

ON WOMEN IN THE HOME

Article 41.2 of the Constitution

41.2.1° 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.

41.2.2° 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.

Historical context

A commitment to the ideal of ‘separate spheres’, premised on the complementarity of gender roles and a presumption of natural sex differences between women and men is given legal recognition in the language of Article 41.2.¹

The inclusion of the reference to women’s role in the home in the Constitution reflects the influence of Catholic social teaching. In his comments on a draft text of the Constitution, Archbishop John Charles McQuaid noted that:²

Nothing will change in law and fact of nature that woman’s natural sphere is in the home.[‘Rights of Women’.

The Women’s Graduates Association led the opposition to the draft Constitution. Hanna Sheehy-Skeffington, a leading feminist activist and a pacifist who had supported DeValera in the civil war, was one of the most vocal opponents. The 1916 Proclamation, she argued, had given Irish women “equal citizenship, equal rights and equal opportunities”.³ Subsequent constitutions had “filched these” or “smothered them in mere empty formulae.”⁴ John A. Costello, a former Attorney General, expressed concern that the language used in Article 41.2 could exclude women’s life outside the home from constitutional protection.⁵

Opposition to the language of Article 41.2, however, was rejected as “anti-Catholic” and as lacking respect for the Church teachings on, “the position, the sphere, the duties of women.”⁶

Against Reform: On Women in the Home

¹ See: S. Mullally *Gender Culture and Human Rights: Reclaiming Universalism* (Hart: Oxford, 2006) ch.7

² John Charles McQuaid Papers, Section 5, File 48, Dublin Diocesan Archives

³ See: Election manifesto of Hannah Sheehy Skeffington, 1943, cited in M Luddy *Hannah Sheehy Skeffington* (Dublin, Historical Association of Ireland, 1995), p.50.

⁴ *Ibid.*

⁵ *Dáil Debates*, vol. 68, col.1856, 4th June 1937

⁶ *Irish Press* 17 Dec. 1937.

Women have traditionally taken primary responsibility for care work in the home and for caring roles, including caring for children, the elderly, persons with disabilities and others. Women continue to take most responsibility for care work. Traditionally, care work in the home has been undervalued. It is largely unpaid and has often remained invisible with little official recognition of its significance to the everyday functioning of society.

Article 41.2 can be read as recognition of the distinct role played by many women in the home and a positive valuation of the care work that women have traditionally undertaken. Although gender roles have changed in contemporary Ireland, women continue to account for the majority of homemakers and carers working full-time in the home. Women continue to take on primary responsibility for care work, both in the home and in the wider community:⁷

- 47% of people in employment are women;
- 55% of women are in employment;
- Just over half of women with children are in employment. Three-quarters of men with children are in employment.
- 61% of Carers are women;
- Women provide two-thirds (66%) of all care hours;
- 86% of child-care is carried out by women.

These statistics reflect wider trends internationally. According to the International Labour Organisation, at least 52.6 million women and men over the age of 15 are engaged in domestic work as their main occupation. Women comprise 83% of the total domestic workers worldwide.⁸ Due to the largely unregulated and hidden nature of domestic work, the total number of domestic workers may be in the region of 100 million, significantly higher than the ILO figures.

On recognising the wider value of care to Irish society

As Joan Tronto reminds us, 'Care is not a parochial concern of women, a type of secondary moral question, or the work of the least well off in society.'⁹ It is a 'central concern of human life', one that is founded in the inevitable vulnerability of the human condition.¹⁰

It is important to safeguard against the isolated individualism of contemporary societies, and to recognise the value of care work and the contribution made by carers to the well being of Irish society. Recognising care as a core constitutional value is an important statement of our commitment to supporting care work and the roles of carers, which are often unpaid.

⁷ These statistics are cited in National Women's Council of Ireland *Submission to the Constitutional Convention* (2013) p. 6

⁸ International Labour Office, Domestic Work Policy Brief 5: Coverage of domestic workers by key working conditions laws http://www.ilo.org/travail/whatwedo/publications/WCMS_157509/lang--en/index.htm accessed 27 November 2012 (Hereafter ILO Policy Brief 5).

⁹ J. C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993), p. 180.

¹⁰ See generally, M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1

Dr Olivia Smith in her essay on the 'Right to Care' has noted that the human need to receive care is universal. As Smith also notes:¹¹

'The need to be enabled and supported in the performance of care work is important to the carer, but also to the recipient of care'.

Care work contributes to developing and supporting the autonomy and dignity of the person receiving care. Supporting the work of the carer requires community support. Care is a public good. It supports the maintenance of a cohesive society, and the production of 'healthy, well-functioning citizens and workers.'¹²

How the household functions, divisions of labour and availability of support to ensure the smooth completion of care-taking tasks, shapes the operation of the public sphere in ways that have often remained invisible or unacknowledged. In most societies, the provision of care labour in the domestic sphere is not yet fully recognised by states as a public good that requires state support and resourcing.

A 'Protective Guarantee': Recognising the Value of Women's Care work?

Traditionally, care work has been undervalued and care work within the home remains largely unpaid. Article 41.2 can be read as an attempt to remedy that lack of recognition. This was the argument made by Justice Susan Denham (as she then was) in her judgment in the *Sinnott* case. She argued:¹³

Article 41.2 does not assign women to a domestic role. Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work performed by women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.

Kathy Sinnott was seeking recognition of her role as a carer within the family, caring for her son who had severe disabilities. She argued that the State's failure to protect her son's rights also breached her constitutional rights as the primary carer within the family. Chief Justice Keane, giving judgment on behalf of the majority of the Supreme Court, rejected her arguments, however. He concluded that while her position evoked "respect, admiration and compassion", these were not grounds in law for any award of damages.

¹¹ O Smith 'How Far From a 'Right to Care'? Reconciling Care Work and Labour Market Work in Ireland' (2012) 47 (1) JUR 143 Irish Jurist, p.174

¹² *Ibid.* p.167

¹³ [2001] 2 IR 545, at p. 665.

Although it has been suggested by some (including Justice Denham), that Article 41.2 could provide support for a rights claim arising from women's contribution to care work, to date this interpretation of the Constitution has been rejected by the Irish courts.

In the case of *L v. L*¹⁴ the Supreme Court rejected a claim by a married woman that was based specifically on Article 41.2. The Supreme Court held that even though she had worked exclusively within the home throughout her marriage she was not entitled to a 50% interest in the family home and Article 41.2 could not support her claim.

THE NEED FOR REFORM: GENDER, WOMEN AND STEREOTYPES

Article 41.2's specific reference to the role of women in the home, and to mothers' 'duties in the home', has given rise to criticism, both during the drafting process of the Constitution itself and more recently in debates on the necessity of constitutional reform. The constitutional text does not assign roles or societal functions in this way to other private individuals. It is specifically women and mothers who are selected to fulfil specific roles and to discharge specific functions in society.

At the time of drafting, and in 2013, concern has been expressed that the specific role assigned exclusively to women by Article 41.2 does not take account of the wide variety of roles and experiences of women – as employees, as carers, as employers, as public, political figures.

Article 41.2 does not refer to or acknowledge the roles played by men and by fathers in the home and in families. The National Women's Council of Ireland, in its submission to the Constitutional Convention, has pointed out that the current wording of Article 41.2 does not recognise the work that men currently do as carers, and neither does it recognise that men have duties and responsibilities as carers.

In *DT v CT*, Judge Murray suggested that Article 41.2 could be interpreted as covering fathers' roles:¹⁵

'the Constitution ... is to be interpreted as a contemporary document. The duties and obligations of spouses are mutual and, without elaborating further since nothing turns on the point in this case, it seems to me that [the Constitution] implicitly recognises similarly the value of a man's contribution in the home as a parent.'

The Irish Human Rights Commission has argued that Article 41.2 of the Constitution is based on:¹⁶

¹⁴ [1992] 2 IR 77

¹⁵ (2002)

¹⁶ Irish Human Rights Commission, *Submission to the UN Committee on the Elimination of All Forms of Discrimination Against Women in respect of Ireland's Combined Fourth and Fifth Periodic Reports under the UN Convention on the Elimination of All Forms of Discrimination Against Women*, p.2

[...] a stereotypical view of the social roles of women as homemakers and mothers. It retains 'a biological determinism' that is, in their view, 'offensive to women and ascribes to them a limited and dependent role.'

On the value of care outside of 'the home'

Article 41.2, as currently drafted, does not recognise or value caring roles that are undertaken outside of the home - in communities, neighbourhoods and the wider society. As such it fails to fully recognise the value of care to Irish society. The right to 'private and family life' protected by Article 8 of the European Convention of Human Rights covers a wider range of activities and of human interaction than found in the wording of Article 41.2. Removing the reference to the home would reflect this wider protection given to 'private and family life'.

Observations of international human rights bodies

Article 41.2 of the Constitution has attracted repeated criticism from international human rights bodies.

The UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressed concern at:¹⁷

[...] the persistence of traditional stereotypical views of the social roles and responsibilities of women and men in the family and in society at large which are reflected in article 41.2 of the Constitution and its male-oriented language, as recognized by the All-Party Oireachtas Committee on the Constitution, in women's educational choices and employment patterns, and in women's low participation in political and public life.

The Committee called on the Government to consider replacing the language of Article 41.2 with 'gender-sensitive' language to convey the concept of gender equality more clearly.

The UN Human Rights Committee concluded that Article 41.2:¹⁸

¹⁷ Committee on the Elimination of All Forms of Discrimination Against Women, *Concluding Observations on Ireland's Combined Fourth and Fifth Reports*, 22 July 2005, UN Doc. CEDAW/C/IRL/CO/4-5, para.24

¹⁸ Human Rights Committee *Concluding Observations on Ireland's Third Periodic Report* 30 July 2008, UN Doc. CCPR/C/IRL/CO/3, para.10

[...] perpetuates traditional attitudes toward the restricted role of women in public life, in society and in the family', in breach of the State's obligations under Articles 3 (equality between women and men), 25 (equality in public life) and 26 (equality before the law) of the International Covenant on Civil and Political Rights.

The UN Human Rights Committee recommended that Ireland take steps to move to a gender-neutral wording of Article 41.2.

Recommendations for reform

In 1993 the report of the Second Commission on the Status of Women recommended that Article 41.2 should be deleted.¹⁹

The Constitution Review Group has recommended that Article 41 should be replaced with a gender neutral provision that specifically recognises the value of caring work in our society, but removes the stereotyping of such roles that arises from the language currently used. The revised provision proposed by the Review Group is:²⁰

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

In their submission to the Constitutional Convention, the National Women's Council of Ireland have argued that this revised wording does not adequately recognise the role of carers and care work that takes place outside of the home, in community and society more generally. Removing the reference to 'the home', they suggest, would address this limitation and give greater recognition to the value of care in Irish society.

The Irish Human Rights Commission has expressed the view that Article 41.2 is in violation of Articles 2 and 5 of the UN Convention on the Elimination of All Forms of Discrimination Against Women, and should be amended.²¹

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¹⁹ Report of the Second Commission on the Status of Women (Government Publications 1993), p. 27. The Second Commission on the Status of Women was established in 1990 to consider and make recommendations on the means, administrative and legislative, by which women will be able to participate on equal terms and conditions with men in economic, social, political and cultural life and, to this end, to consider the efficacy and feasibility of positive action measures.

²⁰ Report of the Constitution Review Group (Dublin: Government Publications, 1996), at pp.333-334.

²¹ Irish Human Rights Commission, *Submission to the UN Committee on the Elimination of All Forms of Discrimination Against Women in respect of Ireland's Combined Fourth and Fifth Periodic Reports under the UN Convention on the Elimination of All Forms of Discrimination Against Women*, p.2