Constitution Review Group Report
The Family

Introduction

Article 41 contains the main provisions relating to the family. Article 42 is closely linked with Article 41 and has been construed by the courts as containing in Article 42.5 a guarantee of children's rights which go beyond education (*In re The Adoption (No2) Bill 1987* [1989] IR 656). Article 40.3 is also relevant, because the rights of an unmarried mother in relation to her child and the rights of a child born of unmarried parents have been held to be personal rights protected by Article 40.3 (*The State (Nicolau) v An Bord Uchtála* [1966] IR 567 and *G v An Bord Uchtála* [1980] IR 32.

Article 41 was a novel provision in 1937. The Constitution of 1922 contained no provision relating to family and marriage. It is generally considered that Articles 41and 42 were heavily influenced by Roman Catholic teaching and Papal encyclicals. They were clearly drafted with only one family in mind, namely, the family based on marriage.

The family in Irish society has been profoundly affected by social trends since 1937. The mores of Irish society have changed significantly over the past six decades. The traditional Roman Catholic ethos has been weakened by various influences including secularisation, urbanisation, changing attitudes to sexual behaviour, the use of contraceptives, social acceptance of premarital relations, cohabitation and single parenthood, a lower norm for family size, increased readiness to accept separation and divorce, greater economic independence of women.

The most striking changes in the family in Ireland since 1937 are the 30% drop in the birth-rate from 18.6 to 13.4 per 1.000, the rise from 3% to 20% in the proportion of births outside marriage and the increase from 5.6% to 32.4% in the proportion of married women who work outside the home. The traditional family consisting of a husband, wife and four to five children has dwindled to husband, wife and two children.

The absence of divorce in Ireland and the significant increase in marital breakdown has meant that there are many couples living together, some with children, who may wish to be married. This has distorted attitudes to non-marital families and, in particular, has resulted in anomalies in the tax and social welfare codes.

These social changes call for amendments in the Constitution, some of which raise difficult issues that require the achievement of delicate balances for their resolution.

Provisions

At the time of drafting the report the litigation on the divorce referendum is proceeding. The Review Group is in a position where the current provisions of Article 41.3 are unclear. The provisions of Article 41, Article 42 and Article 40.3 as they have been interpreted by the courts and in so far as they relate to the family might be divided as follows:

i) recognition and protection of the family based on marriage and the rights of such family units
ii) protection for certain rights of parents and children resulting from a family based on marriage and for other relationships recognised by the natural law, that is, those of natural mothers and children

iii) recognition and support for a particular role of women and mothers within the home

iv) protection for the institution of marriage and consequent prohibition of (or limited permission for) divorce and recognition of certain foreign divorces.

Issues

The Review Group has identified eleven issues which need to be addressed:

1 the constitutional definition of 'family'

2 the balance between the rights of the family as a unit and the rights of the individual members

3 constitutional protection for the rights of a natural father

4 express constitutional protection for the rights of a natural mother

5 expanded constitutional guarantee for the rights of the child

6 the relative balance between parental and children's rights

7 the description and qualification of family rights

8 the continued constitutional protection of the institution of marriage and any necessary constitutional limitations to be placed on it

9 whether there should be an express right to marry and found a family

10 the reference to the role of women and mothers or other persons within the home

11 whether the Constitution should continue to regulate the position of foreign divorces and, if so, how

1 constitutional definition of 'family'

The family recognised and protected in Articles 41 and 42 is the family based on marriage. In *The State (Nicolaou) v An Bord Uchtála* Walsh J in the Supreme Court judgment stated that it was:

> ... quite clear ... that the family referred to in [Article 41] is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the laws for the time being in force in the State.

Support for this view derives from Article 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.

The effect of this definition is that neither a non-marital family nor its members are entitled to any of the protection or guarantees of Article 41. Likewise, they are probably not comprehended by the terms of Article 42: see *G v An Bord Uchtála*. As indicated above, rights of an unmarried mother and of a child of unmarried parents, which some might consider as rights resulting from a family relationship, have been held to be personal rights which the State is obliged to protect under Article 40.3. An unmarried father has been held to have no personal rights under Article 40.3 in relation to his child (*The State (Nicolaou) v An*

Bord Uchtála). In that case the father sought to challenge the provisions of the Adoption Act 1952 which permitted the adoption of his child without his consent.

The Review Group has received many submissions to the effect that Article 41 should be amended so as to recognise in the Constitution family units other than the family based on marriage.

In Irish society there are numerous units which are generally regarded as family units but which are not families based on marriage. There are differences in the treatment of such family units for different purposes. For certain Social Welfare purposes heterosexual couples cohabiting are effectively treated as a family unit. They are not in general so treated for the purposes of tax laws or succession laws.

The Review Group appreciates the point of view of those who feel that persons living in family units not based on marriage should have constitutional recognition. However, the constitutional protection of rights of any family unit other than a family based on marriage presents significant difficulties.

The first and obvious difficulty is that once one goes beyond the family based on marriage definition becomes very difficult. Thus the multiplicity of differing units which may be capable of being considered as families include:

> a cohabiting heterosexual couple with no children
>
> a cohabiting heterosexual couple looking after the children of either or both parents
>
> a cohabiting heterosexual couple either of whom is already married
>
> a cohabiting heterosexual couple either of whom is already married, whose children (all or some of them) are being looked after elsewhere
>
> unmarried lone parents and their children
>
> homosexual and lesbian couples.

Questions will also arise such as what duration of cohabitation (one month? six months? one year? five years?) should qualify for treatment as a family. Furthermore, certain persons living together either with or without children may be deliberately choosing to do so without being married, that is, choosing deliberately not to have a legal basis for their relationship. Would it be an interference with their personal rights to accord in effect a legal status to their family unit?

The Review Group has considered the provisions in relation to family and marriage in many of the European constitutions, in the European Convention on Human Rights (ECHR) and the International Covenant of Civil and Political Rights (CCPR). None appears to attempt a definition of a 'family' in terms other than one based on marriage. Some clearly link family with marriage. Others are silent on the matter. Macedonia and Slovenia refer expressly to non-marital cohabitation in apparent distinction from the family. Some refer to the equal rights of children born 'out of wedlock' with those 'in wedlock' or 'of marriage' (Poland and the Slovak Republic) or the equal rights of children born 'outside matrimony' with those born 'in matrimony' (Slovenia).

If an amendment were made so that the family referred to in the Constitution was not confined to the family based on marriage, it would seem necessary to leave to the judiciary, on a case by case basis, the definition of the form of units which might constitute a family within the meaning of any such amended provision. While this could create uncertainty, it is essentially the approach of the ECHR, Article 8(1) of which provides:

> Everyone has the right to respect for his private and family life, his home and his correspondence.

The focus of the Article is, however, on the protection of an individual's right to family life as distinct from protection of the rights of a family unit.

The European Court of Human Rights and the European Commission of Human Rights have interpreted 'family life' within the meaning of Article 8 as extending beyond formal or legitimate arrangements. The Commission in *K v UK* No 11468/85 50 DR 199 stated:

> The question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties.

In *Keegan V Ireland* (1994) 18 EHRR 342 the court stated:

> The Court recalls that the notion of the 'family' in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage. A child born from such a relationship is *ipso jure* part of that 'family' unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life, even if at the time of his birth the parents are no longer cohabiting or if their relationship has then ended.

The present emphasis of Article 41 is the protection of rights of the family as a unit rather than the protection of rights of individuals resulting from a family relationship (see Issue 2 below). The Review Group considers that this approach presents particular difficulties if the family unit is extended beyond the family based on marriage by reason of the uncertainties referred to above as to the existence at any given time of any such family unit.

An alternative approach is to retain in the Constitution a pledge by the State to protect the family based on marriage but also to guarantee to all individuals a right to respect for their family life whether that family is, or is not, based on marriage. For the reasons that appear later in this section of the report, this is the preferred option of the Review Group.

2 the balance between the rights of the family unit and those of the individual members

The rights referred to in Article 41.1 are the rights of the family as a unit as distinct from the rights of individual members of the family. In *Murray v Ireland* [1985] IR 532, Costello J stated:

> The rights in Article 41.1.1° are those which can properly be said to belong to the institution itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family.

A similar approach was taken by Finlay CJ in *L v L* [1992] 2 IR 77 where he said:

> Neither Article 41.1.1° - 2° purports to create any particular right within the family, or to grant to any individual member of the family rights, whether of property or otherwise, against other members of the family, but rather deals with the protection of the family from external forces.

The Review Group considers that the present focus of Articles 41 and 42 emphasises the rights of the family as a unit to the possible detriment of individual members. Giving to the family unit rights which are described as 'inalienable or imprescriptible', even if they are interpreted as not being absolute rights, potentially places too much emphasis on the rights of the family as a unit as compared with the rights of individuals within the unit. It is desirable that the family should retain a certain authority and autonomy. However, this should not be such so as to prevent the State from intervening where the protection of the individual rights of one member of the family requires this or to prejudice the rights of the individuals within the family. Professor William Duncan (see Appendix 22 – 'the constitutional protection of parental rights') has identified the problem as follows:

> The problem seems to be essentially that of achieving a legal balance which will offer security and a measure of equality to individual family members in a manner which does not devalue or endanger the family as an institution.

The history of adoption legislation in the State and the reluctance of the Oireachtas until recently to permit the adoption of legitimate children undoubtedly was influenced by a fear that any such provision would conflict with the rights of the family in Article 41.1.1°. The circumstances in which the Adoption Act 1988 permits the adoption of legitimate children are extremely limited, essentially those envisaged in Article 42.5, namely where parents for physical or moral reasons have failed in their duty towards their children. It was primarily in reliance upon that Article, while referring also to the obligations of the State under Article 40.3 to vindicate the personal rights of a child whose parents had failed in their duty to it, that the Supreme Court upheld as constitutional the Adoption (No2) Bill 1987 in the relevant Article 26 reference.

From the Review Group's consideration of the family and marriage provisions in many of the European constitutions and in the ECHR and CCPR, it appears that with the exception of Luxembourg, none guarantees expressly the rights of the family unit as such. Many recognise the family as a primary or fundamental unit in society and some state that it is entitled to the special protection of the State or society but the rights or duties which derive from marriage, family, parenthood or as a child are guaranteed to or imposed on the individuals. The Review Group considers that this would be the better approach in any revised form of Article 41.

3 constitutional protection for the rights of a natural father

A natural father is considered not to have any constitutionally-protected rights to his child. This arises from the decision of the Supreme Court in *The State (Nicolaou) v An Bord Uchtála*. In that case the child of a natural father had been adopted pursuant to the Adoption Act 1952 without his consent. He challenged the provisions of the Adoption Act which permitted that to be done. The Supreme Court held:

i) a natural father is not a member of a family within Article 41

ii) a natural father is not a 'parent' within Article 42

iii) a natural father has no personal right in relation to his child which the State is bound to protect under Article 40.3

The basis for the third conclusion is stated by Walsh J:

> It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights, to either the custody, or society of that child and the Court has not been satisfied that any such right has ever been recognised as part of the natural law. If an illegitimate child has a natural right to look to his father for support that would impose a duty on the father but it would not of itself confer any right upon the father.

Since the decision of the Supreme Court in *The State (Nicolaou) v An Bord Uchtála*, there have been two significant developments in relation to the legal as distinct from the constitutional position relating to the rights of a natural father.

Firstly, section 12 of the Status of Children Act 1987 amended the Guardianship of Infants Act 1964 by the insertion of the following section:

> 6A(1) Where the father and mother of an infant have not married each other the court may, on the application of the father, by order appoint him to be a guardian of the infant.

The above section has been construed by the Supreme Court as giving to an unmarried father a right to apply to the court to be appointed a guardian as distinct from giving to him a right to be a guardian which is capable of being annulled, that is to say, a defeasible right (*K v W* [1990] ILRM 121).

There are two particularly important consequences for an unmarried father who is appointed a guardian of his children. Under section 10(2) of the Guardianship of Infants Act 1964, he is entitled, as against every person who is not a joint guardian of the children with him (normally the mother), to the custody of the children. Also, under the Adoption Acts his child may not be adopted without his consent unless the court makes an order dispensing with his consent. However, a father who is not appointed the guardian of his children has no such defeasible right to custody nor to have to give his consent for the adoption of his child.

The second important development is the finding by the European Court of Human Rights that Ireland was in breach of Article 8 of the ECHR in that it failed to respect the family life of an unmarried father who had had a stable relationship with the mother of his child in permitting the placement of the child for adoption without his knowledge or consent: see the *Keegan* case.

Ireland is, therefore, now obliged to give natural fathers to whom children are born in the context of 'family life' as interpreted by the European Court of Human Rights, a legal opportunity to establish a relationship with that child. This obviously requires a legal entitlement to be consulted before the child is placed for adoption; also it would seem to require that he be entitled at a minimum to rights of access to the child and possibly defeasible rights to joint guardianship or joint custody with the natural mother. The European Court of Human Rights expressly declined to consider whether Ireland was in breach of Article 8 by reason of its failure to grant to Mr Keegan a defeasible right to be the guardian of his child. It expressed its approach to these issues as follows:

> According to the principles set out by the Court in its case law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family.

There is of course no requirement that these rights be constitutional rights. It would be sufficient for Ireland in order to comply with its obligations under the ECHR to grant such rights by legislation.

There has been much criticism of the continued constitutional ostracism of natural fathers. This can be readily understood in relation to those natural fathers who either live in a stable relationship with the natural mother, or have established a relationship with the child. However, there does not appear to be justification for giving constitutional rights to every natural father simply by reason of biological links and thus include fatherhood resulting from rape, incest or sperm donorship.

The Review Group considers that the solution appears to lie in following the approach of Article 8 of the ECHR in guaranteeing to every person respect for 'family life' which has been interpreted to include non-marital family life but yet requiring the existence of family ties between the mother and the father. This may be a way of granting constitutional rights to those fathers who have, or had, a stable relationship with the mother prior to birth, or subsequent to birth with the child, while excluding persons from having such rights who are only biological fathers without any such relationship. In the context of the Irish Constitution it would have to be made clear that the reference to family life included family life not based on marriage.

4 express constitutional protection for the rights of a natural mother

A natural mother is not considered to have any rights protected by Articles 41 or 42. She is considered to have rights in relation to her child which are personal rights protected by Article 40.3 (*G v An Bord Uchtála*).

The Review Group is recommending that rights previously identified by the courts as unenumerated personal rights protected by Article 40.3 should now be enumerated in the Constitution. It would be appropriate that the rights of a natural mother be specified in Articles 41 and 42. If as suggested above a new section were inserted in Article 41 giving to everyone a right to respect for their family life, this would clearly include the rights of a natural mother in relation to her child.

Consideration should also be given to whether any modified form of Article 42.1 which refers to parental rights should expressly include unmarried parents. If this were done, care would have to be taken with the drafting to avoid giving rights to natural fathers who have no relationship with the natural mother or no relationship, other than a biological one, with the child.

5 expanded constitutional guarantee for the rights of the child

There is no express reference in Article 41 to the child. As already indicated, the focus of this Article is on the rights of the family as a unit and on protection of it from intervention by the State rather than on the rights of the individual members of the family. Only Article 42.5 makes reference to the rights of the child and imposes any specific obligation on the State.

The *Report on the Kilkenny Incest Investigation* chaired by Judge Catherine McGuinness observed that 'the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the right of parents than to the rights of children' and went on to recommend the amendment of the Constitution to include 'a specific and overt declaration of the rights of born children'.

unenumerated rights

Over the years judicial interpretation of the Constitution has revealed certain unenumerated rights to which the child is entitled:

1 the judgments of the High Court and the Supreme Court in *G v An Bord Uchtála* [1980] IR 32 identify:

   i) the right to bodily integrity

   ii) the right to an opportunity to be reared with due regard to religious, moral, intellectual and physical welfare.

   The judgments went on to emphasise that the State, having regard to the provisions of Article 40.3.1°, must by its laws defend and vindicate these rights as far as practicable.

   O'Higgins CJ in the Supreme Court added to the list when he pointed out that a child, having been born, has the right 'to be fed and to live, to be reared and educated and to have the opportunity of working and realising his or her full personality and dignity as a human being and that these rights must equally be protected and vindicated by the State.'

2 the Supreme Court returned to this issue in *In re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656.

   In this reference to the Supreme Court to test the constitutionality of the Bill, the court was required to construe Article 42.5 and in doing so stated that the rights of a child are not limited to those contained in Article 41 and 42 but include the rights referred to in Articles 40, 43 and 44. This important statement confirms that the child is entitled to all of the personal rights identified in Article 40.

3 *FN (a minor) v Minister for Education* [1995] 2 ILRM 297 was a High Court case dealing with child care and the detention of a child with very special needs caused by a hyperkinetic conduct disorder. It was held that 'where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42.5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child'.

However, it was stated that this was not an absolute duty. Later in the judgment it was stated by Geoghegan J:

> ... the State is under a constitutional obligation towards the applicant to establish as soon as reasonably practicable ... suitable arrangements of containment with treatment for the applicant.

This is a strong affirmation by the High Court of the constitutional obligation on the state to make proper provision for the welfare of a child suffering a psychiatric illness. This is consistent with the judgment of the High Court in *G v An Bord Uchtála* which identified the child's constitutional right to be reared with due regard to her religious, moral, intellectual, physical and social welfare. This wording follows closely on Article 42.1 with the important distinction that the word *welfare* is included instead of *education*.

Consistent with the view already expressed by the Review Group relating to the specific inclusion in the Constitution of identified unenumerated rights, the Review Group recommends the express inclusion of the unenumerated rights of the child set out above. A child is, of course, a person, and therefore the general constitutional rights shared by adults, such as the right to bodily integrity, will be protected elsewhere in the Constitution. Article 41 should contain an express guarantee of those rights of a child which are not guaranteed elsewhere and are peculiar to children, such as the right to be reared with due regard for his or her welfare.

United Nations Convention on the Rights of the Child (CRC)

In September 1992, Ireland ratified the CRC. It constitutes a comprehensive compilation of child-specific rights, many of which have already been identified by the superior courts as unenumerated rights under the Constitution. They include the right to education, freedom of religion, expression, assembly and association.

However, two separate and distinct issues are of interest and may inspire constitutional amendment.

1 The first of these is contained in Article 7 of CRC which states

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality and, as far as possible, the *right to know and be cared for by his or her parents* (emphasis added).

The Review Group recommends that a child ought to have a right as far as is practicable to his or her own identify which includes a knowledge and history of his or her own birth parents. The child ought to be entitled to this information not only for genetic and health reasons but also for psychological reasons. The Review Group recognises that in the case of adoption it may be desirable in the child's interests to regulate the time and manner in which the child should be entitled to this information. There may be other situations where such regulation is also desirable. Thus, the protection of any such right in the Constitution should be subject to regulation by law in the interests of the child.

In addition, the child should have a right as far as is practicable to be cared for by both parents. This is particularly so where the child is a non-marital child. It has already been pointed out that a natural father has no constitutionally protected rights in relation to his child. However, the judgment of Walsh J in *The State (Nicolaou) v An Bord Uchtála* seems to imply that such a child may have a constitutional right to know and be cared for by his or her natural father where it stated:

> If an illegitimate child has a natural right to look to his father for support, that would impose a duty on the father but it would not of itself confer any right upon the father.

2 Throughout the text of the CRC, reference is made to the concept of the 'best interests of the child': see *inter alia* Articles 3, 9 and 18. These Articles deal with different situations such as actions concerning children where the best interest of the child shall be 'a primary consideration' (Article 3), the prohibition of a separation of a child from his or her parents against his or her will, except in certain circumstances, and where 'such separation is necessary for the best interests of the child' (Article 9), where it provides that both parents shall have common responsibilities for the upbringing and development of the child and that 'the best interests of the child will be their basic concern' (Article 18).

Section 3(2)(b) of the Child Care Act 1991 provides that the Health Board, in exercising its function in the care and protection of children, shall 'have regard to the rights and duties of parents, whether under the Constitution or otherwise and shall regard the welfare of the child as the first and paramount consideration'. Accordingly, it appears that the operation of the Child Care Act will closely coincide with the principles set out in CRC.

Section 3 of the Guardianship of Infants Act 1964 also provides that the court shall regard the welfare of the infant as the first and paramount consideration.

However, in *In re JH (an infant)* [1985] IR 375 the Supreme Court held that section 3 of the 1964 Act must 'be construed as involving a constitutional presumption that the welfare of such a child is to be found within the family unless the Court is satisfied that there are compelling reasons why this cannot be achieved or the evidence establishes an exceptional case where the parents have, for moral or physical reasons, failed, and continue to fail to provide education for the child'. In this instance the child was returned to his natural parents who had married subsequent to his birth and placement for adoption but before finalisation of the adoption.

The Review Group considers that, notwithstanding the above legislative provisions, it is desirable to put into the Constitution an express obligation to treat the best interests of the child as a paramount consideration in any actions relating to children. Any such provision might be modelled, with the appropriate changes to suit an Irish context, on Article 3.1 of the CRC which provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be of paramount consideration.

The existence of such a provision would oblige those making decisions in relation to children to take into account not only the child's right to be cared for by his or her parents (which the Review Group suggests should now be constitutionally protected) but also such matters as the desirability of continuity in a child's upbringing. This is expressly recognised by Article 20.3 of the CRC and referred to by Professor Duncan (See appendix 22).

6 the relative balance between parental and children's rights

Closely linked with issues relating to the balance between the rights of the family unit and of the individual members are the issues relating to the correct balance between any constitutional protection of family autonomy or parental rights and the rights of the child. Professor Duncan has discussed these fully.

Express constitutional permission for State intervention is limited at present in Article 42.5 to 'exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children'. If a decision is made to amend Article 41 so as to grant express rights to children and also maintain an express guarantee of parents' rights and duties, it would appear necessary to expand the circumstances referred to in Article 42.5 so as to include a situation where the protection of the constitutionally guaranteed rights of children require intervention. A re-wording of the State's duty to the child under this Article is necessary in the light of the Review Group's proposed amendments to guarantee expressly certain rights of the child and elsewhere remove adjectives and phrases which appear to refer to natural law which have been a source of some difficulties (see Issue 7 below).

Further, if parental rights and children's rights are both being expressly guaranteed, it would be desirable that the Constitution make clear which of these rights should take precedence in the event of a conflict between the rights. One can envisage, for example, a situation where a child has lived for, say, ten years with foster parents and a natural father or mother seeks to recover the custody of that child. The natural mother might well have a constitutional right to the custody of the child but the best interests of the child might require it to remain with its foster parents. If, as suggested above, there is an express statement included in any revised Article 41 that in all decisions affecting a child its best interests should be a paramount consideration, then this would resolve any conflict in favour of the child.

7 the description and qualification of family rights

Article 41.1.1° recognises the family as 'a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law'. Article 42.1 refers to the 'inalienable right and duty of parents', Article 42.5 refers to the 'natural and imprescriptible' rights of the child. These are clearly references to natural law. As Mr Justice Walsh has stated (See 'The Constitution and Constitutional Rights' in *The Constitution of Ireland 1937 to 1987*, IPA, Dublin 1988):

The Constitution does not claim to confer or bestow any of the rights set out [in Articles 41 to 44] but rather expressly acknowledges them as having existence outside the law and beyond the law.

Notwithstanding this, no clear meaning of these terms has emerged from the judicial consideration of them. In *Ryan v Attorney General* [1965] IR 294 Kenny J interpreted 'inalienable' as meaning 'that which cannot be transferred or given away' and 'imprescriptible' as 'that which cannot be lost by the passage of time or abandoned by non-exercise'. However, in *G v An Bord Uchtála* Walsh J referred to some inalienable rights being 'absolutely inalienable' and others as 'relatively inalienable'. Moreover, notwithstanding the absolutist language of this subsection, Costello J in *Murray v Ireland* [1985] IR 532 considered that the rights of the family under the Constitution may be validly restricted by the State. Further in *In the Matter of The Matrimonial Home Bill 1993* [1994] ILRM 241, the Supreme Court, in holding that the Bill, which gave rights to a spouse to a joint tenancy in the family home, was unconstitutional, stated:

> ... the court is satisfied that such provisions [of the Bill] do not constitute reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family.

The Review Group, as already indicated, considers that there should continue to be express protection for the rights of the family based on marriage. It recognises that it would not be possible to set out comprehensively in the Constitution what are the rights of the family and the precise interpretation of such rights will fall to the courts. However, it considers that the rights protected should not be described as 'inalienable' or 'imprescriptible'. These words have given rise to judicial decisions which some consider as tilting the balance in favour of the autonomy of the family to the possible detriment of individual members: see, for example, *In re JH (an Infant)*. Others consider that the present Article 41 has prevented some of the excesses of State intervention in family life experienced in other jurisdictions: see Professor Duncan – Appendix 22. The Review Group considers that the protection of the family in its constitutional authority together with the express guarantee of certain rights of the child (see Issue 5 above) and specific criteria for state intervention as suggested below should provide a reasonable balance.

Apart from the necessity for the State to act where the rights and welfare of a child requires this, there may be other circumstances in which the State should be permitted to interfere with the exercise of family rights or restrict their exercise. The situation which arose in *Murray v Ireland*, where convicted criminals are imprisoned and deprived of the ability to exercise their conjugal rights, is one such example. Notwithstanding that the courts have interpreted even the rather absolutist wording of the existing provisions of Article 41 as not preventing certain restrictions on the exercise of family rights by the State, it appears desirable to set out in the Constitution the relevant criteria which should apply to any such restriction by the State. Article 8.2 of the ECHR might provide a useful model for any such qualifying clause. It provides:

> There shall be no interference by a public authority with the exercise of this right (to respect for, *inter alia*, family life) except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

Article 8.1 of the Convention guarantees respect for private life, home and correspondence in addition to family life. Hence not all the above criteria may be relevant to guarantees in relation to family life alone.

8 the continued constitutional protection of the institution of marriage and any necessary constitutional limitations to be placed on it

The issue to be considered here is whether the Constitution should retain Article 41.3.1° or a revised form of it. The Article provides:

> 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.

The effect of this Article is that the State may not penalise marriage or the married state. This Article has been relied upon successfully to challenge a number of provisions which had the effect of penalising the married state: see for example, *Murphy V Attorney General* [1982] IR 241 – the challenge to the prejudicial taxation of married couples. It would also appear to provide constitutional justification for legislation favouring the married state.

The retention of a pledge to protect marriage similar to this Article would not appear to conflict with Ireland's obligations under the European Convention on Human Rights, Article 12 of which provides:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

This has been construed by the European Court of Human Rights as permitting a State to treat families based on marriage more favourably than ones not so based, provided treatment of the latter does not conflict with those individuals' rights to family life under Article 8 of the Convention.

The Review Group considers that a revised Article 41 should retain a pledge by the State to guard with special care the institution of marriage and to protect it against attack but that a further amendment should be made so as to make it clear that this pledge by the State should not prevent the Oireachtas from providing protection for the benefit of family units based on a relationship other than marriage.

While the Review Group favours an express pledge by the State to protect the family based on marriage, it does not favour the retention of the words 'upon which the family is founded' in Article 41.3.1°. These words have led to an exclusively marriage-based definition of the family which no longer accords with the social structure in Ireland.

9 express guarantee of the right to marry and found a family

Such rights have been held to be amongst the unenumerated personal rights guaranteed by Article 40.3 (*Murray v Ireland*). The Review Group has recommended elsewhere in this report that Article 40.3 be replaced by a comprehensive list of rights. A majority of the Review Group consider that the right to marry and to procreate or found a family should be included among the rights guaranteed in Article 41 as distinct from Article 40. It appears more appropriate to have all the family rights in the one Article.

If, as recommended by the Review Group, Article 40.3.1° is amended to include a comprehensive list of rights, an express right to marry and to procreate or found a family should be guaranteed in Article 41. Such rights have been held by the courts to be personal rights guaranteed by Article 40.3.

10 the reference to the role of women and mothers or other persons within the home

Article 41.2 assigns to women a domestic role as wives and mothers. It is a dated provision much criticised in recent years. Notwithstanding its terms, it has not been of any particular assistance even to women working exclusively within the home. In the *L v L* case the Supreme Court rejected a claim by a married woman who was a mother and had worked exclusively within her home to be entitled to a 50% interest in the family home. At common law, it has been held that a married woman who makes a financial contribution directly or indirectly to the acquisition of a family home is entitled to a proportionate interest in it. However, this principle is of no help to the significant number of women who do not have a separate income from which they can make financial contributions to a family home but who contribute by their work within the home and in many instances relieve their husbands of domestic duties thereby permitting them to earn money. The Supreme Court considered that, while Article 41.2.2° imposed an obligation on the judiciary as well as on the legislature and the executive to endeavour to ensure that 'mothers should not be obliged by economic necessity to engage in labour outside the home to the neglect of their duties within the home', this Article did not confer jurisdiction on the courts to transfer any particular property right within a family.

These provisions have also been cited by the State in support of legislation which appeared to discriminate on grounds of sex. In *Dennehy v The Minister for Social Welfare* (1984) Barron J used Article 41.2 to support his conclusion that the failure of the State to treat deserted husbands in the same way as deserted wives for the purposes of Social Welfare was justified by the proviso in Article 40.1 (the recognition of a difference in capacity and social function).

The Review Group considered whether this Article should simply be deleted or whether section 2.1° should be retained in an amended form which might recognise the contribution of each or either spouse within the home.

The Review Group is conscious of the importance of the caring function of the family. It considers it important that there is constitutional recognition for the significant contribution made to society by the large number of people who provide a caring function within their homes for children, elderly relatives and others. On balance, therefore, the Review Group favours the retention of Article 41.2 in a revised gender neutral form. The retention of Article 41.2.2° may not be appropriate to a gender neutral form of the Article. The revised form of Article 41.2 might read:

> The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home.

11 whether the Constitution should continue to regulate the position of foreign divorces and, if so, how

Article 41.3.3° may be regarded as complementing the provisions of the divorce prohibition contained in Article 41.3.2°. The language of this subsection is not easy to interpret. However, the following extract from the judgment of Kingsmill Moore J in *Mayo-Perrott v Mayo-Perrott* [1958] IR 336 has been subsequently accepted as authoritative:

> The general policy of the Article seems to me to be clear. The Constitution does not favour the dissolution of marriage. No laws can be enacted to provide for the grant of a dissolution of marriage in this country. No person whose divorced status is not recognised by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law that dissolutions of marriage by foreign courts, where the parties are domiciled within the jurisdiction of those courts, will be recognised as effective here. Nor does it in any way invalidate the remarriage of such persons.

The judge went on to hold that it was open to the Oireachtas to regulate the question of the recognition of foreign divorces by law, as the operation of Article 41.3.3° is essentially contingent on their being 'a subsisting valid marriage under the law for the time being in force.'

At the date of the enactment of the Constitution, the law in force for the purposes of Article 41.3.3° was a common law rule by which it was provided that a foreign divorce would only be recognised if both parties were domiciled in the foreign state where the divorce was granted. That common law rule interacted with another common law rule whereby the wife was presumed to take her husband's domicile and the operation of both rules had peculiar consequences. It meant, for example, that an English divorce obtained by a husband who previously acquired an English domicile of choice would have that divorce recognised in this State because (a) the wife was taken to have an English domicile of dependency and (b) it satisfied the criteria for recognition at common law as both parties were domiciled in England.

These common law rules have been overtaken by two significant developments within the last decade. In the case of divorces granted after 2 October 1986, the recognition criteria have been relaxed by section 5 of the Domicile and Recognition of Foreign Divorces Act 1986. This provides that a divorce granted after that date will be recognised in the country where either spouse is domiciled or, where neither spouse is domiciled in the State, if it is recognised in the countries where the spouses are domiciled. The recognition of divorces granted *prior* to 2 October 1986 is now governed by the rules formulated by the Supreme Court in *W v W* [1993] 2 IR 476. In that case, the court first ruled that the common law rule regarding domicile of dependency was unconstitutional as it discriminated against wives, contrary to Article 40.1. The court went on to hold that the common law rules of recognition required to be modified in the light of that finding of unconstitutionality and ruled that a divorce granted prior to 2 October 1986 should be recognised if granted in the country in which either of the parties to the marriage was domiciled at the date of the proceedings. However, a foreign divorce granted to a couple where *both* of the parties were domiciled in Ireland will never be recognised in this State.

Since at the date of the submission of this report it was unclear as to whether the divorce prohibition had been validly deleted and replaced by the 15th Amendment of the Constitution, the Review Group has decided to approach the foreign divorce issue from two perspectives. The first assumes that Article 41.3.2° has been deleted, the second assumes that it has not.

whether Article 41.3.3° should be retained if the original Article 41.3.2° is deleted and replaced by the 15th Amendment

It might be thought that because Article 41.3.3° complemented the original prohibition on divorce, it was rendered redundant by the deletion of that prohibition. The Review Group is not persuaded by this suggestion and considers that Article 41.3.3° might still have a relevant role even in the wake of the enactment of the 15th Amendment. The 15th Amendment provides for the granting of divorce in certain limited circumstances, including proof that the parties to the marriage 'have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years'. If Article 41.3.3° did not expressly provide the Oireachtas with the capacity to enact legislation providing for the recognition of foreign divorces, even where they did not satisfy the requirements specified by the 15th Amendment in the case of divorces granted in this State (for example, foreign divorces granted after one year), it might mean that legislation providing for the recognition of such foreign divorces could be held to be unconstitutional as being contrary to, *inter alia*, Article 41.3.1° whereby the State guarantees to protect the institution of marriage against attack.

By international standards, the requirements specified by the 15th Amendment are highly restrictive. Accordingly, in order to avoid the prospect of 'limping marriages' (that is marriages which remain valid in one country but considered to have been dissolved in another country), the Review Group considers it appropriate that the Oireachtas should retain an express capacity to provide for the recognition of such

divorces, even where the criteria for the granting of such divorces (for example, one year's separation) would not in themselves satisfy the requirement of the 15th Amendment had the divorce been sought in this State.

whether Article 41.3.3° should be amended if the divorce prohibition remains in place

If the divorce prohibition remains in place, it is appropriate that the Oireachtas should retain an express capacity to recognise the circumstances (if any) in which a foreign divorce should be recognised. In the absence of Article 41.3.3°, there would be a danger that all foreign divorce recognition rules would be held to be unconstitutional. Such a development would not only lead to striking anomalies, but it would not be in harmony with the general principles of both public and private international law.

Conclusion

The Review Group considers it important that there is a coherent approach to the family provisions in Article 41 and to the education and religion provisions in Articles 42 and 44 in so far as they affect the family. As indicated at the outset of this section of the report, the Review Group considers that Articles 41 and 42 were drafted with only one family in mind, namely, the family based on marriage with children. For that reason and notwithstanding that the recommendations retain many of the elements of Article 41, they necessitate significant amendment of the Article. It is to be noted that the recommendations set out below are interdependent. They involve delicate balances such that, if any part of the recommendations were not acceptable, a change might be required in the remainder of the recommendations.

Recommendations

1 All family rights, including those of unmarried mothers or fathers and children born of unmarried parents, should now be placed in Article 41.

2 Delete existing Articles 41.1.1°, 41.1.2°, 41.2.1°, 41.2.2° and 41.3.1°.

3 The description of any rights or duties specified in Articles 41 or 42 should not include adjectives such as 'inalienable' or 'imprescriptible'.

4 A revised Article 41 should include the following elements:

i) recognition by the State of the family as the primary and fundamental unit of society

ii) a right for all persons to marry in accordance with the requirements of law and to found a family

iii) a pledge by the State to guard with special care the institution of marriage and protect it against attack subject to a proviso that this section should not prevent the Oireachtas from legislating for the benefit of families not based on marriage or for the individual members thereof

iv) a pledge by the State to protect the family based on marriage in its constitution and authority

v) a guarantee to all individuals of respect for their family life whether based on marriage or not

vi) an express guarantee of certain rights of the child, which fall to be interpretated by the courts from the concept of 'family life', which might include:

a) the right of every child to be registered immediately after birth and to have from birth a name

b) the right of every child, as far as practicable, to know his or

her parents, subject to the proviso that such right should be subject to regulation by law in the interests of the child

c) the right of every child, as far as practicable, to be cared for by his or her parents

d) the right to be reared with due regard to his or her welfare

vii) an express requirement that in all actions concerning children, whether by legislative, judicial or administrative authorities, the best interests of the child shall be the paramount consideration

viii) a revised Article 41.2 in gender neutral form which might provide

> The State recognises that home and family life give society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home

ix) an amended form of Article 42.5 expressly permitting State intervention either where parents have failed in their duty or where the interests of the child require such intervention and a re-statement of the State's duty following such intervention

x) an express statement of the circumstances in which the State may interfere with or restrict the exercise of family rights guaranteed by the Constitution loosely modelled on Article 8(2) of ECHR

xi) retention of the existing provisions in Article 41.3.3° relating to recognition for foreign divorces.