

Legislating on Abortion in Ireland: A Constitutional Approach

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The Irish government is currently drafting the first piece of legislation that would regulate the availability of abortion in Ireland. This comes over twenty years after the Supreme Court's decision in *Attorney General v X* [1991] confirmed that there is a limited constitutional right to access abortion in Ireland. But which abortions fall within the Constitution? And how will the legislation regulate abortion provision?

Despite the decision in *X*, there has been no legislative clarification how to determine whether a woman may access an abortion under the limited Constitutional allowance. This led the European Court of Human Rights in *A, B & C v Ireland* [2010] finding Ireland to be in violation of the ECHR for

failing to clearly outline how that right can be accessed. While the Court held that Ireland has the right to decide on the availability of abortion *per se*, any such right that does exist must be accessible.

Following the decision in *A, B, C v Ireland*, the Government established an Expert Group to consider how to implement the judgment. This Group reported around the same time that Savita Halappanavar died in hospital having contracted serious infection in the course of miscarrying a non-viable foetus following a refused request for a termination. This case created a context in which the Government determined to implement *A, B & C* by means of legislation in line with the *X* Case.

Abortion remains a highly controversial, politicised, and emotive issue in Ireland. During the consultation period and the debates on the proposed legislation, two issues have particularly stood out as areas of concern: the regulation of abortion in cases of suicidal ideation; and the fear that introducing abortion in line with *X* will 'open the floodgates' to abortion on demand.

Fiona de Londras and Laura Graham address these two points, arguing that suicide should not be excluded from the legislative regime or given separate treatment, and that floodgate arguments, especially those drawing comparisons to the British Abortion Act 1967 are disingenuous, unhelpful, and unfounded distortions of the debate.



The Constitutional Position on Abortion in Ireland

Article 40.3.3 of the Irish Constitution provides:

'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

The 'test' for access to abortion within the limits of Article 40.3.3 was laid out in *Attorney General v X* [1991]:

'[I]f it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s. 3, sub-s. 3 of the Constitution.'

Suicide and Abortion in Ireland

In cases of suicidal ideation, two possibilities for the new law have been mooted:

- (i) exclude suicide altogether, or
- (ii) create a separate legal scheme to regulate the availability of abortion in cases of suicidal ideation.

Exclusion of Suicide

Under *X*, the threat that suicidality poses to the life of a pregnant woman is unequivocally included in the realm of constitutionally permissible abortion. In 1992 and 2002, the People of Ireland were offered the opportunity to expressly exclude suicide from the limited contexts in which termination of a pregnancy, including by abortion, would be constitutionally permissible. On both occasions they declined to do so. If the statute were to expressly exclude suicidality, that clause would appear to be *prima facie* unconstitutional. If it were to remain silent on suicide, *X* and Ireland's obligations under the ECHR would require the statute to be interpreted to include suicide in the possible risks to life.

A Separate Scheme for Suicide

Article 40.3.3 does not treat suicide any differently from any other risk to life. In the case of suicidal ideation — as with all other risks to life — an abortion would only be permissible where: (i) the risk to life is real and substantial, (ii) the risk can in probability only be averted by termination, and (iii) the foetus is not viable or on the cusp of viability.

While a separate scheme for suicide may not be legally mandated, neither is it legally prohibited. Any such separate scheme must, however, not be so restrictive as to render the right to access an abortion in the case of suicidality practically inaccessible. That would not resolve the incompatibility with the ECHR. Rather, if there is a separate scheme it must enable decisions on whether an abortion is permissible in any case to be made in good time, allow for a mechanism to challenge differing medical opinions, and must be subject to some form of independent review.

What are the floodgate arguments and why are they unfounded?

The debates about legislating for abortion in Ireland have been rife with floodgates arguments. The claims raised are already managed by the limited constitutional availability of abortion and ought not to bear in any meaningful way on the process of legislative design.

Time Limits

The claim: There is no express time limit on the right to access an abortion, thus Ireland has an unusually wide abortion availability.

The response: The mutual respect outlined in the Constitution clearly prohibits abortion where a foetus is (or may be) viable. In Ireland, there is no stage in foetal development where abortion for anything but a real and substantial risk to the life of the woman is permitted. Even where there is this risk, if the foetus is (or may be) viable, an early delivery would be permitted rather than an abortion. This provides more protection to the foetus than time limits, which would be inappropriate in this restrictive regime.

Patient-Doctor Collusion

The claim: The British Abortion Act 1967 shows us that medical certification does not work, and doctors collude with patients leading to 'abortion on demand'.

The response: Britain does not have 'abortion on demand'. Under the Abortion Act 1967, apart from in an emergency, two doctors must agree in good faith that one of four

grounds for abortion under the Act applies.

Where the practice of 'pre-stamped' forms has been uncovered in Britain, there have been threats of criminal sanctions and steps have been taken to ensure compliance with the law. The two-doctor rule also has the effect of giving doctors the capacity to refuse abortions including, in some cases, on the basis of a pregnant woman's 'actual or reasonably foreseeable environment'. As the Constitution permits abortion only in life-threatening contexts in Ireland, it is almost certainly the case that any abortion decisions will be made in the context of hospital care, where averting procedures (and, indeed, ethics committees) will be more difficult than is the case in general practices. The Abortion Act 1967 thus does not provide any useable argument against abortion legislation in Ireland.

Change in Culture

The claim: Introducing abortion legislation will lead to a change in culture in which abortion will become more acceptable, leading to 'abortion on demand'.

The response: This may well be true given that, as abortion becomes legally available in Ireland, claims for more availability might be made. However, even if there were such a cultural change, this could not result in a legal change without a constitutional amendment, which in turn can only be achieved by means of a referendum of the People.

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References

de Londras, Fiona & Graham, Laura (2013) 'Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate.' *Irish Journal of Legal Studies* (forthcoming)

de Londras, Fiona (2013) 'Suicide and Abortion: Analysing the Legislative Options in

Ireland.' *Medico-Legal Journal of Ireland* (forthcoming).

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