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The Irisch Constitution - an examination of selected issues

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1. Introduction

The current version of the Irish Constitution adopted in 1937 is an expansive document which lays down the system by which the Irish state is governed, how the court system operates and significantly, lists a number of fundamental rights which all citizens are entitled to enjoy. Unlike the constitutions of some other countries[1] the Irish Constitution is a written document, adopted as such by the people of Ireland in a referendum in 1937[2]. The importance of the Constitution as a document of the people is reflected by the fact that it can only be amended by referendum[3]. It is, subject to the provisions of European Union law, the supreme source of law in the country rendering null and void any measure with which it comes into conflict[4]. Interestingly, it is written in both the Irish language and in English, with the Irish version taking precedence in the event of any linguistic conflict[5].

Most of the Constitution is given over to administrative and executive provisions. The Constitution also gives protection to what it describes as

[1] The United Kingdom is a notable example. It is noted that while Ireland enjoys a written Constitution the distinction of having the first written constitution in Europe goes to Poland, with it's Constitution of 1791.

[2] An earlier constitution of 1922 was replaced – largely for political reasons – in its entirety by the 1937 Constitution.

[3] The Irish Constitution has been amended 25 times as of 2008.

[4] The question of Constitutionality is considered prior to the adoption of legislation by both houses of Parliament and if necessary by consideration of a Constitutional Committee on referral by the President. Once a piece of legislation is adopted it's constitutionality can be tested by the Supreme Court only.

[5] Article 8.1 of the Irish Constitution.

[6] The "Fundamental Rights" provisions are found in articles 40–44 of the Constitution.

"fundamental rights"[6]. Included in these are personal rights (article 40)[7], measures relating to the family (article 41), the right to education (article 42), personal property (article 43) and the right to freedom of religion (article 44). In keeping with the traditional formulation of constitutional rights in most jurisdictions, the rights outlined in the Irish Constitution are not absolute, but rather can be limited subject to public order or morality or the public good[8]. Most of the personal rights outlined in article 40 and the right to freedom of religion outlined in article 44(2) are guaranteed to citizens only, the exception to this is the right to life provision in article 40, which does not refer to citizenship. On the other hand, the rights of the family, rights to education and the right to personal property make no reference to citizenship.

Despite this commendable guarantee of rights, the Irish Constitution is nonetheless very much a reflection of the religious society in which it was created and continues to operate. Illustrative of this is the Preamble of the Constitution with its specific references to Jesus Christ and the Holy Trinity[9]. This can be contrasted with the Polish Constitution which includes both believers and none-believers in it's Preamble, referring to "those who believe in God [...] and those who do not share such faith"[10]. In some cases in the Irish context this explicit reference to a Catholic ideology has led to a restrictive interpretation of the Constitution[11] but it would be wrong to think that this is always the case, as the courts have been willing to give a broad interpretation to Constitutional rights[12].

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[7] Included in the Personal rights provision is the right to be held equal before the law (article 40.1), a guarantee that the State will protect the personal rights of the citizen including but not limited to the right to life, the right to a good name, and property rights (article 40.3.1 and article 40.3.2), a guarantee that the State will protect the right to life of the unborn (article 40.3.3), the right to liberty (article 40.4), a statement that the dwelling of every citizen is inviolable subject to the law (article 40.4), the right to free expression, peaceful assembly and the formation of associations and unions subject to public order and morality (article 40.6).

[8] Such a qualification exists also in the Polish Constitution of 1997 which allows in article 33(3) for the limitation of constitutional rights and liberties by legislature where required for the protection of society.

[9] The Preamble states "In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution".

[10] Preamble, Polish Constitution 1997.

[11] See in particular *Norris v Attorney General* (1984) I.R. 84 below.

[12] See for instance *McGee v Attorney General* (1974) I.R. 284 and *Attorney General v X* (1992) 1 IR 1.

In this paper only selected aspects of the Constitution will be addressed, those dealing with the family (including the definition of family, the right to contraceptives and the right to divorce), the right to life (including issues of abortion and the right to die) and the provisions related to the adoption of international law (including our membership of the European Union). The chosen articles are perhaps the most controversial, and may in some aspects, find mirror images in the Polish legal landscape.

2. Family

The provisions regarding the family in the Irish Constitution, contained in article 41, are far-reaching and largely reflective of a conservative Catholic ideology. Article 41 places a positive obligation on the state to "protect the Family"[13], which it recognises "as the natural primary and fundamental unit group of Society, and as a moral institution" possessing "inalienable and imprescriptible rights, antecedent and superior to all positive law"[14]. Thus not only is the role of the family seen to be fundamental to Irish society but the family is described as a unit possessing a special moral authority, superior to other "unit groups" and worthy of special protection by the State. This would not pose any particular difficulties if the Constitutional family was broadly defined and inclusive of all household units. As we shall see however, the definition given to a Constitutional family is much narrower, encompassing only those who are married or are the children of a married unit. This in essence is very much a reflection of the same Catholic ideology that underpinned the preamble to the Irish Constitution as described in the introduction. The ramifications of this narrowly drawn definition are described below.

Family based on marriage

Article 41 defines the family as being based on marriage and places a positive obligation on the State to not only protect the family but to protect the institution of marriage on which the family is founded, stating that,

"The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack"[15].

The Constitution Review Group – a body established by the Government to review the provisions of the Constitution and suggest amendments – reported in 1996 and addressed this narrow definition of 'family'. Despite acknowledging the changing composition of Irish families, which now inclu-

[13] Article 41.1.2.
[14] Article 41.1.1.
[15] Article 41.3.1.

des increasingly larger numbers of co-habiting and single parent families, the Review Group decided against any amendment of the current constitutional definition[16].

In Ireland, marriage is legally only available to opposite sex couples[17]. Constitutional protection therefore is only afforded to married heterosexual couples and their children. The practical effect of this distinction was seen in the case of *O'B v S*[18]. In this case legislation, which in it's effect discriminated against non-marital children was found to be constitutional as it had as it's aim the protection of the children of a married union. The legislative provisions at issue were ss 66 and 67 of the Succession Act 1965 which precluded a non-marital child from automatically inheriting in the same way as marital children on the intestacy of a parent. The Court held that this did not offend the right to be treated equally[19] as it's purpose was to "place members of a family based upon marriage in a more favourable position than other persons in relation to succession to property" as the State was entitled to do by virtue of article 41. It is indicative of an evolving Irish society that this particular provision was replaced by a later piece of legislation which removed the distinction between children based on the marital status of their parents[20]. Despite this positive statutory development it remains the case that the protection afforded by Constitutional Family rights do not extend to non-marital children on an equal footing with the children of married parents[21].

In addition to the negative effect the current wording of the family provision has on some of the nation's children, the wording has also resulted

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[16] *Tenth Progress Report* (2006, Pn A5/1784), pp. 121-129. The Central Statistics Office on the other hand, which is responsible for gathering statistics on Irish society, defines a "Family Unit" for the purposes of data collection much more broadly as comprising: (1) a husband and wife or a cohabiting couple; or (2) a husband and wife or a cohabiting couple together with one or more usually resident never-married children (of any age); or (3) one parent together with one or more usually resident never-married children (of any age)". See [online] <www.cso.ie/census/census2006results/volume_3/entire_volume_3.pdf> at p. 143, visited on 5th September 2008.

[17] This position has recently been affirmed, see *Zappone and Gilligan v Revenue Commissioners, and ors* (Unreported, High Court, 13 Dec 06, Dunne J.) currently on appeal to the Supreme Court.

[18] *O'B v S* (1984) IR 316.

[19] This right is enshrined in article 40.1 which reads "All citizens shall, as human persons, be held equal before the law".

[20] Section 29 Status of Children Act 1987.

[21] More recently, following on calls for the inclusion of a specific constitutional provision to protect children's rights, the Irish Government has drafted the Twenty eight Amendment of the Constitution Bill 2007 which contains the Government's proposals on constitutional provisions in respect of the child. The Joint Committee on the Constitutional Amendment on Children, established in 2007, is due to report on 30th November 2008 on the implementation of these proposals. See [online] <www.omc.gov.ie/viewtxt.asp?fn=%2Fdocuments%2Flegislation%2FconstRef.htm>.

in stagnating efforts to offer protection to co-habiting couples, including heterosexual couples. Early caselaw in this area had focused on the legitimacy of financial supports for unmarried couples. In a number of cases dating from the 1970s taxation laws favouring co-habiting couples were struck down as being an attack on marriage (thus failing to adequately protect the institution of marriage). In the case of *Murphy v Attorney General*[22] for instance a provision of the Income Tax Act 1967[23] which treated the income of two married people as a single income (thereby pushing their taxable income into the higher tax bracket) was deemed to be unconstitutional. This finding was upheld in later cases, and any attempt to change this position has proven extremely contentious.

More recently, a strong lobby to allow for the legal recognition of non-martial unions has led to efforts to draft a Civil Partnership Bill. To date – September 2008 – only the General Scheme of the proposed Bill has been published[24]. It has, unsurprisingly, resulted in strong opposition from more conservative quarters who argue that to allow legal recognition of non-marital or homosexual unions is to attack and undermine the Constitutional family[25]. While the argument is a familiar one the proposed Bill should not cause undue concern. The aims of the Bill as currently worded in the General Scheme are relatively modest. It offers a mechanism by which homosexual couples can register their partnerships and avail of some of the financial benefits available to married couples. As currently formulated, it will not allow for marriage, thus avoiding any possibility of such unions attracting Constitutional protection. Although it is unlikely to silence critics, for our purposes it means that the definition and understanding of the Constitutional family ought to remain unchanged.

As can be seen from the discussion above, there has been a reluctance from a parliamentary perspective to introduce any amendment to the definition of the Constitutional family. A recent High Court case however, has indicated a more flexible approach by the courts to recognising atypical unions. In *Mc D. v L & Anor*[26] the court was willing to recognise a lesbian couple as the "de facto" parents of a child that was biologically the child of

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[22] *Murphy v Attorney General* (1982) IR 241.

[23] Section 192.

[24] As a preliminary step the Department of Justice has published the General Scheme of the Bill and has invited contributions from the public. See [online] <www.justice.ie/en/JELR/Pages/General_Scheme_of_Civil_Partnership_Bill>.

[25] For an alternative view of the effect of protection for non-marital unions on marriage see M.V. Badgett, *Will Providing Marriage Rights to Same Sex Couples Undermine Heterosexual Marriage?*, Sexuality Research and Social Policy Journal of NSRC 2004, 1(3), pp. 1–10. This study, based on an examination of five European countries where "marriage like" rights exist for same-sex couples, found that giving such rights had no effect on heterosexual marriage.

[26] *Mc D. v L & Anor* (2008) IEHC 96.

only one of them. The father, who had sought to establish custody rights was on the other hand, described by the court as being in the position of a "favourite uncle". It is significant in understanding how the court was willing to make such a radical categorisation that the biological parents of the child in this case were unmarried and thus unaffected by the Constitution. Had they not been, it is certain that any recognition of the right of the non-biological lesbian parent would have been seen as a direct attack on the Constitutional family and therefore prohibited.

The Constitutional family and divorce

Until 1997 it was not possible to obtain a divorce in Ireland, the dissolution of marriage being strictly prohibited[27]. A failed attempt was made in 1986 to introduce divorce into Irish society with almost twice as many voting against the provision as for it (over 900,000 against as opposed to over 500,000 in favour). A subsequent attempt to allow for divorce in 1995 succeeded however, albeit with the slightest of majorities (less than 10,000 votes). Following this referendum article 41 of the Constitution was amended and the Family Law (Divorce) Act 1996 introduced, outlining the provisions governing obtaining a divorce in Ireland. The relevant article, article 41.2, now reads,

"A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that

i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the five years,

ii. there is no reasonable prospect of a reconciliation between the spouses,

iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and iv. any further conditions prescribed by law are complied with".

As can be seen from this provision, dissolving a marriage in Ireland is no trivial matter. Couples must have been separated for at least four of the preceding five years, and adequate provision must have been made for the dependent spouse. In practice, what constitutes being "separated" for the purposes of divorce law has been given a wide definition by the courts, with some spouses being deemed to live separately when sharing the same house[28].

[27] There existed a mechanism by which foreign divorces could be recognised and legal separations were available, but these did not allow for remarriage. The Irish Census numbered the number of legally separated couples in 1996 as 78,005.

[28] *McA v McA* (2000) 1 IR 457.

Constitutional family and contraception

The issue of contraception in Ireland has had a difficult history. The Constitution itself does not have any express provision dealing with contraception but constitutional provisions have played a significant role in bringing about the liberalisation of the supply of contraceptives in Ireland. Our starting point is the Criminal Law Amendment Act 1935 which outlawed the importation or manufacture for sale of contraception in Ireland. This legislation remained in force until it was struck down as being unconstitutional following the infamous decision in *McGee v Attorney General*[29]. The plaintiff in this case, a 27 year old woman, had four children and had been advised by her doctor against having any more or risk very serious illness. To avoid pregnancy, and unable to obtain any contraception in Ireland, she imported spermicidal jelly. This was seized at customs however, quite legitimately, pursuant to the provisions of the Criminal Law Amendment Act. Mrs. McGee objected, stating that the act of seizing her supply of contraceptives offended her right to family under the Constitution (by virtue of it denying her the right to decide the size of her family) and her right to marital privacy (an unrecognised right at that time). She succeeded, largely on the basis of the court's decision to recognise a marital right to privacy as one of the unenumerated rights in article 40.3. Relevant also was her right to family which the court considered included the right to determine the size of her family. The use of the Constitution in this way, and the recognition by the judges of the Supreme Court of a right to marital privacy where none was expressly stated in the Constitution, is a superb example of the ability of the Constitution to respond to the needs of the society in which it operates. The expansive definition given to privacy by the Supreme Court which allowed for the offending legislation to be struck out was made possible by the fact that the Constitution was otherwise silent on the issue of contraception. As we have seen with regards to the family above, and as we shall see below in relation to abortion, such an expansive view is not possible where the Constitution expressly deals with the subject[30].

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[29] *McGee v Attorney General* (1974) I.R. 284.

[30] It may be of interest to note that while a right to marital privacy was recognised in this case a subsequent effort by a gay Senator, Senator Norris to expand on the fledgling right to privacy to cover a right of sexual privacy generally to include homosexual couples was denied in the case of *Norris v AG* (1984) I.R. 36. The majority view against recognising such a right was swayed by the Preamble to the Constitution. He ultimately succeeded in his case before the European Court of Human Rights however, and the law was subsequently changed.

3. Right to Life

Prior to 1983 the only constitutional provision governing the right to life was article 40.3, a broadly drawn article which requires the state to guarantee the "personal rights" of citizens, and to protect from "unjust attack" and "vindicate" *inter alia* the "life" of every citizen[31]. The death penalty had been abolished by statute for all offences by virtue of the Criminal Justice Act 1990. In 2001 a referendum was passed to remove from Parliament the right to reintroduce any further legislation permitting the death penalty[32]. The constitutional right to life provisions have, nonetheless, affected how the Irish courts have dealt with two very sensitive legal issues, the right to abortion and the right to die. Both these issues are discussed below.

The Constitution and abortion

Prior to 1983, the Irish Constitution made no reference to the deliberate termination of a pregnancy. The State was obliged constitutionally to protect and vindicate the life of every citizen (see above) and it was clear from a number of cases that this also included the life of the unborn. In *McGee v A.G.* for instance (discussed above) Walsh J. clearly sought to prevent the right of marital privacy recognised in *McGee* as extending to a right to terminate life, stating,

"[a]ny action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in questions".

In addition, sections 58 & 59 of the Offences Against the Person Act 1861 made illegal the procurement, carrying out, or aiding and abetting of an abortion.

Despite these measures, anti-abortion campaigners were concerned that the Constitution could be used to expand the right of marital privacy and pave the way to a recognition of a general right to privacy, which would include a right to procure an abortion. Their fears were based on the US experience where a recognition of a right to privacy ultimately led to the infamous and still controversial decision in *Roe v Wade*[33], which held that a right to privacy encompassed a right to terminate a pregnancy. Should a similar development occur in Ireland, so the reasoning went, this would render the Offences Against the Person Act of 1861 unconstitutional. In order to remove such a possibility anti-abortionists lobbied to have the right

[31] Article 40.3.2.

[32] The referendum to approve the Twenty-first Amendment of the Constitution Act 2001 took place in June 2001, the Act became law in March 2002.

[33] *Roe v Wade* (1973) 410 U.S. 113.

to life of the unborn explicitly protected in the Irish Constitution. What ultimately resulted was a provision that categorically protected the life of the unborn, but was in many ways more confusing than the initial position[34]. Significantly, it did not clarify what was to occur in cases where the life of the mother and that of the unborn child were in conflict, other than to say that both rights must be deemed "equal".

The relevant provision, article 40.3.3, reads as follows,

"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. *(Included in 1983)*

The first opportunity the Irish courts had to test the substantive issue of the right of the mother *vis a vis* the right of the unborn arose in the case of *Attorney General v X*[35] where the extent to which Article 40.3.1 could be used to prevent someone from travelling abroad to secure a termination was tested. The case involved a 14-year-old girl, pregnant as a result of a rape, who had travelled to the United Kingdom to procure an abortion. Her intention to obtain a termination came to the attention of the authorities who obtained an injunction preventing her from carrying out the termination. The case then came before the Supreme Court, which had to consider whether article 40.3.3 meant that the girl could be prevented from obtaining an abortion. The court held that an abortion was permissible under this article where it could be shown that there was a real and substantial risk to her life, as opposed to health, and this included the risk of self-destruction. In this case, the court accepted that the girl was suicidal and could take her own life if forced to go through with the pregnancy. The termination therefore would have been legal in Ireland and as such the injunction preventing her from travelling in order to secure abroad what would be a lawful abortion in this county, was illegal. However, the right to travel was denied to all women who did not come within the terms of the X case, in other words where a woman's life was not at risk she could be prevented from travelling to obtain an abortion. This led to a further amendment to the Constitution in 1992, specifically providing for the right to travel to receive a termination[36]. A right to disseminate information within Ireland on clinics abroad which provided such services was also inserted into the Constitution[37]. Despite

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[34] Article 40.3.3 inserted by the Eight Amendment to the Constitution.

[35] *Attorney General v X* (1992) 1 IR 1.

[36] The provision, included in 1993, reads "This subsection shall not limit freedom to travel between the State and another state".

[37] The provision, included in 1993, reads "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".

these developments, the position with respect to receiving a termination in Ireland is still unclear. From the decision in *X* it appears that if a "real and substantial risk" to the life of the mother exists then a termination is permissible, but it is in no way certain how such a risk is to be established. A later attempt to clarify the position by referendum was defeated in 2002. The relevant provision, The Protection of Human Life in Pregnancy Bill 2002 was narrowly defeated with 49.58% voting in favour and 50.42% against. No subsequent legislative attempts have been made to deal with the issue.

The Constitution and a right to die

The Irish Constitution does not specifically refer to a right to die or to euthanasia. The principal provision which impacts on these issues is again article 40.3.2 where the State is required to "protect from unjust attack" and "vindicate" the life of the every citizen. The relevance of this article for the purposes of a "right to die" was considered in the case of *Re a Ward of Court* (No 2)[38]. The case concerned the fate of a 45-year-old woman who was in an almost persistent vegetative state as a result of complications following a routine procedure. Her family sought to have her nourishment removed so that she be allowed to die a 'natural death', and the Supreme Court was called upon to decide whether this was consistent with the Constitutional guarantee to have one's life protected and vindicated by the State. The Court held that allowing her to die a natural death was consistent with the Constitution, as Hamilton CJ stated,

"As the process of dying is part, and an ultimate inevitable consequence, of life, the right to life necessarily implies the right to have nature take its course and to die a natural death and, unless the individual concerned so wishes, not to have life artificially maintained by the provision of nourishment by abnormal artificial means, which have no curative effect and which are intended merely to prolong life".

In this case, as the patient was a ward of court, the decision to have her nourishment withheld would be made by the court, acting on the basis of what it perceived was the patient's best interests. This decision however, could only apply to the withdrawal of treatment so that a "natural death" occurred, it could not give rise to a right to have life terminated by artificial means. This essentially means that while Constitutionally a right to die by "natural" means exists, there is no related right to die by euthanasia or by other deliberate means.

[38] *Re a Ward of Court* (1996) 2 IR 79.

4. Adoption of International Law

Ireland has a dualist legal system, which means that before international law can form part of the domestic legal system it must be incorporated into Irish law by Parliament. As stated by article 29.6 6, "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas (Parliament)".

The practical effect of this provision is that when the Irish government signs an international treaty it has no legal effect on the Irish domestic legal system (it may of course result in significant diplomatic pressure to comply with the treaty provisions but legally there is no duty to do so). When Ireland signed the European Convention on Human Rights for instance the Irish courts could and did, refuse to be bound by the jurisprudence of the European Court of Human Rights. It was not until the signing into law of the European Convention on Human Rights Act 2003 that these rights and jurisprudence formed part of Ireland's domestic system. More recently, it has become the practice for the Irish government to introduce legislation to bring Ireland into compliance with the various treaties in advance of signing them (for example the Equal Status Act 2000 and the Employment Equality Act 1998 were introduced prior to ratifying the Convention against Racial Discrimination and Ireland is currently in the process of introducing legislation to allow for the ratification for the UN Convention on the Rights of People with Disabilities.)

Because of the dualist nature of our legal system, Ireland's membership of the European Union (or European Economic Community as it was then known) necessitated a similar domestic incorporation of all the changes European membership would bring about. As the Treaty of Rome would have far reaching implications, this domestic incorporation was effected in two ways. The first was a Constitutional amendment, now article 29.3.10, which allowed for both the supremacy of European Law and also the constitutionality of any action required by virtue of European membership as set down in the Treaty of Rome 1957. The article read as follows:

"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by our membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State"[39].

[39] It is worthwhile noting that while this provision is currently article 29.4.10 it has, prior to subsequent amendment of the constitution, borne the article numbers 29.4.3, 29.4.5 and 29.4.7.

The second measure was the adoption of the European Communities Act 1972 providing in section 2 that any measures introduced pursuant to the Treaty of Rome 1957 would be binding domestically[40].

Following the ratification of the Treaty of Rome the next significant treaty to be adopted was the Single European Act 1987 (SEA). The Irish government sought to give effect to the SEA by simply ratifying the Single European Act 1987 without further amendment to the Constitution, but this was challenged by a member of the public, a Mr. Crotty, as being unconstitutional. He argued that as the Single European Act 1987 went far beyond what was envisaged in the Treaty of Rome it ought to require a constitutional referendum. That case, *Crotty v An Taoiseach*[41], ultimately came before the Supreme Court and led to a decision that has affected the adoption of all subsequent European Treaties in Ireland. The Court held that in one aspect, that of Title III of the SEA, which required member states to "take account" of the foreign policy of other member states when drafting their own, the European Union was moving into an entirely new direction to the Treaty of Rome that was "political" as well as economic. As such it was not among the changes envisaged in article 29.4.10 and required a further constitutional amendment. The effect of *Crotty* therefore is to require that Ireland holds a referendum when a new Treaty is being adopted if that Treaty goes beyond that which has already been approved by the Constitution in a referendum. The difficulty of course is in identifying categorically whether a new treaty simply builds on the aims and objectives of existing treaties, or as in the case of Title III of the SEA brings about a new departure for the European Union. The practice therefore, since the decision in *Crotty*, has been to hold a referendum which if passed, would ensure the constitutionality of the Treaty in question. So far, all treaties have been adopted by the people in a referendum, with two exceptions. The first was the Nice Treaty, which was famously rejected by the Irish populace by a margin of 46% to 34% in 2001. The following year it was controversially put to a vote again where it was adopted by a margin of 63% to 37%. The second treaty to have been rejected was the Lisbon Treaty, which was defeated with 53% voting against the Treaty as opposed to 46% in favour when it was voted on by the Irish people in June 2008.

5. Conclusion

This article has dealt with only limited aspects of the Constitution but ones, it is hoped, which give some indication as to the changes which have taken place within Ireland since it's adoption in 1937. The Constitutionally

[40] The effect of the passing of the Act was to incorporate the Treaty of Rome into the Irish legal system. The effect of the Constitutional provision was to render this constitutional.

dualist nature of our legal system and the implications of the political interpretation of the *Crotty* decision has meant that we can measure in some sense Ireland's relationship with the European Union (EU) thorough its acceptance or otherwise of the various European Treaties. This relationship can be seen to be a largely cordial one, with the Irish public generally enthusiastically endorsing each new European Treaty[42]. The more recent rejection of both the Nice and Lisbon Treaties runs contrary to this generally positive acceptance[43]. While the initial rejection of Nice could be blamed on a fear for Ireland's neutrality the situation with Lisbon appears more complicated with many confused as to what the Lisbon Treaty was about[44]. It is also significant that the margin between those in favour of each new Treaty and those against is growing steadily narrower indicating a growing national skepticism for the European project.

The interpretation and development of constitutional rights also reveals changing societal values in Ireland. The recognition of a marital right to privacy in *McGee* and the use of this right to dismantle a repressive restriction of access to contraception reflected a growing independence from strict Catholic ideology, at least within our courts. This was further evidenced by the introduction of divorce in 1996. The slight majority with which divorce was introduced however, revealed that the desire to be independent from religious morality was a limited one and not shared universally or even by a significant majority of the Irish populace. On some issues there has been only limited constitutional development. The right to die is a narrow one, involving very little individual autonomy or choice. The right to a termination of a pregnancy is also limited. Following from the *X* case, a limited right appears to exist where the life of the mother is in danger although the parameters of this are unclear and there is understandable if regrettable political reluctance to legislate on the issue. On others matters the Constitution appears to be out of step with a changing Ireland but more in keeping with a conservative Catholic ideology. The definition of the family remains stubbornly that of a model that does not represent a significant minority of family units in Ireland. Statutory developments to afford co-habiting and

[41] *Crotty v An Taoiseach* (1987) I.R.713.

[42] On entry in 1972, voter turnout was 71% with 83% voting in favour and 17% against; for the SEA 1987 voter turnout was 43.9% with 69.9% in favour and 30.1% against; for the Maastrict Treaty in 1992 voter turnout was 57.2% with 68.7% voting in favour and 30.8% against and for the Amsterdam Treaty in 1998 voter turnout was 56.2% with 62% voting in favour and 38% against. Source: Research Paper 01/57 (2001) House of Commons Library, at p 9.

[43] The rejection of the Nice Treaty in June 2001 took place with a historically low turnout figure of 35%, with 46.1% voting against the Treaty and 53.9% against. The Irish government put the Treaty to the people again in a second referendum in 2002. With a higher voter turnout of 49.47% the Treaty was accepted with a majority of 62.89% in favour as opposed to 49.29% against. See[online] <http://electionsireland.org/results/referendum>.

[44] See F. O'Toole, [online] <www.guardian.co.uk/commentisfree/2008/jun/14/ireland.eu>.

homosexual couples greater rights, while welcomed, will do nothing to extend to them the constitutional protections afforded to families, so long as it is defined as one based on marriage.

It is through these developments that the Irish Constitution has proved itself to be a robust indicator of both the changing face of Ireland and the political and at times conservative values held by it's citizens.

Streszczenie

Autorka w swoim opracowaniu przedstawia wybrane zagadnienia z Konstytucji Irlandii z 1937 r. Szczególna uwaga została poświęcona ochronie rodziny (która w zgodzie z katolicką koncepcją konstytucji bazuje na małżeństwie osób płci przeciwnej), ratyfikowaniu przez Oireachtas (Parlament) prawa międzynarodowego, ochronie życia (ze szczególnym uwzględnieniem życia poczętego). Artykuł zawiera także interesujące rozważania w odniesieniu do prawa do godnej śmierci, a także do eutanazji. Autorka powołuje się zarówno na normy prawa konstytucyjnego, normy prawa europejskiego, jak i na *case-law*.