Semantic Ambiguity, Vagueness, and Constitutional Ramifications for the Family Law Act of 1996

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1 Semantic Ambiguity vs. Vagueness

Article 25, §4(5) of the Constitution of Ireland states:[1]

> As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President, or where the President has signed the text of such law in each of the official languages, both the signed texts shall be enrolled for record in the office of the Registrar of the Supreme Court, and *the text, or both the texts so enrolled shall be conclusive evidence of the provisions of such law*

This principle is generalized to the status of the Constitution itself in Article 25, §5(3), thus establishing a coherent state of affairs in which it is legal texts, rather than hearsay or opinion, that determine the law. In making a commitment to the status of individual texts, the Constitution has a concomitant reliance on the language comprising the texts. The Constitution makes explicit the potential for alternative forms of expression to arise between phrasings stipulated in the national language and the second language, and provides for conflicting interpretations by settling with the interpretation expressed in the national language.[2]

It is arguably the case that the constitutional provision for a Supreme Court is an implicit acknowledgement that a multiplicity of meanings for a phrase can exist within a single language. Certainly, by committing to a given text, and thus the phrasing that forms the text, the state of the law on particular issues depends precisely on the interpretation of the phrasing given. The potential for multiplicity of interpretation is often referred to as ambiguity, but it is important to heed a distinction between semantic ambiguity and vagueness.[3] Intuitively, the difference between ambiguity and vagueness is enumerability: an expression is ambiguous if its interpretations can be enumerated as a finite disjunction of potential meanings; an expression is vague if its meaning cannot be given as a finite disjunction of possibilities. A classic example of semantic ambiguity arises from syntactic ambiguity, as in (1) in which the phrase *with a telescope* may express the method of perception or the objects in the vicinity of the perceived.

(1) Kim saw Lee in the park with a telescope.

(2) Kim saw Lee in love.

In contrast, (2) does not admit to a finite enumeration of possible meanings.[4] The distinction between ambiguity and vagueness is important because there is a certain sense in which for legal texts, outwith the domain of treaties ending armed conflict, it is within the remit of the judiciary to provide interpretation yielding enumerability where vagueness exists in a text, but it is a parliamentary responsibility to excise ambiguity when it exists in an unwanted fashion. Multiplicity of interpretation gives rise to 'loopholes', and it is traditionally the role of legal precedent to establish the parameters of vagueness and the role of legislation to provide texts with a determinate number of potential interpretations.

[1]Emphasis added.

[2]Article 25 §4(6) and §5(4); note that this provision holds even in case the phrase in question was composed first in the second language and subsequently translated into the national language.

[3]See Pinkal (1995).

[4]A successful refuter of this claim will enter into the annals of merit in the history of philosophy.

Consider (3) as a preliminary example from Article 18 §2 of the Constitution.

(3) A person to be eligible for membership of Seanad Éirean must be eligible to become a member of Dáil Éirean.

For reference, Article 16 §1(1) provides for eligibility to be a member of Dáil Éirean as in (4)

(4) Every citizen without distinction of sex who has reached the age of twenty-one years, and who is not placed under disability or incapacity by this Constitution or by law, shall be eligible for membership of Dáil Éirean.

The issue at stake here is that, regardless of intended interpretations, the text of Article 18 §2 is ambiguous. One reading of the text is that eligibility for membership in Seanad is identical with prerequisites to eligibility for membership in Dáil Éirean. The other reading is that membership in Seanad is determined solely by potential to become eligible for membership in the other house. This reading is provided for by use of the infinitive *to become* in the predication *must be eligible to become*. In order to have been unambiguous, the text would have to have been[5] stated as in (5)

(5) A person to be eligible for membership of Seanad Éirean must be eligible to be a member of Dáil Éirean.

The problem with (3), given Article 25 §5(3), is that unless no citizen under the age of 21 can ever hope to be a member of Dáil Éirean and if no one over 21 can ever become a naturalized citizen and eligible, (in which case there could be no future members of Seanad) then anyone who can become a member of the Dáil Éirean in the future (but not now) is now eligible to be member of Seanad. Yet this is patently absurd: of course a child today is eligible to *become* a member of Dáil Éirean even if that same child is not eligible to *be* a member of Dáil Éirean. Thus, the text of the Constitution in Article 25 §5(3) is not vague: it prescribes two possible forms of eligibility to the Seanad, one actual and the other potential.[6]

This particular issue is not the intended focus of this paper. Rather, a different article of the Constitution[7] is demonstrated to be ambiguous in a way that interacts interestingly with intentions surrounding the Family Law Act (1996), and other aspects of the Constitution[8]. The main argument of this paper is that the legal instruments at stake provide for more divorces than has been hitherto observed, is within certain interesting parameters more permissive of no-fault divorce than is provided for by corresponding British legislation[9], and that this permissiveness is in general concert with the Constitutional provision for primacy of the Family[10] as well as the Constitution's declaration of social policy that includes maximization of the number of families in the State.[11]

[5]Of course, there are an uncountable infinity of alternative phrasings that would have yielded the intended meaning unambiguously, however the suggestion given is minimally different from the original.

[6]Handily, by virtue of Article 25 §4 (6), the constitution is in the end unambiguous on exactly this point by virtue of the fact that the Irish version expresses the sense of (5) rather than the sense given by the actual English text (3)(Rósmáire Nic Aodha, personal communication): the English and Irish drafts of the constitution differ on precisely this point, but the constitution further provides that the Irish text prevails.

[7]Article 42 §3(2.i)

[8]Article 42 §1 and Article 45 §2(v)

[9]Family Law Act (1996)

[10]Article 41 §1

[11]Article 45 §2(v)

2 Ambiguity and the Family Law Act (1996)

Following the 1995 referendum, Article 41 §3(2) of the Constitution provides:

> A Court designated by law may grant of a dissolution of marriage where, but only where, it is satisfied that—
>
> i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
> 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 of either or both of them and any other person prescribed by law, and
> iv. any further conditions prescribed by law are complied with.

Moreover, the Family Law (Divorce) Act (1996) provides in §5(1):

> Subject to the provisions of this Act, where, on application to it in that behalf either of the spouses concerned, the court is satisfied that—
>
> a at the date of the institution of the proceedings the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
> b there is no reasonable prospect of a reconciliation between the spouses, and
> c such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family,
>
> the court may, in exercise of the jurisdiction conferred by Article 41.3.2 of the Constitution, grant a decree of divorce in respect of the marriage concerned.

Popular[12] and scholarly[13] perception has it that the minimum time "living apart" required by Article 41 §3(2.i) is four of the five years preceding the date of application. This is indeed patently the case. Walls and Bergin (1997, p. 11) allude to the interesting fact that provided the other conditions are met, nothing here requires that even the year antecedent to application be included in the four years of separation.[14] What has not been pointed out before is that there is no stipulation in the Constitution nor in the Act of the Oireachtas of the starting point in measuring the five years preceding the application. A popular predilection seems to assume that this reckoning commences with the start of the marriage; however, there is no such provision in the text of the Constitution nor the associated Act. On the other hand, the text is not vague either: there is a prescribed period of "living apart" that must be demonstrated to have existed among four of the five years prior to the application. While the corresponding act in

[12] "Divorce Bill Passes Second Stage in Dáil," *The Irish Times*. Home News. Friday, June 28, 1996; Carol Coulter, "'No Fault' Divorce Basis Not Debated," *The Irish Times*. Opinion. Friday, June 21, 1996.

[13] See Conneely (1997) and Walls and Bergin (1997).

[14] The Judicial Separation Act 1989 §2(d) does require a minimum of one year of living apart immediately prior to application.

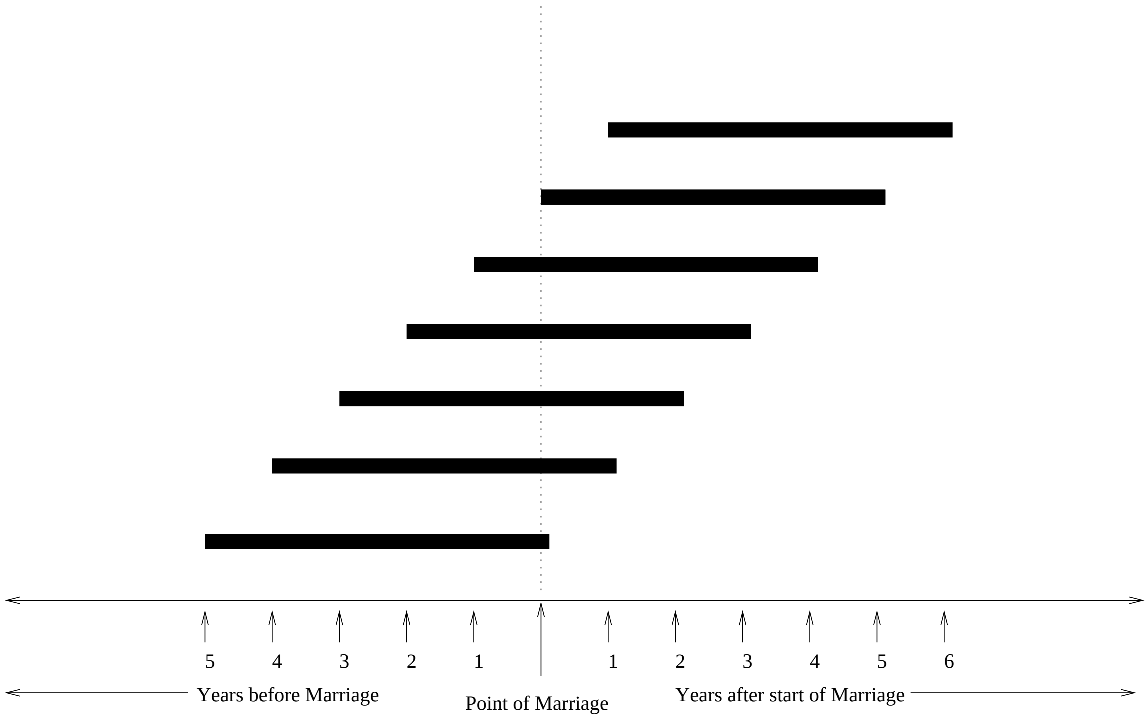

Figure 1: Discrete Five Year Intervals of Interest to the Family Law Act 1996

Britain[15] entails a minimum of 93 weeks of marriage prior to divorce because of a stated prohibition against application within the first year of marriage (along with prescribed periods for various procedures), the text of the Irish laws entail no such minimum.

Figure 1 depicts five-year intervals that are salient to the issue at hand. For clarity of presentation only intervals beginning at discrete numbers of years relative to the point of marriage are depicted—the discussion applies equally to intervals which commence at interim points as well. The dark horizontal bars indicate five year spans prior to filing during which four years of "living apart" must be demonstrated. The illustration indicates that "living apart" does not entail "separation" until after the point of marriage; that is, provided that the spouses did not live together prior to the marriage, a divorce can be applied for immediately after marriage, and, in fact, at any point during the first year of marriage. If the spouses need only demonstrate that they have lived apart for four years (and not that they lived together as spouses and then separated), which is what the text of the Constitution and related Act stipulated, then all that is necessary (in addition to the other provisions, none of which stipulate periods of wait) is to demonstrate that they did not live together prior to the marriage. Obviously, the longer a couple has been married, the greater the length of separation is required and the less the time prior to marriage has an effect. After five years of marriage, none of the time prior to marriage is relevant to the law, and the full four years of "living apart" in the five years prior to application must be separation.[16]

[15] Family Law Act 1996

[16] This discussion is wholly orthogonal to the issue of what counts as "living apart" (cf. Walls & Bergin, 1997).

Two issues of lexical semantics are worthy of discussion at this point. The first is a reiteration: the legal texts stipulate "living apart" is essential, not "separation". Only the latter has any implication of a state of prior "togetherness", and even "separation" does not entail that the prior unity be conjugal. The second, and more interesting point is the use of the definite description, "the spouses". One potential argument against the point made in this paper is that "spouse" conveys the requisite sense of conjugal relation that entails that the period of living apart must actually be separation after the commencement of marriage. The putative argument runs thusly: if the pair of individuals is not married, then they are not spouses, so the time prior to marriage is irrelevant.

However, this argument fails for two reasons, both of which pertain to the potential for the expression "the spouses" to designate a definite pair of individuals who are not conjugally related to each other. The most technical reason is that "the spouses" can in fact be used as a term to designate a definite pair of individuals who are not married to each other nor related in any conjugal sense. Consider the Pension Schemes (Family Law) Regulations 1997 (S.I. No. 107 of 1997; pt 1, §3 (definitions) 1)

> "Spouse" includes a person who is party to a marriage that has been dissolved under the Act of 1996 or under the law of a country or jurisdiction other than the State.

However, an even more obvious fact is that definite descriptions in general are characterized by designating a particular individual or set of individuals with particular members. "The spouses" in the Act is not, of course, designating a particular set of individuals, but instead specifies a function which in any case at hand does properly denote the two individuals who are applying for a divorce. Thus, in a particular case, those individuals will have to demonstrate the requisite period of living apart: "the spouses" designates those two individuals uniquely, and having specified them in this fashion they remain uniquely identified in the period prior to the marriage and subsequent to the divorce. Consider another example of a definite description: "the current President of Ireland". The current President of Ireland is not a man — the individual designated by the expression "the current President of Ireland" (at the time of writing) is a woman, and (to the best of everyone's knowledge) has always been female, even prior to being the current President of Ireland: the description uniquely picks out an individual, yet the diagnostic property of the individual contained in the expression need not always have been a property of that unique individual. Thus, "the spouses" designates two individuals at the time of application for divorce, subsequent to marriage, and so also picks out the same individuals at times prior to the marriage. As one final example of this phenomenon, consider another passage from the Constitution:[17]

> If a member of either House of the Oireachtas be elected President, he shall be deemed to have vacated his seat in that House.

Article 12, §6 (1) stipulates that "the President shall not be a member of either House of the Oireachtas." This sentence makes §6 (2) interesting in that two pronouns are used, "he" and "his". Either those anaphors lack antecedents, or they refer to the

[17] Article 12, §6 (2)

"member" or to the "President". It's an interesting case because the preceding clause §6 (1) stipulates that a single individual can't hold a seat in one of the Houses at the same time as being President, yet intuitively the pronouns both pick out the individual at stake who might have been in such a position. If the pronouns do not pick out the individual in question, then they do not refer at all, as if an individual has vacated his seat he cannot be a member in the corresponding house. That is, the pronoun refers to a potential individual that fits the description, "elected President, former member of a House of the Oireachtas", as that person cannot without contradiction be a member of a House of the Oireachtas and President-elect. The essential point demonstrated here is that a definite description allows the designation of a particular individual, and having denoted that individual the same individual is uniquely identified for the periods prior to and subsequent to the period during which the definite description is accurate. Similarly, there is nothing in the text of the Constitution nor the corresponding Act[18] which stipulates that the spouses who must "have lived apart from each other for a period of, or periods amounting to, at least four of the five years during the previous five years" to have at at the time of application been married for any length of time subsequent to commencement of the marriage, provided that it can be demonstrated that "there is no reasonable prospect of a reconciliation between the spouses."

The Constitution and Act are both ambiguous with respect to the minimum duration of "living apart" required relative to the commencement of the marriage.[19] This entails that the requisite period of separation after the marriage is also ambiguous (but not vague). Vagueness enters into the proceedings by virtue of Article 41 §3 (2.ii) quoted at the end of the preceding paragraph. It is not specified what can constitute a reasonable prospect for reconciliation, and presumably the judiciary is at some liberty to use this clause to prohibit what might be deemed a frivolously short period following commencement of the marriage before application. On the other hand, while "frivolously short" is also vague, it is outwith the texts at issue to require that the full five years be reckoned as the minimum bound. The next section argues why this is the case.

3 Ramifications

The Constitution has declared for itself an interesting pair of principles. On one hand, the Family is proclaimed as "the natural primary and fundamental unit group of Society"[20], and on the other hand it is indicated as a principle of social policy that there should be "as many families as the circumstances shall be practicable."[21]. Another vagueness enters at this point, on exactly what constitutes the "Family". It would cause riot to declare that a single-parent household does not constitute a family. Thus, provided that Article 41 §3 (2.iii) is met in each case, access to divorce and subsequent remarriage does further the State's policy toward the proliferation of families as stated in Article 45, §2 (v). This entails that given that no-fault divorce is constitutionally available, coupled with the finite span of human life, there is a constitutional imperative to minimize any period of time at issue in the demonstration that Article 41 §3 (2.ii) is satisfied; that

[18] Neither explicitly as in the corresponding British Family Act (1996), nor implicitly via lexical semantics.

[19] Unlike the issue of eligibility for Seanad as discussed above for which the Irish text resolves the issue, the same ambiguity persists in both the English and the Irish texts on this point (Rósmáire Nic Aodha, personal communication).

[20] Article 41, §1

[21] Article 45, §2 (v)

is, the phrase "no reasonable prospect of a reconciliation" cannot within the spirit of the Constitution be deemed to specify a duration of time for assessment "reasonable prospect" independent of the duration specified by Article 41 §3 (2.i). Incorporating a period of time into the interpretation of Article 41 §3 (2.ii) independent of that specified by Article 41 §3 (2.i) would violate both Article 45 §2 (v) and Article 25 §5 (3).

What is more deeply interesting is that while the letter of the law maximizes the number of potential marriages, and via correlation the number of families, extant in the State, there is a less sophisticated sense in which the structure of the text with its ambiguity[22] about the required length of time of living apart subsequent to commencement of marriage. The more interesting point is that the current phrasing of the Constitution and corresponding Act on the relevant points is such that there is an increasing commitment to a particular marriage continuing as a marriage in approximate proportion to the length of time of the marriage, with relatively less commitment at the start, and relatively more after the first five years. This is a rather liberal and strikingly sound design given general sociological and psychological principles about break-ups of commitments like marriage as a function of the time during which the married state is in force. That is, a divorce is likely to be more devastating to the individuals involved (dependents included) after more time of marriage than less (Catron, Chiriboga, & Krystal, 1980; Palosaari & Aro, 1994). It is sound that the Constitution respects both the maximization of quantity of families in the state as well as the increasing seriousness of a potential divorce as the union matures.

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[22] Again, it is ambiguous how many of the four years need be subsequent to the commencement of marriage. It is not vague, the text allows a number of possibilities.