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Revisiting Article 41.2

Throughout the history of Bunreacht na hÉireann, Article 41.2 has been one of the most consistently controversial provisions. From the moment the Constitution was published, this provision provoked anger from women's groups and for a long time now it has been generally recognised that this provision is in need of reform. Following years of vague promises to take action, the government recently announced its intention to hold a referendum on Article 41.2 in the coming year. However, at present, it is unclear whether the referendum proposal would be one which would repeal the provision or amend it. In this context and in advance of a potential referendum campaign, the aim of this piece is to attempt to clarify the purpose and potential of this provision with a view to recommending the most appropriate approach for a vote on this topic. First, it will be necessary to go back and investigate the origins and original intent behind this seemingly unusual provision. Then the practical effect of the provision, in terms of its impact on case law, will be analysed. Finally, potential reform proposals will be considered.

The Origins of Article 41.2

Drafts of the Constitution

Many writers have mused about the potential original intent of Article 41.2 and the reasons for its inclusion in the Constitution in the first place. The provision had no equivalent in the earlier Constitution and was one of the new additions inserted in 1936. The first trace of this provision appears in the very simple form of 'protection of maternity' in John Hearne's Draft Heads of a Constitution, drawn up in October 1936. Article 62 of this early draft reads as follows:

> The Family
>
> 1. Guarantee of the constitution and protection of the family as the basis of moral education and social discipline.
> 2. Protection of marriage.
> 3. Prohibition against attacks on purity, health and sacredness of family life.
> 4. Protection of maternity.[1]

This document was the first significant step made in the drafting process which culminated in the 1937 Constitution. Only Hearne and de Valera were involved at this time and it is impossible to say whether it was Hearne or de Valera who originally proposed the inclusion but, according to Dr Eugene Broderick, who has recently published a biography of John Hearne, 'at this (very) early stage in the drafting process it is possible that draft Article 62 reflected Hearne's input'.[2] Nevertheless, it was an issue that de Valera felt very strongly about. Some historians have argued that de Valera's views on women and motherhood were influenced by his own personal circumstances, whereby he

[1] UCD Archives: P150/2373.
[2] Eugene Broderick unpublished notes.

was left to be raised by his grandmother in Ireland while his mother went to work in New York.[3] Of course this is entirely probable. Broderick has written that: 'When Hearne presented de Valera with the draft heads containing Article 62, its sentiments were approved of by him. Hearne was articulating in a preliminary document what de Valera was feeling at the deepest personal level: the importance of family and the centrality of the mother's role in the family unit.'[4]

There were many more influences at play besides de Valera's personal circumstances, however. As a comparative constitutional scholar, Hearne was familiar with the European constitutions of the day and it is clear that many provisions in the Constitution were influenced by the 1919 German Weimar Constitution,[5] among others.[6] Article 41.2 is no different in that regard. Article 103 of the 1921 Polish Constitution stated that 'Maternity is protected by special laws.' Article 126 of the Czechoslovak Constitution of 1920 provided that 'Marriage, the family and motherhood shall be under the special protection of the law.' Article 119 of the Weimar Constitution declared that:

> Marriage, as the foundation of family life and of the preservation and growth of the nation, is under the special protection of the Constitution. … The preservation of the purity and health of the family and its social advancement is the task both of the State and of local authorities. … Motherhood has a claim upon the protection and care of the State.

Donal Coffey[7] has also noted similar provisions in the 1920 Constitution of the Esthonian Republic,[8] the 1921 Constitution of the Kingdom of the Serbs, Croats and Slovenes,[9] the 1931 Constitution of the Spanish Republic,[10] and the 1933 Constitution of Portugal.[11] Thus, while it is sometimes felt that Article 41.2 was the result of a particularly Catholic Irish influence, it is important to remember that such sentiments were very popular in Europe at the time, even in non-Catholic jurisdictions.

Nevertheless, Catholic thinking was also a major influence on this provision. At the time, Ireland was a deeply conservative society; its values were Catholic and patriarchal, with women consigned to the role of mothers within the family home. Hearne was a devoted Catholic, having trained for six years in clerical formation. In this preparatory document he gave expression to the dominant social values

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[3] This is certainly the view of one of his biographers, Tim Pat Coogan, who writes of 'the experiences which befell him in childhood after his mother went out to work'. See Coogan, *De Valera: Long Fellow, Long Shadow* (Hutchinson 1993) 497. See also JJ Lee, *Ireland 1912–1985: Politics and Society* (CUP 1989) 207; and Owen Dudley Edwards, *Éamon de Valera* (University of Wales 1987) 31, 32.

[4] Eugene Broderick, unpublished notes.

[5] See, for example, Gerard Hogan, 'Binchy Memorial Lecture – Some thoughts on the origins of the Constitution' (Burren Law School 2012).

[6] A book was produced containing many constitutions from around the world which had been used by the 1922 Constitution Committee. See B Shiva Rao (ed), *Select Constitutions of the World* (Madras Law Journal Press 1934). De Valera's official biography states that he found this to be useful in his drafting work. See TP O'Neill and Pádraig Ó Fiannachta, *De Valera*, vol ii (Clo Morainn 1970).

[7] See Donal Coffey, *Drafting the Irish Constitution 1935–1937: Transnational Influences in Inter-War Europe* (forthcoming, Palgrave Macmillan 2018).

[8] Article 25 provided for 'the protection of maternity'.

[9] Article 27(2) stated: 'It shall be the concern of the State … to give special protection to mothers.'

[10] Article 43: 'The State shall … give protection to maternity.'

[11] Article 14: 'With the object of protecting the family, it appertains to the State and local authorities ... to protect maternity.'

of contemporary society, values he essentially endorsed.[12] Also, while Fr McQuaid's involvement in the drafting of the Constitution has sometimes been overstated, his influence would have been significant. He became involved personally around November 1936[13] and, since he was a family friend, de Valera could rely on him to provide a Catholic perspective on social matters, in particular.[14] Broderick has written that 'McQuaid's most significant contribution was a sharp focus on Catholic social teachings as they applied to the family and, by extension, to women, who were defined in terms of motherhood. The clearest evidence is in the introduction of language drawn from Catholic documents.'[15] Coffey has also noted that McQuaid's involvement was not confined to the provision on the family but he was involved in drafting many more Articles, such as Article 6 and many of the other fundamental rights provisions.[16] Keogh and McCarthy have also written about McQuaid's influence on the text and, by analysing various letters and documents from McQuaid's archives, they surmise that many Articles were sent to McQuaid to obtain his views. He would make certain changes and these would be returned to de Valera and Hearne and a version would be agreed upon.[17] It is difficult to know when exactly McQuaid became involved with Article 41.2 specifically but his influence is certainly noteworthy.

It is possible to track the evolution of the provision to a certain extent in the drafts[18] and this gives us some understanding of the meaning and context. The provision was developed during the drafting stages beyond the simple sentence contained in Hearne's original suggestions and there were a number of different versions before the final text was agreed. Coffey has noted that provision was fleshed out in the draft of mid October, which stated: 'Maternity is under the special protection of the State. Provision may be made by law for the supervision and inspection of lying-in hospitals and nursing homes.'[19] And a further guarantee was added: '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.'[20] This is certainly reminiscent of the Weimar provision.

In what Broderick refers to as the 'Zurich Draft', which he dates around late December/early January but may have been produced earlier, there was an elaboration of these issues around the family with very specific provisions around protection of marriage and prohibition of contraception.

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 upon 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.

[12] Broderick unpublished notes.
[13] He would also have been involved in the earlier Jesuit submission of October 1936.
[14] However, it is important to remember that McQuaid was a priest at the time – and not the Archbishop of Dublin. He was not a major 'player' in the Church's power structure. He was a school headmaster.
[15] Broderick unpublished notes.
[16] Coffey (n 7).
[17] See Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press 2007) 109–10.
[18] Although it is difficult to provide an exact order given the lack of dates on many documents.
[19] UCD Archives: P150/2385.
[20] UCD Archives: P150/2385.

(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 baptized 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 foregoing, 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 on housing accommodation on reasonable terms.
(6) Maternity is under the special protection of the State. Provision may be made by law for the supervision and inspection of lying-in hospitals and maternity nursing homes.[21]

Another later draft prepared by Hearne, called the 'third draft' and dated 11 January 1937, contains no mention of women, even as mothers. The focus is on the family and its legal protection by the prohibition of divorce.[22] But by February 1937, the bones of the eventual Article 41.2 began to appear:

> In particular, the State recognises that so much importance attaches to the guidance of woman in the family, as a firm support to the State, that the common welfare cannot be achieved without her. The State shall therefore see to it that woman, especially mothers and young girls, shall not be obliged to engage in avocations unsuited to their sex and strength.[23]

An even stronger iteration labelled the 'X Draft' and written by McQuaid, also in February, is quite close to some of the final provisions[24]:

1. The State recognises the Family as the natural primary and fundamental unit of society, and as a moral and juridical institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive laws.
2. The State therefore guarantees to protect the family in its Constitution, Authority and Government, as the necessary basis of order as indispensable to the welfare of the Nation.
3. In particular the State recognises that by her life within the home, woman gives to the State support with which the common good can be achieved. The State shall therefore make it an

[21] Keogh and McCarthy date a similar draft (with subsection 6 missing) as October, See Keogh and McCarthy (n 17) 112 and UCD Archives: P150/2373.
[22] Article 26
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. The constitution of the family depends upon valid marriage.
3. 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.
4. No law shall be enacted providing for the dissolution a vinculo matrimonii of a valid consummated marriage.

[23] UCD Archives: P150/2392.
[24] UCD Archives: P150/2387, 'X Formula'.

aim to see that women, especially mothers and young girls, shall not be obliged to enter avocations unsuited to their sex and strength.

4. 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.
5. No law shall be passed which shall impair its essential properties of unity and indissolubility. No person whose marriage has been dissolved under the Civil Law of any other State shall be capable of contracting a valid marriage in Éire during the lifetime of the other party to the marriage so dissolved.[25]

While any mentions in the earlier drafts referred to the idea of protection of maternity, as per the European Constitutions, the focus here shifts in the first extract to recognising the importance of the 'guidance' of women and in the McQuaid draft to a 'woman's life within the home'. It is also interesting that the final sentence of the third subsection was later put into Article 45, the provision which is specifically labelled as non-justiciable, while the rest remained in Article 41.[26]

Keogh and McCarthy write that this clause was influenced by the encyclical Rerum Novarum, which stated that 'a woman is by nature fitted for homework, and is that which is best adapted at once to preserve her modesty and promote the good bring up (sic) of children and the well being of the family'.[27] McQuaid evidently felt strongly about the provision, as his private papers contain a staunch defence of the Article in the face of the criticisms from women's groups which emerged after publication of the draft. In a document entitled 'Rights of Women', McQuaid tells de Valera that the criticisms were 'confused' and he refers to two papal encyclicals: Casti Connubii and Quadragesimo Anno, which would answer them. He also notes a statement by Pius XI that 'mothers will above all devote their work to the home and things connected with it'.[28] In defence of the Article, McQuaid notes that:

> [n]othing will change the law and fact of nature that woman's natural sphere is the home. She is perfectly free to marry or not to marry; to choose this or that career. No Article in the Draft Constitution even attempts to deny woman's fundamental rights as a human being. Article 41.2.1 merely acknowledges a fact: the dignity and indispensable role of those women who choose to get married. Article 41.2.2 having acknowledged that fact, guarantees that it will endeavour to see, not that women will be prevented from engaging in this or that career, but a certain class of woman, namely Mothers, will not be forced by pressure of need, so to engage in work as to neglect their proper home duties.[29]

Thus, the provision developed from the original intention to protect maternity (although what exactly was intended by this is also unclear) to the February draft's paternalistic desire to prevent women from being forced into unsuitable employment, thereby depriving the family of their

[25] UCD Archives: P150/2387.
[26] The part of this provision which later ended up in Article 45 also provoked the ire of feminist organisations and a minor change was made to the wording during the Dáil debates in an attempt to assuage fears. See Gerard Hogan, *The Origins of the Irish Constitution 1928–1941* (RIA 2012) 520–33.
[27] See Keogh and McCarthy (n 17) 113.
[28] UCD Archives P150/2411.
[29] ibid.

guidance, to finally the rather insulting insinuation that the proper place of a woman is in the home.[30] Also, throughout the drafts it is evident that the focus is on motherhood, child-bearing and child-rearing, but the decision seems to have been taken at some stage to refer to women generally in the final draft and this was also defended by de Valera later during the debates on the Constitution.[31] It is unclear when exactly the wording of what was to become Article 41.2 was agreed but in the first official draft in March 1937 the Article appeared in its current form. This draft in general contained 'an elaboration, precision and complexity of language unlike previous versions in earlier drafts'.[32] There were many more revisions to the rest of the Constitution following this draft but the provision on women in the home remained unchanged.

Dáil Debates

The wording did not go down well with many women's groups[33] and the criticism referred to by McQuaid above extended to Article 40.1 on equality as well as the sentence originally included with Article 41.2 but which was moved to Article 45 on the 'inadequate strength' of women.[34]

When the Article came up for discussion in the Dáil during the debates on the draft Constitution, de Valera seemed surprised by the criticism and defended his position unfailingly, stating his belief that '99 per cent of the women of this country will agree with every line of this'.[35] In defending the provision, de Valera refers repeatedly to 'mothers':

> We state here that mothers in their homes give to the State a support which is essential. … Is it not a tribute to the work that is done by women in the homes as mothers? … This has reference to mothers, and there is no use in bringing into this context young girls and people who are not married.[36]

Two days after this comment Mr Dillon asked de Valera to clarify whether 'Woman' in the Article means 'Mother' and de Valera replied that the first sentence is elucidated by the second – the intention to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. Both men agreed that this was an excellent principle.[37] However, on 4 June, in response to a similar query from Dr Rowlette, de Valera again clarified that

[30] Rowley encapsulates the insult in the following passage: 'It was irrational in the extreme, not to speak of wishful thinking, to oversimplify women and their place in society in such a way. The rhetorical character of the language with its sly imperatives shows no understanding of the complexities involved. Woman is thus summoned form [sic] her polymorphous integrity to display only those attributes essential for the male survival, wellbeing, and self-esteem, in the name of society and the common good.' Rosemary Rowley, 'Women and the Irish Constitution' (1989) 37(1) Administration 42.
[31] See below.
[32] Eugene Broderick, *John Hearne: Architect of the 1937 Constitution of Ireland* (IPA 2017) 133.
[33] Much of the opposition came from university graduates rather than working-class women. The groups which actively opposed the provisions included the International Alliance of Women for Suffrage and Equal Citizenship, the Six Point Group, the Irish Women Workers Union, the National Council of Women of Ireland, the Joint Committee of Women's Societies and Social Workers.
[34] See Hogan (n 26) 520–33.
[35] Dáil Deb 11 May 1937, vol 67, col 66.
[36] ibid col 67.
[37] Dáil Deb 13 May 1937, vol 67, cols 455–56.

he was talking about mothers. This time, Mr Dillon pointed out to him that the section uses the word 'women' rather than 'mothers' and suggested substituting the words for the sake of clarity. However, de Valera refused any change to the text, stating that there are wives who are not mothers also and despite accusations from Mr Dillon that this position was ridiculous, he declared rather huffily that he had 'made up his mind that this is accurate'.[38]

On the issue of the intent of the provision, de Valera stated repeatedly that he could not understand the opposition to the Article, which had as its sole aim the protection of women: 'I would like to know from any women's organisation or from any woman what is wrong in saying that we should strive for a social system which will be such as will not compel women to go out and work …'[39] Members of the Opposition pointed out that the provisions[40] were 'reactionary and retrograde'[41] and that they had 'destroyed the constitutional bulwark of women's rights'.[42] When the Dáil finally heard from a woman on this, she stated that she was glad to hear the intention was not to interfere with the rights of women and asked for the President's assurance that no ambiguity in the text could potentially lessen the status of women and then went on to praise the fact that the provision recognises the services of women in the home.[43] Then she made the following pronouncement: 'women will work better in homes if they have been educated and if they have contact with outside life. Therefore, I hope that this Article will remain as it stands and that women will avail of it and draw from it its full substance and advantage.'[44]

The issue of whether the provision was intended to provide some sort of financial assistance also came up during the course of the debates but the question was not answered to any great degree of satisfaction. At one stage, Professor O'Sullivan asked de Valera directly how he intended to prevent women from being compelled to work.[45] De Valera did not answer on this occasion but later on, in response to an amendment proposing to delete the words 'by her life within the home', he declared the following:

> What is stated here is, if women choose to marry and found a home, that they should not be compelled by modern conditions, which very often force mothers to engage in outside labour, to do that, and that it should be the duty of the State to endeavour to see that shall not happen. How the State may endeavour to see that is quite another question. We leave the methods completely and absolutely open, as it is right that we should.[46]

He then elaborated with some examples:

> [I]f I were able so to organise it, I certainly would try to get for the community as a whole some immediate return from a man who is getting [financial] assistance … But if

[38] Dáil Deb 4 June 1937, vol 67, cols 1867–68.
[39] Dáil Deb 11 May 1937, vol 67, col 69.
[40] The discussion focuses around Article 45 and Article 40.1 also.
[41] Mr Lavery, Dáil Deb 11 May 1937, vol 67, col 137.
[42] Professor O'Sullivan, Dáil Deb 12 May 1937, col 221.
[43] Mrs Concannon, Dáil Deb 12 May 1937, cols 242–45.
[44] ibid. She goes on to express a hope that the education of girls will have 'some relation to the work they will have to do for the "common good" in the home, and be a preparation for it'.
[45] Dáil Deb 2 June 1937, vol 67, col 1596.
[46] Dáil Deb 4 June 1937, vol 67, col 1848.

> it were a woman, I take quite the other attitude. I say a woman, by her duties in the home, is, in fact, performing for the community as a whole a fundamental service. I would say that she, by doing that work, was rendering invaluable service to the State and I would not require of a mother, under these circumstances, any other form of return, such as I would be inclined to demand in the case of a man. … The greatest service she can render is to perform her duties in the due manner and anything that would compel her to neglect these duties would be, in my opinion, a loss to the State as a whole.[47]

However, O'Sullivan criticised these remarks, saying the Article 'accomplishes nothing in the direction of achieving what the President tells us was the purpose of this Article. It compels the State to do nothing. It is exactly like Article 45.'[48] Despite some strong arguments from the Opposition, de Valera remained adamant that the provision should not be changed and so the Dáil approved the provision.

All of this tells us that the inspiration behind this provision was complex. De Valera's personal experience would certainly have been significant. Hearne's knowledge of the European Constitutions and indeed de Valera's own reading of these documents[49] as well as the obvious similarities in the texts of those documents and the various drafts of the provisions on the family are clear evidence of the influence of these documents. However, the strongest influence would seem to be that of Catholic social teaching due to the personal beliefs of both de Valera and Hearne and also through the input of Fr McQuaid. Indeed, the evolution of the provision throughout the drafting process with the input of McQuaid and the obvious similarities to the language of the papal encyclicals bears this out.

As to whether the provision was intended to be symbolic in the sense that no economic consequence was intended, this appears to have been left open. In one sense certainly it was intended to be an expression of the current prevailing attitudes and indeed the ideal scenario based on Catholic social teaching. However, the comments about potentially making future provision, while vague, signal the possibility of financial support. Indeed, as a counter-argument to O'Sullivan's final remarks above, the provision was not included in the non-justiciable provisions of Article 45, which leaves open the possibility of litigation in relation to this issue.

There is nothing to say that the Article could not have been developed into a rights-based provision, as was done to certain other provisions of the Constitution by the radical Supreme Court of the 60s and 70s. There are many provisions of the Constitution which were probably never intended to function as they now do and it is highly unlikely the drafters would have foreseen the use of Articles such as 40.3.1° to create new rights not already contained in the Constitution. However, while more radical readings were given to certain parts of the Constitution, Article 41.2 did not feature in this trend.

[47] ibid cols 1848–49.
[48] ibid col 1850.
[49] See (n 6) on *Select Constitutions of the World*.

The Effect of Article 41.2

We can see that while Article 41.2 may have, at the time of the enactment of the Constitution, reflected contemporary mores, it was not uncontroversial.[50] There were fears that together with the wording of Articles 40.1 and 45.2 it could be used to justify discrimination against women, particularly in the employment context.[51] Some might argue that these fears were justified given legislative measures designed to keep married women out of public service employment. Ferriter has argued that the provision[52] 'became essential to the Local Government Act of 1941 which enabled the Minister for Local Government to declare, as a qualification for a specified office, that the woman holding it be unmarried or widowed.'[53] Clear has opined that de Valera intended the provision as 'retrospective justification of the marriage bar against women in public service'.[54] But then Clear seems to applaud the authorities for not going further and using Article 41.2 to further limit the rights of women, as was feared by women's groups in 1937.

Scannell, in an excellent article on the role of women under the Constitution, points out that there are two potential interpretations of the provision; the first is that it is a tribute to work done in the home by women and a guarantee that no mother will be forced to work outside of the home, but the second interpretation implies that the natural vocation of woman is in the home, which denies women the freedom to choose whether or not to work.[55] That the first interpretation is what was intended is clear from the Dáil debates and that has been borne out (eventually) by judicial interpretation, but at the time when Scannell was writing, she believed that it was the second interpretation which was adopted by de Valera's successors and she points to various legislative measures which assume that the normal vocation of women was in marriage, motherhood and the home. She states, 'The women of 1937 were right to fear that the state would give article 41.2 the most restrictive interpretation of their rights.'[56] While societal changes and the influence of feminist movements meant many improvements in the lives of women later on, this particular provision was not part of that change.

In 1987, Brian Walsh, writing about the provision, referred to it as a 'protective guarantee' and expressed astonishment that it had not at that stage been invoked in litigation.[57] He seemed to anticipate that cases would be brought and that the courts would interpret the extent of the protection provided by the Article. As it turned out, there have only been a handful of cases in which

[50] There was no real dispute at the time that the ideal place for a woman was in the home, but there were concerns that the provision would become a barrier to work. See Diarmuid Ferriter, *Judging Dev* (RIA 2007) 240. There was even a widespread belief that married women in employment should not be competing with 'fathers of families' for jobs.

[51] Various women's groups objected to Articles 40 and 41, including the International Alliance of Women for Suffrage and Equal Citizenship, the Six Point Group, the Irish Women Workers Union, the National Council of Women of Ireland, the Joint Committee of Women's Societies and Social Workers.

[52] In the context of discussion of Article 40.1 also.

[53] Ferriter (n 50) 239.

[54] Caitriona Clear, 'Women in de Valera's Ireland 1932–48: A Reappraisal' in Gabriel Doherty and Dermot Keogh (eds), *De Valera's Irelands* (Cork University Press 2003) 108.

[55] Yvonne Scannell, 'The Constitution and the Role of Women' in Brian Farrell (ed), *De Valera's Constitution and Ours* (Gill and MacMillan 1988) 125.

[56] ibid 126.

[57] Brian Walsh, 'The Constitution and Constitutional Rights' In Frank Litton (ed), *The Constitution of Ireland 1937–1987* (IPA 1988) 98.

the provision has been of any relevance and it has never truly been tested as to its usefulness as a protective guarantee for women.

In *de Burca v Attorney General*,[58] O'Higgins CJ who interpreted women's exclusion from juries as conferring a benefit on women also felt that this exclusion was in line with and 'almost mandatory under s 2 of Article 41' because otherwise women could be forced to serve on juries and therefore take them away from their duties in the home. While it may appear contradictory, O'Higgins CJ also commented 'When one considers the special recognition of women and mothers in Article 41 of our Constitution, it does not appear inappropriate that the State in its laws should give some preference to woman …'[59] In the same case Walsh J made the observation that 'It is undoubtedly true that the Constitution, in dealing with the family, draws attention to and stresses the importance of woman's life within the home and makes special provision for the economic protection of mothers who have home duties.'[60]

In two equality cases, the provision was used to support the conclusion that preferential treatment for women was not contrary to Article 40.1 In *Dennehy v Minister for Social Welfare*,[61] Barron J upheld the provisions discriminating against men on the ground that the schemes were validated by Article 41.2 and, on a similar issue in *Lowth v Minister for Social Welfare*,[62] the Supreme Court held against the plaintiff on the basis that Article 40.1 did not require that all citizens be treated identically without recognition of differences in relevant circumstances and that Article 41.2 justified a difference in treatment.

In *T O'G v Attorney General*,[63] the argument was made by the Attorney General that Article 41.2 permitted the State to discriminate against widowers in relation to eligibility to adopt but this was rejected by the High Court.[64]

However, it was not until 1989 that a case appeared which gave a central focus to Article 41.2. The case of *L v L*[65] could truly have been a legal landmark for women. Former Supreme Court Justice Mrs Catherine McGuinness, who represented the plaintiff in the case, commented that at the time there had been some talk about the potential use of the provision and whether any use could be made of it. Thus when she and her junior counsel, now High Court Judge Carmel Stewart, encountered their 'brave' client they decided to 'have a go'.[66] In order to succeed, however, they would need a

[58] [1976] IR 38.
[59] ibid 61.
[60] ibid 70.
[61] (HC, 26 July 1984).
[62] [1993] IR 339, [1998] 4 IR 321. In *Dennehy*, social welfare provisions which discriminated in favour of deserted wives as against deserted husbands were held to be justified under Article 41.2. The Court also noted that married women were unlikely to work outside the family home whereas married men were likely to be able to support themselves. The fact that lone fathers were not originally entitled to any lone parent support from the State was upheld by the Supreme Court in *Lowth v Minister for Social Welfare* on the same basis.
[63] [1985] ILRM 61.
[64] In holding the restriction on widowers as unreasonable and arbitrary, McMahon J noted that: 'Widowers as a class are not less competent than widows to provide for the material needs of children and their exclusion as a class must be based on a belief that a woman by virtue of her sex has an innate capacity for parenthood which is denied to a man and the lack of which renders a man unsuitable as an adopter. This view is not supported by any medical evidence adduced before me …' ibid 64.
[65] [1992] 2 IR 77.
[66] Interview with Mrs Justice Catherine McGuiness, 12 September 2017.

receptive judge and in Barr J they got not only that but also a judge who truly understood the inherent contradiction in the situation.

The case related to the distribution of marital property related to a judicial separation. The family home was in the name of the husband only but, under the rules of resulting trusts at the time, if a wife had contributed in money or money's worth to the purchase price of the house or to a general family fund which freed up the finances of the husband, then she could obtain a beneficial interest in the family home. However, Mrs L was a housewife who kept the home, looked after the children and provided occasional assistance to her husband. She had made no financial contribution to the purchase price of the house or to a family fund. However, it was argued that since Article 41.2 appeared to prioritise the role of the housewife and attributed to it such importance that the State was given a duty to protect it, that those who chose this role should not be put at a disadvantage. Barr J recognised the ridiculousness of the situation. While the Constitution prized the role of the housewife as giving such support to the State 'without which the common good cannot be achieved', and was clearly designed to protect this role, in law the women who chose or were forced to engage in paid labour were at an advantage since they could potentially make a financial contribution to the family home and thereby be given a beneficial interest. Thus by becoming a housewife, despite the grand language in the Constitution, a woman in this situation was in a weak position in law.

In a well-reasoned judgment, Barr J noted that previous case law had established that a woman's work in the home could not give rise to a beneficial interest in that home unless there had been some sort of financial contribution. However, those cases had not considered Article 41.2. He pointed out that in this provision, the Constitution envisages that ideally a woman should devote her time and attention to her duties in the home and that in practical terms this means a woman who adopts that concept 'has a special place in society which should be buttressed and preserved by the State in its laws'.[67] He also points out that many women who make this choice are obliged to make a sacrifice in doing so and thus in return for that sacrifice 'which the Constitution recognises as being in the interest of the common good, she should receive some reasonable economic security …'[68]

Shortly afterwards, Barr J's judgment was quoted with approval, albeit obiter, by Barrington J in an unreported judgment in a similar case where he criticised the existing legal approaches as starting from the wrong point in the law and equity and stated that the proper starting point was that taken by Barr J.[69] Barrington J also pointed out the inconsistency in the existing laws with the values in Article 41 which meant that a woman with an independent income was in a better position than the woman who fulfils the constitutionally preferred role of wife and mother.

However, his colleagues in the Supreme Court were shocked by the revolutionary nature of Barr J's High Court judgment. McGuinness has noted that the legal team was very doubtful of success in the Supreme Court, especially given that the members of the Court were all middle-aged or older men likely to be the sole owners of their property.[70] While certain members of the Court were sympathetic to the arguments of the plaintiff, Barr J's judgment was simply a step too far for them.

[67] ibid 98.
[68] ibid.
[69] *H v H* (HC, 20 June 1989).
[70] See (n 66). This was very common up until the late eighties or early nineties.

While Barr J's judgment concentrated on the principles involved and took a purposive approach, anxious to give some meaning to this otherwise useless provision, the Supreme Court concentrated on the traditional development of property law and took a strict separation of powers perspective, noting that Barr J was going beyond developing an existing law and had ventured into the realm of law-making. The result was that Article 41.2 was now effectively meaningless and no further litigation was taken directly on the provision.

In more recent years, there have been some attempts to revive the provision. In *Sinnott v Minister for Education*,[71] Denham J attempted to give an up-to-date reading of the provision. In finding for the plaintiff, who argued that the State had breached her constitutional rights as the primary carer within the family, Denham J commented as follows:

> Whatever historical concepts and byways may be traced the reality is that the Constitution sets out constitutional rights, duties and powers. The Constitution is a living document. It must be construed as a document of its time. … This special recognition is of the twenty-first century and belongs to the whole of society. It is not to be construed as representing a norm of a society long changed utterly. Rather it is to be construed in the Ireland of the Celtic Tiger… 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.[72]

However, her colleagues on the Supreme Court did not agree. Keane CJ, giving judgment for the majority, acknowledged that her arguments evoked 'respect, admiration and compassion' but stated that these were not grounds in law for an award of damages. However, Geoghegan J made an interesting comment in relation to the provision:

> There is no doubt that in an appropriate case the mother might be able to claim breaches of constitutional duties towards her under Articles 41.2.1° and 41.2.2° as these are constitutional provisions directly dealing with the family, but it does not seem to me that any of the behaviour of the State disapproved of by the learned trial judge constituted an attack on the family. For the same reason it would not seem to me that Article 42.1, 2 and 3 are in any way relevant to this case.[73]

Unfortunately, we are not given any clue as to what an 'appropriate case' might be.

Another interesting use of the provision was made in *T v T*.[74] The case related to the distribution of the resources of a couple in the context of a separation and divorce and it was recognised that care work could be a factor in assessing the appropriate distribution. Denham J held that the Constitution clearly requires that value be placed on the work of a spouse caring for dependants, the family and the home and she referred to her previous judgment in *Sinnott*. Murray J went even further and in a

[71] [2001] 2 IR 545.
[72] ibid 665.
[73] ibid 725.
[74] [2002] IESC 68.

passage that is somewhat reminiscent of Barr J's judgment, he noted that the wife should not be discriminated against simply because the husband had been the breadwinner and, moreover, that by working in the home she 'facilitated and enabled her husband to give the kind of commitment necessary to establish a successful practice'.[75] He stated that the courts should 'attribute the same value to the contribution of a spouse who works primarily in the home as it does to that of a spouse who works primarily outside the home as the principal earner' and says that this is underscored by Article 41.2. But then he gives what he terms a 'contemporary' reading of the provision: 'No doubt the exclusive reference to women in that provision reflects social thinking and conditions at the time … it seems to me that it implicitly recognises similarly the value of a man's contribution in the home as a parent.'[76]

While the result, which gave a value to care work in the home, is to be welcomed and Murray J's attempt to bring the provision up to date is commendable, it is submitted that while it is only right that the Constitution should be interpreted in the light of modern society, such an interpretation ignores the obvious gendered aspects to Art 41.2 as well as the history of the provision.

Thus, the only cases in which Article 41.2 has had any effect have been either in defeating equality claims or in cases of marital separation, areas which the provision could never originally have been expected to impact. It is unfortunate that a case never arose on the direct issue of women being forced into employment out of economic necessity but it is likely that *L v L* would have dissuaded any potential litigant. It is tempting to hypothesise about the likely conclusion had such a case, or even the *L v L* case itself, arisen before the radical Supreme Court of the 1970s. Similarly, a feminist judgment of *L v L* or a similar case would have been fascinating. In another article in this collection, Mr Justice Hogan argues that the Supreme Court has not been radical enough in its interpretation of the text of the Constitution.[77] This could certainly feature among the provisions which have not reached their potential.

Despite the admirable attempts by Denham and Murray JJ to breathe some life into this provision, it seems clear that as it stands this provision has no real use in law and so the general consensus seems to be that we should amend it. However, the form such an amendment should take has yet to be decided.

Possibilities

Over the last number of years, the provision has been examined by various groups considering reform of the Constitution. It is worth noting that it was not considered by the (all-male) group which carried out the first major review of the Constitution in 1967. In the report of the Second Commission of the Status of Women in 1993, it was recommended that the provision be deleted. In 1996, the Constitution Review Group did not favour deleting the provision and, noting the importance of the caring function of the family, suggested that the provision should be retained but in gender-neutral form. The suggested wording was as follows: 'The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State

[75] ibid 76.
[76] ibid 67–77.
[77] Gerard Hogan, 'Harkening to the Tristan Chorus – The Constitution at 80' (2018) DULJ xx.

shall endeavour to support persons caring for others within the home.'[78] A year later, the first Progress Report of the All-Party Oireachtas Committee on the Constitution came to the same conclusion as the Constitution Review Group, but a slightly different wording was recommended to provide that the State recognises family life only rather than 'home and family life'.[79]

In the 10th Progress Report on the Family in 2006, the Committee appeared to give careful consideration to the many submissions made by various groups arguing for abolition or retention of the provision. In the end, relying presumably on Murray J's judgment mentioned above, the report states: 'The courts are disposed to interpret Article 41.2.1° as applying to either fathers or mothers caring in the home. The need to change the Article to make it gender neutral is therefore not a legal necessity.' But then, referencing criticism from the 2005 recommendation of the UN Monitoring Committee on the Convention on the Elimination of All Forms of Discrimination against Women CEDAW in particular, the Report concludes that 'Change, therefore, in the Articles is at least desirable.'[80] The following changes are later recommended:

> Amend Article 41.2.1° to read: The State recognises that by reason of family life within the home, a parent gives to the State a support without which the common good cannot be achieved.
>
> Amend Article 41.2.2° to read: The State shall, therefore, endeavour to ensure that both parents shall not be obliged by economic necessity to work outside the home to the neglect of their parental duties.[81]

Investigation into the establishment of some 'practical support' for the family was also recommended.[82]

In 2013, the Convention on the Constitution also considered Article 41.2 and, in general, delegates were in favour of retaining but amending the provision to make it gender-neutral, to acknowledge the important role of other carers in the home and to ensure a 'reasonable level' of state support for carers.[83] When the Convention's report was presented to the government, the then Minister for Justice Alan Shatter set up a taskforce to consider the recommendations and to report back to the government on the action which should be taken. The taskforce was duly established and it produced a report which considered various amendment possibilities and arguments for and against

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[78] *Report of the Constitution Review Group* (Stationery Office 1996) 310.
[79] *First Progress Report of the All-Party Oireachtas Committee on the Constitution* (Stationery Office 1997) 85.
[80] *Tenth Progress Report of the All-Party Oireachtas Committee on the Constitution* (Stationery Office 2006) ch 8.
[81] ibid 127.
[82] ibid. The Report made the following recommendation:
'In order to allow the state to invest in such a scheme with confidence the following steps should be taken:
• a solid research base should be established
• a rigorous cost/benefit analysis should be carried out to establish the value to the state of care within the home as opposed to institutional care
• reliable output measures should be established to allow the development of an accountable system.'
[83] 98% voted to make the provision gender-neutral, 62% voted to include carers outside of the home; on a five-point scale 35% voted to recommend that the State offer a 'reasonable level of support' to ensure that mothers and other carers 'shall not be obliged by economic necessity to engage in labour'. See *Second Report of the Convention on the Constitution* <www.constitution.ie/AttachmentDownload.ashx?mid=268d9308-c9b7-e211-a5a0-005056a32ee4> accessed 17 November 2017.

the various proposals. The main aim of the taskforce was to examine all of the variants of the wording which had previously been proposed in order to determine which would be the most appropriate to bring before the people in a referendum and to consider the cost implications of any such proposal. The group engaged with relevant government departments and the Attorney General's office before making its report. Concerns which were raised during this process included the need for clarity around the definition of the word 'carer' and fears that the creation of a constitutionally enforceable right to social welfare payments could curtail the autonomy of government in budgetary policy.

The report focuses on three potential options for amendment of the provision. The first option would delete the existing provision and replace it with the following: 'The State recognises that home and family life gives to society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home as may be determined by law.'[84] This formula would recognise the importance of care-work in the home and would also provide for a legislative basis for economic support, thus preserving executive and legislative autonomy over such matters. However, in contrast to the recommendations of the Convention, it would exclude carers outside of the home as the taskforce felt that to do otherwise would be inconsistent in the general context of Article 41 and would only provide uncertainty. Furthermore, it would not commit the State to a 'reasonable level of support' and would not ensure that carers 'shall not be obliged by economic necessity to engage in labour'.

The second option was to retain the first sentence above but then to add a provision to Article 45 that 'The State shall endeavour to ensure that persons caring for others in the home and in the wider community receive support in recognition of the contribution they make to society.'[85] Like the first option, this has the advantage of being gender-neutral and recognising the value to society of home and family life as well as providing guidance to the Oireachtas in Article 45 on support for carers. However, while it permits recognition of carers in the wider sense of the word, its inclusion in Article 45 is of limited value due to its non-justiciability. This option also leaves out the existing provisions on engaging in labour due to economic necessity.

The third option was simply to delete the provision in its entirety but the Report decides not to recommend this course of action since there is much support for the desirability of recognising care-work in some form in the Constitution. The conclusion of the taskforce is thus to consider alternatives 1 and 2 as potential options for a referendum proposal.

This report is valuable and inevitably will form the basis of a future referendum on this topic but one point to be borne in mind is that the original purpose of this provision appears to have been a desire to allow children to grow up with a stable presence (at the time, the mother) at home and to ensure that mothers would not be forced to work out of economic necessity. The proposals from the taskforce have abandoned this element of the provision.

The language of the existing provision is undoubtedly paternalistic and protectionist but we need to decide as a society if that original principle is desirable. Does our society believe that, in an ideal

[84] See *Report of the Task Force on Implementation of the Recommendations of the Second Report of the Convention on the Constitution* (2013) 13.
[85] ibid 15.

world, a child would have a stable influence to care for him or her at home and that carer should be compensated or facilitated in performing such a social function? The original concern in 1937 was that women might be forced to work but once the provision which was designed to solve this was actually inserted into the Constitution, the fear was that women might be forced out of employment. With the passage of time there are now renewed concerns that women may not be able to stay in the home if they so choose because it is not viable economically.[86]

The bottom line is that we need to decide what we want the provision to do. So much confusion was caused by the failure of the original drafters or legislators to specify the clear intent of the provision. So, if ~~it is intended to~~we are to have a referendum on this issue, it is important to lay the groundwork first. There are four potential options – three have been suggested by the taskforce and a fourth is added here as option 3:

1. We can have a provision which recognises care-work in the home and provides that the State should support this through legislation;
2. We can have a provision that simply recognises care-work in a symbolic fashion;
3. We can recognise that care-work in the home is of such importance that the State will ensure those who choose this role will be sufficiently supported in economic terms[87]; or
4. We can simply delete the provision.

The first option might seem like a reasonable course of action and the version as set out by the taskforce would improve matters by providing a gender-neutral recognition that is backed up by state support, which would be provided as determined by the Oireachtas. Visually, there would be a significant improvement but the problem with this option is that, in all likelihood, it would mean no real change. There is no compulsion on the State to ensure that carers in the home would be adequately or sufficiently supported and, as noted by the taskforce, existing legislation already provides for various forms of carer benefits and allowances. Thus it could be decided that the constitutional obligation has already been fulfilled. Although, it would be entirely possible for a radical Supreme Court to decide otherwise.

One would have to question the value in going through the expense of a referendum campaign simply to provide for symbolic recognition of care-work in the State. It might be a nice nod to those working in the area but I doubt the warm glow would last long for those challenged by economic considerations. While constitutional symbols can be of immense significance, nothing would change in law for those people.[88] Some care organisations have argued that having such recognition in the Constitution has helped carers and dependants to vindicate their rights.[89] However, on balance it

[86] See Victoria White, 'The Nation's Special Homemakers Deserve Constitutional Protection' *Irish Examiner* (Cork, 14 February 2013).

[87] It would not be possible to open such an option to care-workers generally for reasons outlined by the taskforce.

[88] On the importance of symbolism, see Dylan Lino, 'Written Constitutions and the Politics of Recognition: Symbolism and Substance' (World Congress of Constitutional Law 2014, Oslo, June 2014) <www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws17/w17-lino.pdf> accessed 17 November 2017.

[89] The submission by Curam to the Constitutional Convention argued that certain legislative supports derive from the Article – Article 41.2 forms part of the basis for maternity benefit, child benefit, adoptive benefit, parental leave, one parent family payment, carer's allowance, carer's benefit, homemakers' scheme (pension

would be difficult to justify a referendum to retain the provision as a nicely worded symbolic gesture.

The third option was not considered by any of the Reports because it imposes a positive obligation on the government and this is something which is seen as radical and should only be done through legislation in case there is a need to amend or remove the duty for economic or other reasons in the future. However, sometimes the purpose of a Constitution is to shackle government according to the wishes of the people – if the people are truly the masters, then the people can decide how rights should be enforced. After all, it appears the power of the people to amend the Constitution is unlimited. However, it is highly unlikely that such an option would be considered by the government, which is ultimately the only authority with the power to bring forward a referendum.

The fourth option to delete the provision, as mentioned above, was not recommended by the taskforce but if all that is sought to be achieved by a referendum is a visual improvement, perhaps deleting it from the Constitution would be more appropriate.

Conclusion

In looking at the origins of the provision we can see that the inclusion of the provision stemmed from a desire to promote the ideal family with support for children in the home. While there is no clear evidence of an intention to provide for economic benefit, this was not ruled out either. In fact it would have been open to future governments at any time to take action under this provision. But they didn't and while some attempts were made by the courts, ultimately it was felt that the judiciary would be overstepping the mark in attempting to read in an economic benefit into the provision. However, the element of economic benefit or compensation seems to have taken a back-seat to the issue of symbolic recognition in the recent reform recommendations, which raises the question – what do the people want from this provision? Unfortunately, unlike de Valera, we can't simply to look into our own hearts to find the answer to that! So, what is important is that rather than rushing in and holding a referendum on this issue in the absence of any real discussion (like, for example, the failed referendum on the age of the president, which simply did not exercise people), there needs to be some proper debate on the matter before the proposal is decided upon and brought before the people. I hope that this piece has been of some benefit in that regard.

disregard for homemakers, to be transformed into 10 years' worth of credits), qualified adult allowance (pension payment for homemakers), among other payments and income replacement entitlements. Page 7 of the submission also states: In terms of the breakdown of marriage and in custody proceedings, Article 41.2 represents a significant instrument for the protection of those who have reduced their participation in the workforce in order to care for family.