



Abortion, the Irish Constitution, and constitutional change

Aborto, a Constituição irlandesa e mudança constitucional

DAVID KENNY^{1,*}

¹ Trinity College Dublin (Ireland)

david.kenny@tcd.ie

<http://orcid.org/0000-0003-3440-1470>

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Abstract

Abortion in Ireland is regulated by a constitutional provision that was inserted following a referendum in 1983. In May 2018, the Irish people, will voted to remove this provision from the Irish Constitution. In this paper, I examine the reasons for the insertion of the provision; the problems that emerged with it over time; the factors that motivated the campaign for change; and the gradual process of negotiating a proposed change within the political system. The paper concludes by drawing general lessons that might be derived about the about the costs and consequences of the Irish experience of making abortion into a matter of constitutional law and debating its removal. Though somewhat effective in blocking political opponents, constitutionalising abortion has had unexpected consequences: creating uncertainty; involving the judiciary in the regulation of abortion; and perhaps creating a tendency to elevate social and political issues to the constitutional level.

Keywords Abortion; constitutional right to life of the unborn; referendums; constitutional change; citizen-led constitutional change; judicial power.

Resumo

O aborto na Irlanda é regulado por uma disposição constitucional que foi inserida após um referendo em 1983. Em maio de 2018, o povo irlandês votará a remoção desta disposição da Constituição irlandesa. Neste artigo, examinam-se as razões da inserção da provisão; os problemas que surgiram com o tempo; os fatores que motivaram a campanha pela mudança; e o processo gradual de negociação de uma mudança proposta dentro do sistema político. O artigo conclui tirando lições gerais que podem ser derivadas sobre os custos e consequências da experiência irlandesa de fazer o aborto em uma questão de direito constitucional e debater sua remoção. Embora um pouco eficaz no bloqueio de opositores políticos, a constitucionalização do aborto teve consequências inesperadas: criando incerteza; envolvendo o judiciário na regulação do aborto; e talvez criando uma tendência para elevar questões sociais e políticas ao nível constitucional.

Palavras-chave: Aborto; direito constitucional à vida do nascituro; referendos; mudança constitucional; mudança constitucional liderada pelo cidadão; poder judicial.

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*Assistant Professor of Law at Trinity College Dublin (Dublin, Ireland). Ph.D. at Comparative Constitutional Law at Trinity College Dublin (Dublin, Ireland). LL.M. at Harvard Law School (Cambridge, United States of America). LL.B at Trinity College Dublin (Dublin, Ireland). BL at The Honorable Society of King's Inns (Dublin, Ireland). E-mail: david.kenny@tcd.ie.

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1. INTRODUCTION

Ireland, like Brazil, is a predominantly Catholic country and, like Brazil, has restrictive laws on abortion. Ireland, however, has been somewhat more pronounced on both fronts. Ireland's Catholic population constitutes 78% of its population as of 2016, as opposed to around 64% in Brazil, though both countries have seemingly shrinking populations of practicing Catholics. Whereas Brazilian law currently permits abortion in cases of threat to life and rape, in Ireland, abortion is permitted only in cases where the life of the mother is at risk. Both Ireland and Brazil have had high-profile and controversial cases about the restrictiveness of their regimes. In Ireland, for the last thirty years, this issue has been a matter of *constitutional* law and politics: this restrictive position is dictated by Ireland's constitutional provisions on abortion inserted in 1983: Article 40.3.3, or, as it has come to be known, "the Eighth Amendment".¹

However, political momentum on this question may be moving in somewhat opposite directions in each place. In response to a Supreme Court ruling suggesting decriminalisation of the law on constitutional grounds, a constitutional amendment to entrench even stricter abortion laws is being considered in Brazil, suggesting that, by judicial or legislative action, abortion in Brazil may become a domestic constitutional issue.² In Ireland, on the other hand, constitutional change has just been effected to remove the issue of abortion from the constitutional framework, and allow substantial liberalisation of the law. The Irish experiment of constitutionalising the issue has been the centre of public debate, as the Irish people return this question to the realm of ordinary politics, while Brazil may be beginning a new era of abortion as a domestic constitutional question. In this article, I offer an account of the Irish experience of constitutionalisation of abortion, and the debate that led to the recent change, to consider what broad lessons might be derived from the Irish experience about elevating this issue to a constitutional level.

¹ Irish people do not usually refer to constitutional amendments by their number in this way, but this moniker took hold in the public debate, even though it is not entirely accurate. What is called the Eighth Amendment is in fact text created by the Eighth, Thirteenth and Fourteenth Amendments.

² Of course, Brazil is a party to the American Convention on Human Rights or Pact of San José, Article 4 of which provides that life is protected "in general, from the moment of conception."

2. THE INSERTION OF ARTICLE 40.3.3

Why did opponents of abortion lobby so fiercely to introduce a constitutional amendment on abortion in the 1980s? In some ways, there was little need to do this. There was, at the time, no prospect of the law on abortion being altered. The prohibition that had prevailed since the passage of the Constitution remained in place, and there was no talk of legislative change.³ Constitutional change is “costly and time-consuming”⁴ and incurs a high “bargaining cost” that would make one slow to pursue such change.⁵ This is especially true in Ireland where every constitutional change – even minor ones – must be passed by both Houses of Parliament and be endorsed by a majority of voters in a referendum.⁶ Why incur these cost to copper fasten a status quo that was in no danger of alteration?

There are several possibilities.⁷ First, the proponents of this change may have considered that it was worthwhile, at a time when Irish society was strongly opposed to abortion, to constitutionally commit to this position in a way that would slow the pace of change and present obstacles for their opponents, should their strong position be eroded. Constitutional change is usually more durable than other political victories because of the significant hurdles one must overcome to undo it. Secondly, the change could have been symbolic, a statement of constitutional values and an assertion (or re-assertion) of constitutional identity.⁸ The 1960s and 70s in Ireland had seen a drift away from certain aspects of Catholic social morality, and the Constitution as interpreted by the courts had played some role in this.⁹ Asserting this core element of Catholic social teachings in the constitution might have been a way to reassert the power and significance of the religious side of secular-religious cleavage in Irish society.¹⁰

Finally, the Pro Life Amendment Campaign (PLAC) – the civil-society interest group that led the charge for the amendment – wished to forestall the possibility of

³ Abortion was made a crime pursuant to the Offences Against the Person Act 1861.

⁴ LANDES, William; POSNER, Richard. The Independent Judiciary in an Interest-Group Perspective. *Journal of Law and Economics*, vol. 18, n. 3, p. 875-901, Dec. 1975. p. 892.

⁵ DIXON, Rosalind. Constitutional Amendment Rules: A Comparative Perspective. In: GINSBURG, Tom; DIXON, Rosalind (eds.). *Comparative Constitutional Law*. Cheltenham: Edward Elgar, 2011. p. 96-111. p. 104.

⁶ See Article Article 46, Constitution of Ireland 1937.

⁷ See DOYLE, Oran; KENNY, David. Constitutional Change and Interest Group Politics. In: ALBERT, Richard; CON-TIADES, Xenophon; FOTIADOU, Alkmene (eds). *The Foundations and Traditions of Constitutional Amendment*. Oxford: Bloomsbury, 2017. p. 209-211.

⁸ See ALBERT, Richard. The Expressive Function of Constitutional Amendment Rules. *McGill Law Journal* vol. 59, n. 2, p. 225-281, 2013; DIXON, Rosalind. Amending Constituting Identity. *Cardozo Law Review*, New York, vol. 33, n. 5, p. 1847-1859, 2012.

⁹ See WHYTE, John Henry. *Church and State in Modern Ireland 1923-1979*. 2. ed. Dublin: Gill and MacMillan, 1980.

¹⁰ SINNOTT, Richard. Cleavages, parties, and referendums: Relationships between representatives and direct democracy in the Republic of Ireland. *European Journal of Political Research*, vol. 41, p. 811-826, 2002.

judicial intervention that would liberalise the law even in the teeth of political opposition.¹¹ The Supreme Court had, in the early 1970s, struck down as unconstitutional the legislative ban on contraception as being a violation of the right to marital privacy.¹² There was a belief on the part of the Catholic Church that contraception would encourage fornication and sex before marriage that would create a demand for abortion.¹³ Moreover, the United States Supreme Court, which the Irish Supreme Court had cited in the contraception case, had not long before delivered the judgment in *Roe v Wade*;¹⁴ the step from marital contraception to abortion had taken not even taken 10 years in US constitutional jurisprudence.

In fact, this was probably not a major risk. The Irish courts had taken pains in the contraception case to note that their judgment should not be taken to extend to abortion,¹⁵ and had also suggested on other occasions that the right to life of the unborn might be constitutionally protected.¹⁶ One judge had gone out of his way in a privacy case to clarify that nothing in his judgment should be read to say that the law prohibiting abortion was “in any way inconsistent with the Constitution.”¹⁷ Given this, and the general outlook of the Irish courts of the day, it is fair to say that the risk of a *Roe v Wade* style judgment from the Irish Supreme Court was, in the short-to-medium term at least, minimal or nugatory.

However, the Court’s assurances that the Constitution posed no threat to the abortion regime were insufficient, and suspicion that the courts might liberalise the law were a key factor in the setting up of PLAC and the willingness of political parties to cooperate with this agenda.¹⁸ The pro-life movement was bolstered by the political

¹¹ GIRVIN, Brian. *Social Change and Moral Politics: the Irish Constitutional Referendum 1983*. **Political Studies**, London, vol. 34, n. 1, p. 61-81, 1986.

¹² *McGee v Attorney General* [1974] IR 284.

¹³ WHYTE, John Henry. **Church and State in Modern Ireland 1923-1979**. 2. ed. Dublin: Gill and MacMillan, 1980. At 413, quoting a statement of Catholic hierarchy against contraception reform.

¹⁴ 410 U.S. 113 (1973).

¹⁵ “[T]he rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life.” *McGee v Attorney General* [1974] IR 284 at 312 per Walsh J. Two other justices, Henchy and Griffin JJ., also stated that any comments made about contraceptives did not apply to abortifacients, to which entirely different considerations might apply.

¹⁶ “[T]he child... has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth... The right to life necessarily implies the right to be born”. *G. v An Bord Uchtála* [1980] IR 32 at 69 per Walsh J.

¹⁷ *Norris v Attorney General* [1984] IR 36 at 102-103 per McCarthy J.

¹⁸ The comments of the Minister for Justice introducing the amendment bill provide evidence: “it has become apparent that judicial decisions can alter fundamentally what had been accepted to be the law even to the extent of introducing what is virtually a system of abortion on demand... In this context, it is only necessary to think of the U.S. Supreme Court decisions on marital privacy”. 339 Dáil Debates, col. 1354-56 (Feb. 9th, 1983). There was also – unfounded – fears that the relatively new and unknown forces of the European Court of Human Rights or the Court of Justice of the European Communities would intervene and force the liberalisation of abortion.

instability of the early 1980s, with both major political parties seeking the support of such organizations, and pledging to introduce an abortion amendment if elected.¹⁹

Eventually, the Fine Gael party, recently elected to government, agreed to hold the referendum. PLAC's preferred wording had been formulated by the main opposition party, Fianna Fáil. Advised by the Attorney General – the government's chief legal advisor – that this language was legally problematic,²⁰ the government proposed a simpler alternative formulation,²¹ but this was not acceptable to the pro-life groups, and parliament favoured the original proposal.

Most opponents of the amendment claimed not to be in favour of legalised abortion, but said that it should be *legislatively*, not *constitutionally*, prohibited. They also complained that the wording was overly vague and ambiguous, a concern borne out by a series of Supreme Court judgments and subsequent amendment proposals needed to clarify the unclear meaning of the inserted text. Despite the opposition, the amendment proposal received overwhelming popular support. Eighth Amendment of the Constitution Act 1983 was approved by referendum on 7th of September 1983 and signed into law on the 7th of October of the same year. It passed with over two thirds of the vote.²² It introduced a new clause, Article 40.3.3^o:

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

3. ARTICLE 40.3.3 IN PRACTICE

The affirmative protection of the right to life of the unborn – as opposed to a negative provision stopping judicial invalidation of an abortion, say – meant that there were some unanticipated consequences of this amendment. One such consequence was whether information about the availability of abortions in other countries could be lawfully distributed in Ireland. The Supreme Court held that the clause meant it could not.²³ Separately, in 1992, the Attorney General went to Court and obtained an injunction to stop a girl of 14, known to the courts as Ms. X, from travelling to the UK to procure an abortion. She had been the victim of rape and became pregnant, and was suicidal because of the pregnancy. She and her family travelled to England in order to procure

¹⁹ HOGAN, Gerard. Law and Religion: Church-State Relations in Ireland from Independence to the Present Day. *American Journal of Comparative Law*, vol. 35. n. 1, Jan. 1987. p. 87.

²⁰ Potentially problematic interpretations ranged from allowing abortions in many cases on the one hand, and demanding a much stricter abortion regime on the other. See 339 Dáil Debates col. 1357 (Feb. 9th, 1983).

²¹ The opposition proposal simply read “[N]othing in this Constitution shall be invoked to invalidate or deprive of force or effect a provision of law on the grounds that it prohibits abortion.”

²² The referendum was carried by 841,233 to 416,136. There was a 50.3% turnout.

²³ Attorney General (SPUC) v Open Door Counselling [1988] IR 593.

an abortion, but on hearing of the court case, returned to await the outcome of the court proceedings when the injunction was sought. A majority of the Supreme Court, however, discharged the injunction, holding that the constitutional right to travel could not be restricted because a person intended, while abroad, to procure an abortion that would be legal in the foreign jurisdiction.²⁴ Furthermore, it held that the Constitutional prohibition did not prevent abortion in the cases where the life of the mother was in danger, and this included danger of suicide. Otherwise there would be insufficient regard shown for the life of the mother. Abortion was not permissible, however, where only the health of the mother was in danger, as the right to life of the unborn was more important in the constitutional hierarchy of rights than the health of the mother.

The *X Case* was controversial. Pro-life advocates thought that Article 40.3.3° was not intended to include risk of suicide as a threat to the life of the mother, and advocated for another constitutional amendment to overturn it. The Twelfth Amendment to the Constitution Bill 1992 proposed that the abortion prohibition should apply even in cases where the risk to the life of the mother was from potential self-harm. This failed, with almost two thirds of voters voting against it. The Thirteenth and Fourteenth Amendment, which were voted on at the same time as the Twelfth, respectively affirmed that the right to life of the unborn should not inhibit the right of any citizen to travel²⁵ and provided that dissemination of information about abortion available abroad would not be inhibited, overturning the earlier Supreme Court judgment.²⁶ Both of these measures passed with about 60% of the vote, suggesting a limit to the public support for constitutional restriction on abortion. In spite of the failure of the Twelfth Amendment, successive governments failed to provide, in law, for the provision of abortion in the case of risk of life by reason of suicide. Indeed, there was no legislative regime specifying when doctors could terminate a pregnancy to protect the life of the mother, and in the absence of such laws, doctors felt somewhat inhibited in their actions.

In 2002, another referendum was held on the Twenty-fifth Amendment to the Constitution Bill. This sought, once again, to overrule the *X Case* and remove threat of suicide as a ground for abortion. This was rejected, but by a much narrower margin than the Twelfth Amendment Bill: 50.4% of voters voted against it. Even though voters had (marginally) opted to once again affirm the *X case*, it took another 11 years, and tragic circumstances, for the *X* ruling to be reflected in law.

²⁴ **Attorney General v X** [1992] 1 IR 1.

²⁵ The following was added to Article 40.3.3°: "This subsection shall not limit freedom to travel between the State and another state."

²⁶ The following was similarly added to the Article: "This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

4. EXPORTING THE PROBLEM AND THE SAVITA HALAPPANAVAR CASE

While problematic cases periodically arose before the Irish courts,²⁷ the effects of Ireland's abortion provisions were occluded by the fact that – particularly after the affirmation of the right to travel and distribute information – abortion was not banned so much as it was outsourced to Great Britain. The relatively low cost and ease of travel to Great Britain from Ireland, and the wide availability of abortion services there, meant that there was only modest barriers for those who wished to access these services. Between 1980 and 2016, almost 170,000 Irish women travelled to Great Britain to procure a termination.²⁸ In a sense, this provided a release valve; had these services not been available, it is possible that demand for liberalisation might have forced the issue to its crisis earlier.

Ultimately, the issue came to a head in 2013, following the death of a woman named Savita Halappanavar in a hospital in the west of Ireland in October 2012. She suffered from a septic miscarriage at 17 weeks' gestation. She had requested a termination when it had seemingly become apparent that miscarriage was inevitable, but since, at the time, she had not been diagnosed with sepsis, her physicians did not believe her life to be in danger, and refused the request. By the time sepsis was diagnosed, her life was deemed to be in danger, and a termination was attempted, it was too late; Savita Halappanavar died from cardiac arrest resulting from sepsis.

Various enquiries and investigations were launched into her death, and large protests were staged, demanding reform to the law to protect women in such situations. In part due to public pressure that resulted from this case, as well as an earlier adverse ruling from the European Court of Human Rights,²⁹ the Protection of Life During Pregnancy Act 2013 was ultimately enacted in July 2013, providing legal basis for terminations in line with the *X* case, including risk to life by reason of suicide. Though very limited, and only bringing the law into compliance with the binding judgment of the Supreme Court judgment in *X*, the Act was still controversial, and condemned by many pro-life commentators.³⁰

However, in hindsight, we can now see the pressure campaign that followed Savita Halappanavar's death to have been the start of a bigger movement. During the

²⁷ For example, *D v HSE* (unreported, High Court, McKechnie J., May 2007) where a girl in state care was prevented from travelling to procure an abortion; *PP v HSE* [2014] IEHC 622, where a woman was declared legally brain dead when pregnant, and the hospital, fearing the legal consequences of endangering the life of the unborn, intended to keep the woman on life support until the birth of the child; *Roche v Roche* [2009] IESC 82, [2010] 2 IR 321, where the Supreme Court considered if the protection for the unborn extended to human embryos.

²⁸ Irish Family Planning Association, <<https://www.ifpa.ie/Hot-Topics/Abortion/Statistics>>.

²⁹ *A, B & C v Ireland* [2010] ECHR 2032, (2011) 53 EHRR 13.

³⁰ See O'BRIEN, Breda. Fatally flawed legislation will not put abortion to bed. **The Irish Times**, 06 July 2013.

debate on the Protection of Life During Pregnancy Act, proposals were put forward to allow for abortion in certain other circumstances, such as “fatal foetal abnormalities” or “life-limiting conditions”, where the child had a condition that would result in a no life, or a very short life, after birth. However, the government said that it had been advised by the Attorney General that this would be unconstitutional by virtue of Article 40.3.3. It was also widely agreed that an exception for, say, rape, would be unconstitutional, as the life of the mother would not be in jeopardy. In this way, the debate on the Act illustrated the very tight strictures of the Constitution on the legislature’s ability to regulate termination of pregnancies.

By putting the issue to the fore of public debate, and prompting mobilisation of pro-choice groups, this created an organised and focussed campaign to lobby for the removal of the constitutional prohibition. Some of this was motivated by those who wished for broad liberalisation, but it also included those who favoured more limited liberalisation that was still not possible as a result of the constitutional strictures. Various groups pressed to keep the matter on the public agenda through 2013-2015, highlighting the number of women that travelled abroad to procure terminations and the lack of decision-making power Irish women had in respect of pregnancies. Bills were put forward in parliament to liberalise the law, but were resisted by the government as unconstitutional.³¹ However, the campaigners to some degree opted to take a back seat to the campaign for constitutional change on same-sex marriage, which had been long sought, presumably fearing that distraction from this issue with an abortion amendment campaign might hurt either or both causes. When the same-sex marriage amendment was passed in 2015, a campaign began in earnest to, as the slogan went, “Repeal the Eighth” as the next social change that an increasingly less Catholic Ireland should undertake. The perception was also that since the Irish people had been willing to cut against the Catholic position on same-sex marriage, they might also be willing to do this in respect of abortion.

This became a major issue in the 2016 general election, with pressure put on all parties to propose some strategy or plan for reconsideration of the issue. The Fine Gael party was returned to government with a minority arrangement, and adopted an approach to this issue that had produced good results previously.

5. THE CITIZEN’S ASSEMBLY AND THE EIGHTH AMENDMENT COMMITTEE

In the run up to the 2011 general election, the Labour Party – which would become the minor coalition partner in the next government – committed to legalising

³¹ O’REGAN, Michael. Government defeats Daly’s abortion Bill with big majority. *The Irish Times*, 10 Feb. 2015.

same-sex marriage. Fine Gael, their majority coalition partner, was a more centre-right party that has historically been more socially conservative. In the programme for government, a compromise was reached: the question of same-sex marriage was referred to a Constitutional Convention, composed of randomly selected citizens and sitting politicians. The Convention considered a grab bag of other issues, such as the Constitution's blasphemy prohibition and political reform. In many respects, the constitutional mechanics of this constitutional change were simple, and the need for the Convention to investigate this topic was questionable. Indeed, the Convention – the result of which would not be binding – was seen by some as a way for Fine Gael to get political cover on the issue of same-sex marriage in the event that their supporters opposed the change, and to buy time to let public opinion shift in favour of the issue.³² The Convention strongly favoured reform in 2013, and a referendum was eventually held, after further delays, in 2015. By this time, there was strong public support for same-sex marriage, and Fine Gael gave full-throated support to the proposal, which passed comfortably.³³

Perhaps because of the success of this tactic, the same strategy was adopted by the Fine Gael minority government in respect of abortion after the 2016 election. It was decided that the question of changing or removing Article 40.3.3 would be put to a Citizen's Assembly composed of 100 randomly-selected citizens, who would hear from experts and consider the question. The Citizens were, like the Constitutional Convention, given a handful of other issues to address as well – such as the environment, referendums, and fix-term parliaments – but abortion was clearly its *raison d'être*.

This was, again, criticised as a stalling tactic and move for political cover, but the Assembly proved to be influential in the process of reform.³⁴ Having only six months to discuss the issue, and with the citizens having no necessary background in the legal or medical issues, the chair – a retired Supreme Court judge – and expert advisory group assembled legal, medical, and policy experts that had not taken public positions on the question of abortion to testify to the Assembly. They also invited submissions from the public, set aside time for lobby groups to present cases on each side, and heard personal stories of those affected by Ireland's abortion regime. The citizens had a role in shaping the agenda of the Assembly and were allowed to ask questions of those presenting, as well as having time to deliberate at length amongst themselves.

In April of 2017, the Assembly took a final ballot on how to address the question of abortion, both on the constitutional and legislative levels. It proposed – in a move that surprised many – the removal of the constitutional bar, replaced only with

³² O'TOOLE, Fintan. Not doing anything about abortion. **The Irish Times**, 31 May 1997.

³³ 62% of voters voted in favour of the change, with a turnout of a little more than 60%.

³⁴ In the interests of full disclosure, I presented to the Citizen's Assembly in January of 2017 on the topic of the legislative process for passing laws that would govern the area in the event of removal of the constitutional ban.

an empowering provision giving the Oireachtas (parliament) the power to regulate the question of abortion. In respect of their preferred legislative choice, the Assembly recommended abortion for any reason up to 12 weeks, with termination beyond that available on certain listed grounds, such as fatal foetal abnormality.³⁵

This was probably a more extensive liberalisation than many had expected. It was expected that the Assembly would favour a more limited solution, such as abortion on specific listed grounds put into the Constitution or into law. However, perhaps as a result of expert evidence suggesting that these solutions could be difficult, or because members were otherwise persuaded of the wisdom of a broader liberalisation, the Assembly favoured greater change. This surprise was welcomed by supporters of repealing the constitutional ban, but the process was strongly condemned by prominent opponents of abortion, who criticised the whole process, and alleged – with seemingly little basis – bias in selection of citizens and in the presentation of issues.³⁶

The recommendations of the Assembly were not, however, binding, and did not commit the government or parliament to any particular proposal for change, or indeed, any change at all. The government responded to the Assembly's report by setting up another body – the Joint Oireachtas Committee on the Eighth Amendment – to examine the Assembly's recommendations.³⁷ Composed of parliamentarians from various political parties, from both houses of parliament, and from all parts of the spectrum on the abortion issue, this body was given three months to consider the Assembly's report, hear from witnesses, and make recommendations.

The Committee might have been seen as yet another exercise in political cover for the government. The Assembly had reported, and the government and parliament needed to decide what to do. How could a parliamentary committee aid this, and how would it not duplicate the work of the Assembly? It was, in some senses, duplicative in terms of the topics of hearings and the evidence heard. However, it was high profile, receiving far more media and public attention than any usual parliamentary committee. Several committee members changed their minds publicly to favour access to abortion for any reason in the first 12 weeks.³⁸ It also spelt the end of the possibility of libera-

³⁵ Detailed proposals included no time limit for risk to life (including by suicide), risk to health and fatal foetal abnormality; a 22 week time limit for other serious conditions; and ancillary recommendations about the related issues of healthcare, education etc. See First Report and Recommendations of the Citizens' Assembly, June 29th, 2017, available at <<https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/Final-Report-incl-Appendix-A-D.pdf>>.

³⁶ CARSWELL, Simon. Citizens' Assembly: reaction from both sides of abortion debate. **The Irish Times**, 23 Apr. 2017.

³⁷ Again, in the interests of full disclosure, I testified before this committee in September 2017 on constitutional law questions surrounding the question of repealing or replacing the constitutional bar and judicial intervention.

³⁸ KELLEHER, Billy. Why I was persuaded abortion up to 12 weeks should be allowed. **The Irish Times**, 21 Mar. 2018.

lisation by means of specific, listed grounds in the Constitution, which at one point might have been thought the most likely option for reasons of political palatability. These were widely agreed to be unworkable by witnesses before the Committee, and dropped out of the debate.

In its report in December 2017, the Committee recommended the repeal of Article 40.3.3 *without any replacement*, and access to abortion for any reason up to 12 weeks, with access for stated reasons after that.³⁹ These were similar, though not identical to the Citizen's Assembly proposal.

6. THE GOVERNMENT'S PROPOSAL AND THE JUDICIAL REVIEW QUESTION

In January of 2018, the government's proposal for a referendum bill was revealed. The government broadly accepted the proposals of the Assembly and Committee. The government proposed the repeal of the provision and the replacement with a narrow enabling clause: "Provision may be made by law for regulation of termination of a pregnancy."⁴⁰ The government also supported the Assembly and Committee proposal to legislate liberalising abortion up to 12 weeks should the referendum pass, though there was dissent on the issue from some government ministers, and a free vote was promised so that parliamentarians could vote according to their conscience, leaving some doubt as to what legislation might follow the passage of the referendum.

This constitutional proposal hedged between the Assembly and Committee, which had disagreed on a major constitutional point: the question of simple repeal or limited replacement of Article 40.3.3. This touches upon a major point of contention between those who desired reform: whether to guard against the possibility of judicial intervention. The focus of the campaign had been removal of the clause in the constitutional text, or "repeal" as it had some to be known. But questions were raised by an eminent lawyer presenting to the Citizen's Assembly about the uncertainty attendant with this. He suggested that if the clause were removed and nothing were inserted in its place, then there was a small but real risk that the courts might subsequently intervene to invalidate legislation passed by parliament. This could be either on the pro-choice side – using the autonomy and bodily integrity rights of pregnant persons to invalidate a restrictive law – or on the pro-life side – using some unenumerated rights

³⁹ See Report of the Joint Committee on the Eighth Amendment to the Constitution, December 2017, available at <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_eighth_amendment_of_the_constitution/reports/2017/2017-12-20_report-of-the-joint-committee-on-the-eighth-amendment-of-the-constitution_en.pdf>. As well as differing on the constitutional point discussed below, the Committee did not recommend allowing termination beyond 12 weeks for non-fatal abnormalities, which the Assembly had recommended.

⁴⁰ Thirty-sixth Amendment to the Constitution Bill 2018.

of unborn children, which may have been recognised by the courts before the insertion of Article 40.3.3, to invalidate a permissive regime. He suggested repeal without more created some significant uncertainty in this regard.⁴¹ This might be offset by inserting some new clause clarifying that the power to regulate abortion was exclusively for the Oireachtas (parliament), or by excluding the power of judicial review in respect of such legislation. Ultimately, the Assembly, concerned about this risk, proposed the former solution.

Somewhat surprisingly, this was met with anger from many of those in favour of removal, who insisted that the clause should be repealed and nothing inserted in its place. This was surprising because the Assembly's proposal was repeal in all but name; the new clause would not act as any kind of restriction on abortion, as other forms of "replacement" might have.

The Eighth Amendment Committee heard evidence from lawyers and academics that broadly supported the testimony given to the Assembly in this respect, though stressed that complete certainty was never achievable, and it was a political choice as to whether replacement was necessary or appropriate to offset uncertainty. Taking its own legal advice, the Committee went further, deciding that replacement was unnecessary, and recommended repeal without more as the most certain option. However, the Attorney General advised the government that for reasons of certainty, a replacement clause should be inserted. The government, perhaps afraid of being seen to challenge the separation of powers in excluding the judicial branch, opted for a relatively loose empowering clause, which does not formally exclude judicial consideration of abortion legislation, but rather suggests to the courts that they should leave these matters to parliament. Repeal advocates acquiesced in this solution, even if they might have preferred simple repeal.

This was a curious dispute in some ways. Why would advocates of repeal be so unhappy with this minimal replacement? There are several possibilities. One is that they thought exclusion of judicial oversight would be unpopular and make the referendum harder to win. However, there is an equally plausible argument on the other side: that had judicial intervention not been hedged against, the risk of judicial liberalisation could have been a major issue in the campaign, as it had been in 1983. Another is that it was a rhetorical or totemic position: the campaign had articulated forcefully its desire for repeal, and built its campaign around the term, such that anything else – even something functionally equivalent – might seem to be a loss or compromise.⁴² A third is that they may

⁴¹ MURRAY, Brian. Legal consequences of retention, repeal, or amendment of Article 40.3.3 of the Constitution. *The Citizen's Assembly*, 04 Mar. 2017. Available at <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_eighth_amendment_of_the_constitution/reports/2017/2017-12-20_report-of-the-joint-committee-on-the-eighth-amendment-of-the-constitution_en.pdf>.

⁴² See, on the possibility that this was part of another campaign for constitutional change in Ireland, DOYLE, Oran; KENNY, David. Constitutional Change and Interest Group Politics. In: ALBERT, Richard; CONTIADES,

have wished to keep open the option of judicial intervention on their side in the event the legislature proved unwilling to legislate post repeal. This would have meant running the risk of judicial intervention *against* them, but this may have been deemed an acceptable risk. The truth of this matter is difficult or impossible to know.

Interestingly, shortly after the decision on the question was made, the Supreme Court issued a judgment that offered some clarity on the uncertainty in respect of court intervention on the pro-life side. In *IRM v Minister for Justice*,⁴³ a High Court judge had, in the context of an immigration case, unexpectedly held that Article 40.3.3 was not an exhaustive statement of the rights of the unborn in the constitution: there were rights of the unborn in other parts of the Constitution, such as in the Children's Rights provisions of Article 42A. The Supreme Court rejected this, stating that the rights of the unborn were limited to the rights contained in Article 40.3.3, and that it was never clear that, before Article 40.3.3 had been inserted in 1983, the unborn had any constitutional rights. The case was closely watched, because if the Supreme Court had agreed with the High Court judge, it would have been questionable if the plan of removing Article 40.3.3 would have been sufficient to achieve the desired result of removing the constitutional bar to liberalisation. This might have necessitated going back to the drawing board to write a new proposal.

The outcome of this case also means that the prospect of a judicial decision invalidating a liberalised regime would have been very slight in the event of a simple repeal, with or without an enabling clause. This does not mean that the enabling clause is without effect, however; judicial invalidation of a restrictive regime would still be possible on the grounds of the autonomy or privacy rights of pregnant persons, and is made less likely by the enabling clause.⁴⁴ Even for those who favour removal of the provision, the enabling clause might serve a use in the referendum campaign: it might persuade those who would fear judicial liberalisation that the legislature, not the judiciary, will get to decide the issue.

With this Supreme Court judgment, the government was happy to move the proposal forward in parliament, and it passed comfortably. The Irish people voted on the government's proposal in a referendum in late May. By an emphatic margin — 66% to 34% — the people approved the referendum.⁴⁵ Following delays caused by unsuc-

Xenophon; FOTIADOU, Alkmené (eds) **The Foundations and Traditions of Constitutional Amendment**. Oxford: Bloomsbury, 2017. p. 210-211.

⁴³ *IRM v Minister for Justice* [2018] IESC 14.

⁴⁴ The Court did suggest that the legislature would have an entitlement to legislate to protect unborn life as an aspect of the common good even aside of any specific rights of the unborn, which appears to be an indication that the legislature may still limit access to abortion even without Article 40.3.3 or specific constitutional rights of the unborn. *IRM v Minister for Justice* [2018] IESC 14 at [6.3].

⁴⁵ More precisely, 66.4 per cent voted in favour, and 33.6 per cent, with 1,429,981 votes in favour and 723,632 against. Turnout was 64.13 per cent.

cessful legal challenges to the referendum, the result amendment came into force on September 18th, 2018.

7. CONSTITUTIONAL CHANGE AND ABORTION: LESSONS FROM THE IRISH EXPERIENCE

Abortion is a question of acute and perhaps intractable moral conflict, a “clash of absolutes”⁴⁶ between two sides that may not yield readily, or at all, to compromise. The experience of each country in respect of abortion will thus be in many ways idiosyncratic and unique, and the experience of one place may not have ready transferability to another. At the same time, it is instructive to look at countries which have had unusual or distinctive experiences of constitutional change that may provide rules of thumb – heuristics that can inform our suppositions and assumptions more effectively than the pure speculation and conjecture which might otherwise be our guide. With this qualification, there are several general lessons that might tentatively be drawn from the Irish experience of negotiating the difficulties with abortion and constitutional change.

The first is that constitutional entrenchment of the abortion question was, to some significant degree, effective as a means of blocking political opposition. The pro-life campaign failed to win subsequent victories – such as the abortion information referendum or any of the three referendums related to the *X* case – and its success is also qualified by the reality of abortion being exported to the UK, which the movement failed not prevent. But the insertion of the constitutional provision restrained change in the law even after it was apparent that there was popular and political support for certain changes. It took 35 years from the insertion of the Amendment for the removal of Article 40.3.3 to be put to the people. On the other hand, the success this strategy enjoyed might be, in part, a feature of Ireland’s moderately onerous amendment process.⁴⁷ Securing a referendum requires substantial political capital, and having had such capital in the 1980s, the pro-life campaign forced their opponents to do substantial political work to even have such changes put to a vote, let alone ratified by the people. Constitutional entrenchment may be less effective at stymying opponents where change is easier, but it would also be easier and less costly to effect such a strategy in

⁴⁶ See TRIBE, Laurence. **Abortion: The Clash of Absolutes**. New York: Norton, 1990.

⁴⁷ Of course, culture has to be accounted for alongside the formal obstacles in assessing the reality of how difficult an amendment process is. See generally GINSBURG, Tom; MELTON, James. Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty. **International Journal of Constitutional Law**, Oxford, vol. 13, n. 3, p. 686–713, 2015. Ireland’s relatively frequent amendments – particularly in the last thirty years – may suggest is not quite as difficult as it might seem, though there is a reluctance to hold too many referendums, by virtue of their significant cost; public confusion about proposals if too many referendums are held at the same time; and a risk of referendum fatigue amongst voters if they are repeatedly asked to vote on constitutional questions.

the first place, so the cost and the reward might still be congruent. The legitimacy or appropriateness of this tactic is open to debate, but its efficacy, on this example, is clear.

Secondly, this success may have added to or created a trend, noted by several scholars, for Irish politics to be excessively constitutionalised.⁴⁸ There is often a sense in Irish politics that major political and social change should be done at a constitutional level in order to be effective. This is true even when there is little or no need to elevate the matter to a constitutional level, or when non-constitutional political action is more important.⁴⁹ This trend was not apparent before the insertion of Article 40.3.3. It seems that the success of this change led to almost any political campaign for social change being thought apt for elevation to a constitutional level. Not only is this potentially wasteful of political capital, it also serves to impoverish the non-constitutional political sphere by suggesting that major issues should transcend ordinary politics rather than seriously engage with it. This might, over time, erode trust in representative democracy and politicians.⁵⁰ We can say that such a lack of trust is on display in Ireland, although its causes are multifarious, and discerning the influence of any one factor would be impossible.

Thirdly, moving the complex question of abortion to the constitutional sphere – particularly in the form of an unborn right to life, as adopted in Ireland – created a great deal of difficulty and uncertainty. The precise meaning and effect of the amendment were not entirely clear: its effect on the distribution of abortion information may not have been foreseen by voters; the Attorney General believed – erroneously, it transpired – that the clause required the government to injunct citizens from leaving the State to procure abortions abroad. That the government refused to legislate in line with X left doctors deeply uncertain of the legality of potential treatments. Only with the 2013 legislation was any functional certainty obtained, thirty years after the insertion of the amendment. Even then, the government was highly restrained by the constitutional provisions when legislating, and there were doubts raised about the constitutionality of that very limited legislation. Moreover, cases continued to arise where medical professionals were unsure of the balance of constitutional rights and the correct legal position, and they were forced to apply to court to know if the course suggested by their medical judgment was constitutional as the law essentially said nothing, and the

⁴⁸ See generally DALY, Eoin. Reappraising judicial supremacy in the Irish constitutional tradition. In: HICKEY, Tom; CALLIHANE, Laura; GALLEN, James (eds.) **Judges, Politics and the Irish Constitution**. Manchester: Manchester University Press, 2017.

⁴⁹ Examples include campaigns to elevate the right to water and housing to a constitutional level. A less extreme version of this argument can be made against the Children's Rights Amendment proposed and passed in 2012. See DOYLE, Oran; KENNY, David. Constitutional Change and Interest Group Politics. In: ALBERT, Richard; CONTIADES, Xenophon; FOTIADOU, Alkmene (eds) **The Foundations and Traditions of Constitutional Amendment**. Oxford: Bloomsbury, 2017. p. 199-218.

⁵⁰ Tierney highlights this as a major potential risk of constitutional referendums. TIERNEY, Stephen. **Constitutional Referendums: the theory and practice of republican deliberation**. Oxford: OUP, 2012.

Constitution had regulative effect in the area.⁵¹ The Irish case illustrates the potential negative effects for legal certainty and regulatory flexibility of raising abortion to the constitutional level.

Fourthly, and relatedly, though the amendment was in large part motivated by fear of judicial intervention, raising the matter to the constitutional level ironically involved courts very substantially in this area. Obviously, courts were prevented from invalidating a prohibition on abortion – which they probably would not have done in any event – but as a consequence of the new constitutional provision, the courts became intimately involved with setting abortion policy, as every question around the limits of abortion became a matter not of policy or politics, but of constitutional interpretation. The appropriateness of having these matters judicially determined is open to question, and is curiously at odds with the distrust of the judiciary that motivated putting the matter on a constitutional footing in the first place.

Fifthly, the issue being regulated on the constitutional level, and overseen by the judiciary, created a passive attitude to the issue in the executive and legislative branches. On one level this is understandable, as the issue was largely removed from their bailiwick. However, even when a legislative measure was invited or required – after the *X* case, say – the political branches declined to act, preferring repeatedly to offer referendums and let the public decide rather than act on matters plainly within their competence.⁵² Removing this political issue from the ordinary contestation of politics allowed – and even encouraged – political abnegation of responsibility on any question related to it. When the time came to reconsider the question, the government placed two levels of intermediary – the Assembly and the Committee – between it and the making of the decision.

Sixthly, the Citizen's Assembly process of formulating constitutional change in Ireland – though thought by some to be cynical and a political ploy – was in fact seemingly influential in setting a baseline for the debate. The Assembly's findings primed subsequent debate in the Committee and probably in government, and the two core suggestions it made – to remove the clause from the Constitution and not replace it with any regulative provision, and to provide for abortion up to 12 weeks – were adopted by the Committee and the government. Neither of these two results seemed inevitable or even particularly *probable* before the Assembly met. Furthermore, it set the public debate on the constitutional position on abortion in motion, and did so in a carefully curated and controlled way, which may have helped to create a largely civil discourse following its conclusion. Finally, it may have changed people's minds: in the

⁵¹ See *PP v HSE* [2014] IEHC 622.

⁵² One leader even suggested legislating for the *X* case, but having his own party's senators vote against the measure, allowing for a never-used provision of the Constitution (Art 27) to be invoked to put the Bill to the people in a referendum. O'TOOLE, Fintan. Not doing anything about abortion. **The Irish Times**, 31 May 1997.

12 months of 2017, according to opinion polls, many people changed their minds on the abortion question.⁵³ It might have been the Assembly's recommendations – and/or the process of debate it spearheaded – that changed these minds. That a group of randomly chosen citizens, well informed by experts, reached the conclusion that this was the best path may have persuaded voters to reconsider their own views. The case for public participation in the formulation of change proposals is, on this example, strong.

Finally, having raised the issue to a constitutional level, it has been difficult to sever the constitutional question from the regulatory question in the public mind. The Assembly and the Committee dealt with the two issues separately – the removal of the issue from the Constitution and the legislation that might be introduced after the constitutional change might be made. Despite the fact that these are conceptually distinct questions – in principle, any regulatory regime could follow the constitutional change – they have been repeatedly elided in public debate, and opponents of the proposal painted a vote to change the Constitution as a vote for abortion up to 12 weeks,⁵⁴ even though the legislature could only decide what regime to introduce after a successful vote.⁵⁵ Once joined together, abortion and the constitutional order are, at the very least, difficult to disentangle. At the same time, exit polls suggest that the efforts to separate the issues in the minds of voters may have been effective: some voters did vote in favour of the referendum in spite of disagreeing the legislative regime that would likely follow a Yes vote.⁵⁶

Given the outcome of referendum, Ireland's experiment in the constitutionalisation of abortion is, barring an unlikely subsequent judicial intervention, at an end. Even for those ideologically opposed to abortion, it would be hard to call this experiment an unqualified success. It may have prevented the liberalisation of abortion for a time, but its costs – to legal certainty, to the capacity of, and trust in, the political system, to the many who travelled to obtain abortions – have been significant. Time will tell what the

⁵³ 19% of respondent to a January 2018 poll said they had become more open to wider availability in abortion in that period. LOSCHER, Damian. Abortion poll findings dramatic but attitude change has been gradual. **The Irish Times**, 26 Jan. 2018.

⁵⁴ See BINCHY, William. Supreme Court has given us a clear choice in abortion referendum. **The Irish Times**, 14 Mar. 2018.

⁵⁵ Moreover, the current government lacks a majority in the Dáil and is backed by a confidence and supply arrangement by independent parliamentarians and the largest opposition party. This introduces more uncertainty and unpredictability into the legislative process than would be usual. Ireland's Westminster system is executive dominated, and heavy use of the party whip to ensure members vote as instructed means that the government has *de facto* control of the legislative process most of the time. The process of legislating for abortion after a referendum could potentially produce unexpected outcomes.

⁵⁶ This suggested that though 69.4% of respondents in the exit poll voted Yes, only 52% agreed that abortion should be available on request up to 12 weeks, which was the proposal that was promised to follow from a Yes vote, suggested that this group had severed the constitutional question from the legislative one. RTÉ and Behaviour and Attitudes, 'Thirty-sixth Amendment to the Constitution Exit Poll' at 131, available at < <https://static.rasset.ie/documents/news/2018/05/rte-exit-poll-final-11pm.pdf> > .

return of this issue to ordinary politics in Ireland might bring. But the Irish experience offers some cautionary tales to those who would consider raising abortion – or other complex and contested social questions – to a constitutional level and regulating them with constitutional text.

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