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## National Report: Ireland

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# NATIONAL REPORT: IRELAND

DR. AISLING PARKES\*

## 1. Legal Framework

In Ireland, we operate under a system of Common Law (all countries which were colonised by the British have a common law system and decisions made in the courts system operate on the basis of precedent). This means that the primary sources of Irish

Laws are:

- ❖ A written Constitution (Bunreacht na hEireann, 1937)
- ❖ Legislation
- ❖ Case Law
- ❖ European Union Law

The secondary sources of law are:

- ❖ International Law
- ❖ Custom
- ❖ Canon Law
- ❖ Scholarly writings and commentaries

We have a dualist system, which means that in order for a principle of international law to take effect, it must be incorporated into our domestic legal system before it will take effect.

### *The Courts System*

There are both civil and criminal courts in Ireland but the hierarchy for both are very similar.

The Hierarchy of the Civil law courts are as follows (lowest to highest):

- ❖ District Court
- ❖ Circuit Court
- ❖ High Court
- ❖ Supreme Court

The hierarchy of the Criminal Law Courts is as follows (lowest to highest):

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- ❖ District Court
- ❖ Circuit Criminal Court
- ❖ Central Criminal Court
- ❖ Court of Criminal Appeal
- ❖ Supreme Court

## 2. Constitutional Regulations Applicable to Same Sex Partnerships

The position of marriage has a unique position under Irish Law as it is constitutionally enshrined. Indeed, Article 41.3.1 of the Constitution specifically provides that 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.’ Furthermore, in the case of *Ryan v. Attorney General* (1965), IR 294 Kenny, J. stated that the right to marry is also one of the unspecified personal rights protected by Article 40 of the Constitution. However, analogous to the other unspecified personal rights under Article 40, this right is not absolute.

The definition of marriage under Irish Law has been adapted from that elucidated by Ld Penzanze in *Hyde v. Hyde* (1866) LR P & D 130 where he described it as “the voluntary union for life of one man and one woman to the exclusion of all others”. This definition has since found favour in Irish Law in the case of *B v. R* (1995) where Costello P. was of the opinion that “marriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life.” Thus, it is clear from both of these definitions that marriage under Irish law must be between persons of the opposite sex. In a relatively recent Irish case, *Zappone and Gilligan v. Revenue Commissioners and Others* (14<sup>th</sup> December, 2006), the Irish High Court refused to redefine marriage so as to include marriage between same-sex couples on the basis that the institution of marriage between one man and one woman was constitutionally enshrined. The plaintiffs in this case were arguing that in light of a changing consensus worldwide in favour of same sex marriage, it was time that the definition was ameliorated to reflect this. The High Court refused.

### Question 3. Legal Statutes

Ireland has no legislation allowing for same sex marriage. Furthermore, Ireland currently has no legislation regulating civil unions between same sex couples. However, there is a *Civil Partnership Bill* being debated in the Houses of the Oireachtas (the Irish Parliament) which will allow some form of recognition for same sex couples, albeit not marriage. When this bill becomes an act, it will still be subordinate to the Irish Constitution which will always take precedence. Thus, these unions will not have the same elevated status as marriage and will not be in receipt of constitutional

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protection. Since the bill has not yet been passed, it is not yet definite as to which unions it will apply but it appears it will apply to both same-sex couples and heterosexual couples. This bill is currently at committee stage. Currently, there are no legal statutes which recognise same sex couples for specific purposes.

**Question 11. Non-Legislative Regulations**

Ireland does not provide specific benefits/rights to same-sex couples through administrative acts.

**Question 12: Judicial Construction of the Law**

In a recent Irish case called *JMcD v. L and Anor.* [2009] IESC 81, the Irish Supreme Court overturned an earlier decision by the High Court which claimed that a female same-sex couple and their child (which was born as a result of a sperm donor agreement) was not a de facto family under Irish Law. The Supreme Court refused to attribute any legal status to the same sex couple, despite the fact that they had undergone a civil union in the U.K. The case has since been remitted back to the High Court for a decision concerning the rights of the natural father concerning guardianship of the child. Essentially, this case reaffirms the very strict approach adopted in Ireland to the concept of the family based on marriage – that it must be one man and one woman.