

Moral obligation of the state or a woman's right to privacy?

How women's reproductive rights challenged the natural law tradition in Ireland

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Throughout most of the 20th century Ireland was considered one of the most religious countries in Europe and Irish national identity developed as a Catholic identity (Ingils 2005, 66-69). The Irish struggle with the British Empire for independence strengthened the position of the Catholic religion in the society. The religion became a unifying characteristic of the Irish society and as a result the new constitution of the independent Republic (*Bunreacht na hÉireann*) drafted in 1937 was implemented in the spirit of Catholicism. The Constitution affirmed the position of Catholicism in the society and legitimized the impact of religious values on the legal system.

In this article I will discuss the influence of women's reproductive rights on the natural law interpretation of the Irish Constitution. I understand this natural law interpretation to be an interpretation of constitutional norms which conforms to the teachings of the Roman Catholic Church. I will also analyse the influence of European law on women's rights and their impact on the Irish constitutional tradition.

Irish Constitution and the relationship between law and religion

Originally in 1937 Catholicism received a constitutionally privileged position and held it until the amendment of the Constitution in 1973. The doctrine of natural law was entrenched in the Constitution and its interpretation was based on the Thomistic understanding of natural law. Some of the Justices of the Irish Supreme Court during the first 30 years of the existence of the Constitution were particularly devoted to the idea of protecting this Catholic understand-

ing of natural law and amending the common law where it did not conform to Catholic ideology (Whyte 1996-1997, 725-746).

The Irish Constitution has since evolved and experienced many amendments, including the Fifth Amendment removing the privileged position of the Catholic Church. However, certain natural law elements of the Constitution have not been changed until now. The Preamble still proclaims that the Constitution was drafted ‘in the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and states must be referred’. Moreover, article 44.1 declares: ‘The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.’

In accordance with the natural law doctrine, the legal order of Ireland for many years considered practices found to be morally sinful by the Roman Catholic Church to be illegal. The prime examples are divorce,¹ contraception,² gay relationships³ and abortion. Abortion has always been illegal yet the explicit ban on abortion was introduced to the Irish constitution in 1983 by the Eighth Amendment, which was incorporated in the text of the constitution as article 40.3.3.⁴ In addition to the protection of the life of the unborn, it imposed an obligation on the State ‘to defend and vindicate that right’. As the case law analysed in this article illustrates, the Irish authorities have been active in fulfilling this constitutional obligation. Irish and European Courts have re-interpreted certain religiously inspired regulations, recognizing certain formal aspects of women’s rights and their choices in regard to reproductive rights. The judicial review has not, though, confirmed the right to abortion and feminist scholars have argued that upholding the ban does not conform to human rights standards. Such scholars have also seen it as an instrument of women’s oppression and a hindrance to the successful protection of reproductive as well as other rights of pregnant women (Smyth 2002). The violations highlighted by feminist scholars mainly concern the right to privacy, health and non-discrimination. As shown later in this discussion, the current European shift in interpreting women’s rights on the non-binding level begins to confirm those concerns.

¹ Allowed by the introduction of the Fifteenth Amendment of the Constitution Act.

² Amended by: *McGee v. the Attorney General*.

³ Amended by *Norris v. Ireland*.

⁴ The ban on abortion existed even before but did not enjoy constitutional status and was sanctioned by very old provisions of Offences Against the Person Act 1861.

The cases before the Supreme Court of Ireland that challenged the natural law interpretation of the Constitution

In regard to women's reproductive rights, the Catholic values in the Irish legal system have been systematically challenged in the Irish Supreme court. The *McGee* case from the year 1973 was the first case which could be called 'revolutionary' in the history of the tensions between natural law and women's reproductive rights in Ireland. The case addressed a married woman's right to use contraceptives. Mrs. McGee was a married woman and a mother of four. Her second and third pregnancies, the latter of which was a twin pregnancy, were complicated by serious attacks of cerebral thrombosis, which caused complications such as temporary paralysis. Mrs. McGee's doctor warned her that further pregnancies could endanger her life. Thus, the McGees decided to resort to the use of contraceptives and attempted to import a contraceptive jelly. The jelly was seized by the authorities in accordance with section 17 of the Act of 1935, which prohibited the sale and importation of contraceptives. The use of the contraceptives *per se* was not considered illegal. Yet due to the sales ban, the Irish population was effectively prevented from obtaining and using them.

The judges in *McGee* departed from the natural law interpretation of the Irish law and Constitution. They ruled against the Catholic Church's views on reproductive issues and legalized the usage of contraceptives in marriage. The judges agreed that the regulation of such private matters of intimacy as those concerning the choice between sexual abstinence and the usage of contraceptives in marriage is not a matter which should be regulated by the State. The departure from the religious stance was not absolute, though, as none of the justices went far enough to extend the same rules to non-marital relationships. In regard to marriage, however, Justice Fitzgerald drew a distinction between the legal and religious aspects of the case, expressing the opinion that the religion of the plaintiff was not the issue, but rather the privacy aspect. Justice Walsh ruled in favour of the couple and departed from the interpretation, which upheld the State's obligation to vindicate natural law doctrine:

It is a matter exclusively for the husband and wife to decide how many children they wish to have; it would be outside the competence of the State to dictate or prescribe the number of children which they might have or should have. [...] What may be permissible to husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practice either total or partial abstinence in their sexual relations. If the State

were to attempt to intervene to compel such abstinence, it would be intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom.⁵

In this judgement, the issue of reproductive rights and the choices of a married woman challenged the conservative interpretation of the Irish law. Judges deciding on the case departed for the first time so clearly from the teachings of the Catholic Church and separated the issue of religion from the issue of the law's application.

Further cases challenging the natural law interpretation of the Constitution regarded the abortion ban. The most important case in this regard was the shocking case from the year 1992, named the *X case*, which led to the re-interpretation of the law. X was a 14 year old girl who was raped by a friend's father. Her parents arranged an appointment in an abortion clinic in London and issued a formal question to the authorities if the foetal tissue could be used as evidence in the rape case. The response was negative and the authorities referred the case to the Attorney General, who obtained an order to restrain the girl from leaving the country for a period of 9 months. Although the girl was already in London, she and her parents returned to Ireland. X, however, displayed suicidal tendencies and according to the opinion of a clinical psychologist, experienced in similar cases, was ready to end her life to avoid bringing her pregnancy to full term. Thus the legal issue that arose in this case was balancing between the right to life of the mother and the right to life of the unborn child in the context of the mother's freedom to travel.

The majority of the judges agreed that the life of the mother required protection equal to that of the foetus and in circumstances when it is possible to establish a substantial danger to the life of the mother, abortion should be allowed. Justice McCarthy observed that when the life of a mother is in danger, there might be no possibility to vindicate the life of the unborn. Only one of the justices objected to this interpretation. Justice Hederman sustained the opinion that the State must secure the mother's duty to carry the pregnancy to term as a moral duty. The judgment in the *X case* challenged the absolute ban and established a new constitutional exception, which allowed for the termination of pregnancy in cases of real, imminent and substantial risk to the life of the mother, including the risk of death by self-destruction, which could be avoided by terminating her pregnancy.

⁵ *McGee v. the Attorney General*, Judgement of CJ Fitzgerald.

The *X case* was followed by the *C case*, which concerned a female Traveller who had been raped. Travellers are an old ethnic minority characterized by a nomadic lifestyle and their own language, Shelta. The rape victim was 13 years old and she was initially supported by her parents in her wish to terminate the pregnancy. Initially, it had been decided with the approval of the parents that the Health Board would not seek a further interim care order but that instead the parents would take her to England so that she could have her pregnancy terminated there. The arrangements were to be made by the parents, but they were subsequently approached by pro-life activists and changed their mind. The issue at stake was whether such a situation put an affirmative obligation on the State to arrange the procedure in order to protect the girl's life. The victim's parents tried to stop her from travelling and stop the Health Board from arranging the abortion procedure for their daughter.

The High Court decided, however, that there was strong evidence that a pregnant child is likely to commit suicide unless her pregnancy is terminated. In this case, termination of the pregnancy was in the view of the Court a medical treatment for C's mental condition. Since C showed clear suicidal tendencies, the Court established a real and imminent danger to her life, which now allowed abortion. In accordance with the Child Care Act of 1991, the Court regarded the welfare of the child (pregnant teenager) and protection of her life as the first and paramount consideration. As a result of this judgement, C was allowed to travel and it was in practice the Health Board who arranged for her travel and procedure in England. The ban was again slightly re-interpreted towards the understanding of abortion as a medical treatment, which must be provided in case of danger to the life of the mother.

Meanwhile, the cases discussed below, *Open Door* and *Grogan*, brought further amendments to the Constitution. The Thirteenth Amendment introduced a provision forbidding limitations on the right to travel of pregnant women while the Fourteenth Amendment guaranteed freedom to distribute information on abortion services abroad.

Despite the introduction of these provisions in the year 1992, another dramatic case occurred as recently as in 2007. A 17-year-old girl known only as Miss D won a case against the Health Service Executive (further HSE), who attempted to prevent her from travelling abroad to get an abortion. Miss D's foetus was diagnosed with anencephaly, a condition in which the head or part of it is missing. Facing the situation that the baby would survive no more than a few hours, Miss D decided on an abortion to be performed in England. However, the HSE considered that she had no right to travel to obtain an abortion if her life was not

in danger. The case received wide coverage in the media and an analysis of the majority of the commentaries showed that the society was very understanding and compassionate towards the applicant, sometimes referring to the ‘cruelty’ of the HSE professionals (Smyth 2008).

The case was ultimately solved in the High Court of Dublin on 9 May 2007. The judgement underlined the responsible attitude of Miss D, who did not claim she was suicidal. Justice McKechnie underlined in the judgement that the case considered the right to travel and not the rights or wrongs of abortion. The constitutional position concerning the established right to travel was thus reaffirmed. However, a precedent which would modify the law in order to include the right to abortion in cases of severe foetal abnormality was not made. Nevertheless, the Court departed again from the moralistic considerations typical for the natural law interpretation and concentrated on aspects of constitutional rights that had been granted already.

Open Door and Grogan – Europe’s word on the Irish abortion law

The *Grogan* and *Open Door* cases introduced amendments to the Irish Constitution which guaranteed the right to travel to obtain an abortion and the right to receive information about abortion services. Both cases concerned similar situations, namely delivering of information on abortion, but with different actors involved. The cases were considered nearly simultaneously before different Courts on the European level. The ECHR dealt with the case *Open Door v. Ireland* in the issue of freedom of expression and the ECJ with *The Society for the Protection of Unborn Children Ireland v. Grogan* in the issue of the nature of abortion as a service.

A short time before the *X case* and the subsequent amendment of the Constitution, the Irish High Court was faced with a case brought by the Attorney General on behalf of the Society for the Protection of Unborn Children (SPUC) against Open Door Counselling. The question concerned the lawfulness of providing information and counselling for women seeking abortion abroad. Open Door Counselling and another organisation named Dublin Well Women were providing a broad range of services for pregnant women, from health tests through information on abortion services in the United Kingdom to occasionally arranging the procedure for women willing to undergo an abortion abroad. The SPUC claimed that the activity of Open Door and Dublin Well Women violated the constitutional protection of the unborn and applied to the High Court to re-

strain the organizations from distributing the information and leaflets. The High Court referred this issue to the ECJ for a preliminary ruling according to Article 177 of the EEC Treaty in regard to the nature of abortion under Community law (*SPUC v. Grogan*). The SPUC appealed the High Court decision to the Supreme Court. The Supreme Court agreed with the SPUC that providing information on abortion violated the right to life of the unborn and granted an injunction restraining the organizations from publishing or distributing, or assisting in the publishing or distribution, of information on the identity and location of clinics where abortions were performed. The judges saw the restraint as the necessary corollary of the ban on abortion expressed in Article 40.3.3 of the Constitution and as Justice McCarthy commented in the case, the court was obliged to enforce the constitutional ban.

In *SPUC v. Grogan*, the ECJ agreed that abortion as a medical service provided legally in another Member State for remuneration should be considered as a 'service' in the meaning of article 60 of the EEC Treaty. Arguments on a moral plane, explained the Court, cannot influence the judgement, since the assessment deals with legal systems, where the activities in question are governed legally. The termination of pregnancy, where it is practiced lawfully, is provided in exchange for remuneration and is a part of professional activity and thus meets the definition of a 'service' under Community law.

However, the information provided by Steven Grogan and other organizations included in the case was provided free of charge and was not a representation of the economic activity of the clinics in the United Kingdom. Thus, spreading such information, the ECJ underlined, should be treated exclusively in terms of freedom of expression. And judging on the matter of freedom of expression was considered to fall outside of the scope of the ECJ's jurisdiction. Thus, the ban on the distribution of information was not found illegal under the Community law. The judgment was criticised, both by those who contested the nature of abortion as a service and by those who agreed with the judgement in this matter. If abortion was considered a service, why should the information concerning obtaining this service not be considered a necessary corollary of the freedom to receive services? (Colvin 1991-1992, 525).

The aspect concerning freedom of expression was ultimately decided before the ECHR. Open Door Ltd, another organization providing free information on abortion services, filed a complaint concerning the ban on providing information to the European Commission of Human Rights. The case was admissible. The Court delivered its judgment in October 1992 and found a violation of the right to freedom of expression, as entrenched in Article 10 of the Convention.

The ECHR refused to examine further complaints whether Irish law was violating the right to privacy and freedom from discrimination. The Court found that the absolute and perpetual restraint on the provision of information to pregnant women concerning abortion failed to meet the requirement of proportionality of legal limitations necessary in a democratic society. The ECHR underlined that the State's discretion in the field of the protection of morals is not unfettered and unreviewable even though the court once more, as in multiple other judgements, underlined the 'wide margin of appreciation' of States in moral matters. However, restrictions introduced on moral grounds must be necessary and proportional, which was not the case here in the Court's conclusion.

Mrs X and Ms Geraghty, who applied together with Open Door on behalf of women of child-bearing age who were prevented from receiving information concerning their reproductive health, e.g. information necessary for pregnant women, were also found to be 'victims' in the meaning of Article 25.1 ECHR: 'Although it has not been asserted that Mrs X and Ms Geraghty are pregnant it is not disputed that they belong to a class of women of child-bearing age which may be adversely affected by the restrictions'.⁶ The Court also agreed that their complaint was not made *in abstracto*. The decision affirmed that the content of the questioned law put the applicants at risk of being directly prejudiced by its provisions. Therefore, the complaint was made *in concreto*.

Thus, the *Open Door* and *Grogan* cases together with the previously described *X case* influenced the change introduced to the Irish constitution. Local restrictions on information and access to services abroad were found illegal and incompatible with Irish international obligations in two different European legal fora. The ban on abortion inside the State's territory remained, however, to be considered as an internal matter. Neither of the Courts decided to deliberate on the morality or immorality of abortion. No considerations on the influence of the ban on the privacy of women or the influence of abortion on the right to life of the unborn were made in either of the cases.

The conclusions reached in the cases were not unanimous. The *Open Door* judgement was issued with the total of five dissenting or partially dissenting opinions, one separate opinion and one concurring opinion signed together by ten out of 23 judges. The legal protection of the right to life of the foetus was not dismissed as incompatible with women's rights and the incorporation of the religious values of the moral majority into the national legal system was not found to be *per se* incompliant with the requirements of the Convention.

⁶ *Open Door v. Ireland*, par. 44.

Latest European shift in approach towards abortion and reproductive rights

The Irish abortion law has not so far been substantially changed since the *X case*. Irish women continue to rely on the United Kingdom when seeking abortion services. The European approaches towards abortion issues have not yet approved of the right to abortion, but a slight change in this direction has occurred in recently issued non-binding documents.

In 2008, facing the difficult question of abortion, the Council of Europe adopted a report and a resolution on safe access to abortion, calling countries that uphold the abortion ban to decriminalise abortion and effectively guarantee the exercise of the right to abortion. It recommended adopting appropriate strategies to promote sexual and reproductive health and rights as well as access to contraception in order to prevent unwanted pregnancies and abortions. The report and resolution underlined that abortion is not a family planning method and it should be avoided, but the ban on abortion does not result in fewer abortions but leads to clandestine abortions and abortion tourism, which are costly and endanger women's lives and health.

The necessity of further commitment to rights within Europe was also acknowledged by the European Union. In January 2009, the European Parliament adopted a Resolution on the Situation of Fundamental Rights in the European Union. The resolution contained many important acknowledgements concerning, among others, relationships between traditions, religions and rights within the Union as well as the Union's commitment to rights and its credibility in promoting rights-based democracy. In regard to women, the resolution declared that Member States should withdraw their reservations to CEDAW (The Convention on the Elimination of All Forms of Discrimination against Women) and ensure that women can fully enjoy reproductive rights, access to contraception and avoid high-risk illegal abortions. In regard to women's rights, the resolution in particular stressed that invoking custom, tradition or religious considerations to justify any form of discrimination against women, including the adoption of any policies that might endanger their lives, should not be allowed.

Conclusions

Women's rights have had a lasting impact on the Irish legal system by challenging the traditional links between law and religion in Ireland. Legal changes emerged both from within, in the Irish cases before the Supreme and High Courts, and from outside in the form of European judgements. Issues like contraception and abortion stopped being seen as religious issues *per se*, but rather as legal issues connected with matters of privacy and the rights of women. Even though the nature of the Irish Constitution has not been entirely changed and certain natural law elements are still visible, the interpretation has drifted away from a strong identification of law with religious values. Religious tradition is still often a justification for the maintenance of certain regulations favourable to traditional religious conceptions. However, the process of judicial review as the analyzed case law showed has formally separated the religious aspect from the legal one. The new European shift in approach may be the next step in separating law from religiously influenced norms. It touches the material, not purely formal aspects of the abortion ban and with time might challenge the laws banning abortion in Ireland or other countries upholding severe abortion laws. Although it is hard to imagine that these non-binding documents will bring any immediate change, they constitute a new tendency towards separating moral issues from women's reproductive rights and leaving the moral decision to women themselves, instead of legislators.

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