



The Irish marriage equality referendum: a state-sponsored moral conundrum

Niall Leahy SJ

On Friday 22 May, Irish voters will say 'yes' or 'no' to a proposed amendment to the Irish Constitution which will allow same-sex marriage. However, neither result will lead to a problem-free future, argues Niall Leahy SJ. The referendum is not offering voters a clear choice, despite the government's claim – the Irish people are faced with an impossible decision.

One of the tell-tale signs of a moral conundrum is that it doesn't allow your moral compass to settle on one true course. Sound familiar? It ought to for anyone who has been following the debate surrounding the upcoming Irish referendum on same-sex marriage.¹ Granted, there are plenty of pundits who seem to have perfect moral clarity on the question of whether to vote yes or no to same-sex marriage. However, if we look at our situation through a wider lens, it is quite obvious that the Irish people cannot act with one mind and one heart on this issue – we cannot decide collectively. We are torn.

No matter how long we thrash out the arguments, we are not coming any closer to reaching a consensus. Our efforts to boil things down result in short and convincing one-liners like, 'I am voting yes because same-sex couples deserve more recognition', or, 'I am voting no because same-sex couples should not have a constitutional right to procreate'. The standard response to somebody who promotes a one-liner that is at odds with ours has become, 'That's not a reason. It's irrelevant to the debate!' It seems better to rubbish the legitimate concerns of others than to question the soundness of our own position. But after evaluating all the arguments, I firmly believe that we have been placed in a moral conundrum in which the only reasonable position is indeed a position of doubt.

Given the social prestige attached to marriage, the wording of our Constitution and the way in which



Photo by Photography by Shaaree at flickr.com

the courts have historically interpreted it, neither accepting nor rejecting the proposed amendment will have an entirely positive effect on life in Ireland. There will be negative repercussions either way.

Since the yes and no campaigns have been focusing on different issues, it hasn't been obvious for the neutral to identify what is actually at stake. As I see it, an amended Constitution will result in three desirable

outcomes for same-sex couples: lifelong same-sex relationships will be socially recognised as being on a par with lifelong heterosexual relationships; same-sex married couples and their children (if they have any) will be constitutionally defined as a family; and same-sex married couples will potentially be conferred with the right to procreate. All three benefits are tied up with each other so a pick 'n' mix is not permissible – it is all or nothing. By teasing out the various strands of the debate, I wish to illustrate how the 'all or nothing' nature of the proposed amendment means that a win-win scenario is not possible, irrespective of how the vote goes.

Accepting same-sex couples

The vast majority of people who will vote yes will do so because they want the Constitution to guarantee for lifelong same-sex relationships the esteem and value that has until now been the preserve of lifelong heterosexual relationships. Supporters of the proposal act in the name of equality.

It is clear that gay and lesbian couples really have had a belly-full of feeling like they are lower down the pecking order and that it's high time that society did something to raise up those who for far too long have been considered lowly. Embracing equality and allowing same-sex couples to get married will elevate them to a standing that nobody can question. What's more, by bringing in this change by a referendum vote, citizens of voting age will have the opportunity to impart their blessing personally by voting yes.

However, the unavoidable flipside of outlawing discrimination *against* something is that you remove the possibility of positively discriminating *for* something. Even though the lifelong committed relationship between a man and a woman is the only relationship that can naturally conceive and nurture new life, if the referendum is passed it will no longer be considered different enough from other types of relationship to deserve having its own institution. For some no-voters, this would be lamentable as there would no longer be an institution specifically to affirm heterosexual identity. In fact, if the amendment is accepted, there will be no institution to affirm specifically either gay or straight identity.

Needless to say, however, that the majority of the LGBT community would not perceive a no vote as an affirmation of the unique potentiality of a committed man-woman relationship, but as a massive hammer-blow to themselves. A rejection of their request to be allowed to marry would be considered tantamount to a personal rejection of them as people and a slight on their character. What's more, their anger will most likely be directed at the Church which is regularly portrayed in the mainstream media as an enemy of the people. I wince at the thought of such a bloodbath.

The right to family

The Irish Constitution describes the family unit as being founded on the marital relationship of a man and a woman. This assertion allows for several legitimate interpretations. The most obvious is that the Constitution considers married couples and their children (if they have any) to form a family unit. Given the current definition, it also follows that any couple who are not married – even if they are co-habiting or in a civil partnership – cannot, with their children, be considered to be a family unit by the Constitution.

People arguing for a no vote have countered that the recently enacted Family and Relationships Bill makes amends for the narrowness of the constitutional definition of family by making legislative provisions for people who are in such situations. For example, co-habiting and civilly partnered couples are now considered to be the legal guardians of the children that are in their care. So in practice, the state no longer discriminates between family units founded on a married couple or an unmarried couple. True as this may be, the absence of mention in the Constitution of family units founded on co-habiting and civilly partnered couples is a glaring omission and a needless disregard for same-sex couples and indeed any unmarried couples. Knowing oneself as part of a family is probably the most fundamental sense of belonging that we possess. The Constitution ought to articulate this for all lifelong committed couples. A yes vote would not fully achieve this goal, but by including same-sex married couples it would be a step in the right direction.

There is another family-related issue, a fly in the ointment, which has threatened to derail the campaign for same-sex marriage. The Minister for Health, Dr Leo Varadkar, has already announced the government's plans to enact legislation governing the regulation of surrogacy, which will apply to heterosexual and same-sex couples who avail of the process. However, some Irish people don't seem to like the fact that the law will enable the deliberate separation of a child from at least one of its biological parents so that it can be raised by two mothers or two fathers, as will happen if same-sex couples avail of surrogacy.

Given that the government is planning to enact this legislation regardless of the outcome of the referendum, yes campaigners have argued that even raising the issue of surrogacy is an irrelevant side-show that has nothing to do with the referendum whatsoever. However – and herein lies the rub – the Irish Constitution's definition of a family as being founded upon marriage not only conferred the right to *belong* to a family upon a marriage-based family unit, but it also conferred upon married couples the right to *start* a family. In other words, the Constitution gives married couples the right to procreate, a fact which the Referendum Commission has confirmed.²

There is an ongoing discussion as to whether or not this right will extend to assisted human reproduction (AHR) in the case of married same-sex couples.³ To date the courts have only interpreted the marital right to procreate as referring to natural procreation. That said, no judge has ever indicated that the right to procreate does *not* extend to the use of AHR. What all agree on is that such an extension – and with it a strengthening of the legality of separating a child from at least one of its biological parents – remains a possibility with a yes vote.

If the courts determine that same-sex married couples have the right to procreate by artificial means, it will become more difficult for future parliaments to prevent same-sex couples from begetting children through surrogacy. Many people – including no-voters but also some would-be yes-voters who accept the arguments from equality – do not want this practice to be buttressed by our Constitution. The chairperson of the Independent Referendum Commission, the Hon. Mr. Justice Kevin Cross, has publicly stated that this referendum is not primarily about surrogacy. However, he has also indicated that a yes vote would have implications on what the courts would have to take into consideration if they were to restrict same-sex married couples' exercising of their right to procreate. The new starting position would be *not* to restrict their right to procreate, and any argument seeking such a restriction would need to be based on cast-iron evidence that, all things being equal, children fare better when reared by a mother and a father than by two parents of the same sex.⁴ Given that the evidence is limited, controverted and inconclusive in this area, it is no surprise that some no-voters would prefer to be relieved of this burden of proof and to avoid all uncertainty by not granting any right to procreate to same-sex married couples in the first place.

One might think it overly cautious to vote against something that is only a possibility, not a certainty. However, voting on changes to the Constitution necessarily requires the consideration of *possible* interpretations of it as much as extant ones. Given that a Constitution is constantly interpreted and reinterpreted, what we are being asked to vote on is precisely the range of possibilities that we are happy with. A degree of speculation is not just permissible but it is important before agreeing to a constitutional amendment.

Be it for better or for worse, it is not the case that children are always raised by both of their biological parents. The link between procreation and the family unit which nurtures children can no longer be taken for granted. The emergence of donor assisted human reproduction (DAHR) and surrogacy as alternatives to natural procreation has also contributed to the prising apart of procreation and the domestic family. These developments were not conceivable in 1937 when the Irish Constitution was enacted and therefore were not reflected in our nation's founding document.

The prospect of conferring the constitutional right to procreate upon same-sex couples has become a crunch issue in the run-up to the referendum. On one hand, lesbian and gay couples still feel strong parental instincts and have dreams of having and raising children. On the other, these dreams run contrary to the conviction that a child ought to have a mother and a father as far as is possible. Both beliefs run very deep but only one position can be adopted by the law. As a people we have to decide which principle is of greater importance – a difficult position to be in.

A dilemma by design

I have outlined the dilemma as I understand it. You might think that it is unfortunate that we find ourselves in such a quandary but I think that we are not where we are entirely by accident: this situation has been engineered by the government who proposed the constitutional amendment. Personally, I am moved by all of the arguments which have been outlined above – they are all good arguments. But because they are mutually frustrating it is impossible to reach a decision without being left with a nagging conscience. Is this my fault? No – it is the fault of those who forced me into such an onerous scenario.

The government should at least have enough integrity to admit that they have put a difficult decision before the people. Instead they are trying to cover themselves by saying that children and procreation rights are not even a consideration in the debate. They *are* a consideration because possible future interpretations of the Constitution really ought to be considered before making amendments to it. Some will consider the prospect of legally separating a child from one of its biological parents and have no qualms with it

whatsoever. Others will hold on to the belief that the Constitution and the courts should defend a child's right to a mother and a father as far as this is possible. Either way, it is an issue which needs to be considered if one wants to come to a decision after considering all the relevant issues. I find the denial of this point by our own government insulting to the intelligence of the voting public as a whole, irrespective of how they intend to vote.

Where to from here?

Judging by opinion polls, the most probable outcome will be a yes vote. Does this mean the end of the road for those who oppose granting the right to procreate to same-sex couples? Not necessarily. The Constitution is a living document which will continue to evolve. In the event of a yes vote, the vast majority of Irish people will be happy for same-sex couples that their relationships will be considered to be of equal worth in the eyes of the state and that their unions will be constitutionally defined as being the foundation of a family. However, there will be a very real prospect of same-sex couples having a right to procreate and a further weakening of the link between procreation and the family. If people agree to allowing all couples to get married, regardless of gender, but are not so comfortable granting procreation rights to non-heterosexual couples, then surely a further amendment could be made to the Constitution to reflect this. This could be done by simultaneously asserting the right of married couples to belong to a family and removing any inference to procreation rights. This would actually reflect the contemporary secular working definition of marriage, in which it is primarily conceived as a commitment between two people who love each other as distinct from an institution which is fundamentally ordered towards creating new life.

In the event of a no vote, then I would urge those disaffected by the result not to assume that homophobia has won the day, but to consider directing some of their anger at the fact that the Irish voters have been put by their government between a rock and a hard place.

Niall S. Leahy SJ is a Jesuit scholastic and a member of the Irish province of the Society of Jesus. He is currently undertaking a Professional Masters of Education at Maynooth University and teaching at Clongowes Wood College SJ.

¹ The referendum on 22 May will offer a yes or no vote on the amendment of the Irish constitution to include the clause: 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex.'

² The right was established in *Murray v Ireland* [1991] where it was argued that it was the right of married couples to procreate naturally. The Referendum Commission also identifies the right to beget children as a right of married couples. See <http://refcom2015.ie/marriage/>

³ For an in-depth treatments of the points see O'Mahony, Dr. Conor "The Constitution, the Right to Procreate and the Marriage Referendum" at <http://constitutionproject.ie/?p=503> and Finegan, Dr. Thomas, "Constitutional Equality, the Right to Procreate, and the Marriage Referendum" at <http://ionainstitute.ie/assets/files/Published-Dr-O'Mahony-Reply.pdf>

⁴ "Were such different treatment possible, and such laws introduced, they would be upheld only if they did not create invidious or arbitrary discrimination between opposite sex and same sex couples. This means – in practical terms – that the reason for the different treatment would have to be a very good reason, which served a legitimate legislative purpose. The difference in treatment would also have to be relevant to its purpose and both opposite sex and same sex couples would have to be treated fairly. Whether these requirements are satisfied in any given circumstance would depend on the evidence presented." <http://refcom2015.ie/news/>