The Good Wife: Stereotypes of Married Women in Irish Law

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Introduction

Until relatively recently, men and women were believed to hold distinct abilities and characteristics, which influenced the social roles they occupied in society. These stereotypes were reflected in the laws which governed the treatment of men and women. Men received the lion's share of power and influence within the marital sphere, with virtually complete control over their spouses until the late 19th century. They served in all arenas of public life, and acted as head of the household.

Women, on the other hand, were expected to be demure and caring, and their role was confined strictly to the domestic sphere.[59] Laws around marriage not only reflected popular belief at the time, but helped to consolidate women's position as subordinate to men.[60] Women were believed to be inferior and powerless, but the law helped to make them inferior and

59 See generally, C. Smart, 'Disruptive Bodies and Unruly Sex: The Regulation of Reproduction and Sexuality in the Nineteenth Century' in C. Smart (ed) *Regulating Motherhood: Historical Essays on Marriage, Motherhood and Sex* (Routledge, 1992). Diduck has argued that the 'traditional family' has its origins in the marital relationship where each spouse had a distinct and separate role, see A. Diduck and F. Kaganas, *Family Law, Gender and the State* (3rd edn, Oxford 2012) 17-20.

60 Finer and McGregor argue that the law at the time "subordinated one sex to the other. This was both a cause and effect of the wider social social phenomenon which Mill called the 'subjection of women' - a subjection that was sexual, psychological, economic and domestic, as well as legal." M. Finer & O. McGregor, *History of the Obligation to Maintain*, Appendix 5 in M Finer, *Report of the Committee on One Parent Families*, Cmd 5629 (London HMSO, 1974) at 101.

powerless.[61] In this essay, I explore how the law, as it applied to spouses within marriage, reflected these stereotypes and perpetuated inequalities between husband and wife in Irish law. Many of the legal inequalities between spouses have been purged from the legal system, but in the wake of the same sex marriage referendum, the law will have to revisit some of the last remaining rules which operate on a heteronormative, binary gender model.

Early Irish Law

Under Brehon law, women had no legal personality unless they owned property or if they married, when they enjoyed relatively liberal treatment. They could own property jointly with their husbands, and divorce was allowed for a range of reasons.[62] At the end of the 16th century, the common law system came to replace the indigenous Irish laws.[63] Women were stripped of what legal status they had been entitled to under marriage, as the common law system did not recognise a married woman's legal personality. Women were considered to be legally incompetent, alongside children, criminals and the mentally disabled. The doctrine of coverture acted as the basis for this position in marriage. Blackstone explained that:

> "..by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband: under whose wing, protection, and cover, she performs everything."[64]

As Doggett has noted, a husband was not simply permitted to control his wife, he was expected to answer for her conduct in return for the power he had over her.[65] Thus, when a woman married, she surrendered her legal personality and it became subsumed into her husband. This erased married women from the legal system, and it cemented the status of wives as weak and helpless, while their husbands were considered to be the breadwinner and the decision maker of the household.

Coverture : Marital Rape, Nullity & Criminal Conversation

The doctrine of coverture was the basis for Sir Matthew Hale's infamous pronouncement that "…the husband cannot be guilty of rape committed by him upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract."[66] Thus, rape within marriage was not recognised as an offence within common law. This excluded countless rape victims from legal redress, and robbed women of their ability to refuse to sexual relations with their spouse.[67] It legitimised sexual assault, and further cemented the imbalance of power between the spouses.

The doctrine of coverture informed judicial thought as late as 1936

61 'Most feminists are committed to the position that however "natural" and common sex differences may seem, the differences between women and men are not biological compelled; they are, rather, "socially constructed." Over the past two decades this conviction has fuelled many efforts to change the ways in which law produces - or socially constructs - the differences and the hierarchies between the sexes.' M.J. Frug, 'A Postmodern Feminist Legal Manifesto: An Unfinished Draft' 105 (1992) *Harvard Law Review* 1045 at 1048. Feminist scholars have used Foucault's theory of power to explain how law helped to construct social roles for women, see M.M. Slaughter, 'The Legal Construction of Mother' in M. Fineman and I. Karpin (eds) (1995) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (NY: Colombia University Press), pp73-102.

62 D. Binchy, in R. Thurneyson(ed) *Studies in Early Irish Law* (Dublin, Royal Irish Academy, 1936).

63 Case of Tanistrv (1608) Day 28; 80 ER 516. For the English translation, see *A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland* (1762) 78 ('Davies translation'). See generally, F.H. Newark 'The Case of Tanistry' (1950-1952) 9 *Northern Ireland Legal Quarterly* 215.

64 Blackstone, cited in Diduck & Kaganas, *Family Law, Gender and the State* (3rd edn, Oxford 2012) at 319.

65 M.E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (London, Weidenfeld & Nicholson, 1992) at 57-58.

66 Hale, cited Diduck and Kaganas, *Family Law, Gender and the State* (3rd edn, Oxford 2012) at 320.

67 As Harris has pointed out, the doctrine subverted existing legal principle through the alienation of the wife's freedom to consent, as the freedom not to consent is a logical corollary of the freedom to consent. As a result, 'failing to label the husband's behaviour as criminal the state endorsed, for hundreds years, an agreement under which a woman gave away what classic liberal theory tells us she cannot dispose of.' L. Harris, 'The State, the Family and the Private Space: Reconstructing the Liberal Vision' (2000)7 *UCL Jurisprudence Review* 278 at 291.

in Ireland, where in *McK v McK*,[68] repeated attempts by a husband to consummate the marriage were repelled by his wife. The husband sought a declaration of nullity. Hanna J concluded that: "if the respondent had been…more determined…he would have succeeded in overcoming the wilful and continued refusal on the part of the wife to have the marriage consummated."[69] This approach is difficult to characterise as anything but a judicial endorsement of marital rape. It also demonstrates the importance attached to sexual relationship within marriage, to the point that the marriage could be deemed invalid if the marriage had not been consummated.[70]

A marriage may be annulled on the grounds that a party was unable to consummate the marital bond owing to physical or psychological impotence. Consummation is defined as a single act of ordinary sexual intercourse, which takes place subsequent to a marriage ceremony.[71] What Shannon describes euphemistically as a 'historical anomaly' dates from a period where female virginity was highly prized, and marital consummation rendered a woman worthless to other potential suitors.[72] It also marked the moment where the woman ceased to be the property of her father and became the property of her husband. It has been clearly established that the importance of this act has nothing to do with its procreative function, as a marriage can be consummated even if one of the spouses is infertile or using contraceptives.[73] While sexual intimacy is generally considered to be beneficial to marital relations, a single act of consummation does not necessarily lead to life time of sexual compatibility.[74] It is difficult to see how the law continues to place such value on a single act of ordinary intercourse, particularly where an annulment can be granted even if the couple have

68 [1936] IR 177.

69 McK v McK [1936] IR 177.

70 W. Duncan, 'Sex and the Fundamentals of Marriage' (1978) 2 Dublin University Law Journal 29 at 34-35.

71 *D-e v Ag (falsely calling herself D-e)* [1845] Rob Ecc 279'173 ER 1039.

72 G. Shannon, *Divorce Law & Practice* (Thomas Roundhall, 2007) 420.

73 *Baxter v Baxter* [1948] AC 274. It has also been established that a child can be conceived through artificial insemination, and there is no consummation, per *REL v EL* [1949] P 211. Similarly, if the husband practices coitus interruptus consummation is not prevented, per *White v White* [1984] 2 All ER 151.

74 W. Duncan, 'Sex and the Fundamentals of Marriage' (1978) 2 *Dublin University Law Journal* 29 at 34.

had pre-marital sexual relations.[75] The lack of criminal sanctions for marital rape, and the rules which informed the dissolution of marriage objectified women and solidified the belief that a husband was entitled to conjugal relations with his wife. It reinforced the stereotype of women as sexual objects and the property of their spouse.

This perception was further embodied in the tort of criminal conversation, which gave a husband a right of action against a man who has had sexual relations with his wife.[76] The consent of the wife to the relations did not affect the entitlement to sue. Adultery on the part of the husband did not give rise to a corresponding action to the wife,[77] and it was only relevant in the estimation of damages that a husband might receive in his own personal claim. This particularly unsettling strand of law was not abolished in Ireland until 1981.[78] As late as 1974 in *Maher v Collins*,[79] it was noted by the Supreme Court that regard should be had to - amongst other things - "the actual value of the wife to the husband", as well as "the wife's general qualities as a wife and mother and her conduct and general character."[80] As the tort of conversation is the traditional avenue of redress for lost or

75 For examples of this, see R (*W*) *v W* (HC, 1 February 1980), S v S [1976] ILRM 176.

76 See the Law Reform Commission, *The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse*, Working Paper No. 5, 1978 (Dublin: Law Reform Commission, 1978). N. McCafferty, "What would you take for loss of his services?" The Irish Times, November 23, 1979 reproduced in *The Best of Nell* (Attic Press, 1984) at 68-70.

77 The Law Reform Commission did argue in 1978 that an action by a wife might be successful, the Commission noted that the wife's right to sue had never arisen for judicial decision in Ireland, see the Law Reform Commission, *The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse*, *Working Paper No. 5*, 1978 (Dublin: Law Reform Commission, 1978) at 6-10. There is also English authority which suggests that a wife might be able to avail of the related action of enticement of a spouse, which did not require sexual misconduct, unlike the tort of criminal conversation. See, for instance, *Gray v Gee* (1923) 39 TLR 429, *Place v Searle* [1932] 2 K.B. 497 (obiter comments) and *Newton v Hardy* (1933) 49 TLR 522. On the other hand, the logic of the Supreme Court's decision in *McKinley v Minister for Defence* [1992] 2 IR 333 meant that the tort (had it not been repealed) would have either had to be made gender neutral (as a majority of the Court did in relation to the *actio per quod servitium amisit* or else found to be unconstitutional as contrary to Article 40.1. See also generally A. Shatter, *Family Law in the Republic of Ireland*, (4th edn, Butterworths 1997) 91-93.

78 Repealed by s1(1) of the Family Law Act, 1981.

79 [1975] IR 232.

80 [1975] IR 232 at 237. See also, *Butterworth v Butterworth* [1920] P 126.

stolen goods, this approach seems to suggest a proprietary interest in one's wife. As Ryan has succinctly noted, this perspective further objectifies the woman by reducing her to "an item of property that the lover had misappropriated."[81] These laws based on coverture solidified the stereotype of submissive, obedient wives, who lacked sexual autonomy and owed conjugal duties to their spouses.

Coverture & Property in Common Law

Coverture also ensured that any property a woman owned at the time of her marriage became vested in her spouse. This ensured that women could were excluded from full personhood in the eyes of the law, and were economically dependant on their husbands. Any money made through wage, gift or investment automatically became her husband's, and she could not make contracts or incur debts without his approval. A married woman could not sue nor be sued in a court of law. Only extremely wealthy women could be exempted from strict inheritance rules - in equity, a portion of a married woman's property could be set aside in the form of a trust for her or her children's use. However, as Poovey has pointed out, this measure was less to protect married women than to allow fathers to pass money to their sons.[82] Where a husband transferred property to his wife or purchased it in her name, the presumption of advancement arose,[83] but it did not operate both ways and instead a resulting trust was presumed where a wife bought

81 F. Ryan 'The Rise and Fall of Civil Partnership' (2016) 19(3) *Irish Journal of Family Law*, 50-62.

82 M. Poovey, *Uneven Developments: The Ideological Work of Gender in Mid-Victorian England* (Chicago University Press, 1988).

83 An equitable doctrine which recognises that the purchaser is under an obligation in equity to provide for the person to whom the property is given, see H. Biehler, *Equity and the Law of Trusts in Ireland* (Thomas Roundhall, 2016) 181-184.

property for her husband.[84]

The Married Women's Property Act 1870 allowed women to be the legal owners of property they inherited and money they earned, and acknowledged married women as owners of property for the first time. This was particularly significant for working class married women, who were given a legal right to their wages for the first time. The Married Women's Property Act 1882 altered the doctrine of coverture to include the wife's right to own, buy and sell her separate property. For the first time, married women were acknowledged as legal persons in their own right and courts were forced to recognise husband and wife as distinct individuals. These progressions were particularly significant as multiple theorists have argued that a level of ownership or control over property is central to personal development.[85] Recognising wives as property owners helped to confer on them legal personhood for the first time, paving the way for full equality under the law.[86]

Irish State & Married Women

The dawn of the twentieth century witnessed new growth in the movement

84 The general principle was stated by Malins VC in *Re Eekyn's Trust*: 'The law of this Court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once.'(1877) 6 Ch D 115, 118. The Irish courts today still proceed on the basis that the presumption of advancement applies prima facie unless it can be rebutted by evidence which demonstrates a different intention. See H. Biehler, *Equity and the Law of Trusts in Ireland* (Thomas Roundhall, 2016) 181-184. Again, however, the logic of the Supreme Court's decisions in *The State (Director of Public Prosecutions) v Walsh* (No.2) [1981] IR and *McKinley v Minister for Defence* [1992] 2 IR 333 suggests that the presumption of advancement must either work in a gender neutral fashion or else be found unconstitutional as contrary to Article 40.1.

85 See, for example, G.W.F. Hegel, *The Philosophy of Right* (OUP 1967) 40; P Thomas, 'Property's Properties: From Hegel to Locke' (2003) 84 Representations 30; M. Radin, *Reinterpreting Property* (University of Chicago Press 1993) 55.

86 The Privy Council were tasked with the same problem in *Edwards v Canada* [1930] AC 124. Here, the plaintiffs sought to argue that women should be legally considered persons so that they could be appointed to the Senate. The 'Person's Case' was successful, and an important part of a drive for political and legal equality for women. The case also engendered a radical change in the Canadian judicial approach to the Constitution, an approach which ensures that the text is read in a broad and progressive manner to adapt to changing social norms. See Allan Hutchinson, 'Living Tree?' (1992) *Constitutional Forum* Vol. 3 Issue 4 pp.97-99.

for women's rights in the United Kingdom and America.[87] Followed closely by the First World War, these social shifts propelled women into the workforce and exposed many women to previously male dominated professions and public spaces. In the struggle for Irish independence, there was an expectation that a new Irish state would award women full civil and political rights.[88] Consequently, the 1916 Proclamation guaranteed the "equal rights and equal opportunities to all its citizens" and women were granted full equal citizenship by Article 3 of the 1922 Constitution, which contained no reference to marriage or to family life.[89]

Despite formal legal equality, the belief persisted that wives - and women generally- were naturally suited to the domestic sphere. A number of pieces of legislation were introduced between 1922 and1937 which indirectly impacted the status of married women. In 1925 the Cosgrave government introduced the Civil Service Regulation Act which limited the right of women to sit for competitive examinations in the Civil Service, and the 1932 marriage bar which required female teachers to retire on marriage, a bar eventually extended to the entire Civil Service.[90] In 1935, the de Valera government piloted the Conditions of Employment Act 1936 that gave the Minister for Industry and Commerce authority to limit the number of women employed in any given industry and restrict the type of industries

87 M. Phillips, *The Ascent of Women: A History of the Suffragette Movement* (Little Brown 2003).

88 Senator Jennie Wyse Power recalled later that "…these young girls kept constantly assuring me:'When our own men in power, we shall have equal rights.'" *Seanad Éireann debates*, 27 November 1935. Senator Wyse Power consistently opposed legislation which limited women's equal participation in the workforce, and even succeeded in delaying the Civil Services Regulation (Amendment) Bill by 12 months. See, D.M. O'Connor 'A Dissenting Voice: Jennie Wyse Power, an Equal Rights Advocate in the Irish Free State' in Sarah O'Connor and Christopher C. Shepard (eds) *Women, Social and Cultural Change in Twentieth Century Ireland* (Cambridge, 2008).

89 Ivana Bacik has noted that the extension of franchise to women in the 1922 Constitution was arguably "the last piece of progressive legislation for women in Ireland for over fifty years." *Kicking and Screaming: Dragging Ireland into the 21st Century* (O'Brien, 2004) at 80. See generally, T. Mohr 'The Rights of Women under the Constitution of the Irish Free State' 41 *The Irish Jurist* 20 (2006).

90 The Civil Service Regulation Act 1956, ss.10 and 16. These sections were abolished by ss .2 and 3 of the Civil Service (Employment of Married Women) Act 1973.

that could employ women.[91] Whilst these provisions did not solely impact married women, they demonstrate how the law was used to create barriers to women entering non-domestic spheres, helping to solidify the belief that marriage was the natural occupation for women to aspire to.

In 1937, a new Constitution was introduced. Influenced by Catholic social teaching, it heralded marriage as the primary unit of society, and gave extensive protection to the marital family.[92] It brought mixed outcomes for married women. On one hand, it led to the principle of spousal equality, first established in Re Tilson.[93] In this case, a dispute arose between two parents as to whether their children should be raised as Catholic or Protestant. Gavan Duffy P held that the old principle of paternal supremacy could not survive under the Constitution, which was upheld by the Supreme Court.[94] Prior to that the common law had always upheld the ultimate right of the father to determine the education of his children in cases of dispute.[95] The decision was ultimately given statutory effect by ss. 3 and 4 of the Guardianship of Infants Act 1964: this was the first entirely gender neutral statute to address questions of guardianship and custody of children. Wives were gradually, in the eyes of the law, beginning to assume equal status with their husband within marriage. Over the next few decades, the courts began to revisit old common law doctrines which were rendered constitutionally sus-

91 One senator expressed his support for the Act by pointing out that certain forms of manual labour detrimentally affected women's physical attractiveness. See, *Seanad Debates*, Vol. 20, Col. 1413, December 12, 1935. It was believed that the legislation would combat unemployment by targeting the trend of replacing male workers with cheaper female workers. See, NAI, Department of the Taoiseach, S6462, Amendment of Factories and Workshop Acts 1901-1920, undated.

92 There are no express provisions for non-marital fathers or *de facto* families, and case law has made it clear that the Constitution only recognises families which are based on marriage, per *State (Nicolaou) v An Bord Ucbtála* [1966] IR 567, In *Re SW, K v W* [1966] IR 567, *WO'R v EH* [1996] 2 IR 248, *Ennis v Butterly* [1996] 1 IR 426, *McD v L* [2009] IESC 81, [2010] 2 IR 199. See generally, M Staines, 'The Concept of 'The Family' under the Irish Constitution' (1976) *The Irish Jurist* 223.

93 [1951] IR 1.

94 However, in *Re May, Minors*, (unrep. HC, February 1957) it was stated that if the parents could not agree, the father's wishes would prevail.

95 As Lord O'Hagan LC put the matter in *In Re Meades* (1871) LR 5 Eq 98, 103. "The authority of a father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law."

pect in light of spousal equality. In McKinley v Minister for Defence,[96] the Supreme Court unanimously agreed that the restriction of the common law action for loss of consortium to husbands was inconsistent with Article 40.1 and held that the defect should be remedied by extending the action to wives. In State (Director of Public Prosecutions) v Walsh (No 2),[97] the respondent could not avail of the former presumption of law[98] that the act of a wife committed in the presence of her husband was caused by his coercion.[99] In W v W the Supreme Court held that the concept of a wife's dependent domicile was contrary to Art 40.1.[100] Old common law doctrines were gradually eroded from the legal system, and a number of cases reaffirmed the constitutional protection afforded to the marital couple, as opposed to simply the husband.[101] A husband was no longer considered to

96 [1992] 2 IR 333.

97 [1981] IR 412.

98 According to Hawkins, the principle was based on the wife owing 'the highest obedience' to her husband, W Hawkins *Pleas of the Crown* vol 1, 4n (1824, first published 1716) cited in K.J.M. Smith *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence*, 1800–1957 (Oxford: Clarendon Press, 1998) 102n. See generally, G. Rubin, 'Pre-dating Vicky Pryce: the Peel case (1922) and the Origins of the Marital Coercion Statutory Defence' 34(4) *Legal Studies* (2014) 631.

99 Henchy J stated ([1981] IR 412, 449-450) that such a presumption:
"….pre-supposes a disparity in status and capacity between husband and wife which runs counter to the normal relations between a married couple in modern times. The conditions of legal inferiority which attached ta common law to the status of a married woman and which gave rise to this presumption have been swept away by legislation and by judicial decisions…"
He went on to say that such a presumption could not be justified "based on any difference of capacity or of social function as between men and women" and was thereby unconstitutional.

100 [1993] 2 IR 476.

101 In *Murphy v Attorney General* [1982] IR 241, a statutory scheme which was punitive to married couples was held to be unconstitutional. This gave rise to the situation in *Muckley v Attorney General* [1985] IR 472. Here, the plaintiffs had overpaid their tax in 1979/1980. However, they had underpaid their taxes in the years 1975/1976 to 1978/1979, under the legislation subsequently struck down as unconstitutional. The Revenue Commissioners sought to offset the previous underpayments against the more recent overpayment, with the result that the overpayment would not have been repaid. This would have been the correct position if s.21 of the 1980 Act were constitutionally valid; however, the Supreme Court held that s.21 was unconstitutional on the grounds that it penalised the married state.

have absolute control over his wife, and the marital union came to mean a partnership of equals within Irish law.

The constitutional protection afforded to marriage had unintended benefits for women generally: in McGee v Attorney General,[102] the plaintiff challenged the constitutionality of a ban on contraceptives and succeeded on the basis of the right to marital privacy. Walsh J noted that Art 41 guaranteed the rights of a married couple to determine size of their family, and to privacy in their sexual relations. McGee based her claim on her status as a married woman, and the protection of marriage in the constitutional order seems to have been the primary reason for her victory. Although there is acknowledgment of the plaintiff's dignity and bodily integrity,[103] it is difficult to imagine that the Court would come to have the same result had McGee been a single woman seeking to control her reproductive capacities or even a married woman, separated from her husband, but seeking to avail of contraception with a new partner. The foundation of the decision rests in marital privacy and the importance of allowing a husband and wife to make intimate decisions, free from state interference.[104] Although the judgment appeared to have a narrow application, this decision led to contraceptives

102 [1974] IR 284.

103 Henchy J invoked the Preamble's guarantee of the dignity and freedom of the individual as grounds by which the prohibition was found to be unconstitutional ([1974] IR 284, 326) which are modern understandings for the use of contraception as an element of reproductive rights. See, for example, Dixon and Nussbaum, 'Abortion, Dignity and the Capabilities Approach' in B. Baines, D. Barak-Erez and T. Kahana (eds), *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press, 2012), p.64, Christyne L. Neff, 'Woman, Womb and Bodily Integrity' 3 *Yale Journal of Law & Feminism* 327 (1990-1991), Stephanie Palmer 'Abortion and Human Rights' 6 *European Human Rights Law Review* 2014 596. The Irish Supreme Court were following the U.S. model for privacy as the basis for the right to use contraceptives, see *Griswold v Connecticut*, 381 US 479 (1965), *Eisenstadt v Baird*, 405 US 438 (1972), *Carey v Population Servs*. Int'l, 431 US 678 (1977). As West has argued, legal discourse has often used arguments which would serve the male experience, even when advancing causes for women, see R. West, 'Jurisprudence and Gender' (1988) 1 *The University of Chicago Law Review* 55 61-62. For a reimagined version of the McGee judgment, see M. Enright, 'McGee v Attorney General' The Feminist Judgments Project, available at http://www.feministjudging.ie.

104 See, for example, the dicta of Henchy J at 325: "The net question is whether it is constitutionally permissible in the circumstances for the law to deny her access to the contraceptive method chosen for her by her doctor and which she and her husband wish to adopt…the answer lies primarily in the fact that the plaintiff is a wife and a mother."

becoming widely available a decade later, first with legislative regulation in 1979 and further liberalisation in 1985.[105]

The new Constitution was not, however, a model of feminist jurisprudence. Despite being formally placed on an equal footing with their husbands, women were considered to have a separate and distinct role to play in society as mothers and homemakers. Art 41.2 was included amongst the provisions on the family, which acknowledged women's place within the home and specific mention is made to women as mothers. As Scannell has pointed out, there are two ways of interpreting the provision.[106] The first perspective was described by Denham J (as she then was) in Sinnott v TD:

> "Article 41.2 does not assign women to a domestic role…this recognition and acknowledgement does not exclude women and mothers from other roles and activities."[107]

On this interpretation, Art 41.2 is a recognition of the work done by women within the domestic sphere, enshrining constitutional protection for caregivers, traditionally an undervalued role in society. However, in practice the courts have been reluctant to give the provision any real legal weight. In L v L[108] the plaintiff's reliance on Art 41.2 to ground an equitable claim

105 The Health (Family Planning) Act 1979 made statutory provision for the operation of family planning services and the supply of contraceptives. Substantial portions of the Act were repealed or amended by the Health (Family Planning) (Amendment) Acts of 1985, 1992 and 1993.

106 Yvonne Scannell,'The Constitution and the Role of Women' in Farrell, Brian (ed.) *De Valera's Constitution and Ours* (Dublin: Gill and MacMillan, 1988) at 124.

107 [2001] 2 IR 505 at pp.197. This is how de Valera himself saw the article, arguing 'Is it not a tribute to the work that is done by women in the home as mothers?' *Dáil Debates*, vols. 67-8, col 64.

108 [1992] 2 IR 77. This can be contrasted with the approach taken by the Supreme Court of Canada in *Peter v Beblow* [1993] 3 WWR 337. Here, the court held that household labour was a sufficient contribution to give rise to a constructive trust to an interest in the family home. The court noted that 'The notion that household and child care services are not worthy of recognition by the court fails to recognise the fact that these services are of great value, not only to the family, but to the other spouse…it has contributed to the phenomenon of the feminisation of poverty.' (346).

to half of her family home was unsuccessful, as it was held that to interpret Art 41.2 in this way would usurp the legislative function. Thus, the Court's interpretation of Art 41.2 – despite describing it as a recognition of caregivers – reinforced the limited value placed on caregiving by failing to give the provision any legal force.[109] Consequently, Art 41.2 serves as nothing but a symbolic relegation of women to motherhood and domesticity, a deeply stereotypical perspective which reeks of biological determinism. The Constitution does not assign specific roles to anyone else. As Connelly notes, "it is clear from the tenor of the relevant…provisions that it is in their roles as wives and mothers that women are especially valued."[110]

The National Women's Council have pointed to the lack of recognition of fathers and men within the home, reinforcing a patriarchal supposition that women are naturally superior child carers.[111] Both the Constitutional Review Group and the Constitutional Convention have recommended that

109 Art 41.2 was, however, successfully relied on to justify social welfare discriminations against deserted husbands obliged to care for their children full time in *Dennehy v Minister for Social Welfare*, (HC July 20 1984).

110 A. Connelly 'The Constitution' in A. Connelly (ed) *Gender and the Law in Ireland* (Oak Tree Press, 1993).

111 Caselaw has affirmed women as natural childcarers, such as *G v Bord Úchtála* [1980] IR 32, where an unmarried mother was held to have personal rights to her child, but not an unmarried father, per *Nicolau v an Bord Úchtála* [1966] IR 567. However there are some outliers - for example, in the case of *O'G v Attorney General* [1985] ILRM 61 adoption provisions which allowed widows - but not widowers- the right to adopt were held to be unconstitutional. In his judgment McMahon J in O'G stated (at 64):

"Widowers as a class are not less competent than widows to provide for the material needs of children and their exclusion as a class must be based on a belief that a woman by virtue of her sex has an innate capacity for parenthood which is denied to a man and the lack of which renders a man unsuitable as an adopter. This view is not supported by any medical evidence adduced before me…The culture of our society has assigned distinct roles to father and mother in two parent families in the past….but this is a feature of our culture which appears to be changing as the younger generation of married people tend to exchange roles freely."

the provision be replaced by a gender neutral clause which recognises the role of caregivers within society.[112]

It might be argued that it matters little either way – after all, it could not reasonably be said that Art 41.2 has ever stopped a woman from working outside the home, or a man from adopting the role of home maker.[113] However, constitutions are intended to proclaim values which society at large subscribes to. Whilst they may not always correlate perfectly, if the Constitution contains ideology which is no longer relevant or reflective of common Irish attitudes and beliefs, it risks becoming redundant.[114] Although the Constitution recognises the rights of both male and female workers,[115] this does not take from the fact that, viewed in isolation, it is an objectionable statement of values in our most fundamental legal document. Art 41.2 preserves a limited stereotype of women, confined to the domestic

112 *Report of the Constitution Review Group* (Dublin: Government Publications, 1996), at pp.333-334. The Constitutional Convention recommended that 'Article 41.2 (on the role of women) should be made gender-neutral to include other carers both 'in the home' and 'beyond the home' and a provision be included which would ensure that the state should provide 'a reasonable level of support' to caregivers, *Appendix D, Ninth Report of the Convention on the Constitution, Conclusions and final recommendations*, (Dublin: Government Publications, 2014).

113 However, it has been used to ground some of the more objectionable interpretations of 'social function' under the equality guarantee of Art 40.1. In *de Búrca v Attorney General* [1976] IR 38, for example, O'Higgins CJ noted (albeit in dissent) that mothers with young children ought to be excused from jury service because of their constitutionally recognised social function. On the other hand, in *DT v CT* [2003] 1 ILRM 321, 376 Murray J suggested that interpreting the Constitution as a "contemporary document", he thought that Art 41.2 "implicitly recognises the value of a man's contribution in the home as a parent."

114 A. Connelly 'The Constitution' in Alpha Connelly (ed) *Gender and the Law in Ireland* (Oak Tree Press, 1993).

115 It should be noted that the provision must be read in conjunction with Art 45.2i which states that "men and women equally have the right to an adequate means of livelihood" and Article 45.4.2 also envisages that the "strength and health of workers, men and women.." shall not be abused.

sphere, which does not fully reflect the contribution that women can and have made to Irish society.[116]

Legislation – Post 1937 Constitution

Notwithstanding some limited advances for wives, the law continued to lag behind in many areas. Despite the societal forces which colluded to ensure that women worked in the domestic sphere, wives continued to have limited autonomy over the family home. The Married Women's Status Act 1957, amongst other provisions, made wives liable for breaches of duty and debts, and was used by the courts to establish the rights of a spouse to the family home.[117] The Succession Act 1965 ensured that a married woman could not be disinherited or left homeless by her husband. However, a married woman had no right to a share in her family home in Irish law, even if she was the breadwinner, and her husband could sell the home without her consent. This inequality was somewhat remedied by the introduction of the Family Home Protection Act 1976, which ensured that neither spouse could sell the family home without the written consent of the other. It did not, however, confer ownership rights on the non owning spouse (in practice, the woman) which led Senator Mary Robinson to query the difference between the 1976 Bill and the Succession Act; "Why not give [a wife] a protection during her life which we have been happy to give her after her death?"[118] This

116 The present Government has committed to holding a referendum on Art 41.2. See, *Dáil Debates*, Tuesday November 15th 2016. It should be noted that Art 41.2 should be read in conjunction with Article 45..2.i (affirming that all citizens, "men and women equally have the right to an adequate means of livelihood) and Article 45.4.2 (whereby the State endeavours to ensure that the "strength and health of workers, men and women" shall not be abused). While the provisions of Article 45 are not directly justiciable, these provisions which seems to envisage full female participation in the workplace were inserted during the course of the Dáil Debates on the Constitution in order to address objections by women's groups to the draft Constitution, see G. Hogan, 'De Valera, The Constitution and the Historians' 40 *Irish Jurist* (2005) 293, 313-315.

117 *EM v WM* [1996] IFLR 155 (Cir Ct). It also provided that a married woman would be capable of entering into contracts and could be held personally liable for her torts, contracts and debts. It also acknowledged that a married woman would be capable of acquiring holding and disposing of property. Husband and wife were treated as two separate people for purposes of acquisition of any property.

118 84 *Seanad Debates* col. 920 (Second Stage) 928. Presumably, she meant a married woman's husband's death.

was not to be attempted until 1993, when the Fianna Fáil/Labour government introduced the Matrimonial Home Bill 1993. Section 4 provided that where a spouse was the sole owner of the matrimonial home on the commencement date, or became a sole owner thereafter, the beneficial interest in the property would vest in both spouses as joint tenants. On an Article 26 reference, the Supreme Court found the Bill to be unconstitutional as it had retrospective application and because it disproportionately interfered with family autonomy.[119] This measure has never been attempted since, although it has been argued that similar legislation with prospective application would be constitutional.[120]

Despite formal constitutional equality, most women remained financially dependant on their husbands and the vast majority of women did not work outside the home, although this was beginning to change by the latter part of the twentieth century.[121] The 1970s and early '80s marked a period of 'high energy and radical action' as feminist organisations such as Irish Women's Liberation Movement and the Council for the Status of Women were established.[122] High profile events such as the 'contraceptive train' drew attention to women's issues in Ireland,[123] and there was growing awareness and discussion of how women were treated in society. Individual female litigants started to challenge laws which indirectly discriminated against them, and although the Courts showed a marked unwillingness to strike down

119 *Re Art 26 of the Constitution & in the matter of the Matrimonial Home Bill1993* [1994] 1 ILRM 241.

120 Woods notes, "One could assume that if the Bill was reintroduced without retrospective application, it would withstand constitutional scrutiny." See U. Woods, "The Matrimonial Home Bill 1993—Should the Government Try Again?" (2001) 4(4) *Irish Family Law Journal* 8. See also F. de Londras, *Principles of Irish Property Law* 2nd edn (Dublin: Clarus Press, 2011) at 221.

121 Beale has noted that in early 1970s "…only one in fifteen married wives worked outside the home and women's traditional roles as family-based wives and mothers were more firmly established." J. Beale, *Women in Ireland: Voices of Change* (Dublin: Gill and Macmillan, 1986), p.5.

122 A. Smyth, 'The Women's Movement in the Republic of Ireland 1970-1990' in A. Smyth(ed) *Irish Women's Studies Reader* (Attic Press, 1993).

123 'Laying the Tracks to Liberation: The Original Contraceptive Train' The Irish Times, 28 October 2014. See generally, A. Stopper, *Mondays at Gaj's : The Story of the Irish Women's Liberation Movement* (Liffey Press, 2006).

legislation by reference to the equality clause,[124] many of these cases had positive results for Irish women.[125] Ireland entered the EEC (now the EU) in 1973, which obliged the State to introduce employment equality protection as well as maternal protection legislation. The Anti Discrimination (Pay) Act 1974 compelled employers to give women and men equal rates of pay, and the Employment Equality Act 1977 prohibited discrimination on the basis of marital status. The Marriage Bar was finally repealed in 1973, which allowed married women to continue working in the Civil Service. The growing access employment helped women to secure greater financial independence from their spouses, and ensured that women no longer faced the same pressure to marry to avoid economic destitution.

There was, finally, growing recognition that married women needed the law to protect them in the event of marital breakdown, as well as during the marriage itself. In 1976, Ireland's first piece of legislation on domestic violence was introduced[126] and in 1981, protection orders were introduced and barring orders were increased up to 12 months.[127] The 1981 Family Law Act abolished the tort of criminal conversation, and the right to sue for breach of promise to marry. In 1985, junior minister for Women's Affairs Nuala Fennell drove forward the Domicile and Recognition of Foreign Divorces Act 1986, which granted married women the right to an independent

124 As Yvonne Scannell notes, 'it proved impossible to persuade the courts to strike down sex discrimination under the equal rights clause in 40.1' and virtually all judgements which struck down discriminatory measures against women used other articles of the Constitution to ground their reasoning. See, The Constitution and the Role of Women' in B. Farrell (ed.) *De Valera's Constitution and Ours* (Dublin: Gill and MacMillan, 1988) 123 at 124. See further, F. Beytagh, 'Equality under the Irish and American Constitutions: A Comparative Analysis' *Irish Jurist* 18 (1983) 56.

125 Cases which improved the status of women generally included *Murtagh Properties v Clery* [1972] IR 330 where it was held that sex discrimination in employment recruitment was constitutionally impermissible. In *de Búrca v Attorney General* [1976] IR 38, two journalists successfully challenged the constitutionality of the 1927 Juries Act which indirectly discriminated against women by requiring jurors to be ratepayers. Until 1973, only three women had ever served as jurors.

126 Family Law (Maintenance of Spouses and Children) Act, 1976.

127 Family Law (Protection of Spouses and Children) Act 1981, replaced by the Domestic Violence Act 1996.

domicile.[128] Marital rape was recognised as an offence in 1990.[129] In 1995, a referendum on divorce was held and narrowly passed. Subsequent legislation helped to ensure that the dependant spouse and children would be provided for in the case of marital breakdown.[130] These developments ensured that women had greater access to remedies against abusive spouses, and gave women greater control within the marital sphere. By the end of the twentieth century, many of the stereotypes which had persisted around the role of wives in Irish society had been broken down. Many women worked in some form outside the home, and there was no longer an expectation that married women would confine their lives to the domestic sphere.

Marriage in the New Millennium

Today, women can confidently claim to be on an equal footing with their husbands in the eyes of the law, even if inequality persists in an informal sense. A greater number of women participate in the workforce, ensuring that married women are less likely to be entirely financially dependant on their spouses; although the pay gap persists and has risen in recent years.[131] Expensive childcare remains out of reach for most working couples, meaning that women continue to shoulder the vast majority of domestic tasks and childcare within marriage - despite the emphasis that the law places on equality and partnership between spouses.[132]

This suggests that essentialist perceptions around women still persist, and that there needs to be a radical societal shift to address the inequality

128 At common law, foreign divorces could be recognised once the divorced spouses were living in the jurisdiction in which the divorce was granted. Traditionally, courts had relied on the idea of 'dependent domicile' - the wife was always deemed to share the domicile of her husband. Thus if the husband was held to be domiciled in the country which had granted the decree, the courts were happy to recognise the decree to be valid. See Shannon, *Divorce Law & Practice* (Thomas Roundhall, 2007) 304. The rule was found unconstitutional by the Supreme Court in *W v W* [1993] 2 IR 476. The retrospective effects of this finding of unconstitutionality are still causing some difficulties see *H v H* [2015] IESC 7.

129 See also, *R v R* [1991] 4 All ER 481.

130 Family Law (Divorce) Act 1996.

131 'Pay gap between men and women in Ireland up to 14.4%' *The Irish Times*, March 5 2015.

132 'Working women "still expected to do housework"' *Irish Independent* 25 February 2015, 'Women still responsible for most housework in Ireland' *Irish Examiner* November 29 2005, 'Irish childcare fails to care for working mothers' *The Irish Times*, November 1 2016.

that married women continue to endure.[133]

The face of marriage has also gone undergone radical change in the past twenty years. Divorce has given unhappy couples the freedom to dissolve their marriage and to remarry, although the requirements remain onerous.[134] Despite having a high marriage rate,[135] there are an increasing number of couples who chose to cohabit outside of marriage, perhaps in part due to the institution's historical associations of sexism.[136] In 2016, Ireland made history by opening the institution of marriage to same sex couples after an overwhelming popular vote in its favour.[137] As the laws relating to marriage in this country have historically relied on a binary gender model to create artificial distinctions between men and women, there are still laws in operation which have their foundations in those archaic beliefs. Those stereotypes will have to be revisited in the light of marriage equality, as the law can no longer delineate within marriage based on the concepts of 'husband' and 'wife'.

The Definition of Sexual Activity in Nullity & Judicial Separation

Nullity for lack of consummation, and judicial separation for adultery both operate on strictly heterosexual definitions, which are no longer sustainable. These narrow conceptions of sexual activity have always given rise to curious anomalies, for example, a husband could only apply for a judicial separation if his wife was having an extra marital affair with another man, not a

133 See, for example, A.M. Slaughter, *Unfinished Business: Women Men Work Family* (Random House, 2016).

134 Family Law (Divorce) Act 1996.

135 *The Statistical Yearbook of Ireland 2015* (CSO Publications, 2015).

136 "While marriage is now facially neutral as regards gender (particularly since the marriage referendum), the history of marriage is replete with examples of how it oppressed and sidelined women", per F. Ryan, *The Rise and Fall of Civil Partnerships* (2016) 19(3) *Irish Journal of Family Law* 50-62. It could also explain the mounting interest in opening civil partnerships to heterosexual couples in the UK. See for example, *Steinfeld v Secretary of State for Education* [2016] EWHC 128 (Admin); [2016] 4 WLR 41 (QBD (Admin)). See generally, A. Shadbolt 'The Quest for Equality' *Family Law Journal* 2016, 156 (May), 11-13.

137 The Irish people voted 62.07 per cent to 37.93 per cent in favour of an amendment to the Constitution paving the way for same-sex marriage. See D. O'Connell, 'Marriage Equality Introduced by Referendum' (2015) *Public Law* 705.

woman.[138] However, the law cannot continue marginalise homosexuality, given that on the existing definition of consummation, all same sex marriages have the capacity to be annulled. As Ryan has pointed out, although heterosexual sex can be considered worthy of extra protection given its potential to create life, there are no age limits in respect of adultery or inquiries into fertility of the parties.[139] How can the law continue to define consummation and adultery so narrowly, when heterosexual intercourse is no longer the norm for a substantial portion of married couples? The question is whether it is possible to redefine consummation and adultery to include same sex activity.

Ryan suggests a number of ways that adultery be redefined, although the arguments are just as valid for the definition of consummation.[140] Rape law for example, characterises it as penetrative acts- however, this is a phallocentric approach to adultery, which is plainly inappropriate for lesbians.[141] Assessment could be carried out on a case by case basis, but that approach carries the risk of imprecision and vagueness. In the context of adultery, another option could be to follow the approach of the Superior Court of New Jersey in SB v SJB where it held that the focus should be on the breach of marital trust rather than the adulterous act itself.[142] Again, the vagueness and subjectivity of such an inquiry suggests it would add little to the clar-

138 Shatter has suggested that this could come under another bracket for judicial separation, on the basis that the applicant cannot reasonably be expected to live with the respondent, per Section 2(1)(b) of the Judicial Separation and Family Law Reform Act 1989, *Family Law*, ibid. See also *Gardner v Gardner* [1947] 1 All E.R. 630 (PDA Div, Hodson J), where a divorce was granted based on the wife's "unnatural relations" with another woman. It should be noted that sexual orientation has been recognised as a basis for an annulment in the case of UF v JC [1991] ILRM 65. See also M v O, unrep., High Court, January 24,1984 and C(G) v C unrep., November 1989.

139 F. Ryan, '"Playing Away from Home on an Uneven Pitch?": Spouses, Civil Partners and Adultery in Irish and UK Law' 17(2) *Irish Journal of Family Law* 2014 41, 47.

140 F. Ryan '"Playing Away from Home on an Uneven Pitch?" Spouses, Civil Partners and Adultery in Irish and UK Law' (2014) 2 *Irish Journal of Family Law* 41.

141 See the Criminal Law (Rape) Act 1981 and s4. of the Criminal Law (Rape) (Amendment) Act 1990. Ryan argues that 'it is unclear… whether the definition of rape in s4. of the Criminal Law (Rape) (Amendment) Act 1990 includes oral sex performed upon a female. Penetration of the vagina by an object can constitute rape, but it is unclear whether an animate part of the body constitutes an "object" for this purpose.' *ibid* at 47.

142 258 NJ Super 151; 609 A.2d 124 (1992).

ity of the law in this area. One solution would simply be to abolish lack of consummation as a grounds for nullity, and adultery for judicial separation. In the case of the former, the inability to enter and sustain normal marital relations as a ground for nullity derives from the principle of non-consummation as a ground for the avoidance of marriage. It has long been criticised as a judicially created remedy which has produced numerous inconsistencies.[143] Its incoherence and rapid spread is no doubt due to a sympathetic judiciary, who were conscious of the considerable hardships faced by unhappy couples who could not obtain a divorce in Ireland. With the legalisation of divorce now twenty years old, perhaps it is now time to finally abandon this nebulous area of law and ensure that outdated definitions are no longer part of our legal order.

Judicial separation, on the other hand, remains a popular and useful remedy, even if divorce is now the main avenue of recourse for marital breakdown. However, inquiring into the reason for the demise of the marriage is unhelpful, given that the purpose of judicial separation is to regulate the couples's separation, rather than to punish an errant spouse for his or her behaviour, a view which has been supported by the courts in practice.[144] Branding one of the parties as an 'adulterer' carries a stigma which can only make the adversarial nature of the proceedings more acrimonious. Given that neither divorce nor the dissolution of civil partnership are fault based, it is difficult to understand why judicial separation has operated on that basis.[145] It could easily be subsumed into a pre existing ground of 'unreasonable behaviour' as opposed to maintaining a distinct category of its own.[146]

Furthermore, marriage equality can help to modernise the meaning of

143 "For too long nullity has been allowed to develop as a surrogate form of divorce." F. Ryan, 'Reversal of Fortune: Nullity Law in the Age of Divorce' 22 Dublin University Law Journal (2000) 224, 235. See also, F. Ryan, '"When Divorce's Away, Nullity's At Play" A New Ground for Annulment, its Dubious Past and its Uncertain Future' 1 *Trinity College Law Review* (1998) 15.

144 See the dicta of O'Hanlon J, for example, *MM v CM* (HC, July 1993).

145 Divorce can be granted where the parties have been living apart for four out of five years and there is no prospect of reconciliation. Proper provision must be made for the spouse and children of both or either of the spouses. Article 41.3.2 of the Constitution of Ireland 1937 and s.5 of the Family Law (Divorce) Act 1996. A civil partnership may be dissolved where the parties have been living apart for two of the three years provided proper provision is arranged for both parties.

146 Section 2(1)(b) of the Judicial Separation and Family Law Reform Act 1989.

marriage. Hunter has observed that the introduction of same sex marriage allows for the societal perception of marriage to broaden beyond the traditional focus on heteronormative gender roles and procreation.[147] Haddad echoed this view, arguing that ''marriage is no longer stringently tied to opposite-sex gender roles, procreation, or religion."[148] The Irish courts have consistently emphasised that the constitutional definition of marriage is based on spousal equality, and it is submitted that marriage equality will continue to direct the meaning of marriage towards that of romantic affiliation and economic partnership.[149] Marriage equality is a hugely promising development for the eradication of stereotypes within Irish marital law. As the marital union can no longer be assumed to comprise of man and woman, heteronormative stereotypes can be erased by reforming nullity and judicial separation. Consequently, the legal system will be compelled to revise laws which distinguish between men and women within marriage and move away from gendered stereotypes.

Conclusion

The Irish legal system has helped to perpetuate a number of gendered stereotypes through caselaw, legislation and its Constitution. With the arrival of the common law system, married women were stripped of their legal status. The doctrine of coverture formed the basis for the non criminalisation of marital rape, the tort of criminal conversation and excluding wives from holding property rights. The common law cemented the status of married women as the property of their husbands, and much of the stereotyping was based on a belief that women were naturally inferior to men, and suited only to the domestic sphere. The 1937 Constitution, with its principle of spousal equality, gradually eroded law based on coverture from the Irish legal system. Women were no longer considered to be the rightful property of their husbands, yet the idea persisted that women had 'natural duties' in the home, as evidenced by the wording of Art 41.2. The 1970s and 1980s brought with it renewed energy and activism around women's rights, which helped to draw attention to the extent to which wives were discriminated

147 N. D. Hunter, Marriage, Law, and Gender: A Feminist Inquiry, *Law and Sexuality* 1 (1991) 9, 17

148 J. Haddad, (2016) 'The Evolution of Marriage: The Role of Dignity, Jurisprudence and Marriage Equality' *University of Boston Law Review* 1489, 1518.

149 D. NeJaime, 'Windsor's Right to Marry' (2013) *Yale Law Journal* 219, 222.

against in Irish society. The removal of the marriage bar and the influence of the EEC encouraged more women to join the workforce and improved the financial independence of wives. Legislation on domestic violence, the criminalisation of marital rape and the introduction of divorce gave legal remedies to women in abusive or unhappy marriages. These developments have helped to erode the stereotypes of women and men within marriage, despite the informal inequality which persists for women. With the advent of marriage equality, the courts will have to revisit some of the last remaining vestiges of spousal inequality within the law for married couples, such as the grounds for nullity and judicial separation.