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Justice Done? An Analysis of the 2006 High Court Ruling in *Zappone and Gilligan v. Revenue Commissioners and Attorney General*

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Abstract

The dominant understanding of Article 41 of the Irish Constitution (1937), which pertains to marriage and family, informed the 2006 High Court ruling in *Zappone and Gilligan v. Revenue Commissioners and Attorney General* (see [2008] 2 I.R. pp.417-513),³ which centred on same-sex marriage. Justice Dunne held that a lesbian couple did not have the right to have their Canadian marriage recognised in Ireland. This article challenges this ruling by critiquing aspects to one of the grounds for justifying the ban on same-sex marriage. This centred on the issue of child welfare. I first discuss the general impetus behind the conducting of research pertaining to lesbian and gay parenthood. I elaborate on aspects to this imperative that can reinforce heterosexist norms in society. I then critique research findings in a study that denoted evidence in this court case. My analysis will demonstrate that these dynamics denote core aspects to the routine operationalisation of heteronormativity in Ireland.

Keywords: Same-Sex Marriage; Gay Marriage; Zappone and Gilligan; Child Development; Child Welfare

Introduction

³ Hereafter, I refer to this case as *Zappone and Gilligan*.

The dominant understanding of marriage in Ireland, which derives from Article 41 of our Constitution (1937), is such that it remains inextricably linked to family. The nuclear family paradigm denotes one social institution in Ireland, which has both constitutional and legislative underpinnings.⁴ Article 41.3.1 of our Constitution stipulates the following: ‘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.’ This understanding of marriage and family informed the constitutional court ruling in *Zappone and Gilligan* in 2006. Justice Dunne held that a lesbian couple did not have the right to have their Canadian marriage recognised in this jurisdiction.

In this regard, she stated the following: ‘The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare.’ (Extract I, Justice Dunne, [2008] 2 I.R. pp.417-513 at para. 248)

This journal article hones in on the second ground for justifying the ban on same-sex marriage in Ireland. This requires an elaboration on important aspects to international research that has been conducted since the late 1970s in relation to the parenting that is done by lesbians and gay men. Firstly, I allude to the possible circumstances surrounding the impetus behind the inclusion of such research as evidence in court cases pertaining to the right to marry. I then suggest that the conducting of such research can run the risk of reinforcing heterosexist norms in society. Lastly, I critique some of the findings that are contained in the American Academy of Pediatrics (2002) review of a number of research studies that were conducted in relation to lesbian and

⁴ Examples of legislation pertaining to marriage that has been enacted in this jurisdiction include the following: *Registration of Marriages Act, 1936*; *Vital Statistics and Births, Deaths and Marriages Registration Act, 1952*; *Judicial Separation and Family Law Reform Act, 1989*; *Civil Registration Act, 2004*. Section 2.2(e) of the *Civil Registration Act, 2004*, bars same-sex couples from marrying in Ireland. Details available from: <http://acts.oireachtas.ie>

gay parenting. My analysis will demonstrate how these dynamics denote core aspects to the routine operationalisation of heteronormativity in Ireland. But first, I elaborate on the background to this High Court case. I then highlight important considerations that inform this analysis.

Background to this Constitutional Case

The plaintiffs in this case are Katherine Zappone and Ann Louise Gilligan, who have lived as a couple in Ireland since 1983. Together since 1981, they married each other in British Columbia, Canada, in 2003. This was possible for two reasons: this Canadian province did not require citizenship or residency as preconditions for issuing a marriage license; marriages between persons of the same gender have been legal there since the ruling in *Barbeau v. British Columbia (Attorney General)* in 2003 (see [2003] BCCA 251). In 2004, the plaintiffs sought confirmation from the Irish Registrar General that their marriage was legally binding in Ireland. That office stated that it was not within its remit to make a declaration on the validity of a marriage that occurred outside Ireland. The plaintiffs also contacted the Revenue Commissioners in this country in 2004 because they wished to be treated as a married couple for taxation purposes. When this was refused, the plaintiffs sought leave to apply for a judicial review. The High Court in Ireland granted this in 2004. Their case came before that court in October 2006. In their pleadings, Katherine Zappone and Ann Louise Gilligan asserted that the refusal to treat them as a married couple breached their constitutional rights under Articles 40 and 41 of the Irish Constitution (1937). Justice Dunne delivered her ruling in December 2006.⁵ The plaintiffs lost their High Court action. They appealed the decision to the Supreme Court. In 2011, they tried to incorporate additional evidence into this appeal. Specifically, they sought to test the constitutionality of the *Civil Registration Act, 2004*, which bars same-sex marriage in Ireland. However, this was ultimately denied. They subsequently withdrew their Supreme Court appeal. They have now initiated a new High Court action in which they will challenge the constitutionality of this 2004 legislation.⁶

⁵ I garnered this information from the reported judgment (see [2008] 2 I.R. pp.417-513 at paras. 1-6).

⁶ I garnered information regarding the background to the new High Court challenge through personal communication with the following: the organisation that is known as Marriage Equality, which campaigns for the introduction of same-sex marriage in Ireland; Dr. O'Mahony from the Faculty of Law in University College Cork.

Important Considerations

Theoretical and Conceptual Considerations

This article relies on de Beauvoir's (1988) analysis of the 'Other'. With regard to the routine reproduction of gender inequality, de Beauvoir (1988, p.16) stated the following: 'She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the Other.' Here, the phenomenon of gender inequality derives from women's difference *to* men. Women are 'commonsensically'⁷ defined in relation to men or according to a male diktat. A hierarchy inheres in this gendered framework and social organisation (Kimmel, 2004, pp.1-17), which reinforces dominance and subordination, and the attendant issue of sexism. de Beauvoir's (1988) thesis is applicable to the reproduction of gay / lesbian inequality and heteronormativity. Heteronormativity dictates that institutionalised heterosexuality denotes the standard for legitimate social and sexual relations (Ingraham, 2007, p.199). Heterosexism denotes '... a belief in the inherent superiority of one pattern of loving over all others and thereby its right to dominance ...' (Lorde, 1993, p.17). Heteronormativity is routinely 'justified' through the relentless 'othering' of lesbians and gay men as parents, for example. Leaving heterosexual privilege intact, it normalises the idea that the spectre of child welfare 'necessarily' denotes an issue that warrants consideration with regard to the distribution of marriage rights in Ireland,⁸ as if gay men and lesbians should remain outside the realm of constitutional protection *vis-à-vis* Articles 40 and 41 of our Constitution.

Other Considerations

I support the premise of marriage equality, which holds that the right of gay men and lesbians to marry is linked to the fundamental principle of equality (see Pillinger, 2008). My perspective informs this analysis of the 2006 High Court ruling in *Zappone and Gilligan*.

⁷ I use 'scare quotes' in this article to signal the contentiousness of particular terms, such as commonsensically (see Fairclough, 2000, p.173).

⁸ Through the accretion of Irish case law, the right to marry denotes a constitutional right in this jurisdiction under Article 40. See *Ryan v. Attorney General* ([1965] I.R. pp.294-353). Here, High Court Justice Kenny held that the right to marry denotes a personal right even though it is not expressly enumerated in Article 40 (see [1965] I.R. at p.313). The Supreme Court accepted this interpretation of Article 40 *vis-à-vis* personal rights (see [1965] I.R. at pp.344-345).

Contrary to some of the detail in Extract I of the reported judgment, none of the research studies that expert witnesses interpreted in the High Court pertained to child welfare. Rather, this evidence centred on child development. This is a crucial point. I associate the term ‘child development’ largely with physical, psychological, cognitive, and personal / social development. Relevant dynamics in this regard include language acquisition, formal education attainment, peer-group relations, and inter-personal skills. The term ‘child welfare’ has a very specific connotation that largely encompasses the protection and safety of children, particularly in relation to the risk or perpetration of abuse, neglect, and / or abandonment. It can demand attention from the State in the form of interaction with our criminal justice system. While child development and child welfare are interlinked, I reject their seemingly self-evident conflation in the High Court.

In this article, I refer to Professor Green who is a psychiatrist and a lawyer. He testified on behalf of the plaintiffs in this case, i.e. Katherine Zappone and Ann Louise Gilligan. In alluding to his testimony in the reported judgment, I am reliant on Justice Dunne’s December 2006 recounting of his October 2006 testimony in the High Court.

Impetus for Conducting Child Development Research in the Context of Lesbian or Gay Parenting

In the 1950s in the United States, anxieties about lesbianism and homosexuality came to the fore in courtrooms in the context of custody proceedings in the wake of divorce (see Rivera, 1979, pp.883-904). Here, concerns about child welfare largely centred on the sexuality of the non-heterosexual parent. This needs to be understood against the backdrop of the criminalisation of same-sex intimacy in many states at the time (see Rivera, 1979, pp.949-950).⁹ The rationale behind criminalisation in the United States was that sexual acts had to be gendered, heterosexual, marital, and procreative, as well as consensual and mutual (Eskridge, 1999, p.161). It is conceivable that the imperative of marital procreation, and the attendant issue of gender complementarity, combined with the embeddedness of prescriptive roles in terms of ‘doing gender’ in

⁹ Decriminalisation at a federal level in the United States did not take place until 2003 on foot of the U.S. Supreme Court ruling in *Lawrence v. Texas*. See Denniston (2003) and Robertson (2003) for commentary on this ruling.

marriage (see Dryden, 1999), would have underscored normative assumptions about the sexual orientation of parents. In the United States in the 1970s, gay and lesbian parents began to rail against courts' preoccupation with the presumed immorality of same-sex intimacy,¹⁰ and they began to vigorously defend their right to parent (Rivera, 1979, pp.897-898).¹¹ This sparked a growing trend in the inclusion of expert testimony on homosexuality and lesbianism as evidence in court proceedings, of which Professor Green was at the forefront (see Rivera, 1979, pp.897-904). It is at this juncture that Professor Green, who testified in *Zappone and Gilligan*, emerged as a researcher.¹² Both the conducting of systematic research comparing children of lesbian or gay parents with those of heterosexual parents, and the publication of that research in professional journals, began in the late 1970s (Patterson, 1992, p.1029).¹³ It is conceivable that these elements coalesced, and created a context in which the elaboration and interpretation of such research in courtrooms became inevitable, once the right to marry became as contested a concept as the right to parent. Indeed, counsel for the plaintiffs in *Zappone and Gilligan* identified the issue of child welfare, rather than child development *per se*, as one of the justifications that obtain in jurisdictions that limit the right to marry to opposite-sex couples (see [2008] 2 I.R. pp.417-513 at paras. 75-81). However, against the backdrop of deeply embedded heteronormative assumptions, the interpretation of research pertaining to lesbian or gay parenting can be problematic. I will revisit this dynamic shortly.

Problematic Aspects to Conducting such Research Amidst the Backdrop of Heteronormativity

Here, I suggest that the general imperative of conducting such research on child development is problematic when the 'logic' of heteronormativity remains all-

¹⁰ For some judges, this preoccupation verged on the prurient. Rivera (1979, p.898) alludes to a case in Ohio in 1974 involving a lesbian, wherein the judge asked an expert witness how the sex act between lesbians was accomplished? Such voyeurism in a person who had the institutional authority (see Bergvall and Remlinger, 1996, p.476) to decide on the matter before the court is a measure of the toxicity of heteronormativity.

¹¹ In Ireland in the 1970s, it would have been inconceivable to consider the issue of child custody in the context of parental sexual orientation. The absence of divorce and the rigidity of gendered expectations *vis-à-vis* family would have put paid to that. Having said that, Smyth (1983, p.151) does allude to the issue of custody rights in the context of lesbian parents against the backdrop of social prejudice that attached to lesbianism in Ireland in the 1980s.

¹² See Green (1978) for example.

¹³ See Miller (1979), for example, who conducted in-depth interviews with both men as fathers, whose age range from youngest to oldest spanned forty years, and their minor / adult children, who ranged from young teenagers to persons in their thirties. This study was conducted in Canada and the United States over a period of three years.

pervasive. Firstly, it can presuppose that there is something about non-normative sexualities, rather than sexual orientation *per se*, that warrants attention, analysis, interrogation or investigation. Secondly, it creates the imperative to prove that lesbians and gay men are just as capable as their heterosexual counterparts at rearing children (see Stacey and Biblarz, 2001, p.162). This can presuppose a ‘lacking’ in the gay and lesbian ‘Other’, which has to be disproved into perpetuity, or until such time as it can be determined that ‘othered’ parenting can measure *up* to the ‘gold standard’ of heterosexual parenting (see Stacey and Biblarz, 2001, p.162). Heteronormativity can dictate the persuasiveness of the ‘no differences’ thesis (see Stacey and Biblarz, 2001, p.163). This finds no appreciable differences in the development of children of lesbian or gay parents, as compared *to* those of heterosexual parents, while failing to adequately theorise why that might be the case (see Stacey and Biblarz, 2001, pp.162-164). Alternatively, any differences in child development that might arise in the context of gay or lesbian parenting could be conceived of as deficits (see Baumrind, 1995, p.133; Stacey and Biblarz, 2001, p.162) when compared *to* the norm.¹⁴ Thus, scientific endeavour runs the risk of being informed by the imperative to either prove or disprove the ‘difference as deficit’ thesis regarding the suspect ‘Other’. All of these dynamics take as given the idea that the parenting that is done by heterosexuals denotes the norm that does not require investigation in its own right. A rather heavy burden of proof resides with the gay or lesbian ‘Other’ (see Stacey and Biblarz, 2001, p.162), requiring endless scientific investigation, so as to determine if lesbian or gay parenting can really measure *up* to the norm.

Justice Dunne implicitly underscored this when she stated the following in the High Court: ‘I have to say that based on all of the evidence I heard on this topic I am not convinced that such firm conclusions can be drawn as to the welfare of children at this point in time. It seems to me that further studies will be necessary before a firm conclusion can be reached.’ (Extract II, Justice Dunne, [2008] 2 I.R. pp.417-513 at para. 216)

Evoking Extract I of the reported judgment, a seemingly rational logic takes hold here. A normatively imposed doubt about the suspect ‘Other’ implicitly presupposes a

¹⁴ It is important to state that neither Baumrind (1995) nor Stacey and Biblarz (2001) conceive of differences as necessarily implying deficits.

‘lacking’ in gay or lesbian persons as parents. This will remain until such time as it can be unequivocally proven, into infinity, that their parenting is not antithetical to child welfare.

The Interpretation of Child Development Research in the High Court

Here, I draw upon one extract from the reported judgment in *Zappone and Gilligan*. It relates to part of Professor Green’s interpretation of the American Academy of Pediatrics (2002) review of research pertaining to child development in the context of lesbian or gay parenting. So as to ground my analysis, I rely on the 2002 review, as well as other relevant studies.

Extract III of the reported judgment indicated the following: ‘None of the children had gender identity confusion, wished to be of the other sex or consistently engaged in cross-gender behaviour. For older children in the study there were no differences in sexual attraction or self-identification as homosexual. The children showed no differences in personality measure, peer group relationship, self-esteem, behavioural difficulties or academic success.’ (Extract III, Justice Dunne, [2008] 2 I.R. pp.417-513 at para. 35)

At the outset, it is important to state that the recounting feature is problematic here. It is difficult to determine whether Extract III constitutes Professor Green’s verbatim evidence or whether it simply denotes a summary of his testimony. This is important in the sense that Extract III appears to pertain to one reviewed study. This is misleading because the corresponding text in the American Academy of Pediatrics (2002, p.342) review demonstrates that Extract III pertains to many research studies that were conducted throughout the 1980s and 1990s by different (teams of) researchers. Thus, Extract III of the reported judgment glosses over an important detail that could challenge the notion that not enough is known about the suspect ‘Other’ as regards their parenting.

It is in the formation and development of gender identity and sexual orientation in children reared by gay or lesbian parents that heteronormative anxieties are particularly acute. The first sentence in Extract III of the reported judgment, and the review that it is derived from (see American Academy of Pediatrics, 2002, p.342),

implicitly take as given, until proven otherwise, the idea that lesbian or gay parenthood raises the spectre of gender identity disorder. It conflates or confuses gender with non-normative sexualities. No indication is given as to the prevalence of this condition in children or adolescents who are reared by heterosexual parents. This is a reasonable expectation in that the abstract to this review (see American Academy of Pediatrics, 2002, p.341), which was read out to Professor Green over the course of his testimony (see [2008] 2 I.R. pp.417-513 at para. 35), makes reference to this cohort. Rather than investigate the phenomenon of gender identity disorder, or interrogate the normative assumptions that surround it, it is presumed that the non-heterosexual orientation of parents denotes the ‘logical’ starting point of scientific endeavour in this regard. Neither the American Academy of Pediatrics (2002), nor Professor Green, offer an explanation as to why this is the case, or why the research finding about *not* finding this condition warranted a research question in the first instance. Crucially, no explanation is offered in the High Court as to why the non-development of gender identity disorder is relevant to the issue of child welfare. Yet, child welfare denoted the second ground for justifying the ban on same-sex marriage in Ireland.

Similarly, the American Academy of Pediatrics (2002) review offers no explanation as to why children or adolescents who are reared by gay or lesbian parents would wish to be of a different gender, or would engage in cross gender behaviour, to the extent that such phenomena would denote research findings deriving from research questions. Such findings about non-findings do nothing to disturb the rootedness of gender complementarity with regard to the rearing of children. This is a dynamic that problematises gay and lesbian parenting in the first instance. Here, the imperative to prove the ‘no differences’ thesis (see Stacey and Biblarz, 2001) is so persuasive that no explanation is given as to why these findings about phenomena that do not arise are somehow relevant to the issue of child welfare. Moreover, the routine morphing of child development issues into a matter of child welfare, in a case that centred on the right of two women to marry, neither of whom is a parent, is indicative of the ease with which heteronormativity is operationalised and ‘justified’ in Ireland.

The second sentence in Extract III of the reported judgment is also problematic. It presupposes that a teenager’s self-identification as gay is of scientific interest in a way

that heterosexuality, for example, is not. The latter is not remarked upon. This silence implies that the onset of homosexuality in adolescents ‘necessarily’ or ‘naturally’ denotes an issue that requires attention and analysis by researchers. There is no indication given as to why that might be the case. Moreover, there is a failure to interrogate the heteronormative assumptions that inform the articulation of such a research finding in the first instance. The reported judgment in *Zappone and Gilligan* is silent as to the relevance of this research finding to the welfare of children or adolescents.

The last sentence in Extract III of the reported judgment denotes part of a review of six research studies by the American Academy of Pediatrics (2002), including Golombok *et al* (1983). With regard to this 1983 study, the heterosexual cohort of women is first identified by the status of those within it as both single and a parent (see Golombok *et al*, 1983, p.554). Here, women’s (hetero) sexual orientation does not denote a signifier at the outset. However, it appears to be self-evident that the lesbian cohort of parents should be immediately identified through the lens of sexual orientation, i.e. the lesbian group (see Golombok *et al*, 1983, p.554). This helps to underscore the idea that it is a particular sexual orientation, rather than the variable of sexual orientation *per se*, which is at the root of scientific endeavour *vis-à-vis* child development in the context of the parenting that is done by persons who happen to be lesbian in this instance. Against the backdrop of heteronormativity, where such presumptions ‘make sense’, this dynamic failed to garner attention from the American Academy of Pediatrics (2002). This silence serves to reinforce heteronormative assumptions surrounding the lesbian ‘Other’ as mother.

Conclusion

This analysis sheds some light on the many ways in which heteronormativity is routinely operationalised in society. The seemingly logical linking of all of the above issues to child welfare, rather than child development, demonstrates its utter toxicity. While the issues of child development and child welfare are interlinked, they are also quite distinct. Clearly, the issues of gender identity and sexual orientation, for example, are relevant to child and adolescent development. What is not so clear is why self-identification as gay (see Extract III), for example, denotes an issue that warrants attention in a research study, while self-identification as heterosexual, for

example, is barely remarked upon? Similarly, why is self-identification as gay, for example, sufficient to raise the spectre of child welfare in an Irish courtroom, while self-identification as heterosexual, for example, does not? Answers to such questions can either challenge or defend the routine operationalisation of heteronormativity in this jurisdiction.

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*Legislation*¹⁵

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¹⁵ Details are available from: <http://acts.oireachtas.ie>

Civil Registration Act. No. 3. 27th February 2004.

Personal Communication

Marriage Equality,¹⁶ Dublin, 6th June 2012

Dr. Conor O'Mahony, Faculty of Law, University College Cork, 7th August 2012

¹⁶ This organisation has recently changed its name from MarriagEquality.