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The Irish Abortion Cases: European Limits to National Sovereignty?

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1. Introduction

Abortion is prohibited in Ireland. Section 58 of the *Offences against the Person Act*, 1861, makes it a criminal offence for a pregnant woman to attempt to procure an abortion, as it is for others to provide assistance to that end. The prohibition was confirmed by the Eighth Amendment to the Irish Constitution, enacted after a referendum in 1983. The new provision, Article 40.3.3, not only outlawed interference by public authorities with the right to life of the unborn, but also provided for a clear positive obligation to defend it:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

Chief Justice Finlay referred to this Amendment as "a decision by the people to insert into the Constitution a specific guarantee and protection for a fundamental right perceived to be threatened by developments in the societies of countries outside Ireland".[1] Paradoxically, it appears that after the introduction of Article 40.3.3 the Irish situation has been all but immune to the outside world. In fact, the new constitutional provision has led to litigation which ultimately caused two European courts – bodies *par excellence* which may be expected to apply more or less 'European' standards – to review the Irish situation.

This note will attempt to describe in chronological order how both the European Commission and Court of Human Rights and the Court of Justice of the European Communities became involved in what quickly developed into 'the Irish abortion issue'. In March 1991, the European Commission dealt

with the case of *Open Door* (see § 4), followed a few months later by the Court of Justice of the European Communities (ECJ) in the *Grogan* case (§ 5) after which Ireland requested that a special protocol be added to the Treaty on European Union. In February 1992, a fourteen-year-old rape victim was restrained from travelling to Great Britain to have an abortion (§ 6). In § 7, the judgment of the European Court of Human Rights in the *Open Door* case (October 1992) will be discussed and some conclusions will be drawn in § 8. A brief introduction to the facts which led to this series of judgments would seem to be useful as would be a summary of the case-law under the European Convention on Human Rights with respect to abortion.

2. Litigation in Ireland

As stated above, it is a criminal offence to procure an abortion in Ireland. Nevertheless, the legislation involved does not contain any explicit provisions criminalising departure from Ireland to obtain an abortion abroad. Although estimations vary, it appears that each year several thousand Irish women travel to Great Britain were abortion is legal. Information about abortion facilities is available in Ireland from a variety of sources, including telephone directories and magazines imported from Great Britain. Moreover, a number of Irish medical centres are active in the providing of this information. The litigation centred on these activities.

The first set of proceedings related to two medical centres, *Open Door Counselling Ltd.* and *Dublin Well Woman Centre Ltd.* Both companies provided a range of services relating to marriage, family planning, procreation and health matters. In the framework of these activities, they were, as far as abortion is concerned, involved in non-directive counselling, *i.e.* neither advising for or against an abortion as the preferred option, but rather providing objective information about such an option if desired by the client. The centres carried out regular inspections of certain medical clinics in Great Britain. In some cases, Dublin Well Woman made travel arrangements for those who wished to avail themselves of such facilities in Great Britain.

In June 1985, a 'pro-life' organisation, the *Society for the Protection of the Unborn Child (SPUC)*, brought an action against the two centres claiming that the practice of counselling violated Article 40.3.3 of the Constitution. This 'actio popularis' met with success, at least initially. In March 1988, the Irish Supreme Court, confirming a High Court judgment, ruled that it is unlawful to assist pregnant women to travel abroad to obtain an abortion or even to provide information about clinics abroad that are willing to carry out

abortions. In a unanimous judgment, the Supreme Court granted an injunction which provided that the two centres

> be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise.

With respect to the question whether there is a fundamental right to information about the availability of abortion outside Ireland – which would turn out to be the key issue in the procedures that were to follow on the European plane – the Supreme Court held that "(...) there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn".[2] Following this judgment, Open Door Counselling and Dublin Well Woman lodged a complaint before the European Commission of Human Rights.

In the meantime *SPUC*, apparently encouraged by its success, launched a second attack. A number of students' unions disseminated information on abortion facilities in Great Britain through various publications. In September 1989, *SPUC* applied to the High Court for a declaration that these publications were unlawful. Since the students' unions, represented by their official Mr Grogan, invoked European Community law in their defence (see § 4 below), the High Court decided to refer certain questions to the ECJ for a preliminary ruling under Article 177 of the EEC Treaty.

3. Abortion and the European Convention on Human Rights

The European Convention is silent on the issue of abortion as such.[3] Article 2 guarantees the right to life to everyone but this provision does not give a definition of "everyone" or indicate when "life" begins. Neither does the right to respect for private life, laid down in Article 8, give an indication, although the right to privacy was considered in the United States "to encompass a woman's decision whether or not to terminate her pregnancy".[4] The European Court of Human Rights has not yet had the occasion to decide whether the Convention should be interpreted as prohibiting, tolerating or requiring the availability of abortion services.

Several complaints against national abortion legislation have been brought before the European Commission of Human Rights. On the one hand, the

prohibition of abortion in Germany was unsuccessfully contested.[5] On the other hand, national legislation permitting abortion has been challenged in vain before the European Commission. In a recent case concerning the Norwegian legislation, which allows abortion under certain circumstances, the Commission held:

> (. . .) it is clear that national laws on abortion differ considerably. In these circumstances, and assuming that the Convention may be considered to have some bearing in this field, the Commission finds that in such a delicate area the Contracting States must have a certain discretion. (. . .) As the present case shows there are different opinions as to whether such an authorisation [by a board of two doctors] strikes a fair balance between the legitimate need to protect the foetus and the legitimate interests of the woman in question. However (. . .) the Commission does not find that the respondent State has gone beyond its discretion which the Commission considers it has in this sensitive area of abortion.[6]

As the Convention is tacit and a 'uniform European conception' is lacking, the Commission exercises judicial restraint. As will be seen, the same attitude was also clearly present in the series of 'Irish' cases – although these cases primarily related to freedom of information. The European courts were not asked to review the legitimacy of either the Irish prohibition on abortion or the availability of abortion facilities in Great Britain.

4. Open Door: The European Commission of Human Rights

In their complaint under the European Convention on Human Rights, Open Door Counselling and Dublin Well Woman claimed to be the victim of a violation of Article 10.[7] This provision provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and to impart information without interference by public authority and regardless of frontiers (. . .)
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, (. . .) for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others (. . .).

A majority of the European Commission of Human Rights felt that there had been a violation of Article 10.[8] Obviously, the Supreme Court injunction

interfered with the freedom to impart information. In the view of the Commission, this interference could not be justified under Article 10 § 2, as it had not been 'prescribed by law'. The main argument for the Commission's position was that it is not a criminal offence under Irish law to obtain an abortion abroad or to travel abroad for that purpose:

> Article 40.3.3 [of the Irish Constitution] (...) primarily imposes obligations upon the State, including an obligation to legislate for the protection of the right to life of the unborn. It does not provide a clear basis for the individual to foresee that providing information about lawful services abroad, albeit affecting the right to life of the unborn, would be unlawful. (...) the applicants could not reasonably have foreseen that their activities were unlawful and that their freedom to receive and impart information about abortion services in Great Britain could lawfully be restricted under the domestic law prevailing prior to the Supreme Court judgment. (...) a law which restricts freedom of expression in such a vital area requires particular precision to enable individuals to regulate their conduct accordingly.[9]

For this more or less 'technical' reason, the injunction was found to be in violation of the Convention. Consequently, the Commission felt no need to explore the other issues raised under Article 10 – which enabled it to avoid the much more sensitive question of whether the Supreme Court's injunction was "necessary in a democratic society". Consequently, it remained unclear how the Commission would react to a situation where legislation explicitly restricted freedom of information. It should be noted that the Commission was divided: of the thirteen members involved in the case, five dissented.[10]

Subsequently, both the Commission and the Irish government decided to bring the case before the European Court of Human Rights. It took the Court almost a year and a half to deliver its judgment, and in the meantime there were many developments.

5. Grogan: The European Court of Justice

There are two differences between *Open Door* and the *Grogan* case. The students' unions represented by Grogan were not engaged in overt counselling; they merely provided information in some publications. A more essential difference is that they did not only seek to rely on the freedom of expression, but also, and more surprisingly perhaps, on Community law. Their argument ran as follows.

The provisions which guarantee free movement of services (Articles 59 and 60 EEC Treaty) also apply to medical services and thus to lawfully provided abortion. According to the principles developed in the ECJ's case-law, this implies that Irish women have a right under Community law to go to Great Britain and receive the service as they desire.[11] In turn, the right to receive information on this possibility is inextricably linked to the effective enjoyment of this right.[12] So any prohibition to publish information on British abortion clinics will infringe Community law.

When confronted with this argument, the Irish High Court judge distinguished this case from *Open Door* and decided to ask the ECJ for a preliminary ruling, thus forcing it to rule on a very delicate issue while the opinion of the Strasbourg Court in *Open Door* was still far from certain. *SPUC* appealed against this decision, and in December 1989, the Supreme Court granted an interlocutory injunction restraining the students from carrying on with their publications. The Supreme Court criticized the High Court's decision to distinguish the case, but did not interfere with the reference to the ECJ.

In his Opinion on the case, Advocate General Van Gerven to a certain extent adopted Grogan's line of reasoning.[13] The Advocate General was prepared to consider abortion as a service within the meaning of the EEC Treaty, if carried out in accordance with the prevailing national legislation, and he agreed that the provision of information thereon was protected under Community law. Nevertheless, he felt that an injunction like that granted in *Open Door* could be justified under the public policy exception of Articles 56 and 66 EEC Treaty. In this respect, he emphasised that the protection of the unborn is regarded in Ireland as forming part of "the basic principles of society". Moreover the Advocate General considered that a national rule prohibiting the provision of information on abortion complied with the demands of proportionality: such a restriction could be regarded by a Member State "as being useful and indispensable and not disproportionate to the aim sought, since that aim is intended to effectuate a value judgment, enshrined in its Constitution, attaching high priority to the protection of unborn life". As was noted in the literature, his comments "sound more like a decision to respect the State's assessment of indispensability, usefulness and proportionality, than the result of his own examination and assessment".[14] Be that as it may, the Advocate General noted explicitly, and this will appear to be of special interest to us, that the Irish practice did not prevent pregnant women from going abroad to obtain an abortion.

Judicial restraint also prevailed in the second part of the Opinion in which the Advocate General proceeded to test the Irish practice once more – from the perspective of the European Convention on Human Rights.[15] He thus elaborated on the requirements of Article 10 and applied these to the Irish

practice, exactly as the European Commission of Human Rights had done in *Open Door*. He did not, however, arrive at the same conclusion. Although he found that the Irish ban interfered with the freedom of expression, he considered it justified under the limitation grounds of Article 10 § 2.

How could an Advocate General of the ECJ come to this position, only three months after the European Commission of Human Rights had reached the opposite conclusion in *Open Door*? First of all, Mr Van Gerven laid emphasis on the Commission's remark that there had been no legal basis for an injunction "*prior* to the Supreme Court judgment". With a rather doubtful *a contrario* reasoning he deduced that "it appears from the Commission's decision that the national prohibition is now [i.e. when the *Grogan* case came before the court] sufficiently 'prescribed by law'".[16] As to whether the ban was "necessary in a democratic society", as required by Article 10 § 2, the Advocate General was prepared to give Ireland a wide margin of appreciation, and he arrived at a similar conclusion as in the first part of Opinion: no violation.

Against this background, the actual judgment of the ECJ was an anti-climax, although it does contain some observations the importance of which should not be underestimated. The Court did recognize explicitly that the medical termination of pregnancy is to be considered as a service within the meaning of the EEC Treaty. The argument of *SPUC* that abortion, being grossly immoral, could not be regarded as a service, was flatly rejected: "Whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question. It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally".[17] However, the ECJ immediately went on to stress that the students' unions in fact did not cooperate with the British clinics; nor were they paid for their publicity. Since their link with the clinics thus was "too tenuous", the publications lost their relevance to Community law. "The information", the Court observed, "constitutes a manifestation of freedom of expression and of the freedom to impart and receive information which is independent of the economic activity carried on by clinics in another Member State".[18] In these rather exceptional circumstances the Irish courts are, as far as the ECJ is concerned, free to prohibit 'voluntary' publications.

It has been noted by virtually all commentators of the judgment that the ECJ, a "reluctant constitutional adjudicator"[19], has evaded giving a substantive ruling on a sensitive issue. This aspect of the Court's decision has been both deplored and supported – criticism coming from those who point to inconsistencies with earlier case-law or give priority to direct legal protection for Grogan[20] and support being provided by those who favour, for vari-

ous reasons, a restrained position of the ECJ.[21] Having said that, it seems inescapable that the ECJ will sooner or later be confronted with the same matter. If for example the students' unions establish a link with the British clinics (compare the position of *Open Door*!), their publications acquire the economic dimension which the ECJ requires. In that case, the Court will have to rule on the compatibility of the Irish ban with Community law, including fundamental rights.

Despite its prudent approach, the ECJ has been criticized by some for accepting that abortion, when carried out lawfully, can be seen as a service.[22] Yet this view seems to ignore that the ECJ had no alternative. If it had accepted *SPUC*'s submission that abortion, because of its allegedly immoral character, should not be considered as a service within the meaning of Community law, it would have imposed this view on the other Member States. As a consequence, even in those Member States where an individual's freedom to choose for abortion is accepted, individuals offering a lawful service or wishing to avail themselves of it would have been deprived of the protection to which they are entitled under Community law. Instead, *Grogan* does not oblige any Member State to legalise abortion, but where legally available it does qualify as a service. The present solution allows for derogations from the corollary right to information about these services (see the Opinion of the Advocate General), provided that a Member State has valid reasons under Community law.

6. Subsequent developments

It took the Irish government two months to react to the *Grogan* judgment. As the negotiations on the Treaty on European Union were entering their final phase, Ireland seized the opportunity to introduce a special protocol relating to the Irish abortion legislation. This initiative met with success as the other Member States apparently did not regard the abortion issue as vital enough to oppose Ireland on this extremely delicate issue.[23] Consequently, the Maastricht Treaty contains a protocol which reads as follows:

> Nothing in the Treaty on the European Union, or in the Treaties establishing the European Communities, or in the Treaty or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.

The protocol has been criticized, by pro-abortion groups of course, but also by those who fear that the cohesiveness and supremacy of Community law are undermined by this unprecedented step. Yet, the effects of the protocol

seem limited, certainly when applied to the cases reviewed here. The words "the application in Ireland" indicate that the free movement of persons *to another Member State* cannot be affected by it.[24]

After the *Grogan* judgment, censorship measures in Ireland were apparently tightened. Copies of the *Guardian* newspaper containing an advertisement for a British abortion clinic were seized on their arrival at Dublin airport.[25]

In February 1992, however, no censor would have been able to prevent the abortion issue from hitting the newspaper headlines once again. A 14-year-old girl, pregnant as a result of alleged rape, was restrained by a High Court injunction from procuring an abortion. The girl, who remained anonymous and is referred to as *X*, was moreover restrained from leaving Ireland for a period of nine months. The High Court emphasized the positive obligation which Article 40.3.3 imposes upon the judiciary as a state organ to defend the life of the unborn. In response to evidence presented by experts that X was suicidal, Judge Costello applied some remarkable calculations: "The risk that [X] may take her own life if an order is made is much less and is of a different order of magnitude than the certainty that the life of the unborn will be terminated if the order is not made". He held that pursuant to Article 40.3.3 an abortion could only be contemplated if it were established, *quod non*, that an inevitable or immediate risk to the life of the mother existed. As an astounding result, whereas each year thousands of women make the journey to Great-Britain, one very young and suicidal girl was selected and would be forced to carry and deliver a child as a result of rape.

The injunction being severely criticized domestically and abroad,[26] the Irish government found itself in an embarrassing situation. In an extraordinary response, it offered to pay the costs of X's appeal proceedings before the Supreme Court. The Supreme Court, dealing with the case within an exceptionally short period, indeed overturned the injunction by four votes to one.[27] The case was decided exclusively on the basis of the interpretation of the words "due regard to the equal right to life of the mother" of Article 40.3.3 – "a harmonious interpretation", according to Finlay CJ, "carried out in accordance with concepts of prudence, justice and charity". The Supreme Court ruled that termination of pregnancy was permissible where it was established as a matter of probability that there was "a real and substantial risk to the life of the mother" if such termination was not effected. The "inevitable or immediate risk" test applied by the High Court was thus rejected. As the suicide threat of X was taken seriously enough to satisfy the new test, the Supreme Court held that she should be allowed to leave Ireland.

As the case could be solved on the basis of the Constitution, the Supreme Court per Finlay CJ held that an interpretation of Community law was not necessary.[28] Hence, he held that there was no need to refer the matter for

a preliminary ruling to the ECJ. By the same token, the Chief Justice was prepared to state in an *obiter dictum* that in general the freedom to travel of pregnant women can be restricted in order to defend the life of the unborn.[29] This view was supported by a majority of the court. It is submitted that this combination, i.e. a statement by the highest court of the jurisdiction, albeit in an *obiter dictum,* that the free movement of persons can lawfully be restricted and a simultaneous refusal to refer the case to the ECJ, is not exactly a *bona fide* application of Community law and may amount to a violation of Article 177 § 3 EEC Treaty.[30] The Supreme Court should either have limited its judgment to the interpretation of Article 40.3.3 of the Constitution,[31] or, if it wished to address the issue of restricting the free movement of persons, it should have submitted the matter to the ECJ. The *Grogan* case inevitably leads to that conclusion. As noted above, the Advocate General had assumed in *Grogan* that Irish practice did not prohibit women from going abroad to obtain an abortion. He explicitly held that to restrain pregnant women from leaving Ireland would be a disproportionate restriction of the free movement of persons as protected under Community law.[32] This issue, hypothetical at the time, was not addressed in the ECJ judgment, but the ECJ did make it clear that abortion falls within the scope of Community law. That the EC Commission carefully stayed out of the controversy can be explained by political rather than by legal motives.[33]

The story of X produced more surrealistic results. A link was made by many between her case and the protocol annexed to the Treaty of European Union. On the one hand, the majority of the Irish population, disagreeing with the injunction initially imposed on X, feared that the protocol would lead to similar cases and would slow down the liberalisation of the abortion practice; in their view, then, the protocol (and thus the Treaty) should not be ratified. The reasoning was incorrect, as the protocol only states that within Ireland the application of a constitutional provision remains unaffected by Community law. The way in which this provision is interpreted or applied by the Irish authorities can hardly be attributed to the Treaty on European Union. On the other hand, supporters of the existing ban feared that the protocol would not be effective, citing the X case as an example, and they therefore wanted to do away with the Treaty as a symbol of increasing Community competence. This reasoning was equally incorrect: *Grogan* had been decided under the 'old' EEC Treaty and likewise the Community law aspects in the case of X existed independently of the Treaty on European Union. Nevertheless, the political controversy was there, and ratification of the Treaty, which was to be approved through a referendum in June 1992, seemed more and more unlikely.[34]

In order to secure the ratification of the Treaty on European Union, the Irish government requested the other Member States to be allowed to withdraw the very protocol which it had introduced only a few months before. In a paradoxical answer to a paradoxical request, the other Member States refused to cooperate, although the protocol was seen by many as a *Fremdkörper* in the Community legal order. Apparently, the Member States were afraid that to re-open the negotiations would lead to many other requests for amendments being made.[35] By way of compromise, a Solemn Declaration was signed on 1 May 1992 in Portugal, assuring that the protocol "shall not limit freedom to travel between Member States or to obtain information in Ireland on services lawfully available in the Member States".[36]

Nevertheless, in mid-1992 the ban on abortion was still very much alive. This was illustrated by the High Court, which still had to decide the *Grogan* case on the merits. It fully used the possibility offered by the ECJ's preliminary ruling to confirm the Supreme Court's interlocutory injunction.[37] Moreover, the High Court transmitted the case file to the public prosecutor for contempt of court proceedings against the students' unions, as they had ignored the injunction while the case was pending. The High Court was not impressed by Grogan's argument that, as a consequence of the ECJ's ruling, distributors who receive payments for their activities are treated more advantageously. For the latter category, the High Court considered that the Supreme Court's ruling in *Open Door* still applied. That brings us back to the very first of the series of Irish abortion cases: *Open Door*, still to be decided by the European Court of Human Rights.

7. Open Door: The European Court of Human Rights

In its judgment[38] the European Court of Human Rights did not follow the reasoning of the Commission but nevertheless arrived at the same conclusion. Whereas the Commission had argued that the Supreme Court injunction had not been prescribed by law, the Court reached the opposite conclusion. It took into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the domestic courts have interpreted their role as the guarantors of constitutional rights. According to the Court, the possibility that action might be taken must have been, with appropriate legal advice, reasonably foreseeable.

Continuing the test prescribed by Article 10 § 2 of the Convention, the Court accepted that the Supreme Court injunction had a legitimate aim: the protection of morals "of which the protection in Ireland of the right to life

of the unborn is one aspect".[39] The Court then went on to address the most sensitive issue: was the injunction "necessary in a democratic society"?

The Irish government had argued that the injunction was necessary for the protection of the right to life of the unborn and that Article 10 should be interpreted against the background of Article 2, which in their view also protected unborn life. The Court rejected this contention:

> The Government stressed (... that ...) the traditional approach of weighing competing rights and interests in the balance was inappropriate where the destruction of unborn life was concerned. Since life was a primary value which was antecedent to and a prerequisite for the enjoyment of every other right, its protection might involve the infringement of other rights such as freedom of expression in a manner which might not be acceptable in the defence of rights of a lesser nature. (...)
>
> The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable (...) It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. (... However...) the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions.[40]

Accordingly, the Court had to examine on the basis of its case-law whether there existed a "pressing social need" for the measures in question and, in particular, whether the restriction complained of was "proportionate to the legitimate aim pursued". The Court first recalled that "that pluralism, tolerance and broadmindedness without which there is no democratic society" require that the freedom of expression is also applicable to information that offends, shocks or disturbs the State or any sector of the population.[41] The Court then emphasised that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion and that the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Against this background, the Court found that the injunction was over broad and disproportionate:

> The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of *The Attorney General v. X and Others* and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court's judgment in that case, were now free to have an abortion in Ireland or abroad.[42]

This assessment, which left no room for any "margin of appreciation" on the part of the Irish authorities, was confirmed by several other factors. In the first place, the Court referred to the non-directive character of the counselling provided by the applicants, *i.e.* neither advising for or against an abortion as the preferred option. Accordingly, the link between the provision of information and the destruction of unborn life was not as definite as contended by the Irish government. In the second place the Court recalled that information concerning abortion facilities abroad could be obtained from other sources in Ireland such as magazines and telephone directories. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner less protective of women's health. Furthermore, the injunction appeared to be largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain. Finally, the Court took into account evidence suggesting

> that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing of customary medical supervision after the abortion has taken place. Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information.[43]

The Court finally addressed the submission of the Irish government, invoking Articles 17 and 60 of the Convention, that Article 10 should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law:

> Without calling into question under the Convention the regime of protection of unborn life that exists under Irish law, the Court recalls that the injunction did not prevent Irish women from having abortions abroad and

> that the information it sought to restrain was available from other sources. Accordingly, it is not the interpretation of Article 10 but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.[44]

The Court concluded, by fifteen votes to eight, that the restraint imposed on the applicants was disproportionate to the aims pursued. Accordingly there was a breach of Article 10.

8. Some concluding remarks

Very shortly after the *Open Door* judgment, another referendum was held in Ireland. Two amendments to the Constitution were adopted. One amendment ensured that Article 40.3.3 could not be used "to limit the freedom to travel between the State and another state"; the other provided that it "shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state".[45] To a large extent, that seems to settle the issues arising in *Open Door, Grogan* and *Attorney General v. X*, although it is to be noted that the amendments do not explicitly refer to the making of travel arrangements. Anyway, the Supreme Court's *obiter dictum* in *Attorney General v. X* seems no longer valid, if it ever was.

It will be recalled that Chief Justice Finlay referred to the Eighth Amendment as "a decision by the people to insert into the Constitution a specific guarantee and protection for a fundamental right perceived to be threatened by developments in the societies of countries outside Ireland". Ten years after the adoption of the Eighth Amendment, the question should be raised to what extent the perceived threat actually existed – and whether the Maginot Line of Article 40.3.3 proved to be effective.

To my knowledge, no attempts have been made in the last decade, either by the Community or by any other international body, to impose upon Ireland an obligation to legalise abortion. On the contrary, the EC Commission carefully stayed out of the controversy on the travel restraints imposed on X, apparently wishing to avoid the impression that it was ready to interfere in this field. When looking back at the litigation so far, a similar impression of self-restraint clearly dominates. In *Grogan*, Advocate General Van Gerven was extremely careful to leave the Irish authorities a very wide margin of appreciation and emphasising his respect for the aim of the injunction, i.e. "to effectuate a value judgment, enshrined in its Constitution, attaching high priority to the protection of unborn life". The ECJ did (deliberately, it could be said) not

review the validity of the injunction but it explicitly held that "it is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally". The same is true, of course, for the legislature in those Member States where the activities in question are banned. In *Open Door*, the Commission examined the necessity of the injunction as little as the ECJ, but in its decision in the Norwegian case mentioned in § 3 above, it was prepared to leave the Contracting States "in such a delicate area (...) a certain discretion". Finally the European Court of Human Rights explicitly held that "[w]ithout calling into question under the Convention the regime of protection of unborn life that exists under Irish law" it had to respond to certain submissions of the Irish government. One could thus conclude that any desire that may have existed to challenge the Irish abortion legislation was well-hidden. It might of course also be argued that the cautious approach was motivated by the very existence of a specific constitutional provision.

Now that the Treaty on European Union has entered into force, the 'abortion protocol' forms an integral part of the treaty texts. Its limited scope has been confirmed by the May 1992 Declaration, but it nevertheless prevents the adoption of any Regulation which would thwart the application (in Ireland, I must stress) of Article 40.3.3. It thus seems to be an effective, if perhaps superfluous, line of defence against any 'surprise attack' in the field of abortion legislation.

Article 40.3.3 did *not*, however, prove an effective guarantee when the domestic courts, prompted by *SPUC*, started to give this provision a wide interpretation. By including, in the positive obligation to defend the right to life of the unborn, the prohibition to publish information about legal abortion facilities abroad and the prohibition to travel thereto, the Irish courts necessarily got involved in a confrontation with the surrounding legal systems.[46] It is exactly at this point that Article 40.3.3 had to yield at the European level. What the European courts essentially did in reaction to the new Irish case-law, was to enforce mutual acceptance or at least a "peaceful coexistence" among the Irish and the British systems. Article 40.3.3 was unable to prevent the European Court of Human Rights from upholding the freedom of expression in *Open Door* (so that information should continue to be freely provided as before), nor to neutralize the potential of Community law with respect to the freedom to provide services with its corollary rights (so that Irish women should be entitled to travel freely to Great Britain as before). The European courts restored the *status quo ante*, as it existed until *SPUC* brought its first action against *Open Door* – nothing more and nothing less.

In conclusion, one could submit that, in the absence of a noticeable foreign threat to the traditional abortion ban as it is applied in Ireland, Article 40.3.3

primarily seems to be a "specific guarantee and protection" against changes (some might argue: the *threat* of changes) at the domestic level. The legislator is prevented from simply setting aside the prohibition contained in the Offences against the Person Act.

Turning from the Irish to the European perspective, the question can be raised what the first abortion cases to come before the European courts have yielded. Of course, these were freedom of information cases – not cases directly related to the right to life or questioning the lawfulness of abortion as such.[47] On the one hand, it could be argued that *Open Door* will not be a strong precedent as the facts complained of were quite extreme: an injunction perpetually restraining the applicants from giving any information on legal abortion facilities abroad whatsoever *n'importe* the circumstances. Moreover, the European Court of Human Rights could easily rely on the *Attorney General v. X* judgment of the Irish Supreme Court itself to demonstrate that the injunction in its earlier *Open Door* ruling had been too broad. Neither the Commission not the Advocate General in *Grogan* had this advantage. It is therefore not fully certain how the Court (and the Commission) would react to less far-reaching restrictions on the freedom of expression. On the other hand, the way in which the Court decided *Open Door* is certainly relevant for future cases. The approach of the Irish courts, giving the right to life of the unborn priority above all other rights, has not been followed in the interpretation of Article 10. Moreover, it is beyond doubt that the Court, when reviewing national legislation, will pay full attention to its consequences for the health of the pregnant women involved.[48]

The position of the ECJ is less outspoken, when compared to the European Court of Human Rights. That seems defensible, taking into account the respective roles of these courts. In *Grogan,* the Advocate General delivered too careful an opinion, but one would expect that in future cases the *Open Door* ruling would be followed. Nevertheless, neither of the European courts is likely to prohibit or to require the availability of abortion facilities. On the basis of the judgments discussed here, it seems more likely that they will refrain from such far-reaching positions, and will limit themselves essentially to tolerating the national systems as they are.

Did the abortion tale end here? In the United States, the Supreme Court has been confronted with several abortion cases without being able to settle to issue. On the contrary, a recent judgment showed a highly fragmented Court.[49] As a commentator put it: "There is little indication that this decision, or any that the Court could craft, will ever be viewed as a satisfactory compromise of issues which, for many, allow for no compromise".[50] The same is certainly true in Europe, even the more so as in this region *international* courts must try to find the right balance between national practices existing in different states

which often regard themselves as sovereign. With respect to abortion, the European courts so far have only enforced a coexistence among the different national traditions. To that extent, European limits to national sovereignty have been set.

Notes

1. T.A. Finlay, The Constitution of Ireland in a Changing Society, in: *Constitutional Adjudication in European Community and National Law – Essays for the Hon. Mr. Justice T.F. O'Higgins*, (eds.) D. Curtin, D. O'Keeffe, p. 140, 1992; cf. B. Walsh, Reflections on the Effects of Membership of the European Communities in Irish Law, in: *Du Droit International au Droit de l'Integration (Liber Amicorum Pescatore)*, (eds.) F. Capotorti et al., 1987, referring to "the fear that under the guise of 'health care', Community legislation might in some way bring about the introduction of legalized abortion in Ireland", at p. 815.
2. See D. Costello (the judge who issued the High Court injunction in the case of X, see *infra* § 6) for a similar reasoning with respect to the right to privacy: The Irish Judge as Law-Maker, in: Curtin, O'Keeffe, *ibidem*, p. 162.
3. The literature on this issue is abundant. See e.g. W. Peukert, Human Rights in international law and the protection of unborn human beings, in: *Protecting Human Rights: The European Dimension – Studies in Honour of G.J. Wiarda*, F. Matscher, H. Petzold, pp. 511–519, 1988; P.W. Smits, *The Right to Life of the Unborn Child* (diss. Leiden, 1992) is rather one-sided but contains useful references.
4. United States Supreme Court, *Roe v. Wade*, p. 153, 1973, 410 U.S. But see *infra* note 49 and accompanying text.
5. See Appl. No. 6959/75, *Brüggemann, Scheuten v. Germany*, Dec. of 12 July 1977, D.R. 10, p. 100.
6. European Commission of Human Rights, Appl. No. 17004/90, *Hercz v. Norway*, Dec. of 19 May 1992, not yet reported in D.R. See the annotation of T. Loenen in *NJCM-bulletin/Nederlands Tijdschrift voor de Mensenrechten* vol. 18, pp. 65–73, 1993. See for earlier case-law e.g. Appl. No. 8416/79, *X. v. UK*, Dec. of 13 May 1980, D.R. 19, p. 244 and Appl. No. 11045/84, *Knudsen v. Norway*, Dec. of 8 March 1985, D.R. 42, p. 247.
7. The case was also brought by two employees of Dublin Well Woman and two Irish "women of child-bearing age" as well. Since the position of the applicants was substantively similar, they will hereinafter be referred to as *Open Door* (the word "Counselling" being omitted by the Court in the name of the judgment). Apart from the complaint under Art. 10, a claim was made that Art. 8 (the right to privacy) had been violated too. Since the latter issue did not play any substantive role in the proceedings, it will not be discussed in the present review. Likewise, the Irish preliminary objection that the four individuals could not claim to be a "victim" in the sense of Art. 25 will not be dealt with; suffice it to mention that the Court rejected the objection.
8. Report of the European Commission of Human Rights, Appl. No. 14234/88 and 14235/88, adopted 7 March 1991. The Commission's opinion is annexed to European Court of Human Rights, *Open Door and Dublin Well Woman* judgment of 29 October 1992, Series A vol. 246–A, pp. 53–81. It is interesting to note that before the Commission, the applicants were represented by Mrs. M. Robinson, currently President of the Republic of Ireland.
9. Commission's Report, *ibidem*, p. 57, §§ 51–52.
10. Loucaides, for example, stated that "it is reasonable to consider that such an activity was directly undermining the moral values of the Irish people enshrined in their Constitution"

(Commission Report, *ibidem*, p. 81). On the other hand, three members (Schermers, Thune and Hall) in their concurring opinions stated that in their view the injunction – assuming it was prescribed by law – was not necessary in a democratic society and therefore incompatible with Art. 10. As Hall put it: "Whilst the majority of Irish people may not wish to see abortion performed in Irish territory, this cannot, in my view, be seen as a justification to prevent a minority of people receiving reliable information about lawful services elsewhere" (*ibidem*, p. 72).

11. Joined cases 286/82 & 26/83, *Luisi & Carbone*, [1984] ECR 377 and case 186/87, *Cowan*, [1989] ECR 220. See also the Resolution on abortion of the European Parliament, O.J. 1990 C 96/19.
12. Case C–362/88, *GB-Inno-BM*, [1990] ECR I–667.
13. Case C–159/90, *Society for the Protection of the Unborn Child – Grogan*, Opinion of 11 June 1991, [1991] ECR I–4703–4732.
14. See G. de Búrca, Fundamental Human Rights and the Reach of EC Law, in: *Oxford Journal of Legal Studies* vol. 13, 283–319, at p. 294, 1993.
15. This step is to be explained by the fact that the ECJ is increasingly prepared to review the actions of national authorities for compliance with general principles of Community law, notably fundamental rights. See for a review of this development F.G. Jacobs, The Protection of Human Rights in the Member States of the European Communities: The Impact of the Case-law of the Court of Justice, in: *Human Rights and Constitutional Law (Essays in Honour of Brian Walsh)* (ed.) J. O'Reilly, 1992, pp. 243–250, 1992. See for recent examples case 5/88, *Wachauf* [1989] ECR 1263, case C–260/89 *ERT* [1991] ECR I–2963 and case C–168/91, *Christos Konstantinidis*, Judgment of 30 March 1993, not yet reported in ECR.
16. *Supra* note 13, p. I–4727. See my earlier remarks on this reasoning in: Miscarriage of Justice? Het Ierse abortusverbod aan 'Europese' maatstaven getoetst, in: *NJCM-bulletin/Nederlands Tijdschrift voor de Mensenrechten* vol. 17, pp. 47–55, 1992.
17. Judgment of 4 October 1991, [1991] ECR I–4733–4742, at p. I–4739.
18. *Ibidem*, p. I–4740, § 26. See for critical remarks the annotation of D. Curtin in *Common Market Law Review* vol. 29, pp. 585–603, 1992.
19. According to S. O'Leary, The Court of Justice as reluctant constitutional adjudicator: an examination of the abortion information case, in: *European Law Review* vol. 17, pp. 138–157, 1992.
20. See e.g. Curtin, *supra* note 18, O'Leary, *supra* note 19 and my own review, *supra* note 16.
21. See De Búrca, *supra* note 14, again O'Leary, *supra* note 19; H. Gaudemet-Tallon in her annotation of the judgment in *Revue Trimestrielle du Droit européen* vol. 28, pp. 163–180, 1992; and M.A.J. Leenders, Grondrechten als algemene beginselen van gemeenschapsrecht, in: *EG en grondrechten* (eds.) M.C. Burkens, H.R.B.M. Kummeling, p. 64, 1993.
22. See J. Coppel, A. O'Neill, The European Court of Justice. Taking Rights Seriously?, in: *Common Market Law Review* vol. 29, pp. 685–689, 1992; and D.R. Phelan, Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union, in: *Modern Law Review* vol. 55, pp. 670–689, 1992 – the latter text being an apparently impassioned, but for me sometimes confusing comment on the case.
23. In reply to a question put by a Member of Parliament, as to why the Dutch government had agreed to the protocol, the Dutch Minister of Foreign Affairs stated in March 1992: "It was well-known that the Irish government set great store by certainty relating to the application of the relevant constitutional provision. As the text of the protocol has been formulated in a way that the Dutch legal order remains unaffected, the government had no reasons to be unfavourably disposed towards it" (Tweede Kamer, Aanhangsel van de Handelingen, no. 471, 1991–1992, author's translation).

24. See esp. D. Curtin, *supra* note 18, 602–603; the same author: The Constitutional Structure of the Union: A Europe of Bits and Pieces, in: *Common Market Law Review* vol. 30, pp. 47–49, 1993; and R. Lawson, *supra* note 16, p. 55. I therefore fail to see how the protocol could "protect Article 40.3.3 from the jurisprudence of the ECJ", as Phelan submitted (*supra* note 22, p. 670).
25. See *International Herald Tribune*, 22 May 1992 and De Búrca, *supra* note 14, p. 312, note 122.
26. According to a public poll published in Dublin's *Sunday Independent* of 23 February 1992, 64 percent of the Irish population was against the travel ban, whereas 25 percent supported it. In the Netherlands, seven Members of Parliament, representing a large majority, asked the Minister of Foreign Affairs to demand a clarification from his Irish colleague. The Minister refused this, as the case was at the time still *sub judice*. See Tweede Kamer, Aanhangsel van de Handelingen, No. 398, 1991–1992.
27. Irish Supreme Court, *Attorney General v. X.*, ruling of 26 February 1992; judgment delivered on 5 March 1992, reprinted in [1992] 2 Common Market Law Reports vol. 64(6), p. 277 et seq. The judgment of the High Court is reprinted at pp. 280–289.
28. *Ibidem*, pp. 305–307.
29. *Ibidem*, pp. 303–305.
30. This is a borderline case, however. According to Case 283/81, *CILFIT*, [1982] ECR 3415, the highest court is "not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them *if that question is not relevant*, that is to say, if the answer to that question, regardless of what it may be, *can in no way affect the outcome of the case* (§ 10, emphasis added). On the one hand, it should be conceded that "the outcome of the case" would probably not be affected by an ECJ ruling, on the other hand it cannot be maintained that the interpretation of Community law "would not be relevant". This is especially true as far as the *obiter dictum* is concerned as it takes a very outspoken position on the right to travel.
31. And even that approach seems doubtful from a Community law perspective, as Community law forms part of and takes precedence over domestic law (see case 6/64, *Costa/ENEL*, [1964] ECR 585). To separate the issues of constitutional and Community law, as occurred in *Attorney General v. X* is rather artificial.
32. *Supra* note 13, pp. I–4720–4721.
33. The Commission was invited by several Members of the European Parliament to open infringement procedures against Ireland under Article 169 EEC Treaty – but the Commission refused. See *Agence Europe* of 21 February and 13 March 1992.
34. See D. Curtin, Confusion over effect of Maastricht protocol, in: *Irish Times* of 2–3–1992 and *de Volkskrant* of 26 February 1992, "EG-verdrag in gevaar door Iers abortus-verbod".
35. See *Agence Europe* of 6 April 1992 and, for the Dutch position, Tweede Kamer, 21 501–02, nr. 61, p. 1, 1991–1992.
36. See *Agence Europe* of 4 May 1992. But see *supra* note 24.
37. High Court, *SPUC v. Grogan and others*, judgment of 4 August 1992, [1993] 1 C.M.L.R. 197.
38. See *supra* note 8, pp. 1–52.
39. *Ibidem*, pp. 27–28, § 63. "It is not necessary in the light of this conclusion", the Court added, "to decide whether the term "others" under Article 10 § 2 extends to the unborn". See on this point the critical remarks of J. van Nieuwenhoven, Zwangerschapsafbreking en vrije meningsuiting, in: *NJCM-bulletin/Nederlands Tijdschrift voor de Mensenrechten* vol. 18, pp. 700–715 at p. 711, 1993.
40. *Ibidem*, pp. 28–29, § 67–69.
41. See e.g. *Handyside* judgment of 7 December 1976 Series A vol. 24, p. 23, § 49.
42. *Supra* note 38, p. 30, § 73.
43. *Ibidem*, p. 31, § 77.
44. *Ibidem*, p. 31, § 79.

45. This seems to be in conformity with the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993. This instrument contains the following provision: "the World Conference on Human Rights reaffirms (. . .) a woman's rights to accessible and adequate health care and the widest range of family planning services". See UN doc. A/CONF.157/23 of 12 July 1993.
46. Incidentally, the question could be raised to what extent the voters who supported the Eighth Amendment in 1983 were aware of this possible interpretation by the Irish courts, also taking into account the reactions to the travel restraint imposed upon X.
47. But see *supra* note 39 and the annotation of A. Sherlock in *European Law Review* vol. 18, pp. 253–259, 1993: in *Open Door*, the Court *chose* to regard the injunction as a limitation of the freedom of expression imposed in order to protect morals. It explicitly avoided to be drawn into the wider and even more controversial discussion on the lawfulness of abortion as such or the interpretation of "life" in Article 2.
48. See *supra* note 43 and accompanying text.
49. US Supreme Court, *Planned Parenthood v. Casey*, judgment of 29 June 1992.
50. H.J. Bourguigou, Abortion, the Irreconcilable Conflict: Planned Parenthood v. Casey, in: *Human Rights Law Journal* vol. 13, p. 336, 1992.