The sexual politics of citizenship and reproductive rights in Ireland: From national, international, supranational and transnational to postnational claims to membership?

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*European Journal of Women's Studies* 2012 19: 413
DOI: 10.1177/1350506812466580

The online version of this article can be found at: [http://ejw.sagepub.com/content/19/4/413](http://ejw.sagepub.com/content/19/4/413)
The sexual politics of citizenship and reproductive rights in Ireland: From national, international, supranational and transnational to postnational claims to membership?

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Abstract

Claims concerning the death of the nation-state are often accompanied by postnationalist arguments that emphasize the potential of human rights to contest nation-bounded conceptualizations of membership. Conversely, arguments focusing on the continuing importance of state-bounded social citizenship rights undermine such postnationalist claims. To assess these claims, this article turns to the Irish state and its prohibition of abortion except in cases where the life of the pregnant woman is in danger. The authors focus their analysis on four legal cases that unfolded between 1992 and 2010. These cases reflect how specific women’s social location within interconnected power hierarchies of nationality, gender, class, race/ethnicity positioned them differently vis-à-vis the Irish state, international (European Court of Human Rights) and supranational (EU) bodies. Furthermore, the transnational, in the form of immigration, non-governmental organizations and the Catholic Church, plays an important role in structuring the context within which these cases unfold. Rather than showing that the international, supranational and transnational are conduits for the declining power of the nation-state, this article finds that in the increasingly dense legal-political field there is room for all of these forces.

Keywords

Abortion, EU, gender, international human rights law, intersectionality, public/private

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The State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. (Article 41.2.1 – Irish Constitution of 1937)

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 41.2.2 – 1937)

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 respect, and, as far as practicable, by its laws to defend and to vindicate that right. (Article 40.3.3 – Eighth Amendment to the Irish Constitution in 1983)

These excerpts from the Irish State Constitution show how the Irish state enshrines an interpretation of women’s contribution to the nation that puts the state in the role of enforcing highly patriarchal gender relations. Yet, Ireland is also a signatory to the European Convention on Human Rights, a member of the EU and the Council of Europe, and a recent immigrant-receiving state. Will Ireland be able to hold onto this restrictive interpretation of women’s rights in the face of the pressures generated by these forces beyond the nation-state?

Claims concerning the death of the nation-state are often accompanied by postnationalist arguments that emphasize the potential of human rights to contest state-bounded conceptualizations of membership. Conversely, arguments focusing on the continuing importance of state-bounded social citizenship rights undermine such postnationalist claims. To assess these arguments, we turn to women’s reproductive rights asking whether they are understood as human rights, social citizenship rights, or both, in various legal-political arenas.

In looking at the Irish state’s regulation of reproductive rights, or the rights that ensure that women can choose whether, when and where to have children free of coercion, we argue that, in the contemporary era, national, international, supranational and transnational forces do not cancel each other out in a kind of zero-sum game. Rather, they represent particular forms of governance at the state (national), between-state (international) and above-the-state levels (supranational) that intersect in complicated ways to produce the rights attending membership. In addition, non-state actors and institutions engage with multiple polities (whether state, between-state and supra-state) in the transnational field. From this perspective, the question becomes whether changes in the ways these levels intersect signify the rise of the postnational, or the reduced relevance of the state in regulating people’s lives. In answering this question, we emphasize that national, international, supranational and transnational all give rise to ‘imagined communities’, in which particular understandings of territory (or its absence!) coincide with certain institutions of governance (Anderson, 1991; Taylor, 1999).

In this article we focus on four legal cases involving six women to show the ways in which national, international, supranational and transnational interpretations of reproductive rights come into tension, producing new membership boundaries for differently classed, gendered and racialized women in the Irish context. The cases span 1992–2010 and involved teenage girls whose pregnancies were the result of rape, an asylum-seeking woman claiming Irish citizenship for her unborn child and single women facing
unwanted pregnancies for physical or mental health reasons. The cases illustrate how the relative influence of the international, supranational and transnational increased, culminating in a promise of change to Irish laws that govern the definition of pregnant women’s right to life. Rather than arguing that this signals the death of the nation-state, our analysis shows that in the increasingly dense legal-political field all levels of governance remain in play. In what follows, we first turn to a history of Irish nation-state formation. We then discuss our theoretical framework, focusing on reproductive rights and membership at multiple levels of governance, before discussing our case analyses.

**Irish nation-building: Postcolonialism, Catholicism and women as nation**

Postcolonialism and Catholicism are the two primary forces in the history of Irish nation-state building. Ireland was a British colony until 1922, when the Irish Free State was established. It became the Irish Republic, as we currently know it, after the introduction of the 1937 Irish Constitution and the signing of the Anglo-Irish Treaty, which partitioned Ireland into North and South (Mullally, 2005). Women played an important role during the Irish War of Independence (1919–1921), both within and outside the private sphere (Thapar-Björkert and Ryan, 2002: 308). However, after gaining independence, the role of Irish women in the public sphere during the war was significantly downplayed, while their role within the private realm, primarily as mothers, was accentuated and ultimately institutionalized in the 1937 Irish Constitution (Lentin, 1998; Mullally, 2005; Thapar-Björkert and Ryan, 2002).

The Roman Catholic Church played a key role in institutionalizing this highly gendered relationship between the ‘public’ world of politics and the ‘private’ sphere of home and body, fostering the reification of Irish women as mothers of the ‘Irish race’ (Gray and Ryan, 1998: 126). Thus, the Church also served to mark the distinction between Ireland and its non-Catholic colonial overseer, Britain (Mullally, 2005). To this day, Irish Roman Catholicism reinforces dominant conceptualizations of Irishness as white, settled and heterosexual. This excludes Travellers, immigrants and other racialized groups (even more so since Ireland joined the EU), as well as women whose sexual identity and/or practices may threaten the ideal of the nuclear family (Lentin, 1998, 2004; Luibhéid, 2004, 2006).

The gendered public/private divide enshrined in the Irish Constitution has rendered Roman Catholic morality hegemonic over the decades, by naturalizing a particular interpretation of the private through the exercise of public control. Although women were legally enfranchised in 1922 with the creation of the Irish Free State, in the following decades their rights were increasingly circumscribed. Divorce was outlawed in 1925 (to be changed only in 1995 after a referendum that was implemented in 1997); while the 1929 ban to access information on birth control culminated in the total prohibition of the importation, advertising and sale of contraceptives six years later (Murphy-Lawless, 1993: 54). Abortion itself had been criminalized since the Offences Against the Person Act of 1861 while Ireland was still under British control; this law remains in place to this day, criminalizing women who have abortions and the physicians who would provide them.

In the 1970s, the second-wave women’s movement attempted to break through this institutionalized public/private linkage by fighting to change access to contraceptives and
abortion (McBrien, 2002; Murphy-Lawless, 1993: 60). In 1974, the case of *McGee v. Attorney General* established the right to privacy (within marriage), which afforded women some degree of reproductive self-determination in that it allowed them to import contraceptives for their private use (McBrien, 2002). This decision, however, stirred fears among the Irish public and the Catholic Church that the invocation of privacy rights could lead to a similar decision to *Roe v. Wade* in the United States, which served as the basis to legalize abortion (McBrien, 2002: 203). Feminist efforts were met by a backlash in the form of an anti-abortion Eighth Amendment to the Irish Constitution in 1983. Article 40.3.3 criminalized abortion, except in cases where the life of the woman was endangered by her pregnancy. The amendment was passed with the approval of 67% of the Irish electorate, indicating the continuing hegemony of Catholic morality (Buckley, 1998).

At the same time, Irish women privately negotiate the restrictions the state places on reproductive rights by availing themselves of social rights granted by other states. In particular, the legalization of abortion in Britain in 1967 generated a so-called ‘abortion-trail’ or ‘abortion migration’ (Earner-Byrnes in Luibhéid, 2006: 65). From 1970 to 1999, an estimated 72,000 Irish women had an abortion while in Britain, although many more could have given fake British addresses to British providers out of fear of being criminalized upon their return to Ireland (McBrien, 2002: 195). Having to travel to Britain for an abortion drives home that Irish women are subordinated citizens within the dominant construction of the nation: the continuing abortion trail is a product of a state-sanctioned heteronormative sexual regime (Luibhéid, 2004).

Ireland’s unique position within Europe (where only Malta and Poland also disallow abortion) has been upheld by the EU, the European Court of Justice (EJC) and the European Court of Human Rights (ECtHR). Yet, as we will show, recent legal developments have put pressure on the Irish state in the reproductive rights arena.

**Reproductive rights from the national, international, supranational and transnational to the postnational?**

Irish abortion politics illustrate how gender, citizenship and nationalism are inextricably intertwined. Citizenship and nationalism are both premised on dynamics of inclusion and exclusion; and gender has played a critical role in the exclusionary politics of collective national belonging. As McClintock argues, ‘despite nationalisms’ ideological investment in the idea of popular *unity*, nations have historically amounted to the sanctioned institutionalization of gender *difference*’ (1993: 61; emphasis in original). Despite women’s active participation in nationalist struggles, once the nation-state is established women are often relegated to the private realm associated with the biological reproduction of national collectivities; the reproduction of the boundaries of national and/or ethnic groups; and the transmission and production of national culture (Anthias and Yuval-Davis, 1989: 7). The symbolic politics that produce these linkages also position heteronormativity as a constitutive element of the nation-state (Luibhéid, 2004: 342).

The nation-state reinforces these linkages through the delineation of citizenship rights. TH Marshall (1965: 92) defined citizenship ‘as a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed.’ Citizenship is guaranteed by civil, political and social rights. Social rights entail ‘the right to a modicum of economic welfare and security
to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society’ (Marshall, 1965: 78). By providing the substantive bases for participating in the community, social rights enable the enactment of civil (which guarantee personhood within the state) and political rights (which guarantee the right to participate in processes of governance). Hence, citizenship rights generate equality of membership that can function as the bulwark against the inequalities of capitalism.

Marshall’s work is gender-blind; but, if we take the social organization of gender to produce systems of inequality akin (and invariably linked) to capitalism, could the same citizenship rights ameliorate gender inequality? If we treat reproductive rights as a component of social rights (Taylor, 1999), expanding women’s reproductive rights can strengthen Irish women’s civil and political rights. Furthermore, social rights as conceptualized by Marshall were instrumental to combat inequality in the public sphere; yet, the gendered inequalities that result from the Irish heteronormative sexual regime are usually associated with the private sphere. Thus, granting Irish women full reproductive rights would combat the gendered inequality resulting from the public/private demarcation that has been central to Irish nation-building.

Reproductive rights, however, are not solely determined within the nation-state context. International governance has come increasingly into play. Ireland is a signatory to a number of international treaties through the United Nations and the Council of Europe, where such treaties govern political, economic and legal relationships between states (Bauböck, 2003). From an international perspective, reproductive rights are usually understood as women’s human rights guaranteeing women’s bodily and mental integrity. This raises the question whether the presumed universality of the human rights framework that informs international governance disrupts or reinforces the gendered public/private demarcation inscribed at the nation-state level. The 1995 Platform for Action of the United Nations Fourth World Conference on Women in Beijing argued that reproductive rights are inseparable from women’s rights to control their sexuality (Section C, Paragraph 96). This includes being free from sexual violence, including that resulting in pregnancy. Thus, the Platform for Action cemented the importance of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This international treaty obliges states that are party to it to protect and ensure women’s reproductive self-determination through the eradication of discriminatory laws and cultural practices (Cook et al., 1999; Correa, 1997). Ireland is a signatory to CEDAW.

By virtue of its membership in the EU, the Irish state is also embedded in the supranational, which occurs when ‘independent states … pool their sovereignty by forming a larger federal polity’ (Bauböck, 2003: 704–705). Ireland became one of the founding members of the EU in 1992 by signing the Maastricht Treaty. However, to retain sovereignty over women’s reproductive rights, Ireland added Protocol No. 17 to the Treaty as a condition of signing. This reflects the fears of the Irish state, the Church and conservative sectors in society that European law could potentially undermine Article 40.3.3. These fears surfaced once again in 2008 and 2009, when the Irish electorate was to vote in a referendum whether to accept the Treaty of Lisbon. If ratified, this Treaty would secure the legal status of the Charter of Fundamental Rights over domestic law. Ireland again added a Protocol to ensure that the Treaty would not, in fact, infringe on the power of the Irish Constitution in matters of the family, the right to life and education.
In the European context, the international and the supranational are closely intertwined because European Union law and the Council of Europe’s human rights treaties stand in a dialogical relationship with each other (Madsen, 2007; Slaughter and Burke-White, 2006). The EU and the Committee of Ministers of the Council of Europe increasingly shape nation-state policies and individual rights of membership in nation-states, reflecting the growing strength and legitimacy of the ECJ and ECtHR (Madsen, 2007). In terms of reproductive rights, however, these international and supranational bodies have left the moral dimension of decisions regarding the beginning of life to the individual member states, applying the margin of appreciation doctrine, which holds that international and supranational bodies should respect as much as possible the moral boundaries inscribed in the laws of individual member states (McBrien, 2002; Wicks, 2011). Thus, these international and supranational forms of governance recreate a public/private divide that transposes the ‘sanctity’ of the ‘private’ home in the national context onto that of ‘domestic law’ in the international or supranational context (Charlesworth and Chinkin, 2000).

The reproductive rights arena also has a transnational dimension. The transnational captures personal and non-state institutional linkages that cross state boundaries (Bauböck, 2003; Levitt and Jaworsky, 2007). To conceptualize this dimension, we borrow from socio-legal scholarship that constructs the transnational as a field in the Bourdieusian sense, or a field of negotiation shaped by the contested circulation of ideas and material goods (Dezalay and Garth, 2002; Madsen, 2006). In this field, actors negotiate the rights that traditionally have been associated with the nation-state by creating coalitions with organizations in other nation-states or those that operate at the international or supranational level. Contra some of the legal scholarship, we focus on those actors in this field that are explicitly non-state. We identify three sources of transnational linkages that affect reproductive rights claims and negotiations of the public/private relevant in the Irish case: immigration (Levitt and Jaworsky, 2007); transnational advocacy networks and non-governmental organizations (Keck and Sikkink, 1998); and the Catholic Church (Casanova, 1997).

The seemingly ever-increasing influence of the inter-, supra- and transnational in our ever-globalizing world has led a number of scholars to argue that the nation-state is on the decline. They claim that rights formerly enshrined in nation-state constitutions are increasingly being supplanted by a global human rights regime in which human rights treaties, rather than nation-states, guarantee individual rights to personhood. The concept of postnational citizenship is most closely associated with Soysal (1994: 3), whose research on Turkish guest workers in six different European countries prompted her to assert that ‘what were previously defined as national rights become entitlements legitimized on the basis of personhood’, bolstered by international human rights law and supranational bodies of governance. Conceptualizations of postnational (Soysal, 1994), denationalized (Bosniak, 2001) or cosmopolitan citizenship (Benhabib, 2007) challenge traditional nation-bounded definitions of citizenship. In short, according to postnational logics, when women’s reproductive rights are understood through the lens of human rights rather than social rights, reproductive rights become an arena for the constitution of postnational membership. To assess such claims, we now turn to four legal cases to assess how the national, international, supranational and transnational intersect in defining Irish women’s reproductive rights.
Negotiating women’s reproductive rights: An analysis of four legal cases

In the past two decades, the cases of X (1992), C (1997), O (2002) and A, B and C (2010) have shown the changing relationship between the national, international, supranational and transnational in defining reproductive rights and claims to membership in Ireland. All these cases deal with the supremacy placed on the life of the foetus when adjudicating the protection of women’s life as distinct from their health, as defined by Article 40.3.3 of the Irish Constitution. When read chronologically, the cases suggest an increase in the power of the international and supranational, particularly the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ); with the transnational often providing a conduit for moving cases beyond the national arena. Yet, they also show how the Irish state continues to protect its powers in defining membership.

The case of X

The 1992 case of X, a 14-year-old white, middle-class Irish girl, reflected a series of cultural and legal changes that structured the conditions under which the national struggles over reproductive rights pertaining to her case took place. The Attorney General had become aware of X’s decision to travel to abort because her parents had contacted the police, asking if DNA foetal tissue could be accepted as evidence against X’s rapist (Oaks, 2002: 317). Article 40.3.3 served as the rationale for the Attorney General’s decision to issue an injunction that prevented X from terminating her pregnancy while in England in the company of her parents. Acting under the orders of the Attorney General, the Irish police followed the family to England and ordered them to return to their residence in Dublin. Once there, the Attorney General further prohibited X from leaving Ireland for the period of nine months, ensuring that she would not be able to circumvent the power of Article 40.3.3. Amidst a climate of growing national controversy and international media attention, X threatened to commit suicide. Although heretofore unprecedented, suicidal behaviour was ultimately considered a ‘real and substantial threat to the life of the mother which could only be avoided by the termination of the pregnancy’ (M Reid in Oaks, 2002: 317). On this basis, the Irish Supreme Court ultimately upheld X’s right to travel.

The salience of X’s right to travel and its implications for Irish women’s reproductive rights has a clear supranational dimension. Ireland’s incorporation to the EU was jeopardized as the ‘X case’ unfolded, when it became clear that the Irish nation-state had sought to assert its sovereignty over and above the EU by adding Protocol No. 17 to the Maastricht Treaty in 1991. The Protocol stated that ‘no act or amendment at the European level could supersede the 1983 Amendment to the Irish Constitution’ (in Luibhéid, 2006: 66). That X’s right to travel was threatened, and hence her ability to obtain an abortion outside Irish territory, had shown that the Protocol could potentially deny Irish women recourse to European law, which guaranteed such freedom of movement. The irony of it all was that the Maastricht Treaty was intended to secure the freedom of travel of European citizens within the EU (Luibhéid, 2006; Mullally, 2005).

Against this background, the Irish state entered a phase of intense negotiation with the Irish citizenry to secure the acceptance of the Treaty, which now included Protocol 17. Both anti-abortion and pro-choice civil society groups urged their followers to
vote against it. Pro-choice groups argued that the Irish government was using the Maastricht Treaty to strengthen Article 40.3.3, while anti-abortion groups feared that the power of the EU would eventually lead to a weakening of the article, despite Protocol 17. Pro-abortion pressures forced the Irish state to make a Solemn Declaration to try to mitigate the effects of the Protocol (Luibhéid, 2006: 67). The Declaration also aimed to redeem Ireland before the eyes of other EU members and the international community, who questioned Ireland’s status as a modern nation-state worthy of becoming a member state, given its restrictive stance on women’s reproductive rights (Taylor, 1999). The Treaty was finally ratified as a result of the state’s promise to hold a separate referendum on (1) whether suicide should be removed as a ground for legal abortion; (2) whether women should be free to travel to another jurisdiction to access abortion services; and (3) whether there should be freedom of information within Ireland about abortion services outside its borders (McGuinness, 2011). The first question was rejected, while the last two were passed, effectively amending Article 40.3.3.

The issue of freedom to provide information about abortion services outside Irish territory is also relevant in terms of the international and supranational dimensions. In 1991, the ECJ ruled against an Irish student organization’s right to distribute information on British abortion clinics in Society for the Protection of Unborn Children v. Grogan (McBrien, 2002). However, in 1992, the ECtHR ruled against the ECJ in Open Door Counselling and Dublin Well Woman Centre Ltd. v Ireland (Thompson, 1994). Despite this favourable decision, which established that the European Convention on Human Rights could supersede member states’ domestic laws, the ECtHR did not directly challenge Article 40.3.3. Rather, it applied the margin of appreciation doctrine, arguing that the Irish nation-state had discretionary power in matters of morality (McBrien, 2002: 200). Interestingly, the discrepant rulings of the ECJ and ECtHR show that interpretations of EU law and international human rights law do not always coincide. In sum, the X case, and some of the cases surrounding it, illustrate how the Irish nation-state sought to maintain control in how it defines women’s reproductive rights as it entered the new supranational space of the EU and negotiated its participation in international bodies like the ECtHR. While the state retained jurisdiction over the matter of abortion from the perspective of morality, EU pressure and ECtHR rulings led to concessions on questions of what a threat to women’s life consisted of, as well as on the issues of freedom of travel and of information.

The case of C

In 1997, the rape and ensuing pregnancy of C, a 13-year-old Traveller girl from a poor family of 12 children, put the Irish nation-state in the difficult position of having to revisit the ‘X case’. Legally defined as a child, C was taken into foster care, since her parents were allegedly unable to provide her with ‘appropriate’ care in the aftermath of the rape (Mullally, 2005). From the beginning, C expressed her wish to terminate her pregnancy and her parents, as well as the Irish Eastern Health Board (EHB), which now guarded C, supported her decision to travel to England to do so (Buckley, 1998). However, C’s parents abruptly withdrew their consent; allegedly after being contacted by the anti-abortion civil society organization Youth Defence (Oaks, 2002). In an attempt to deter C from procuring the abortion, C’s father appealed the decision of the EHB. Meanwhile, Youth
Defence offered to raise funds to cover her pre- and post-natal care. C then threatened to commit suicide. The Irish High Court ultimately dismissed the grounds of C’s father’s appeal in accordance with the decision of the ‘X case’ and allowed C to go to England. Ironically, in its role of the protector of C’s welfare as a child, the Irish nation-state had to cover the costs of her trip and her abortion, despite Article 40.3.3 (Oaks, 2002).

Salient in this case are the ethnic and class dynamics that were not readily visible in the ‘X case’. Though an Irish citizen, C was socially located in a position of disadvantage far greater than X. The poverty and Traveller ethnic background of C’s family were exploited by the media and both anti-abortion and pro-choice civil society groups to further their own agendas (Oaks, 2002). Against this background, the ‘C case’ is an example of the Irish nation-state’s negotiations around membership of those who do not represent majority society. As is often the case with marginalized people, the welfare state had a much heavier hand in the case of C than of X, through its involvement giving meaning to the right-to-life of the mother elements of Article 40.3.3.

The legal negotiations of this case remained a strictly national affair, but with heavy transnational activist involvement. Consistent with Keck and Sikkink’s (1998) work, Irish anti-abortion and pro-choice activist groups strategically appropriated a transnational discourse of human rights to frame the terms of the debate over reproductive rights in Ireland in the ‘C case’. Religiously influenced anti-abortion groups like Youth Defence, for example, claimed the human rights of the foetus and put them above women’s reproductive rights. Conversely, pro-choice groups like Catholics for Freedom of Choice pointed to women’s rights as human rights, and hence argued that women’s right to reproductive health should have precedence over the rights of the foetus. Both groups had strong ties to similar organizations in the United States and Britain (Oaks, 2002). This heavy transnational involvement set the stage of the terms of the negotiation of C’s reproductive rights, showing how the transnational comes to intersect with the national in producing the definition of her membership in the Irish nation-state. The international and supranational dimensions are absent from this case, arguably given the temporary status quo on the theoretical lawful right to abortion within Ireland that was achieved in the aftermath of the ‘X case’ and the 1992 referendum.

Comparing these two cases, we see how the Irish state strategically defined the girls as mothers, rather than as rape survivors whose pregnancies were the results of violence (Mullally, 2005). The cases show how, at this point in time, struggles over reproductive rights were primarily fought obliquely, in reference to a right to travel, not in terms of a right to reproductive control. Furthermore, the international and the supranational come into the picture through the right to information, while the transnational dimension, in the form of NGO engagement, intensifies as multiple cases are brought before the courts. Finally, the girls themselves became transnational actors as they moved across borders to access a social right granted to British residents.

The case of O

In 2002, the case of O, a pregnant 32-year-old Nigerian asylum-seeker, became widely publicized. O did not seek to terminate her pregnancy. On the contrary, she invoked Article 40.3.3 as a means to counter the multiple deportation orders that had been issued against her. Her lawyers used Nigeria’s much higher infant mortality rates, in
comparison to Ireland’s, to argue that O’s deportation would effectively endanger the life of her unborn child. Despite its commitment to defending the right to life of the unborn, the Irish Supreme Court ruled against her and she was deported. As Mullally (2005: 101) aptly elaborates, ‘the threat imposed by higher infant mortality rates could not invoke the protection of Article 40.3.3. The State’s duties to defend and vindicate the right to life to the unborn did not extend to ensuring the health and well-being of Baby O, or even ensuring a safe delivery.’ Moreover, according to Luibhéid (2006: 71), ‘the state claimed that it had no further responsibilities toward Ms. O either, since her asylum claim had been duly considered by state representatives and was found lacking in merit’.

O’s status as a refugee-claimant marks her as having potential transnational political, social and cultural allegiances to both Nigeria and Ireland; allegiances that are often problematized in debates on refugees and immigrant integration more generally (Levitt and Jaworkszy, 2007). O’s presence in Ireland must also be understood within the larger setting of globalization and transnational social processes that structure the asymmetrical relationships between the global North and the global South (Sassen, 2000).

In deporting Ms. O and, by proxy, ‘Baby O’, the Irish state was able to effectively deny both of them membership in the Irish and European community. At the national level, babies born on Irish soil were entitled to Irish citizenship until 2005 (Luibhéid, 2006). Furthermore, having a de facto Irish citizen as a child entitled parents to residency. However, public perceptions of asylum-seekers ‘abusing’ the system prompted the Irish electorate to vote in a 2004 referendum to end citizenship based on jus soli (or right to citizenship based on the country of birth) to make it heavily dependent on jus sanguinis, or descent from already-Irish citizens (Luibhéid, 2004). As Luibhéid (2004, 2006) argues, Irish discourses of ‘genuine’ versus ‘bogus’ asylum-seekers reinforced gendered and racialized hierarchies through which the Irish state justified the control of immigration flows. Ultimately, the absence of supranational institutions in the O case reflects that O is a third-country national and not a EU citizen. As Lutz (1997: 106) suggests, ‘the division of Europe into those with and without full citizenship is not only an outcome of the fear of losing control. It also serves the urgent need of creating a consistent image of what it means to be “European”’. As a third-country national, O had no claim against either the Irish nation or the European supra-nation.

The A, B, C case

The 2010 ECtHR ruling in the case of *A, B and C v. Ireland* involved three adult women, two Irish and one Lithuanian, residing in Ireland, who were partially successful in challenging Ireland’s restrictive regulation of abortion under Article 40.3.3 by invoking Articles 2, 3, 8 and 14 of the European Convention on Human Rights (ECHR). Although their circumstances were different, all three women had to travel to England to have abortions. A and B felt that that their pregnancies threatened their health, including their mental health, but not their life. Therefore, they could not obtain a lawful abortion in Ireland. A already had four children, who were not in her custody at the time of this fifth pregnancy, given her problems with alcoholism. B feared an ectopic pregnancy, which she could not discuss with her physician, given the criminalization of abortion. C did claim a threat to her life and thus a violation of Article 2. C had undergone chemotherapy for cancer and believed herself to be infertile. Her unexpected pregnancy threatened her life.
in that it risked a cancer recurrence. However, C had difficulty convincing her physicians of the necessity of an abortion, since they were fearful of violating Ireland’s anti-abortion law. She went to Britain, even though she believed that the risk to her life should have enabled her to abort within Ireland, under the care of her regular physician.2

In taking their case to the ECtHR, these women claimed that their human rights as established in the ECHR had been breached. They claimed that Ireland had not acted in accordance with the ‘X case’ ruling and the 1992 referendum, which showed that threats to the life of pregnant women constituted grounds for a legal abortion within Ireland.3 All claimants felt that Article 3 of the ECHR prohibiting torture, including inhumane and degrading treatment, applied to their cases – having to travel to Britain, at great cost both financially, physically and emotionally, was ‘disproportionate and excessive’ (Press Release). All three also claimed a breach of Article 8, or the right to private and family life. Finally, all three claimed a breach of Article 14 prohibiting discrimination given that the restriction on abortion ‘placed and excessive burden on the applicants’ as women (Press Release).

The Court decided against the women on Articles 2, 3 and 14. The Court argued that Article 2 did not apply because the women’s lives had not been in any real danger, since they had the right to travel abroad to obtain their abortions. It also considered the harm done by this travel not grave enough to ‘represent inhuman or degrading treatment prohibited under Article 3’ (Press Release). The claims under Article 14 were rejected without further explanation. A and B’s claims under Article 8 were also rejected. Article 8 did, however, apply in the case of C. In finding this, the ECtHR directly ordered the Irish state to adjust certain elements in its practices surrounding abortion. The Court argued that by failing to provide for an appropriate, reasonable avenue for ascertaining whether C’s life was endangered by her pregnancy, it had failed to implement its own laws. The Irish government responded to this ruling by paying the damages the ECtHR awarded C (€15,000), and promised to establish an expert group to assess how to make its practices consistent with its laws.

The A, B and C case brings together all four levels of governance. The case has a transnational dimension, with a multitude of transnational activists and NGOs (anti- and pro-abortion) involved in the case. The case also shows how the international (within the supranational EU context) is increasingly important in defining women’s reproductive rights. The A, B and C case was the first to bring Irish abortion law to the ECtHR (prior cases, like Open Door, concerned the right to information about abortion, not abortion itself). However, the ECtHR’s ruling does not change Irish law so much as force Ireland to apply its already existing laws and introduce legislation in accordance with its case law. The ECtHR explicitly cites the margin of appreciation doctrine in its assessment of the women’s claims, stating that, while according to European standards the women’s complaints were valid, the Court nonetheless deferred to Irish understandings of the beginning of life at conception that informed Ireland’s highly restrictive abortion regime. Through its respect for the sovereignty of the states party to the ECHR, the ECtHR reinscribes the public/private demarcation that marks Irish domestic reproductive law.

Conclusion

In analysing the contestations surrounding reproductive rights in Ireland over the past two decades, this article investigates claims concerning the death of the nation-state that
are associated with postnational conceptualizations of membership based on rights of personhood. The national, international and supranational institutional dimensions of governance that are simultaneously at play in the contemporary Irish context illustrate that reproductive rights cannot be exclusively understood either as social rights or as human rights. Rather, these two understandings of reproductive rights are articulated in ways that produce new membership boundaries for differently classed, gendered and racialized women, who are differently positioned in the national, and European international and supranational imaginaries, as well as legal-political arenas. A multiplicity of transnational actors influences these processes.

Our analysis of the four legal cases shows that claims of the death of the nation-state, especially in terms of women’s reproductive rights as human rights, are unfounded; yet, international, supranational and transnational forces do intersect with the national to change the contested terrain of membership in Ireland. Historically, the Irish nation-state has espoused Roman Catholic notions of morality to frame understandings of gender relations, women’s bodies and the meaning of life to differentiate itself from its former colonizer, Britain. The presence of human rights discourses and/or their accompanying legal and institutional practices at the international or supranational levels have not eroded this power. Therefore, we argue that the customary understanding of women’s reproductive rights as human rights that operates at these beyond-state levels is not synonymous with the rise of the postnational.

International human rights law as applied in the ECtHR and the ECJ confirm that neither the international nor the supranational have superseded the national in defining the terms of membership. Supranational and international forces have, however, increasingly circumscribed the universe of the legally possible for Ireland as a nation-state. The response of the Irish government to the ECtHR ruling on the A, B, C case shows a real shift in the relationship between the national and the international within the supranational context of the EU. Arguably, this ruling signifies the increasing importance of the dialogical interaction of the international and the supranational. However, that importance does not necessarily signal a decline in power of the state per se; but rather a change in the individuals and institutions with which the state will negotiate.

The transnational exerts opposing pressures on the national. Even though transnational civil society organizations have adopted discourses of human rights to frame Irish national debates over women’s reproductive rights, as in the ‘C case’, human rights as such do not constitute a legitimate basis for the membership of women in the Irish nation-state. Other facets of transnationalism actively work against such an understanding. In particular, the Catholic Church has dismissed the human rights discourse to understand women’s reproductive rights, while anti-abortion organizations collaborate with conservative groups in the United States and Britain. The latter has led to transnational power stunting the promise of reproductive rights as social rights to combat gender inequality within the Irish nation-state. Ironically, the absence of this social right has since 1970 prompted over 70,000 Irish women to become individual transnational actors as they travel to Britain to obtain abortions. Finally, Ireland’s change from *jus soli* to *jus sanguinis*, which happened after the ‘O case’, as a means to control migration flows that can give rise to transnational ties further spotlight the power of the national over the transnational.

Our case analysis thus bears out that one of the main reasons why the influence of the inter-, supra- and transnational is not greater is because the institutions implementing
international treaties recreate the public/private divide by construing what is domestic law (and what is deemed as the private realm within it) as the ‘private’ in relation to the ‘public’ arena of international law (Charlesworth and Chinkin, 2000). However, the extensive involvement of transnational activists in the A, B, C case suggests that the implementation of the margin of appreciation doctrine may be heavily contested in future cases concerning women’s reproductive rights.

Ultimately, we argue that postnational claims to membership as defined by Soysal (1994) are associated with legal marginality, as in the ‘O case’. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), asylum-seekers are protected by virtue of their human rights. Given her statelessness, O’s human rights, as rights rooted in her personhood, were her only source of rights and they did not convey the same privileges as citizenship status. This is what makes postnational claims to membership marginal in their effects (Somers, 2006). As argued earlier, the Irish nation-state saw no commitment to defend and vindicate the right to life of O’s unborn child; much less to welcome O, portrayed as a ‘bogus’ asylum-seeker, into the Irish and European communities. Indeed, nothing says ‘you are one of us’ more clearly than voting in support of X’s plea to be allowed to procure an abortion, despite entrenched societal and religious beliefs about ‘the right to life of the unborn’. And nothing says ‘you don’t belong here’ more clearly than the speedy deportation of Ms. O and ‘Baby O’ and voting to change citizenship laws in the aftermath of her case. Although C was also in a position of social marginality as a member of the Traveller community, it was her rights as an Irish girl and not her human rights as a child, which determined her access to abortion. In other words, her rights to the protections of the Irish nation-state rather than her rights to personhood decided her fate.

To conclude: the ‘X case’ acted as a catalyst for the reconfiguration of the legal-political context in Ireland, showing that membership in the Irish nation and women’s reproductive rights are contested terrains. What the C, O and A, B and C cases show is that this contestation over reproductive rights and membership has grown increasingly more complex given the simultaneous interaction of rapidly developing international, supranational and transnational forms of governance. Adding to this complexity is also the (tenuous) relationship between understandings of reproductive rights as social rights or as human rights in these debates. Clearly, the notion of reproductive rights as human rights has captured the legal and political imaginary of different state, non-state and supra-state actors involved in these debates. An understanding of reproductive rights as social rights, however, should not be dismissed here; their state-bounded dimension renders them less limited in their effect than human rights, as evidenced in the C case. The Irish state’s welfare apparatus intervened to secure C’s well-being on the basis of a series of social rights granted to children in the care of the Irish state. Future research should investigate the differential political and legal impact of understanding reproductive rights as social rights versus human rights, especially given the implications of social rights for women’s civil and political rights. Future research should also continue to focus on the ways in which international and supranational governing bodies recreate the public/private distinction at the root of exclusionary reproductive rights. Finally, future research should consider the relationship between reproductive rights and sexual violence. A more focused analysis on this point was beyond the scope of the article. Nevertheless, it is important to note that the dimension of violence is effaced when the debate becomes one exclusively addressing reproductive rights and the right to life.
Funding
This research received no specific grant from any funding agency in the public, commercial or not-for-profit sectors.

Notes
1. This decision was reinforced in 1995 in the Irish Supreme Court’s decision in Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995 (Buckley, 1998; Hanafin, 1996).
3. This interpretation of a threat to life was further confirmed in a referendum in 2002, in which the Irish voted that a risk of suicide constitutes a danger to the pregnant woman’s life (McGuinness, 2011).

References


