

# **The Case for Marriage Equality**

## *A Time to Embrace<sup>1</sup>*

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It is a great pleasure for both of us to be at the Sutherland School of Law, University College Dublin, at the invitation of Ms. Suzanne Egan (UCD Human Rights Network) and members of the UC DLGBTQ+ and UCD Philosophy Society. We are particularly pleased to be sharing a platform with Dr. Maurice Manning, the Chair of this evening's event.

We have titled our presentation 'The Case for Marriage Equality: a Time to Embrace'.

As you are all aware Katherine and I took the case for Marriage Equality during the early years of 21<sup>st</sup> century Ireland. It became known as the 'KAL' case. It was a case born of love, a forever love between us both. We met in 1981 and by the time a couple of months had passed, we had fallen in love.

This intense, involuntary emotional attraction and desire is no different for opposite sex or same sex couples.

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<sup>1</sup> This beautiful phrase is taken from the title of a book by William Stacy Johnson, *A Time to Embrace: Same-Gender Relationships in Religion, Law and Politics* (Grand Rapids: Wm. B. Eerdmans Publishing Co. 2006).

Over the course of those months in 1981 in the town of Boston we started to imagine together the creative possibilities of a shared life of love.

In 1982 on one evening in the quiet of a home in Rockport, Massachusetts we vowed a life-partnership to each other, promising fidelity to each other and life-long cherishing of the other into the future. We promised to share our dreams, our fears, our financial resources, our accomplishments and our failures. We moved to Dublin about a year after that.

Fast forward to Ireland in 2003. Though significant progress had been made to decriminalize homosexuality and to place in law some protections against discriminatory treatment of gay and lesbian people, there was no law that would protect and support our life-long love.

That is the reason we travelled to Canada to marry each other in a civil law ceremony in 2003. That is the reason we subsequently took a case against the Irish state to recognize our marriage in 2006.

We lost in the High Court that same year. We sought an appeal to the Supreme Court and finally had a short hour before that court in 2011, five long years after we lost. The Supreme Court judges effectively sent us back to the High Court to argue explicitly against the constitutionality of the statutory ban on marriage for same-sex couples. So we started our way again to the High Court and lo and behold a new government was formed during this same period, with a Constitutional Convention as part of its Programme for Government, and the question of same-sex marriage as an agenda item for the Constitutional Convention. An overwhelming majority of citizens and politicians recommended that the Government

should put the question of same-sex marriage to the people. When the Government accepted this recommendation and announced that they would hold a referendum on Marriage Equality, we decided to put our case on hold.

The Case for Marriage Equality has evolved into the Referendum for Marriage Equality.

And so it is that the question of marriage equality is before the People.

It isn't often that 'we the People' get to decide on our core values. This process tells us a lot about who we are and what we aspire to be.

This is a decade of remembrances. And we should remember those who came before us who struggled to give us this precious right to decide for ourselves – and I stress *for ourselves*. In a Republic it is the people and their will who are sovereign and nowhere more visibly so than during key constitutional moments when our core values and institutions are revisited. Jefferson said this should be done every generation. Now it is the turn of this generation in Ireland to decide whether to perpetuate a legacy of the past that foreclosed human possibilities or whether to open our hearts and minds to a more positive future that values human love as a bedrock of a civilized society.

I hope and expect that all who participate in this Referendum will take this right to decide for ourselves seriously and will set to one side the dead hand of history and the chilling effect of orthodoxy on our hearts and minds. I hope and expect all will reflect deeply and personally on the issues that require decision. To exercise this right requires clear-

sightedness about our past and imagination about our future. Our topic this evening is not a narrow sectional interest –it goes to the heart of who we are as a people and the generosity of spirit we owe to one another.

There is a certain majesty in allowing the People decide. It means that change will come not just from the head but also from the heart.

You know that we come here in support of a Yes vote in the Referendum. We want to be clear why. Public Reason and the narrative of our lives demands nothing less.

### **Valuing the Family**

First of all, let us make this as plain as day. We support the concept of the family – we don't seek to alter radically the family or its relationship with the State. The family protected by Article 41 of our Constitution will still be the family based on marriage subsequent to the referendum. (This is something that also needs changing in our view, but that is outside of the scope of the current debate and referendum – it is the work of another day).

Most States in the world value the family – although relatively few of them embed it in their Constitution. In making the case for marriage equality it is vitally important to bring to the surface the reasons why the family is valued as well as the institution of marriage on which it is founded. We need to keep in mind the deeper and fundamental purposes of the family – purposes that should inform how we structure access to the family through the marriage contract. We need to retrieve a sense of the primacy of the family –what it is for and how everyone can benefit

and contribute. And we need to highlight and evaluate restrictive laws controlling access to marriage in the past. The deeper question is whether these restrictive laws on access have served the concept of the family well. We argue not.

So, why value the family? What is a positive rationale for the family that everyone can relate to? And, how does this vantage point help us to think about who ought to have access to marriage, thereby who ought to be recognized and protected as ‘family’ by the Constitution?

Well, the most obvious reason to value the family is because it represents a place, a setting, a relational context where human beings who love one another can grow and nourish each other. It’s a setting where our identities are forged, re-made and reinforced. It is a place of human relationships bristling with hope about human possibilities when love is given space to breathe. Though life is studded with pitfalls and sorrows it also has a capacity for renewal that comes from enabling people find and rediscover joy in their lives together. We all intuit this. What’s really interesting today is what modern science – and especially neuroscience— tells us about this urge to connect. The neuroscientist DaMasio tells us that our brains are ‘wired to connect’. Or, as the philosopher Martin Buber says, ‘we become ourselves in relation.’ In short, we become ourselves with and through the others who are close to us in our lives.

Now – and this is a prime point – becoming who we are in relation is not something that is sex or gender specific.

**Love has no regard for sex or gender.**

Indeed, reflect on the opening words of the provision in our Constitution on the Family.

*Art. 41. 1.1. The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

The Family is said to be the natural primary and fundamental unit group of society. It says nothing about sex or gender.

A couple of more words from the Constitution as it stands:

*Art 41.1.2 . . . The State . . . guarantees to protect the Family in its constitution and authority . . .*

Nothing about sex or gender . . .

I maintain that if we are faithful to this positive image of Family –as a relational context where we grow and nourish each other – and as such an institution that is protected by our Constitution as the fundamental unit group of society, then it follows that there ought to be no sex or gender based barrier to entry.

**Love should be the only ticket to entry.**

Our arguments for a YES vote are rooted in valuing the family as such. YES is ‘pro-family.’

## Valuing Marriage

And what does our Constitution say about Marriage?

*Art 41.3.1 The State pledges itself to guard with special care the institution of Marriage, on which the family is founded, and to protect it against attack.*

Again, nothing about sex or gender – neither for the Family nor for Marriage. Nothing about sex or gender qualifying who is in or who is out in relation to marriage. And, it is marriage that is the gateway to the constitutional family.

So, I want to talk about marriage now.

I stand before you as a married woman. I stand before you as a woman legally married to another woman, for the past twelve years.

Our marriage is rooted in our vows of life-partnership and promise-making to each other – which we spoke of earlier.

Margaret Farley, a moral theologian, writes eloquently about the essence of life-long promise keeping. She says:

Sometimes we love in a way that makes us yearn to gather up our whole future and place it in affirmation of the one we love.” To remain faithful we “cannot, not even in our imagination, play games that will threaten that bond.”

What is the essence of married love? For us, it is not simply about a basket of rights and responsibilities and financial benefits that come in the wake of such a profound life decision. While these are extremely significant, they are not the full sum and substance of marriage.

We married each other because we wanted to bind ourselves in law, as well as in love, to receive societal support for our promise-keeping and the generativity that flows from it. We married each other because in that one act we were able to exercise our human freedom for the single most important choice of our lives.

No one will ever know the psychic well-being that happens when oppression and prejudice life. This is why we took a court case for Marriage Equality, for ourselves, as well as for others. This is why we hope that the People will say YES to the referendum for Marriage Equality.

Marriage confers a legal status and a place in society, including access to a well-defined structure of benefits and obligations.

The term ‘marriage’, however, is not actually defined in the Constitution. Before we took our case, very few people probably thought about whether the term, as it appears in the Constitution, includes same-sex couples. It is obviously true that the framers of the Constitution did not contemplate this issue – it was simply assumed that marriage referred to the traditional notion of the union of one man and woman for life.

But a number of concepts in our Constitution have been redefined, reshaped and re-interpreted over the years – in response to changes in

society and in societal attitudes. And many new laws have been brought into force and others abolished as a result of greater knowledge of particular issues and our changed opinions that affect key dimensions of our lives.

There are so many examples to draw on here:

- The Divorce Referendum twenty years ago – when the People chose to change the legal definition of marriage from ‘for life’ to ‘potentially but not necessarily for life’ [Art 41.3.2]
- In 1973, the Supreme Court affirmed that there was a constitutional right to marital privacy that also allowed for the use of contraceptives (probably not contemplated in 1937 either!)
- The meaning of “primary education” in the Constitution has been expanded to include not just children from ages of 4-12, but also to include education for children with severe disabilities up to the age of 18 if necessary (Sinnott v Minister for Education).

There are also some provisions in our Constitution that clearly show its age, such as the provision in Article 41.2 that recognizes the valuable role played by women in the home. This is clearly a provision that does not chime well with modern reality and which would very likely not have been included if the Constitution were being drafted today. In fact, as many of you know, the Constitutional Convention also recommended to government to put this issue to the People by way of referendum, but the government is dragging its feet on this one!

So, the legal institution of marriage in Ireland has certainly changed from the one that was envisaged in 1937. Back then, under the law, a wife's domicile was regarded as being that of her husband. And according to the law, a husband could not be prosecuted for raping his wife. Legislating has been passed to abolish these two glaring anomalies and to bring the institution into line with substantive conceptions of equality between women and men.

We are advocating a YES vote by the People so that further positive change in the law with regard to marriage will come about. A YES vote will remove the restrictive barriers to the institution of marriage, and open it to all people to enjoy the benefits and constitutional protection of marital union, regardless of sexual identity.

### **The 34<sup>th</sup> Amendment of the Irish Constitution**

The People will be asked to vote on whether or not they believe the Irish Constitution should include the following statement [inserted as article 41.3.2]:

*Marriage may be contracted in accordance with law by two persons without distinction as to their sex."*

What does the amendment mean?

Two people may marry each other, regardless of sex, but in line with other law (for example, it is illegal for siblings to marry).

This amendment will equalize citizens of same-sex and opposite-sex couples.

### **Valuing Equality**

The time is right in Ireland to open our restrictive laws regarding marriage so that all citizens will be treated equally with respect to marriage.

In most other countries where the Courts have interpreted the family and marriage to be open toward same-sex relationships it was mainly because of the interaction of provisions on marriage with provisions on equality.

In the 2003 *Goodridge v Department of Health* groundbreaking case in Massachusetts, Chief Justice Marshall had this to say:

“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. . . . The question before us is whether the Commonwealth may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. **We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second class citizens.**”

Likewise, the Judgment of Justice Albie Sachs of the South African Constitution Court in *Min of Home Affairs et al. v Fourie* in 2005. In that case, the Court held that excluding same-sex couples from equal

protection in terms of access to marriage breached the terms of the South African Constitution. In the course of his judgment Justice Sachs stated:

“The exclusion of same-sex couples from the benefits and responsibilities of marriage . . . . represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities . . . .

What the applicants in this matter seek is . . . the right to be acknowledged as equals and to be embraced with dignity by the law.”

Let’s turn to the philosophers now to help us unpack the meaning of ‘equality.’ It is incumbent on us to do so, if one of our prime arguments to the People to Vote Yes in this referendum is rooted in the notion/concept of ‘equality.’

Two thinkers who have inspired us in the tradition of political philosophy are John Rawls, a liberal philosopher, and Iris Young, a radical philosopher. Taking some of the best of what both have to offer, we have developed what we call ‘**an inclusive understanding of equality**’ that guides much of our practice in every day life.

Within the “powerful ideal of equality” in liberal political philosophy, equality is theorised with reference to the foundational notion of the individual’s equal moral worth.

It is this claim of equal moral worth that underlies John Rawls’ conception of equality and its intrinsic connection to a society organised according to the principles of justice. However, in our inclusive understanding of equality, we suggest that we are of equal intrinsic worth by virtue of being the human we are. Our equal worth is not dependent exclusively on capacities or characteristics that we hold in common (as Rawls has argued) or, our equal worth is not simply dependent on our *sameness*; it is dependent also on the reality of diverse ways of being human. So, we are inherently equal to one another *in and through our differences*, as well as in and through the common essence we share in our humanity. Put simply, equality will only be realised when we recognise our differences.

Moving on, then, we must think about the type of society and institutions we need to embrace difference mutually, so that everyone’s human rights are respected equally. As Iris Young wrote:

‘The ordering and governing of a just society must not design institutions and laws that eliminate group difference, but instead promote equality ‘among socially and culturally differentiated groups, who mutually respect one another *and affirm* one another in their differences.’

From this, we can conclude:

- The practice of equality requires attention to group differences and;
- Decisions regarding the design or re-design of systems, laws and policies should be the product of political practices that acknowledge group differences and are inclusive of the different identities of individuals.

Equality, as well as another closely related concept, dignity, is also a core value of international human rights law. The Preamble to the Charter of the United Nations in 1945 and the Preamble to the Universal Declaration on Human Rights in 1948 refer to ‘the dignity and worth of the human person’ and the ‘equal rights of men and women.’ Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognise ‘the inherent dignity and ... the equal and inalienable rights of all members of the human family’ as the foundation of freedom and justice.

Our own Constitution, Bunreacht na hEireann, upholds equality in Article 40.1 when it states :

‘All citizens shall, as human persons, be held equal before the law.’

The Constitution also refers expressly to dignity in the Preamble when it outlines that the people seek “to promote the common good with observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual be assured.”

This appeal to the centrality of individual liberty, or freedom—as expressed by Enlightenment thinkers such as Immanuel Kant—requires that all persons be treated with respect and dignity as human beings.

Each should be allowed to live the life of his or her own choosing. Amartya Sen—the great contemporary political philosopher and economist—re-interprets this powerful ideal of freedom by arguing that a society characterised as ‘equal’ must provide people with economic and social freedoms ‘to lead the kind of lives we have reason to value.’ A society filled with substantive equality for all means that each one of us are free to choose the lives we wish to live. In our case—as in the case of all others whose identity resides within a sexual minority—we ought to be free to live our sexual identity with integrity, and without unwarranted interference by the majority. When we are talking about the human right to marry, in plain, common language, this translates to mean *that we have the right to marry the person we choose to love, that we have a fundamental right to marry the person of our choice.*

### **What about the Children?**

Clare O’Connell, the daughter of two lesbian mothers, stated publicly when she was 13 years old, ‘we want to be able to say we have a real family; we don’t want anyone to be able to question that. We want people to see that children of lesbian parents aren’t all messed up, we are normal, we deserve the same rights as anyone else.’”

Now, there are some who say that opening the institution of marriage to same-sex couples will deny the rights of the children. Clare O’Connell (and many other children of same-sex couples) would not agree with this position. There are some who say that same-sex marriage would deny children the right to a mother and a father. The United Nations

Convention on the rights of the child declares that every child has the right to know and be cared for by his or her parents (Art 7.1). The Convention, however, does not define a parent in either social or biological terms [that is, does not insist that parent means the biological parent], and more significantly, perhaps, that Article 2 outlaws discrimination against children on the basis of their parents' status or activities.”

So saying ‘yes’ to equality in the referendum means that Irish children of lesbian and gay couples will be recognized and protected as FAMILY by our Constitution.

Saying ‘yes’ to equality means that Irish children of lesbian and gay couples will have equal status to Irish children of heterosexual couples.

Research evidence show extremely positive outcomes for children raised by same-sex loving parents, and no indication that they do less well than children raised by opposite sex parent.

No one has a right to a child. The best interests of children can only be supported by parents who love and nourish them.

It is love that is the heart of the matter, and it is the protection of the rights and best interests of ALL our children that our Constitution and laws should uphold.

## **A Time to Embrace**

Returning to Rawls' principle of the equal moral worth of all human beings, there can be no valid ethical, intellectual, legal or spiritual argument to interpret the Constitution in a way that settles for less than equality for some of the citizens of this land. There can be no sound moral arguments to treat some citizens as second-class citizens. All of us in this room know that the arguments for "separate but equal" never worked in any other civil rights movement throughout the world.

And so we conclude with an invitation to all citizens of Ireland to Vote Yes.

On the 22<sup>nd</sup> May in Ireland it will be 'A Time to Embrace' all the citizens and the children of our nation equally.

ENDS

