

Introduction

In 2015, the electorate of the Republic of Ireland voted in favour of the 34th amendment of the Constitution¹ (2015 Referendum), permitting marriage to “*be contracted in accordance with law by two persons without distinction as to their sex*”². In campaigns surrounding this referendum, regardless of pursued outcome, involved parties often presented marriage as something of importance, as something worth protecting, and essential for dignity and emotional well-being. More tangibly, marriage was also recognised as a contract which accrued legal and economic benefits for the contracting persons. Case law demonstrates this sentiment is supported by Irish jurisprudence also.^{3, 4, 5}

Normativity of ‘Marriage Equality’

A consequence of political discourse surrounding the 2015 Referendum was the placing into relief of the relationship contemporary Irish society held and wished to hold with marriage. Which the author proposes the result indicates an understanding that if marriage would continue to be an institution which entailed social, legal, and economic benefits, it should be one which persons are not arbitrarily barred from; more colloquial to the 2015 Referendum, we should aspire towards ‘marriage equality’.

It was primarily through the prism of sexuality with which social movements looked to permit access to marriage in 2015. Four years after ‘marriage equality’ was normatively identified by Ireland, this essay seeks to review this ideals realisation from the perspective of a social group which has different access to advocacy machinery than LGBTQ+ social groupings, that of adults with intellectual disability in Ireland.

¹ Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015 (previously bill no. 5 of 2015)

² Article 41.4°.

³ Nicolas v. An Bord Uchtala (1966) I.R 567.

⁴ Hyland v. Minister for Social Welfare (1990) I.L.R.M 213

⁵ Murphy v. Attorney General [1982] 1 I.R 241 at 274.

Outline

The first section of this essay identifies the sources and substance of rights related to entering a marriage contract before analysing them in relation to each other and in the context of a person with an intellectual disability seeking to access that right.

The second section explores the distinct approaches outlined in section one and questions the proportionality of capacity specific restrictions when balanced against considerations towards risk aversion and safeguarding.

The third section considers what substantive access to their rights to marriage persons with disability experience in Ireland; considering the practical accessibility concerns regarding appeals and potentially being resident in a disability service.

The fourth section explores our recent legislative choices around risk aversion and assisted decision making; the powerful norm shifting and signalling effect this reform, and the eventual true implementation of this reform, could have to further disability rights and alter service providers and public perceptions towards persons with diminished capacity. Through this reflection, this section also presents a series of recommendations for legal and policy reform which would aid people with intellectual disability in accessing their rights related to marriage while also exploring the normativity of capacity-based legal barriers to marriage in light of their impact on society.

Section One - Legal frameworks, domestic and international

Section Two - Exploration of Distinct Approaches

Section Three - Substantive access to rights

Section Four - Signalling and norm-shifting effects of capacity-based reform and space for further reform.

Section One - *Legal frameworks, domestic and international*

Sources of rights

For a person in Ireland, sources for rights pertinent to marriage are the Constitution of Ireland and the European Convention on Human Rights⁶. Having a dualist approach to international law, Ireland is legally obliged to act in accordance with the treaties it has ratified. However without domestic incorporation, these treaties are not directly enforceable domestically. These obligations must be given legal effect domestically via an Act of the Oireachtas or an amendment to the Constitution. With regards to the ECHR, the European Convention on Human Rights Act, 2003, provides for a more direct applicability for the Convention in domestic courts⁷. At the domestic Irish level, being both a human right and a civil contract, marriage is subject to Irish common law and statute.

The author now presents these rights and frameworks and analyses them in relation to each other and in the context of a person with an intellectual disability seeking to access that right.

Irish Domestic Legal Framework

The Irish legal order contains a constitutional right to marry⁸, which must only be restricted in line with the doctrine of proportionality. What is a proportional restriction is a matter of jurisprudence and can be gleaned from case law on this question.⁹ With regards to case law on restrictions as a consequence of the lack of capacity to consent, case law is sparse in Ireland. However marriages have been nullified as a result of mental illness.

Possessing an intellectual disability is not recognised as a *prima facie* ground for the prevention of a person entering a marriage contract. However, in Ireland, only adults with the necessary legal capacity are lawfully able to marry. In the context of the fact that intellectual disability, to vastly varying degrees, can often alter a person's capacity to make informed decisions, possessing an intellectual disability often directly affects the ability of a person to enter into a contract, marriage or otherwise. The current legal order regarding marriage and capacity stems from both common law and statute and has seen significant reform in recent years as the Irish state sought to position itself to ratify the United Nations Convention on the Rights of Persons with Disabilities (CRPD).¹⁰ In Ireland, marriages have been nullified due to the inability of one

⁶ European Convention on Human Rights

⁷ European Convention on Human Rights Act 2003, s 3(5)(a)

⁸ Article 41.4°.

⁹ O'Shea and O'Shea v. Ireland [2006]

¹⁰ United Nations Convention on the Rights of Persons with Disabilities

of the parties to consent to the marriage due to mental illness¹¹, but there is no case law on the capacity to consent to marriage on the part of older persons with dementia, or those with intellectual disabilities.

Statutory framework and legislative overhaul;

With the reforms in Irish law associated with the passing of the Capacity Act, Ireland has made strides towards compliance with the normative content of article 12 of the CRPD¹², the right to absolute equality before the law. However analysis of the domestic legal framework for assisted decision-making in the context of marriage is complex, considering that it is compromised both common law sources, wherein no direct considerations of cognitive impairment as a barrier to marriage have been made within Irish courts, and a partially enforced legislative framework. As such Ireland currently does not have a statutory test of mental capacity and relies on the functional test found at common law, until the Capacity Act or another framework is enforced.

The author now analyses the currently unenforceable framework which the *Assisted Decision Making (Capacity) Act 2013*¹³ establishes, in the context of the research question of this essay; whether it provides sufficient safeguards for persons with an intellectual disability.

The Assisted Decision Making (Capacity) Act 2013

This framework will have significant consequences for persons with intellectual disability seeking to access their right to marriage. Primarily in this regard, it repeals the *Marriage of Lunatics Act 1811*¹⁴ (“Lunacy Act”), which forbade the marriage of Wards of court or those who were sufficiently cognitively impaired¹⁵, and provides a new framework for state and state emanations presumptions and interactions regarding the legal capacity of persons with diminished capacity. The framework under the Lunacy Act would fall firmly under the medical model of disability, and as such is incompatible with the principles of the CRPD. Instead of cases being decided case by case, the Lunacy Act provides that Wards automatically lack the capacity to marry.

¹¹ James O'Reilly, ‘Fraud, Duress and Nullity’ (1972) 7 Irish Jurist (ns) 352

¹² United Nations Convention on the Rights of Persons with Disabilities, Art 12

¹³ Assisted Decision Making (Capacity) Act 2015

¹⁴ Marriage of Lunatics Act 1811

¹⁵ Dr Frances Matthews, ‘Cognitive Impairment and the Capacity to Marry’ (2015) 5(2) Irish Journal of Legal Studies

Functional Test, the Capacity Act Standard

Further pertinent to marriage, the Capacity Act, in section 30¹⁶, provides that a registrar or intending spouse now have the standing to apply to the circuit court to assess the capacity to marry. An important clarification, the Court does not consent to the marriage on behalf of the person but assesses and declares the capacity of the person to consent to marriage. The Capacity Act contains further provisions which safeguard the autonomy of a person with diminished capacity, while still providing a framework with safeguards against abuse and exploitation. The Act sets out a functional test for the assessment of a person's capacity. This functional approach¹⁷ to the definition of capacity allows for changes in a person's capacity over time.

Domestic Framework Conclusions

To conclude on the formal access to the right to marriage of person with intellectual disability in Ireland, under the domestic legal framework, the author notes that under the Capacity Act, a person with an intellectual disability will not automatically be deemed incapable of consenting to marriage. Instead that a series of various categories of persons will help a person make the decision to marry, and if this is not possible the Circuit Court can appoint a decision making representative. The guiding principles of the Capacity Act also grounds any assisted decision making in the giving of effect to the will and preferences of the person. Highly pertinent to marriage, the framework within the Capacity Act does not permit courts to see an unwise decision as an indication of a person being unable to make that decision. As such the Court does not assess whether the intending spouse and subsequent marital status with them is a suitable, ideal, or positive addition to the person's life, but rather whether the person understands the implications of their decision. The author notes that this framework is compliant with the normative content of the CRPD, as it is not centred around paternalistic risk prevention but the realisation of a persons will and preference and acknowledges the right to make the wrong decision.

International Human Rights Law Comparison

The right to marry within the ECHR:

As noted by the Strasbourg Court¹⁸, the provisions of the ECHR are to be considered, inter alia, in the context of European and international norms. Relevant legal norms to capacity focused restriction of rights here being the 2003 Council of Europe Parliamentary Assembly

¹⁶ S. 30, Assisted Decision Making (Capacity) Act 2013

¹⁷ A "functional" approach to assessments of legal capacity requires a person to be able to understand the nature and consequences of a particular decision in order to be deemed to have legal capacity.

¹⁸ *Glor v Switzerland* Application No. 13444/04, April 2009,

Recommendation and the UNCRPD as evidence of the aspiration towards prohibition of discrimination on the grounds of disability in IHRL. Acknowledging this, the author attempts to address relevant European and international norms which impact on the rights of persons with disabilities in Ireland during analysis.

Article 12 of the ECHR confers a right to marry and found a family on men & women of marriageable age in accordance with national laws governing the exercise of this right. When interpreting the convention, the right to marriage has also been considered in the context of Article 8, the right to privacy and a family life, as demonstrated in *Lashin V Russia*.¹⁹

Capacity restrictions and the ECHR

The European Court of Human Rights (ECtHR) disapproves of blanket bans on marriage due to a presumed lack of mental capacity, due to guardianship or warship status. This was demonstrated in *Shtukatarov v. Russia*²⁰, wherein the Court acknowledged that legislative frameworks should recognise that degrees of capacity exist and that capacity may vary from time to time and restrictions should only be made when necessary for protection. The author submits that this judgement is a positive step away from the paternalistic medical model of disability, but stops short of reaching the social model ideals by allowing a loosely defined justification of protection to permit restrictions, in contrast to the functional assessment found within the Capacity Act in the domestic Irish context.

Recent developments

In November 2018, the ECtHR considered the case of *Deloitte v. France*²¹, here the court issued its first ruling regarding the right to marriage and persons under guardianship. The court here ruled that Article 12 only benefited those possessing full legal capacity. This is not only incompatible with the CRPD but incongruent with the courts previous judgements such as *A-MV v Finland*²², where an applicants will and preferences were recognized as a paramount element of any judgment regarding assisted decision making and wherein the courts acknowledged capacity as in flux and in requiring of a functional approach by the courts.²³

In *AM-V v Finland*, the ECtHR showed further jurisprudence which the author submits is of concern, the standard for the court to undermine the will and preference of the applicant was

¹⁹ *Lashin V Russia* Application No: 88117/02, 22nd January 2013

²⁰ *Shtukatarov v. Russia* Application No. 44009/05, 27th June 2008

²¹ *Delecolle v. France* Application No: 37646/13

²² *A-MV v Finland*, (Application no. 53251/1)

²³ *Guberina v. Croatia*, *LÇam v. Turkey*

expressed as a “danger to wellbeing”, as opposed to a “serious harm” standard, which the author submits is a low threshold and offers opportunity for disproportionate restrictions of the autonomy of a person with a disability.

International Framework Conclusions

Considering the jurisprudence in *Deloitte v France*, the author submits that the Irish domestic framework, once the Capacity Act is enforced, is more compliant with the CRPD than the jurisprudence of the ECtHR is. This is striking, in the context of the longstanding previous framework found within the Lunacy Act. This ruling is a backwards slide into paternalistic safeguarding against risk at the expense of the autonomy of individuals.

Section Two - Exploration of Distinct Approaches

The modern disability rights movement is built upon the social model, which understands disability not as an inherent personal deficiency but as the result of the environment with which an impairment interacts. The CRPD epitomises this model, presenting states with duties to create social systems which realise the human rights of persons with disabilities.

As explored in the previous section, with regards to assisted decision-making, as it is pertinent to seeking marriage, the Irish statutory framework and legal order is trending towards this model. Yet, as seen in section one of this essay, the approaches and legal tests applied when considering capacity vary greatly, from those within ECtHR jurisprudence and those found domestically, with the Irish legislative framework falling closer to the normative content of Article 12 of the CRPD.

In this section the author explores the justifications for restrictions of decision-making and marriage rights in the context of the CRPD as a normative ideal.

Striking contrasts, as a consequence of ableist structures

The author notes the distinct approaches seen between the functionalist approach of the Irish Capacity Act (and called for within the CRPD) and the approach by the ECtHR. The author submits that the nature of the bodies creating/interpreting the law has, in part, contributed to this distinction.

The United Nations General Assembly, which adopted the CRPD, and the CRPD Treaty Body, which elucidates via general comments on the articles enumerated within, both exist in a normative space. Both were formed in the absence of cases which see the bodies applying the law to an individual's setting. Likewise, the Capacity Act was formed by the Oireachtas, away from any individual case.

In contrast, the ECHR does not have a capacity specific article within it and has developed the law in this area through its jurisprudence. The author submits that the nature of this process, of developing case law in the context of an individual's petition, prevents the courts from existing in a truly normative space and introduces room for error by way of allowing our cultural tendencies to engage with persons with intellectual disability in a paternalistic manner to enter into the process through this contact between a judge and a person with an intellectual disability or diminished capacity.

This is exacerbated by the general cultural perception towards persons with intellectual disability as a victim, with many people primed to see themselves in a caregiving and safeguarding role concerning a disabled person. Judges have to overcome this barrier, in the context of a specific case and a specific person's reality, and avoid taking the route of avoiding risk and safeguarding. Meanwhile the UN treaty bodies process does not have this as a potential issue.

There is no such thing as a risk free decision and the role of the courts should not be to avert risk, but to enable autonomy via a functional approach to capacity.

Section Three - Substantive access to rights

Having reviewed the competing doctrines with which the law seeking and assessing the formal access to rights, the author now considers the degree of substantive access persons with intellectual disability may have to their right to marriage.

To do this, this section will, while recognising that persons with intellectual disability are a heterogeneous group, characterise the social group of persons with intellectual disability; exploring what access these people, as a social group, have to legal advocacy, advice, processes and environments which support the realisation of their rights. Within academia, it is often

highlighted that we exist in a culture which engages with persons with disability akin to children via the best interests model.^{24, 25, 26}

Beyond often reduced decision-making capacity, there are further commonalities which characterise persons with intellectual disability as a social group and aid in contextualising the discussion within this article. In Census 2016, 66,611 persons representing 1.4 per cent of the population, reported having an intellectual disability.²⁷ According to Census 2016, the unemployment rate for persons with intellectual disability is 42.8%, with a workforce participation rate of 21.4%.²⁸ The majority of adults with intellectual disability in Ireland live with their families with the aid of additional support services and 98.5% of 27,985 people on the National Intellectual Disability Database were in receipt of services such as residential support or day programmes.^{29, 30} These data suggest that, as a social group, adults with intellectual disabilities face overwhelming barriers to accessing employment and a large majority require financial and service support from the state and their family to maintain quality of life.

Beyond the legislative framework, the author has concerns regarding the access persons with disability have to justice. As a safeguard of access, the author suggests courts, marriage registrars, legal and medical professionals are all ensured to have training regarding a functional approach to capacity and that a well resourced state watchdog is tasked to oversee this.

Upon the enactment of the Capacity Act, the independent advocates provided for within will be an effective safeguard, until then there are serious barriers a person with an intellectual disability may face in even accessing legal advice in anticipation of seeking marriage.

²⁴ Irish Journal of Family Law 2019, 22(1), 25-27

²⁵ The Bar Review 2017, 22(5), xxix

²⁶ Eileen McPartland, *The Best Interests of the Child: Interpreting Irish Child Legislation* (2nd edn, Gill and MacMillan 2013)

²⁷ Central Statistics Office, 2014 <<https://www.cso.ie/en/releasesandpublications/ep/p-cp9hdc/p8hdc/p9tod/>> accessed 30 March 2019.

²⁸ Central Statistics Office, 2014 <<https://www.cso.ie/en/releasesandpublications/ep/p-cp9hdc/p8hdc/p9tod/M>> accessed 30 March 2019.

²⁹ Central Statistics Office

<https://www.hrb.ie/fileadmin/2._Plugin_related_files/Publications/2018_pubs/Disability/NIDD/NIDD_Annual_Report_2017.pdf> accessed 30 March 2019.

Section Four - Signalling and norm-shifting effects of capacity-based reform and space for further reform

Impact of Capacity Law Reform on Society

Persons with intellectual disability often face barriers of access to civic action, as such the ability to spur a shift in the cultural perception of intellectual disability is hampered. In this context the author submits it is the role of the state to lead society's norms via law reform. Legislative overhaul has powerful signaling effect and a culture level change is essential for ensuring that the decisions and rights of persons with disabilities are respected.

By passing the Capacity Act, eventually enacting the Capacity Act, and ratifying the CRPD, the Irish state is not only shifting the legal framework through which people with intellectual disabilities navigate, but signaling a new approach to disability which will have direct and indirect impacts in courts, communities, organisations and families.

Given the author's belief that the recent jurisprudence of the ECtHR is tarred by the paternalistic culture surrounding disability, the Irish state must actively work to combat stereotypes, negative attitudes and harmful and involuntary practices against persons with disabilities in all areas of life, and promote the support the notion of will and preference centered assisted decision-making, both domestically and internationally.

The author echoes the sentiment of the UN Special Rapporteur on the Capacity Act, in its strides towards the ideals of the CRPD³¹. This legislation should be enacted promptly, and the state should resource the services enumerated within adequately to ensure its effective enactment.

Reflecting on the research question, in the context of the material explored, the author acknowledges that any framework for assisted decision making in the context of marriage should not be seen as a safety blanket and must be flexible in its balancing of risk and autonomy, however the author submits that this balance must have been made in a context where persons with disabilities are not seen as objects of care, but as rights holders.

³¹ United Nations General Assembly, 2017, A/HRC/37/56

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