

# 'A hope raised and then defeated'? the continuing harms of Irish abortion law

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## **‘A Hope Raised and Then Defeated’? The Continuing Harms of Irish Abortion Law**

The 8<sup>th</sup> Amendment to the Irish Constitution recognised ‘the unborn’ as a constitutional entity with a right to life equal to that of ‘the mother’ (formerly Article 40.3.3, Irish Constitution). The state was obliged by the text to respect and, ‘as far as practicable...defend and vindicate’ that foetal right (ibid). To all intents and purposes, the 8<sup>th</sup> Amendment created a near-total constitutional ban on abortion in Ireland.

However, the 8<sup>th</sup> Amendment did more than ‘simply’ ensure that abortion could not be made legal in Ireland. It also placed abortion in a zone of constitutional, legal and political exception (de Londras and Enright, 2018), marking it as something with which politicians and politics could not be trusted lest they might undermine the fetocentric state (McEvoy, 2013). It concretised the pre-existing “pro-life state of mind” (Earner-Byrne and Urquhart, 2019; chapter 5) in Irish law and politics. Relying on the 8<sup>th</sup> Amendment, politicians in particular shifted responsibility for the harms imposed on pregnant women, attributing them to the ‘will of the people’ reflected in the constitutional text rather than to political failure to do anything to make life under the 8<sup>th</sup> more liveable for pregnant people (Fox and Murphy, 1992).

For the vast majority of politicians,<sup>1</sup> the constitutional settlement of abortion in the 8<sup>th</sup> Amendment meant that it could be avoided almost entirely, at least until ‘tragic’ cases exposing the scale of its intrusion into women’s reproductive agency arose. These cases were ones where adolescent rape victims found themselves pregnant, suicidal, and enjoined from travelling for abortion in order to protect foetal rights (‘the X Case’: *Attorney General v X* [1992] 1 IR 1); ones where miscarrying women died in Irish hospitals because medical and legal staff considered that the persistence of a foetal heartbeat precluded miscarriage management that might be interpreted as abortion (the case of Savita Halappannavar; Health Service Executive, 2013); ones where asylum seekers, suicidal and pregnant as a result of wartime rape, were subjected to court orders allowing non-consensual hydration and other interventions when they protested their inability to access lawful abortion in Ireland (the

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\* Eavan Boland 2018, “Our Future will become the past of other women” (Dublin; Royal Irish Academy)

<sup>1</sup> There are of course exceptions, and some current parliamentarians have argued for abortion law reform throughout their political careers, including in some cases proposing private members bills that align much more closely with a rights-based approach. While some politicians first became vocal about abortion rights in the latter stage of the campaign, others have long argued for abortion law reform. These include Ivana Bacik, Ruth Coppinger, Clare Daly, Jan O’Sullivan, Katherine Zappone, Brid Smith, Lynn Ruane, Colette Kelleher, and Alice May Higgins. Most politicians, however, tended to say nothing about abortion unless and until circumstances forced them to.

case of ‘Ms Y’; Fletcher, 2014). Less visible were the everyday stories of cruelty and restriction: women borrowing money from money lenders to get abortions abroad, women importing abortion pills from Women on Web and self managing illegal abortions at home, women receiving diagnoses of fatal conditions for their pregnancies and having to travel to Liverpool Women’s Hospital to receive a termination in a theatre colloqually known as ‘the Shamrock suite’ because so many Irish families found themselves ending their pregnancies there (TFMR, 2018).

These ‘tragic’ cases sometimes forced formal political institutions—and in particular the Oireachtas (the Irish parliament)—into proposing and securing modest abortion law reform. However, even then, legislative engagement with abortion in the 8<sup>th</sup> Amendment era never dislodged the core propositions of the natalist state: that the foetus was a constitutional entity deserving of protection through law, that women’s constitutional and other rights could be limited (perhaps even rendered illusory or unenforceable) to protect foetal life, and that abortion law could and should be punitive in disposition. In other words, government-led legislative engagement with abortion in Ireland has never been framed by recognition of pregnant peoples’ rights.<sup>2</sup> Instead, it was an exercise of ‘troubleshooting’ where government and legislators acted to address what they considered to be the discrete problems raised by these ‘tragic’ cases. This framing of abortion law determined much about its form; if framing is an active process of making meaning (Benford and Snow, 2001), then the way politicians understand and represent the ‘problem’ they are said to be addressing is a reflection of the meaning that they are making of the issue (Bacchi, 2009). The moments of (actual or attempted) abortion law reform that took place under the 8<sup>th</sup> Amendment showed clearly, I will argue, that the majority of Irish legislators did not see the problem with the 8<sup>th</sup> Amendment as its suppression of women and girls.

In spite of the removal, following decades of intergenerational activism (de Londras, 2018a), of the 8<sup>th</sup> Amendment by referendum in 2018 (‘repeal’), I will argue that these sentiments continue to underpin Irish abortion law so that pregnant people are still not recognised as full constitutional rights bearers. This underpins and partly explains the shortcomings of the new law: the Health (Regulation of Termination of Pregnancy) Act 2018 (‘HRTPA 2018’). This new law decriminalises abortion for pregnant people, although not for doctors or those who assist women in accessing abortion outside of the Act. Under the law abortion is available without restriction as to reason in the first twelve weeks of pregnancy, but subject to a three-day waiting period and the medical certification of gestational age. After

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<sup>2</sup> Throughout this piece I use the terms people, women and girls interchangeably; in all cases this language is intended to include all persons who can become pregnant in Ireland, regardless of their gender identity.

12 weeks, abortion is lawful only where there is a risk of serious harm to the woman's health, a risk to her life, or a fatal diagnosis for the foetus. Even where there is a risk to a woman's life, abortion is prohibited once foetal viability has been reached.

Within that new legal regime, I argue, pregnant people continue to lack decisional security when it comes to their reproductive lives and are exposed to significant constitutional and dignitary harms as a result (Sanger, 2009). Under this law, pregnant people in Ireland now occupy a space of interstitial legality (Krajewska and Cahill-O'Callaghan, 2019) in which the constitutional labour of securing a rights-based approach to abortion regulation remains with pregnant people and reproductive rights activists.

The critical reading offered here of Ireland's recent and substantial abortion law reform, and its continuity with pre-repeal legislative disposition, provides a cautionary accent to celebratory discourses of repeal and of what reproductive rights movements in other countries might learn from the Irish experience. In particular, it highlights that progressive and substantial law reform does not necessarily indicate the displacement of pronatalist repronormativity (Franke, 2001) as the dominant frame for abortion regulation. Even in the face of massive public demand for the liberalisation of abortion law, based substantially on overwhelming majority support for a woman's right to choose (RTE & Behaviour and Attitudes, 2018), political failure to design abortion law from a commitment to the protection, promotion and enforcement of pregnant people's rights can produce law that exposes abortion-seeking women to humiliation, harm, indignity, and decisional insecurity.

### **Fetocentric Abortion Law Under the 8<sup>th</sup> Amendment**

The effect of the 8<sup>th</sup> Amendment was to make abortion unlawful and un-amenable to legalisation except where there was a "real and substantial risk" to the life of a pregnant person (*Attorney General v X* [1992] 1 IR 1). The duty of the state to "defend and vindicate" "the right to life of the unborn" to the extent practicable was interpreted extremely restrictively in a series of superior court cases (de Londras, 2016) meaning that, for years, women were unable to access information or even abortion travel with any kind of legal security. In 1992 new provisions were added to the Constitution to ensure information and travel were not prohibited (13<sup>th</sup> Amendment of the Constitution Act 1992; 14<sup>th</sup> Amendment of the Constitution Act 1992). These changes were a direct reaction to the *X Case* and the realisation that even in such extreme circumstances—an adolescent girl, at risk of suicide, and pregnant as a result of rape—the 8<sup>th</sup> Amendment might compel continued pregnancy and prevent abortion travel. The Government's reaction, however, was not to change the Constitution to ensure abortion would be available in such situations, or to allow for its less-

restrictive regulation; rather it was to work tolerance for abortion travel into the constitutional text (de Londras and Enright, 2018; 5), formalising the long-standing practice of those who could traveling to access abortion abroad, and those who could not enduring pregnancy at home (Gilmartin and Kennedy, 2019). At the same time, the Government also proposed reversing the Supreme Court's finding that a risk of suicide was a sufficient risk to life to allow abortion under the 8<sup>th</sup> Amendment (12<sup>th</sup> Amendment of the Constitution Bill 1992).

Rather than recognise that the 'problem' exposed by the *X Case* was the imposition of unacceptable burdens on reproductive agency, then, the government of the day's response framed it as a problem of being unable to access abortion care abroad. Rather than loosen restrictions at home, the state's reaction was to try (unsuccessfully) further to tighten them by proposing a referendum to reverse the Supreme Court's finding that a risk of suicide was a risk to a life in respect of which abortion was constitutionally permissible in Ireland. The government's reaction suggests its implicit endorsement of the 'pro-life' view (Binchy, 1992) that the problem here was not that the 8<sup>th</sup> Amendment had come perilously close to forcing a child to remain pregnant after rape and in spite of her suicidality, but that the Supreme Court had somehow subverted the will of the People expressed in 1983 by unacceptably 'widening' the circumstances in which abortion was constitutionally permitted.

In 2002 when the government proposed a further referendum to reform abortion law the framing remained unchanged. Once again the Government asked the people to reverse the *X Case* by expressly excluding a risk of suicide from the realm of constitutionally permissible grounds for abortion in Ireland (25<sup>th</sup> Amendment of the Constitution Bill 2001). Once again the People refused. The 2002 referendum also proposed the unprecedented step in Irish law of embedding a new statute in the Constitution. This statute would have governed the process by which people could access abortion where there was a real and substantial risk to their life, and would have made it impossible to amend that statute without a referendum because it would, effectively, have become a *quasi* constitutional text. The 'problem', again, was seemingly not what the 8<sup>th</sup> Amendment did to women, but the (remote) risk that legislators might somehow seek to ameliorate that harm, even within the miniscule constitutional space for action left by the constitutional text.

Even though the constitutional right to access abortion in cases of real and substantial risk to life was confirmed in 1992 (*Attorney General v X* [1992] 1 IR 1), legislation to outline how women could exercise that limited right was not introduced until 2013 (Protection of Life During Pregnancy Act 2013). In 2013 the focus was not on avoiding the risks of death, ill-health and abortion travel resulting from the 8<sup>th</sup> Amendment and made graphically clear the

case of *A, B & C v Ireland* ([2010] ECHR 2032) and Savita Halappanavar's death (Health Service Executive, 2013), but on complying minimally with the international legal obligation to ensure that the constitutional right to access abortion where life was at risk could be exercised with some element of certainty. Indeed, in its press statement on the European Court of Human Rights' decision in *A, B and C* the Government's first observation was that the judgment "confirms that Article 40.3.3 of the Constitution is in conformity with the European Convention on Human Rights" (Department of the Taoiseach, 2010). Of course, this was true; the Court did find that Article 40.3.3 did not *per se* violate the Convention, but this was hardly an endorsement of Irish law. Rather it was a statement that the availability of abortion is a matter for national governments to determine through domestic law, disappointing as that was from a human rights law perspective (de Londras, 2019). Even in the 2013 Act the focus was very clearly on preventing abortion where possible: multiple doctors had to certify risk to life, and even more when someone was at risk of suicide (Murray, 2016); abortion remained criminalised including for women in respect of their own pregnancies; and in the end fewer than 30 women ever accessed abortion care per year under this law. During its operation, thousands continued to travel and thousands more self-managed abortion through the use of pills (Sheldon, 2018).

This short account illustrates that, in the moments under the 8th when circumstances forced politicians to attend to abortion, Irish legislators tended to frame abortion conservatively so as to 'troubleshoot' the particular issue that had compelled them to engage without addressing the deeper questions of control, self-actualisation, and agency that abortion restrictions present (Hursthouse, 1987; Greasley, 2017). This engagement with abortion law reform was, quite simply, never about women and girls. Where it happened, abortion law reform was never about making women's reproductive lives better or more liveable. It was never about loosening "the noose of the Eighth Amendment around the republic's womb" (O'Toole, 2018). It was never about recognising women's agency or the unbearability of the burdens of the 8<sup>th</sup> Amendment. Rather, it was always about maintaining the myth (Smyth, 2016) of an abortion-free Ireland and about punishing—through stigma, exile, constitutional invisibilisation (Krajewska and Cahill-O'Callaghan, 2019), and criminalisation—women who dared to subvert this "resolutely foetocentric" narrative (Enright, 2019; 58).

### **Framing 'Repeal'**

Although a 'standard' institutional narrative may seem to suggest that repeal of the 8<sup>th</sup> Amendment followed a linear, politician-driven progression from the 2016 General Election, to the Citizens' Assembly, the Joint Oireachtas Committee on the 8<sup>th</sup> Amendment and, ultimately, the referendum on 25 May 2018 (Enright, 2019), the reality is that Repeal was a

decades-long, intergenerational, feminist activist movement that forced the state to act and which, from the moment they began to engage with it, the institutions of the state and political elite attempted to discipline (de Londras, 2018b). Much has already been written about the pragmatic but problematic ways in which the official civil society campaign, Together for Yes, framed its campaign for a yes vote (Burns, 2018; Enright, 2018a; Fletcher, 2018; Duffy, 2019), and I will not repeat that here. Instead, I want to focus more on formal political framing and, in particular, on how key government actors framed the question.

With the exception of independent minister Katherine Zappone TD (Zappone, 2017a; Zappone, 2017b) and Minister Regina Doherty in her television debate appearances at the very end of the referendum campaign,<sup>3</sup> I can find no record of a government minister delivering a speech or publishing an opinion editorial during the referendum that framed the question of repeal as being fundamentally about reproductive justice, or articulated the argument that the ethical status of a pregnant person and a foetus was such that they ought not to be equated under the law. Instead, for most government ministers who engaged with the campaign, repeal seemed to be about the dangers of unregulated abortion pills, the suffering endured in cases of fatal foetal anomaly, the burdens on medical practitioners of being unable to provide what they considered to be appropriate medical care, and the particular burdens of the 8<sup>th</sup> on very young people and survivors of rape (Harris, 2018; Madigan 2018; Coveney 2018).<sup>4</sup> Of course reference was occasionally made to the fact that life is complicated and that when people have to make serious and difficult decisions about whether to continue a pregnancy they should not face exile from their country to give effect to these decisions. But even when such a claim was made, the underpinning to the request for a ‘yes’ vote in the referendum was an appeal to empathy and compassion. It was rarely if ever framed as necessary to assert and vindicate pregnant persons’ rights; rights to privacy, rights to bodily integrity, rights to choose. Rather, in the main, the formal political frame within which government ministers engaged in the referendum debate was primarily one in which abortion was exceptional, difficult, and, unless regulated and controlled by the state through law, potentially dangerous (see further Calkin 2020). All of this meant that, even during the referendum to repeal the 8<sup>th</sup>, at the highest political levels the discourse of abortion law reform failed, in the main, to frame repeal as a matter of freedom, agency or rights.

This is in sharp contrast to the extent to which the rights of the foetus featured in the discourse, whether this was in terms of assessing whether ‘simple’ repeal would leave

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<sup>3</sup> TV3 debate, 22 May 2018; RTÉ The Week in Politics, 20 May 2018.

<sup>4</sup> See esp. the speech of Minister Simon Harris at the Second Stage of the debate of the 36<sup>th</sup> Amendment to the Constitution Bill 2018, 9 March 2018, Dáil Éireann.

residual foetal rights in the Constitution (de Londras 2016)—a matter resolved by a Supreme Court decision during the referendum that the foetus enjoyed only a constitutional right to life under Article 40.3.3 (*M & Ors v Minister for Justice* ([2018] IESC 14)—or in respect of addressing persistent anti-choice campaign claims that repeal would leave the foetus extremely vulnerable, with fewer rights than a bird’s egg (e.g. McCárthaigh 2018, reporting the comments of Bishop John Buckley) and vulnerable to the vagaries of politics. This persistent foetocentricism was perhaps to be expected; repeal *was* about removing constitutional rights from the foetus and reversing (doctrinally at least) the position under the 8<sup>th</sup> where the foetus had the status of constitutional rights-bearer. However, on a doctrinal legal basis, repeal was not only about ‘taking something away’ from the foetus. By removing the text of the 8<sup>th</sup> Amendment repeal would delete from the Constitution the language that compelling restriction of women’s rights during pregnancy, thus returning exercisable and enforceable constitutional rights to pregnant people (de Londras and Enright, 2018). This was, however, largely ignored.<sup>5</sup>

Added to (or perhaps partially conditioning) this persistent foetocentricism were the political conditions and context in which the referendum was proposed and pursued. The government proposing the referendum was a minority government, dependent on a confidence and supply agreement with a notoriously conservative opposition party, Fianna Fáil. The senior partner in government, Fine Gael, is also reasonably socially conservative, although less so traditionally than Fianna Fáil (e.g. Galligan and Knight, 2011). At the time of the referendum to repeal the 8<sup>th</sup>, both parties and the Cabinet still included some important socially conservative actors, including the Tánaiste Simon Coveney. For such politicians, a referendum represented not only a political risk but also a personal ethical challenge (Coveney, 2018). Proposed reforms were made incrementally made more and more conservative as they moved from demands on the streets, to compromises in the Cabinet room. The Citizens’ Assembly’s recommendation that abortion be available on socio-economic grounds (Citizens’ Assembly, 2017), for example, was not agreed by the Joint Oireachtas Committee (Joint Oireachtas Committee on the 8<sup>th</sup> Amendment, 2017) despite the attempts of some members (especially Senator Lynn Ruane) to secure such a recommendation, and by the time the Cabinet-approved proposals emerged in March 2018 the proposed change had narrowed even further (de Londras, 2018b) and ‘unsafe’ and

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<sup>5</sup> Although c.f. the questions of Senator Lynn Ruane seeking to confirm that this would be the effect of repeal during the hearings of the Joint Oireachtas Committee on the 8<sup>th</sup> Amendment to the Constitution: “The eighth amendment, particularly the X case, has prevented the courts from considering all of the pregnant woman's rights in abortion cases. Is it fair to say that if the eighth amendment is removed those rights are reinvigorated and cannot be suspended?” (Joint Oireachtas Committee on the 8<sup>th</sup> Amendment to the Constitution, 27 September 2017).



unregulated abortion pills had taken centre stage as a risk to which the 8<sup>th</sup> Amendment exposed pregnant women (Calkin, 2020).

Seemingly largely to satisfy Coveney's anxieties (Coveney 2018), the Cabinet decision to propose abortion 'on request' up to 12 weeks in the event of repeal was subject to agreement on 'clinical protocols' including a three-day mandatory waiting period (Doyle and Murray, 2018; Coveney, 2018), which in turn was reflected in the 'General Scheme' of the law the government would propose following repeal which was published in March 2018 (Department of Health, 2018). This conservatism and caution could be discerned even in the language used during the official announcement of the referendum by the Taoiseach (Varadkar), the Minister for Health (Harris), and Zappone (Minister for Children and Youth Affairs). At that late-night press conference following a long and specially-convened Cabinet meeting, on 29 January 2018, all three ministers used the phrase 'safe, legal and rare' abortion to describe what they hoped would follow repeal. The narrowing of the radical proposals from the Citizens' Assembly into a more limited language of change in the referendum announcement and ultimately a considerably more restrained proposed law in the General Scheme suggested that a political establishment that had been surprised by the liberalism of the Citizens' Assembly recommendations was struggling to negotiate its own conservatism and long-standing disengagement from abortion law reform. Framing abortion and the 8<sup>th</sup> Amendment as raising practical questions of safe medication, medical risk, medical practice and exclusion from the formal medical system of the state was a useful way of doing that, providing a 'middle ground' to which much of the establishment could subscribe (Calkin, 2020). The problem was never framed as being about reproductive justice; no wonder, then, that the 'solution' failed to deliver it.

That solution now comprises, primarily, the HRTPA 2018 and its associated guidance documents for medial practitioners (Institute of Obstetrics and Gynaecologists 2018; Institute of Obstetrics and Gynaecologists 2019). In important ways this new law is a remarkably different legal and regulatory framework to what preceded it. Abortion is safe, legal and free for most people who will need it and who can negotiate the legislation. The clinical guidance produced by the Institute of Obstetrics and Gynaecologists is striking for its insistence on listening to and respecting the needs and views of pregnant people, even beyond what the letter of law seems to demand (Ibid). There is no question that this new law is more than what many, if any, of us could have expected when the most recent intensive period of pro-choice activism began in 2012. Although the new law is immeasurably better than the Protection of Life During Pregnancy Act 2013 and does important things (like decriminalising abortion for pregnant people and allow for private medical abortion including in women's homes), it is deeply flawed. These flaws emerge, not

least, from the mis-framing of repeal; from the failure to centre rights and decisional security for women and pregnant people during the referendum, and from continuing to treat abortion law reform as an exercise in troubleshooting rather than as part of the slow but vital process of righting a century-long system of structural harm imposed by the Irish state on the bodies of women and girls.

Notwithstanding the enormous majority in favour of repeal and the possibilities for political imagination and for precisely this kind of reckoning with injustice through taking seriously the newly enlarged space for rights that repeal opened up, the Government and Opposition proceeded in a way that treated the General Scheme published in March 2018 as if it were effectively binding. Big questions of justice, rights, and the purpose of abortion law were not up for discussion; any attempt to raise them (including by anti-abortion members of the Oireachtas) was rejected as an attempt to ‘rerun the referendum’.<sup>6</sup> Not only were the General Scheme proposals a reflection of the political compromise within the Cabinet and the delicately balanced political landscape of the minority government, but they were also to be treated as a covenant between the government and reluctant ‘yes’ voters (Fletcher, 2018). They were not up for negotiation.

### **The Failure of Decisional Security following Repeal**

Core to making a meaningful change to the regulation of abortion in Ireland is an acknowledgement of the impact of repeal on pregnant people’s rights and a dispositional shift towards abortion law to see it as something that *gives effect to women’s rights* rather than restricting agency in order to protect foetal life. The 8<sup>th</sup> Amendment severely curtailed pregnant people’s constitutional rights. It meant that from the moment of conception, a pregnant person’s rights to, for example, bodily integrity, privacy, information and freedom from inhuman and degrading treatment could not be exercised in a way that would violate the foetus’ constitutional right to life (de Londras, 2016; de Londras and Enright, 2018). Indeed, the only constitutional right a woman had in pregnancy that was strong enough to ‘defeat’ the foetal right to life was her own right to life, understood here in bare terms as a right not to die in pregnancy (Fletcher, 2017). On a textual and doctrinal (legal) level it thus seems quite uncontroversial to suggest that removal of the foetal right to life had implications for the scope, scale and exerciseability of pregnant people’s other constitutional

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<sup>6</sup> See, for example, the remarks of Ruth Coppinger at report and second stage (Dail Debates, 29 November 2018, 5 December 2018), Catherine Murphy at report stage (Dail Debates, 4 December 2018), Clare Daly at report stage (4 December 2018), Thomas Byrne at report stage (Dail Debates, 29 November 2018), Minister Simon Harris at committee and second stage (Dail Debates, 7 November 2018, 4 October 2018), Billy Kelleher at second stage (Dail Debates, 4 October 2018), and Lisa Chambers at second stage (Dail Debates, 17 October 2018).

rights newly enlivened by the lifting on the bounds placed upon them by the 8<sup>th</sup> Amendment (de Londras and Enright, 2018; Chapter 2).

Thus, from a legal perspective at least, the full, transformative potential of repeal lay not only in releasing the Oireachtas from the constitutional prohibition on legislating for abortion, but also in releasing pregnant people from these limitations on their constitutional rights. In order fully to operationalize this transformational potential, engagement with what the Constitution might now *demand* of the state to fulfil, protect and vindicate women's constitutional rights was required. This is not to suggest that the possession of legal rights constitutes freedom; of course, it does not (e.g. Brown, 2000; Kapur, 2018). Legal rights and the forms of liberal and constrained argumentation they 'force' justice claims into can be deeply restrictive and exclusionary. However, holding constitutional rights empowers the rights-bearer in important ways, including by meaning that the government can be forced to listen and required, through litigation if necessary, to act to fulfil those rights (Minow, 1990). In other words, rights can enable women to "assert their needs in the language of the powerful" (Fileborn, 2010); they can help us to insist on recognition of women's humanity (MacKinnon, 2007).

However, the HRTPA 2018 was designed without effective engagement with the full range of the constitutional implications of repeal; the process of post-repeal law-making did not recognise women's newly liberated constitutional rights as being so "normatively and philosophically disruptive and disquieting" (Kapur, 2015; 268) as to alter the frame through which abortion law reform should take place. The Oireachtas and the Government continued, instead, to exceptionalise abortion and to fail properly to undertake their role in interpreting and giving meaning to the constitutional text through their engagement with the Constitution in developing legislation. This means that, while in principle pregnant people in Ireland now have a newly reinvigorated set of constitutional rights (albeit ones that are subject to proportionate limitation through law), the new law was introduced without any serious engagement with questions of constitutional adequacy understood from this perspective.

Even the Explanatory Memorandum to the Bill suggests that its purpose is not primarily to advance the rights of pregnant people; instead, it was introduced "to give effect to the decision of the people to permit the Oireachtas to make laws governing regulation of termination of pregnancy" (Explanatory Memorandum, p. 1). Understood in this way, repeal empowered the Oireachtas, not women. Thus, while we know on a doctrinal level that there are new dimensions to women's constitutional rights in pregnancy and that in at least some cases those rights will demand that abortion be lawfully available to women (de Londras and

Enright, 2018, chapter 2), we do not yet know the scale or substance of them; none of the key interpreters of the Constitution (executive, Oireachtas, and judiciary) has attempted to articulate them.

The failure to engage seriously with these questions of constitutional rights has produced a law that fails to deliver decisional security; a pregnant person simply does not know what she is *entitled* to. Does her right to bodily integrity mean that the prohibition of abortion where there is a risk of mere (rather than serious) injury to her health post-12 weeks (HRTPA 2018, s. 9) unconstitutionally violates her right to bodily integrity? Does the continued necessity of abortion travel where the foetus has been diagnosed with a severe illness, but not one that two doctors can certify will likely result in death before or within 28 days of birth (HRTPA 2018, s. 11), violate her right to be free from inhuman and degrading treatment? Without any sense of the *constitutional* reasoning underpinning the legislation we do not know the government's intuitions and judgements about this, or those of the Oireachtas for that matter. As a result it is almost impossible to say that pregnant people have the decisional *security* they need to insist upon their *rights* in situations of unwanted, unsustainable, or unbearable pregnancy.

That lack of decisional security is not academic or insignificant. As has been well documented elsewhere (Enright, 2019), the 2018 Act builds into its structure significant amounts of medical judgement about whether someone 'qualifies' for lawful abortion care or not. This is most evident in the provisions on legally permitted abortion post-12 weeks, but it is also present in the regulation of early abortion care, i.e. pre-12 weeks (HRTPA 2018, s. 12). For example, how certain must a practitioner be of the dating of the pregnancy before she can certify that it falls within the 12 week period, so that abortion is lawful? When can he or she insist that a woman have an ultrasound (with all the associated delay) before certifying gestation and, thus, initiating the three-day waiting period after which abortion is permitted? And if someone with no health complications misses the 12-week window because of delay in getting an ultrasound combined with the mandatory waiting period, have her constitutional rights been violated? In other words, and to borrow a phrase from the US Supreme Court, do the provisions of the law and its dependence on professional medical judgement for 'admission' to state-provided, lawful abortion care place 'undue burdens' on women's ability to exercise and enjoy their constitutional rights? (*Planned Parenthood v Casey* 505 U.S. 833 (1992)). Do a pregnant person's constitutional rights *ever* entitle her to access abortion, or is the provision of abortion a matter of benevolent political and legislative bestowal? If so, can it simply be removed by future legislative change?

The absence of security in respect of reproductive rights under the changed constitutional landscape places pregnant people in a space of interstitial legality (Krajewska and Cahill-O'Callaghan, 2019) in which they are visible to the law no longer as criminals, but also not as rights-bearers. Instead, pregnant women are, once more, the *subjects* of abortion law; they are not yet agents in the navigation, through the law, of their own reproductive lives. Rather than being recognised as bearers of reproductive freedom bolstered by rights, pregnant people's ability to *control* their reproduction is parcelled out by medical professionals, empowered by a sometimes-vague legislative framework that was designed to resolve practical problems of travel, drugs and illegality but not to recognise women as constitutional rights-bearers entitled to *demand* reproductive freedom from the state.

### **The Harms of Decisional Insecurity for Pregnant People in Ireland**

This lack of decisional security not only perpetuates legal disempowerment of pregnant people in the deeply patriarchal (Sally, 2018) and sometimes violent context of Irish medical and obstetric care (Enright, 2018b), but also frames a law through which significant harms are imposed on abortion-seeking people. These harms, which occur in the liminal space of pregnant people's interstitial legality, are both constitutional and dignitary. I understand constitutional harms as harms that tend to suggest women's constitutional rights are not such as to *entitle* one to access abortion, although the state may permit abortion access without being compelled constitutionally to do so or to do in a particular way or subject to an immovable set of enforceable, constitutional parameters. The concept of dignitary harm is drawn from Sanger (2009) and refers to the significant costs imposed on a person trying to access abortion including the humiliation, diminishment, invasive physical examinations, intimidation or effectively-enforced abortion travel that one may be required to endure in order to access lawful abortion provided by the state.

I have already argued that it is not clear that, post-repeal, the state considers pregnant women to have any constitutional entitlement to access abortion, or at least to do so beyond the extreme circumstances of risk to life (as was the case prior to repeal). However, even if the state *did* consider that pregnant people had such constitutional rights, I argue that the HRTPA 2018 imposes constitutional harms on them by failing to treat them *qua* constitutional rights bearers within the edifice of abortion law itself. This is particularly the case because the new law makes no provision for remedy where a person is denied abortion care, even though at the time of requesting it she may have been 'qualified' under the Act. If remedies are how we make rights *enforceable*, then the lack of remedy communicates either a lack of state openness to being compelled to provide abortion care, or a failure to see rights as implicated in abortion law, or both.

Where someone has either been refused a decision or been told that she does not meet the requirements for access to abortion under s.s. 9 or 11 (i.e. risk to life or health (HRTPA 2018, s. 9), or condition likely to cause death of the foetus (HRTPA 2018, s. 11)) then she must be informed, in writing, of her right to seek a review of that decision (HRTPA 2018, s. 14). A review panel is then to be formed within three days of receiving a request for review (HRTPA 2018, s. 15) and, within seven days of its constitution (HRTPA 2018, s.16), should provide the result of the review to the pregnant person. However, this review is not remedy-oriented. Instead, it involves a new assessment of whether *at the time the review committee examines the pregnant person* (HRTPA 2018, s. 16) she ‘qualifies’ for lawful abortion under the Act. It does not ask whether, at the time she was first assessed, she met the legal requirements for access to abortion. If, at the time examination by the review panel, she does qualify the pregnant person can be provided with lawful abortion, but nothing is said about what a woman is entitled to if she *no longer* qualifies for abortion care because by the time the review is completed (which could be as much as 10 days from the original assessment) the foetus is now viable, for example, so that abortion where there is a risk to the woman’s life is no longer permitted (HRTPA 2018, s. 16(2)(ii)). In such a scenario—which is hardly unimaginable—the pregnant woman is left in quite the same situation she was in under the 8<sup>th</sup> Amendment: she cannot elect to end her pregnancy through abortion in order to avert the risk to her health or life unless she engages in abortion travel. This example shows precisely how the internal logic of the new law fails to construct women as being entitled to access abortion in these cases in order to vindicate their constitutional rights. Here abortion is bestowed by the state, not demanded by respect for the rights of the pregnant woman, her agency, and her reproductive autonomy. The notion of pregnancy as an injury in itself (Bridges, 2013) remains, it seems, beyond the pale.

The situation is even more pronounced in respect of early pregnancy. The law allows for abortion without restriction as to reason up to 12 weeks of pregnancy, but accessing abortion care requires one first to receive a certificate of gestational age from a medical practitioner and to undertake a mandatory three-day waiting period (HRTPA 2018, s. 12). Depending on the circumstances a woman might need to be sent for an ultrasound in order for a doctor to be satisfied that the pregnancy is under 12 weeks, or to determine whether abortion care should be provided in a primary or hospital setting. Similarly, where a minor presents seeking abortion care a doctor may be concerned to try to involve parents or have a legal obligation to report suspected abuse to the police authorities (Children First Act 2015). A woman might find herself first approaching a medic with a conscientious objection who can refuse her care (HRTPA 2018, s. 23), or be far from a doctor in a rural area without a means of transport, or have to travel in-country to access care because there is no local

doctor or hospital who is providing abortion care under the new law. There are, in short, many reasons why the HRTPA 2018 might mean that someone who seeks abortion care within the first twelve weeks might not have been certified and completed her mandatory waiting period in time to access lawful abortion. Once the 12-week limit has been passed, however, the pregnant person cannot access lawful abortion in Ireland unless there is a risk to her life or of serious harm to her health, or a diagnosis of a fatal condition for the foetus. She also cannot seek a review or remedy within the Act; no such remedy or review is provided in respect of abortion decisions in early pregnancy. Indeed, as under the 8<sup>th</sup> Amendment, she must take matters into her own hands. As long as it is sufficiently early in pregnancy and she can access the medication, she can self administer abortion without attracting criminal liability (HRTPA 2018, s. 23), although anyone who assists her is committing an offence (*ibid*).

Of course, in those situations a pregnant person might go to Court and seek a remedy, likely seeking to have some of all of the HRTPA 2018 struck down as unconstitutional, or an order permitting or ordering the provision of abortion care to vindicate her constitutional rights. But repeal was supposed to put an end to this; to provide women with the decisional security they needed to know and access their entitlements without the need to subject themselves to the 'juridical gaze' (Ledwon, 1998). Clearly the internal logic of the Act is such that abortion within the first twelve weeks is not conceptualised as a rights-based entitlement; if it were, much more would be done to secure it, including the provision of review and remedy where someone is wrongly denied care through delay, obstruction, or obfuscation.

Quite apart from these constitutional harms, the new law sets the conditions for, and in some cases directly imposes, dignitary harms on abortion seeking pregnant people. These harms are significant; they amplify the implicit characterisation of pregnant abortion seekers as subjects rather than rights bearers, and in doing so diminish women as agents and authors of our own lives. The imposition of a mandatory waiting period of three days, for example, denigrates women and has no medical or clinical function (World Health Organisation, 2012). Furthermore, it almost certainly exacerbates the unequal distribution of reproductive freedom throughout the country because it requires at least two appointments with a doctor to access abortion care (the first to certify gestation, and the second to dispense the medication) so that young girls with limited resources, people without access to transport, people in abusive or controlling relationships, people in direct provision, people whose local doctors are not providing abortion care and others may be less able to access abortion, at least not without exposing themselves and their decisions to others from whom they may request assistance (Side, 2020). Women's ability to keep their

abortion private is thus clearly compromised; the criminalisation of assistance means that, when it does not comply with the expectations and requirements laid down in the law, abortion is once more forced out of the realm of privacy and into the zone of secrecy (Sanger, 2017). This is exacerbated by the failure of the Oireachtas to deal in the HRTPA 2018 with known threats to pregnant people's ability securely to access abortion care: exclusion zones were discussed and committed to but at the time of writing (June 2019) are not yet in place; targeted protest and intimidation is taking place at hospitals and GP surgeries around the country (Yeginsu, 2019); personal data about abortion seekers has been leaked from hospitals (O'Neill, 2019); rogue and deceptive information agencies and websites are in operation (Ring, 2019); and women are being routinely exposed to humiliation, breaches of privacy, intimidation and denigration when accessing abortion care (Abortion Rights Campaign, 2019). Of course, this is not unique to Ireland and is part of the guerrilla strategies of anti-abortion activists (McGuinness, 2015). However, knowing this—and having had the likelihood of such disruptive techniques brought to their attention (Fletcher et al, 2018; Enright et al, 2018)—one would expect any administration focused on *rights-based* abortion law reform to take steps to protect against such dignitary harms, rather than seeming to accept them as part and parcel of accessing abortion care. For trans and non-binary persons accessing abortion care the dignitary harm will extend to being mis-gendered as 'pregnant woman' as a result of the government's refusal to add 'pregnant person' to the statutory descriptor of those accessing care under the law (HRTPA 2018, s. 2).

This kind of situation—where women have to explain themselves and ask for help and appeal for legal authority to give effect to their decision no longer to be pregnant—is not a situation of decisional security, decisional dignity, and reproductive rights. It is, in truth, not that dissimilar for the person subjected to its sharp edges to what was borne under the 8<sup>th</sup>.

### **Conclusion: Negotiating Interstitial Legality, Reclaiming Reproductive Rights**

The fact that the HRTPA 2018 does not treat women and pregnant people as if we have rights that underpin, shape, and determine how abortion law should work does not, of course, mean that those rights do not exist. They almost certainly do. By removing the foetus from the category of constitutional personhood and restarting constitutional rights in pregnancy, repeal imposed such significant textual and structural change on the Constitution that it is almost unthinkable that there is not now a new constitutional tapestry on which to sew and stitch the rights of pregnant women (de Londras and Enright, 2018). What it does mean, however, is that once more it will be for women and for reproductive rights activists to do the labour of constitutional meaning-making; to expose



themselves to publicity, to the juridical gaze, to the burden of displacing the presumption of constitutionality, to the power of the medical establishment, and almost certainly to the continued abortion lawfare of Ireland's formidable anti-abortion establishment (de Londras and Enright, 2020). As Krajewska and Cahill-O'Callaghan have noted, human rights litigation is how legal subjects negotiate and emerge from this state of interstitiality (Krajewska and Cahill-O'Callaghan, 2019). It is unlikely to be any different for pregnant people in Ireland.

However, in the wake of 35 years of activism and a bruising (if in some ways replenishing (Fletcher, 2018)) constitutional referendum, women, girls and all who can become pregnant in Ireland might reasonably have expected that we had done our bit to make meaning and bring about constitutional change; that the state might have conceded to take seriously the claim for reproductive freedom underpinned by enforceable rights and not to have constructed again a terrain of law in which state failure to respect and support a decision not to remain pregnant was all but inevitable. Less than a month into the operation of the law we already knew that some hospitals were not providing abortion up to 12 weeks but only up to 11 (Coyne, 2019a); that women with serious but not-fatal-enough diagnoses for their foetuses were travelling to England for abortion care (Holland, 2019); that women whose details were leaked from hospitals were being harassed and deceived by rogue 'agencies' (Rahim 2019); and that anti-abortion activists were trying to instigate criminal investigations by claiming that 'illegal' abortions were taking place in hospitals (Coyne, 2019b).

In this interregnum between the 8<sup>th</sup> Amendment and post-repeal litigation, we have no judicial conceptualisation of abortion and the constitutional rights of pregnant people. In their passage of the HRTPA 2018 the Oireachtas failed to articulate a meaningful new vision of that constitutional terrain. Although the worst excesses of paternalistic and punitive abortion regulation proposed by anti-choice politicians during the passage of the Act were rejected (de Londras and Enright; 2019), what the Oireachtas endorsed was hardly a clean break from the pre-repeal landscape. The underlying messages of caution, criminalisation, fetocentricism, and the decisional insecurity of pregnant people remain inscribed on the bodies of pregnant people, traced there by the application of the hyper-medicalised terms and operation of the HRTPA 2018. Pregnant bodies in Ireland are not yet free from repronormativity; the law is not yet an assistant to reproductive freedom, but still the instrument of its limitation.

In the absence of any other willing constitutional author, pregnant women are thrust once more into the terrain of decisional insecurity and constitutional and dignitary harm, reliant

again on solidarity and meaning-making among activists, poised again for litigation that—just like under the 8<sup>th</sup>—will most likely involve those who cannot travel to access abortion but must instead battle for abortion rights in the courts at home; that, or remain pregnant when they do not want to be.

Writing in commemoration of the centenary of some Irish women receiving the right to vote, Eavan Boland remarked that:

“Freedom is not abstract, is not a concept,  
is not an ethic only nor a precept.  
It can also be a hope raised and then defeated  
Then renewed. It can be a voice braided  
Into the silences of other women  
Who came before” (Boland, 2018)

The promise of freedom that repeal represented has not yet been defeated, but neither has it been fulfilled. What seems sure, though, is that the women who demand it will no longer be silent; that they will insist on its renewal. This refusal to be silent, to be invisible, will no doubt be enacted on the streets and in the courts, and will remain essential if our pregnant bodies are ever fully to be liberated from, rather than constrained by, the laws of the Irish state.

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