

## Legislating for Article 40.3.3°

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This article discusses the development of the law on abortion in Ireland, and in particular outlines the context for the passage of the *Protection of Life During Pregnancy Bill 2013*, currently before the Oireachtas, which implements the decision of the Supreme Court in *A.G. v. X.* [1992] 1 I.R. 1.

### I – Introduction

Ireland has a unique legal and constitutional approach to reproductive health. It was the last country in Europe to legalise contraception, while reproductive health services such as in-vitro fertilisation (I.V.F.) remain unregulated. From the 1980s onwards, highly divisive debates on abortion have focused on the Constitution, the law and the moral-legal aspects of abortion, rather than the medical-health or indeed women's rights aspects. This article will review the events that have led up to the drafting of the *Protection of Life During Pregnancy Bill 2013*, which is currently before the Oireachtas.

### II – The Legal Context

Abortion is a criminal offence in Ireland under sections 58 and 59 of the *Offences Against the Person Act 1861* (1861 Act). Section 58 makes it an offence for a pregnant woman unlawfully to “attempt to procure a miscarriage”, *i.e.* to undergo an abortion, while section 59 criminalises anyone who assists a woman in having an abortion.

For many years after 1861, prosecutions were taken against persons performing backstreet abortions in both England and Ireland. However, the legal position in England was altered after the 1939 case of *R v. Bourne*.<sup>1</sup> Dr. Bourne was prosecuted under the 1861 Act for performing an abortion on a young girl who had been gang-

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<sup>1</sup> *R. v. Bourne*, [1939] 1 K.B. 687 [hereinafter *Bourne*].

raped by a group of soldiers. The trial judge, Judge Macnaghten, directed the jury that the use of the word “unlawful” to qualify the procurement of a miscarriage meant that there were circumstances in which it would be lawful to perform an abortion. He said that a doctor would have a defence if he or she carried out an abortion to preserve the life of the pregnant woman; and, the doctor would also have a duty to carry out an abortion if the effect of the continuation of the pregnancy would be to make the woman or girl a “physical or mental wreck.”<sup>2</sup>

This judgment led to an increase in the availability of backstreet abortion in England, as doctors were able to rely upon the *Bourne* defence. As a result, women began to travel from Ireland to England for abortions, and the numbers of Irish prosecutions for abortion and infanticide fell considerably. They rose again during the years of World War II, when restrictions were placed on travel to England from Ireland. The last prosecution for a backstreet abortion in Ireland was the infamous Nurse Cadden case in 1956. The nurse, reputed to have performed hundreds of such abortions, was the last woman sentenced to hang in Ireland following the death of one of her patients. This sentence was later commuted, and she died in prison in 1959.<sup>3</sup>

Matters moved faster in Britain. In 1967, largely as a result of pressure from the medical profession concerned at the many deaths of women undergoing abortion in poor sanitary conditions, the U.K. Parliament passed the *Abortion Act 1967* which provides for a range of circumstances in which abortion can legally be carried out. Once abortion became legally available in Britain under this statute, the numbers of women travelling to England from Ireland for terminations began to increase significantly, and reached 3,600 in 1981 – the same year that an Irish right to choose campaign was launched. The numbers peaked at over 6,700 per year in 2001 and have fallen since, with a total figure of 3,982 Irish women having abortions in England in 2012<sup>4</sup>.

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<sup>2</sup> *Ibid.* at 693–4.

<sup>3</sup> See generally the account of Nurse Cadden’s life in R. Kavanagh, *Mamie Cadden: Backstreet Abortionist* (Cork: Mercier Press, 2005).

<sup>4</sup> Department of Health U.K., *Abortion Statistics, England and Wales: 2012* (July 2013) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/211790/2012\\_Abortion\\_Statistics.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211790/2012_Abortion_Statistics.pdf)> (date accessed: 17 July 2013).

These figures demonstrate the extent of the need for legal abortion in Ireland. At present, for many Irish women this is addressed through the availability of travel to Britain. But the needs of the most vulnerable women for whom travel can be very difficult – the young, the poor, or asylum-seekers – are not being met. The voices of these women are not heard in the debate on abortion – they have effectively been silenced under the present legal regime. These are women who face a double crisis; on top of their crisis pregnancy, they also face the added crisis involved in the practical, financial and emotional difficulties in making the journey to England.<sup>5</sup>

So what has the Irish women's movement done to address this double crisis? In late 1979, a group of feminist activists established the first Women's Right to Choose group in Ireland, demanding the legalisation of contraception and abortion. In March 1981 this group held a public meeting at Liberty Hall, Dublin. What happened as a result of that meeting has been described by Linda Connolly:

[t]he counter right made itself visible and increasingly mobilised in 1981 by diverting the abortion debate into the legal/constitutional arena – an area which required extensive resources and expertise. Tactically, it aimed to block the women's movement from providing its services by actively campaigning for a constitutional referendum on the 'right to life of the unborn'...<sup>6</sup>

More than three decades on from that significant public meeting, little has changed on reproductive health, apart from the legalisation of contraception. However, as the quotation vividly conveys, the stage was being set for major political and legal conflicts that still remain to be resolved.

### **III – The 1983 Eighth Amendment**

Before the establishment of the Irish right to choose campaign, there had been dramatic legal change on abortion, not just in England and Europe but also in the

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<sup>5</sup> For anonymised accounts of these experiences see Medb Ruane, *The Irish Journey: Women's Stories of Abortion* (Dublin: I.F.P.A., 2000).

<sup>6</sup> L. Connolly, "From Revolution to Devolution: Mapping the Contemporary Women's Movement in Ireland" in A. Byrne and M. Leonard, eds., *Women and Irish Society: A Sociological Reader* (Belfast: Beyond the Pale Publications, 1997) 552 at 561.

U.S.A. – and this was to have repercussions in Ireland. In 1973 the U.S. Supreme Court held in *Roe v. Wade*, building on earlier case law around the right to privacy and contraception, that women had the right to abortion under the U.S. Constitution.<sup>7</sup> This decision acted as a catalyst for conservative forces in Ireland to lobby for a constitutional referendum to reinforce the legislative prohibition on abortion. The same year that *Roe* was decided, the Irish Supreme Court had held in *McGee v. Attorney General* that a right to marital privacy was implicit in the Constitution, thereby enabling a married couple to import contraceptives for their own use.<sup>8</sup>

The *McGee* decision was described by Professor William Binchy, a leading member of the anti-abortion movement, as being a “timebomb” in the hands of a court; he warned that the privacy concept espoused by the Court in *McGee* could provide a key for opening the door to legalised abortion in the future.<sup>9</sup> The decision in *Roe*, and the legal reasoning of those who saw *McGee* as offering a backdoor route to the legalisation of abortion had “a clearly visible effect on the development of Irish law and policy on abortion, in giving an impetus to the Pro-Life Amendment Campaign (PLAC) which resulted in the passing of the Eighth Amendment to the Irish Constitution in September 1983 ... .”<sup>10</sup>

The bitter and angry 1983 referendum campaign has been described as a “second partitioning of Ireland.”<sup>11</sup> The anti-abortion campaign had successfully played one political party against another to win promises from the government to hold a referendum. Despite serious misgivings expressed by many about the wording P.L.A.C. wished to insert into the Constitution, the Fine Gael-Labour government reluctantly put a referendum to the people that the parties in government ultimately did not support. It was passed by a two-to-one majority (67% to 33%, on a 53% turnout of the electorate). Many commentators have analysed this campaign and identified the

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<sup>7</sup> *Roe v. Wade* (1973) 410 U.S. 113 [hereinafter *Roe*].

<sup>8</sup> *McGee v. Attorney General* [1974] I.R. 284 [hereinafter *McGee*].

<sup>9</sup> W. Binchy, “Privacy and Family Law: A reply to Mr. O’ Reilly” (1977) Winter: Studies: An Irish Quarterly review 330 at 330.

<sup>10</sup> J. Kingston & A. Whelan with I. Bacik, *Abortion and the Law: An Irish Perspective* (Dublin: Round Hall Sweet & Maxwell, 1977) 260 [hereinafter Kingston *et al.*].

<sup>11</sup> T. Hesketh, *The Second Partitioning of Ireland? The Abortion referendum 1983* (Dublin: Brandsma Books, 1990).

outcome of the referendum as a pivotal moment in the history of the Irish women's movement.<sup>12</sup> The wording of the Eighth Amendment to the Constitution became Article 40.3.3<sup>o</sup>.<sup>13</sup>

It is submitted that Article 40.3.3<sup>o</sup> is uniquely misogynistic, in that it expressly sets up the right to life of both the pregnant woman and the foetus that she carries in conflict – anticipating that a time would come when somebody would have to decide between them. That time did come, only nine years after the passing of the referendum, after a great deal of litigation had taken place which was to extend the effect of the provision well beyond that publicly envisaged by its advocates.

#### **IV – The Effect of the Eighth Amendment**

Very shortly after the passing of the Eighth Amendment, the Society for the Protection of Unborn Children (S.P.U.C.), established in 1980, began to use the new provision as the basis for a series of cases taken against those audacious enough to provide desperate women with information on abortion facilities in Britain. S.P.U.C. first issued proceedings against two non-directive pregnancy counselling agencies, Open Door Counselling and the Well Woman Centre. Both offered pregnant women information on all the options open to them, including information on the contact details of clinics offering abortion in Britain. S.P.U.C. argued that the provision of this information amounted to a breach of the constitutional right to life of the unborn – and that the State was failing in its constitutional duty if it did not close down the agencies.

This argument clearly required a breathtaking leap of logic in order to succeed; it assumed that women would not choose to terminate their pregnancies if they were not provided with information. Yet this argument succeeded – Mr. Justice Hamilton ruled against the counselling agencies in *Attorney General (S.P.U.C.) v. Open Door*

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<sup>12</sup> See for example A. Smyth, *The abortion papers: Ireland* (Dublin: Attic Press, 1992) and S. McAvoy, "From anti-amendment campaigns to demanding reproductive justice: the changing landscape of abortion rights activism in Ireland 1983-2008" in J. Schweppe, ed., *The Unborn Child, Article 40.3.3 and Abortion in Ireland: Twenty-five Years of Protection?* (Dublin: Liffey Press, 2008) 15.

<sup>13</sup> Article 40.3.3<sup>o</sup> provides: "[t]he 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."

*Counselling Ltd.* in December 1986, stating that their right to freedom of expression could not be invoked to interfere with the “fundamental right” to life of the unborn.<sup>14</sup> This High Court decision, subsequently upheld by the Supreme Court, established that the provision of information on abortion was unlawful under the Constitution. The agencies however appealed to the European Court of Human Rights, which in October 1992 ruled that the Irish Government’s ban on abortion information was in breach of the freedom of expression guarantee in Article 10 of the European Convention on Human Rights, since it was overbroad and disproportionate.<sup>15</sup>

In the meantime, the Irish courts’ judgments in the *Open Door* case had a dramatic effect on the availability of information. Other counselling agencies, in fear of being closed down, stopped providing information on abortion. An underground helpline run by the Women’s Information Network (W.I.N.) was established, and linked up with the London-based, Irish Women’s Abortion Support Group (I.W.A.S.G.) to provide women with both information and practical help with travelling arrangements. Other underground groups in Ireland also provided information through informal networks.<sup>16</sup> However, the only Irish organisations that continued to openly provide information on abortion were students’ unions.

Shortly after initiating the *Open Door* litigation, S.P.U.C. began similar legal action against the officers of a number of students’ unions, which were providing information on abortion in their handbooks. The student officers, of whom this author was one, were from three bodies: the national Union of Students in Ireland (U.S.I.), University College Dublin and Trinity College Dublin. Once again, S.P.U.C. succeeded in obtaining court orders against the students from the High Court and the Supreme Court, prohibiting them from distributing this information. They had at first sought to jail the four officers from Trinity College, who had already distributed their student handbooks prior to the High Court case. Mary Robinson, then a Senior Counsel,

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<sup>14</sup> *Attorney General (S.P.U.C.) v. Open Door Counselling Ltd.* [1987] I.L.R.M. 477 [hereinafter *Open Door*].

<sup>15</sup> *Open Door Counselling and Others v. Ireland (Open Door No. 2)* (1993) 15 E.H.R.R. 244.

<sup>16</sup> See for example P. Conroy Jackson, “Women’s Movement and Abortion: The Criminalisation of Irish Women” in D. Dahlerup, ed., *The New Women’s Movement: Feminism and Political Power in Europe and the U.S.* (London: Sage 1996) 48.

defended the students, and succeeded in persuading the Court to refer the case to the European Court of Justice (E.C.J.).

In its 1991 judgment in *S.P.U.C. v. Grogan (No. 2)*, the E.C.J. raised the possibility that a future right to provide information on abortion might be established through European Community (E.C.) law.<sup>17</sup> The E.C.J. defined abortion as a service under E.C. law – and prohibition of the provision of information in one member state on a service lawfully available in another member state would normally be in breach of E.C. law. However, ultimately the E.C.J. concluded that because there was no commercial connection between the students' unions and the British clinics, the information ban could not be regarded as a restriction under E.C. law – so the students' case was returned to the Irish High Court, where in August 1992 Mr. Justice Morris granted a permanent injunction restraining the students from providing information on abortion.<sup>18</sup> This was finally lifted by the Supreme Court in March 1997,<sup>19</sup> by which time many other more dramatic legal and social developments had occurred.

In the context of E.C. law, two further significant developments took place following the decision of the E.C.J. in *Grogan*. First, in November 1991, the Irish Government negotiated a protocol to be adopted as part of the Treaty on the European Union (the Maastricht Treaty), stating: “[n]othing in the Treaty on European Union ... shall affect the application in Ireland of Article 40.3.3 of the Constitution of Ireland.” The adoption of Protocol No. 17 was to become highly controversial in the aftermath of the second significant development, the case of *A.G. v. X.*, which came before the High Court in February 1992.<sup>20</sup>

### **V – Conflicting Rights: the X. Case and Beyond**

The Eighth Amendment provides that the right to life of the “unborn” must be respected, defended and vindicated “with due regard to the equal right to life of the

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<sup>17</sup> Case no. 159/90 [1991] 3 C.M.L.R. 849 [hereinafter *Grogan*].

<sup>18</sup> *S.P.U.C. v. Grogan (No. 3)* [1992] 2 I.R. 471.

<sup>19</sup> *S.P.U.C. v. Grogan (No. 4)* (6 March 1997, unreported), Supreme Court.

<sup>20</sup> [1992] I.R. 1 [hereinafter *X.*].

mother.” Thus, it was inevitable that where the two rights came into conflict, the courts would have the unenviable task of deciding which of them took priority. This dilemma first occurred in February 1992, with the *X*. case. A 14-year old girl had been raped and had become pregnant. She wished to terminate the pregnancy and her parents took her to England for that purpose. They notified the police that they were leaving the country for this purpose because they wished to use D.N.A. samples from the foetus in any subsequent criminal proceedings for rape. The Attorney-General, Harry Whelehan, then sought a High Court injunction to stop the girl from travelling out of Ireland for the abortion. This was granted by Mr. Justice Costello.<sup>21</sup> The nightmare scenario predicted by those who had campaigned against the 1983 amendment had come to pass; a pregnant child had effectively been imprisoned in her own country.

*X* and her parents, who were already in England when notified of the injunction, cancelled their appointment at the clinic and returned to Dublin and political uproar ensued. There was popular outrage at the notion that this rape victim might be forced to proceed with an unwanted pregnancy. In the face of mounting public pressure, an appeal was heard within a matter of weeks, and the Supreme Court reversed Justice Costello’s decision, allowing the girl to travel. The Court found that because the girl was suicidal, the continuation of the pregnancy would have threatened her right to life. Thus, the two rights were in direct conflict. In such situations, the Court ruled, the right to life of the girl should prevail. Mr. Chief Justice Finlay stated that: “if it can be 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.”<sup>22</sup> In other words, *X* could legally have an abortion in Ireland, but the corollary of the test was that where a woman was not facing a threat to her life, then not only would it be illegal for her to have an abortion in Ireland, but she could also be prevented from travelling abroad to avail of legal abortion elsewhere. Further, because of the Protocol to the Maastricht Treaty, a woman in this invidious position could not rely upon the E.C. law guarantee of freedom of movement to enable her to travel. When it was realised that the Maastricht Treaty

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<sup>21</sup> *Ibid.* at 9.

<sup>22</sup> *Ibid.* at 62.



might have this effect, a campaign was launched by the pro-choice movement against its adoption.

Faced with the potential defeat of the Maastricht Treaty referendum, the government was again forced to take action. First, in May 1992, the Foreign Ministers of the E.C. Member States adopted a Declaration stating that the operation of the Protocol would not affect freedom to travel, or to obtain information.<sup>23</sup> The actual legal effect of this Declaration apparently contradicting the words of the Protocol has never been tested. But its adoption reassured people that girls like X would not be prevented from travelling, and it ensured that the Maastricht referendum was passed in June 1992.

The government also put three amendments to Article 40.3.3° of the Constitution before the people in November 1992. The aim of the first (the Twelfth Amendment) was to remove the threat of suicide as a legally recognised threat to the life of a pregnant woman, *i.e.* abortion would be allowed where necessary to save a woman's life if she had a physical condition causing a real and substantial risk to her life, but not including the risk of suicide. The second amendment guaranteed the freedom to travel abroad, and the third allowed the provision of information on services lawfully available in other states.

The Twelfth Amendment was opposed by pro-choice groups who wished, at a minimum, to maintain the lawfulness of abortion in X. case circumstances. In a bizarre twist, it was also opposed by some anti-abortion groups who, while seeking to overturn the decision in X., did not think that the proposed wording went far enough, in that it still allowed for abortion where necessary to save the life of the pregnant woman. They denied that abortion was ever necessary to save a woman's life. It was hardly surprising that the Twelfth Amendment was rejected by the people. However, in a clear victory for the pro-choice movement, the travel and information referendums were passed.<sup>24</sup>

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<sup>23</sup> Declaration adopted at Guimaraes, Portugal, by the High Contracting Parties to the Treaty on European Union, 1 May 1992. For analysis see Kingston *et al*, *supra* note 10 at 162 *et seq.*

<sup>24</sup> B. Kennelly & E. Ward "The Abortion Referendums" in M. Gallagher & M. Laver, eds., *How Ireland Voted 1992*, (Dublin: P.S.A.I. Press & Folens, 1993) 115.

Following these amendments, the *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995* came into force, providing for the conditions under which information on abortion may be provided. The first comprehensive study of women and crisis pregnancy in Ireland, conducted subsequently, found that information on both contraception and abortion was still difficult to obtain for many women and girls.<sup>25</sup>

In calling the November 1992 referendum, the outgoing Fianna Fáil-Progressive Democrat coalition government had stated that if the twelfth amendment were not passed, it would introduce legislation to implement the *X.* case. Indeed, the need for legislation had already been explicitly commented upon by the Courts. In the *X.* case, Mr. Justice McCarthy, one of the Supreme Court judges, had pointed out that:

[i]n the context of the eight years that have passed since the Amendment was adopted... the failure by the legislature to enact the appropriate legislation is no longer just unfortunate, it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are the medical profession to do? They have no guidelines save what may be gleaned from the judgments in this case.<sup>26</sup>

## **VI – The C. Case**

Despite these political promises and strong comments, yet another case of a tragic teenager came before the High Court in November 1997 – the case of *A. & B. v. Eastern Health Board and C.*,<sup>27</sup> involving a 13-year-old girl who had been raped and became pregnant. She was in the care of the State and being looked after by the Regional Health Board (now re-named as the Health Services Executive or H.S.E). The Health Board was granted permission by the District Court to take her to England for an abortion. However, the girl's parents, having previously supported her decision, changed their minds, and appealed the District Court decision to the High Court. There, Mr. Justice Geoghegan found on the evidence of psychiatric opinion that the girl was

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<sup>25</sup> E. Mahon, C. Conlon and L. Dillon, *Women and Crisis Pregnancy: A Report presented to the Department of Health and Children* (Dublin: Stationery Office, 1998).

<sup>26</sup> *X.*, *supra* note 20 at 90.

<sup>27</sup> [1998] I.L.R.M. 464 [hereinafter *C.*].

suicidal, and that the continuation of her pregnancy would pose a real and substantial risk to her life. Thus the abortion would have been lawful in Ireland, and so the health board was entitled to take her to England. Once again, however, if there had been no such risk to the girl's life, she would not have been entitled to have the abortion in Ireland, nor to travel abroad for it.

Young women in the position of the girl in the *C*. case, that is girls who are pregnant but unable to travel abroad without assistance, remain the most vulnerable group of pregnant women, whose legal position is untenable. Unless they are in the care of the H.S.E., which can seek court permission for them to travel, they will be forced to continue the unwanted pregnancy. Even where the H.S.E. applies for permission to travel, the court may not grant it unless the girl is suicidal or her life is otherwise at risk if her pregnancy continues. The freedom to travel is only exercisable by those with the means to do so – there is no enforceable right to travel.

In the years immediately after the *C* case, a number of further developments took place. The Constitution Review Group recommended legislation in 1996 to clarify the application of the *X*. case test, concluding then that a bill passed within the ambit of the existing constitutional framework was the only practical possibility. The Group considered that it would not be safe to rely on the position of the anti-abortion campaign that abortion is never necessary to save the life of a pregnant woman, thereby ruling out the introduction of an absolute constitutional ban on abortion.

During the first stage of a protracted consultation process on abortion which followed the *C*. case, a comprehensive Green Paper was published by the government in September 1999, which presented a total of seven options, ranging from an absolute constitutional ban on abortion (which they also rejected as unsafe) to legislation allowing for abortion on request.<sup>28</sup> This Report was referred to the All-Party Oireachtas Committee on the Constitution (A.P.O.C.C.), which itself engaged in a further

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<sup>28</sup> Interdepartmental Working Group, *Green Paper on Abortion* (Dublin: Stationery Office, 1996).

consultation process, holding oral hearings during 2000, and finally reporting to the Cabinet Sub-Committee on Abortion in November 2000.<sup>29</sup>

Although these recommendations were not as considered as those contained in the Green Paper, all members were agreed on the need to invest resources in a programme to tackle the incidence of crisis pregnancy. As a result, the Crisis Pregnancy Agency was established in 2002. It was subsumed into the Department of Health in 2010, but for a time ran major contraceptive and sex education programmes. The members of A.P.O.C.C. could not however agree on a single recommendation for legal change, so they presented three alternatives. The first was to leave the legal position unchanged, the second to introduce legislation within the existing constitutional framework, and the third to amend the Constitution to rule out suicide as a ground on which a threat to life could be established. Of the three options, the anti-abortion movement supported the referendum to rule out suicide risk as a ground for abortion. This was effectively a re-run of the November 1992 Twelfth Amendment, which had already been defeated, but despite this the government was persuaded by the movement's intensive lobbying, and on 6 March 2002, they again put an amendment to the people to reverse the decision in the *X.* case, by ruling out suicide risk as a ground for abortion.

The campaign around this referendum was dominated by a debate over whether pregnant women or girls ever really became suicidal. This deeply unpalatable debate carried within it a perceptibly misogynistic undercurrent – that pregnant women would pretend to be suicidal in order to obtain abortion. In order to counter this approach, a range of different women's groups and civil liberties groups united under the Alliance for a No Vote (A.N.V.) banner, and organised a group of psychiatrists and psychologists to explain that there exist established professional methods to assess suicide risk, which could be applied in order to guard against any "abuse" of the system. Following extensive campaigning by the A.N.V. and other progressive groups, the referendum was

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<sup>29</sup> All-Party Committee on the Constitution, *Fifth Progress Report: Abortion* (Dublin: Stationery Office, 2000).

ultimately defeated. Unfortunately, while this was important symbolically, defeat did not mark any step forward for pro-choice campaigners. It simply stopped the clock turning backwards.

One further significant development took place subsequent to this referendum. The ethical code of the Medical Council, the doctors' professional body, was revised to take account of the *X.* case test. Where previous editions of the code regarded any deliberate and intentional destruction of the foetus as professional misconduct, the seventh edition of the *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* now reads:

[a]bortion is illegal in Ireland except where there is a real and substantial risk to the life (as distinct from the health) of the mother. Under current legal precedent, this exception includes where there is a clear and substantial risk to the life of the mother arising from a threat of suicide. You should undertake a full assessment of any such risk in light of the clinical research on this issue.<sup>30</sup>

Paragraph 21.4 of the same *Guide* reads:

[i]n current obstetrical practice, rare complications can arise where therapeutic intervention (including termination of a pregnancy) is required at a stage when, due to extreme immaturity of the baby, there may be little or no hope of the baby surviving. In these exceptional circumstances, it may be necessary to intervene to terminate the pregnancy to protect the life of the mother, while making every effort to preserve the life of the baby.

This paragraph, which acknowledges that pregnancy may be terminated lawfully in cases of fatal foetal abnormality, for example, is particularly noteworthy in light of recent case law before the European Court of Human Rights (E.Ct.H.R.).

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<sup>30</sup> Medical Council, *Guide to Professional Conduct and Ethics for Registered Medical Practitioners* (Medical Council, 2009) at para. 21.1 <[www.medicalcouncil.ie/News-and-Publications/Publications/Professional-Conduct-Ethics/Guide-to-Professional-Conduct-and-Behaviour-for-Registered-Medical-Practitioners-pdf.pdf](http://www.medicalcouncil.ie/News-and-Publications/Publications/Professional-Conduct-Ethics/Guide-to-Professional-Conduct-and-Behaviour-for-Registered-Medical-Practitioners-pdf.pdf)> (date accessed: 28 July 2013) [hereinafter *Guide*].

## VII – The *D.* and *A., B., & C.* cases

Following the defeat of the 2002 referendum, abortion slipped off the political agenda altogether for some years. In 2007, a 17-year-old woman in the care of the State and with an anencephalic pregnancy sought permission from the H.S.E. to allow her to travel to obtain an abortion. The High Court ruled that she had a right to travel.<sup>31</sup> A similar issue then arose in a case before the E.Ct.H.R. taken against Ireland by another applicant, also *D.*, whose pregnancy had resulted in the diagnosis of a fatal foetal abnormality. She was forced to go to England to terminate the pregnancy, and argued that this breached her rights under the European Convention. In its decision, however, the E.Ct.H.R. found the application inadmissible because the applicant “did not comply with the requirement to exhaust domestic remedies as regards the availability of abortion in Ireland in the case of fatal foetal abnormality.”<sup>32</sup>

The E.Ct.H.R. accepted the rather hypocritical argument made by the Irish government, that:

there was “at least a tenable” argument which would seriously be considered by the domestic courts to the effect that a foetus was not an “unborn” for the purposes of Article 40.3.3 or that, even if it was an “unborn”, its right to life was not actually engaged as it had no prospect of life outside the womb. In the absence of a domestic decision, it was impossible to foresee that Article 40.3.3 clearly excluded an abortion in the applicant’s situation in Ireland.<sup>33</sup>

In accepting this argument, the E.Ct.H.R. made reference to the A.P.O.C.C. Report of November 2000. The Court noted that the Committee during its deliberations had met the Masters of the three major Dublin maternity hospitals. The Court commented that: “[a]ll three [Masters] spoke in favour of permitting in Ireland termination of pregnancy in cases of foetal abnormality ... where the foetus would not survive to term or live outside the womb ... .”<sup>34</sup>

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<sup>31</sup> *D. (A Minor) v. District Judge Brennan, the Health Services Executive, Ireland and the Attorney General* (9 May 2007, unreported), High Court.

<sup>32</sup> *D. v. Ireland*, no. 26499/02, § 4, E.C.H.R. 2006 (28 June 2006) at para. 103 [hereinafter *D.*].

<sup>33</sup> *Ibid.* at para. 69.

<sup>34</sup> *Ibid.* at para. 40.

The E.Ct.H.R. also noted the comments of the Masters of the hospitals at the press conference in February 2002 referred to above, and observed that:

[s]ince abortions (in the case of a “real and substantial risk” to the mother’s life) were already available in Ireland and since the Masters of the main obstetric hospitals were not against terminations in the case of a fatal foetal abnormality... the Court finds unsubstantiated the suggestion that the relevant ... orders would not have been implemented in good time [had the applicant sought a remedy before the domestic courts].<sup>35</sup>

Thus, the E.Ct.H.R. concluded in the *D.* case that there was “a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the ‘unborn’ suffered from an abnormality incompatible with life” and found that if she had initiated legal action before the Irish courts, the applicant’s case would have been “an arguable one with sufficient chances of success” to mean that a domestic legal remedy was therefore in principle available to her.<sup>36</sup> In other words, she should have pursued her case through the Irish courts before applying to the E.Ct.H.R. so her application was deemed inadmissible. Nonetheless, the judgment of the Court in *D. v. Ireland* clearly envisages that terminations of pregnancy in cases of fatal foetal abnormality would be declared lawful in any relevant case by the Irish courts.

Then came the more substantive decision of the E.Ct.H.R. in *A., B., & C. v. Ireland*.<sup>37</sup> Three women, all of whom had been living in Ireland when they had become pregnant and in a range of different circumstances had been obliged to travel to England to terminate their pregnancies, argued that Ireland had breached their human rights under the Convention. While ruling against the applications of A and B, the E.Ct.H.R. unanimously ruled that Ireland’s failure to implement the existing constitutional right to a lawful abortion in Ireland when a woman’s life is at risk had violated Applicant C’s rights under Article 8 of the European Convention because Applicant C’s pregnancy had posed a risk to her life. The E.Ct.H.R. also ruled that the three women did not have an effective remedy available to them under the Irish legal

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<sup>35</sup> *Ibid.* at para. 88.

<sup>36</sup> *Ibid.* at paras. 90-92.

<sup>37</sup> *A., B. & C. v. Ireland*, no. 25579/05 [2010] E.C.H.R. 2032 (16 December 2010) [hereinafter *A., B. & C.*].

system. The E.Ct.H.R. concluded that the Irish State had violated the right to privacy under Article 8 of the Convention in respect of Applicant C because:

... the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution.<sup>38</sup>

A new government (a Fine Gael-Labour coalition) was elected in February 2011, just months after the European Court decision. It committed to establishing an expert group to review the judgment and its implications for the provision of health care services to pregnant women. The Expert Group, announced in November 2011, reported to government in November 2012, setting out the framework for legislation to clarify the criteria under which terminations of pregnancy may be carried out in order to save a woman's life.<sup>39</sup>

In advance of the Expert Group's findings, a private members' bill on abortion was introduced in the Dáil in April 2012.<sup>40</sup> Although supported by pro-choice campaigners, the bill was defeated by the government on the basis that it would preempt the report of the Expert Group. Tragically, just before the publication of the Expert Group Report, in October 2012 a young woman named Savita Halappanavar died while undergoing a miscarriage at Galway University Hospital. Her death generated immense public anger and outrage at reports that she and her husband had requested a potentially life-saving termination of pregnancy but that this had been denied. The lack of legal clarity as to when doctors may intervene to carry out a life-saving abortion clearly contributed to the failures in her medical treatment.<sup>41</sup>

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<sup>38</sup> *Ibid.* at para. 367.

<sup>39</sup> *Report of the Expert Group on the Judgment in A, B and C v. Ireland*, Department of Health and Children (November 2012) <[http://www.dohc.ie/publications/Judgement\\_ABC.html](http://www.dohc.ie/publications/Judgement_ABC.html)> (date accessed: 14 June 2013).

<sup>40</sup> *Medical Treatment (Termination of Pregnancy in Case of Risk to Life of Pregnant Woman) Bill 2012* <<http://www.oireachtas.ie/viewdoc.asp?DocID=20441&&CatID=59&StartDate=01%20January%202012&OrderAscending=0>> (date accessed: 14 June 2013).

<sup>41</sup> See for example: Genevieve Carbery, "Legal Confusion' over abortion law – Shatter" *Irish Times* (15 April 2013) <<http://www.irishtimes.com/news/politics/legal-confusion-in-savita-case-shatter-1.1360821>> (date accessed: 14 June 2013).



In the aftermath of this case and of the publication of the Expert Group Report, the Government announced an intention to legislate to provide for the implementation of the E.Ct.H.R. judgment in *A., B. & C.* so as to provide an “accessible and effective procedure” whereby women may vindicate their constitutional right to life in accordance with the *X.* case test. Following this decision, extensive hearings on the proposed legislation were held by the Oireachtas Health Committee in Leinster House in January 2013. The overwhelming majority of doctors and psychiatrists who testified agreed that legislation is essential in accordance with the *X.* case to give women access to life-saving abortions. Doctors emphasised that the lack of legislation posed serious difficulties for them in cases where the continuance of a pregnancy posed a potential threat to a woman’s life.<sup>42</sup>

The *General Scheme of the Protection of Life During Pregnancy Bill 2013* was published by the Government in April 2013.<sup>43</sup> Following this publication, a series of hearings was again held by the Oireachtas Health Committee in May 2013, this time with medical and legal experts only, on the proposed scheme. The *Protection of Life During Pregnancy Bill 2013* was introduced to the Oireachtas on 14 July 2013 and is due passed all stages in both Houses on 23 July 2013.<sup>44</sup>

## **VIII – Conclusion**

Twenty-one years after the *X.* case, legislation is urgently needed to establish a statutory framework within which abortion may be carried out to save a woman’s life. However, legislation is also long overdue on the provision of other reproductive health services. Here again, the judiciary have had to make decisions within a legislative vacuum – with a series of complex issues concerning I.V.F., sperm donation and

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<sup>42</sup> See Joint Oireachtas Committee on Health and Children, *Report on Public Hearings on the Implementation of the Government decision following the publication of the Expert Group Report on A, B, & C v Ireland, Vol. 1* (2013) <[http://www.oireachtas.ie/parliament/media/Volume\\_1\\_142239.pdf](http://www.oireachtas.ie/parliament/media/Volume_1_142239.pdf)> (date accessed: 14 June 2013).

<sup>43</sup> Department of Health and Children, *General Scheme of the Protection of Life during Pregnancy Bill 2013* <[http://www.dohc.ie/press/releases/pdfs/plp\\_2013.pdf?direct=1](http://www.dohc.ie/press/releases/pdfs/plp_2013.pdf?direct=1)> (date accessed: 14 June 2013).

<sup>44</sup> <<http://www.oireachtas.ie/viewdoc.asp?DocID=23800&&CatID=59>> (date accessed: 28 June 2013).

surrogacy coming before the Irish courts in recent years.<sup>45</sup> Legislation should similarly govern the carrying out of embryonic stem-cell research.

Until now, a significant reason given for the failure to legislate in these areas is the presence of Article 40.3.3° in the Constitution and the legal status it gives the foetus. Yet there is no evidence that the adoption of the Article has prevented any abortions from being carried out, and its continued existence serves to compound the crisis of a crisis pregnancy, and to create a culture of secrecy and silence around the termination of pregnancy. Its retention maintains the hypocrisy that there is no abortion in Ireland.<sup>46</sup>

Because of the reluctance of legislators to confront the issue until now, the judiciary have been left to step into a legal vacuum; it would be greatly preferable if the regulation of abortion had in the first place remained outside the constitutional domain. It is very welcome that legislation is at last envisaged to provide for life-saving terminations of pregnancy although disappointing that the proposed bill will not cover the cases of fatal foetal abnormality, which could clearly be legislated for within the current constitutional framework. However, even if the legislation were extended in that way, it would still only address the needs of women in the most desperate circumstances. In the longer term, more fundamental and far-reaching legal change, namely the deletion of Article 40.3.3°, is necessary to meet the real reproductive health needs of Irish women.

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<sup>45</sup> See for example *R. v. R.* [2009] I.E.S.C. 82 (concerning the legal status of frozen embryos created during I.V.F.); *McD. v. L. & Anor.* [2009] I.E.S.C. 81 (concerning the rights of a sperm donor father); *M.R. & Anor. v. An tArd Chlaraitheoir & Ors.* [2013] I.E.H.C. 91 (concerning the legal parentage issues arising out of a surrogacy arrangement).

<sup>46</sup> See for example R. Fletcher, "Silences: Irish women and abortion" (1995) *Feminist Review* 44 at 50; A. Rossiter, *Ireland's Hidden Diaspora: The 'abortion trail' and the making of a London-Irish underground, 1980-2000* (London: I.A.S.C. Publishing, 2009); and J. Schweppe, ed., *The Unborn Child, Article 40.3.3 and Abortion in Ireland: Twenty-five Years of Protection?* (Dublin: Liffey Press, 2008).