-focused re-shaped its understanding of what it means to govern well, yet the marriage based family has remained central to how regulation of the social domain is achieved. Further, despite proving largely ineffective to solve social problems, marriage law retains a pivotal role in political attempts to shape social practice. Pro-marriage rhetoric

and the intensification of regulatory structures around the authorised conjugal couple act to encourage ways of living that support shifting governmental objective and the connection forged by the marriage law complex between personal and political aspirations means that, despite significant social, economic and political change, marriage law remains an important political technique. It supports the normalising objectives of politics by directly promoting lifetime conjugality in the interests of social stability, and indirectly by acting on our capacity to manage our own lives in ways that support political understandings of what it means to govern well.

Ireland.

Using Ireland as an example, this research describes the process of marriage law reform between 1970 and 2010 in its social and economic context, focusing on the problems that marriage law was intended to address and the conceptual framework within which the Irish government pursued legal reform. Ireland is an exemplary case study because most European jurisdictions have taken hundreds of years to build a body of law corresponding to that enacted in Ireland in the past fifty years (Stone 1992; Barker 2010; Glendon, 1989). When Ireland gained independence from Britain in 1922, it inherited a body of marriage law built upon the political concerns of a colonial power, and the ecclesiastical rules of a church with few Irish adherents. The 1937 Constitution, at Article 41, pledged to protect the institution of marriage ‘upon which the Family is founded,’

but in practice the regulation of the marriage relationship itself was left entirely within the authority of the various churches. Nonetheless, its position at the centre of a network of social power meant that the marriage-based family became a relay for government. Lifetime, gendered, dependency marriage was assumed by public institutions, and rendered married women largely invisible to politics. Beginning in the 1970s, however, successive governments pursued a program of marriage law reform, culminating in a 2015 plebiscite that made Ireland the first country in the world to extend marriage to same-sex couples by popular vote. In a relatively short period, Ireland had moved from exclusively socio-religious regulation to the European frontier of marriage law.

Problematizing² marriage.

Between the foundation of the state and the 1960s, the Irish government accepted dependency marriage as an unproblematic and familiar set of practices, outside of politics. Representing a lifetime commitment, the obligations of marriage were shaped by the religious beliefs of the vast majority of the Irish population, who accepted Catholicism as the essence of their identity and their country's ethos (Fuller, 2002: xiii). Religious and cultural understandings, both at the level of the population, and within government, excluded the state from direct intervention in family life. As a result state services were routed through male heads of household; personal taxation, social

insurance and (limited) social assistance programs presumed that women and children were maintained and protected by men.

A Keynesian policy shift in the 1960s led to a sustained period of economic growth, a halting of emigration and a dramatic increase in government revenues (Kennedy et al, 1998). It also precipitated the centralisation and expansion of the social welfare system (Cousins, 1995: 21). In order to expand welfare provision, government needed to identify deserving recipients of social transfers. One such worthy group were vulnerable, deserted, left destitute following the failure of male support. The wilful abandonment and failure to support a wife and children had been a criminal offence since the foundation of the State,³ and men without means risked prosecution following the failure of their marriage. The phenomenon of 'wife desertion' was thus linked to criminality and social disorder; deserted wives were victims of crime, punished by stigma and poverty, their husbands were criminals punished by law. Desertion evidenced moral transgression and left families without male protection. The state, aiming to preserve the integrity and status of the gendered, marriage-based family differentiated deserted wives from the mass of indigents reliant on discretionary public assistance, took the place of the absent husbands, and made deserted wives one of the first beneficiaries of the developing, centralised welfare system.⁴ Provision of welfare for these women inevitably led to the production of statistics detailing the prevalence of desertion, and

to political concern with minimising its occurrence. Politics had begun to assume responsibility for the welfare of the population, and as it did so, family and relationship characteristics and practices became a particular concern of government.

Marriage law as a solution to 'desertion' in the 1970s.

A number of women's rights organisations emerged at the end of the 1960s with a mainly liberal feminist agenda. They advocated a statutory right to maintenance and effective enforcement mechanisms as the solution to the problem of desertion (Galligan, 1998: 91). A government appointed Commission on the Status of Women also recommended reform of maintenance law to address the financial difficulties experienced by deserted wives. The Commission formulated its recommendations in terms of legal rights, interpreting Article 6 of the United Nations Declaration on the Elimination of Discrimination against Women in light of Article 41 of the Irish Constitution to formulate a right for women to adopt a dependent role in marriage (Commission on Status of Women, 1973: 227).

Similarly, a Government appointed Committee, asked to 'to examine and make recommendations on the substantive law as to the desertion of wives,' focused on the 'pressing social evil' of desertion, which was 'on the increase.' Deserted wives were

identified as victims of 'abandonment,' and 'ill treatment,' and existing marriage law as inadequate to meet their needs. The committee found that there was 'a real need for radical change in the legal provisions relating to the provision of maintenance for deserted spouses and families' (Committee on Court Practice, 1974: 7, 14 – 15). By 1975, political discussion of desertion had been colonised by legal formulations of marriage and its obligations. Experts proposed solutions in legal terms, emphasising Article 41 of the Constitution, with its statement of the social primacy of marriage and the place of women within it. The Minister for Justice, in introducing a Bill to reform the rules on spousal maintenance, referenced Article 41, in particular its marriage protection imperative. The legislation imposed a lifetime, mutual support obligation on spouses, offering maintenance without proof that either husband or wife had left the marital home. The Minister reasoned that the Bill would therefore:

strengthen marriages by no longer obliging wives who have been badly neglected by their husbands to leave the home ... the widely held view nowadays is that ... indeed such an action could possibly be a factor that would save a family relationship.⁵

Ideas about the horror of desertion and its links to criminality and poverty, the legal rights of women and their vulnerability, the moral obligations of men, came together in a political drive to save marriage.

Maintenance and family home protection legislation enacted in 1976⁶ marked a transformation in the relationship between politics and marriage in Ireland; politics

wanted something from the marriage relationship itself. Legal mechanisms were deployed in an attempt to take control of relationship practices and maximise those considered normal, and optimal, by government. The choice of what constituted natural or normal relationship behaviour was largely based on preponderant social practice and the tenets of dominant morality, and marriage law was enacted with the explicit purpose of saving marriage. Government accepted that lifetime dependency marriage was an essential social institution in need of protection, but it also needed citizens to perform marriage because it was central to the social management imperative of Keynesianism. Marriage was a transfer point between the state and individual interests, and the process of law reform both engaged with, and reinforced, social understandings of the nature of the marital relationship. The objective of marriage law reform in the 1970s was quite specific – it was intended to ensure the performance of lifetime dependency marriage. Of course, this was an objective doomed to failure. That all marriages did not last for life, nor adopt the dependency paradigm was already apparent, but government accepted the basic moral premise that marriage was a social good, essential to the functioning and good governance of society.

The problem of marriage breakdown.

The oil crisis of 1973 put an end to the economic expansion of the 1960s, but the government, on the assumption that this was a temporary difficulty, borrowed heavily to fund further expansion in public expenditure (Lee, 1989: 471). Government involvement in the economy had increased hugely in the period since independence, but more particularly between 1973 and 1985 when the ratio of public expenditure to gross national product rose from 42 percent to 67 percent (Kennedy et al, 1998: 87). Nonetheless, the economic situation did not improve, and by the end of the decade one fifth of the labour force were unemployed, despite levels of emigration not experienced since the 1950s (Kennedy et al, 1998: 93). Marriage remained pivotal to the administration of the expanding welfare state, and administration of the social domain was predicated on dependency model marriage (Second Commission on Status of Women, 1993: 17). Despite the enactment of maintenance legislation in 1976, the number of deserted wives and children in receipt of welfare assistance continued to increase. Legal ordering had failed to achieve conformity with the received norm of lifetime marriage; women and children persisted in falling out from under men's wings, creating a charge on public funds, threatening moral decline and social disorder.⁷

. A 1983 labour force survey estimated that there were 21,100 separated and deserted persons in the country (Commission on Social Welfare 1986: 121), and the

1986 census, which for the first time included a question designed to measure marriage breakdown, identified 40,000 people who were separated, deserted, or remarried following divorce (Lunn et al, 2009: 45). Statistics made the phenomenon of 'marriage breakdown' visible, giving it a material reality and designating it as a social risk that could happen to anyone (Ewald, 1990: 146). Government responded to the perceived crisis in family stability by appointing a Joint Committee 'to consider the protection of marriage and of family life' (Joint Committee on Marital Breakdown, 1985: vii). A decrease in the *rate* of marriage was a 'cause for concern' for the committee making it 'necessary to tackle the problems which give rise to this' and to 'make marriage as secure and viable as humanly possible.' Thus, 'much of the committee's deliberations focused on the protection of marriage and family life' (Committee on Marital Breakdown, 1985: vii). It was assumed that marriage was a social good, and marriage breakdown (or alternative relationship practices) a social problem. Crucially, the *phenomenon* of marriage breakdown was the problem, not its practical effects at the level of individual lives. Marriage failure represented a deviation, a countable abnormality, and in order to protect stability in family life mechanisms had 'to be installed around [this] random element inherent in [the] population so as to maximise a state of life' (Foucault, 2003: 247).

Laws role in identifying 'normal' relationship practice.

During the 1980s, legal articulations were central to both the meaning of 'marriage' and its construction as a social good worthy of protection. The Committee on Marital Breakdown relied on the Superior Courts' description of marriage as 'permanent, indissoluble union of man and woman,'⁸ rooted in the 'natural law.'⁹ The social truth of Article 41, and the self-evident advantages of marriage, had been endorsed by a series of high profile court decision during the decade. In *Murphy v Ireland*, the Supreme Court confirmed that marriage had a privileged position in the natural order and could not be penalised by fiscal measures. The supremacy of marriage was also endorsed in *O'B v S*, where the court refused to interpret the word 'issue' in the Succession Act 1965 to include children born outside marriage. In *Dennehy v Minister for Social Welfare*, the High Court held that making a social welfare payment available to a deserted wife, but not a deserted husband, was not, having regard to Article 41.2 of the Constitution and a wife's important social function, 'unreasonable, unjust or arbitrary.' In *Hyland v Minister for Social Welfare*, the Supreme Court declared parts of the social welfare code unconstitutional because they 'penalised the married state.' Legal expertise had identified optimal relationship behaviour, but this simply reflected and consolidated all of the notions about marriage that had circulated between politics, religion, and individual practice since the foundation of the State.

Legal articulations provided a justification for political intervention to 'save marriage,' and the Law Reform Commission (LRC), established in 1976, demonstrated the utility of legal process in supervising marriage practices, publishing its *First Report on Family Law* in 1981. The theme of the report was the 'protection of the family against damage to the continuity and stability of relationships among its members' (LRC, 1981: 2). Seven further reports on family law were published between 1982 and 1985, revealing the historic importance of law and legal mechanisms in the management of individual marriages and demonstrating law's efficacy in identifying and containing abnormal marital behaviour. The Commission's methodology was to state existing legal rules and then make proposals for reform. As a result, its reports contained detailed accounts of historical (often British and centuries old) case law detailing marital irregularity, individual deviance and aberration. It also laid claim to the continuance of legal machinery into the future and demonstrated that marriage failure, when seen from a legal perspective, was an individual failure. Specific spouses, with particular disadvantages were unable to maintain lifetime marriages; their problems were personal, not social or structural. In the application of legal rules the state, which increasingly defined the contours of family life, 'remained invisible' (Smart, 1984: 191).

Saving marriage with divorce.

The Irish Constitution, as promulgated in 1937, specifically prohibited the enactment of legislation facilitating the dissolution of marriage. By the mid-1980s this ban had become central to political discussion of marriage breakdown. The introduction of divorce, was not, however, seen by government as a way to end failed marriages. Rather, it was conceptualised as a route to the stabilisation of 'irregular unions' (Dillon, 1993: 33). The Tenth Amendment to the Constitution Bill 1986 proposed the removal of Article 41.3.2, and its replacement with a restrictive framework within which marriage could be dissolved. Throughout debate on the Bill, deputies and senators emphasised the potential for remarriage, and the over-riding theme of both the pro and anti-divorce campaigns was the protection of marriage, each side arguing that their position was the best way to achieve this objective.

Although the Bill was passed by the Oireachtas, it was rejected by voters in a referendum. Anti-divorce campaigners focused on the shift of legal protection from first to second families implicit in the government's proposal, and how such shift would impact, in particular, on 'discarded' first wives. As the first family would no longer be based on marriage, it would have no entitlement to constitutional protection, and women who entered such marriages in good faith expecting them to last for life would be left without the incidents of the marriage protection doctrine (Dillon, 1993). Despite

the pro-divorce side also emphasising the need to protect marriage, its focus on the relief of suffering caused by inability to remarry meant that it had no effective counter-argument to the allegation that first families would suffer financial hardship. So intense was the relationship between marriage and the state, that imagining family life outside marriage was politically impossible. Facilitating a replacement spouse, 'saving marriage' was the only conceivable solution to the problem of marriage breakdown.

Without a mandate to introduce divorce, but with marriage-protection a political imperative, government settled for comprehensive reform of ~~the~~ existing ecclesiastically based law governing judicial separation. The Judicial Separation and Family Law Reform Act 1989 apportioned blame for marital failure, facilitated suspension of the obligation to cohabit, and allocated property between spouses. It also adopted new ways of thinking about managing marriage breakdown; reconciliation, mediation and separation by agreement were an integral part of the legislative framework. For those unable to manage the breakdown of their own marriage, an intricate, court-based machinery was established designed to re-make post-relationship lives in the image of lifetime marriage. The legislation provided no route, other than remarriage (following a foreign divorce) or death of a recipient spouse, out of the legal or financial obligations of marriage. For those who could not rescue their relationships through the self-governing techniques of counselling or mediation, the litigation process

provided a way to individualise, and remove from public view, the effects of the failure of dependency marriage.

Political aims – legal solutions.

In the 1980s, dependency model marriage continued to act as an instrument of government, facilitating the distribution of welfare and the collection of tax. Statistics demonstrating the prevalence of ‘marriage breakdown’ brought it into political focus. Marriage was accepted as normal social behaviour, a self-evident social good; marriage breakdown was a threat to social well-being. Increased political interest in marriage breakdown corresponded with the expansion of the judicial review jurisdiction of the superior courts who, from a position of presumed neutrality, formulated a marriage protection doctrine based on the provisions of Article 41 of the Constitution. The form of marriage deserving protection, according to the courts, was that described by the Constitution and largely corresponded to dominant social practice and the form of relationship assumed by government in managing the social domain. An attempt to introduce provision for dissolution of marriage by referendum failed, because in focusing on the capacity for remarriage, government was (in a social context where wives depended on their husbands for their means of existence) recommending a form of polygamy. The referendum, nonetheless, emphasised the essential legal quality of the marriage relationship and the political objective of marriage saving was, at the end

of the decade, pursued through reformed marriage law. The problem with marriage thus identified in the 1980s was marriage breakdown, the solution to this difficulty was to save marriage, and the conceptual framework within which it was to be achieved was drawn from morally bound legal expertise. The 'legal complex' (Rose and Valverde, 1998: 144) adopted a number of roles that acted (even when purporting to challenge political action) to support the marriage saving objectives of government. Law defined marriage and justified its privileging, it offered a mechanism for identifying and containing abnormal relationship behaviour, and it personalised the problematic effects of marriage breakdown, removing them from their structural context.

Marriage saving divorce in the 1990s.

Economic conditions improved in the 1990s, immigration replaced emigration, and increasing numbers of women remained in the workforce after marriage (Walsh, 2004). Social practice began to move away from dependency marriage, marriage and birth rates fell, and by the end of the decade more than one in six births took place outside marriage (Second Commission, 1993: 67). The Supreme Court in *Hyland* had struck down a section of the social welfare code that gave larger welfare payments to cohabiting couples than to similarly situate married couples. Parallel disparities applied in other parts of the social welfare code, and following a review, the definition of 'spouse' for

social welfare purposes was extended to include 'a man and a woman who are not married to each other but are cohabiting as man and wife,'¹⁰ allowing downward revision of welfare payments to cohabitants.

Despite acknowledging the existence of cohabitation as a social practice, government continued to insist upon the primacy of marriage. A 1992 white paper on marital breakdown described the objective of government as 'the preservation of stable marriage and the avoidance of marriage breakdown' (Department of Justice, 1992: 9). The paper suggested that divorce could promote relationship stability by removing the need for 'people whose marriages have broken down to ... form "second unions"' (Department of Justice, 1992: 24). Relationship counselling was also proposed to prevent marriage failure. Psychological expertise and reformed marriage law, it was assumed, could protect marriage, and if necessary, deal with the effects of marriage breakdown. The white paper identified poverty among women as the principle practical effect of marriage breakdown. It also noted the inability of maintenance rules to address this poverty, and the connection between dependency in marriage and poverty following breakdown. Nonetheless, the report's principle recommendation was a divorce jurisdiction with comprehensive financial reliefs. In response to this report, government substantially reformed the 1989 Act and began preparations a referendum. The Family Law Act 1995 was intended to provide a model for future divorce legislation

and extend the range of financial orders available on Judicial Separation. Provision was made for more comprehensive ancillary relief; a new pension adjustment order was introduced, and variation provisions were updated to facilitate unlimited applications for property adjustment orders.¹¹ The continuing nature of spousal support obligations was thus enhanced, rather than diminished, in anticipation of divorce.

A proposed amendment to the Constitution was drafted, and a referendum set for 30 November 1995. The prohibition on divorce would be replaced with a statement of the terms upon which a marriage could be dissolved by the Court. An information paper was circulated by Government prior to the referendum stating that government was 'strongly committed to protecting the family and the institution of marriage,' (Department of Equality, 1995: 5) and that this commitment was 'central to government's position on divorce.' In debate on the referendum Bill, the Minister for Justice drew attention to 'the authenticity of government support for marriage' demonstrated by 'the package of action, involving both laws and services, to prevent marriage breakdown in so far as possible.' This included 'Department of Equality and Law Reform funding for marriage counselling organisations which provide pre-marriage counselling and assist marriages under stress.'¹² The message was clear; marriages must be saved, using professionals paid by the state if necessary. On a practical level, and perhaps decisive for the electorate, government re-ordered the social welfare system

to ensure that both first and subsequent wives could claim benefits based on a husband's social insurance contributions.

The Fifteenth Amendment Bill passed by a slim majority. The Family Law (Divorce) Act 1997 provided for divorce without proof of marital fault, following the separation of the spouses for a period of four out of the previous five years. Fault was not wholly irrelevant. The conduct of each of the spouses was a factor to be taken into consideration in making of ancillary financial orders 'if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it.'¹³ The Act envisaged financial orders being available following divorce, save in cases where the recipient had remarried, thus ensuring the continuation of the financial obligations of marriage beyond its legal dissolution.

'Proper provision' for spouses and children was a constitutional prerequisite to the grant of a decree of divorce, but its content was left to judicial discretion. Neither was any legislative guidance given to the court regarding how it should determine that there was 'no reasonable prospect of reconciliation,'¹⁴ or whether the parties have indeed lived apart for four out of the previous five years. As with judicial separation, a list of factors to be taken into account by the court in making financial awards was provided, but the termination of financial obligation was not one of them. Marriage, as defined by the Act, was a semi-terminable relationship which produced unpredictable post-

relationship obligations that were subject to continual review during the lifetime of former spouses.

Marriage, somewhat paradoxically, became more popular as a social practice following the introduction of divorce. Fahey (2012) has suggested that this was the result of improved economic conditions, and perhaps this is so, but by the end of the 1990s, marriage was no longer a social pre-requisite to family status, couple formation or parenting. Nonetheless, it experienced a resurgence at the level of social practice, despite the onerous obligations imposed by marriage law.¹⁵ In the 1990s, Government feared marriage breakdown because it threatened social stability and created a charge on public resources. The population also feared marriage breakdown, for themselves and their children, but they also sought constitutional protection (highlighted publicly and at length through two intensely contested national plebiscites) and the increasing range of fiscal benefits conferred upon the marriage-based family. The legal complex surrounding the authorised conjugal family had further entrenched the connection between the aims of government and the personal aspirations of citizens.

Family practices, social stability and economic growth – the 2000s.

Ireland joined the European Economic Community in 1973 when it was a political and economic initiative. By the 1990s, the EEC had developed a strong social policy role. A specific link between economic and social development was made in the governing

treaties, and closer union between member states was predicated on both economic and social cohesion. The Amsterdam Treaty inserted a new Article 2 into the governing treaties making an explicit link between social protection and economic government. This connection was given further weight in Ireland between 1987 and 2003 by six partnership agreements entered into between government, trade unions, employer groups, and later, representatives of civil society. The purpose of this process was the maintenance of a low-inflation economy with a stable exchange rate, producing higher standards of living, and improved social services. Social inclusion was a central aim, particularly in later agreements, and was to be achieved 'through a strengthening of economic capacity and the adoption of a coherent inclusion strategy' (Department of the Taoiseach, 2000: 4). The form of social inclusion envisaged was predicated on workforce participation. *Partnership 2000* stated that unemployment was the single biggest contributor to social exclusion and therefore the most effective strategy for achieving greater social inclusion was an increase in employment (Department of the Taoiseach, 2000: 19). Direct control over monetary policy was removed from individual States following the currency union adopted under the Maastricht Treaty, but strict controls on inflation and growth were imposed by Europe. The partnership strategy maintained economic stability, as required by the European Union, and achieved the

desired outcome of significant economic growth. By the late 1990s, Ireland's economy was considered one of the best performing in Europe.¹⁶

The marriage-based family, as the central institution around which social provision orbited, was uniquely placed to mediate the implementation of social policies necessitated by European integration. Whilst previously government had formulated its support for families in terms of direct financial transfers, by the end of the 1990s a much more interventionist approach emerged. It was no longer acceptable to simply subsidise families, they needed to be supported in order to 'combat disadvantage and social exclusion by improving the functioning of the family unit.' (Daly and Clavero, 2002: 63). Such an aim could not be achieved, within a technocratic and economically rational approach to government, without significant investigation and consideration of the Irish family, and by 2001, Fahey and Russell were able to note a 'considerable policy interest in various aspects of family behaviour.' (2001: 56)

A government appointed Commission produced a detailed report in 1997 that reviewed family policy and concluded that marriage had clear advantages from a public policy perspective, 'in promoting security and stability in family life and in providing continuity in society' (Commission on the Family, 1998: 183). Sociologists contributing to the Commission's report drew on the 'individualisation' thesis of family change (Giddens, 1992) arguing that the modern condition had created companionate

relationships based on feelings, which were more fragile than relationships with an institutional base, and therefore required effort and professional counselling assistance to survive. The report led to the establishment of a Family Affairs Unit in the Department of Social Community and Family Affairs, a Family Support Agency, and to a significant increase in funding for relationship counselling and social research into the nature and structure of the Irish family. Social science had replaced morality in the rationalisation of marriage and family life, providing scientific support for the preferential status of marriage and supporting increased governmental intervention in the management of individual lives.

The economic imperative of gender equality and two adult households.

As economic growth continued into the first decade of the twenty-first century, the Irish population proved inadequate to support the demands of the 'Celtic Tiger' economy. Immigration became a feature of Irish population growth, and domestic policy focused on labour market activation measures. Women, particularly those performing a domestic role, became a particular target. The *Programme for Prosperity and Fairness* in 2000 (mirroring the objectives of the Amsterdam Treaty) specifically connected gender equality imperatives to the needs of the expanding economy. The program emphasised that women must be facilitated in their aspirations for equal treatment

because it served economic needs. Men were to be encouraged to share with women ‘the caring responsibilities carried out within the home for children and dependent family members,’ because this would facilitate the entry of women into the labour market. A society must be created in which access to labour is ‘available to all.’ Supply must be mobilised by ‘tapping into potential pools of labour to support sustainable low inflationary growth’ (Department of the Taoiseach, 2000: 116). The terms of the Irish Constitution had not changed, but women were no longer defined by marital status, and wives were not mothers in the home needing protection. Women, wives and mothers, like other ‘disadvantaged groups’ (Department of the Taoiseach, 2000: 116) were a supply of labour to be called upon in support of the governmental growth imperative.

Family stability was also essential to the pursuit of economic development. Households with children headed by two adults caused considerably less difficulty for labour-market activation measures than those with just one resident parent (NESC, 2001:60). A historical focus on supporting women *qua* mothers through welfare payments until their children were adults had created a welfare trap for single parents who wished to work. Similar barriers existed to the formation of two-parent households, and this issue was raised in a number of government sponsored research reports. Despite detailed assessment of the issue, experts were unable to reach a conclusion beyond the desirability of cohabitation over lone parenthood (NESC, 2001:95). The

acceptability of cohabitation, for the middle classes, was endorsed by the individualisation of the income tax code, completed in 2001. The income tax advantage of marriage over cohabitation, and the tax privileging of dependency marriage, were largely removed for those who paid tax at the higher rate (McGowan, 2015: 330). Government considered it necessary to achieve an increased rate of couple formation because this would lead to decreased levels of lone parenting, and greater workforce participation, particularly among women with dependent children. The functional characteristics of couple relationships had become more important than their institutional form.

Secularising marriage.

Although 'marriage,' had been instrumental in the administration of the social domain since the foundation of the Irish State, it had remained undefined in legislation until 2004. The Civil Registration Act 2004 codified the operation of the Central Registrar's office, necessarily involving a statutory statement of the rules governing entry into marriage. The Act listed impediments to marriage, including age, consanguinity, pre-existing marriage, mental incapacity, and both parties being of the same sex. The marriage ceremony was to be 'solemnised' following a three month notice period during which time both parties had to attend in person at the registrar's office to sign a declaration that there was no impediment to their marriage. The registrar was required

to request detailed information from the parties, and could, if required by the Minister, publish details of forthcoming marriages. Marriage, following the 2004 Act, was no longer a social practice that government recognised and deployed in managing the social domain. It became a fully legal status, available only to those who had complied with the detailed provisions of the Civil Registration Act 2004. Although the 2004 Act was the first codification of the legal rules for entry into marriage since the foundation of the State, there was no discussion of the nature of marriage during Oireachtas debates, in contrast to earlier debates on divorce and judicial separation, which focused almost entirely on its institutional and transcendent characteristics. It now seemed universally accepted that marriage was a committed long-term companionate relationship based on contract, a civil and legal matter fully within the domain of state regulation.

Legal expertise – human rights imperatives and the right to marry.

The legal principle of equality or non-discrimination, although reflected in the Irish Constitution, gained discursive vigour in the 2000s via the activities of the European Union and its institutions. The Amsterdam Treaty had particular influence in the Irish context, leading to the enactment of the Employment Equality Act 1998 and Equal Status Act 2000. The deployment of rights based arguments by campaigners for marriage law reform emerged around the same time as these legislative enactments, reflecting the increased influence of European equality imperatives on Irish political discourse. The

Good Friday Agreement of 1998, which recorded a settlement agreement in relation to Northern Ireland, pushed the human rights agenda further to the fore in the Republic.

Following the Good Friday Agreement, which required Ireland to have similar protection for human rights as existed in the United Kingdom,¹⁷ a Human Rights Commission was established, and the European Convention on Human Rights was incorporated into domestic Law. Establishing and funding a Human Rights Commission represented an acknowledgement by the Irish government of the political potential of international rights norms. It also provided a forum for discussion, and an expert body ready to identify how government should act to vindicate rights. By the beginning of the 2000s, human rights and equality had become appropriate world views within which to formulate policy. Specific bodies had been established to inform government, and reflecting the continued social importance of marriage, directed their attention to the issue of marriage law. Four of the nine forms of discrimination set out in the Equal Status Act 2000 had application to the area of marriage law: gender, marital status, family status and sexual orientation. It is therefore not surprising that one of the first reports published by the Equality Authority related to couple relationships (Mee and Ronayne, 2000). The report was a careful account of the specifically legal disadvantages suffered by same-sex couples in negotiating their joint lives. Although making no recommendations, the title of the report, *Partnership Rights of Same-sex Couples*,

placed the issues clearly within the domain of relationship regulation. It assumed that legal rights should attach to couple relationships, and the comparisons made in the report between the position of married couples and same-sex couples who could not marry clearly suggested that the inequalities identified should be addressed through the extension of marriage law. A second Equality Authority report, published in 2002 also identified the specific disadvantages of same-sex couples *vis a vis* married couples, but also made recommended extension of marriage law to gay and lesbian couples (Equality Authority, 2002). The exclusionary effect of marriage law was identified, but there no suggestion that the privileges of marriage should be removed from heterosexual couples. It was accepted that the officially legitimated couple should have economic and social advantages.

The growing consensus on the need to reform marriage law was further evidenced by a 2006 report commissioned by the Human Rights Commission on the *Rights and Duties of De Facto Couples* (Walsh and Ryan, 2006). This report focused on international human rights standards, assessing 'the adequacy of Irish law in the light of that International framework.' Within this conceptual scaffold, it was possible only to see the inequalities between one form of couple relationship and another, no account was taken of wider inequalities produced by the privileging of couple relationships. Also in 2006, the Department of Justice appointed a working group to examine 'the categories

of partnerships and relationships outside of marriage to which legal recognition might be accorded, consistent with Constitutional provisions.’(Working Group on Domestic Partnerships, 2006: 10). The report focused on ‘key objectives for advancing equality,’ which included, not only the eradication of specific material or legislative disadvantage, but also the need to accord ‘visibility and value to diversity’ (Working Group on Domestic Partnerships, 2006: 17). It was considered important that a visible form of legitimation be available to couples willing and able to commit to long term stable relationships.

The need for relationship stability.

In the 2000s, the Irish government pursued a project of economic growth predicated on social stability and increased labour market participation. Traditional marriage practices denied equality and self-actualisation to women, but they also removed workers from the labour force. Lone parents created significant difficulties for government, remaining stubbornly disadvantaged despite economic growth. Cohabitation had become an accepted social practice and had the capacity to perform a similar social function to marriage, although the permanence of marriage was preferable, both for individual families and the state. The arrival of human rights as a way of rationalising government did nothing to challenge the social and political supremacy of the officially legitimated couple, rather it acted to further reinforce its necessity. In order to implement human rights and equality imperatives government needed to identify and regulate more

marriage-like relationships. It needed to investigate, know, and categorise the intimate and familial lives of a greater range of citizens. As new forms of stable partnership became visible, and demanded the advantages conferred on married couples, human rights and equality arguments were deployed to re-enforce the privileges of long-term conjugality. The government objectives of social stability and economic growth could thus be furthered with more marriage law.

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provided for the civil registration and recognition of same (but not opposite) sex relationships, and extended many of the obligations of marriage law to these relationships. Adopting a Law Reform Commission proposal (LRC, 2006), the Act also initiated a presumptive recognition scheme for cohabitants, and created two new forms of regulated couple relationships; civil partnership and 'qualified cohabitation.' Civil partnership mirrored marriage, save with respect to some inelegant attempts to differentiate it, purportedly for the purpose of constitutional compliance. The main differences between the two were that marriage applied to opposite sex couples, and civil partnership to those of the same-sex; judicial separation was not available to civil partners; and the minimum period after breakdown before dissolution for civil partners was two years rather than four. Provisions in relation to financial orders were broadly similar to those for married couples, including the need to ensure proper provision, and

the potential for lifetime support. In relation to qualified cohabitants, the position was more complex. In order to avail him or herself of the statutory redress scheme a cohabitant was required to demonstrate that they were involved in a relationship of cohabitation that was intimate and committed, and lasted for five years (or two if the parties were of opposite-sex and had a child together). Additionally, they needed to show financial dependence on their partner. The forms of redress were much less comprehensive than those attaching to civil partnership or marriage. Crucially, however, if a qualified cohabitant demonstrated the seriousness of the relationship in accordance with the Act, and proved financial dependence during or arising from the relationship, he or she could, potentially, continue to seek redress for life

By 2010 marriage was no longer a moral relationship; it was a legal manifestation of mutual commitment. The moral imperative to protect marriage had been replaced with social scientific justifications focused on stability in relationship practice. Economic growth and European equality imperatives came together in a drive to make marriage a partnership of (economic) equals. The untethering of marriage from morality facilitated its expansion beyond the traditional form. The 2010 Act applied selected incidents of marriage law to relationships depending on the degree to which they performed marriage, as then understood. In relation to civil partners, a public declaration of lifetime commitment would attract the obligations and advantages of marriage. By entering into

a lifetime, monogamous, couple relationships, same-sex partners would become an authorised unit, ready to support and maintain one and other in much the same way as a married couple. For cohabitants, the position was more complex, their performance of marriage needed to be more closely monitored to ensure that they were indeed intimate and committed, and that they had a record of accomplishment in mutual support and dependency. In order to avail themselves of redress, a cohabitant needed to show, not only commitment to the relationship, but also a financial investment in it, by demonstrating that they were economically dependent on their partner. Although the 2010 Act did not have the overriding 'marriage saving' objective of earlier marriage law reform, it did represent an attempt to secure the performance of marriage among a greater range of relationship types in the interests of social stability and economic growth.

Conclusion.

Recent political discourse has focused on marriage law's potential as an instrument for the protection of human rights and the promotion of social equality. Existing law is conceptualised as oppressive and exclusionary in failing to extend social and economic privileges beyond the heterosexual couple, and reform, it is claimed, will liberate lives. The extension of marriage to same-sex couples equalises the treatment of individuals and undoubtedly has instrumental and symbolic value. Nonetheless, despite current

emphasis on the progressive potential of more marriage law, we must remain attentive to its dangers. As the genealogy of marriage law demonstrates, political recognition and regulation of relationships does not liberate individual practice. Rather, it categorises lives, divides them into authorised and unauthorised forms, supervises, observes and manages interpersonal conflict and connects relationship failure to social and economic instability. Marriage, when subject to social and religious control between the foundation of the Irish state and the 1970s, constructed women as dependents and those who failed at marriage as social problems. As the state apparatus gradually moved marriage from social and religious control, making it a political concern, lives were not liberated, they were simply transferred from one mode of control to another. Government assumed responsibility for the relationship practices of the population and undertook to modify them. The process of marriage law reform since the 1970s, coupled with shifts in how good government is conceptualised, has resulted in a dense network of regulation that requires us to declare publically who we are, who we love, how we live. These declarations have significant economic, social and cultural significance, not least because they re-enforce the necessity of the categorisation and act to further reaffirm it. In 1993, Katherine O'Donovan asked 'why, notwithstanding the critique of legal marriage, people continue to uphold the institution.' Her answer focused on the 'sacred, magical status' of marriage (O'Donovan, 1992: 44). This research suggests a

more prosaic explanation. Marriage law, with its capacity to colonise public discussion of social problems, and link individual aspiration to the regulatory political objectives, is a uniquely effective technique of government.

Cases Cited

Murphy v Attorney General [1982] 1 IR 241.

Northants County Council v ABF [1982] ILRM 164.

O'B v S [1984] IR 316.

Dennehy v Minister for Social Welfare Unreported High Court (26 July 1985) Barron J.

Hyland v Minister for Social Welfare [1989] IR 624.

References

Barker, Nicola (2013) *Not the Marrying Kind*. Basingstoke: Palgrave MacMillan.

Baxter, Hugh (1992) 'Bringing Foucault into Law and law into Foucault.' *Stanford Law Review* 48(2): 449-479.

Boyd, Susan (1999) 'Family Law and Sexuality: Feminist Engagements', *Social & Legal Studies* 8(3); 369-90.

Campbell, Colin, Colin Harvey and Fionnula Ní Aoláin (2003) 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland.' *Modern Law Review* 66(3): 317-345.

- Cherlin, Andrew (2009) *The Marriage-Go-Round*. New York: Vintage.
- Commission on Social Welfare (1986) *Report*. Dublin: Stationery Office.
- Commission on Taxation (1982) *First Report: Direct Taxation*. Pl 617, Dublin: Stationery Office.
- Commission on the Family (1998) *Strengthening Families for Life*. Pn 5818. Dublin: Stationery Office.
- Commission on the Status of Women (1973) *Report to the Minister for Finance*. Prl 2760, Dublin: Stationery Office.
- Committee on Court Practice and Procedure (1974) *Nineteenth Interim Report: Desertion and Maintenance*. Prl 3666, Dublin: Stationery Office.
- Coulter, Carol (2009) *Family Law in Practice: A Study of Cases in the Circuit Court*. Dublin: Clarus Press.
- Cousins, Mel (1995) *The Irish Social Welfare System: Law and Social Policy*. Dublin: Roundhall Press.
- Daly, Mary and Susan Clavero (2002) *Contemporary Family Policy in Ireland and Europe*. Dublin: Department of Social Welfare
- Department of Equality and Law Reform (1995) *The Right to Remarry: A Government Information Paper on the Divorce Referendum*. Pn 1932, Dublin: Stationery Office.

Department of Justice (1992) *Marital Breakdown a Review and Proposed Changes*.

Dublin: Stationery Office.

Department of the Taoiseach (2000) *Programme for Prosperity and Fairness*. Dublin:

Stationery Office.

Diduck, Alison (2003) *Law's Families*. London: Lexisnexis.

Dillon, Michele (1993), *Debating Divorce: Moral Conflict in Ireland*. Lexington: University

of Kentucky Press.

Donzelot, Jacques (1977), *The Policing of Families: Welfare versus the State*. London:

Random House.

Equality Authority (2000) *Implementing Equality for Lesbians, Gays and Bisexuals*.

Dublin: Equality Authority.

Ewald, Francois (1990) 'Norms, Discipline and the Law.' *Representations* 30: 138-161.

Fahey, Tony (2012) 'Small Bang? The Impact of Divorce Legislation on Marital

Breakdown in Ireland.' *International Journal of Law, Policy and the Family*. 26(2):

242-258.

Fahey, Tony and Helen Russell (2001) *Family Formation in Ireland: Trends, Data Needs*

and Implications. Report to the Family Affairs Unit, Department of Social,

Community and Family Affairs. Policy Research Series Number 43. Dublin: ESRI.

- Ferguson, Lucinda (2007) 'Family, Social Inequalities and the Persuasive Force of Interpersonal Obligation.' *International Journal of Law, Policy and the Family* 22: 61-90.
- Fineman, Martha (2004) *The Autonomy Myth*. New York: New Press.
- Firestone, Shulamith (1970) *The Dialectic of Sex: The Case for Feminist Revolution*. New York: Farrar, Straus & Giroux.
- Foucault, Michel (1984) 'Nietzsche, Genealogy, History' in Michel Foucault, *The Foucault Reader*. Paul Rabinow (ed), New York: Pantheon Books.
- Foucault, Michel (1986) *The Care of the Self: The History of Sexuality Part III*. Robert Hurley trs. New York: Pantheon.
- Foucault, Michel (2000) 'The Subject and Power' in Michel Foucault, *Power: Essential Works of Foucault 1954 - 1984, Volume 3*. J.D. Faubion ed, Robert Hurley and ors trs, New York, The New Press.
- Foucault, Michel (2001) *Fearless Speech* Joseph Pearson ed. Los Angeles: Semiotext(e).
- Foucault, Michel (2003) '*Society Must be Defended:*' *Lectures at the Collège de France 1976-76*. David Macey tr, London: Picador.
- Foucault, Michel (2007) *Security, Territory, Population: Lectures at the Collège de France 1977-78*. Michael Sennellart ed, Graham Burchell tr. London: Palgrave Macmillan.

- Fuller, Louise (2002) *Irish Catholicism since 1950*. Dublin: Gill and Macmillan.
- Galligan, Yvonne (1998) *Women and Politics in Contemporary Ireland: From the Margins to the Mainstream*. London: Pinter.
- Giddens, Anthony (1992) *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies*. London: Polity.
- Gittins, Diana (1993) *The Family in Question: Changing Households and Familiar Ideologies*, 2nd edn. Basingstoke: Macmillan.
- Glendon, Mary Ann (1989) *The Transformation of Family Life*. Chicago: University of Chicago Press.
- Hanley, Sarah, 'Engendering the State: Family Formation and State Building in Early Modern France.' *French Historical Studies*. 16(1): 4-27.
- Joint Committee on Marital Breakdown, Report (PI 3074, Stationery Office 1985) vii.
- Kennedy, Keiran, Thomas Giblin and Deirdre McHugh, (1998) *The Economic Development of Ireland in the Twentieth Century*. London: Routledge.
- Law Reform Commission (1980), *First Report on Family Law*. Dublin: LRC.
- Law Reform Commission (2006) *Report on the Rights and Duties of Cohabitants*. Dublin: LRC.
- Lee, John (1989) *Ireland 1912 – 1985*. Cambridge: Cambridge University Press.

- Lunn, Patrick, Tony Fahey and Carmel Hannan (2009) *Family Figures: Family Dynamics and Family Types in Ireland, 1986 – 2006*. Dublin: ESRI.
- McGowan, Deirdre (2015) *The Normalising Power of Marriage Law: An Irish Genealogy 1945 – 2010*. PhD Thesis, National University of Ireland Maynooth.
- Mee, John and Kaye Ronayne (2000) *Report on Partnership Rights of Same-Sex Couples*. Dublin: Equality Authority.
- National Economic and Social Forum (2001) *Forum Report No. 20: Lone Parents*. Pn 100074, Dublin: Stationery Office.
- O'Donovan, Katherine (1985) *Sexual Divisions in the Law*. London: Weidenfeld & Nicholson
- O'Donovan, Katherine (1993) *Family Law Matters*. London: Pluto Press.
- O'Riain, Seán (2013) *The Rise and Fall of Ireland's Celtic Tiger: Liberalism Boom and Bust*. Cambridge: Cambridge University Press.
- O'Sullivan, Patrick (1993) 'An assessment of Ireland's Export-led Growth Strategy via Foreign Direct Investment: 1960 – 1988.' *Weltwirtschaftliches Archiv* 129(1): 139-158.
- Pateman C (1988) *The Sexual Contract*. Cambridge: Polity Press.
- Richardson, Diane (2004) 'Locating Sexualities: From Here to Normality', *Sexualities* 7(4): 391-411.

- Rose, Nicholas and Mariana Valverde (1998) 'Governed by Law.' *Social and Legal Studies* 7(4): 541-551.
- Ryan, Fergus (2007) 'The Mainstreaming of Same-sex Couples in Contemporary Legal Discourses.' in Doyle O and Binchy W (eds) *Committed Relationships and the Law*. Dublin: Four Courts Press.
- Shatter, Alan (1977) *Family Law in the Republic of Ireland*. Dublin: Wolfhound Press.
- Smart, Carol (1984) *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations*. London: Routledge and Keegan Paul.
- Smart, Carol (1997) 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy.' *Journal of Social Policy* 26(3): 301.
- Stone, Laurence (1992) *Road to Divorce: England 1530 – 1987*. Oxford: Oxford University Press.
- Tadros, Victor (1998) 'Between Governance and Discipline: The Law and Michel Foucault.' *Oxford Journal of Legal Studies* 18(1): 75-103.
- van Krieken, Robert (2001) 'Legal Informalism, Power and Liberal Governance.' *Social and Legal Studies* 10(1): 5-22.
- Walby, Kevin (2007) 'Contributions to a Post-Sovereignist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism.' *Social and Legal Studies* 16(4): 551-571.

Walsh, Brendan (2004) *When Unemployment Disappears: Ireland in the 1990s*. Working Paper 02/2, Dublin: Centre for Economic Research University College Dublin.

Walsh, Judy and Fergus Ryan (2006) *The Rights of de Facto Couples*. Dublin: Irish Human Rights Commission

Working Group on Domestic Partnership (2006) *Options Paper*. Dublin: Department of Justice, Equality and Law Reform.

Notes.

¹ Para 67, Reichsgesetz über die Beurkundung des Personenstands und die Eheschließung vom 6. Februar 1875.

² Foucault used the term 'problematization' to describe the starting position for his historical analyses at the point of emergence of a crisis in formerly silent behaviour. (Foucault 2001:74).

³ Pursuant to Section 83 of the Public Assistance Act 1939 wilful neglect and failure to maintain a wife or child was a criminal offence.

⁴ A means tested deserted wives allowance was introduced in 1970, and a social insurance based deserted wives benefit in 1973.

⁵ Patrick Cooney, Dáil Deb 22 July 1975, vol 284, col 54-68.

⁶ Family Law (Maintenance of Spouses and Children) Act 1976, Family Home Protection Act 1976.

⁷ Walby (2007: 557) notes that incompleteness and failure are an integral part of law as governance; 'total conformity and regulation are never achieved.'

⁸ *Murphy v Ireland* [1982] 1 IR 241, 286.

⁹ *Northampton County Council v ABF* [1982] ILRM 164, 166.

¹⁰ Social Welfare (no 2) Act 1989, s 1(b).

¹¹ Family Law Act 1995, s 18.

¹² Nora Owen, Dáil Deb 27 September 1995 vol 456, col 46.

¹³ Family Law (Divorce) Act 1996, s 20(2)(i).

¹⁴ Family Law (Divorce) Act 1996, s 5(1)(b).

¹⁵ Foucault, in writing about ancient Greek and Roman marriage practices notes a surge in popularity as marriage evolved from a private ceremony to a public institution increasingly subject to legal regulation. (Foucault, 1986:73).

¹⁶ A useful account of Ireland's economic development between 1992 and 2008 can be found at O'Riain (2013), 32-67.

¹⁷ The precise legal significance of the agreement is discussed at Campbell et al (2003).