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# THE ABORTION POLICY MAKING PROCESS, THE HISTORICAL ANALYSIS AND THE EUROPEAN COMMUNITY REGULATIONS IMPACT A Case Study of the Republic of Ireland

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UDK: 343.62  
173.4:34

Pregledni rad

Priljeno: 2. 12. 1999.

Abortion, as a measure of fertility regulation, has been a well-known practice in all human societies. With the rise of modern state this special issue, with the large and complex medical, social and legal implications, begins to be regulated by the specific legislation within a single state. The present paper focuses on the abortion legislation process in the Republic of Ireland from 1921 up to 1992. A special emphasis is laid on the legislation changes, policy making process and abortion policy historical background. Moreover, the location of the main factors and circumstances, with a particular stress on the impact of the European Community regulations, which have influenced these changes, is made. In dealing with the topic one might expect a strong ideological impact, as the powerful Catholic philosophy has been one of the most evident historical characteristics marking the former British colony. Finally, the Esping-Andersen's typology of welfare regimes as an explanatory theoretical model of the Irish social policy system and the specific area of AB policy is used.

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## **INTRODUCTION**

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Abortion has been a very well known phenomenon in all present and former societies and exercised by women of all social-economic backgrounds. Discussions about abortion, as a way of birth prevention, have been a burning part of the political debates and usually linked to different opinions. With the rise of modern states this discussion commenced to be a part of the broader social policy field. Moreover, this political segment has been always affected by governmental actions either in the direction of natality promotion or in the direction of its breaking. Today this issue is regulated by the specific legislation within each state.

To deal with this topic is an important issue due to its eternal actuality and its strong empirical impact on at least two levels: the individual level (impact of the "birth regulation policy" in the everyday life of a single woman) and the state level (questions of national survival, national power, state intervention and its demographic application).

The main purpose of this paper is to deal with the question of abortion policy in the Republic of Ireland and changes in the abortion legislation throughout time. A special emphasis is laid on the factors and circumstances, which have influenced these changes. In addition, the connections and relations between the mentioned influencing factors are shown. Moreover, the paper puts a particular stress on the abortion policy making process and the European Community regulations impact (for the Republic of Ireland as a member state). The focus is on a limited period, from 1921 up to 1992. This time limitation has been chosen due to the importance it had for the abortion (AB) policy developments: the lower time limit presents the beginning of the AB's legal solution, while the upper one presents the last AB legislation change. To sum up, Esping-Andersen's typology of welfare regimes has been chosen for theoretical examination of the Irish social policy system and the special area of the AB issue.

## **HISTORICAL OVERVIEW OF THE IRISH ABORTION LEGISLATION**

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The independent Ireland (which achieved its autonomy in 1922) inherited the British Criminal Act: *Offences Against the Person Act* from 1861, which unconditionally prohibited abortion. Indeed, sections 58 and 59 of the Criminal Act forbid abortion (AB) in any circumstance, creating three abortion offences: that of pregnant woman who seeks an AB, that of any person who directly assists her in the AB, traditionally meaning the medical practitioner or referral agent, and that of any person who supplies the necessary medications or other requirements for the AB. So, guilty were not only the women

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

but also those who helped them to have the AB. Those who broke the law were liable to a sentence of penal servitude for life or, in case of a person who supplied the medications or other noxious things for AB, the sentence of penal servitude for a three year term (Rose, 1976: 17).

Year	A Content	Legislation Acts
1921 – 1937	Abortion was <i>prohibited</i> .	Inherited Criminal Act: Offences Against the Person Act (1861)
1937	The <i>same standpoint</i> as Criminal Act from 1861	The New Constitution, 1937
Referendum 1983	Life of mother <i>is equal</i> to the life of unborn.	The Eighth Amendment of the Constitution Act, 1983
Maastricht Treaty 1992 and the Irish Protocol Tripartition	Referendum 1992	
1992	The freedom of <i>travelling</i> between the State and another state cannot be limited. The right to receive some <i>information</i> about the services lawfully available in another state.	The Thirteenth Amendment of the Constitution Bill, 1992 The Fourteenth Amendment of the Constitution Bill, 1992

➔ The Main Dates in the History of Abortion Legislation Changes

When *de' Valera's Constitution* was adopted by the Free State in 1937 as the foundation for all future laws, it reflected contemporary Catholic social teaching. Indeed, the 1937 Constitution was based on the Catholic doctrine of the "natural moral law", which was unconditional and absolute (Beale, 1986). Reflecting Catholic teaching, the Constitutions made only two direct references to women: "In particular, the State recognises that by her life within home, woman gives to the State a support without which the common good cannot be achieved" (Article 41.2.1) and "The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home" (Article 42.2.2). Dealing with the AB issue, the New Constitution took the same standpoint as the inherited Criminal Act from 1861. The AB remained prohibited under any circumstance.

During the Second World War criminal prosecutions for AB rose in the Free State, as women were restricted from travelling to England for backstreet AB. The prohibition of travel-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

ling was a part of overall prohibition of movement between Ireland and England. However, soon after the war the Free State broke its connections with England by declaring itself a Republic. In dealing with the AB legislation in Ireland, we can mention the *Abortion Act* enacted in 1967 in Great Britain due to the significance the Act had for the Irish women. Adopted in Great Britain as a reform of the 1861 Act, it was important because of the fact that thousands of women travelled to Britain from the Irish Republic and other countries as well (Smyth, 1992).

In the 1970s another confirmation of the AB legislation prohibition appeared. The Republic's anti-contraceptive law, the *Health (Family Planning) Act, 1979*, was reformed, but Section 10 reaffirmed the prohibition of AB in the Criminal Law (Act 1861).

Until 1983 the Irish prohibitive abortion legislation remained intact since 1861. However, on 7th September 1983 the Irish electorate decided to amend the existing Constitution. The amended wording was written into Article 40.3.3: "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." The main and the basic idea of the amendment was the fact that the life of the unborn began to be equal to that of the mother's life. In addition, the same article allowed AB when the lives of women were in danger, including the case of suicide threat (Fletcher, 1995). Anti-abortion amendment enforced, in the minds of the electorate, the legislators and the Catholic Church, a complete ban on AB in Ireland.

Concerning the 1983 Amendment wording, there were several important ambiguities (Sherlock, 1989). Regardless of two important court cases concerning information about AB services in other member states in the 1980s, the essential meaning of the amendment did not come into dispute until 1992. However, the 1990s brought about new discussions, which resulted in a special *Protocol within the Maastricht Treaty* amended by Ireland in 1992 and the Tripartition Referendum on the issues of abortion, travelling and information which took place in the same year. The Protocol sought to ensure that AB could never be introduced in Ireland as a consequence of its membership of the European Community. In other words, the Protocol was introduced in the Treaty with the aim to protect the existent restrictive legislation (Article 40.3.3 of the Constitution, amended in 1983). In June 1992 the Irish electorate (the Eleventh Amendment of the Constitution) accepted the Protocol and the Maastricht Treaty was ratified by Ireland. Moreover, in the spring of the same year the Irish people decid-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

ed about further development of the AB legislation in the new tripartition Referendum: about the right to live (the Twelfth Amendment), the right to travel (the Thirteenth Amendment) and the right to obtain information in other member states (the Fourteenth Amendment). The Referendum took place on 25th November 1992. All Amendments proposed to amend Article 40 subsection 3 of section 3 of the Constitution of Ireland. The Thirteenth and the Fourteenth amendments were approved by the people and affirmed the right to travel and the right to receive information on AB services. On the other hand, the Twelfth Amendment restricting the right to AB to cases where the pregnant women's life was in danger and not including the threat of suicide, was not approved by the people.

## **THE HISTORICAL ANALYSIS OF THE ABORTION LEGISLATION POLICY-MAKING PROCESS**

### **Irish Independence and the Influence of Catholicism in the New State**

It was the conservative wing of the independent movement that was on the winning side in Ireland in 1921. In addition, the ideology adopted by the new State was both, Catholic and national: "The Church gave to Ireland a sense of identity which reinforced its separation from Britain and gave to Irish a sense of self-confidence and mission in a secularising world" (Speed, 1992: 85). Moreover, the new adopted Catholic ideology "glorified rural Irish life and romanticised the Catholic family" (Beale, 1984: 4). The de' Valera's Constitution enacted in 1937 reflected, on the whole, the mentioned doctrine, where the family had a special place (Article 41) and ideal family organisations consisted of male-breadwinner and female-carer. Hence, women's role was defined as that of mothers and wives. The Constitution recognised women a special place within the home and obliged the State "...to assure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home" (Article 41.2.2). The State recognised all married women as economically dependent on husbands, so that they did not pay taxes separately. Moreover, contraception was illegal and women were openly discriminated against in education, employment and the welfare system. A marriage ban forced women to give up their jobs on marriage (Beale, 1986). To sum up, "Church and State worked hand in hand to protect Catholic morality and institutionalise the Catholic family." (Beale, 1986: 8). In the 1920s, two-thirds of the population lived outside towns and villages with half of the work force employed in the agricultural sector. Two categories, "...the farmers and tradesmen dominated the political and social life of the country; both were essentially conser-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

vative and ruled by the same conservatives of the Catholic Church" (Beale, 1986: 6); and 93 per cent of the population were Catholic at this time.

In these first years, the economic policy of the Irish State was based on the idea of national self-sufficiency. The industrial base was small and the isolationist policy prevented any significant industrial development until the 1960s (Speed, 1992). The existent economy reflected, on the whole, the adopted ideology: "The small farm was the key economic unit, and to support it, the family was the key social unit, and the Church was the basis of Irish society" Beale (1986: 8). In the rest of Europe institutions were secularised, while the Irish commitment to religion intensified and the situation remained relatively static until the 1950s (Girvin, 1983). However, the 1950s brought about economic decline and social stagnation. The ability of the society to sustain itself was questioned as the population decline, due to the mass emigration, accelerated.

### **The Economic and Social Changes of Irish Society**

De Valera's Ireland had failed to provide a solid economic base, so in 1957 economic protectionism was abandoned and rapid industrialisation began. This Ireland provided an economic solution to the economic problem and left religion, family and the rest of the other aspects untouched. However, the consequences of the industrialisation were much the same in Ireland as in other countries. Between the 1960s and 1980s the transition between the old and the new began. This transition resulted in tension between Catholicism and nationalism, liberalism and materialism (Ryan, 1984). Speed (1992: 90) describes the 1960s as a period "when economic growth resulted from the state enjoying the benefits of the last gaps of the world-wide economic boom lasting from 1945 to 1973, which had eluded us previously because of a refusal by the major economies to allow the protected Irish economy to participate fully in the world market." In this period mass emigration ceased and the Irish entered into the European Economic Community (1972). Over-dependence on Britain finished and Irish economy started to integrate into a capitalistic Europe. The living standard rose and the modernisation process began. The mass media introduced new values into Irish society and the women's position began to change due to a new need for labour force (Beale, 1986).

The 1970s saw a period of considerable social activity. In 1972 a Commission on the Status of Women was set up and in 1973 the people voted down the Constitutional and symbolic special position of the Catholic Church. The Marriage ban was removed in 1973, followed by legislation on equal pay in 1974

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

and on employment equality in 1977. In the end, the contraceptives were legalised in 1979 and maternity leave was introduced in 1981. The mentioned changes happened as a result of a slow, but definite separation of Church and State which took place in the 1970s (Speed, 1992).

## A Change of Traditional Values

🔗 The main actors and social organisations involved in the abortion legislation changes, the actors' main aims and the main events that have influenced the topic discussion

Economic development resulted in the modernisation process, which encompassed Ireland in the 1960s. The modernisation process is characterised by economical development, urbanisation, industrialisation, demographic changes, and finally, by secularisation and decline of the Church's role and Church's values. Most of the people before 1970 had internalised the self-image, which the Church offered. However, from the 1970s onwards an alternative viewpoint emerged that challenged the traditional morality. This process can be seen from a series of Surveys about religious opinions (see Sedmak, 1997).<sup>1</sup> The Irish secularisation process included removal of some sectors of society and culture from the influence of religious values, institutions and symbols. Finally, people living in urban areas and young people were seemingly more affected by the secular processes (McRedmond, 1980).

Year	Actors and Influencing Factors	Social Organisations	The Aims	Events, Meetings, Conferences
1983	Modernisation processes, Pro-Life Amendment Campaign, Anti-Amendment Campaign, Political Parties, individuals as G. FitzGerald, C. Haughey, the Catholic Church, the Protestant Church, the Irish People, etc.	Pro-Life Amendment Campaign, Anti-Amendment Campaign, Rape Crisis Centre, Irish Council for Civil Liberties, Irish Pregnancy Counselling Centre, Dublin Well Women Centre, etc.	Pro-Life Amendment Campaign's: Constitutional Amendment achievement to prevent any further changes in restrictive AB legislation.	The 1983 Referendum.
1992	Society for the Protection of the Unborn Child, Open Line Counselling, the Dublin Well Women Centre, European Court of Human Rights, High and Supreme Court, X case, European Union's directives, Irish people, etc.	Society for the Protection of the Unborn Child, Women Organisations, etc.	Society for the Protection of the Unborn Child's: The inclusion of the Protocol into the Maastricht Treaty, to prevent possible further liberalisation of AB legislation, Adaptation of the Irish law to European Union's directives.	The Maastricht Treaty, The Tripartition Referendum, 1992.

## The Eighth Amendment Act, 1983

To stop emerging modernisation and secularist trends and to prevent their possible consequences in the area of the AB legislation, activist anti-AB pressure groups have emerged. The groups were influenced by the events inside and outside Ire-



DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

land, where modernisation processes influenced the AB issue liberalisation. Thus, the groups decided to prevent any possible future liberalisation of the AB legislation with the additional amendment in the Irish Constitution, which would secure the institutional protection of the unborn from the very earliest moment of its life. With this aim in mind the *Pro-Life Amendment Campaign* (PLAC) was founded in January 1981. PLAC<sup>2</sup> was the umbrella organisation for 14 anti-AB groups, which were trying to hold a referendum to achieve the amendment, which would make any change of the restrictive AB legislation impossible. However, we must bear in mind that the Offences Against the Person Act from 1861, prohibiting AB in any case, was at that period still in force in Ireland.

PLAC launched its campaign shortly before the General Election in 1981. It was an opportune moment because the outcome of election was uncertain. Its argument for campaigning was that there was nothing in the Constitution that would prohibit changes. Abortion might become legal as a result of either parliamentary or court action somewhere in the future (Hesketh, 1990). The special feature of the Irish case was that while in other countries pro-life lobbies started to fight after liberal legislation was introduced, PLAC was planning to do the opposite. PLAC based its case on the Article 40 of the Constitution, which "guarantees life to the citizen but not to the unborn". The campaign aimed to extend the constitutional guarantee to cover unborn too. The PLAC, which had an essentially Roman Catholic nature, began with two different strategies: with the national-wide signature campaign<sup>3</sup> and lobbying with the political parties (to achieve the commitment to pro-life amendment). Before the 1981 election the two main Party's leaders, Dr. Garret FitzGerald – Fine Gael (FG) and Charles Haughey – Fianna Fail (FF), agreed to promote the amendment, while the Labour Party (LP) declared itself "unequivocally opposed to abortion" (Girvin, 1983: 69). In just two weeks, PLAC had achieved its objective: parties representing over 90 per cent of Dail<sup>4</sup> members had acceded to its demand.<sup>5</sup>

In the June 1981 Elections FG won and made a coalition with LP (FitzGerald was a Taoiseach). Regardless of FG's previous commitment to the pro-life amendment, no such commitment was included in the legislative programme released by the new Government. Finally, FG promised to think more about it, but the promise was superseded by the defeat of the Government in January 1982 and the announcement of a general election (Hesketh, 1990).

In February 1982 FF come into power with Haughey as Taoiseach. This was the PLAC's good fortune, due to his confirmation of the promise given to PLAC during the last elec-



DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

tion. Moreover, at the end of 1982 the amendment wording was formulated: "The state acknowledges the right to life of the unborn and with due regard to the equal right of life of the mother, guarantees in its laws to protect, and as far as practicable, by its law, to defend and vindicate that right." (Girvin, 1983: 70). FG, surprisingly, welcomed the wording and put former reservations behind. This fact illuminated one of major failings of the Irish political system, namely, that pressure could be brought to bear upon politicians during an election to make concessions to interest groups.

In November another election was supposed to take place. PLAC maximised its pressure as three elections took place between June 1981 and November 1982. However, in the November 1982 Election the issue was clearer cut. Two left wings, Democratic Socialist Party and Labour Party had opposed the referendum. After the November election FitzGerald formed the Government once again, this time with parliamentary majority (coalition with LP) (Girvin, 1983). When FitzGerald made his promise to hold a referendum, opposition to the proposed pro-life amendment – Anti Amendment Campaign (AAC)<sup>6</sup> - emerged. The AAC's main argument was that PLAC's demand was explicitly Catholic and therefore not religiously pluralistic.<sup>7</sup> In addition, PLAC began to stress mainly biological arguments<sup>8</sup> to avoid accusation of the links with the Church (Hesketh, 1990). By February 1983 the AAC pressure was increasing its impact. The FG youth group, Democratic Socialist Party and Senior members of LP came out in opposition. The Protestant Church and Liberal Catholic Alliance entered in the debate. They argued that amendment was inappropriate for Constitution, which professed "religious pluralism" (Girvin, 1983). In late July 1982 the leader of the LP announced his opposition to the amendment. This was the end of all parties' support, which PLAC cultivated during 1981. The LP leaders were soon supported by Senior Labour participants, FitzGerald and others within FG (Hesketh, 1990). Due to this setback received by PLAC, which had worked for an all-parties support on the issue, the Catholic Church began to play a more active role. The Church, in addition, made a statement that the amendment presents "... just a prudent anticipation..." (Girvin, 1983: 73). The pressure increased when the Church started to exert influence over its people.

In the period prior to the referendum, both main parties (FG and FF) made an effort to distance themselves from the campaign. However, although the party leaders did not want to involve the parties in the Campaign, it happened. So, for most of the August and September of 1983 the party leaders engaged themselves in a cat-and-mouse intrigue on the television (Hes-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

keth, 1990). On 7th September 1983 the Amendment was passed by a two to one majority. The Irish people decided to amend Constitution. The amendment guaranteed the right to life of the unborn and was explicitly an attempt to prevent changes in the existing anti-AB legislation through a more liberal one.

There were numerous suggestions that the amendment debate had nothing to do with AB and that the real motivation of the campaign was an attempt to hold back progress on social issues, in the campaign supported by the Catholic Church. Interestingly there was a very high rate of abstention votes. The reason for this are diverse and difficult to explore. Girvin claims that there were people who opposed both sides, people who were against referendum under any circumstances, but unwilling to vote "No" because the individual was opposed to AB. Also, abstention was a protest vote or voters did not feel urgency to vote because they believed the outcome was predictable (Girvin, 1983: 77). This was the first time since the establishment of the Irish state that a significant cleavage emerged around a religious issue. Finally, the "No" was registered mainly in the cities and the vote "Yes" mainly in rural areas. Thus, the importance of the rural-urban cleavage must not be ignored. In accordance with the modernisation theory, people living in rural areas manifest more conservative opinion, while those living in cities manifest more liberal views. Therefore, modernisation of Irish society did indeed influence changes in the people's acceptance of the AB issue (Sedmak, 1997).

## **The Maastricht Treaty, the Irish Protocol and Tripartition Referendum**

### **The Information Cases**

At the beginning of the 1990s another significant AB discussion began, influenced by the events that had originated in the 1980s. In 1985 the Society for the Protection of the Unborn Child (SPUC) initiated a legal action against the two major pregnancy counselling services for women in Ireland: Open Line Counselling (OLC) and the Dublin Well Women Centre (DWWC). SPUC maintained that the provision of a non-directive counselling service was in violation of Article 40.3.3 of the Constitution<sup>9</sup> (Reid, 1992). In 1986 the High Court placed an injunction on both services and the DWWC ceased its counselling. In addition, an appeal to the Supreme Court by both services in 1988 failed to reverse the Court decision (Smyth, 1992). Although the Irish Constitution gave its citizens the rights to freedom of expression and an implied access to information, the courts held that in both cases these rights were subordinate to the right to life of the foetus under Article 40.3.3 (Reid, 1992).

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

The centres subsequently brought the case to the European Commission of Human Rights (ECHR), which held in preliminary ruling that Ireland was in violation of Article 10 of the European Convention of Human Rights (the right to receive and impart information). The case went before the full Court in March 1992 and ECHR confirmed the preliminary ruling that Ireland actually violated the mentioned Article. The ECHR decision was at the same time a clear demand to the Irish government to start the process of the legislation change. So, the Irish government was expected to change the Article that was prohibiting the access and impart of the information about AB in the other member states.

Another event, known as Grogan, happened in 1989. SPUC sought an injunction in the High Court preventing the officers of the Union of Students in Ireland (USI) from publishing information about AB services. The SPUC's main argument was that "...informing women about the identity and location of a specific clinic(s) where AB are performed and how to contact such clinics was illegal under Article 40.3.3 of the Irish Constitution." (ECJ, 1991: 4687). The then High Court Justice Mella Carroll referred the case to European Court of Justice (ECJ). High Court, namely, considered that the case caused problems of interpretation of Community law. Regardless of the defendants arguments that the prohibition of the distribution of information in question is acting contrary to Articles 59 and/or 62 of the Treaty, the ECJ ruled (1991) that: "It is not contrary to Community law for a member state in which medical termination of pregnancy is forbidden to prohibit students' associations from distributing information about the identity and location of clinics in another member state where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information." (Smyth, 1992: 15-16). But, ECJ referred specifically to the dissemination of information by students associations and not in general.<sup>10</sup> In fact, the Court also ruled that AB is a service within the Treaty of Rome: "The activity of performing abortion is a service within the meaning of article 60 (European Economic Community – EEC) unless it is carried out by a public authority in fulfilment of its duties in the health sector and is funded from the public purse." (ECJ, 1991: 4693).

### **Changing Values**

From the 1980s onwards another important shift in the people's values occurred (see Sedmak, 1997: 67). Whelan and Fahy (1994: 69-72) compared the people's approval of AB in the

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

1981 and 1990 Surveys. The percentage of those who agreed with AB due to mother's health risk percentage and due to a possibility that a physically handicapped child would be born, in general, increased. Moreover, the same research proved that regular attendants of the Church were in decline (Whelan, Fahy 1994: 22-23).

### **The X Case**

In February 1992, a fourteen-year-old rape victim was prevented by a High Court injunction from leaving the jurisdiction of Ireland to obtain AB in Britain. The Attorney General cited as the basis of his action Article 40.3.3 of the Constitution.<sup>11</sup> His further justification was "that he had clear evidence that a foetus with guaranteed rights under the Constitution was about to be aborted and that he must act immediately to prevent this in his capacity as protector of the people's Constitutional rights." (Smyth, 1992: 10).<sup>12</sup> Moreover, Judge Costello had argued that although "X" had specifically told both her parents and the police "that she felt suicidal, the risk to her life was not equal to the real and imminent danger to the life of the unborn." (Smyth, 1992: 11). Also, he argued "that Ireland was free to do as it pleased in relation to AB law, even when it had extra-territorial implications, as AB constituted public policy and was therefore immune to European Community (EC) challenge" (Smyth, 1992: 12). Ireland was, despite the imminence of European Union (EU), a "law into itself". The High Court injunction provoked a huge outcry both within Ireland and internationally: 7,000 people marched in protest to the Dail, radio, phone-in-programmes were inundated with calls, newspapers were deluged with letters expressing both anti-AB and pro-choice of view and many points between.

Influenced by the people's reaction, the Government applied intense pressure on the girl's family to appeal the High Court judgement to the Supreme Court, with the Government undertaking to pay all expenses (Smyth, 1992). Early in March the girl was permitted to leave Ireland. The Supreme Court gave, "within the concept of the equal right to life of mother and foetus enshrined in the Constitution, a superior right to life for the pregnant mother"(Reid, 1992: 27). With its decision Supreme Court showed that not all AB were illegal in Ireland. Moreover, the Supreme Court judgement contained severe outspoken criticism of Government inaction and its judgements tone helped to shape the abortion discourses in the following years.

The outcome was unexpected and it influenced a strong anti-abortion lobby emergence. The lobby demanded the Su-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

preme Court judgement overturn by the will of the people through another referendum which would reinstate the "original meaning" of the Eighth Amendment (Smyth, 1992). The X case derived directly from the Eighth Amendment<sup>13</sup> and it presented a complicated event with serious consequences for the questions of women's rights. In addition, the X Case became entangled with Ireland's imminent ratification of the Maastricht Treaty on European Union. In this regard, Smyth (1992) stressed the politicisation of the AB issue, which took place during the Treaty's discussion in 1992.

### **The European Community Impact**

In the period when the Irish Supreme Court was dealing with the X case, the final draft of the Maastricht Treaty on European Union (MT) was drawn up. The Irish Government had requested the insertion of a Protocol, which would guarantee that the EC would not interfere with Article 40.3.3 of the Irish Constitution. In other words, the Treaty Protocol sought to ensure that AB could never be introduced in Ireland as a consequence of Ireland's membership in the EC. Some people argued that the Protocol was unnecessary because the Offences Against the Person Act, 1861 and Article 40.3.3 were still in place. On the other hand, the ECJ had determined that AB is a "service" and that EC citizens could arguably have a right to avail themselves of this service in other EC Member States. However, in the case of Attorney General v X and Others, Justice Costello ruled that "the right to travel to another EC member state for the purposes of procuring an AB would be subjected to the provisions of the right to life of the unborn on the grounds that the EC allows derogation for reasons of 'public policy' in member states" (Smyth, 1992: 17-18).

The Protocol in the MT was the Governmental political strategy made under the anti-AB lobbies' pressure. On the other hand, a campaign group composed of women activists demanded withdrawal of the Maastricht Protocol, arguing that the Protocol "creates a separate group of European citizens with fewer rights and without the guarantee of protection by the European courts" (Smyth, 1992: 19). The campaign received political support only from the small Democratic Left and the Green Party. As a result, the Campaign did not succeed in putting enough pressure for the Protocol withdrawal.<sup>14</sup>

The legal position of AB in Ireland has been complicated by the fact that three different legal systems, i.e. Irish Constitutional Law (ICL), European Community Law (ECL) and the European Convention on Human Rights (ECHR), have been influencing the Irish law in this area. ECL is obligatory in Ireland on terms laid down by the EC Treaties and according

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

to Article 29.4 of the Constitution. Insofar as ECL relates to AB, its provisions have superior force in Ireland to the Irish Constitution. An issue arising here is a very slow working process of ECL. It normally takes eighteen months and more to get ECL's decision ratified. This delay causes problems in relation to cases involving AB (Reid, 1992). Moreover, ECL's main preoccupation is within the economic law of market, and areas of morals, health, etc. are mostly a matter for the individual state. Indeed, the AB issue was hardly affected by the Community law in the past. However, distinction arose when the debate about AB information and travelling between the states emerged. The ECL is concerned with the movement of economic services between the member states. As such, AB would be accepted, by ECL, as a service within the EC Treaty, the AB clinics from another member state would have a Community law right to advertise their services in Ireland and Irish citizens would have a Community law right to receive information<sup>15</sup> (Reid, 1992). To sum up, while Community law had no relevance to whether AB is available in Ireland or not, it gave the rights to Irish women to travel to another member state for AB as well as to receive, in Ireland, information provided by commercial AB clinics abroad.

#### **The Maastricht Protocol and Tripartition Referendum**

From 5th May to 22nd October 1992 the debate about the Constitutional amendments and the Maastricht Treaty took place in the Irish Parliament and Senate. The only Party to oppose the Eleventh Amendment<sup>16</sup> was the Democratic Left. There was all-party support when the discussion about ratification of the "Treaty on European Union" took place, but AB, the problem within Protocol<sup>17</sup> and the subsequent Solemn Declaration created controversy. Finally, the second stage passed by 41 votes to 4 and referendum took place on<sup>18</sup> June 1992. The inserted Protocol 17 read: "Nothing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall effect the application in Ireland of Article 40.3.3 of the Constitution in Ireland." (Reid, 1992: 32). So, the possible effect of the Community law was removed. Irish people voted "Yes" and Ireland ratified the Treaty on EU. In addition, the tripartition referendum about the Twelfth, Thirteenth and Fourteenth Amendments of the Constitution of Ireland began to be discussed. The debate was, in many respects, a re-run of the 1983 debate, although at a much lower density and with much greater courtesy. It centred largely on the merits of the Twelfth Amendment Bill in relation to AB. In particular the question was raised, if the distinction between health and life



DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

could or would pose a threat to the pregnant woman's life. The only issue raised concerning the Constitution as such was whether such a matter should or should not be treated in the Constitution at all, and that issue was not really discussed in depth (Foley, Lalor, 1995). All the three proposed Amendments passed all the stages in Parliament as well as in Senate without any serious standstill and the tripartition referendum took place in November of 1992.

## **THE IRISH SOCIAL POLICY SYSTEM AND ESPING-ANDERSEN'S WELFARE TYPOLOGY**

A special system of social policy had been developed by modern states with the aim to assure at least minimal individual and social welfare. The main social policy's aim is, therefore, "to improve individual and community welfare by providing different social services<sup>17</sup> by the state or other agencies" (Curry, 1993). The Irish National Economic and Social Council (NESC, 1981) is defying social policies as those Government's actions "which deliberately or accidentally affect the distribution of resources, status, opportunities and life chances among social groups and categories of people within the country, and thus help shape the general character and equity of its social relations". A further step following the social policy development is the welfare state emergence. The welfare state is a phenomenon typical for the modern state's evolution and its development is connected to the capitalist economy and mass political system development. The main difference between the notion of social policy and the concept of welfare state is, that the concept of the modern welfare state has embraced not only the provision of social services for those in need but also "the acceptance by Government of a responsibility on behalf of the whole community, the general well-being of the people" (NESC, 1981). Furthermore, the provision of welfare in any given modern society is always a combination of market, public or civil societal interventions into the individual's lives (Abrahamson, 1995).

The state's intervention and the social policy objectives are various and depending upon the single state and its specific needs. In this regard, when the special policy is examined, the concrete place and the time of the policy application has to be researched. Therefore, the role of history, tradition and culture has to be taken into account when the government's responses to AB issue are examined (Sedmak, 1997).

The different theories aimed, on the basis of certain criteria, to classify state's welfare systems into the theoretical models. Such theoretical models present, of course, the ideal types of welfare regimes that in reality do not exist. However,



DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

➔ Welfare ideology  
and main societal  
sphere of provision  
(Sedmak, 1997: 86)

with the help of theoretical classifications, the easier understanding of the single welfare state can be achieved. One of the earliest typologies of the welfare states was the one developed by Titmuss (1974). He made a division between three models based essentially on the extent to which welfare policy was distanced from the market. He distinguished residual, industrial (achievement) and institutional (redistribute) models (Mitchell, 1991). Esping-Andersen (1990) developed the theoretical approach by generalising Titmuss's typology. The welfare states cluster, in opinion of Esping-Andersen (1990), into three distinct regime-types: a liberal, a conservative and a social-democratic (which corresponded to Titmuss's residual, industrial and institutional models). His criteria for defining welfare states has to do with the quality of social rights, social stratification and different arrangement between state, market and family.

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Welfare ideology and main societal sphere of provision

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Liberal	Market
Social	State
Conservative/Communitarian	Civil society

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In *liberal welfare state* the progress of social reform has been circumscribed by liberal work-ethic norms. Entitlement rules are strict and associated with stigma. Moreover, benefits are modest and the state encourages the market role. The consequence of the mentioned is that this regime "minimised de-commodification effect, effectively contains the realm of social rights and erects an order of stratification that is a blend of a relative equality of poverty among state-welfare recipients, market-differentiated welfare among the majorities and a class-political dualism between the two" (Esping-Andersen, 1990: 26-27). It can be said that such a model generates new social inequalities. The states which fit in the liberal model are for instance USA, Canada, Australia. In a *conservative/corporatist regime*, the liberal obsession with market efficiency and commodification is absent and the role of market as a provider of welfare is marginal. The corporatist regimes are strongly influenced by the Church and prevalent Church's values and committed to the preservation of traditional family role. Social insurance system excluded non-working wives and family benefits encouraged motherhood. Moreover, family services (as a day care) are generally underdeveloped. In accordance to the principle of subsidiarity "the state will interfere only when the family's capacity to service its members is exhausted" (Esping-Andersen, 1990: 26-27). As we will see, the Irish social policy system is one of the embodiments of the mentioned model. Finally, a *social democratic regime* is com-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

posed by the principles of universalism and de-commodification of social rights. Rather than tolerate a dualism between state and market, the regime persuaded a welfare state that would "promote an equality of the highest standard, not an equality of minimum needs as was persuaded elsewhere" (Esping-Andersen, 1990: 27). The services and benefits are so "upgraded to levels commensurate with even the most discriminating tastes of the new middle classes and equality is furnished by guaranteeing workers to participating fully in the quality of rights enjoyed by the better-off" (Esping-Andersen, 1990: 27). The regime's principle resulted in universalistic programmes and all people are incorporated under the one universal insurance system. Moreover, the regime addresses both the market and the traditional family and in contrast to the corporatist model, the principle "is not to wait until the family's capacity to aid is exhausted, but to pre-emptively socialise the costs of familyhood" (Esping-Andersen, 1990: 28). The model is a particular mix of liberalism and socialism and it can be found in the so-called Scandinavian countries.

According to the Esping-Andersen typology, Ireland is placed into a corporatistic model, characterised by the strength of the Catholic Church and by the principle of subsidiarity, which means "that the nearest instance should always try and solve an eventual problem" (Abrahamson, 1992). That is to say, "when an individual fails to help himself/herself, he/she must turn to the clan. If the clan also fails, the next instance is the local community including church and civil organisations. And only when all above mentioned instances have proven unable to solve the problem, the state steps in." (Abrahamson, 1992). A Catholic corporatist's approach adopted by the Irish state presented the third way between the extremes of free market capitalism and communism (Cochrane, Clarke, 1993: 205).

➔ The Christian Social  
Teaching's Hierarchy  
(Abrahamson, 1992: 6)

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#### The Christian Social Teaching's Hierarchy

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The individual as basically self-responsible  
Family and clan  
The Local Community including Church and Networks  
Insurance  
The (local) public sector

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Until the late 1960s the Irish Church remained unfavourable to the state's intervention into the people's welfare, it stressed that "it would undermine the voluntary sector, result in higher taxation and violate Catholic social teaching because it aimed at doing away with poverty and consequently the opportunity to practising Christian charity" (Cochrane, Clarke, 1993: 215, cit. Kaim-Caudle, 1967: 43). Strict adherence to the subsidiarity principle ensured that the state had a limited welfare role. It was the Church that provided a rudimentary social

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

welfare infrastructure. However, from the 1960s onwards, Ireland, as a part of its development strategy, invested heavily in welfare. Although adherence to the Catholic corporatist principle meant that the role of the state in the delivery of social services was not as extensive as in other countries (Cochrane, Clarke, 1993: 215, cit. Kaim-Caudle, 1967: 43).

The fact is that the questions connected with the AB policy present only a relatively small (and for some even relatively unimportant) part of the broad social policy field. Therefore, it is very difficult or even impossible to classify the Irish welfare system into Esping-Andersen's conservative/corporatist model only or solely on the evaluation of the specific situation in the AB policy field. Moreover, there are some concrete social policy areas, which are universally and traditionally used as criteria for such classifications as for instance: the pension system, health insurance system, maternity leave, etc.

However, there are some connections between the historical presence and influence of the Catholic Church in the Republic of Ireland, between the mentioned classification of the Irish social policy system into Esping-Andersen's conservative-corporatist regime and the AB policy field.

The above mentioned omnipresence and active influence of the Catholic doctrine in the historical development of the Irish welfare system is used as one of the Esping-Andersen's criteria for classifying the Irish social policy system into the conservative-corporatist model. On the other hand, the very same intervention of the Catholic Church in the provision of the people's general welfare and the development of the state's welfare system had some impact on the AB policy field as well. In the states that are characterised by strong Church influence and where traditionally the Church has been intervening in the areas connected with the provision of individual and common social welfare, there is a greater probability that these areas would be marked (at least to some extent) by the prevalent ideology of the Catholic teaching. In this regard we must not be surprised that in Ireland, AB has been prohibited in all circumstances, with the only exception accepted, also, by the Catholic Church doctrine. As Curry said, the states' social policy developments were, in general, influenced by different factors, and Irish social policy was, without any doubt, influenced by the historical presence of the Catholic Church (1993).

## **CONCLUSION**

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There are two dominant features of the Irish abortion policy making process: the relative stacity of the (conservative) abortion legislation through the time and the constant historical presence and influence of the Catholic church and its ideological impact. However, we must bear in mind that the AB le-

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

gislation process is a complex proceeding involving the different actors' actions and including different influential circumstances. Moreover, we must be aware of the fact that direct, and especially indirect impact is not easy to locate. Indeed, the extent of the single actor's influence is sometimes almost impossible to measure (Sedmak, 1997).

Hence, the Irish AB policy has rested relatively static due to the influence by anti-abortion lobbies (SPUC and PLAC) and the Catholic Church, which have fought against any possible liberalisation of the restrictive legislation. However, in opposition to the anti-abortion lobbies' initiative and the Church's influence, the modernisation process which has overflowed Ireland from the 1960s onwards, the EC's directives and the EC's law have liberalised the Irish public opinion. Moreover, the all parties' support, for which the anti-AB lobbies were fighting (especially during the 1980s) had fallen and consequently the political parties began to support both sides: pro-choice and pro-life. Finally, in 1992 the Irish people decided to amend the Constitution and the treatment of the AB question became more liberal. The Irish actors' approach can be generally signed as a "prevention approach". The anti-AB groups (the legislation changes initiator) were, namely, fighting for such Constitutional Amendments (in 1983 as well as in 1992), which would prevent any possible further change of the restrictive AB legislation into the more liberal one. The Irish opposition's reasons were, of course, opposite – to remove the Church's and anti-AB lobbies' power and to obtain the preservation of the former legislative acts dealing with AB or, furthermore, to liberalise AB in Ireland.

Finally, we can mention an interesting lack of common, organised and straightforward profession's involvement in the abortion legislation discussion. Moreover, profession involved itself only in the "concluding part" of the policy making process and it has never advocated straightforward liberalisation of AB. Its opinion included both approaches: pro and against AB liberalisation.

To sum up, the Irish social policy system is classified by the Esping-Andersen's welfare typology as part of the conservative-corporatist regime. The mentioned regime is marked (also) by the historical presence and strong influence of the Catholic Church and its prevalent ideology. The traditional and historical intervention of the Catholic Church in the provision of the people's welfare marked the development of the Irish welfare system in general and the area of AB policy and AB legislation as well. The fact that AB has been prohibited in all circumstances, with the only exception accepted, also, by the Catholic Church doctrine, is showing us that this is the case.

## NOTES

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<sup>1</sup> Irish Survey 1971, The European Values Group 1980, Irish Marketing Survey 1981.

<sup>2</sup> From early 1970s the Catholic interest groups appeared, organised by a lay people. These groups were committed to the defense and promotion of traditional Catholic values. This new phase for Irish Catholicism, as lay activism had not previously received the support of the clergy, proved beneficial to the Church. These groups had a power to put pressure on the politicians and permitted the Church to claim that its point of view had a popular backing (Girvin, 1983).

<sup>3</sup> A big number of signatures could not be ignored by the State.

<sup>4</sup> The Irish parliament

<sup>5</sup> It must be emphasized, that PLAC was organized very well, its having included in the campaigning: the television and radio promotion, education of politicians, etc. (Hesketh, 1990).

<sup>6</sup> Within the AAC we can find further organizations: Rape Crisis Center, Irish Council for Civil Liberties, Group for Family Law Reform, Irish Pregnancy Counseling Center, Dublin Well Women Center, etc.

<sup>7</sup> The others were: amendment is sectarian, unnecessary and an inadequate response to the Irish hidden problem.

<sup>8</sup> The unborn has a right to live, because it is the part of Homo Sapiens and therefore has a right to live by virtue of humanity.

<sup>9</sup> At this point it can be mentioned, that distribution of the material "advocating abortion" was being, before Article 40.3.3, technically illegal under the Censorship of Publications Act but this dealt primarily with printed material and did not affect verbal individual counseling (Reid, 1992).

<sup>10</sup> The students were the third part in the case (neither women who sought AB nor clinics which provided AB) and without any economic interest, what is crucial in the case of EC.

<sup>11</sup> The Eighth Amendment, 1983.

<sup>12</sup> The evidence had come to the Attorney General's attention through the Irish Police. The girl and her parents had gone to the UK so that the pregnancy could be terminated, but before the pregnancy was carried out they had contacted the Irish police to check whether a DNA test would be admissible as forensic evidence in seeking to prove paternity. Following the injunction, the girl and parents returned to Ireland. The injunction was confirmed by the High Court on 17 February and the girl was prohibited from leaving Ireland "for a period of nine months from the date hereof". (Smyth, 1992: 11)

<sup>13</sup> That the 1983 Amendment contained several ambiguities came to light only in the 1992 X case.

<sup>14</sup> In addition, under the pressure, the Government obtained a Solemn Declaration appended to the Protocol which purports to reduce its effect. However, the Solemn Declaration has no decisive status in European law.

<sup>15</sup> However, in the case of the student's unions, they were the third parties who had no economic interest in the matter, and the ECJ held that therefore they had no Community right to distribute information.

<sup>16</sup> The ratification of the Maastricht Treaty.

<sup>17</sup> Certain public programmes (social services) as income maintenance, housing, education and health, have traditionally come to be regarded as the main constituent elements of social policy since they are the most visible instruments of achieving the distributive aims of government (Curry, 1993).

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## Proces stvaranja politike pobačaja, povijesne analize i utjecaj regulacije Europske zajednice. Studija slučaja Republike Irske

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Članak obrađuje proces prihvaćanja i promjena zakonodavstva povezanog s pitanjem pobačaja u Republici Irskoj. Njegovi su središnji ciljevi povijesni pregled zakonodavnih spisa (od 1921. do 1992. godine) koji se bave tim područjem te povijesna analiza sudionika i događaja koji su utjecali na mijenjanje zakonodavstva toga specifičnog područja socijalne politike. Posebno je prikazan utjecaj Europske zajednice, a s pomoću Esping-Andersenova modela režima javne skrbi navedeni je segment socijalne politike postavljen u teorijski kontekst. Dva temeljna obilježja određuju irsko zakonodavstvo pobačaja: relativna vremenska statičnost (konzervativnih) zakonodavnih spisa te utjecajna povijesna nazočnost Katoličke crkve i njezina ideološka pozicija. Nepromjenljivost irske politike pobačaja označuje i utjecaj protupobačajnih lobija, koji su nastali

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

početkom 80-ih godina, s jasnim ciljem sprečavanja liberalizacije restriktivnoga zakona do koje bi mogli dovesti procesi modernizacije i sekularizacije koji su zahvatili Republiku Irsku 60-ih godina ovoga stoljeća. "Preventivnom" pristupu tradicionalističkih lobija suprotstavili su se zagovornici "izbora" i postupne liberalizacije zakona te usklađivanja irskoga zakonodavstva sa zakonima Europske zajednice. Modernizacija, sekularizacija, opća liberalizacija vrijednosti te utjecaj Europske zajednice i pojedinih ključnih događaja ("X primjer") odrazili su se na referendumu 1992. godine na kojem je irski narod liberalizirao zakonodavstvo pobačaja, ne u smislu njegove legalizacije, već kao prava na putovanje (u neku drugu članicu Europske zajednice radi pobačaja), prihvaćanje ključnih informacija i usluga drugih država članica povezanih s pobačajem.

## Die Entstehung einer Politik des legalen Schwangerschaftsabbruchs. Geschichtliche Analysen und Einflüsse durch EG-Regelungen. Fallstudie: Republik Irland

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Der Artikel beschäftigt sich mit Änderungen bestehender Rechtsvorschriften und der Übernahme neuer Gesetzesvorlagen in der Republik Irland bezüglich der Frage des Schwangerschaftsabbruchs. Das Hauptziel ist, einen geschichtlichen Überblick über den Bestand der entsprechenden Rechtsvorschriften zu geben, die von 1921 bis 1992 entstanden sind. Ferner werden in einer historischen Analyse Entwicklungen und Akteure thematisiert, die Gesetzesänderungen in diesem spezifischen Bereich der Sozialpolitik beeinflussten. Der Artikel behandelt im Besonderen den Einfluss entsprechender EG-Regelungen. Abschließend wird das angeführte sozialpolitische Segment anhand des öffentlichen Fürsorgemodells nach Esping-Andersen in einen theoretischen Kontext gestellt. Die irische Gesetzgebung zur Frage des legalen Schwangerschaftsabbruchs wird von zwei grundlegenden Faktoren bestimmt: zum einen ist das der relative zeitlich-statische Charakter der (konservativen) Gesetzesvorschriften, zum anderen die traditionelle, einflussreiche Präsenz der katholischen Kirche mit ihren ideologischen Positionen. Die Unnachgiebigkeit der irischen Abtreibungspolitik wird verstärkt durch den Einfluss von Anti-Abtreibungs-Lobbys, die zu Beginn der 80-er Jahre entstanden sind. Ihr Ziel ist ganz klar, eine Liberalisierung der restriktiven Gesetzesvorschriften

DRUŠ. ISTRAŽ. ZAGREB  
GOD. 10 (2001),  
BR. 1-2 (51-52),  
STR. 279-303

SEDMAK, M.:  
THE ABORTION POLICY...

zu verhindern, die durch die Modernisierungs- und Säkularisierungsprozesse, die in den 60-er Jahren des 20. Jahrhunderts in der Republik Irland ihren Einzug hielten, herbeigeführt werden könnte. Den an der Schwangerschaftsverhütung orientierten traditionalistischen Lobbys stellten sich die Fürsprecher des Rechts auf freie Entscheidung entgegen. Letztere befürworteten außerdem eine allmähliche Liberalisierung der bestehenden Rechtsgrundlage sowie die Anpassung der irischen Gesetze an entsprechende Gesetzesvorschriften der EG. Die Prozesse der Modernisierung, Säkularisierung, die allgemeine Liberalisierung von Wertvorstellungen sowie der Einfluss der EG und bestimmter weittragender Vorfälle haben sich bei der Volksabstimmung von 1992 bemerkbar gemacht. Damals entschied die irische Bevölkerung zugunsten einer Liberalisierung der Gesetzesvorschriften, zwar nicht im Sinne einer Legalisierung, sondern dafür, dass die Frau, die sich zu einem Schwangerschaftsabbruch entschlossen hat, ausreisen und in einem anderen EG-Mitgliedsland den Eingriff vornehmen lassen kann. Der positive Ausgang des Volksentscheids ermöglicht also die Übernahme wesentlicher Informationen sowie Dienstleistungen anderer EG-Mitgliedsstaaten im Bereich des legalen Schwangerschaftsabbruchs.