

RELIGION AND FAMILY LAW IN IRELAND: FROM A CATHOLIC PROTECTION OF MARRIAGE TO A “CATHOLIC” APPROACH TO NULLITY

1. INTRODUCTION

In works about comparative family law Ireland is often portrayed as having a very conservative approach to the family, particularly in its attitude to divorce.¹ This approach has been attributed to the influence of the Irish Constitution of 1937 which heralded an age of highly restrictive family law, in contrast to more liberal trends in the rest of Europe at that time.² Catholicism was an important part of the Irish national identity³ and the articles of the Irish constitution relevant to family matters are influenced by Catholic values.

This chapter will examine the development of a separate treatment of Catholic marriages by the secular courts before the framing of the Irish constitution. It will go on to analyse the underlying Catholic influences behind the constitutional ban⁴ on divorce in Ireland. The use of Catholic doctrines by the courts will be examined. It will be argued that far from being an entirely conservative influence, Catholic doctrines were used by some of the judiciary to create a functioning alternative to divorce. This ‘catholic’ approach to Church doctrines shows that in family law the courts will find a way to reflect prevailing liberal morality even if they must use an inherently conservative framework.

2. PRE 1937: TWO SEPERATE FUNCTIONING SYSTEMS

Before the founding of the Irish Free State and the express legal recognition of Catholic values in the Irish constitution, the doctrines of the Church had a huge influence on the average Irish marriage. Although English rule had extended many English Marriage Acts to Ireland,⁵ most left Catholic marriages outside their scope. The regulation of Catholic marriages was left to the devices of the Catholic Church. The grant of a Church annulment allowed a Catholic to remarry within the Catholic Church according to Catholic formalities and there was little reason for Catholics to turn to the secular courts.

The Marriages (Ireland) Act 1844 left most of the formalities of a Catholic marriage entirely up to the Catholic Church. This disinterest in the marital affairs of Roman Catholics tied in very well with the position taken by the Roman Catholic Church,

¹ M ANTOKOLSKAIA, *Harmonisation of Family Law in Europe: A Historical Perspective* (European Family Law Series, Intersentia, Antwerp 2006).

² *ibid* 253.

³ *ibid* 252.

⁴ Found in the original Article 41.3.2° of the Irish Constitution.

⁵ These included prohibitions on marriage within the prohibited degrees (32 Henry VIII c6); Prohibitions on a Catholic priest celebrating a mixed marriage or a Protestant marriage (6 Anne c16; 12 Geo 1 c3; 19 Geo II c13; 23 Geo II c 10; 32 Geo III c21 ss 9 10; 33 Geo III c21 s12) and some legislation prohibiting clandestine marriage.

that the regulation of marriage within the community of Roman Catholics was a matter in its exclusive competence.⁶

Although judicial divorce was introduced to England and Wales in 1857 no such facility was given to the Irish courts.⁷ The possibility of a parliamentary divorce⁸ continued until 1922 but was rarely exercised.

The Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 transferred matrimonial jurisdiction from the ecclesiastical courts to a new civil court. This ultimately gave the Irish High court the right to grant decrees of nullity based on the same grounds as previously used by the English ecclesiastical courts.

From 1870, the Irish secular courts had the power to grant nullity decrees but were not used by the vast majority of the Irish population. The civil courts were used far less than the Regional Matrimonial Tribunals of the Roman Catholic Church. Between 1901 and 1909 for example, there were only 36 decrees granted by the secular courts in total (including divorce *a mensa et thoro*, nullity and restitution of conjugal rights).⁹ Most reported cases before the 1940s involve the marriages of the Protestant gentry in Ireland.¹⁰ Without the benefit of establishment, the Roman Catholic Church became the focal point of marriage regulation for Roman Catholics.

Just before the framing of the Irish Constitution, the mainly Protestant judiciary tread a careful line when dealing with the secular invalidity of Catholic marriages. They often backed up their decisions with contemporary Catholic canon law to give their decisions public legitimacy. The judges were deferential to the religious scruples of Catholic parties. As a result, where the technically applicable law was in opposition to the position of contemporary Catholic teaching or the rulings of the Matrimonial Tribunals of the Catholic Church a compromise to give effect to the Catholic teachings could usually be found.

In *A v A (Sued as B)*¹¹ where a Roman Catholic couple already had a decree of nullity from the Catholic courts, the court developed a sort of estoppel doctrine to give validity to Catholic rulings. Where the marriage had been declared invalid by the Catholic Matrimonial courts and this was accepted by the respondent, the respondent could not raise objections to a decree of nullity in the secular courts.

⁶ *Report of the Royal Commission on Divorce and Matrimonial Causes* 1868, appendix, Letter 13 from Archbishop Leahy suggests that any state regulation would be superfluous as the sanctity of marriage was held in high regard by all Irish Catholics; W DUNCAN, 'Supporting the Institution of Marriage in Ireland' [1978] *The Irish Jurist* 215, 217.

⁷ The 1857 Act implemented the recommendations of the *First Report of the Commissioners appointed by Her Majesty to enquire into the law of divorce, and more particularly into the mode of obtaining divorces a vinculo matrimonii* [1604], 1852-53i which only had a remit to look at the laws of England and Wales.

⁸ In the *Report of the Royal Commission on Divorce and Matrimonial Causes* [Cd.6478-9], 1912-13, xviii, 143, 18. Mr James Roberts, an Irish solicitor, noted that since 1857 there had been a total of 39 Irish Private Divorce Acts.

⁹ *Report of the Royal Commission on Divorce and Matrimonial Causes* [Cd.6478-9], 1912-13, xviii, 143.

¹⁰ W DUNCAN, 'Supporting the Institution of Marriage in Ireland' [1978] *The Irish Jurist* 215, 216.

¹¹ (1887)19 L. R. Ir 403.

Hanna J outlined the extent of the secular law applicable to Catholic marriages in *McM v McM & McK v McK*.¹² Under the 1870 Matrimonial Causes and Marriage Law (Ireland) Amendment Act, the jurisdiction of the Irish High Court was the same as that enjoyed by the English ecclesiastical Courts.¹³ The Irish Courts thus applied English ecclesiastical Law which was made up of Catholic canon law as it existed in the reign of Henry VIII subject to amendments made by the Bishops and Archbishops of the Church of England and by English secular legislation.

The creation of this myth, that medieval canon law formed part of the English ecclesiastical law,¹⁴ opened the door for the import of contemporary canon law principles into Irish law. If medieval canon law was part of the secular law, then contemporary canon law merely showed the development of medieval canon law principles and could be used as a persuasive source of authority. This fitted conveniently with the political dilemma faced by the judiciary of holding Catholic couples to rules that were not in harmony with the Catholic values held by the majority of the Irish people.

Although *McM* reached the secular courts, it is clear from the report that the parties involved gave first importance to the ruling of the Catholic Church courts. *McM* involved the nullity of a marriage entered into in 1927. The marriage had never been consummated and the parties were living apart after permission had been granted to them by the Archbishop of Tuam. The husband sought to have the marriage annulled on the basis of his own impotence. The wife refused to repudiate the marriage, for reasons of conscience until set aside by the Catholic Courts.

Hanna J noted that unlike in England and Scotland there was a strong public policy in Ireland to preserve marriages and nullity should not be granted lightly. Otherwise the law would create a way for petitioners to circumvent the law and established public opinion and “make their marriage vows as false as dicers’ oaths.”¹⁵

He looked to a variety of sources to support his ruling that a petitioner could not rely on his or her own impotence including the 1917 Canon law, Judgments from the English and Scottish Matrimonial courts, the *Codex Juris Ecclesiastici Anglicani*, the Ecclesiastical Law of the Church of Ireland and Pothier’s *Traité du Contrat de Mariage*. Thankfully, all sources were consistent on the point giving his judgment both Catholic and secular legitimacy.

The case does little to clarify the principles applicable to nullity in Irish law. However, Hanna J’s reliance on contemporary canon law source shows an understanding by the court that Catholicism was the most legitimate source of law in the eyes of most Catholic couples. His judgment is diplomatic, supported by secular authorities and canon law. This mixing of authorities was to continue in Irish

¹² *McK v McK* [1936] IR 177.

¹³ *McK v McK* [1936] IR 177, 187.

¹⁴ Hanna J relied heavily on *R v Millis* (1844) 10 Cl. & F. 534; 8 ER 844. A case that was quickly distinguished and is now largely discredited.

¹⁵ *McK v McK* [1936] IR 177, 185.

nullity jurisprudence up until the late 1990s. However, the policy reasons for doing so were to change radically.

3. THE IRISH CONSTITUTIONAL PROTECTION OF MARRIAGE: A PROTECTION OF CATHOLIC VALUES?

Irish law is currently subject to *Bunreacht na h-Éireann*, a constitution brought into force in 1937. Although the Constitution has been subject to many amendments since 1937, the family related Article 41 retains most of its original wording.

Many of the framers of the Irish constitution were devout Catholics with a good knowledge of canon law.¹⁶ From the beginning of the drafting process, marriage and the family were subject to express constitutional protection. The original draft of the 1937 Constitution showed a desire to define marriage and the ways in which a marriage could be dissolved at a constitutional level. To give a flavour of the initial approach to family and marriage the article is reproduced in full:

1. The State guarantees the constitution and protection of the family as the basis of moral education and social discipline and harmony, and the sure foundation of ordered society.
2. (1) The constitution of the family depends on valid marriage.
(2) Marriage, as the basis of family life, is under the special protection of the State; attacks on the sanctity of marriage or of family life are prohibited.
(3) Contraception and advocacy of the practice of contraception are prohibited and the possession, use, sale and distribution of contraceptives shall be punishable.
(4) No law shall be enacted authorising the dissolution of a valid consummated marriage of baptised persons. No law shall be enacted authorising the annulment of marriage save on the following grounds, namely, that either or both of the parties did not agree to enter into the marriage contract, or was or were not free to enter, or did not freely enter into the marriage contract, or that the marriage was under the law for the time being in force invalid in form. Subject to the forgoing, the contract of marriage shall be regulated by law.
(5) The State shall encourage early marriage and foster the production of large families by appropriate grants of remission of taxation in respect of children, by the promotion of saving and thrift schemes and by facilitating the provision of housing accommodation on reasonable terms.¹⁷

¹⁶ For example, John Hearne was part of the original committee set up to review the 1922 constitution in 1934. He had trained for the priest hood before becoming a barrister. See further: D KEOGH AND A MCCARTHY, *The Making of the Irish Constitution 1937* (Mercier Press, Cork 2007).

¹⁷ UCDA P150/2373 October draft; reproduced in D KEOGH AND A MCCARTHY, *The Making of the Irish Constitution 1937* (Mercier Press, Cork 2007) 113.

Under this Article the constitutional family was based, not only on marriage, but on a valid marriage and the grounds for nullity were spelt out. It is possible that under such a constitution the courts could have continued with all the previous common law grounds. The constitution technically only prohibited the *enactment* of law allowing nullity for other reasons, not the retention of the grounds in use. There is a strong prohibition on divorce that seems to apply only to Christians, being limited to 'baptised persons.'¹⁸ This coincides with idea of the sacramental nature of marriage between Catholics at the time.¹⁹

Further Catholic influences on the framing of the articles protecting the family are abundant. McQuaid²⁰ forwarded no less than two copies of the 1917 *Codex Iuris Canonici* to the drafting team. In September 1936, Cahill²¹ wrote to de Valera²² arguing that the new Constitution must mark 'a definite break with the Liberal and non-Christian type of State.' He went on to suggest that, 'A Constitution for Ireland should be, if not confessedly Catholic (which may at present be not feasible) at least definitely and confessedly Christian.²³'

At De Valera's suggestion Cahill put his submissions into the form of draft articles and with the input of a committee of Jesuits.²⁴ These draft articles suggested that Irish marriage law, as far as Catholics were concerned, should be given over to the competences of the Church and governed by canon law. In the alternative, they suggested that the nullity laws of Ireland should be identical to those of the Catholic Church.

The final version of Article 41 (before amendment by the 1995 referendum) read as follows:

1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

¹⁸ This would include anyone baptised 'in the name of the Holy Trinity' in canon law.

¹⁹ EN PETERS, *The 1917 Pio-Benedictine Code of Canon Law* (Ignatius, San Francisco 2001) 351, Canon 1012.

²⁰ John Charles McQuaid, Archbishop of Dublin (1940-1972).

²¹ Fr Cahill was de Valera's main link with the Jesuit order. See further: D KEOGH AND A MCCARTHY, *The Making of the Irish Constitution 1937* (Mercier Press, Cork 2007) 94.

²² Éamon de Valera, President of the Executive Council (1932-1937) later Taoiseach and President of Ireland and Head of the Constitutional Drafting Committee.

²³ UCDA P150/2393 Letter from Fr Cahill with suggestions for the drafting of the new constitution. September 4, 1936.

²⁴ The annotations ground this submission in papal encyclicals: Leo XIII *Quod Apostolici Muneris*, *On Socialism*, 28 December 1878. Available online at <<http://www.papalencyclicals.net/Leo13/l13apost.htm>> and Leo XIII *Arcanum Divinici* (*On Marriage*), February 10 1880. Available online at <<http://www.papalencyclicals.net/Leo13/l13cmr.htm>>.

2° The State, therefore, guarantees to protect the Family in its constitution and authority and the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2. 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

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.

2° No law shall be enacted providing for the grant of a dissolution of marriage.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.

Whether the institution of marriage envisaged by the framers was predominately Catholic or whether it was a more Christian notion is not possible to answer definitively.²⁵ Providing for the minority Protestant population was a concern for the framers. It is clear that the understanding of marriage in the Constitution was not based on the common law in force at the time. The evidence available suggests that the Irish framers had direct recourse to the canon law and Papal encyclicals.²⁶

By using the language of *Casti Connubii*, the Irish framers rooted the constitutional understanding of marriage in sacrament rather than a civil institution of marriage or the rather confused jurisprudence of the common law. This understanding of marriage as inviolable and sacramental was underlined by the blanket ban on

²⁵ Although McQuaid had no doubts on this point:

‘Of course, once the State acknowledges God’s right to public worship, it cannot be secular, even if be not Catholic...And when the State legislates according to natural law, of necessity, it legislates according to Catholicity, because the latter is the guardian of the natural law.’

McQuaid to de Valera, undated, UCDA P150/2395.

²⁶ For example Keogh suggests that the McQuaid article was heavily influenced by Leo XIII’s Encyclical, *Rerum Novarum (On Capital and Labor)* May 15 1891. D KEOGH AND A MCCARTHY, *The Making of the Irish Constitution 1937* (Mercier Press, Cork 2007)133. The encyclical is cited by McQuaid in UCDA P250/2408. In addition McQuaid refers to *Casti Connubii* and Pius XI, *Quadragesimo Anno (On Reconstruction of the Social Order)* May 15 1931, UCDA P150/2395.

divorce. There was no real understanding of secular idea of marriage in law that transcended all religious communities.

When introducing the draft of the present Constitution to the Dáil, de Valera mentioned both the religious and social objections to divorce and emphasised the latter:

From the social point of view, without considering any other point of view, the obvious evil would be so great, and it has been proved to be so great in other countries, that I do not think that any person would have any difficulty... in making a choice in this matter.²⁷

The framers believed in the evils of divorce and felt that the Catholic majority took precedence over the concerns of the Protestant minority. It was not that the framers of the constitution saw themselves as enforcing the doctrine of the Catholic Church *per se* but they honestly believed that divorce was a great evil; a view that was bolstered by their Catholic beliefs.²⁸

Some commentators have attempted to minimise the influence of Catholic teachings on the drafting of Articles 41 and 42. Sheehy, for example argues that the influences of the canon law on Articles 41 and 42 were not due to 'religious belief but rather ... the law itself.'²⁹ He dismisses any suggestion that Article 41 amounts to the importation of Roman Catholicism into the Constitution as 'singularly unfortunate and misleading'.³⁰ His argument is based on the latent content of medieval canon law that was part of the ecclesiastical laws of England and in turn inherited by the 1937 framers as part of the secular law. Thus, he argues, they had no choice but to include a canon law influence at a constitutional level.

However, as seen in *McM v McM* the only canon law that could be supposed to have legal force in Ireland was that passed before the Henrician Reformation. Yet, the framers of the Constitution had greater recourse to the canon law than a mere glance at medieval canon law principles. Certain draft articles actually reproduced the canon law of 1917.³¹ This seems to contradict Sheehy's assertion that the only influence of canon law on Articles 41 and 42 was that mandated by the King's ecclesiastical law.

Articles 41 and 42 were in fact, subject to three religious influences; the latent influence of medieval canon law that remained in the civil law, the direct influence of the 1917 Canon law Code and the Papal encyclicals to which there the framers made reference and the Catholic influences of the personal beliefs of the framers: a

²⁷ *Dáil Debates*, vol 67 col 1886.

²⁸ W DUNCAN, 'Supporting the Institution of Marriage in Ireland' [1978] *The Irish Jurist* 215.

²⁹ G SHEEHY, 'The Right to Marry in the Irish Tradition of the Common Law' in J O'REILLY (ed) *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (The Round Hall Press, Dublin 1992) 21.

³⁰ *ibid* 13.

³¹ For example the emphasis in the October draft to baptised persons and the references in the X draft to the 'essential properties of unity and indissolubility'.

form of cultural Catholicism. This means that the ideology behind the constitutional protection of marriage is based on the religious and social importance of marriage rather than the legal recognition of the institution by the common law at that time.

Although the 1937 Constitution did not create an Established Church the secular idea of marriage that was to apply to all communities was inherently linked to Catholic doctrines.

4. JUDICIAL DEFERENCE TO CATHOLIC VALUES IN THE IMMEDIATE AFTERMATH OF THE 1937 CONSTITUTION

The express terms of Article 41.3.2° seemed to preclude the creation of new grounds for nullity. However, it took many years for the full effect of the constitutional protection of marriage to take hold in nullity jurisprudence. There is was little case law until the 1970s due the continuing reliance by most of the population on the Catholic matrimonial tribunals. Duncan suggests that this stagnation of the civil law was probably not the product of a conscious policy of deference by the State to the Church resulted from the slowness of the legislators to recognise the social need to develop civil law remedies.³² Litigation in the secular courts was also expensive and legal aid for family matters was not introduced until 1979.

In the absence of legislation, conflicts between Church law and State law continued to occur in family cases. In general, most conflicts were resolved in favour of Catholic teachings and where the secular law differed to the canon law the judiciary tried to bring the two regimes into compliance.

In *Griffith v Griffith*³³ Haugh J brought the secular law and canon law together. This case concerned a nullity petition on the basis of duress. The husband petitioned for nullity as he had only married to prevent criminal conviction when his fiancée was found to be pregnant. The child turned out not to be his. Haugh J based his ruling on the law as outlined in *McK vMcK* and cited several authorities from the English ecclesiastical courts. He ruled that consent in this case was not real and that no marriage had been entered into. However, he also made reference to canon 1087 of the 1917 Code of Canon law³⁴ and was influenced by the fact that the parties had secured a Church annulment. Haugh J noted that canon 1087 applied to the facts and was similar to the test in the common law and held that in order for duress to erode the consent to marriage it had to come from a grave, external fear that is unjust.

The report reflects Haugh's delight in bringing the parties into a legal situation that reflected canon law, '...I am glad that I can justly relieve the petitioner from the anomalous and unhappy position of being unmarried in the eyes of his Church and married according to the law of the land'

³² W DUNCAN, 'Supporting the Institution of Marriage in Ireland' [1978] *The Irish Jurist* 215, 227.

³³ *Griffith v Griffith* [1944] IR 35.

³⁴ *ibid* 52.

Similarly, in *Tilson v Tilson*,³⁵ a child care dispute, the court gave effect the *Ne Temere* decree by allowing the agreement that children be raised as Catholics to be enforced. In this case the husband and wife were married in a Roman Catholic Church. The husband signed an undertaking that any issue of the marriage would be brought up as Roman Catholics. When difference arose between the husband and wife the three elder children were removed by the husband and placed in a Protestant institution.

In the High Court, Gavan Duffy P ordered that the children be returned to their mother on welfare grounds. However, his judgment was also motivated by Catholic values:

In my opinion, an order of the court designed to secure the fulfilment of an agreement peremptorily required before a mixed marriage by the Church, whose special position in Ireland is officially recognised as the guardian of the faith of the Catholic spouse, cannot be withheld on any ground of public policy by the very State which pays homage to that Church.

Both *Griffith* and *Tilson* show that while courts were not in the habit of directly applying canon law, some judges did refer to it as an influencing factor and were delighted when the common law could be developed in a manner consistent with Catholic teachings.

Public confusion existed as to the laws applicable to marriage. In general, the public were much more familiar with Catholic teachings than the state of the common law. This created a two way problem between the Church and the courts in the area of bigamy cases. The grounds under which nullity could be granted by courts were narrower than those in contemporary Catholic teachings. Thus the courts were sometimes forced to declare valid, a marriage that was declared void by the Church courts. On the other hand, the Church was prepared to sanction re-marriage in the Church of a party to such a marriage in defiance of civil law.

This situation forced O Briain J in *The People v Ballins*,³⁶ to convict the defendant of bigamy even though in canon law he had committed no crime. He made a plea that the law be changed to comply with the canon law:

...after forty years of independence, it should be possible to amend the law here which for historical reasons now raises a grave problem of conscience for the majority of Irish citizens.

The Catholic nature of the State continued to be stressed by the judiciary. In *Ryan v Attorney General*³⁷ Kenny J expressly based the right to marry on the 'Christian and

³⁵ *Tilson v Tilson* [1951] IR 1.

³⁶ *People (Attorney General) v Ballins* [1964] Ir Jur Rep 14 (IRCC).

³⁷ *Ryan v Attorney General* [1965] IR 294 (IESC).

democratic nature of the State' and backed up his argument by reading from papal encyclicals.

This view that, where possible, the common law should be developed to reflect Catholic values was not limited to the judiciary. At the end of the 1960s Walsh argued that Irish civil law still preserved the old canon law bequeathed to it through the common law.³⁸ In his thesis he argued that where possible the two laws should be made compatible and even called for the recognition of the exclusive matrimonial jurisdiction of the Catholic Church over Catholic marriages.³⁹ The idea that marriage law should reflect different religious values for different religious groups was also reflected in proposals for constitutional reform.

5. CONSTITUTIONAL REVIEW 1967: A CATHOLIC MARRIAGE LAW FOR CATHOLIC PEOPLE?

The only comprehensive review of Article 41 before the introduction of divorce in 1995 was the Report of the Committee on the Constitution, December 1967.⁴⁰ The main criticism of Article 41.3.2° at that time was that it took no heed of the wishes of the Protestant minority of the population, who would wish to have divorce facilities and were not prevented by the tenets of their religious denomination. As the Constitution was originally intended for the whole of Ireland⁴¹ the prohibition was a source of embarrassment to those seeking to bring about better relations with the North. It was also argued that other predominately Catholic countries did not expressly ban the dissolution of marriage in their constitutions and that there was a more liberal attitude prevailing in Catholic circles since the Second Vatican Council.

The 1967 Committee on the Constitution suggested that a different wording of the Article 41.3.2,° would be appropriate so as not to cause offence to the religious minorities:

In the case of a person who was married in accordance with the rites of a religion, no law shall be enacted providing for the grant of a dissolution of that marriage on grounds other than those acceptable to that religion.⁴²

This amendment would mean that the applicable marriage law would be different for each religion. No enthusiasm for the idea of a single notion of civil marriage applicable to all can be seen. The Committee acknowledged that the proposed

³⁸ JA WALSH, *The Law of Marriage in Ireland* (UCD 1969) 59.

³⁹ *ibid* 69.

⁴⁰ Committee on the Constitution, *Report of the Committee on the Constitution* (Stationery Office PR 9817, Dublin 1967).

⁴¹ Articles 2 & 3 originally referred to the territory of Ireland as including Northern Ireland until the Nineteenth Amendment of the Constitution Act, 1998 changed these articles to allow Ireland to consent to be bound by the British-Irish Agreement done at Belfast on 10 April 1998.

⁴² Committee on the Constitution, *Report of the Committee on the Constitution* (Stationery Office PR 9817, Dublin 1967).

amendment might breach the constitutional prohibition on religious discrimination but suggested that a clause be introduced to make this article a special exception.

The proposal demonstrates that divorce is no longer seen primarily as a factual social evil. Instead, the focus is on not offending the religious beliefs of citizens by offering them a legal option that is contrary to their faith.

The Committee pointed out that Article 41 denied Catholics the rights of dissolution of marriage in situations allowed by the Vatican. The canon law had moved on since 1937,⁴³ but the nullity law of Ireland based on pre-Reformation canon law had not. Many thousands of such cases were dealt with by diocesan and metropolitan courts every year. The absolute prohibition in the Constitution had the effect of imposing more rigid regulations on Catholics than those required by the law of the Church. The Committee declared that the original Article was unnecessarily harsh and rigid and they unanimously declared that it should be changed and some form of divorce introduced.

The proposal of different marriage laws for different religion opened up the possibility that people would convert to Protestantism to obtain a divorce. The Committee thus outlined a need for laws to prevent people changing to another religion to avail of more liberal divorce laws.

The proposals of the 1967 Committee were never implemented. Nullity law continued to develop subject to the original wording of Article 41.3.2° until the introduction of divorce in 1995. However, the proposals of the 1967 Committee do provide a snap shot into policy concerns at the time and the desire for nullity law to reflect Catholic values, at least for Catholic people.

6. AN EXPLOSION OF NULLITY GROUNDS: THE HIGH TIDE MARK OF CANON LAW

By the 1970s a general tendency had developed in case law to give effect to Catholic values when appropriate. However, the express terms of Article 41.3 seemed to preclude the development of nullity grounds that would make it easier to end a marriage. The problem was that Catholic canon law had moved on and become more flexible since 1937. Should the judiciary give effect to these new developments that were contrary to the values that the original framers of Article 41 were trying to preserve? How was such a conflict to be resolved?

The constitutional ban on divorce did little to prevent marital instability actually occurring. In the 1970s marital breakdown continued to persist. The applications for Church annulments increased and a demand for 'postal divorces' from England⁴⁴

⁴³ The interpretation of the nullity grounds of the 1917 Code of Canon Law had become more liberal by 1967. This was later reflected in the extension of many grounds under the 1983 Code of Canon Law.

⁴⁴ Divorces granted by the English courts on the basis that the parties involved were resident in England. These divorces were not legally valid in Ireland contrary to the understanding of the applicants.

developed in the 1970s and 1980s.⁴⁵ In contrast to England and Wales,⁴⁶ no statutory reforms on nullity were adopted in Ireland and the area remained a predominately common law doctrine.

In the 1970s, the judiciary continued to borrow principles from canon law.⁴⁷ Unlike the judiciary of the 1940s and 1950s these principles were borrowed, not to ensure the survival of orthodox Catholic values, but to respond to the increasing reality of marriage breakdown.

The old objective test for duress laid down in *Griffith v Griffith*,⁴⁸ and considered to be consistent with canon law in the 1940s, was rejected by several High Court judgments in the seventies and eighties in favour of a subjective approach to consent. Some of these decisions were routed in canon law.

In *S v S*,⁴⁹ a nullity petition based on impotence, Kenny J was influenced by the fact that the parties had already successfully obtained a decree of nullity from the Catholic marriage tribunal. He dealt with the case not on the basis of impotence but on intention and introduced the canon law doctrine of simulation⁵⁰ into Irish secular law. He ruled that at the time of the marriage, the husband had decided not to engage in sexual intercourse. As this decision was not known to the wife, no true consent to the marriage had been given. This decision was to have an impact on move away from set grounds for nullity towards a general subjective ground of proper consent.

In *MK (Otherwise McC) v McC*⁵¹ O'Hanlon J referred to the fact that a Roman Catholic Tribunal had granted a decree of nullity on the basis of duress which included merely moral pressure. He took this as evidence that the canon law embraced a broader view of duress which should now be used by the Irish secular courts.

In the Supreme Court decision of *N (otherwise K) v K*⁵² the broad subjective approach to duress taken by O'Hanlon J in *MK v F McC* was approved. However, it was held that the fact that a decree of nullity could be awarded by a Roman Catholic Court on the facts was a factor to be taken into account but should not influence the court per se. Seeking a decree of nullity soon after a purported marriage and some time before the petition for nullity in the civil courts could, in certain cases, be accepted as evidence corroborating the allegation of an absence of real consent.⁵³

⁴⁵ W DUNCAN, *The Case for Divorce in the Irish Republic* (2nd edn, Irish Council for Civil Liberties, Dublin 1982).

⁴⁶ The Nullity of Marriage Act 1971

⁴⁷ P O'CONNOR, *Key Issues in Irish Family Law* (The Round Hall Press, Dublin 1988) 49.

⁴⁸ *Griffith v Griffith* [1944] IR 35.

⁴⁹ *S v S* Unreported judgment, Supreme Court July 1976 Kenny J.

⁵⁰ Although he did not specifically point to canon law in his judgment.

⁵¹ *MK (Otherwise McC) v McC* [1982] ILRM 277.

⁵² *N (otherwise K) v K* [1985] IR 733 (IESC).

⁵³ *ibid*, 741.

Finlay CJ limited the use of contemporary canon law principles, stating "the principles and rules which the ecclesiastical courts of Ireland have heretofore acted on and given relief" must, in my view, be taken to refer to the ecclesiastical courts in Ireland established and in operation prior to 1870 and cannot be taken to refer to the current decisions of ecclesiastical courts of the Roman Catholic Church in Ireland.⁵⁴ In Finlay CJ's judgment canon law is replaced with Article 41.3.2°. He notes that because of the bar on divorce:

Consent to the taking of such a step must, therefore, if the marriage is to be valid, be a fully free exercise of the independent will of the parties.

Henchy J⁵⁵ called for the end of a system where the court went back to the principles medieval canon law and worked forward. 'Such a jurisdiction, defined by reference to what is now an obscure and outdated system of canon law, can hardly be said to be suited to the needs of today.'

This movement away from canon law and towards Article 41 is also seen in Griffin J's judgment.⁵⁶ McCarthy J also noted that the level of consent required for marriage should be commensurate with the constitutional status accorded to marriage.⁵⁷

This is an important step forward in judicial reasoning. The authority initially gleaned from canon law being part of the secular law of Ireland is now found in the wordings of Article 41 itself.

Finlay CJ stated that in order to rebut the presumption of validity of consent it was not necessary to prove a defined legal concept such as duress. Instead, such concepts were subservient to the ultimate objective which was to ascertain whether the consent of the party was real or apparent.⁵⁸ The standard of consent required to form a marriage was set at 'free exercise of the independent will of the parties'.⁵⁹ The consequence of this development was that consent could be rebutted by evidence of any flaw that rendered the consent less than perfect. By not limiting the grounds for which consent could be invalidated, the courts paved the way for a purely subjective approach to the level of consent required for marriage.

By the end of the 1980s, commentators recognised that the expansion of the civil law of nullity owed much to the canon law.⁶⁰ O'Connor suggested that there should be no objection to the courts taking note of the scientific advances that had shaped

⁵⁴ *ibid* 741.

⁵⁵ *ibid* 749.

⁵⁶ *ibid* 751.

⁵⁷ *ibid* 754.

⁵⁸ *ibid*.

⁵⁹ *ibid* 742.

⁶⁰ P O'CONNOR, *Key Issues in Irish Family Law* (The Round Hall Press, Dublin 1988) 51.

canonical jurisprudence and suggested that as the civil law and the Church law came to resemble each other, conflicts between the two would become less frequent.⁶¹ In other words, both systems stemmed from medieval canon law. The Catholic courts had more case law and thus more experience of fitting the rules to modern facts and this should be considered as persuasive authority.

However, it would seem that by *N v K* the use of canon law has been relegated in favour of the use of Article 41.3 itself. Because marriage was to be protected, a value based on Catholic teachings, it must be ensured that every marriage was properly formed. Instead of appealing to the minutiae of canon law rulings, the judiciary could now take a broad brush approach, justifying their liberal approach to nullity with the Catholic values embodied in Article 41.

For example in *O'R v B*⁶² Kinlen J seemed to suggest that the presumption of consent was very easy to rebut: 'The institution of marriage is recognised and supported by common law and by the Constitution. In taking and conferring of a status the Courts must examine as to whether on both sides there was a full, free exercise of the respective independent will of the parties.'

The problem with the subjective test developed in *N v K* was that it did not seem to matter what sort of pressure caused the flaw in consent. It was only a matter of time before the courts dispensed with the need for duress altogether and focused merely on the consent itself. In *M O'M (or se O'C) v B O'C*⁶³ the Supreme Court unanimously decided that even in the absence of any form of duress, consent could be invalid where it was inadequately informed. The test laid down was whether 'this spouse, marrying this particular man, could be said to have had adequate knowledge of every circumstance relevant to the decision she was making, so that her consent could truly be said to be an informed one'.⁶⁴

According to *M O'M v B O'C*, in order to establish that consent is invalid it must be shown that the petitioner was ignorant of some material fact. The assessment of whether or not a fact is material was up to the retroactive judgment of the petitioner.⁶⁵ In *M O'M v B O'C*⁶⁶ itself, Blayney J granted a decree of nullity on the grounds that the wife had not given informed consent where the husband had not disclosed that he had previously seen a psychiatrist. No intention to deceive was required. It became difficult to fix a limit on defective knowledge when the court began to accept the subjective, personal and retroactive opinion of the petitioner.⁶⁷

⁶¹ *ibid* 54.

⁶² *O'R v B* [1995] 2 ILRM 57 (IEHC).

⁶³ *M O'M (or se O'C) v B O'C* [1996] 1 IR 208 (IESC).

⁶⁴ *ibid*.

⁶⁵ P WARD, 'Defective Knowledge: A New Ground for Nullity?' in A Bainham (ed) *The International Survey of Family Law* (Martinus Nijhoff,, The Hague & Boston 1996) 223.

⁶⁶ *M O'M (or se O'C) v B O'C* [1996] 1 IR 208 (IESC).

⁶⁷ P WARD, 'Defective Knowledge: A New Ground for Nullity?' in A Bainham (ed) *The International Survey of Family Law* (Martinus Nijhoff,, The Hague & Boston 1996) 225.

So although leading constitutional lawyers had argued that the original 41.3 barred widely-framed nullity legislation or 'back-door divorce' as well as divorce,⁶⁸ It would seem that the constitutional bar on divorce liberated rather than curtailed judicial imagination in according nullity decrees.

The respect accorded to the marital institution in the Constitution stemming from the Catholic value of marriage as a permanent institution meant that it could not be entered lightly, as to do so would fragilise marriage. This development reflects a changing value of marriage. No longer was the semblance of stability enough for the court. To merit protection, the marriage had to have a chance of being successful.

It is argued that the judiciary went further than modernising the law by reflecting current Catholic values and in fact hijacked the rhetoric of canon law to create a nullity doctrine that was effectively nullity on demand. This development was undoubtedly inspired by a pragmatic need to respond to marital breakdown in a country with no divorce.

In *N v K* Finlay J put this judicial pragmatism on more solid ground by confining canon law to its place as a medieval foundation for the system and using Article 41.3 on which to base a liberal nullity regime. The use of canon law as a intermediary step had softened the impact of circular reasoning whereby in the 1940s Article 41.3 was interpreted as preventing a liberal nullity doctrine while in 1985 it was interpreted as mandating one.

MOM v BOC signalled the high tide mark for subjective nullity. After the introduction of divorce in 1995, judicial activism in this area retreated.

7. A NEW SECULAR AGE OF DIVORCE

The first serious attempt to change the constitutional ban on divorce occurred in 1986. The tenth Amendment of the Constitution Bill 1986 would have provided for divorce where the marriage had broken down and the failure had existed for five years. The proposal to amend the Constitution was rejected at the polls by 63.50% to 36.50%.⁶⁹ Instead a new regime for judicial separation was introduced.

In 1989, the Judicial Separation and Family Reform Act made it possible to get a judicial separation where the spouses had lived apart for 3 years or where the marriage had broken down for at least a year, as well as on fault grounds. A decree of judicial separation abolished the duty to cohabit which had up until this point been part of the legal obligations of marriage.⁷⁰ This radical change was challenged in *TF v Ireland*.⁷¹ The plaintiff contended that, in order to fulfil the State's obligation in Article 41, the State must oblige parties to make an attempt to save their marriage

⁶⁸ J CASEY, *Constitutional Law in Ireland* (3rd edn, Round Hall Sweet & Maxwell, Dublin 2000) 621.

⁶⁹ A SHATTER, *Shatter's Family Law* (4th edn, Butterworths, Dublin 1997) 383.

⁷⁰ Section 8.

⁷¹ *TF v Ireland* [1995] 1 IR 321, [1995] 2 ILRM 321 (IESC).

and that s2 ss1 (1) of the Judicial Separation and Family Law Reform Act 1989 set too low a threshold for the protection of the institution of marriage against attack.

In the High Court, Murphy J held that the abolition of the restitution of conjugal rights was a clear and proper recognition that the institution of marriage could not be invoked in modern times to compel one party to live with another.⁷²

In the Supreme Court, Hamilton CJ held that the protection accorded to marriage 'is given in recognition of the contribution made by the institution of marriage to the welfare of the nation and the State, and the pledge must be seen in this light. It is not concerned solely with marriage itself, or with the spouses in a marriage, but was also in the common good.'⁷³ In many cases, it was in the common good that spouses should be separated, and this action merely recognised the breakdown in the marriage and did not constitute an attack on the institution of marriage or a failure to treat it with special care.

In *TF* the constitutional duty to protect marriage became a duty not to reduce the appeal of marriage. If people could be forced to live together against their will after marrying, they would be unwilling to enter the institution. This reflects a change in social morality. In 1937, the idea of living apart when married would have been socially unacceptable. By 1989 it was more tolerated. In taking the purposive approach, Hamilton CJ's understanding of the protection of marriage was that the State must protect the aspects of marriage that contribute to the good of the society. This is a changeable standard that moves away from traditional Catholic values. By the standards of Irish modern society, forcible cohabitation served no good purpose and thus could not be retained solely on the basis that State must protect marriage against attack.

However, Hamilton CJ was careful not to sever the Catholic heritage of Article 41 completely. He recognised that civil marriage was not limited by its traditional roots although it was derived from Christian notions of partnership. This was the first clear judicial recognition of marriage as a secular concept, albeit with religious roots.

The second effort to introduce divorce followed shortly after *TF*. The fifteenth Amendment to the Constitution Bill 1995 was supported at the polls by 50.28% to 49.72%.

Article 41.3 now reads:

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.

2° A court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:

⁷² He relied on *State (Healy) v Donoghue* [1976] IR 325.

⁷³ *TF v Ireland* [1995] 1 IR 321, [1995] 2 ILRM 321 (IESC) 372.

- i. at the date of the institution of the proceedings, the spouse have lived apart from one another for a period of, or periods amounting to at least four years during the previous five,
- ii. there is no reasonable prospect of a reconciliation between the spouses,
- iii. such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children or either or both of them and any other person prescribed by law, and
- iv. any further conditions prescribed by law are complied with.

The Family Law (Divorce) Act 1996 gave civil marriage a new existence separate from its original inception as an alternative to religious marriage. Divorce ended all marriages in the eyes of the State. The response of the individual churches was a matter for individual faith. At the same time, section 32 of the Family Law Act 1995 brought in standard preliminaries applicable to all marriages carried out in the State. Finally, in the 1990s, Irish law had conclusively moved to the idea of marriage as a legal concept applicable to all couples regardless of religion.

However, the importance of marriage as a value in Irish society was still so high that divorce could not be left to the regulation of mere statute. While Ireland has adopted a modern no-fault divorce regime, it is quite strict compared with many other European systems. Moreover, those conditions are written directly into the Constitution and cannot easily be changed. It is argued that the necessity to do this reflects the reality that Irish morality was changing. While a bare majority were in favour of divorce, some were more enthusiastic than others. In 1937 it was enough to promise to protect marriage against attack, in 1995 the conservative population needed the reassurance at constitutional level of when divorce would and would not be permitted.

One of the peculiarities of divorce law in Ireland is the total absence of fault grounds. This is partly due to the lateness of the introduction of divorce which meant that Victorian ideas of matrimonial offence were unpopular.⁷⁴ It is more directly attributable to the decision by the Government that the grounds for divorce should be simple and judgmentally neutral.⁷⁵ However, the period of living apart is constitutionally set at a minimum of four years.

Divorce in Ireland cannot be obtained unless financial provision for a dependent spouse and children has been settled and deemed 'proper' by a court of law. Section 20 of the Divorce Act 1996 allows the court to have great discretion in deciding what constitutes 'proper provision' in any particular case. In addition Section 22 allows

⁷⁴ Although the *Government White Paper* PL 9104 (Dublin Stationery Office 1992) did give an option (5) suggesting that irretrievable breakdown be established by proof of adultery, desertion and unreasonable behaviour.

⁷⁵ *Government White Paper* PL 9104 (Dublin Stationery Office 1992).

the court to review the orders made at any later stage, if it considers it proper to do so having regard to any change in circumstances or any new evidence.

Irish statute does not provide for 'clean-break' divorce and so divorce does not completely sever the financial duties of the parties in regard to each other. The courts have no power to order that no further application for a lump sum or a property adjustment order can be made in the original divorce proceeding. It is therefore possible for to apply for an adjustment order up until the death of your spouse⁷⁶ although there is no guarantee that such an adjustment will be granted.

The Supreme Court has indicated that finality in financial adjustment is desirable after marital breakdown⁷⁷ however, they are not ready to admit that marriage is no longer a lifelong commitment. In *DT v CT*, Murray J reiterated that marriage is entered into in principle for life. Furthermore Murray J interpreted the 'proper provision' principle, as being linked to the nature of marriage as a lifelong commitment:

Even where a marriage is dissolved by judicial decree, the laws of many if not most states require that the divorced spouses continue to respect and fulfil certain obligations deriving from their dissolved marriage for their mutual protection and welfare, usually of a financial nature. This reflects the fact that marriage is in principle intended to be a lifetime commitment and that each spouse has fashioned his or her life on that premise. If the law permitted a spouse to cut himself or herself adrift of a marriage on divorce without any continuing obligation to the former spouse, it would undermine the very nature of the marriage contract itself and fail to protect the value which society has placed on it as an institution. Hence the constitutional imperative of proper provision for spouses.⁷⁸

The 2006 Constitutional Review took a more pragmatic view and concluded that the introduction of divorce had changed the nature of marriage and that the family in the Constitution had in turn been redefined as being based on a potentially temporary arrangement.⁷⁹

The introduction of divorce in the 1996 brought an end to what Duncan described as 'a policy which tries to counter the stresses which modern life imposes on the marriage relationship by strapping it into an institutional strait-jacket.'⁸⁰ However, as can be seen by the decisions in *TF* and *N(K) v K*, the judiciary had already moved

⁷⁶ And indeed, after the death of your spouse, in the case of secured maintenance.

⁷⁷ *DT v CT (Divorce: Ample resources)* [2002] IESC 68.

⁷⁸ *ibid.*

⁷⁹ The All-Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family* (Stationery Office, Dublin 2006) 39.

⁸⁰ W DUNCAN, 'Supporting the Institution of Marriage in Ireland' [1978] *The Irish Jurist* 215, 227.

away from a policy of protecting all marriages to one where the potential functionality of the protected marriage was paramount. The courts ensured the stability of marriage, by making it easier for unstable couples to resolve their differences or to walk away from a failed relation to form a new and, hopefully, more stable unit.

The approach had been to favour the common good that the marital unit has brought to society rather than to fossilise the letter of the 1937 protection of marriage as an irrevocable commitment based on Catholic teachings. It is argued that, in this way, the protection of marriage has developed to give greater respect to the private sphere of family relationships.

8. THE END OF SUBJECTIVE NULLITY

The introduction of no fault divorce meant that there was no longer any pragmatic need for a liberal nullity regime. However, the absence of financial certainty when a divorce was granted led to one final hurrah for the subjective doctrine of nullity. In Irish law, if a decree of nullity was granted, the marriage was deemed never to have existed and the court had no powers for financial distribution.

Unsurprisingly the courts were unreceptive to this attempt to evade the 'proper provision' requirement for divorce. *M O'M v B O'C* signalled the high tide mark of subjectivism in Irish nullity law and from 1999 onwards the courts swung back to the 1940s standpoint that the Irish constitutional protection of marriage meant that nullity should be very difficult to prove and rarely granted.

In *O'B v R*⁸¹ Kinlen J reverted to the approach to Article 41 seen in *Griffith v Griffith*. He held that the constitutional protection of marriage meant that 'There is undoubtedly a heavy burden of proof on a petitioner to establish that a marriage is null and void. It is for the trial judge to determine whether the parties' marriage is a nullity. As marriage is protected by the Constitution, it is important that the courts must exercise particular caution and scepticism in scrutinising the evidence proffered'.⁸²

Limitations were placed on the doctrine of defective knowledge in *PF v G O'M*.⁸³ In the Supreme Court, McGuinness J stated that *M O'M v B O'C* had left the requirement for informed consent so wide as to cover almost any situation where a petitioner gave evidence that her or she would not have married the respondent had the information been available before the marriage.⁸⁴ She held that this was incompatible with the Irish constitutional protection of marriage:

⁸¹ *O'B v R* [1999] 4 IR 168.

⁸² *ibid* 176.

⁸³ *PF v GO'M* [2001] 3 IR 1 (IESC) 23.

⁸⁴ *M O'M (or se O'C) v B O'C* [1996] 1 IR 208 (IESC).

The introduction of a ground for nullity which, taken to its logical conclusion, could bring uncertainty into a wide variety of marriages is not only undesirable as a matter of public policy but is contrary to the clear intention of Article 41.3.1.⁸⁵

The Supreme Court limited the ruling in *MO'M v BO'C* to its facts.

The 2009 Supreme Court case of *LB v T MacC*⁸⁶ ends all further possibilities for a subjective approach to nullity. This case involved a financially successful woman who had married a man who had held himself out to be successful. On the contrary, he was a financial drain on his wife, debtridden and did not contribute financially to the relationship. In the High Court O'Higgins J. concluded that the respondent's lack of full disclosure about his financial affairs, family and social circumstances, were not grounds upon which one could base a claim for nullity.

In the supreme Court Kearns J clearly approved a return to the original understanding of the effect of Article 41 on nullity jurisprudence:

The Constitution imposes a clear obligation on the courts to uphold the marriage contract and it would require far stronger evidence than has been adduced in this case to satisfy me that the respondent lacked the requisite capacity to enter a valid contract of marriage.⁸⁷

The Supreme Court have called for legislative action in the area of nullity in both *PF v GOM* and *LB v T MacC*. It is clear that after the introduction of no fault divorce, the door has shut on subjective nullity.

9. CONCLUSIONS

The approach of the Irish courts to the doctrine of nullity has come full circle. The interaction between canon law and Catholic values, and the secular doctrine of nullity was instrumental in the development of a flexible nullity doctrine that filled the gap before the introduction of divorce in 1995.

The relationship between canon law and secular law in Ireland has always been uneasy and the extent that one influences the other has depended largely on the politics and social morality of the time. Before 1937, Catholics remained largely outside the secular system. When cases did make it to the Irish secular courts, the mainly Protestant judiciary were eager not to rule in a way that was contrary to the morals of Catholic couples and the prevailing ideology at the time.

⁸⁵ *PF v GO'M* [2001] 3 IR 1 (IESC) 24.

⁸⁶ *LB v T MacC* [2009] IESC 21.

⁸⁷ *ibid* 22

The myth created in *McK v McK*, that canon law is at the root of Irish secular nullity law proved an excellent tool for the judiciary to use to make their judgments publically acceptable. The development of a liberal nullity law through the rhetoric of canon law was merely an extension of this policy.

Until 1970, the prevailing Irish morality was strictly against the breakdown of marriage and the possibility of divorce by nullity. The framing of Article 41 shows that the framers originally intended for the article to hold people to their marriage vows and reflect 1940s Catholic values. Clearly, by design, Article 41 was supposed to prevent the creation of a liberal approach to nullity. For a time the secular law was interpreted as being as close as possible to Catholic teachings and this reflected a clear national identity and homogeneous interpretation of Catholic teachings.

However, the problem quickly appeared that the medieval canon law values on which secular nullity law was supposedly based, were not the same as contemporary Catholic values. Thus in the cases of *Griffith, Tilson* and *Ballins* there is a clear attempt by the judiciary to develop the law in line with contemporary Catholic values and where they could not, this was something that the legislature was implored to remedy. Until 1970, strict Catholic values as represented by the constitutional protection of marriage were used to justify a conservative law and this was acceptable to a largely conservative Catholic population.

After 1970 these strict Catholic values are used to create a stepping stop to the development of a flexible nullity doctrine that takes the place of much needed divorce. The rhetoric of canon law is used in cases such as *S v S* and *MK (Otherwise McC) v McC* to legitimise what the judiciary were doing but lots of other cases from the time cite no authority whatsoever for the creation of a subjective approach to nullity.⁸⁸ The unpinning goal of the judiciary must be interpreted as responding to a changing social morality. The judiciary took a 'catholic' approach to canon law taking the bits that are useful to respond to the growing societal need for divorce.

Canon law provided a legitimacy which was replaced in *N v K* by a resort to the wording of Article 41.3 itself. The logic of *N v K* leaves the doctrines of canon law behind merely taking from Catholic values the idea that marriage is sacred, an idea embodied in Article 41. This protection meant that that marriage is such a serious commitment that it must be very difficult to make. This interpretation ignored the original intention of the framers and the contemporary canon law yet the basis for its legitimacy is Catholic values.

After the introduction of divorce, this interpretation of Article 41 has served its purpose. The courts reverted to using Article 41 to limit the doctrine of nullity and the justifications found in *Griffith* and *McK* used to legitimise a conservative Catholic law resurface. The judiciary no longer use canon law to justify their 'catholic' approach to nullity grounds. Marriage law become a more secular concept merely routed in Christianity.

⁸⁸ *B v D* High Court Unreported Judgment 20 June 1973 Murnaghan J; *S v S* Unreported High Court Judgment, 10 November 1978, Finlay P.

Although the constitutional protection of marriage remains, in the absence of homogenous religious values is having an increasing inconsistent effect. The courts have established that the institutional protection of marriage is subject to the common good.⁸⁹ It has also been established that other constitutional rights will take priority over the constitutional protection of marriage such as those under Article 40.3.⁹⁰ The intervention of EU law also means that the Article 41 protection must be interpreted subject to the rights given under EU treaties.

⁸⁹ *TF v Ireland* [1995] 1 IR 321, [1995] 2 ILRM 321 (IESC)

⁹⁰ *Foy v An t-Ard Chlaraitheoir & Ors (No. 2)* Unapproved judgment, McKechnie J 19 October 2007 (IEHC), *O'Shea v Ireland* Unreported judgment of Laffoy J delivered on 17 October 2006.