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LIBERALIZING ABORTION IN IRELAND: *IN RE* ARTICLE 26 AND THE PASSAGE OF THE REGULATION OF INFORMATION (SERVICES OUTSIDE THE STATE FOR THE TERMINATION OF PREGNANCIES) BILL

I. INTRODUCTION

The Irish Constitution recognizes the right to life of an unborn child and provides that the laws of Ireland will protect and defend that right.¹ In light of this, may Ireland prohibit women from obtaining abortion information for the purpose of traveling abroad in order to avail themselves of legal abortion services in other countries?² This

1. IR. CONST. art. 40, § 3(3). Section 3(3) provides that "[t]he 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." *Id.*

2. The Censorship of Publications Act of 1929, § 16, "makes it unlawful to print, publish, sell or distribute any book or periodical which advocated abortion." Censorship of Publications Act, 1929, § 16, *quoted in* Ann Sherlock, *The Right to Life of the Unborn and the Irish*

topic has been at issue in many cases, with the Irish courts continuously holding that any assistance provided for women seeking an abortion violated the unborn child's constitutional right to life and was, therefore, illegal.³ However, in its most recent and controversial decision on the topic, *In re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill*,⁴ the Irish Supreme Court ultimately held that the mother's right to information can coexist with the unborn child's right to life. Therefore, if seeking a lawful abortion, women cannot be prohibited from traveling abroad nor be denied information regarding the location of legally operating abortion clinics abroad.⁵

The debate over whether women may obtain information regarding abortion services abroad began long before the current case was decided. By 1992, Irish law had recognized the principle that a mother's rights are superior to those of an unborn child; and, because of this, in a situation where a mother's life was substantially at risk, she could obtain a legal abortion in another country.⁶ By resolving the conflict that arises when both the unborn child's and the mother's lives are at risk, the Irish Supreme Court unknowingly unleashed a stream of logic culminating in the decision of *In re Article 26*. After a series of decisions on the issue and upon advice from both the European Economic Community (EEC) and the European Court of Human Rights (ECHR),⁷ the supreme court in *In re Article 26* had no choice but to abandon its traditional policies and permit women to obtain information regarding abortion services in other countries. The court unanimously held that the rights of individuals stemmed from the constitution.⁸ In recognizing its duty to adhere to positive law,⁹ the judges concluded that the only way to logically follow the principles of the constitution, the cases interpreting it, and the principles of the EEC¹⁰ and the

Constitution, 24 IR. JUR. 13, 34 (1989).

3. *E.g.*, Attorney Gen. *ex rel.* Soc'y for the Protection of Unborn Children (Ir.) Ltd. v. Open Door Counseling Ltd., 1988 I.R. 619 (Ir. S.C.), available in LEXIS, IrelnD Library, CASES File.

4. No. 87 (Ir. S.C. May 12, 1995) (LEXIS, IrelnD library, CASES file) [hereinafter *In re Article 26*].

5. *Id.* at *15.

6. Attorney Gen. v. X, [1992] 1 I.R. 1, 1992 I.L.R.M. 401 (Ir. S.C.); see also McGee v. Att'y Gen., 1974 I.R. 284 (Ir. S.C.).

7. See discussion *infra* part III.

8. *In re Article 26*, *supra* note 4, at *18.

9. *Id.* at *21. The judges abandoned precedent by using positive law. Positive law meant that the judges used the language of the constitution to decide this issue. In past cases, the court referred to natural law which resulted in the judges looking toward public policy regarding the right to life of the unborn child first in order to interpret the constitution. *Id.* at *22.

10. This is referring specifically to the desire in Articles 59 and 60 of the EEC Treaty to

ECHR was to permit women to obtain information regarding abortion services abroad.¹¹

This casenote focuses on the *In re Article 26* decision and the constitutionality of the passage of the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill (Information Bill)¹² legalizing the distribution of abortion information in Ireland. Part II presents the history of abortion law in Ireland and the circumstances that lead to the presentation of this issue by the President of Ireland to the Irish Supreme Court. Part III explores the pertinent cases that lead to the decision in *In re Article 26*, including the influence of the EEC and the ECHR and their implied endorsement of the Information Bill. Part IV focuses on the decision in *In re Article 26*, analyzing its reasoning and explaining the Irish Supreme Court's finding that an unborn child's right to life can coexist with the mother's right to abortion information.

II. *IN RE ARTICLE 26* - FRAMING THE ISSUE

A. *Legal History*

Most Western European countries have moved from restrictive abortion legislation toward liberalized policies. However, Ireland's abortion legislation remained virtually unchanged, and perhaps had even grown more restrictive,¹³ until *In re Article 26*. Under the common law, abortion has always been illegal in Ireland.¹⁴ This law has been codified in many statutes, the first of which was enacted in 1803.¹⁵ The Offences Against the Person Act of 1861¹⁶ is still in

remove any barriers to citizens wishing to avail themselves of services available in other member states. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 59, 60, 298 U.N.T.S. 11, 40-41 [hereinafter EEC Treaty].

11. *In re Article 26*, *supra* note 4, at *30.

12. *Id.* at *3-6 (summarizing the Regulation of Information Bill).

13. TOM HESKETH, *THE SECOND PARTITIONING OF IRELAND I* (1990).

14. Case 159/90, *Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, [1991] 3 C.M.L.R. 849, 854.

15. 43 Geo. 3, ch. 58 (1803) (Ir.) in 2 *THE STATUTES CXXXV* (3d ed. 1950) This statute was one generally dealing with "malicious shooting or stabbing." *Id.*

16. Offences Against the Person Act, 1861, 24 & 25 Vict., ch. 100, § 58 (Eng.) in 7 *THE STATUTES 266* (3d ed. 1950). Section 58 states:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life

force today and was "reaffirmed by the Oireachtas in the Health (Family Planning) Act [of] 1979."¹⁷ These laws culminated in 1983,¹⁸ when a referendum submitted to the citizens of Ireland resulted in a constitutional amendment to article 40, section 3, and acknowledged the right to life of the unborn.¹⁹

The issue presented by *In re Article 26* had previously lurked in many cases, with the court consistently holding that no conflict in the constitution would be resolved to the unborn child's detriment. In 1988, the Irish Supreme Court first addressed the issue of whether women would be permitted to obtain information and to travel to other countries for the purpose of availing themselves of abortion services.²⁰ The supreme court avoided making a decision specifically addressing a woman's right to travel for the purpose of obtaining an abortion by maintaining that this issue had not been directly raised in the case.²¹ However, the court did conclude that the distribution of information regarding the location of abortion clinics threatened the life of the unborn and was therefore unlawful.²²

In 1992, the court considered whether a girl whose life was in peril could travel to Great Britain in order to obtain an abortion.²³ In that case, although the court reversed the lower court's decision and allowed a woman to obtain information in order to procure an abortion, it emphasized that this decision did not permit women whose lives were not in peril to receive abortion information.²⁴ In neither case was the court compelled to follow the principles of the EEC, which are generally to guarantee the right to have access to services abroad.²⁵

However, the question was directly presented to the Irish High Court in *Society for the Protection of Unborn Children (Ireland) Ltd. v.*

Id.

17. *Case 159/90*, [1991] 3 C.M.L.R. at 854. The Oireachtas is the Irish Legislature. BRIAN DOOLAN, CONSTITUTIONAL LAW AND THE CONSTITUTIONAL RIGHTS IN IRELAND 29 (1984).

18. In 1983, a referendum went to the people of Ireland who, in return, voted to amend the Irish Constitution to include the right to life of the unborn as a fundamental right. Pro-life advocate groups wanted to extinguish any possible future legislation on abortion in Ireland. HESKETH, *supra* note 13, at 2.

19. IR. CONST. art. 40, § 3(3). This amendment was enacted because it was feared that a recent Irish Supreme Court decision recognizing the right to privacy in the marriage threatened the anti-abortion statutes. J. M. KELLY, THE IRISH CONSTITUTION 790 (3d ed. 1994).

20. Attorney Gen. *ex rel.* Soc'y for the Protection of Unborn Children (Ir.) Ltd. v. Open Door Counseling Ltd., 1988 I.R. 619 (Ir. S.C.), *available in* LEXIS, IrelnD Library, CASES File.

21. *Id.*

22. *Id.*

23. Attorney Gen. v. X, [1992] 1 I.R. 1, 1992 I.L.R.M. 401 (Ir. S.C.).

24. *Id.* at 403.

25. EEC Treaty, *supra* note 10, art. 2.

*Grogan*²⁶ (*S.P.U.C.*). In this instance, the court referred the case to the European Court of Justice (ECJ) for a preliminary ruling on whether abortions were "services" within the meaning of the Treaty Establishing the European Economic Community (EEC Treaty).²⁷ The court found that abortion was a service within the meaning of the treaty,²⁸ however, the court would not require Ireland to refrain from prohibiting women from obtaining assistance in locating abortion services in other countries,²⁹ holding that, in this case, the denial of information does not affect services in such a way as to frustrate the goals of the EEC.³⁰ Finally, in light of the ECJ's advisory opinion and the constant resurrection of the issue of whether to provide information on overseas abortion, the President of Ireland, Mary Robinson, submitted it to the Irish Supreme Court for redeliberation.³¹

B. *The Issue*

When the issue of the legality of providing abortion information was submitted to the Irish Supreme Court, the leading pro-life advocates of Ireland were invited to participate in the discussion.³² The question presented was whether the Information Bill pronounced pursuant to article 26 of the Irish Constitution was repugnant to any other provisions in the constitution. If found repugnant to the constitution, it would become illegal to provide women with information regarding abortion services abroad.³³

26. [1994] 1 I.R. 46, [1990] 1 C.M.L.R. 689 (Ir. H. Ct. 1989).

27. Case 159/90, *Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, [1991] 3 C.M.L.R. 849. "Services" are discussed within the EEC Treaty in articles 59 and 60. EEC Treaty, *supra* note 10, arts. 59-60.

28. Case 159/90, [1991] 3 C.M.L.R. at 893.

29. *Id.*

30. *Id.* at 893. The court, when examining a national law that conflicts with a Community law, applies a proportionality test designed to balance the need for compliance with the EEC Treaty and the importance of the national law to the member state. Grainne De Burca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. LAW 106 (1994).

31. Chris Parkin, *Abortion Information Bill is Legal, Irish Court Rules*, PRESS ASS'N NEWSFILE, May 12, 1995, available in LEXIS, NEWS Library, PANEWS File. The President submitted the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill in April, 1995, after the passage of the 14th Amendment to the Irish Constitution. This amendment provided that the Eighth Amendment was to be regarded as separate from the right to information. *In re Article 26*, *supra* note 4, at *15.

32. *In re Article 26*, *supra* note 4, at *15.

33. *Id.* at *7.

III. THE PREVIOUS DECISIONS

A. *The Open Door Decision*

In a case in 1988, *Attorney General ex rel the Society for the Protection of Unborn Children (Ireland) Ltd. v. Open Door Counseling Ltd.*,³⁴ the defendants appealed an Irish High Court ruling that declared unlawful non-directive counseling regarding abortion services abroad and issued a restraining order preventing the defendants from counseling women regarding abortion.³⁵ The defendants contended that the court could not deny women the right to receive information for the purpose of seeking abortion services abroad, and that because the supreme court was the highest court in Ireland, the issue must be submitted for review by the ECJ to determine whether denying women information regarding abortion clinics abroad conflicted with the free movement of trade desired by the EEC.³⁶ The defendants also contended that the counseling services were neither directive nor judgmental, but only provided information regarding services requested by women after their own consideration of their situation and options.³⁷

The high court stated that although in some instances the right to express opinions enumerated in the constitution may involve an auxiliary right to information, this cannot override the constitutional rights of the unborn child.³⁸ Ultimately, the court declared the actions of the defendants unlawful, stating that it would not consider the question of a woman's constitutional right to information in a vacuum, free from context.³⁹ In the view of the court, the context clearly illustrated that the information requested was directly related to the termination of

34. 1988 I.R. 619 (Ir. S.C.), available in LEXIS, IrelnD Library, CASES File. This case was one of a series of cases presented to the Irish High Court and the Irish Supreme Court after the 1983 referendum to the people that resulted in the Eighth Amendment to the Irish Constitution. These cases were initiated by amendment supporters who wanted to terminate abortion clinic referral services in Ireland. This issue was presented to the courts in a number of cases which inevitably invoked European law when defendants in such cases appealed these decisions to the European Court of Human Rights and the ECJ. KELLY, *supra* note 19, at 792.

35. *Open Door*, 1988 I.R. 619, available in LEXIS, IrelnD Library, CASES File, at *2.

36. *Id.*

37. *Id.* at *5. Defendants also emphasized that abortion clinics in Great Britain, to which Open Door Counseling referred its clients, maintained a high standard of medical care. *Id.*

38. *Id.* at *9.

39. *Id.* The judge stated:

It seems to me an inescapable conclusion that if a woman was anxious to obtain an abortion and if she was able by availing of the counseling services of one or other of the defendants to obtain the precise location, address and telephone number of and method of communication with, a clinic in Great Britain which provided that service, put in plain language, that was knowingly helping her to attain her objective.

Id. at *8.

pregnancies, violating article 40, section 3, of the Irish Constitution.⁴⁰ Counseling women in a non-directive fashion, "knowing that they were contemplating abortion, amounted to counseling or assisting pregnant women to obtain an abortion."⁴¹

Addressing the ECJ jurisdiction issue, the supreme court agreed with the defendants that, as a member state of the EEC, the issue of services sought by Irish residents outside their jurisdiction invoked articles 59⁴² and 60⁴³ of the EEC Treaty.⁴⁴ However, the court did not debate this issue because the pleadings, as written, failed to challenge the right of Irish citizens to avail themselves of services in other member states of the EEC.⁴⁵ The pleadings instead referred to the legality of information provided inside the jurisdiction.⁴⁶ In its decision, the court stated that the link between abortion policies in Ireland and the right to information was not strong enough to deny citizens of Ireland the right to information.⁴⁷ Also, the court pointed out that ultimately, the denial of information endangered women's health because many women were obtaining abortions in the later stages of pregnancy due to the lack of counseling.⁴⁸ The court ultimately granted an injunction preventing the defendants from distributing abortion information.⁴⁹

Pro-life advocates viewed the 1988 *Open Door* decision as a victory. However, after the decision in *Open Door*, the defendants appealed to the ECHR, claiming that the injunction violated article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁵⁰ which protects the freedom of expression.⁵¹ The defendants'

40. *Open Door*, 1988 I.R. 619, available in LEXIS, Ireln Library, CASES File, at *8.

41. Sherlock, *supra* note 2, at 32.

42. EEC Treaty, *supra* note 10, art. 59.

43. *Id.* art. 60.

44. *Open Door*, 1988 I.R. 619, available in LEXIS, Ireln Library, CASES File, at *10. Article 59 states that "within the framework of the provisions set out below, restrictions on the free supply of services within the Community shall be progressively abolished." EEC Treaty, *supra* note 10, art. 59.

45. The EEC Treaty, article 177, has been interpreted to compel member states to refer issues that involve an interpretation of a provision of the Treaty when such an issue is raised in the highest court of the member state. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 340 (2d ed. 1995).

46. *Open Door*, 1988 I.R. 619, available in LEXIS, Ireln Library, CASES File, at *10. Defendants never claimed that women were denied the right to travel and obtain an abortion. In fact, women cannot be restrained from traveling to foreign countries to obtain abortion services. *Id.* at *9.

47. *Id.* at *10.

48. *Id.*

49. *Id.* at *9.

50. Nov. 4, 1950, art. 10, 213 U.N.T.S. 222, 230 (entered into force Sept. 3, 1953).

51. KELLY, *supra* note 19, at 806.

appeal to the European Court of Human Rights ultimately pressured Ireland to change its policies.

B. *Case 159/90: The ECJ Ruling*

1. Background

The Treaty of Rome establishing the European Economic Community (EEC) was signed on March 25, 1957, and became effective on January 1, 1958.⁵² The Community was originally comprised of three separate entities,⁵³ but in 1993 came under one institution known as the European Union.⁵⁴ Ireland joined the EEC in 1973, and today there are a total of fifteen member states.⁵⁵

The EEC, by design, works to promote free trade of services and products between the European member states. Article 2 of the EEC Treaty sets forth this principle:

The Community shall have as its task, by establishing a common market and approximatizing the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase of stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.⁵⁶

The purpose of the EEC is to establish a "Community legal system, which is characterized by the transfer of sovereign powers . . . from the member states to the institutions of the community."⁵⁷ The success of the EEC is largely due to the allegiance of the member states to the Community. However, this allegiance has resulted in a conflict between national sovereignty and conformity to the EEC.⁵⁸ The ECJ retains the power to resolve this conflict,⁵⁹ often holding an individual member state's national law subordinate to the law created through an EEC agreement or treaty.⁶⁰

52. EEC Treaty, *supra* note 10.

53. These separate entities were the European Coal and Steel Community, the European Atomic Energy Community, and the European Economic Community. CARTER & TRIMBLE, *supra* note 45, at 549.

54. Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247 (entered into force Nov. 1, 1993).

55. As of January 1995, the fifteen member states were: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 209 (1995).

56. EEC Treaty, *supra* note 10, art. 2

57. Mark L. Jones, *Regional Economic Organizations: Treaty Establishing the European Economic Community (Treaty of Rome)*, 2 BASIC DOCUMENTS INT'L ECON. L. 3, 11 (1994).

58. CARTER & TRIMBLE, *supra* note 45, at 343.

59. *Id.*

60. *Id.* Although it is not expressly stated in the EEC Treaty, it is well established that

2. S.P.U.C. II

In recognition of the importance of the EEC, the Irish High Court referred the issues raised in *S.P.U.C.*⁶¹ to the ECJ for a preliminary ruling on whether the Irish law and Community law could coexist.⁶² The issues presented by the high court to the ECJ were: (1) whether abortions were "services" within the meaning of the EEC treaty; (2) if so, whether a member state could prohibit the distribution of information regarding those services; and (3) if not, whether under Community law, there was an exception.⁶³ Before the ECJ ruling (*S.P.U.C. II*) was returned and the high court could make a final judgement on the merits, the Irish Supreme Court affirmed an interlocutory injunction restraining the defendants from providing women with information regarding abortion clinics abroad.⁶⁴

3. Abortion as "Services"

Article 3 of the EEC Treaty states that one of the principles of the Community is to abolish any restriction on the movement of services between the member states.⁶⁵ The first question presented was whether abortions are considered "services" within the meaning of the treaty, which would subject them to the provisions of the treaty.⁶⁶ The plaintiffs contended that abortion procedures were not services within the meaning of the EEC Treaty because abortion was unlawful in Ireland, arguing that it was both grossly immoral and repugnant to Ireland's

Community law preempts national law, just as U.S. federal law preempts state law. *Id.*

61. [1994] 1 I.R. 46, [1990] 1 C.M.L.R. 689 (Ir. H. Ct. 1989).

62. EEC Treaty art. 177 states:

The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community; and

(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

EEC Treaty, *supra* note 10, at art. 177.

63. *Case 159/90, Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, [1991] 3 C.M.L.R. 849, 888-89.

64. *Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, 1989 I.R. 760, [1990] 1 C.M.L.R. 689, 700 (Ir. S.C.).

65. EEC Treaty, *supra* note 10, art. 3. "Freedom to provide services is one of the foundations of the Community. As appears from Article 3 (c) of the Treaty, this freedom is one of the constituents of the common market and consequently is indispensable to the achievement of the objectives of the Community listed in Article 2 of the Treaty." Jean-Yves Art, *Legislative Lacunae, the Court of Justice and Freedom to Provide Services*, in *CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW* 121 (Deirdre Curtin & David O'Keefe eds., 1992).

66. *Case 159/90*, [1991] 3 C.M.L.R. at 888.

constitution.⁶⁷

However, in its decision, the ECJ made it clear that all medical procedures, including abortions, are services within the meaning of the EEC Treaty.⁶⁸ The EEC Treaty recognizes as services any service which is normally provided for remuneration, and article 60, section (d), of the EEC Treaty specifically names as services "activities of the liberal professions."⁶⁹ The court reasoned that although abortion services were illegal in a few member states, the issue in this case was not the extent to which Ireland has found abortion illegal, but rather, that the member state providing the service recognizes abortion as a legal service for which the physician receives compensation.⁷⁰

The ECJ also supported its decision by pointing out that it had reached the same conclusion in previous cases.⁷¹ When defining services within the meaning of the treaty, the court traditionally takes a broad stance. The goal of the EEC is to integrate the markets of all member states to such an extent that the economy is virtually that of one great internal market.⁷² Recognizing this goal, the court rarely excludes a service legally provided for in several member states from the provisions of the EEC Treaty, resulting in a tendency to be over-inclusive instead of under-inclusive.⁷³

4. May Ireland Prevent its Citizens from Using Services Provided by other Countries Within the Communities?

Having established that abortions are a service subject to the provisions of the EEC Treaty, the court in *S.P.U.C. II* next questioned the prohibition of abortion services and the distribution of information regarding the location of abortion clinics to determine if they fell within the scope of articles 59 and 60 of the EEC Treaty. In answering this question, the court also addressed the third issue by concluding that a country that prohibits abortion may deny its citizens information regarding legally established abortion clinics in other Community countries.

67. *Id.* at 890.

68. *Id.* at 890-91.

69. EEC Treaty, *supra* note 10, art. 60, § d.

70. Case 159/90, *Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, [1991] 3 C.M.L.R. 849, 890-91.

71. *Id.* at 890 (citing Case 286/82 & 26/83, *Luisi v. Ministero del Tesoro*, 1984 E.C.R. 377, [1985] 3 C.M.L.R. 52 (1984)).

72. Art. *supra* note 65, at 123 (citing Case 15/81, *Schul v. Inspecteur der Invoerrechten en Accijnzen*, 1982 E.C.R. 1409, 1431-32).

73. The court concluded with this statement: "Consequently, the answer to the national court's first question must be that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 EEC." *Case 159/90*, [1991] 3 C.M.L.R. at 890.

In *Cowan v. Tresor Public*,⁷⁴ the ECJ established that providers of services have the right under the EEC Treaty to offer those services; and accordingly, citizens of member states have the right to receive those services.⁷⁵ However, the court in *S.P.U.C. II* held that the link between the distribution of information in Ireland and the abortion procedures occurring in other countries "is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of Article 59."⁷⁶ Prohibiting the distribution of abortion service information does not curtail the free movement of services in such a way to hinder the stated goals of the EEC Treaty.⁷⁷ Therefore, article 62, which prohibits countries from introducing restrictions on the movement of services, does not apply since it only pertains to restrictions which fall within the scope of article 59.⁷⁸

The court in *S.P.U.C. II* noted that the denial of information could potentially affect the freedom to provide services.⁷⁹ In deciding whether the services would be impaired enough to invoke the Treaty, the court examined the nature of the service. This case deals with two important rules, both stemming from fundamental rights: first, the right under Community law to provide services; and second, the right to life of the unborn child which is protected under the Irish Constitution. Choices regarding public policy and morality are permitted under Community law and may serve as a basis to dismiss provisions infringing on the member states' concepts of morality.⁸⁰ The framers of the EEC Treaty anticipated such claims and included them in articles 36, 56, and 66 by making references to concepts of morality and public policy.⁸¹ The court concluded that this issue sufficiently falls outside the scope of Community law, entitling Ireland to interpret its own law to see if it comports with fundamental rights such as the freedom of speech.⁸²

74. Case 186/87, [1990] 2 C.M.L.R. 613 (1989) (Fr.).

75. *Id.* at 631.

76. Case 159/90, *Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, [1991] 3 C.M.L.R. 849, 891.

77. *Id.* at 891-92.

78. *Id.* at 892.

79. *Id.* at 891 (citing Case 362/88, *GB-INNO-BM v. Confederation du Commerce Luxembourgeois*, [1990] 1 E.C.R. 667, [1991] 2 C.M.L.R. 801).

80. Art. *supra* note 65, at 124.

81. EEC Treaty, *supra* note 10, arts. 36, 56, 66.

82. Case 159/90, *Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan*, [1991] 3 C.M.L.R. 849, 892.

5. Protocol No. 17

Before the signing of the Treaty on European Union in February 1992, Ireland wanted to be guaranteed that the decision in *S.P.U.C. II* would insulate itself from any pro-abortion law stemming from any provisions of the new treaty.⁸³ Ireland persuaded the European Union to adopt Protocol No. 17 which states, "Nothing in the Treaty on the European Union or in the Treaties establishing the European Communities or in the Treaties or Acts modifying or supplementing those Treaties shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland."⁸⁴ This provision was designed to prevent Community law from affecting Ireland's abortion policy after the new treaty went into effect on November 1, 1993.⁸⁵ However, the effect of this provision was unclear.

The question remained as to what extent Ireland was to be insulated from European law. The new provision could be interpreted as forbidding women from both obtaining information regarding abortion services and traveling abroad for the purpose of obtaining an abortion.⁸⁶ The provision could also be more narrowly interpreted to protect anti-abortion law by forbidding the distribution of abortion information in Ireland without having any effect on the right to travel, which is guaranteed under EC law.⁸⁷ The effect of the ECHR decision in *Open Door* suggests that the European Union favored the narrower version,⁸⁸ and in light of the confusion raised by the decision in *Attorney General v. X*,⁸⁹ the Irish government felt compelled to enact some

83. KELLY, *supra* note 19, at 795.

84. Protocol 17, *as quoted in* KELLY, *supra* note 19, at 795.

85. KELLY, *supra* note 19, at 796.

86. *Id.*

87. *Id.*

88. The Irish government wanted to amend Protocol 17 to clarify the terms and affirm Irish citizens right to travel, however the other European Union members would not allow this fearing an amendment would lead to other amendments to the treaty. Ireland settled for the issuance of the Solemn Declaration which provides,

The High Contracting Parties to the Treaty on European Union signed at Maastricht on the 7th day of February 1992

Having considered the terms of Protocol No. 17 to the said Treaty on European Union which is annexed to that Treaty and to the Treaties establishing the European Communities

Hereby give the following legal interpretation:

that it was and is their intention that the Protocol shall not limit freedom either to travel between member States or, in accordance with conditions which may be laid down in conformity with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in member States

Solemn Declaration, *as quoted in* KELLY, *supra* note 19, at 804.

89. [1992] 1 I.R. 1, 1992 I.L.R.M. 401 (Ir. S.C.).

protective measures reaffirming Irish citizens' fundamental rights to expression and travel.

C. *Attorney General v. X*

The monumental holding of *Attorney General v. X* cannot be underestimated because its reasoning led to the resolution of many unanswered questions regarding the right to information and the right to travel. It also foreshadowed the holding of *In re Article 26*.⁹⁰ In *Attorney General v. X*, a young schoolgirl, who had allegedly been raped, desired an abortion to be performed outside the jurisdiction because the birth of the child posed a threat to the girl's life.⁹¹ The Irish Supreme Court prioritized the conflicting rights to life of the mother and the unborn child she carried by favoring the mother.⁹²

1. The Lower Court

In the case's earlier phase, the Irish High Court, comports with the reasoning of *Open Door*, granted a permanent injunction restraining the girl from leaving the country.⁹³ The court reasoned that although the Oireachtas failed to legislate on the issue of conflicting rights, it was clear from the language of article 40, section 3 of the constitution that any means of destroying the life of an unborn child was repugnant to the laws and policy of Ireland.⁹⁴ Furthermore, it was not definitively certain that the mother would lose her life as a result of the delivery; yet, it was certain an abortion would destroy the fetus.⁹⁵ The court also referred to the EEC advisory opinion and maintained that the court was not obligated to permit women to travel to other countries for the purpose of obtaining an abortion under articles 59 and 60 of the EEC Treaty because anti-abortion sentiment was deeply embedded in Ireland's history and laws.⁹⁶

90. The court in *In re Article 26* relied heavily on this case because it directly dealt with the question of information provided within Ireland for the purpose of obtaining an abortion, and for the first time, the court held that such information would be permitted. Ironically, this case (considered the most controversial case in Irish history before Article 26) was submitted to the Irish court ten days after the signing of the Treaty on European Union at Maastricht. KELLY, *supra* note 19, at 796.

91. *Attorney Gen. v. X*, [1992] 1 I.R. 1, 1992 I.L.R.M. 401, 401 (Ir. S.C.). The girl threatened that she would commit suicide if she were forced to continue the pregnancy. KELLY, *supra* note 19, at 797.

92. *Attorney Gen.*, 1992 I.L.R.M. at 421.

93. *Id.* at 401.

94. *Id.* at 420.

95. *Id.*

96. *Id.* at 402.

2. The Mother's Life Shall Prevail

Surprisingly, the Irish Supreme Court reversed the high court's decision and discharged the injunctions.⁹⁷ The court's methodology differed from the lower court's because it did not offer the preferred result and then find a way to reach that result. Rather, it adopted a positivist position and examined the language of the constitution to arrive at its conclusion.⁹⁸ Article 40, section 3(3) of the Irish Constitution states, "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."⁹⁹ This language, the court asserts, may only be interpreted to mean that individuals (citizens) are afforded a fundamental right to life, and the "courts were the custodians of these rights."¹⁰⁰

In true vindication of these rights, and settling the conflicts between them, the court must consider the life of the mother, her role in the family, the dependence of persons on her, and her interaction with people in the world.¹⁰¹ In light of these considerations, it would "insufficiently vindicate the mother's right to life" to require that the birth pose an immediate and definite risk to her.¹⁰² The supreme court adopted a less stringent test than the high court, requiring that there must be a "probability that there is a real and substantial risk to the [mother's] life."¹⁰³ The court found that the risk of suicide was sufficient to establish a threat to the mother's life.¹⁰⁴

3. The Right to Travel and the EEC

The supreme court found it necessary to then prioritize rights, not only between the lives of the mother and the unborn child, but also between other rights expressly and implicitly stated in the constitution, specifically the right to travel versus the right to life.¹⁰⁵ In the consti-

97. *Attorney Gen.*, 1992 I.L.R.M. at 461. The Irish Supreme Court wanted to submit the case to the ECJ for a preliminary ruling. However, this would have delayed the case for eighteen months or so which the court was not willing to do. KELLY, *supra* note 19, at 799.

98. *Attorney Gen.*, 1992 I.L.R.M. at 424-25. The court explains that it is the judge's role to interpret the constitution in accordance with the prevailing concepts of prudence, justice, and charity. The judge should not interpret the constitution in accordance with the ideas behind the constitution at the time it was drafted because the constitution must adapt to changes in sentiment among the people of Ireland. *Id.*

99. IR. CONST. art. 40, § 3(3).

100. *Attorney Gen.*, 1992 I.L.R.M. at 423.

101. *Id.* at 425.

102. *Id.*

103. *Id.* at 427.

104. *Id.*

105. *Attorney Gen.*, 1992 I.L.R.M. at 427.

tution, there is an implied right to travel stemming from the expressed right to liberty. The supreme court recognized that with liberty comes the freedom to be free from encumbrances, and from this right stems a right to travel.¹⁰⁶ However, the court found that in a free society, where rights may conflict, it is sometimes necessary to establish a hierarchy of rights.¹⁰⁷

The freedom to travel is guaranteed in the constitution and so is the right to life. When the two concepts are "in stark conflict"¹⁰⁸ with each other, it is clear that the right to life takes precedence over the right to travel.¹⁰⁹ In saying this, a mother cannot vindicate her right to travel over an unborn child's right to life.¹¹⁰ Even though this ideology conflicts with the stated goals of the EEC, in light of the magnitude of the public policy considerations, the court explained that this issue should not be resolved in any other way.¹¹¹

The supreme court decision in *Attorney General v. X* left many questions unanswered, particularly the level of protection awarded to the fundamental rights of freedom to travel and freedom of expression. In light of the *Open Door* decision, and the right to have access to services protected under EC law, the Irish courts were slowly being forced to clearly reconcile these rights with the right to life of the unborn. As part of the campaign to support the European Union, the Irish government added amendments to the constitution that were designed to protect the right of freedom to travel and the right to information.

One such amendment was added to article 40, section 3(3),¹¹² which also protects the right to life of the unborn. After the passage of this amendment, courts were still able to issue injunctions preventing women from obtaining abortions in other countries because although the newly guaranteed rights were designed to reaffirm fundamental personal liberties of Irish citizens, they were not designed to diminish the right to life of the unborn.¹¹³ In the case of *In re Article 26*, the supreme court looked at the language of the constitution to find that by implementing the legislation protecting women's fundamental freedoms

106. *Attorney Gen.*, 1992 I.L.R.M. at 428.

107. *Id.* at 429.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Attorney Gen.*, 1992 I.L.R.M. at 433.

112. IR. CONST. art. 40, § 3(3). Sub-section 3 provides, "This subsection shall not limit freedom to travel between the State and another state. This subsection 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." *Id.*

113. KELLY, *supra* note 19, at 807.

was to bridge the gap so that the rights of the mother and the rights of the unborn child could finally coexist, but at the expense of Ireland's anti-abortion tradition.

IV. CASE ANALYSIS

A. *The Facts*

The President of Ireland submitted the Information Bill¹¹⁴ to the Irish Supreme Court on March 18, 1995.¹¹⁵ The Information Bill "amend[ed] the Indecent Advertisements Act [of] 1889 and the Censorship of Publications Acts of 1929 to 1967"¹¹⁶ to allow information regarding the termination of pregnancies legally performed outside the state to be provided to women and the general public.¹¹⁷ The Information Bill was referred to the supreme court pursuant to article 26 of the Irish Constitution¹¹⁸ which provides that the President may refer any bill to the supreme court for a determination of whether a bill is repugnant to any other provision of the constitution.¹¹⁹ The power to obtain advice from the supreme court, or from the people through a referendum, is unique to this jurisdiction.¹²⁰ However, once a bill has been submitted to the supreme court, article 26 forbids the President from signing it if the court concludes that constitutional provisions are jeopardized by the introduction of the bill in question.¹²¹

Considering the nature and controversy surrounding the Information Bill, the strong opposition to it, and the magnitude of the decision, the President took an unusual approach in staging the supreme court argument by appointing two groups, each advocating opposite positions in reference to the bill.¹²² One group argued on behalf of the child's

114. *In re Article 26, supra* note 4, at *3-6 (summarizing the Regulation of Information Bill).

115. *Id.* at *2.

116. *Id.* (quoting the Regulation of Information Bill).

117. *Id.*

118. IR. CONST. art. 26. Article 26 procedure has been used only eight times since the 1937 Irish Constitution. KELLY, *supra* note 19, at 214.

119. IR. CONST. art. 26, § 1(1). Section 1(1) provides:

The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or any provision thereof.

Id.

120. DOOLAN, *supra* note 17, at 29.

121. IR. CONST. art. 26, § 3. Sub-section 1 of section 3 provides, "In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill." *Id.*

122. *In re Article 26, supra* note 4, at *2.

right to life, and the other group argued on behalf of the mother's right to life.¹²³ Neither team was "limited in the making of any arguments against the constitutionality of the Bill or any provision thereof."¹²⁴ The oral hearing on the matter began on April 4, 1995.¹²⁵ On May 12, 1995, the supreme court handed down its eighty page opinion, holding unanimously that the Information Bill was not repugnant to any provision in the constitution.¹²⁶

B. Constitutional Interpretation and the Presumption of Constitutionality

The court began its analysis of the constitutionality of the Information Bill by making two preliminary and crucial decisions. First, in determining whether the bill is repugnant to the provisions enumerated in the Irish Constitution, the court stated that they would evaluate the content of the Information Bill under a presumption of constitutionality.¹²⁷ Former decisions have required that where the President refers a bill pursuant to article 26 of the constitution to the supreme court, the court must apply the presumption of constitutionality.¹²⁸ The principle is based on the fact that the bill had already been passed by both houses of the Oireachtas, and was therefore entitled to that presumption.¹²⁹ This standard requires that where two interpretations of the constitutionality of the bill are possible, the interpretation finding that the bill and constitution are compatible must be adopted.¹³⁰

The second decision made by the court, which had a direct impact on its final decision, was that when interpreting the constitution, the

123. *Id.*

124. *Id.*

125. *Id.* at *3.

126. *Id.* at *30; *see also* Parkin, *supra* note 31.

127. *In re Article 26*, *supra* note 4, at *7.

128. *Id.* Article 34, subsection 3 of the constitution provides that a Bill which is introduced under article 26 and passes the test of constitutionality is entitled to permanent immunity, and even upon a change of condition, it cannot be challenged. IR. CONST. art. 34, § 3; *see also* KELLY, *supra* note 19, at 218.

129. *In re Article 26*, *supra* note 4, at *7.

130. *Id.* The court provides:

(1) That it must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by the Bill are intended [to] be conducted in accordance with the principles of constitutional justice, and

(2) that as between two or more reasonable constructions of the terms of the Bill the construction that is in accordance with the provisions of the Constitution would prevail over any construction that is not in accordance with such provisions.

Id. (quoting from *East Donegal Co-operative Livestock Marts v. Attorney Gen.*, 1970 I.R. 317 (Ir. S.C.)).

court would adhere to the principle of positive law.¹³¹ In most of its past decisions considering abortion law, the supreme court began its decision with the outcome in mind derived from principles of natural law.¹³² The court carried anti-abortion policies throughout its analysis and interpreted the constitution so as to validate the decision already made pursuant to natural law. In *Open Door*, the court asserted that "the natural law is the fundamental law of the state and as such is antecedent and superior to all positive law, including the Constitution."¹³³ The supreme court in *In re Article 26* rejected this argument by re-examining its role prescribed by the constitution, and ultimately departed from traditional "natural law" adhered to in previous abortion cases.¹³⁴

Upon examination of the text of the constitution, the supreme court held that the constitution is the supreme law of the state.¹³⁵ Article 5 of the constitution states that "Ireland is a sovereign, independent, democratic state."¹³⁶ Article 6 provides that as a sovereign and democratic state, the government derives its powers, "under God, from the people;"¹³⁷ therefore, the government is in the hands of the people, and the constitution defines and limits the powers assigned to the government.¹³⁸ Article 15, section 1, sub-section 1 of the constitution enumerates this principle by stating that "[t]he Oireachtas shall not enact any law which is in any respect repugnant to the Constitution or any provision thereof."¹³⁹ Article 28 provides that the President must also refer to the constitution as well.¹⁴⁰ Finally, article 35, section 2 states that "[a]ll judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."¹⁴¹ In sum, all three branches of the government derive their

131. *Id.* at *17.

132. *Id.* at *18.

133. *Id.* at *17. The quote continues:

that it is impermissible for the People to exercise the power of amendment of the Constitution by way of variation, addition or repeal, as permitted by Article 46 of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution and if they purport to do so, such amendment had no effect.

Id.

134. *In re Article 26*, *supra* note 4, at *18.

135. *Id.*

136. IR. CONST. art. 5.

137. *Id.* art. 6.

138. *Id.*

139. *Id.* art. 15, § 1.

140. *Id.* art. 28, § 2. Section 2 provides, "The executive power of the State shall, subject to the provisions of this Constitution be exercised by or on the authority of the government." *Id.*

141. *Id.* art. 35, § 2.

power solely from the constitution and are subservient to it.

The judges also dedicated a substantial portion of their decision in *In re Article 26* to analyzing their role as interpreters of the constitution and declared that they may not choose among various beliefs.¹⁴² Rather, they must turn to the constitution, which outlines their duties.¹⁴³ The court concluded that when determining the fundamental rights granted to citizens by the constitution, judges are required to read the language in light of the principles of prudence, justice, and charity.¹⁴⁴ Moreover, the court recognized that "from time to time the prevailing ideas of these virtues may be conditioned by the passage of time: no interpretation of the Constitution is intended to be final for all time."¹⁴⁵ In other words, it is clear that "rights given by the Constitution must be considered in accordance with concepts of prudence, justice, and charity, which may gradually change or develop as society changes and develops and which fail to be interpreted from time to time in accordance with prevailing ideas."¹⁴⁶

The court envisioned a constitution which can adapt to changing ideas and social policies; and having established this, it began its interpretation of the constitution and the Information Bill free from the weight of past decisions regarding abortions. This set the stage for the radical departure the supreme court took from traditional abortion law.

C. Article 14

The passage of the Information Bill would not be possible without the enactment of article 14¹⁴⁷ of the constitution.¹⁴⁸ This article bridges the gap between the Information Bill, which allows distribution of information pertaining to abortion services abroad, and article 40, which protects the fundamental right to life of the unborn.¹⁴⁹ Article 14 states, "this sub-section [referring to article 40, section 3, sub-section 3] 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."¹⁵⁰ This provision enables the Information Bill to co-exist with the right to life of the unborn because the information regarding abortion services sought by

142. *In re Article 26*, *supra* note 4, at *20.

143. *Id.*

144. *Id.* at *21.

145. *Id.*

146. *Id.*

147. IR. CONST. art. 14.

148. *In re Article 26*, *supra* note 4, at *7.

149. IR. CONST. art. 40. The amendment was intended to overrule the decisions in *Open Door* and *S.P.U.C. KELLY*, *supra* note 19, at 790.

150. IR. CONST. art. 14.

pregnant women only pertains to legal services outside the state and does not encourage illegal abortions within Ireland.¹⁵¹

The supreme court in *In re Article 26* acknowledged that before the enactment of article 14, information regarding the termination of pregnancies was illegal because it presented a direct conflict with the eighth amendment to the constitution providing that unborn children have a fundamental right to life that the state vows to protect and defend.¹⁵² The court in *Open Door*¹⁵³ considered the right to information and its effect on the right to life of unborn children and held that allowing assistance to women to obtain abortion was in direct conflict with the eighth amendment and was therefore unlawful.¹⁵⁴ This judgment was affirmed by the Irish Supreme Court in the *S.P.U.C.* case.¹⁵⁵ Although the issue was framed for the purpose of invoking the EEC Treaty, the *In re Article 26* court held that the judgment in "the Open Door Counseling case is not open to any other interpretation."¹⁵⁶

This issue was further considered in *Attorney General v. X*,¹⁵⁷ but this decision threw a wrench in the supreme court's reasoning in previous cases making the outcome of *In re Article 26* inevitable. The court in *In re Article 26* held that

having regard to the true interpretation of the Eighth Amendment, termination of the life of the unborn is permissible if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health of the mother and that that risk can only be avoided by the termination of her pregnancy.¹⁵⁸

The court further interpreted this to mean that "once the termination of the pregnancy is permissible the mother has the right to all relevant information necessary to enable her to have the pregnancy terminated."¹⁵⁹ This interpretation of the constitution is embodied in article 14 which, as the court notes, clearly states that information relating to a

151. *In re Article 26*, *supra* note 4, at *15. The court states, "The purpose of this Amendment was to remove the inhibition placed on the granting of information with regard to these services relating to the termination of pregnancies, by the decisions of the Supreme Court based on the provisions of Article 40, section 3, sub-section 3 of the Constitution." *Id.*

152. *Id.* at *9.

153. Attorney Gen. *ex rel.* Soc'y for the Protection of Unborn Children (Ir.) Ltd. v. Open Door Counseling Ltd., 1988 I.R. 619 (Ir. S.C.), available in LEXIS, Ireln Library, CASES File.

154. *Id.* at *9.

155. Society for the Protection of Unborn Children (Ir.) Ltd. v. Grogan, [1994] 1 I.R. 46, [1990] 1 C.M.L.R. 689 (Ir. H. Ct. 1989).

156. *In re Article 26*, *supra* note 4, at *12.

157. [1992] 1 I.R. 1, 1992 I.L.R.M. 401 (Ir. S.C.).

158. *In re Article 26*, *supra* note 4, at *13.

159. *Id.* at *14.

lawful service must be available to those desiring it.¹⁶⁰

D. The Rights to Life of the Mother and the Unborn Child

The court in *In re Article 26* emphasized that neither the Information Bill nor article 14 affect the constitution other than in relation to the right to information.¹⁶¹ The provisions contained in the bill are designed neither to promote nor to encourage abortions in Ireland.¹⁶² The Information Bill includes a substantial number of provisions which directly relate to the manner in which abortion information will be provided so as not to sanction abortion practices. For example, section 8(1) provides that no person giving information shall arrange or schedule the abortion abroad.¹⁶³ Section 7(1) provides that it is unlawful for persons to receive financial compensation or any other benefit for providing information regarding abortion services abroad.¹⁶⁴ These safeguards are essential in determining the constitutionality of the Information Bill because their absence would endanger the delicate balance between the bill and the eighth amendment to the constitution.¹⁶⁵

Another element of the Information Bill worth noting is that the only person entitled to receive such information is a woman.¹⁶⁶ Counsel for the opponents to the Information Bill pointed out that under this definition, husbands would not be notified that their wives were seeking such information.¹⁶⁷ They also pointed out that the definition does not exclude minors.¹⁶⁸ The court acknowledged this interpretation and applied the presumption of constitutionality which requires that if a provision of the Information Bill can be interpreted two ways, the

160. *Id.* at *15. This also comports with the provisions of the EEC Treaty.

161. *Id.* at *24.

162. *Id.*

163. *In re Article 26*, *supra* note 4, at *5 (quoting the Regulation of Information Bill, § 8(1)). This section states:

It shall not be lawful for a person to whom Section 5 applies of the employer or principal of the person to make an appointment or any other arrangement for or on behalf of a woman with a person who provides services outside the State for the termination of pregnancies.

Id.

164. *Id.* at *5 (citing the Regulation of Information Bill, § 7(1)). This section provides that it is unlawful "[t]o obtain directly or indirectly any financial or benefit or advantage from any person who provides services outside the State or who has an interest in a body providing such services." *Id.*

165. *In re Article 26*, *supra* note 4, at *27.

166. *Id.* at *28.

167. *Id.*

168. *Id.*

interpretation of constitutionality must be adopted.¹⁶⁹ The court found that this provision does comport with the provisions of the constitution because the information is allowed for those who will use it.¹⁷⁰ Any adjustment to the provision that would allow for husbands to be notified would upset the balance of rights by infringing on the rights of the mother.¹⁷¹

The Information Bill manages to resolve the difficult issue of conflicting rights of the unborn child and the mother by protecting the fundamental right to life of the unborn within Ireland while protecting a woman's right to information and to travel outside Ireland for the purpose of obtaining a lawful abortion abroad. Therefore, the supreme court ruled that the Information Bill was not repugnant to any provisions contained in the Irish Constitution.¹⁷²

V. CONCLUSION

The decision in *In re Article 26* represents a divergence from tradition in two respects. First, the opinion itself overturned centuries of anti-abortion policies in Ireland by allowing women access to information provided for the sole purpose of obtaining abortions. Although this decision only liberalizes abortion indirectly, the Catholic Church has expressly opposed the passage of the Information Bill, fearing its enactment has set off the first domino in legal and constitutional reasoning which will end with legally permitted abortions in Ireland. Second, the method by which the court arrived at its conclusion has great legal significance in that it clarifies the principles of Irish law and the method by which the Irish Constitution will be interpreted. The court held that the constitution is the supreme law of the land and all government entities are subordinate to it. This break from the traditional natural law approach directly affected the outcome of *In re Article 26*. It is surprising, in light of the complexity and controversy surrounding this case, that the court's decision was unanimous. However, the clarity and simplicity in the logic of the opinion reveals that, at this point in history, Ireland is prepared to concede to some principles of the world outside its Catholic tradition.

The court apparently weighed heaviest the opinion of the ECJ and the holding of *Attorney General v. X* when considering the constitutionality of the Information Bill. Although the ECJ refrained from requiring Ireland to allow abortion information about services abroad, its determination that Irish law could potentially conflict with the princi-

169. *Id.*

170. *In re Article 26*, *supra* note 4, at *29.

171. *See id.*

172. *Id.* at *30.

ples of the EEC and the opinion of the ECHR clearly affected the court's willingness to conform to intra-community policies, and to acquiesce to the growing uniformity among the European states. *Attorney General v. X* best represents the tension between the conflicting rights of the unborn child and the mother, and the rights to information and travel. This case provided a bridge by which the supreme court in *In re Article 26* could combat the previous decisions while appearing to simply expand on reasoning already founded in *Attorney General v. X*. Although the *In re Article 26* was a radical departure, it was masked by the rationality, timeliness, and ultimate constitutionality of the Information Bill.

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