Supreme Court of Ireland Decisions

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THE SUPREME COURT

[1971 No. 2314 P]

Walsh J.

Budd J.

Henchy J.

Griffin J.

Fitzgerald C.J.

BETWEEN

MARY McGEE

PLAINTIFF

and
THE ATTORNEY GENERAL
and
THE REVENUE COMMISSIONERS

DEFENDANTS

JUDGMENT of FITZGERALD C.J. delivered on the 19th day of December 1973.

This is an appeal by the plaintiff from the judgment and order of the President of the High Court dismissing her action against the defendants. The plaintiff is a married woman aged 27 years, who lives with her husband, a fisherman, and their children at Loughshinny, Skerries, County Dublin. She was married in the year 1968, and has four children. The first two children of the marriage were boys; the third and fourth were twin girls who were born on the 15th November, 1970. The parents and children are all Irish citizens and of the Roman Catholic religion.

In her statement of claim the plaintiff pleaded that her second and third pregnancies were complicated by serious attacks of cerebral thrombosis; that the second caused a temporary paralysis, and that the third caused toxaemia with high blood pressure and a threat of cerebral thrombosis. She alleged that she had been warned by her medical adviser that her life would be in danger if she were to become pregnant again. She further alleged that, having considered this advice, she and her husband decided that they should have no more children and would resort to the use of contraceptives. She further

alleged that her doctor prescribed the use of a diaphragm together with a contraceptive jelly known as "Staycept Jelly", and that he supplied her with a quantity of it. At the trial her evidence, the evidence of her husband, and the evidence of her doctor, duly established the case which she had pleaded. She further pleaded, and adduced evidence to support her plea, that when she attempted to import a quantity of "Staycept Jelly" it was seized by the customs authorities, and that they refused her application to release it on the ground that its importation was prohibited by s.17, sub-s.3, of the Criminal Law Amendment Act, 1935. The plaintiff claims a declaration that s.17 of the Act of 1935 is inconsistent with the Constitution and that, therefore, it was not carried forward by Article 50 of the Constitution, and that it no longer forms part of the law of the State. She further claims a declaration that the seizure by the second defendants of the packet of jelly was unauthorised by law and illegal, and she claims damages for its detention or conversion.

It is clear that s.17 of the Act of 1935 was part of the law of Saorstát Eireann between the year 1935 and the coming into operation of the Constitution in 1937 and that, therefore, it would be carried forward by the provisions of s.1 of Article 50 of the Constitution unless it was inconsistent with the Constitution. [*The Chief Justice quoted s.17 of* 1935, *and continued* ...] It is to be observed that the section does not prohibit the manufacture of a contraceptive, nor does it prohibit the use of a contraceptive. In my opinion, it was clearly directed against the market in contraceptives by prohibiting their importation or sale. If it was intended to prohibit the manufacture or use of contraceptives, I have no doubt that the section would have so stated. There was evidence, and it appears to be the fact, that the "Staycept Jelly" which the plaintiff endeavoured to import is not manufactured in this country; presumably that is so because a manufacturer could not sell the product lawfully. There was no evidence of the elements or constituents of which the jelly was composed. Consequently, it does not appear to me to have been established that the plaintiff, or anybody else who took the trouble of having it analysed, should not proceed to make it and distribute it, if so minded, so long as there was no sale.

The plaintiff's real complaint is that s.17 of the Act of 1935, by its prohibition of sale and importation, effectively prevents her from obtaining the jelly or making it available to herself. In my opinion, the evidence adduced on behalf of the plaintiff does not establish that she is prohibited from making or obtaining this product. Notwithstanding the fact that it is not commercially on the market for sale, it should be borne in mind that she obtained a quantity of it from her doctor. He committed no offence by supplying it to her, and whoever manufactured it committed no offence either.

I think it well to make it quite clear that, while it is pleaded that the plaintiff and her husband are of the Roman Catholic religion, the issue to be determined is not based, and was not argued, on any issue related to any particular religion. The issue is confined strictly to the legal effect of the Constitution on the law as laid down by s. 17 of the Act of 1935.

It is alleged by the plaintiff that s.17 of the Act of 1935 is inconsistent with the following articles in the Constitution: sections 1 and 3 of Article 40, section 1 and sub-s. 1 of s. 2 of Article 41, section 1 of Article 42, section 2 of Article 44, and Article 45. The benefit of s.1 of Article 40 is conferred on all citizens, and confers upon the plaintiff a benefit which she shares with all other citizens. She has, however, personal characteristics which are not common to all citizens. First, she is a female and not a male; secondly, she is a married woman, not a spinster or a widow; thirdly, she is of a child-bearing age; fourthly, her state of health is such that a further pregnancy would expose her to dangerous risks beyond those which a healthy married woman might be prepared to face. This latter distinction and the additional risk to the plaintiff if she should become pregnant again constitute the real basis of the plaintiff's claim. The economic situation of her husband and herself is no different to thousands of other couples. I find myself unable to hold that any portion of s.17 of the Act of 1935 contravenes section 1 of Article 40 of the Constitution. Section 17 does not create any inequality affecting the plaintiff's rights. The real basis of her complaint is that the section, in affecting all citizens, fails to make special provision exempting her because of her own particular disability.

[The Chief Justice quoted s. 3 *of Article* 40 *of the Constitution, and continued* …] The right to marry and the intimate relations between husband and wife are fundamental rights which have existed in most, if not all, civilised countries for many centuries. These rights were not conferred by the Constitution in this country in 1937. The Constitution goes no further than to guarantee to defend and

vindicate and protect those rights from attack. If s.17 of the Act of 1935 prohibited the use of contraceptives, it might reasonably be held to contravene Article 40. However, the section does not do so and, in my opinion, it is not inconsistent with any of the clauses of that Article.

It was further submitted on the plaintiff's behalf that s.17 of the Act of 1935 was inconsistent with Article 41 of the Constitution. The material provisions of Article 41 upon which reliance was placed are s.1 and sub-s.1 of s.3; it is also material to refer to sub-s.2 of s.3 of that Article. There is no definition of the word "family" in the Constitution. It was submitted on behalf of the plaintiff that in some way, in addition to the rights of herself and her husband based on their married state, the four infant children of the marriage were entitled to be considered by the law as being entitled to protection as having an interest in seeing that the family was not further enlarged. This contention appears to me to be completely untenable. It appears to me to be fundamental to the married state that the husband and wife—and they alone—shall decide whether they wish to have children, or the number of children they wish to have. It does not appear to me that s.17 of the Act of 1935 contravenes in any way the provisions of Article 41 of the Constitution.

Article 42 of the Constitution recognises the family as the natural educator of a child, and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. It is, I think, unnecessary to set out this article in *extenso;* suffice to say that it recognises the parents' right to choose the form of education for the child, that it recognises the duty of the parents to provide such an education, and accepts the responsibility for providing free primary education, and to give further reasonable aid in further educational establishments. I see nothing in s.17 of the Act of 1935 which in any way is inconsistent with Article 42 of the Constitution. This article is concerned with, and only with, the duties and rights of parents and the duty of the State in relation to the education of children. While s.*3,* sub-s.1, of Article 42 provides that parents shall not be obliged "in violation of their conscience" to send their children to a State school, or any particular type of school, it is quite unjustifiable, in my opinion, to take the word "conscience" out of its context and seek to apply it to the wish of the parents as to whether they would have children or not.

Article 44 of the Constitution, which deals with religion and religious institutions, was recently amended by referendum. It confers no special status on any religion; every citizen is entitled to profess the religion of his choice, or no religion. Reliance was sought to be placed on sub-s.1 of s.2 of that Article which states :— "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen." In my opinion the freedom of conscience referred to in that sub-section relates to the choice and profession of a religion, and to it alone; the word "conscience" can not be taken out of its context and applied to the decision of the plaintiff and her husband, or any other married couple, as to whether they should or should not have children.

Article 45 refers to principles of social policy which are intended for the general guidance of the Oireachtas in its making of laws and which are declared to be exclusively its province and not cognisable by any Court. In my opinion, the intervention by this, or any other Court, with the function of the Oireachtas is expressly prohibited under this article. To hold otherwise would be an invalid usurpation of legislative authority.

While it is the fact that in her statement of claim the plaintiff claimed a declaration that the seizure by the second defendants of the packet of "Staycept Jelly" was unauthorised and illegal, no argument was addressed to this Court or, so far as I can ascertain, to the President of the High Court in relation to any interference by those defendants with the property rights, if any, of the plaintiff in the product. I do not know whether the plaintiff was in any difficulty in establishing ownership of the packet before it was delivered to her. Whatever the reason, as there was no argument upon the issue of the ownership of the packet, I find it unnecessary to decide such issue.

It is, perhaps, worthy of note that the product popularly referred to as "the pill " can be imported and sold in the open market quite lawfully. Apparently, it is not in the schedule which prohibits the importation or sale of contraceptives. Its omission from the list of prohibited articles is due, apparently, to the fact that it has other properties which are unconnected with contraception.

I can find no guidance or help from my consideration of the three decisions of the American Federal Supreme Court which were cited to us. *Poe* v. *Ullman* (1961) 367 U.S. 438 was concerned with the constitutionality of a Connecticut statute which prescribed criminal penalties for any person using any contraceptive drug. As I have pointed out, s.17 of the Act of 1935 does not prohibit the use of a contraceptive. *Griswold* v. *Connecticut* (1965) 381 U.S. 479*,* decided in the Supreme Court of the United States, was again concerned with a Connecticut statute which made the use of a contraceptive a criminal offence. Finally, *Eisenstadt* v. *Baird* (1972) 405 U.S. 438 was concerned with a Massachusetts statute which made it a crime to sell, lend or give away a contraceptive to a person who was not married. Quite apart from the obvious discrimination by the statute between married and unmarried persons, it is worthy of note that only two of the nine judges appear to have observed that no offence had in fact been proved against the defendant, as there was no evidence that the recipient of the contraceptive was either married or unmarried.

It is well to realise that the plaintiff's claim here is as a citizen and that, if any portion of s.17 of the Act of 1935 is declared unconstitutional, the benefit to be derived from such a decision is equally to be enjoyed by every other citizen, be they married or not.

To summarise, it appears to me that the fact that the plaintiff professes a particular religion, or that she and her husband have agreed upon the course which they wish to adopt, is quite irrelevant. To hold otherwise, would be to distinguish between citizens of different religions; and to distinguish between cases where the spouses were of the same mind and cases where one or other, for reasons of health, economics or social considerations, might wish to avoid a further pregnancy independently of the wish of the other spouse.

One must naturally be sympathetic with the plaintiff in the dilemma in which she finds herself and which is attributable to her own physical health. It surely, however, must be recognised that the physical and mental health of either spouse in a marriage may effectively preclude a pregnancy either temporarily or, in some instances, permanently. Having regard to the provision in the Constitution prohibiting divorce, the physical or mental illness of one spouse necessarily has its repercussions on both, perhaps for their joint lives. These appear to me to be natural hazards which must be faced by married couples with such fortitude as they can summon to their assistance.

In my opinion, the plaintiff has failed to establish a case entitling her to the relief claimed, and this appeal should be dismissed.

THE SUPREME COURT

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BETWEEN

MARY McGEE

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DEFENDANTS

JUDGMENT of WALSH J. delivered on the 19th day of December 1973.

The facts of this case are lot in dispute and I do not find it necessary to recite them in any detail The central facts are that the plaintiff is a young married woman and that the case is concerned with the impact of the provisions of s.17 of the Criminal Law Amendment Act, 1935, upon the sexual relations between the plaintiff and her husband.

The effect of the statutory provision in question is to make it a criminal offence for any person to sell or expose, offer, advertise, or keep for sale or to import or to attempt to import into the State any contraceptive. Section 17 of the Act of 1935 invokes s.42 of the Customs Consolidation Act, 1876, and thereby includes contraceptives among the list of prohibited imports with the result that an importation of such an article could lead to the person importing the article being prosecuted and convicted under s.186 of the Act of 1876. For the purpose of s.17 of the Act of 1935 the word "contraceptive" means "any appliance, instrument, drug, preparation or thing, designed, prepared, or intended to prevent pregnancy resulting from sexual intercourse between human beings." I thought it necessary to give this definition in the detail in which it appears in the Act of 1935 so as to make clear that this case is not in any way concerned with instruments, preparations, drugs or appliances, etc., which take effect after conception, whether or not they are described as or purport to be contraceptives. Whether any such article is designed to or in fact takes effect after conception is a question which in each particular case can be decided only as one of fact based on the best available scientific evidence.

The event which led immediately to the present proceedings was the refusal of the second defendants to permit the importation by the plaintiff of a contraceptive jelly for use by her in her sexual relations with her husband, with the consent of her husband, and which had been prescribed for her by her medical adviser. It does not appear to be in dispute that the article in question is a contraceptive within the statutory definition to which I have already referred.

There is no law in force in the State which prohibits the use of contraceptives, either in or outside of marriage, or the manufacture or distribution of contraceptives within the State. It appears to be the accepted fact that at present there are no contraceptives manufactured within the State and, therefore, that any contraceptives presently available within the State must necessarily have been imported in breach of the statutory provisions; although if innocently imported it would not attract a penalty to the importer. Such importation, however, would leave the goods liable to seizure.

The plaintiff seeks a declaration that s.17 of the Act of 1935 is inconsistent with the Constitution and was not carried forward by Article 50 of the Constitution and no longer forms part of the law of the State. She also seeks a declaration that the seizure by the second defendants of the commodity in question was unauthorised by law and was illegal. In consequence she also seeks damages for detinue or conversion.

Article 50, s. 1, of the Constitution provides;-

> "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Eireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

I have referred to the wording of s.1 of Article 50 because, apart from being the foundation of the present proceedings, one of the submissions made on behalf of the Attorney General was to the effect that a statutory provision in force prior to the Constitution could continue to be in force and to be carried over by Article 50 even though its provisions were such as could not now be validly enacted by the Oireactas because of the provisions of the Constitution. Stated as a general proposition, I find that this is in direct conflict with the very provisions of Article 50 and is quite unsustainable. However, in my opinion, there are circumstances in which the proposition could be partially correct.

If a pre-Constitution statute was such that it was not in conflict with the Constitution when taken in conjunction with other statutory provisions then in existence and with a particular state of facts then

existing, and if such other statutory provisions continued in effect after the coming into force of the Constitution and the particular state of facts remained unaltered, the provisions of the first statute might not in any way be inconsistent with the provisions of the Constitution. If, however, subsequent to the coming into force of the Constitution the other statutory provisions were repealed and the state of facts was altered to a point where the joint effect of the repeal of the other statutes and the alteration of the facts was to give the original statute a completely different effect, then the question would arise of its continuing to be part of the law. In my view, Article 50, by its very terms (both in its Irish and English texts), makes it clear that laws in force in Saorstát. Eireann shall continue to be in force only to the extent to which they are not inconsistent with the Constitution; and that, if the inconsistency arises for the first time after the coming into force of the Constitution, the law carried forward thereupon ceases to be in force.

The relevance of this to the present case is clear. There is no evidence in the case to indicate what was the state of facts existing at the time of the passing of the Act of 1935 and the years subsequent to it up. to the coming into force of the Constitution, and even for a period after that. It appears to have been assumed, though there is no evidence upon which to base the assumption, that contraceptives were not manufactured within the State at that time or were not readily available otherwise than by sale. The validity or otherwise of a law may depend upon an existing state of facts or upon the facts as established in litigation, as was clearly indicated by this Court in *Ryan* v. *The Attorney General* [1965] IR 294. To control the sale of contraceptives is not necessarily unconstitutional *per se;* nor is a control on the importation of contraceptives necessarily unconstitutional. There may be many reasons, grounded on considerations of public health or public morality, or even fiscal or protectionist reasons, why there should be a control on the importation of such articles. There may also be many good reasons, grounded on public morality or public health, why their sale should be controlled. I use the term "controlled" to include total prohibition. What is challenged here is the constitutionality of making these articles unavailable. Therefore, the decision in this appeal must rest upon the present state of the law and the present state of the facts relating to the issues in dispute. Therefore, even if it were established that in 1935, 1936 or 1937, or even 1940, contraceptives were reasonably available without infringement of the law, that would not necessarily determine that s.17 of the Act of 1935 now continues to be in full force and effect.

The relevant facts, which are not in dispute in this case, are that at the present time the effect of s.17 of the Act of 1935, if it is still in force, is effectively to make contraceptives unavailable to persons within the State without an infringement of the law and the possibility of a criminal prosecution and conviction.

The plaintiff claims that s.17 of the Act of 1935 is inconsistent with ss.1 and 3 of Article 40 of the Constitution. In respect of s.1 of Article 40, it is claimed that s.17 of the Act of 1935 discriminates unfairly against the plaintiff and fails to hold her, as a human person, equal before the law in that it fails to have due regard to her physical capacity, her moral capacity and her social function in the situation in which she now finds herself. The latter reference is to the plaintiff's particular condition of health. So far as s.3 of Article 40 is concerned, it is claimed that, by reason of s.17 of the Act of 1935, the State has failed to guarantee in its laws to respect and as far as practicable by its laws to vindicate her personal rights or to protect them from unjust attack, and has failed to vindicate her life, her person and her good name and her property rights. It is also claimed that s.17 of the Act of 1935 is inconsistent with Article 41 of the Constitution in that it violates the inalienable and imprescriptible rights of the family in a matter which the plaintiff claims is peculiarly within the province of the family itself, in that the section attempts to frustrate a decision made by the plaintiff and her husband for the benefit of their family as a whole and thereby attacks and fails to protect the family in its constitution and authority: that claim was based on s.1 of Article 41. Section 2 of Article 41 is invoked by the plaintiff in her claim that s.17 of the Act of 1935 fails to recognise and give due weight to a private family decision of the plaintiff and her husband touching her life within the home and by attempting to frustrate that decision endangers the plaintiff's life and refuses to allow her to live her life within her home as she and her husband think best in the interests of the family.

The plaintiff has also invoked the provisions of s.1 of Article 42 of the Constitution by relating the decision taken by herself and her husband to practise contraception as being partly motivated by their desire to provide for the better education of their existing children; and she submits that the Act of

1935 attempts to frustrate that decision. The plaintiff also says that her decision to practise contraception is in accordance with the dictates of her own conscience, and she invokes s.2 of Article 42 of the Constitution which guarantees to every citizen freedom of conscience and the free profession and practice of religion, subject to public order and morality. The plaintiff claims that s.17 of the Act of 1935 prevents her from leading her private life in accordance with the dictates of her own conscience. Article 45 of the Constitution, which is the Article which deals with the directive principles of social policy, is also invoked by the plaintiff. She relies on s.1 of that Article wherein it is stated that the State shall strive to promote the welfare of the whole people by securing and protecting, as effectively as it may, a social order in which justice and charity shall inform all the institutions of family life. In the same vein, the plaintiff also invoked that portion of the preamble to the Constitution in which the people, in giving themselves the Constitution, express the intention to seek "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…"

Articles 40, 41, 42 and 44 of the Constitution all fall within that section of the Constitution which is titled "Fundamental Rights." Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control. However, at the same time it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society It is important to recall that under the Constitution the State's powers of government are exercised in their respective spheres by the legislative, executive and judicial organs established under the Constitution. I agree with the view expressed by O'Byrne J. in *Buckley and Others (Sinn Féin)* v. *The Attorney General* [1950] I.R. 67 at 83 that the power of the State to act for the protection of the common good or to decide what are the exigencies of the common good is not one which is peculiarly reserved for the legislative organ of government, in that the decision of the legislative organ is not absolute and is subject to and capable of being reviewed by the Courts. In concrete terms that means that the legislature is not free to encroach unjustifiably upon the fundamental rights of individuals or of the family in the name of the common good, or by act or omission to abandon or to neglect the common good or the protection or enforcement of the rights of individual citizens.

Turning to the particular submissions made on behalf of the plaintiff, I shall deal first with the submission made in relation to the provisions of Article 41 of the Constitution which deals with the family. On the particular facts of this case, I think this is the most important submission because the plaintiff's claim is based upon her status as a married woman and is made in relation to the conduct of her sexual life with her husband within that marriage. For the purpose of this Article I am of opinion that the state of the plaintiff's health is immaterial to the consideration of the rights she claims are infringed in relation to Article 41. In this Article the State, while recognising the family 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, guarantees to protect the family in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the State. The Article recognises the special position of woman, meaning the wife, within that unit; the Article also offers special protection for mothers in that they shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. The Article also recognises the institution of marriage as the foundation of the family and undertakes to protect it against attack. By this and the following Article, the State recognises the parents as the natural guardians of the children of the family and as those in whom the authority of the family is vested and those who shall have the right to determine how the family life shall be conducted, having due regard to the rights of the children not merely as members of that family but as individuals.

It is a matter exclusively for the husband and wife to decide how many children they wish to have; it would be quite outside the competence of the State to dictate or prescribe the number of children which they might have or should have. In my view, the husband and wife have a correlative right to agree to have no children. This is not to say that the State, when the common good requires it, may not

actively encourage married couples either to have larger families or smaller families. If it is a question of having smaller families then, whether it be a decision of the husband and wife or the intervention of the State, the means employed to achieve this objective would have to be examined. What may be permissible to the husband and wife is not necessarily permissible to the State. For example, the husband and wife may mutually agree to practise either total or partial abstinence in their sexual relations. If the State were to attempt to intervene to compel such abstinence, it would be an intolerable and unjustifiable intrusion into the privacy of the matrimonial bedroom. On the other hand, any 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 question.

The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid having children by use of contraceptives, it is a matter peculiarly within the joint decision of the husband and wife and one into which the State cannot intrude unless its intrusion e justified by the exigencies of the common good. The question of whether the use of contraceptives by married couples within their marriage is or is not contrary to the moral code or codes to which they profess to subscribe, or is or is not regarded by them as being against their conscience, could not justify State intervention. Similarly the fact that the use of contraceptives may offend against the moral code of the majority of the citizens of the State would not *per se* justify an intervention by the State to prohibit their use within marriage. The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it counsel for the Attorney General did not seek to argue that the State would have any right to seek to prevent the use of contraceptives within marriage. He did argue, however, that it did not follow from this that the State was under any obligation to make contraceptives available to married couples. Counsel for the second defendants put the matter somewhat further by stating that, if she had a right to use contraceptives within the privacy of her marriage, it was a matter for the plaintiff to prove from whence the right sprang. In effect he was saying that, if she was appealing to a right anterior to positive law, the burden was on her to show the source of that right. At first sight this may appear to be a reasonable and logical proposition. However, it does appear to ignore a fundamental point, namely, that the rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life. It is undoubtedly true that among those persons who are subject to a particular moral code no one has a right to be in breach of that moral code. But when this is a code governing private morality and where the breach of it is not one which injures the common good then it is not the State's business to intervene. It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire.

In my view, Article 41 of the Constitution guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion and, as such, assumes the status of a right so guaranteed by the Constitution. If this right cannot be directly invaded by the State it follows that it cannot be frustrated by the State taking measures to ensure that the exercise of that right is rendered impossible. I do not exclude the possibility of the State being justified where the public good requires it (as, for example, in the case of a dangerous fall in population threatening the life or the essential welfare of the State) in taking such steps to ensure that in general, even if married couples could not be compelled to have children, they could at least be hindered in their endeavours to avoid having them where the common good required the maintenance or increase of the population.

That, however, is not the present case and there is no evidence whatever in the case to justify State intervention on that ground. Similarly it is not impossible to envisage a situation where the availability of contraceptives to married people for use within marriage could be demonstrated to have led to or would probably lead to such an adverse effect on public morality so subversive of the common good as to justify State intervention by restricting or prohibiting the availability of contraceptives for use within marriage or at all. In such a case it would have to be demonstrated that all the other resources of the State had proved or were likely to prove incapable to avoid this subversion of the common good while contraceptives remained available for use within marriage.

In my opinion, s.17 of the Act of 1935, in so far as it unreasonably restricts the availability of contraceptives for use within marriage, is inconsistent with the provisions of Article 41 of the Constitution for being an unjustified invasion of the privacy of husband and wife their sexual relations with one another. The fundamental restriction is contained in the provisions of sub-s.3 of s.17 of the Act of 1935 which lists contraceptives among the prohibited articles which may not be imported for any purposes whatsoever. On the present state of facts, I am of opinion that this provision is inconsistent with the Constitution and is no longer in force.

For the reasons I gave earlier in this judgment, the prohibition of the importation of contraceptives could be justified on several grounds provided the effect was not to make contraceptives unavailable. For example, the law might very well prohibit for health reasons the importation of some if not all contraceptives from sources outside the country if, for example, there is a risk of infection from their use. No such reason has been offered in the present case and in any such instance, for the reasons already given, the law could not take other steps to see that contraceptives were not otherwise available for use in marriage.

As this particular case arose primarily out of the ban on importation, I think that, in so far as Article 41 is concerned, the declaration sought should only go in respect of sub-s.3 of s.17 of the Act of 1935. That does not necessarily mean that the provisions as to sale in sub-s.1 of s.17 cannot be impugned. If, in the result, notwithstanding the deletion of sub-s.3, the prohibition on sale had the effect of leaving a position where contraceptives were not reasonably available for use within marriage, then that particular prohibition must also fall. However, for the moment I do not think it is necessary to make any declaration in respect of that.

So far I have considered the plaintiff's case only in. relation to Article 41 of the Constitution; and I have done so on the basis that she is a married woman but without referring to her state of health. I now turn to the claim, made under Article 40 of the Constitution. So far as this particular Article is concerned, and the submissions made thereunder, the state of health of the plaintiff is relevant. If, for the reasons I have already given, a. prohibition on the availability of contraceptives for use in marriage generally could be justified on the grounds of the exigencies of the common good, the provisions of s.1 of Article 40 (in particular, the proviso thereto) would justify and would permit the State to discriminate between some married persons and others in the sense that, where conception could more than ordinarily endanger the life of a particular person or persons or particular classes of persons within the married state, the law could have regard to this difference of physical capacity and make special exemptions in favour of such persons. I think that such an exemption could also be justified under the provisions of s. 3 of Article 40 on the grounds that one of the personal rights of a woman in the plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. I am of opinion also that not only has the State the right to do so but, by virtue of the terms of the proviso to s.1 and the terms of s.3 of Article 40, the State has the positive obligation to ensure by its laws as far as is possible (and in the use of the word "possible" I am relying on the Irish text of the Constitution) that there would be made available to a married woman in the condition of health of the plaintiff the means whereby a conception which was likely to put her life in jeopardy might be avoided when it is a risk over and above the ordinary risks inherent in pregnancy. It would, in the nature of things, be much more difficult to justify a refusal to do this on the grounds of the common good than in the case of married couples general.

Next I turn to the submissions made on behalf of the plaintiff which relate to the provisions of s. 2 of Article 44 of the Constitution. In my view these submissions are based on a mistaken interpretation of the constitutional provision in question. In particular the reference to the decision of this Court in *Quinn's Supermarket v. The Attorney General* [1972] I.R. 1,15 is misinterpreted. That particular case dealt with a situation where a law might be in such terms as to impose upon a member of a particular religion the choice of exercising his religion and thereby suffering some economic or other loss, or foregoing the practice of his religion to avoid the loss in question. It was held that any such law would be invalid having regard to the provisions of s. 2 of Article 44. In the present case the plaintiff says that, so far as her conscience is concerned, the use of contraceptives by her is in accordance with her conscience and that, in using them, she does not feel that she is acting against her conscience. It was sub□mitted that social conscience, as distinct from religious conscience, falls within the ambit of Article 44. I do not think that is so. The whole context in which the question of conscience appears in

Article 44 is one dealing with the exercise of religion and the free profession and practice of religion. Within that context, the meaning of s. 2, sub-s. 1, of Article 44 is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned and, subject to public order and morality, is free to profess and practise the religion of his choice in accordance with his conscience. Correlatively, he is free to have no religious beliefs or to abstain from, the practice or profession of any religion. Because a person feels free, or even obliged in conscience to pursue some particular activity which is not in itself a religious practice, it does not follow that such activity is guaranteed protection by Article 44. It is not correct to say, as was submitted, that the Article is a constitutional guarantee of a right to live in accordance with one's conscience subject to public order and morality. What the Article guarantees is the right not to be compelled or coerced into living in a way which is contrary to one's conscience and, in the context of the Article, that means contrary to one's conscience so far as the exercise, practice or profession of religion is concerned.

However, the reference to *Quinn's Supermarket v. The Attorney General* [1972] I.R. 1, is relevant to this case in another way. The judgment in that case pointed out that the Con□stitution recognises and reflects a firm conviction that the people of this State are a religious people and that, as it then stood, the Constitution referred specifically to a number of religious denominations which coexisted within the State, thereby acknowledging the fact that while we are a religious people we also live in a pluralist society from the religious point of view. In my view, the subsequent deletion of sub-ss. 2 and 3 of s. 1 of Article 44 by the fifth amendment to the Constitution has done nothing to alter this acknowledgment that, religiously speaking, the society we live in is a pluralist one. It was also pointed out in that case that the guarantees of religious freedom and freedom of conscience were not confined to the different denominations of the Christian religion but extended to other religious denominations see s. 2 of Article 44 which guarantees freedom of conscience and the free profession and practice of religion to every citizen, whether of the Christian religion or not.

Both in its preamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority. The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law. There are many to argue that natural law may be regarded only as an ethical concept and as such is a re-affirmation of the ethical content of law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgment of Christianity in the preamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution in□tended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledg□ment of the ethical content of law in its ideal of justice. What exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not yet fully agreed. While the Constitution speaks of certain rights being imprescriptible or inalienable, or being antecedent and superior to all positive law, it does not specify them. Echoing the words of O'Byrne J. in *Buckley and Others (Sinn Fein) v. The Attorney General* [1950] I.R. 67, at 82*,* I do not feel it necessary to enter upon an inquiry as to their extent or, indeed, as to their nature. It is sufficient for the court to examine and to search for the rights which may be discoverable in the particular case before the court in, which these rights are invoked.

In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law; the Constitution speaks of one of them when it refers to the inalienable duty of parents to provide according to their means for the religious, moral, intellectual, physical and social education of their children: see s. 1 of Article 42. In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable. In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s. 3 of Article 40 expressly subordinate the law to justice. Both Aristotle and the Christian philosophers have regarded justice as the highest human virtue. The virtue of prudence was also esteemed by Aristotle as by the philosophers

of the Christian world. But the great additional virtue introduced by Christianity was that of charity not the charity which consists of giving to the deserving, for that is justice, but the charity which is also called mercy. According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. The development of the constitutional law of the United States of America is ample proof of this. There is a constitution which, while not professing to be governed by the precepts of Christianity, also in the Ninth Amendment recognises the existence of rights other than those referred to expressly in it and its amendments. The views of the United States Supreme Court, as reflected in the decisions interpreting that constitution and in the development of their constitutional law, also appear firmly to reject legal positivism as a jurisprudential guide

Three United States Supreme Court decisions were relied upon in argument by the plaintiff : *Poe v. Ullman (1961) 367 U.S. 497; Griswold v. Connecticut (1965) 381 U.S. 479; and Eisenstadt v. Baird (1972) 405 U.S. 438.* My reason for not referring to them is not because I did not find them helpful or relevant, which indeed they were, but because I found it unnecessary to rely upon any of the dicta in those cases to support the views which I have expressed in this judgment.

Lastly, I wish to emphasise that I have given no consideration whatsoever to the question of the constitu□tionality or otherwise of laws which would withhold or restrict the availability of contraceptives for use outside of marriage; nothing in this judgment is intended to offer any opinion on that matter.

For the reasons I have given, I would grant the plaintiff a declaration that sub-s. 3 of s. 17 of the Criminal Law Amendment Act, 1935 is not; and was not at any time material to these proceedings, of full force and effect as part of the laws of the State.

THE SUPREME COURT

[1971 No. 2314 P]

Walsh J.

Budd J.

Henchy J.

Griffin J.

Fitzgerald C.J.

BETWEEN

MARY McGEE

PLAINTIFF

and
THE ATTORNEY GENERAL
and
THE REVENUE COMMISSIONERS

DEFENDANTS

JUDGMENT of BUDD J., delivered on the 19th day of December 1973

The plaintiff is a married woman and has four children, two of them twins. She has suffered from very serious complications during and after her three confinements. So severe have these complications been that she has been advised by her doctor that she should not undergo the hazards of another confinement which might endanger her life or have a crippling effect.

In these circumstances she came to the conclusion, although at first reluctant to do so, that she should adopt some form of contraception which would avoid these dire results but would still allow her to lead a natural married life with her husband. Having sought medical advice on the matter, she was advised by her doctor that a suitable contraceptive for her case would be an intra-uterine device to be used with a contraceptive jelly called "Staycept Jelly". She was supplied with some of this preparation but was advised to order some from England as the preparation is not manufactured in this country. She ordered some from England but the preparation was impounded on arrival; the second defendants stating in a letter dated the 29th April, 1971, that the preparation, being a contraceptive preparation, was prohibited to be imported under s. 17, sub-s. 3, of the Criminal Law Amendment Act, 1935, and consequently that they were not empowered to release it for delivery in the State. Section 17, sub-s. 3, of the Act of 1935 provides" that contraceptives shall be deemed to be included among the goods enumerated and described in the Table of Prohibitions and Restrictions Inwards contained in s. 42 of the Customs Consolidation Act, 1876, and that the provisions of that Act (as amended or extended by subsequent Acts) relating to the importation of prohibited goods shall apply accordingly. Section 42 of the Act of 1876 provides that the goods enumerated in the table therein contained of prohibitions and restrictions are prohibited to be imported and, if imported, should be forfeited. The said table contains a list of such goods, and contraceptives are now deemed to be included in the goods enumerated therein pursuant to the provisions of s. 17, sub-s. 3, of the Act of 1935.

The plaintiff then commenced these proceedings claiming that s. 17 of the Act of 1935 was inconsistent with the Constitution and was not carried forward by Article 50 of the Constitution and that the section no longer forms part of the law of the State; and she claims a declaration that the seizure of the packet was illegal.

The plaintiff based her contentions upon certain Articles of the Constitution which I shall mention. Article 40, s. 1, declares that all citizens shall be held equal before the law, and s. 3, sub-s. 1, of that Article declares that "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." By Article 41 the State recognizes the family as the natural primary and fundamental unit group of society possessing inalienable rights antecedent to all positive law, and the State guarantees to protect its constitution and authority. By Article 43 the State acknowledges that man has the natural right, antecedent to positive law, to the private ownership of external goods. It is also necessary to mention Article 50 which provides that, subject to the Constitution and to the extent that they are not inconsistent therewith, the laws in force in Saorstat Eireann immediately prior to the date of the coming into operation of the Constitution shall continue to be of full force and effect.

There is no presumption in favour of the constitutionality of a pre-Constitution statute. Section 17 of the Act of 1935, therefore, was only carried forward if not inconsistent with the Constitution; and the construction of the Constitution is a matter for the Courts. It is not contested that the plaintiff considered her decision to be the best open to her. Her husband agreed with her. The State guarantees as far as practicable by its laws to vindicate the personal rights of the citizen. What more important personal right could there be in a citizen than the right to determine in marriage his attitude and resolve his mode of life concerning the procreation of children? Whilst the "personal rights" are not described specifically, it is scarcely to be doubted in our society that the right to privacy is universally recognized and accepted with possibly the rarest of exceptions, and that the matter of marital relationship must rank as one of the most important of matters in the realm of privacy. When the preamble to the Constitution speaks of seeking to promote the common good by the observance of prudence, justice and charity so that the dignity and freedom of the individual may be assured, it must surely inform those charged with its construction as to the mode of application of its Articles.

When I apply what I have stated about the principles of the Constitution to Article 40, I am driven to the conclusion that the Act of 1935 is in particular conflict with the personal rights of the citizen which the State in sub-s. 1 of s. 3 of Article 40 guarantees to respect, defend and vindicate as far as

practicable. The other Articles which I have quoted from are in no way inconsistent with the construction I have placed on sub-s. 1 of s. 3 of Article 40. This Act does not defend or vindicate the personal rights of the citizen or his or her privacy relative to matters of the procreation of children and the privacy of married life and marital relations. Section 17, sub-s. 3, of the Act of 1935 is inconsistent with the Article already referred to and is therefore unconstitutional and invalid in law. I would allow this appeal.

THE SUPREME COURT

[1971 No. 2314 P]

Walsh J.

Budd J.

Henchy J.

Griffin J.

Fitzgerald C.J.

BETWEEN

MARY McGEE

PLAINTIFF

and
THE ATTORNEY GENERAL
and
THE REVENUE COMMISSIONERS

DEFENDANTS

JUDGMENT of HENCHY J., delivered on the 19th day of December 1973

The essential facts of this case may be summarised as follows. The plaintiff, who is aged 29, lives in the restricted quarters of a mobile home with her husband, who is a fisherman earning about £20 per week, and their four children who were born in December, 1968, in January, 1970, and (the twins) in November, 1970. Her medical history, shows that during each pregnancy she suffered from toxaemia; that during her second pregnancy she developed a serious cerebral thrombosis from which she nearly died, and which left her temporarily paralysed on one side; and that during her last pregnancy she suffered from toxaemia which was complicated by hypertension. She has been advised by her doctor that if she becomes pregnant again there will be a very great risk that she will suffer a further cerebral thrombosis, which is an illness that apparently has a mortality rate as high as 26% in married women of her age and which would be apt to cause her a disabling paralysis if it did not prove fatal.

Confronted with that dire prospect, she has had to decide between sexual abstinence and the use of a contraceptive-no question apparently having arisen as to a surgical intervention. With the agreement of her husband, and having due regard to her obligations to her husband, her children and herself, she decided in favour of contraception. Because of her medical history of vascular thrombosis and hypertension, her doctor advised against an oral contraceptive and recommended instead an intrauterine device which was to be used with a contraceptive jelly. The doctor fitted the device and gave her a small supply of the contraceptive jelly. This jelly is not made in this State, so she had to order a further supply from England. When the packet containing it was sent to her by post, it was intercepted and seized by the Customs authorities because, being a "contraceptive" as defined by sub-s. 4 of s. 17 of the Criminal Law Amendment Act, 1935, its importation is prohibited by s. 42 of the Customs Consolidation Act, 1876, as applied by sub-s. 3 of s. 17 of the Act of 1935.

In the present proceedings the plaintiff has challenged the constitutional validity of s. 17 of the Act of 1935 and has claimed that it was not carried over by Article 50 of the Constitution because it is inconsistent with certain provisions in Articles 40, 41, 42, 44 and 45 of the Constitution. The primary contention is that it trenches on her rights under sub-s. 1 of s. 3 of Article 40 which provides that: - "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

The Act of 1935, as its long title shows, is not aimed at population control but at the suppression of vice and the amendment of the law relating to sexual offences. Section 17 follows immediately on a section directed against the practice of prostitution in public and immediately precedes a section making criminal certain acts which offend modesty or cause scandal or injure the morals of the community. The section creates a criminal prohibition in an area in which the legislature has thought fit to intervene in the interests of public morality. What it seeks to do, by means of the sanction of the criminal law, is to put an end, as far as it was possible to do so by legislation, to the use of contraceptives in the State. It does not in terms make the use of contraceptives a crime, but the totality of the prohibition aims at nothing less. Presumably because contraceptives are of differing kinds and vary in the ways, internal and external; they can be used, and because of the difficulty of proving their use in the intimacy of the sexual act, the section strikes at their availability. Sub-section 1 of s. 17 of the Act of 1935 makes it an offence to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import for sale any contraceptives. In effect, this makes it legally impossible to sell or buy a contraceptive in the State. Had the prohibition stopped there, it would have left the loophole that contraceptives could be imported otherwise than for sale. That loophole, however, is sealed by sub-s. 3 of s. 17 which makes contraceptives prohibited articles under the customs code so that their importation for any purpose, if effected with the intention of evading the prohibition, is an offence: see s. 186 of the Customs Consolidation Act, 1876; *Frailey v. Charlton* [1920] 1 K.B. 147*; Attorney General v. Deignan* [1946] I.R. 542.

Because contraceptives are not manufactured in this State, the effect of s. 17 of the Act of 1935 as a whole is that, except for contraceptives that have been imported without the intention of evading the prohibition on importation, it is not legally possible to obtain a contra□ceptive in this State. It is doubtful if the legislature could have taken more effective steps by means of the criminal law to put an end to their use in the State.

It is the totality and absoluteness of the prohibition effected by s. 17 of the Act of 1935 that counsel for the plaintiff impugn as infringing what they say are her constitutionally guaranteed rights as a citizen. As has been held in a number of cases *(See [1965] I.R. 344; [1972] I.R. 155; [1973] I.R. 117)*, the unspecified personal rights guaranteed by sub-s. 1 of s. 3 of Article 40 are not confined to those specified in sub-s. 2 of that section. It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality. The lack of precision in this test is reduced when sub-s. 1 of s. 3 of Article 40 is read (as it must be) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution. The infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible.

The dominant feature of the plaintiff's dilemma is that she is a young married woman who is living, with a slender income, in the cramped quarters of a mobile home with her husband and four infant children, and that she is faced with a considerable risk of death or crippling paralysis if she becomes pregnant. The net question is whether it is constitutionally permissible in the circumstances for the law to deny her access to the contraceptive method chosen for her by her doctor and which she and her husband wish to adopt. In other words, is the prohibition effected by s. 17 of the Act of 1935 an interference with the rights which the State guarantees in its laws to respect, as stated in sub-s. 1 of s. 3 of Article 40 ?

The answer lies primarily in the fact that the plaintiff is a wife and a mother. It is the informed and conscientious wish of the plaintiff and her husband to maintain full marital relations without incurring

the risk of a pregnancy that may very well result in her death or in a crippling paralysis. Section 17 of the Act of 1935 frustrates that wish. It goes further; it brings the implementation of the wish within the range of the criminal law. Its effect, therefore, is to condemn the plaintiff and her husband to a way of life which, at best, will be fraught with worry, tension and uncertainty that cannot but adversely affect their lives and, at worst, will result in an unwanted pregnancy causing death or serious illness with the obvious tragic consequences to the lives of her husband and young children. And this in the context of a Constitution which in its preamble proclaims as one of its aims the dignity and freedom of the individual; which in sub-s. 2 of s. 3 of Article 40 casts on the State a duty to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the life and person of every citizen; which in Article 41, after recognising the family 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, guarantees to protect it in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the State; and which, also in Article 41, pledges the State to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack.

Section 17, in my judgment, so far from respecting the plaintiff's personal rights, violates them. If she observes this prohibition (which in practice she can scarcely avoid doing and which in law she is bound under penalty of fine and imprisonment to do), she will endanger the security and happiness of her marriage, she will imperil her health to the point of hazarding her life, and she will subject her family to the risk of distress and disruption. These are intrusions which she is entitled to say are incompatible with the safety of her life, the preservation of her health, her responsibility to her conscience, and the security and well being of her marriage and family. If she fails to obey the prohibition in s. 17, the law, by prosecuting her, will reach into the privacy of her marital life in seeking to prove her guilt.

In Griswold v. *Connecticut* (1965) 381 U.S. 479 the American Supreme Court held that a Connecticut statute which forbade the use of contraceptives was unconstitutional because it violated a constitutional right of marital privacy which, while unexpressed in the American Constitution, was held to be within the penumbra of the specific guarantees of the Bill of Rights. In a judgment concurring in the opinion of the court, Goldberg J. said at p. 498 of the report: -"The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern - the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see *Tileston v. Ullman* 129 Conn. 84, 26A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples." At p. 499 Goldberg J. cites with approval the words of Harlan J. in *Poe v. Ullman* (1961) 367 U.S. 497, at 553:- "… the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

It has been argued that Griswold's Case (1965) 381 U.S. 479 is distinguishable because the statute in question there forbade the use of contraceptives, whereas s. 17 of the Act of 1935 only forbids their sale or importation. This submission was accepted in the High Court. However, I consider that the distinction sought to be drawn is one of form rather than substance. The purpose of the statute in both cases is the same: it is to apply the sanction of the criminal law in order to prevent the use of contraceptives What the American Supreme Court found in *Griswold's Case (1965) 381 U.S. 479* to be constitutionally objectionable was that the sweep of the statute was so wide that proof of an offence would involve physical intrusion into the intimacy of the marriage relationship, which the court held to be an area of constitutionally protected privacy. If the plaintiff were prosecuted for an offence arising under or by virtue of s. 17 of the Act of 1935, while there might not be the same degree of physical

intrusion, there would necessarily be a violation of intimate aspects of her marital life which, in deference to her standing as a wife and mother, ought not to be brought out and condemned as criminal under a glare of publicity in a courtroom. Furthermore, if she were found guilty of such an offence, in order to have the penalty mitigated to fit the circumstances of her case, she would have to disclose particulars of her marital dilemma which she ought not to have to reveal.

In my opinion, s. 17 of the Act of 1935 violates the guarantee in sub-s. 1 of s. 3 of Article 40 by the State to protect the plaintiff personal rights by its laws; it does so not only by violating her personal right to privacy in regard to her marital relations, in a wider way, by frustrating and making criminal any efforts by her to effectuate the decision her Husband and herself, made responsibly; conscientiously and on medical advice, to avail themselves of a particular contraceptive method so as to ensure her life and health as well as the integrity, security and well-being of her marriage and her family. Because of the clear unconstitutionality of the section in this respect, I do not find it necessary to deal with the submissions made in support of the claim that the section violates other provisions of the Constitution.

What stands between the plaintiff and the exercise of any constitutional right claimed by her in this case is sub-s. 3 of s. 17 of the Act of 1935. With that subsection out of the way, her cause of complaint would disappear because what she wishes to do (to import the required contraceptive by post) would then be legal as the importation, not being for sale, would not be forbidden by sub-section 1. Since s. 17 without sub-s. 3 can stand as a self-contained entity, independently operable and representing the legislative intent, sub-s. 3 is capable of being severed and declared unconstitutional. Therefore, I would allow the appeal to the extent of declaring that sub-s. 3 of s. 17 of the Act of 1935 is without validity as being inconsistent with the Constitution. In the particular circumstances of this case, I do not find it necessary to make any adjudication on the constitutionality of the remaining part of the section.

THE SUPREME COURT

[1971 No. 2314 P]

Walsh J.

Budd J.

Henchy J.

Griffin J.

Fitzgerald C.J.

BETWEEN

MARY McGEE

PLAINTIFF

and
THE ATTORNEY GENERAL
and
THE REVENUE COMMISSIONERS

DEFENDANTS

JUDGMENT of GRIFFIN J. delivered on the 19th day of December 1973

The plaintiff is a young woman aged 29 and she resides with her husband, a share fisherman aged 30, at Loughshinny in the County of Dublin. The plaintiff and her husband have four children who reside with them in a mobile home. These four children were all born to the plaintiff between December,

1968, and November, 1970 a period of only 23 months. With each of her three pregnancies the plaintiff had very serious complications.

Prior to the birth of her first child in December, 1968, she developed toxaemia, a urinary tract infection and high blood-pressure; her second child was born in January, 1970, and during the currency of this pregnancy she again developed toxaemia, a cerebral thrombosis or stroke, and a continuation of her high blood-pressure, and she was lucky to have survived. After the birth of her second child, having regard to her medical condition, she was advised by her doctor that a further pregnancy would be extremely unwise because of the risk of recurrence of the cerebral thrombosis which, if not fatal, would be likely to result in paralysis. She discussed with her doctor the best methods to avoid another pregnancy. She was unable to operate properly the temperature method of birth control and, because of her history of thrombosis, oral contraceptives were unsuitable for her. She was advised to use a diaphragm and, after serious consideration of the entire matter and consultation with her husband, she decided to be fitted with a diaphragm. Having reached this decision with her husband, she went to see her doctor who discovered on this visit that the plaintiff was again pregnant. This visit was made in April, 1970, which was only three months after the birth of her second child. It is not difficult to imagine how upset and concerned the plaintiff was when this information was conveyed to her. During this pregnancy she also developed an infection and toxaemia, and she was very ill. She gave birth to twins, which were premature, on the 15th November, 1970. She had very serious complications during and subsequent to the birth of the twins.

In view of the birth to the plaintiff of four children between December, 1968, and November, 1970, and having regard to the risk to her life and health in the event of her becoming pregnant again, the plaintiff and her husband decided that they should have no more children. She was fitted with a diaphragm by her doctor but with this it is necessary to use a spermicidal jelly which was duly prescribed for her. This is not manufactured within the State so it was necessary to import it from England. As this jelly is a "contraceptive" within the meaning of sub-s. 4 of s. 17 of the Criminal Law Amendment Act, 1935, it was impounded by the Customs authorities. Representations on behalf of the plaintiff were made to the Customs authorities but, having regard to the absolute prohibition against importation, the Customs authorities had no alternative but to seize the goods as they were powerless to allow importation of the jelly.

In consequence the plaintiff instituted these proceedings and her claim, put in general terms, is based on a submission that s. 17 of the Act of 1935 constitutes a violation of her fundamental rights under Articles 40-44 of the Constitution and is inconsistent with these Articles, and also violates Article 45. For the purpose of this case, I do not consider it necessary to consider Articles 42, 43, 44 or 45 of the Constitution.

The Act of 1935 is entitled: - " An Act to make further and better provision for the protection of young girls and the suppression of brothels and prostitution, and for those and other purposes to amend the law relating to sexual offences." The long title of the Act would seem to suggest that the Act would have little relevance to the intimate relations between the plaintiff and her husband. Sub-section 1 of s. 17 of the Act of 1935 is aimed only at the sale of contraceptives or their importation for sale. Sub-section 2 of s. 17 provides that any person who acts in contravention of sub-s. 1 commits an offence, and it provides for the penalties on conviction. Sub-section 3 of s. 17 provides that: - "Contraceptives shall be deemed to be included among the goods enumerated and described in the Table of Prohibitions and Restrictions Inwards contained in s. 42 of the Customs Consolidation Act, 1876..." Sub-section 4 of s. 17 defines the word "contraceptive."

By s. 42 of the Act of 1876, the goods enumerated and described in the "Table of Prohibitions and Restrictions Inwards " are thereby prohibited to be imported or brought into the State so that, once contraceptives are included in this table, the importation of contraceptives into the State is totally prohibited. It is to be noted that whereas in sub-s. 1 of s. 17 of the Act of 1935 importation for sale is dealt with, there is no such limitation in respect of sub-s. 3 of section 17. Section 186 of the Act of 1876 provides *(inter alia)* that every person who shall import or bring or be concerned in importing or bringing into the State any prohibited goods, contrary to such prohibition, or shall knowingly acquire possession of any such goods, shall for each such offence incur the penalties specified in the section. Many other offences are provided for in this section, but I have included or dealt with only those that

are relevant to the present case. Having regard to the decisions in *Frailey v. Charlton* [1920] 1 K.B. 147 and *Attorney General v. Deignan* [1946] I.R. 542 the offences of importing or bringing prohibited goods into the State or knowingly acquiring possession of them are committed only where there is an intent "to evade any prohibition applicable to such goods."

It is to be noted that s. 17 of the Act of 1935 doe; not prohibit the use of contraceptives. The prohibition: are against sale, distribution for sale, importation for sale (sub-s. 1), or importation for any purpose (sub-s. 3) There is no prohibition against manufacture within the State; but if contraceptives were manufactured within the State they could not be sold or distributed for sale or exposed, offered, advertised or kept for sale. The net effect of sub-ss. 1 and 3 of s. 17 of the Act of 1935 is to ensure effectively that no person can lawfully obtain contraceptives for use within the State. If the plaintiff brings or imports contraceptives into the State, or knowingly acquires possession of contraceptives brought in or imported by another person, she commits an offence under s. 186 of the Act of 1876.

The Act of 1935 was enacted prior to the date of the coming into operation of the Constitution and, therefore, there is no presumption of constitutionality in respect of it. The effect of Article 50 of the Constitution 73 is that any laws in force prior to the coming into operation of the Constitution shall not be continued in force and effect if they are inconsistent with the Constitution. The plaintiff submits that s. 17 of the Act of 1935 is inconsistent with the provisions of s. 3 of Article 40 of the Constitution and that, therefore, it was not continued in force when the Constitution came into operation.

[The judge referred to s. 3 of Article 40 of the Constitution, and continued...] One of the "personal rights" claimed on behalf of the plaintiff is the right of privacy in her marital relations with her husband. The Constitution does not define the personal rights which are guaranteed by Article 40. However, it was pointed out by Mr. Justice Kenny in *Ryan v. The Attorney General* [1965] IR 294 at p. 313 of the report that the general guarantee in Article 40, s. 3, extends to rights not specified in Article 40, and that there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all. On the hearing of the appeal in that case, this Court agreed (p. 344) with Mr. Justice Kenny that the personal rights mentioned in sub-s. 1 of s. 3 of Article 40 are not exhausted by the enumeration of "life, person, good-name, and property rights" in sub-s. 2 of s. 3, nor by the more detached treatment of specific rights in the subsequent sections of Article 40: see also *O'Brien v. Keogh* [1972] I.R. 144 at p. 155. The Courts have not attempted to define with exactitude or to make a list of the rights which may properly be included in the category of personal rights, but Mr. Justice Kenny instanced the right to bodily integrity and the right to marry. It seems to me that the right of married persons to establish a home and bring up children is inherent in the right to marry. In so far as the plaintiff is concerned, the questions of whether the right of privacy in relation to her intimate relations with her husband is one of the unspecified rights referred to in sub-s. 1 of s. 3 of Article 40 and, if so, whether such right has been violated by s. 17 of the Act of 1935 are essentially the matters for determina□tion in this action.

In my opinion, the right of marital privacy is one of the personal rights guaranteed by sub-s. 1 of s. 3 of Article 40 and so the nature of that right possessed by the plaintiff must be considered. The plaintiff is without doubt in an unenviable situation. She has four very young children who live with her in a mobile home. We have no evidence of the size of this structure but it is to be assumed that space is at least limited. She and her husband are both young and they are anxious to have normal marital relations. This they cannot have because of the danger to the plaintiff's life or health in the event of another pregnancy and because of the unsuitability of oral contraceptives for her and her inability to use what are called the natural methods of birth control. It is in her interest and in the interests of her husband and small children that she should not take the risk of another pregnancy which might deprive the husband of his wife and the children of their mother. The plaintiff, her husband, and their children are a unit recognised by and given a special place in the Constitution. *[The judge referred to the provisions of s. 1 of Article 41 of the Constitution, and continued...]* The word "family" is not defined in the Constitution but, without attempting a definition, it seems to me that in this case it must necessarily include the plaintiff, her husband and their children.

The nature of the right of privacy in marriage has been discussed by the Supreme Court of the United States of America in considering the constitutionality of a Connecticut statute which made the use of contraceptives a criminal offence. In Poe v. *Ullman* (1961) 367 U.S. 497 at p. 552 of the report Harlan

J. said: -"The family ... is not beyond regulation,' *Prince v. Massachusetts* (1944) 321 U.S. 158 supra, and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare ... Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy." Adultery and extra-marital sexuality are not, as such, crimes here.

To return to sub-s. 1 of s. 3 of Article 40, the guarantee of the State in its laws to respect the personal rights of citizens is not subject to the limitation "as far as practicable" nor is it circumscribed in any other way. The relevant portion of that sub-section in the Irish version, which prevails, is in the following terms :- "Rathaionn an Stat gan cur isteach lena dhlithibh ar cheartaibh pearsanta aon tsaoranaigh." The literal translation makes it a guarantee -"not to interfere with" rather than a guarantee to "respect." Does a law which - effectively prevents the plaintiff and her husband in their particular circumstances from resorting to the use of contraceptives for the purpose of ensuring that the plaintiff will not have another pregnancy "respect" or "not interfere with" the right of family privacy of the plaintiff and her husband?" In this context, I wish to emphasise that this judgment is confined to contraceptives as such; it is not intended to apply to abortifacients, though called contraceptives, as in the case of abortifacients entirely different considerations may arise. In my opinion, a statute which makes it a criminal offence for the plaintiff or her husband to import or to acquire possession of contraceptives for use within their marriage is an unjustifiable invasion of privacy in the conduct of the most intimate of all their personal relationships.

In Griswold v. *Connecticut (1965) 381 U.S 479,* which was another case dealing with the same Connecticut law, Douglas J. delivered the judgment of the Supreme Court of the United States; at p. 485 of the report he said: - "The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms *NAACP v. Alabama.* Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights-older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."

Although in s. 17 of the Act of 1935 the use of contraceptives is not prohibited, the section effectively prohibits the plaintiff from obtaining contraceptives and makes acquiring possession thereof a crime in the circumstances which I have already outlined; in my view the section achieves the same result as the Connecticut law.

It was submitted on behalf of the plaintiff that the entire of s. 17 is inconsistent with the Constitution and that sub-ss. 1 and 3 of s. 17 should stand or fall together. One of the grounds advanced in support of the argument that the entire section should fall was that contraception is a matter of private morality and not of public morality. In my view, in any ordered society the protection of morals through the deterrence of fornication and promiscuity is a legitimate legislative aim and a matter not of private but of public morality. For the purpose of this action, it is only necessary to deal with the plaintiff as a married woman in the light of her particular circumstances. In my opinion, by the inclusion of sub-s. 3,

the provisions of s. 17 of the Act of 1935 in the words of Douglas J. do "sweep unnecessarily broadly and thereby invade the area of protected freedoms." In my judgment, this sub-section violates the personal rights of the plaintiff, in this case, her right of privacy in her marital relations with her husband under sub-s. 1 of s. 3 of Article 40. For the purposes of this action, it is not necessary that the entire of the section should be struck down.

For the reasons I have given, sub-s. 3 of s. 17 of the Act of 1935 is inconsistent with the Constitution and was not continued of full force and effect by Article 50 of the Constitution and, to the extent only of making a declaration accordingly, I would allow this appeal.

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