SUBSTANTIVE EQUALITY AND POSITIVE DUTIES IN IRELAND

SIOBHÁN MULLALLY

ABSTRACT

The pursuit of substantive equality through legal strategies has met with significant obstacles in Ireland. Positive duties are one of a number of measures adopted in the pursuit of substantive equality, taking legal strategies beyond the limits of anti-discrimination laws. The reluctance to introduce positive duties to promote equality in Ireland is due largely to the absence of a substantive vision of equality and a growing antipathy towards socio-economic rights. This reluctance has particular implications for women. Over the last decade, the emergence of the so-called ‘Celtic Tiger’ economy has brought with it significant tensions concerning the distribution of care responsibilities in the domestic sphere. These tensions highlight deeper conflicts within Ireland’s welfare regime and the limits of equality laws in tackling substantive inequality. This article traces these limits, highlighting the growing gap between equality protection in Ireland, North and South, and its detrimental impact on gender equality.

I INTRODUCTION

In Ireland, attempts to use legal means to achieve substantive equality have met with significant obstacles. These obstacles find their roots in an antipathy to socio-economic rights, a reluctance to acknowledge the justiciability of such rights and a denial of the legal system’s role in challenging resource allocations or in monitoring distributive justice outcomes. This reluctance has particular implications for women. Over the last decade, the emergence of the so-called ‘Celtic Tiger’ economy has brought with it increasing gaps between rich and poor, persistent income inequalities and significant tensions concerning the distribution of care responsibilities in the domestic sphere. These tensions highlight deeper conflicts within Ireland’s welfare regime and the limits of equality laws in tackling substantive inequality. To date, a formal model of equality — a conception of equality as requiring consistency in treatment — has dominated legal thinking and practice in Ireland. Attempts to mobilise the legal system in the pursuit of substantive equality have been thwarted by a reluctance to recognise a positive duty to provide on the part of

* Co-Director, Centre for Criminal Justice and Human Rights, Senior Lecturer, Faculty of Law, University College Cork. I am grateful to the editors and to an anonymous reviewer for their many helpful comments and suggestions.


2 While this article focuses specifically on gender inequality, the failure to engage with socio-economic rights has implications for many disadvantaged and vulnerable groups, usually those groups who have little impact within political processes.

the state. This reluctance, often represented as judicial deference to legislative and executive roles, has constrained the development of the constitutional guarantee of equality and, in more recent times, has limited the emergence of new equality strategies.4

The welfare state in Ireland has shifted between conservative and neo-liberal approaches to welfare provision. Common to both of these models is a laissez-faire approach to caring responsibilities arising in the domestic sphere. The conservative model, underpinning Ireland’s constitutional text, presumes that care work is undertaken by the family unit and fails to scrutinise the distribution of responsibilities and burdens within that unit. The neo-liberal model opts out of care responsibilities for the state, leaving such responsibilities to private ordering. Both models have a detrimental impact on women. As Alison Jaggar has noted, ‘millions of people … have spent millions of hours for hundreds of years giving their utmost to millions of others’.5 This long overlooked ‘moral proletariat’ is mostly women.6

In recent years, a range of initiatives, including both ‘soft’ and ‘hard’ law measures, have been adopted in an attempt to ease the burden of combining paid employment with family responsibilities. In Ireland, this has led to extended rights to maternity leave, provision for parental leave, a long overdue child-care strategy, and various measures to promote family friendly working practices. The suspicion remains, however, that this has less to do with the pursuit of equality as a social right and more to do with the need to respond to labour shortages and demands for a competitive, flexible labour force. In many cases, the pursuit of gender equality has been co-opted by the ideologies of the free market and the pursuit of global capitalism. Gender equality measures are justified where they serve to eliminate unfair competition or to ensure a more diverse and more competitive labour market. As we have seen in Ireland, increasing women’s participation in paid employment does not necessarily eliminate gender inequalities. The last two decades have witnessed significant increases in women’s participation in the labour market, yet gender remains a significant factor in poverty and social exclusion, and women remain under-represented within political processes.7

This article examines the commitment to equality as a social right within the Irish legal system. Recent debate on equality law and enforcement procedures has focused, in particular, on positive duties to promote equality. Added momentum to debates on positive duties arises from the Belfast Peace Agreement (the Good Friday Agreement), concluded in 1998. The Agreement includes an extensive chapter on equality and human rights and has been iden-

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4 See generally G Whyte Social Inclusion and the Legal System Public Interest Law in Ireland (2002).
tified by some as heralding a ‘rights revolution’.8 The equality commitments in the Agreement have led to a range of legal initiatives in Northern Ireland, most notably the adoption of s 75 of the Northern Ireland Act 1998 establishing a positive duty on all public authorities to promote equality across a range of grounds. In the Republic of Ireland, however, equality initiatives have met with greater obstacles.9 Creeping neo-liberalism within economic policies and the absence of a political will to support further equality initiatives have stymied the introduction of a positive duty. Indeed, changes introduced in the Equality Act 2004, seek to stem the tide of anti-discrimination claims against licensed premises, in particular. The Minister for Justice, Equality and Law Reform, reflecting the dominance of neo-liberal thinking in governmental policy, recently commented that inequality provided a necessary incentive to economic progress. Against this background, measures to promote equality have been confined to soft law initiatives. Despite the promise of an equivalence of rights in Ireland, North and South, the introduction of a statutory duty to promote equality is now quite a long way off.

Positive duties are one of a number of measures that seek to mobilise policy makers in pursuit of substantive equality and to overcome the now well-documented limits of anti-discrimination measures. The reluctance to introduce positive duties to promote equality in Ireland is due largely to the absence of a substantive vision of equality and a growing antipathy towards socio-economic rights. This article traces this reluctance, highlighting the growing gap between equality protection, North and South, and its detrimental impact on the pursuit of gender equality.

II SUBSTANTIVE INEQUALITY AND THE IRISH CONSTITUTION

Article 40.10 of the Constitution is a general guarantee of equality for all citizens and is a free-standing equality norm — equality before the law is guaranteed in itself, not merely in the context of a threat to other constitutional rights. The scope of application of the equality guarantee is, therefore, potentially very broad. Despite this potential, its usefulness as a tool to promote substantive equality has been limited. The judicial creativity applied to other provisions of the fundamental rights chapter of the Constitution has not extended to the equality guarantee.

To begin with, equality is not recognised as a core norm within the constitutional text. As a result, it is frequently in danger, as the Report of the Constitution Review Group notes, ‘of losing out in the inevitable boundary

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10 Article 40.1 provides: ‘All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.’
adjustment between it and other rights. The Constitution Review Group decided against a change in the status of the equality norm. It was felt inappropriate to introduce into the Constitution a form of ‘ranking’ of fundamental rights. Any reconciliation of conflicting rights-claims was, they concluded, more properly regarded as a matter for the courts. The courts engaged in a ranking that limited the scope or import of equality claims. Property rights ‘trumped’ equality claims. Among the arguments cited in opposition to the proposal that equality should be denominated as a core principle in the Constitution was the view that this proposal was inspired in part by essentially political arguments for an optimum degree of socio-economic equality rather than strictly for equality before the law. The relationship between the two is acknowledged but the former is a policy issue appropriate to be addressed by Government and Oireachtas (Parliament) rather than by a constitutional assertion.

The Review Group was responding to a submission from the Commission on the Status of Persons with Disabilities, which had argued in favour of denominating equality as a core norm. Without such a core status, the Commission argued that equality would otherwise fall victim to competing constitutional commitments. The Commission’s concerns were proven subsequently, and very quickly, to be prophetic indeed.

The Employment Equality Bill, originally introduced in the summer of 1996, sought to extend the prohibited grounds of discrimination to race, religion, sexual orientation, disability, age, family status and membership of the traveller community. It was followed shortly after by the Equal Status Bill 1997, which moved beyond the confines of the workplace outlawing discriminatory practices by registered clubs, in education, the provision of goods and services and in the disposal of property and accommodation. The proposed equality code was welcomed as being one of the most comprehensive in the European Union. It was, however, also the subject of considerable controversy.

Following their passage through the Houses of the Oireachtas (Parliament), the then President, Mary Robinson, decided to refer both pieces of legislation to the Supreme Court for a determination as to their constitutionality. In a judgment delivered on 15 May 1997, the Court identified three issues in respect of which the Employment Equality Bill failed to comply with constitutional requirements. The third and most controversial of the Court’s findings concerned the ‘reasonable accommodation’ aspect of the Bill’s disability provisions, which imposed a duty on employers to take ‘reasonable’ steps to accommodate the needs of persons with disabilities, unless this obligation would lead to ‘undue hardship’. Despite the ‘undue hardship’ provision, the Court concluded that the duty of accommodation amounted to an ‘unjust

12 Ibid 223.
13 Ibid 233.
14 I am grateful to the reviewer for pointing to the role of the Commission in originally highlighting this danger.
15 See Equal Opportunities Review No 69 (September/October 1996).
attack’ on the property rights of employers and an unjust limitation on an employer’s right to carry on a business and earn a livelihood. While the Court accepted that the Bill had the ‘totally laudable aim’ of promoting greater equality for persons with disabilities, it concluded that the cost of pursuing this aim should fall to society as a whole rather than to any particular section of society. The Equal Status Bill was also found, on the same basis, to fail the test of constitutionality. The Supreme Court’s defence of property rights is closer to the kind of ‘property as a natural right’ approach, expounded by Lockean philosopher Richard Epstein. Epstein’s exposition of property as a ‘natural right’ supports the imposition of a very tight rein on a government’s rightful powers to regulate the use of private property. Under this view, uncompensated restrictions on the use of private property are viewed as a ‘taking’. This reluctance to admit to a governmental power of regulation is to be contrasted with a Rawlsian ‘political conception of justice’, which, drawing on the application of the difference principle, requires greater state intervention to remedy socio-economic disadvantage. Rawls’ conception of justice is but one of a number that might be drawn on to justify a more ‘supportive state’. Epstein’s libertarian view of a limited state, however, found greatest resonance with the Supreme Court.

The duty of reasonable accommodation, finally enacted in the Employment Equality and Equal Status Acts, extended only to nominal costs. A number of possible responses were open to the government in responding to the Supreme Court judgment. One, which was recommended by the Inter-Departmental Working Group, proposed that the state, rather than a private individual, could bear the cost of accommodation. This proposal was vetoed by the Department of Finance, reflecting again the reluctance to accept a positive duty on the part of the state to secure substantive equality.

Other difficulties arise with the constitutional guarantee of equality. The so-called ‘human personality’ doctrine distinguishes between ‘essential’ rather than ‘contingent’ features of a citizen’s existence. It is the ‘essence’ of the human person that is granted an entitlement to equality before law. The contingencies of daily existence, of the everyday, are not deemed to be deserving of such protection. This narrow interpretation of Art 40.1 emerged for the first time in Macauley v Minister for Posts and Telegraphs. It was reiterated in Quinn’s Supermarket v Attorney General by Walsh J: ‘this guarantee refers to human persons for what they are in themselves rather than to any

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17 As protected by articles 43 and 40.3.1 of the Constitution respectively.
18 (Note 16 above) 72–73.
19 See R Epstein Takings Private Property and the Power of Eminent Domain (1985). I am grateful to the reviewer for bringing this to my attention.
20 This term is borrowed from Alan Gewirth. See A Gewirth The Community of Rights (1996).
21 1966 IR 345.
22 1972 IR 1. The plaintiffs challenged the provisions of the Victuallers’ Shops (Hours of Trading on Weekdays) (Dublin, Dun Laoghaire and Bray) Order, 1948 made by the Minister for Industry and Commerce under s 25 of the Shops (Hours of Trading) Act, 1938. Article 2 of the Order exempted Kosher butcher shops from a ban on evening opening.
lawful activities, trades or pursuits which they may engage in or follow."23 The ‘human personality’ doctrine finds its roots in Catholic social justice teaching of the 1930s.24 As such, it appears that the original intent behind its inclusion was to support an ideal of universality in conceptions of the human person. From these more inclusive beginnings, however, the doctrine has developed to restrict rather than expand the application of equality norms. The jurisprudence surrounding the term has been widely criticised and seems to be losing favour within judicial circles.25 As is noted by Kelly, restricting the application of the equality guarantee, ‘to “man” qualified only by race, religion, social position and not much else seems to put a constitutional premium on his [sic] remaining so far as possible in a state of nature’.26 The very word citizen in the constitutional text itself carries within it the recognition that the subjects of the legal system exist within a society.27 Appeals to such artificial distinctions and dichotomies serve only to constrain the application of the equality guarantee. Such appeals can be seen also in concerns to limit the application of the guarantee to state action, narrowly defined.

The words ‘equal before the law’ and the reference to ‘the State ... in its enactments’ suggest that art 40.1 applies only to the state. The existing institutional materials do not give decisive guidance on these questions. Unlike other constitutional guarantees, the equality guarantee has not been applied to relations between non-state actors.28 A gendered division between the public and the private prevails. The Constitution Review Group considered the possibility of extending the existing equality guarantee so as to allow for ‘horizontal applications’.29 The Group noted that discrimination is often practised by persons and bodies other than the state. However, they concluded that to extend the scope of the equality guarantee would raise a number of difficulties — both conceptual and practical. A majority of the Group took the view that relations between private individuals did not raise issues of constitutional rights or wrongs. Indeed, it was felt that it would be difficult to identify to whom, other than the state, the obligation to respect equality should apply. The Group was concerned to protect against ‘unjustified intrusions’ upon individual autonomy. As was noted earlier, equality is not a core constitutional value. In this instance, liberty won out over equality and the Review Group eventually concluded against an extension of the existing guarantee. No reason was given by the Group for distinguishing between the degree of protection afforded by art 40.1 and that afforded by other fundamental rights provisions, which have been applied ‘horizontally’. No reference was made by the Review Group to the significant body of case law in which relations between non-state actors have been identified by the Irish courts

23 Ibid 31
26 Ibid 722.
27 Ibid fn 53.
29 Note 11 above, 223.
as raising issues of fundamental rights. The CEDAW Committee has noted with concern the failure to apply the constitutional guarantee of equality to private, non-state actors.  

A remaining question is whether the state may be held responsible for ‘inaction’ in the face of private discrimination, or to put it another way, whether a failure to provide an effective remedy against private acts of discrimination attracts the responsibility of the state? This could only be the case, first, if it was accepted that art 40.1 guaranteed all citizens a general right to equal treatment, and secondly, if the state has a duty to ‘defend and vindicate’ this right against infringement by non-state actors. The existing jurisprudence does not provide decisive guidance on this point. The possibility of extending the scope of equality protection along these lines was considered by the Constitution Review Group. The Group concluded however that it would be undesirable and contrary to the separation of powers for the courts to require state action, for example legislation, in order to ensure equality in private relations. Such matters, it was thought, are more properly regarded as policy issues to be determined by the government and/or the Oireachtas. An obligation on the state to ensure general respect for equality would be more appropriately addressed in the Constitution as a non-justiciable directive of social policy. Thus, it seems that relations between non-state actors were perceived as raising policy issues only while relations between individuals and the state were presumed to raise questions of legal right.

III SUBSTANTIVE INEQUALITY, DISTRIBUTIVE JUSTICE AND SOCIO-ECONOMIC RIGHTS

The limits of the constitutional guarantee of equality are further exacerbated by a failure to give constitutional recognition to economic and social rights. Substantive inequalities, questions of distributive justice that would require positive action on the part of the state or a recognition by the courts of a positive duty to provide, are frequently placed beyond the limits of constitutional law.

The rights to property and to education are the only expressly recognised social and economic rights in the Constitution. The judiciary, through the doctrine of unenumerated rights, has recognised a number of socio-economic rights. In Ryan v Attorney General the right to bodily integrity was recognised. In Murphy v Stewart the Supreme Court recognised the right to earn a livelihood and invoked the Directive Principles to support this finding. In State (C) v Frawley and the State (Richardson) v The Governor of Mountjoy Prison the duty of the state to protect the health of prisoners was recognised.

30 Concluding Observations of the Committee on the Elimination of Discrimination Against Women Ireland 01/07/99, UN Doc A/54/38.
31 Note 11 above, 223–224.
32 1965 IR 294.
33 1973 IR 97.
34 1976 IR 365.
35 1980 ILRM.
The development of a body of jurisprudence on socio-economic rights has been hindered, however, by a continuing reluctance to impose positive duties on the state. In *G v An Bord Uchtála*, Henchy J defined the right to bodily integrity in essentially negative terms:

36 such a right arises for judicial recognition or enforcement only in circumstances which require that, in order to assure the dignity and freedom of the individual within the constitutional framework, he or she should be held immune from a particular actual or threatened bodily injury or intrusion.

A similar reluctance to impose positive duties on the state is to be found in the Report of the Constitution Review Group. One of the proposals considered by the Review Group was the possibility of amending the Constitution to include a specific right to freedom from poverty and social exclusion. 37 The Group agreed that economic inequalities needed to be addressed in order to reduce social divisions in Irish society. The Group noted, for example, that poverty had increased in relative terms, despite overall increases in Ireland’s economic wealth. This trend suggested that some kind of constitutional protection for vulnerable groups was necessary if the aim of distributive justice was to be realised. However, despite the Group’s concern to address economic inequalities, the arguments against constitutional protection of social and economic rights eventually won out. The majority of the Group concluded that economic and social entitlements were essentially political matters, which should remain the sole responsibility of elected political representatives and not be the responsibility of an un-elected judiciary. The Group also took the view that the right to be free from poverty was so vague as to be incapable of objective determination. The Group appears to leave open the possibility of the courts protecting economic rights through judicial vindication of the right to life and to bodily integrity. They point out that the Constitution already provides ultimate protection to ensure that no one would fall below a minimum level of subsistence. 38 Beyond this minimum, however, they were reluctant to recognise any role for the judiciary in protecting social and economic rights.

A dissenting opinion was voiced by two members of the Group, Alpha Connelly and Kathleen Lynch, who both argued that failing to recognise economic inequalities would lead to a constitutional system that was blind to the fundamental social divisions in Irish society. 39 Their concerns were well-founded. The willingness of the judiciary to defend and vindicate fundamental rights, including unenumerated rights, has not extended to problems of poverty and social exclusion.

In *O’Reilly and Ors v Limerick Corporation* 40 the plaintiffs who were members of the travelling community sought a mandatory injunction directing the corporation to provide them with adequately serviced halting sites. They

37 Note 11 above, 234–236.
38 Ibid 236.
39 Ibid appendix 18, 589–590.
40 1989 IR 181.
claimed that the conditions in which they were forced to live — described by Denham J as involving ‘considerable poverty and deprivation’ — amounted to a breach of their constitutional rights, as protected under arts 40.3.° and 41. The High Court, however, dismissed their claim. Speaking through Costello J, the Court held that the plaintiff’s claim was a claim to distributive rather than commutative justice and, as such, fell within the remit of the legislature rather than before the courts. This view was reiterated by the Supreme Court more recently in Sinnott v Minister for Education. The Sinnott case involved a young man, Jamie Sinnott, who suffered from severe physical and mental disablement and autism. The case raised the question whether the state had a continuing duty to provide free primary education to Jamie after he had reached the age of majority. The High Court concluded that a citizen’s right to free primary education, as protected in art 42.4, was not subject to any age limitation. The ultimate criterion in determining the state’s obligation to a physically disabled person must be based, the Court said, on need rather than age. In arriving at this conclusion, Barr J noted that the difficulties encountered by Jamie and his mother were symptomatic of a ‘widespread malaise’ in the Irish education system. The Court, as a guardian of constitutional rights, had a duty to criticise the state’s failure to respond to this malaise. Barr J argued that while the judiciary should not generally ‘trespass’ into the realm of executive or administrative decision-making, in this case, the grounds for criticism were ‘overwhelming’. The state had a duty to respond, in full, to the citizen’s constitutional rights. A partial response had no justification in law. When difficult financial circumstances prevailed, in Barr J’s view, the state could be required to raise new tax revenues to meet its constitutional obligations. The High Court further concluded that the state, by failing to support the role of Kathy Sinnott, Jamie Sinnott’s mother and primary carer, had violated its constitutional obligation to protect the family unit. In support of his findings, Barr J cited OB v S where the Supreme Court held that the provisions of art 41 create ‘not merely a State interest, but a State obligation to protect the family’. Relying on the constitutional guarantee of equality, Barr J further concluded that Mrs Sinnott and her family (in particular her son, Jamie) were entitled to equality of treatment by the state and ought not to be deprived without just cause of ‘basic advantages’, which the state provides for others (in this case, free primary education).

Barr J’s statements clearly recognise rights-claims as ‘trumps’ — as claims that take priority over general questions of utility. He also recognises the vul-

41 Ibid 189.
42 Sinnott v Minister for Education (2001) 2 IR 505.
43 Sinnott v Minister for Education (2000) 2 IR 545.
44 Ibid 571.
46 Ibid.
47 1985 ILRM 86.
48 Ibid 94.
49 Note 43 above, 570
nerability of groups that do not have, in his words, ‘numerical strength and/or political clout to achieve their just desserts’. His views, however, were not shared by the Supreme Court. Keane CJ, speaking for the majority, concluded that to require the state to provide ongoing free primary education to Jamie would have violated the ‘exclusive role’ of the executive and the legislature in the distribution of the nation’s wealth. This view was shared by Hardiman J. Distributive justice was a subject, in his view, on which the judiciary had ‘no mandate’. To abandon judicial restraint in this area would, he argued, limit the proper freedom of action of the legislature and the executive. It is worth quoting Hardiman J in full:

Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the courts into the taking of decisions in areas in which they have no special qualification or experience. Thirdly, it would permit the courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the court, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.

Hardiman J distinguishes in his judgment between commutative and distributive justice. Missing from his argument, however, is any recognition that the adjudication of civil and political rights raises equally difficult questions for the judiciary. Ensuring effective protection of rights, whether civil or political, economic or social, requires state action and an allocation of state resources. In hiding behind the doctrine of separation of powers, the Supreme Court ignores the similarities that exist between rights-claims, whether rooted in economic entitlements or civil liberties.

The Supreme Court also refused to give legal recognition to the rights claims advanced by Kathy Sinnott. The findings of the Supreme Court in this case display a number of failings. Firstly, the Supreme Court failed to find a duty on the part of the state to provide ongoing free primary education, despite the existence of a constitutional provision specifically providing for a right to free primary education. As counsel on behalf of the plaintiffs had argued, this is the only constitutional provision which mandates the state to meet a specific social objective. Even against this background of strong textual support, the Supreme Court refused to impose a duty to provide on the state.

Secondly, the Court fails to recognise the relational nature of rights and responsibilities arising in this case, denying the significance of the network of relationships within which both Jamie and Kathy Sinnott are located. These relationships define the structure of their daily lives and the specific rights and responsibilities that arise from their particular location at the interstices of gender, disability, educational and economic disadvantage. Keane CJ outrightly rejects Kathy Sinnott’s claim to general damages for the breach of her constitutional rights alleged to have flown from the breach of her son’s rights.

50 Ibid 569.
51 Note 42 above, 640.
52 Ibid 711.
53 Ibid 710.
This claim, he concluded, was ‘wholly unsustainable’. The High Court, in contrast, repeatedly highlighted the benefits due to the family as a unit, arising from the state’s obligation to provide education, and the burden of caring work that accrued to the family unit (and in this case to Kathy Sinnott) because of the state’s failure to meet its obligations.

Thirdly, in contrast with the findings of the High Court, the Supreme Court fails to give due weight to the equality claims advanced by both Jamie and Kathy Sinnott. Specifically the Court fails to recognise the necessary connections between inequality, lack of access to education and lack of state support for carers (the majority of whom are women). This failing reflects a broader reluctance, as noted earlier, to give legal recognition to equality as a social right.

In a dissenting judgment in the Supreme Court, Denham J concluded that both Jamie and Kathy Sinnott had suffered invidious discrimination. Addressing the claim brought by Kathy Sinnott, Denham J repeatedly addresses the specificities of Kathy Sinnott’s claim as a parent and mother of a child with disabilities, and as a carer of a child whose constitutional rights were violated by the state.

The appeal to the separation of powers was voiced again in TD and Ors v Minister for Education and Ors. This case arose from the state’s ongoing failure to provide suitable accommodation for young offenders and children at risk. The appeal to the Supreme Court arose from a series of cases in the High Court in which the Court had been asked to ensure that the state discharged its constitutional obligation to provide for the accommodation needs of children at risk. The High Court responded to these requests by ordering the state

54 Ibid 640.
55 Ibid 654.
57 The sequence of events that culminated in the TD case began with a decision of the High Court in FM v The Minister for Education & Ors (1995) 1 IR 409. In that case, the applicant sought a declaration that the state had failed in its constitutional obligations under arts 40.3 and 42 of the Constitution. He also sought an order directing the state to protect and vindicate his constitutional rights by: (a) providing secure accommodation; and (b) providing for his religious and moral, intellectual physical and social education. Geoghan J, speaking for the High Court, accepted that a constitutional obligation was owed to the applicant. The case was adjourned pending further information to be submitted by the state. Seven days after Geoghan J’s judgment, the Minister for Health informed the High Court of government proposals to provide residential places for young offenders and children with special problems. The proposals were accepted by the Court. A year later, however, it became clear that the state had ‘substantially departed’ from the proposed schedule. Delays in drafting legislation, interdepartmental wrangles, and reverses in policy were blamed. The High Court, speaking through Kelly J, described the state’s failure to discharge its obligations as nothing less than a ‘scandal’. There followed a series of cases in which the High Court ordered the state to provide the residential places required for children at risk within an agreed time-scale. Any variation on the agreed time-scale was to be possible only by way of an application to the Court and would have to be supported by ‘objectively justifiable’ reasons. This, as Kelly J recognised, involved the Court to a much greater extent in the provision of accommodation for children at risk. For the children concerned, it would mean that the judiciary was now directly involved in securing the effective enforcement of their constitutional rights. TD v Minister for Education [1998] IEHC 173 (4th December, 1998), TD v Minister for Education [2000] IEHC 21.
to take ‘all steps necessary’ to facilitate the building and opening of secure and high support units, in a list of ten specified places. The units were to be built and opened by dates specified by the High Court. The judicial activism of the High Court and its willingness to engage with issues relating to socio-economic rights gave rise to considerable public controversy. On the question of whether the judiciary was encroaching on matters of policy, more properly falling within the spheres of the legislature and executive, Kelly J concluded that the courts could intervene in matters of policy in ‘an appropriate case’, where such intervention was absolutely necessary to ensure the protection of constitutional rights.58 In the *TD* case, the applicants, relying on arts 40.3.1 and 42 of the Constitution, claimed a right to be placed and maintained in secure residential accommodation so as to ensure, as far as practicable, appropriate religious and moral, intellectual, physical and social education. In this particular case, Kelly J took the view that the judiciary were not intervening in matters of policy as the executive had already formulated a policy. The judiciary were merely ensuring that this policy was properly implemented and the constitutional obligations of the state fully discharged.59

Kelly J’s statements in the High Court and the orders issued against the state attracted considerable controversy. On appeal to the Supreme Court, the state challenged the High Court’s jurisdiction to issue orders requiring the completion of residential facilities for children at risk. The issue was one, they argued, that had far-reaching implications for the government, beyond the issues raised in these cases. The appeal focused, in large part, on the doctrine of the separation of powers and the allocation of duties as between the executive, legislature and judicial arms of government. The Supreme Court, in a majority judgment, reversed the decisions of the High Court, concluding that the court had no jurisdiction to issue mandatory orders against the government.60 In the course of his judgment, Keane CJ expressed the ‘gravest doubts’ as to whether the courts should at any stage recognise unenumerated socio-economic rights. While he accepted that the executive had failed in its duty to provide appropriate accommodation for the applicants, he concluded that the High Court did not have any jurisdiction to specify the manner in which this breach should be remedied by the executive. To do so would breach the ‘constitutionally mandated separation of powers’. In the High Court’s judgment, he said, a ‘rubicon had been crossed’.61

In this view, he had an ally in Hardiman J. Reiterating his statements in the *Sinnott* case, Hardiman J concluded that adjudicating on matters of social and economic rights was a ‘constitutionally impermissible invasion of the functions of the Government’.62 By contrast, the adjudication of disputes concerning civil and political rights was ‘the most quintessentially judicial of all

58 *TD v Minister for Education* [2000] IEHC 21, para.61.
60 *TD v Minister for Education* (2001) 4 IR 259.
61 Ibid para 81.
judicial duties'. Again Hardiman J takes the view that social and economic rights, because they require expenditure of public monies, are somehow different in nature from civil and political rights. The expenditures arising from the fulfilment of 'quintessentially judicial duties', such as protecting the right to a fair trial, were not considered.

The only dissenting voice in the Supreme Court was that of Denham J. Again, in Denham J’s judgment, we see a concern with the nature of the judicial function and the role of the judiciary in securing distributive justice. Denham J’s views on this role and function, however, differ significantly from those of the majority of the Court. While she accepts that the judiciary must be mindful of the separation of powers, she argues that the duty to protect and guarantee fundamental rights should not be ‘shirked or abdicated’. For Denham J, the judiciary had a duty to defend and vindicate rights to distributive as well as to commutative justice. As she recognised, however, the Irish courts have been less than enthusiastic in responding to social and economic rights-claims.

This reluctance on the part of the courts is also reflected in the state’s failure to engage meaningfully with the International Covenant on Economic, Social and Cultural Rights (ICESCR) — the so-called ‘other half’ of the human rights bill’. Ireland signed the ICESCR on 1 October 1973 and ratified it on 8 December 1989. In its concluding observations on Ireland’s first and second reports, submitted under art 16 of the ICESCR, the Committee has criticised Ireland’s failure to incorporate the Covenant into domestic law or to provide an effective remedy for violations of Covenant rights. It has called on the All Party Oireachtas Committee on the Constitution to consider proposals to amend the Constitution to ensure greater recognition of economic and social rights. To date, however, its criticisms have fallen on deaf ears. In commenting on Ireland’s second report in July 2002, the Committee pointed out that the increasingly favourable economic conditions meant that there were now no insurmountable difficulties to full implementation of the Covenant in Ireland. Despite these favourable conditions, however, the Committee expressed concern at the persistence of poverty among disadvantaged and vulnerable groups, notably the disabled, the traveller community, children, elderly women and single women with children. The Committee was critical of the failure to incorporate a rights-based framework into the National Anti-Poverty Strategy and questioned Ireland’s compliance with art 11 of the Covenant, guaranteeing the right to an adequate standard of living. Pointing to its own Statement on Poverty, the Committee questioned whether the government had any plans to remedy this failure.

63 Ibid.
64 Ibid para 159.
66 Ibid para 11.
The government’s response to the Committee reveals, yet again, a reluctance to recognise the indivisibility of human rights. Appealing to the separation of powers, the government reiterated the view of the Supreme Court — that a rights-based anti-poverty strategy would disturb the delicate checks and balances between the three independent pillars of government. The majority view in Ireland was, they argued, against the judicial enforcement of economic and social rights. No reference was made to the Committee’s General Comments or to the obligations of conduct incurred by the state under art 2 of the Covenant. Though domestic law is not accepted as an excuse for non-compliance with international law, the government clearly refuses to recognise the ICESCR as giving rise to strict legal obligations.

IV SUBSTANTIVE INEQUALITY, GENDER AND THE FAMILY

As is evident from the Sinnott judgment, the failure to address substantive inequalities and problems of distributive injustice is also found in the courts’ interpretation of the constitutional provisions on the family, including, in particular, references to women’s roles within the family. The constitutional guarantee of equality does not contain any explicit prohibition on sex discrimination, an omission that greatly exercised the women’s movement at the time of drafting the Constitution. De Valera (the then President) defended this omission arguing that a reference to sex discrimination would suggest that such discrimination persisted in post-independence Ireland — a suggestion that he refused to countenance. In rejecting the amendments proposed by the women’s movement, he argued that there was ‘no distinction made whatever between men and women as far as the vote, the franchise, office or anything else is concerned’.68 The examples cited by De Valera related specifically to participation in civil and political life. Inequalities or distinct gender roles persisting in other spheres were not considered to fall within the scope of equality law. An ideology of ‘separate spheres’, reflecting conservative Roman Catholic teachings and De Valera’s specific vision of family life, permeates the constitutional text.69

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 central to much Roman Catholic teaching. In the drafting of the Constitution, this ethos was to find its way into the constitutional provisions on the family. Article 41.2.1º leaves little room for debate as to the nature of women’s citizenship under the Irish Constitution providing that ‘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’. The category woman that is here invoked does not admit of much difference or diversity. A woman’s citizenship was to be defined, first and foremost, by her ‘life within the home’. The conflation of woman and mother is reinforced fur-

68 67 Dáil Debates Cols 64–65 cited in O Doyle (note 24 above) 54.
ther by art 4.2.2º, which provides, ‘the State shall 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’. That De Valera presumed a differentiation in gender roles within the family is evident from his contributions on the constitutional provision on equality. Article 40.1 guarantees equality before the law. The corresponding provision in the 1922 Constitution had included the phrase, ‘without distinction on grounds of sex’. De Valera thought this additional phrase was unnecessary. His justification for deleting the phrase, however, refers repeatedly to the realm of ‘political life’, a qualification that went unnoticed by parliamentary colleagues. Clearly, in his view, the domestic sphere was to be subject to different tests of justice.

Justifying the inclusion of gender-specific references to roles within the family, De Valera argued:

This Constitution has been attacked on the ground that it is taking away women’s rights. What it is doing where women are concerned is that, where their rights are equal, they are equal. Therefore, where they are referred to here [Article 4.1], they are referred to by way of protection and the protection which the State is bound to give.

The need for protection is reiterated in the non-justiciable Directive Principles of Social Policy, which provide inter alia, that the state ‘should endeavour to ensure that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex’. The gender specific focus of such references is to be contrasted with the more inclusive language of art 45(2)(i) that requires the state to direct its policy towards securing:

That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.

This provision, as Doyle notes, is not necessarily incompatible with the language of art 41.2, if one considers that the state should ensure an adequate means of livelihood equally to those working within the domestic sphere. This non-justiciable provision has rarely been cited in legal proceedings. Given the judicial reluctance to draw on art 41.2 to support a claim to equality as a social right, it is unlikely to wield much influence in legal arguments for a positive duty to provide on the part of the state.

The gender-differentiated nature of citizenship and the situating of women firmly within the domestic sphere provoked a huge outcry from the women’s movement, many of whom had earlier supported De Valera. 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 De Valera in the civil war, was one of the most vocal opponents. The 1916 Proclamation of Independence, she argued, had given Irish women

70 67 Dáil Debates Cols 70 cited in O Doyle (note 24 above) 55.
71 Article 45(4).
72 The gendered nature of the Irish Constitution is discussed in greater detail in Mullally (2006) note 9 above, chapters 7 & 8.
equal citizenship, equal rights and equal opportunities’. Subsequent constitutions had ‘filched these’ or ‘smothered them in mere empty formulae’. John A Costello, a former Attorney General, expressed concern that the maxim expressio unis, as applied to art 41.2.1, could exclude women’s life outside the home from constitutional protection. An editorial in the Irish Press described the opposition to the Constitution as a ‘revolt against the authority and teaching of Pius XI’ and as lacking respect for the Catholic Church’s teachings on, ‘the position, the sphere, the duties of women’. Reverend John Charles McQuaid (later archbishop of Dublin), commenting on feminist opposition, noted that ‘nothing would change the law and fact of nature that women’s natural sphere is the home’. The constitutional references to women’s lives within the home are drawn directly from Catholic teaching, specifically, the Papal Encyclical of Quadragesimo Anno: On Reconstruction of the Social Order. There, the proposed reconstruction of the social order, called for better wages for workers (presumed male). The call for improved wages for workers was supported, in part, by the concern to ensure that mothers, ‘concentrating on household duties, should work primarily in the home or in its immediate vicinity’. It was, in the words of the Encyclical, ‘an intolerable abuse … for mothers on account of the father’s low wage to be forced to engage in gainful occupations outside the home to the neglect of their proper cares and duties, especially the training of children’. Added to this, was the concern not to abuse the ‘limited strength of women’. The influence of Catholic teaching is evident in the constitutional provisions on the family, and in the ideology of separate spheres that permeates those provisions. The broader concerns of Catholic teaching on social justice, did not, however, find the same resonance in the constitutional text.

The courts have repeatedly failed to interpret art 41.2 as requiring a ‘supportive state’. In L v L, a married woman invoked art 41.2 to support her claim that a woman working as a full-time homemaker and mother should be entitled to a proprietary interest in the family home. In the High Court, Barr J concluded that the Court had a positive obligation to interpret art 41.2, in a way that recognised marriage as an equal partnership. If a woman chose to work full time in the home, she should receive reasonable economic security within the marriage in return for the economic and emotional sacrifice this choice involved. Barr J held that the wife and mother in this case was entitled

74 Ibid.
75 Dáil Debates (4 June 1937) vol 68 col 1856.
76 Irish Press (17 Dec 1937).
77 Dublin Diocesan Archives. McQuaid Papers, section 5 file 4b Rights of Women (1936).
78 Encyclical of Pope Pius XI (15 May 1931) para 71.
79 Ibid.
80 Ibid.
81 Note 22 above.
to a 50 percent beneficial ownership in the family home. This finding, however, was reversed on appeal by the Supreme Court. Drawing a clear line between the public and domestic sphere, Chief Justice Finlay concluded that art 41 did not create any particular rights within the family, nor did it grant individual members rights against other family members. It dealt only with the protection of the family from external forces. Egan J specifically discusses the question of positive obligation, distinguishing between ‘recognition’ of a ‘woman’s life within the home’ and State’s obligation to ‘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’. The recognition given, does not lead to a positive obligation.

Following on from L v L, the government introduced the Matrimonial Home Bill 1993, which sought to guarantee joint ownership of the family home. The Bill was the subject of a Supreme Court referral by the President. Finding the Bill to be unconstitutional, Finlay CJ concluded that the intervention by the state in the family was not ‘reasonably proportionate’ and constituted a failure by the state to protect the authority of the family. This view was reiterated by Costello J in Murray v Ireland. In his view, the rights in art 41 attached to the institution of the family itself rather than to any personal rights that an individual might enjoy by virtue of family membership. On this reading, the Constitution protects the family as a unit but does not inquire into relations within the family. The defence of domestic jurisdiction, presented as reflecting a ‘natural order’, is clearly dominant here.

A reluctance to invoke art 41.2 to support claims arising from women working full time in the home was also evident in the Sinnott judgment. Kathy Sinnott claimed, inter alia, that the failure of the state to provide free education facilities appropriate to the needs of her son, had imposed inordinate burdens on her as a single parent and full-time mother, and had deprived her of rights as defined in the constitutional provisions on equality and the family. Before the Supreme Court, she specifically invoked her right to state support for her role as a carer, arising from art 41.2. 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. Keane CJ, giving judgment on behalf of the majority of the Supreme Court, rejected her arguments, however, noting that while her position evoked ‘respect, admiration and compassion’, these were not grounds in law for any award of damages. Caring work and family life is categorised as other than economic and, therefore, beyond the scope of legal protection.

83 Ibid 98–99.
85 Ibid 108.
86 Ibid 115.
89 Ibid 549.
90 Note 42 above.
91 Note 42 above, para110.
In a dissenting judgment, Denham J attempts to rescue art 4.2. She notes the criticisms made of its conservative origins. However, she notes that:

Whatever historical concepts and byways may be traced the reality is that the Constitution sets out constitutional rights, duties and powers … Article 41 is an article of the twenty-first century, an Article of our times … it is to be construed in the Ireland of the Celtic Tiger. As important now as ever, is the recognition given.92

Following this line, Denham J argues that art 4.2 does not assign women to a domestic role, but rather seeks to give recognition to the work performed by women in the domestic sphere. In this case, she concluded, the state had failed to give due recognition to the work performed by Kathy Sinnott, work, that Denham J noted, has ‘immense benefit for society’.93 In her conclusion, Denham J implicitly rejects the view that rights cannot entail positive action on the part of the state. The Constitution, she argues, is a constitution for the people of Ireland and not for an economy.94 The majority of the Supreme Court, however, acknowledged the work undertaken by Kathy Sinnott, but refused to acknowledge any rights arising from her role as a carer.

Deference to the legislature in matters concerning the allocation of resources has not always led to outcomes that are distributively unjust. In MacMathúna v Attorney General,95 the Supreme Court dismissed a constitutional challenge to tax reliefs granted by the state to single parent families, emphasising the deference owed by the courts to the legislature in matters concerning taxation policy and the allocation of public finances. Implicit within the Supreme Court’s finding, however, is the persistent view that fiscal policy and the distributive outcomes of such policy decisions, raised questions of policy rather than constitutional rights.

V Expanding the Scope of Equality Legislation

(a) Securing an ‘Equivalence Of Rights’?

The Good Friday Agreement, with its extensive equality and human rights provisions, gave an added momentum to equality debates in Ireland, as did the commencement of a ‘Rainbow coalition’ in government, committed to introducing expanded equality legislation. The Good Friday Agreement includes a requirement that the Irish government ensures ‘at least an equivalent level of protection of human rights as pertain in Northern Ireland’.96 The Irish government, however, has failed to make good on this promise, with the result that the legal framework to secure equality in the Republic of Ireland now lags far behind the parallel legal framework applicable in the North.

92 Ibid para 195.
93 Ibid para 197.
94 Ibid para 205.
95 [1995] 1 IR 484.
Legislative developments since the adoption of the Good Friday Agreement have focused primarily on identity-based discrimination, responding to the specific context of identity politics in Northern Ireland and the need to fill gaps in the anti-discrimination laws of the Republic. While identity-based discrimination has been the primary focus of legislative change, the question of whether to include socio-economic status as a prohibited ground of discrimination has also attracted much debate both in Northern Ireland and in the Republic in recent years.

The inter-dependency of rights has been the subject of recent discussion amongst the Equality Commission of Northern Ireland. Pointing to the ‘strong link’ between poverty and inequality, the Commission has called for further discussion of the role that equality legislation can play in combating socio-economic inequality. Although legal practice in this area is less well developed than in others, it is widely recognised that discrimination on the basis of socio-economic status underpins, and is linked with, discrimination on other grounds such as race, gender and disability. In its comments on the proposed Single Equality Act, the Equality Commission of Northern Ireland has expressed some concern about including socio-economic status amongst the prohibited grounds of discrimination, noting the possibility that such a provision could be used to protect socially advantaged groups. Citing the South African case, City Council of Pretoria v Walker, the Commission points out that equality provisions can be used to challenge social programmes and measures designed to promote distributive justice. Problems arising from symmetrical legislative provisions have been avoided elsewhere, however. In the Canadian context, the North Western Territories Human Rights Act 2002 specifically targets groups that suffer social or economic disadvantage. This brings the legislation beyond the confines of traditional anti-discrimination measures, to combine a concern with group-based disadvantage and a politics of redistribution.

The Northern Ireland Human Rights Commission (NIHRC) has recommended the inclusion of a social origin ground in the general non-discrimination clause of the proposed Bill of Rights for Northern Ireland, mirroring the requirements of art 14 of the European Convention on Human Rights (ECHR). Social origin is not defined in the published proposals on the Bill. However, in its discussions on this question, the NIHRC Equality Working Group took the view that discrimination on the basis of geographical location and postcode would be included within the social origin ground. It was pointed out that, on
occasion, people are treated differently depending on whether they are rural or urban dwellers, of no fixed abode and so on. The Working Group concluded that many of the most serious problems of discrimination were likely to flow from the fact that postcodes and the like were used to determine a person’s social origin or political beliefs, and that this issue would therefore be covered by either of these grounds of discrimination. 102

In Ireland, the Equality Authority has recommended the extension of the Employment Equality Act 1998 to include socio-economic status as a prohibited ground of discrimination. 103 This recommendation forms part of an ongoing review of the equality legislation, undertaken in fulfilment of the statutory requirement set out in s 6(1) of the Act itself. The Authority suggests a number of key indicators that could be included in any statutory definition of socio-economic status. 104 These include: family background, such as inter-generational history of occupation; geographical location, such as living in areas of relatively high concentrations of socio-economic disadvantage; housing tenure or home ownership; educational background; economic situation. This approach is similar to that adopted in Québec 105 and more recently in the Canadian North Western Territories, 106 where the related term, social condition, is more commonly used. The Irish Human Rights Commission has added its voice to calls for the extension of equality legislation to include reference to socio-economic status. 107 As yet, however, these calls have fallen on deaf ears.

105 The Québec Charter of Human Rights and Freedoms 1975 prohibits discrimination on the basis of social condition. This prohibition applies to all rights and freedoms protected in the Charter, including social and economic rights such as the right to free education, the right to a decent standard of living and the right to fair and reasonable conditions of work, ss 39–48. See generally P Bosset ‘Les Droits Économiques Et Sociaux: Parents Pauvres De La Charte Québécoise?’ (1996) 75 Canadian Bar Review 583.
106 Drawing on the Québec experience, the Northwestern Territories has recently included discrimination on grounds of social condition in its Human Rights Act 2002 s 5(1). The prohibition on discrimination applies in the context of employment, the provision of goods, services, accommodation and facilities. Social condition is defined in the Act as: ‘The condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance (s 1).’

In parliamentary debates prior to the enactment of the Act, the prohibition of discrimination on the basis of social condition was explained as follows: ‘a person has protection against discrimination if he or she is part of a disadvantaged group. The disadvantage has to be social or economic and result from poverty, source of income, illiteracy, meaning a lack of literacy skills, level of education or another condition that is similar to these.’

VI Positive Duties to Promote Equality: Remediing the Limits of Anti-Discrimination Laws?

The Good Friday Agreement has been interpreted as requiring a substantive approach to equality. The introduction of positive duties to promote equality has been viewed as essential to securing substantive equality and moving beyond the now well-documented limits of anti-discrimination laws.  

(a) Positive Duties in Northern Ireland

In the Good Friday Agreement, the British government clearly identified policy appraisal and impact assessment procedures as being essential to mainstreaming equality in law and policy-making processes. It committed itself to creating a statutory obligation on public authorities in Northern Ireland to carry out all their functions with ‘due regard’ to the need to promote equality of opportunity. This commitment was followed through in s 75 of the Northern Ireland Act 1998. The enactment of the statutory duty represents one of the most comprehensive mainstreaming initiatives adopted in any national jurisdiction to date. It follows an extensive process of consultation on the reform of the PAFT Guidelines, introduced in Northern Ireland in 1994. The Guidelines required that considerations of equality and equity would be viewed as ‘important issues’, conditioning and influencing policy-making in all spheres and at all levels of government activity. Their introduction marked a shift away from the narrow pre-occupation with non-discrimination that had previously prevailed in Northern Ireland. Ultimately, however, the promise of reform was not realised. Weak implementation mechanisms, ambiguities within the Guidelines themselves, and a lack of political will were amongst some of the reasons that led to this failure.

The commitment to the idea of positive duty however, did not fade. An extensive process of consultation and dialogue between governmental and non-governmental organisations led to calls for a more effective and systematic approach to policy appraisal. These led finally, in 1998, to the introduction of s 75 of the Northern Ireland Act requiring all public authorities to have ‘due regard’ to the need to promote equality of opportunity between: (a) persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (b) men and women generally; (c) persons with a disability and without; and (d) persons with dependents and persons without. In addition, authorities are required to have ‘regard’ to the desirability of promoting ‘good community relations’ between persons of different religious belief, political

\[108\] See generally C O’Cinneide ‘Positive Duties and Gender Equality’ (2005) 12 International Journal of Discrimination and the Law 91. I am grateful to Colm O’Cinneide for forwarding this paper to me.


opinion or racial groups. To give effect to this duty, public authorities are required to adopt comprehensive ‘Equality Schemes’ setting out arrangements for policy appraisal, public consultation, public access to information and services, and monitoring of progress. Equality Impact Assessments are to be carried out across ‘the general run’ of policy-making and the outcomes of impact assessment and consultation must be taken into account in policy design and review. The government has also made it clear that it expects consultation ‘to embrace those directly affected by a policy as well as non-governmental organisations and relevant statutory bodies’.

Significant legislative reforms have taken place in Northern Ireland. The introduction of positive equality duties have been at the heart of such changes. Their introduction in Northern Ireland has been followed in the United Kingdom with positive duties relating to race, disability and gender equality. As yet, it is unclear whether such changes will promote greater substantive equality. In Northern Ireland, where an extensive body of positive duties are now in force for some time, there is little evidence to suggest that socio-economic inequalities have declined. Concern has been expressed that legal reforms have focused primarily on identity-based discrimination, not socio-economic inequalities. This focus, it is suggested, limits the transformative outcomes of reforming measures.

Other concerns have been expressed in relation to positive duties. Given the increased administrative burdens that have come in wake of positive duties — for policy-makers, non-governmental organisations, advocacy groups and others — questions arise as to their sustainability. Inadequate organisational capacities limit the likelihood that procedural changes will lead to substantive change. The momentum for substantive change, it is argued, may be lost in the excessive emphasis on procedure. Against this background is a concern that formal equality models, ‘equality as consistency’, yet again come to dominate as promoting equality becomes a process of ‘ticking’, ‘checking’, ‘proofing’. Procedures to promote equality are becoming incorporated into performance management discourse, raising the question as to what is the endgame? Is a commitment to equality merely ‘added in’ to existing institutions, policies and processes? Are positive duties concerned with mainstreaming rather than

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111 Section 75(2). It seems from the drafting process that the duty to have ‘due regard’ to equality of opportunity is weightier than the requirement to have ‘regard’ to the promotion of good community relations. See C McCrudden ‘Mainstreaming Equality in the Governance of Northern Ireland’ (1999) 22 Fordham Journal of International Law 1696.
113 Ibid col 810.
transforming? Such concerns have been raised repeatedly in the context of gender mainstreaming initiatives and are now well documented.\(^6\)

Despite these concerns, in the Republic of Ireland, interest in the transformative possibilities of positive duties persists. However, proposals to introduce a statutory duty to promote equality have met with less success. While a range of equality mainstreaming initiatives have been introduced, these have remained within the realm of ‘soft law’, reflecting a broader reluctance to recognise the role of law in securing substantive equality or in monitoring resource allocation. Rather than a positive duty to promote equality, a range of policy ‘proofing’ initiatives have been introduced. As the language suggests, these are largely checking mechanisms and have not, as yet, become transformative tools to promote a substantive approach to equality. Indeed the possibility of such measures being transformative is limited by the very methodology employed. The key concern underpinning proofing procedures is to ensure that policy measures do not discriminate; proofing is concerned primarily to limit state action, to secure compliance with negative duties. As such, the possibility of proofing measures bringing about a reallocation of resources so as to promote substantive equality, is limited.

(b) Positive Duties in Ireland / Promoting equality

In 1993, following a recommendation of the Second Commission on the Status of Women, ‘gender proofing’ procedures were introduced.\(^7\) As a result, all Memoranda for Government must include a statement setting out the impact of the proposed policy on women.\(^8\) According to the government’s First Report on Implementation of the Platform for Action (setting out the progress to date on implementation of the 1995 Beijing Declaration and Platform for Action), there is now ‘a general recognition that policy proposals being made to government need to be gender proofed ie, assessed for the differential effect they have on women and men’.\(^9\) According to the Report, the government now ‘systematically’ considers the impact that any proposed policy initiative might have on women. Despite this apparent commitment to gender proofing, many of the essential features of an effective policy process to promote equality are lacking. Consultation with outside bodies is not a requirement or even a general practice.\(^\text{10}^6\) Cabinet confidentiality requirements prevent impact assessment statements coming under public scrutiny, making it difficult to assess their accuracy or adequacy. The absence of gender desegregated data in many areas of public policy makes it difficult to assess the impact of a


\(^{118}\) Department of the Taoiseach _Cabinet Handbook_ (1998).


policy on gender equality. In response to these criticisms, a set of guidelines for gender proofing within the context of the European Structural Funds was adopted. However, they are recommendations only, adding to the growing body of ‘soft-law’ on gender equality, and suffering the same difficulties of enforcement as did the ill-fated PAFT Guidelines in Northern Ireland.

A ‘poverty proofing’ process has also been established and is undertaken by government departments in the preparation of all legislative and significant policy proposals, including annual budget estimates and EU plans and programmes. Many of the shortcomings of the gender proofing process have persisted within poverty proofing. For the moment, poverty proofing has been added on to the existing policy process ‘doing little to transform [the policy process], much less mobilise it in pursuit of greater equality.’ Despite these difficulties in implementing proofing procedures, interest in policy appraisal and impact assessment mechanisms is growing. In the national agreement, Partnership 2000, the Irish government committed itself to introducing improved administrative procedures for ‘equality proofing.’ Guidelines for equality proofing were subsequently published and an initial ‘learning phase’ saw equality proofing applied in selected areas of public policy making. The scope of equality proofing extends to those groups covered by existing equality legislation, that is, those who are at risk of discrimination because of gender, race, sexual orientation, religion, age, family status, marital status, disability, or membership of the traveller community. As yet, equality proofing remains a soft law initiative only. A lack of political will to adopt a statutory duty is evident, with government seeking to limit the implications of the equivalence commitments in the Good Friday Agreement. Equality legislation, adopted in 2004
to complete the transposition of the EC Equality Directives, has been widely criticised for removing equality disputes relating to licensed premises from the jurisdiction of the equality tribunal. Against this background, the introduction of a positive duty to promote equality is some time away. The failure to ensure an equivalence of rights in the field of equality reflects a broader failing to recognise any role for the legal system in securing distributive justice. Promoting substantive equality is

121 See Concluding Observations note 30 above.
122 S Mullally, Gender Proofing within the Context of the European Structural Funds (1999).
125 See note 123 above.
viewed as, at best, a task for government policy, not properly a legal function, not properly a matter of rights.

VII CONCLUDING REMARKS

Positive duties to promote equality have been identified by feminists as potentially useful legal tools in the pursuit of substantive equality. Positive duties seek to institutionalise a feminist methodology into law and policy processes. A duty to promote gender equality, for example, can be understood as requiring law and policy makers to ‘ask the woman question’ — ‘to expose how the substance of law may silently and without justification submerge the perspectives of women and other excluded groups’.\(^{130}\) As Katherine Bartlett notes, ‘a question becomes a method when it is regularly asked’\(^{131}\). The ‘woman question’ is a question, or set of questions, which identify the gender implications of rules and practices that might otherwise appear to be neutral or objective. The difficulty with this methodology, however, as intersectionality analysis has pointed out, is that the category ‘woman’ is, itself, exclusionary, insensitive to the multiple and often invisible forms of exclusion that many women face. The broader equality duty asks more questions: ‘What assumptions are made by law (or practice or analysis) about those whom it affects? Whose point of view do these assumptions reflect? Whose interests are invisible or peripheral? How might excluded viewpoints be identified and taken into account?’\(^{132}\)

Requiring states to act to achieve equality objectives takes equality laws beyond the limits of traditional anti-discrimination measures, with their focus on retrospective fault-finding and individual complaints. Positive duties are intended to address the broader structural problems that lead to inequalities. Positive duties place participation at the heart of law and policy processes. They represent an attempt to bring into being a model of participatory democracy. They seek to facilitate, in the words of Jürgen Habermas, ‘equal participation in the practice of civic self-determination’.\(^{133}\) A key component of positive duties is the requirement of consultation. Feminist critiques of anti-discrimination law have pointed to the ‘ambivalent consequences of more or less successfully implemented programs’.\(^{134}\) Too often, over generalised classifications have been used to label disadvantaging situations and disadvantaged groups. Participation of affected groups in policy processes seeks to guard against such generalisations and to ensure a more reflexive approach to equality strategies. This emphasis on participation underpinning positive duties puts in places a dialogic procedure, institutionalising an ‘expanded

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130 K Bartlett ‘Feminist Legal Methods’ (1990) 103 Harv L Rev 103, 829.
131 Ibid.
132 Ibid.
134 Ibid.
moral conversation’ (to borrow Hannah Arendt’s term). The requirement of impact assessment and consultation underpinning positive duties emphasises the need for reciprocity and a process of reversing perspectives. The polity is transformed into a ‘dialogical community’. This ongoing moral conversation also allows for greater attention to context, seeking to avoid the over generalised abstractions of welfarist measures.

Positive duties place the legal process at the heart of decision-making on matters of resource allocation and distributive justice. Indeed, they may function as a tool to overcome the divisions between the so-called politics of recognition and the politics of redistribution. The duties placed on the legal process remove the possibility of courts appealing to separation of powers doctrines or employing other legal tricks to avoid decisions requiring positive state action and reallocation of resources. In the Irish context, adopting a statutory duty to promote equality would not only grant the judiciary a role in monitoring resource allocation, it would signal recognition of equality as a social right. The antipathy to socio-economic rights, however, has limited both the scope of the constitutional guarantee of equality and the legal reforms, despite governmental commitments to ensuring an ‘equivalence of rights’, North and South. The dominance of neo-liberal thinking in government has constrained debates on equality, reinforcing the ‘limited institutional, imaginative universe’ within which equality debates have taken place to date. Against this background, positive duties hold out the possibility of challenging the myth of the ‘limited state’. As had been noted in the Northern Irish context, however, positive duties will not necessarily be transformative. Continuing engagement is required, therefore, to ensure that yet another reforming measure does not become co-opted into maintenance of the status quo.