

“Empty without and empty within”: the Unworkability of the Eighth Amendment after Savita Halappanavar and Miss Y¹

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Introduction

The cases of Savita Halappanavar and Miss Y have brought to public consciousness a new sense of the ways in which day-to-day interpretations of the test for constitutionally permissible abortion in *Attorney General v X*² can affect Irish obstetric practice.

Savita Halappanavar died in 2012 as her pregnancy miscarried in a Galway Hospital. Miss Y, a teenage asylum seeker, delivered a premature baby by Caesarean in very distressing circumstances in August 2014, having applied under s.9 of the Protection of Life During Pregnancy Act 2013 (PLDPA) to terminate the pregnancy. While it might be argued that developing new professional policies around maternity care will address the issues raised by these cases, we argue that the suffering of each woman was directly attributable to failings of the Irish law on abortion, including the Constitution as interpreted.

These cases are not exceptional outliers. Although a more liberal interpretation of the Constitutional text is possible,³ the current understandings of Art.40.3.3° are so deeply entrenched in political and constitutional consciousness as to make any such reinterpretation extremely unlikely. In these circumstances, and bearing in mind the hardship caused by the current abortion law regime, we argue that constitutional reform is urgently required.

The Cases of Savita Halappanavar and “Miss Y”

Savita Halappanavar’s case occurred before the enactment of the PLDPA, which was itself a response to the European Court of Human Rights decision in *A, B & C v Ireland*.⁴ Ms. Halappanavar entered hospital while suffering a miscarriage 17 weeks into her pregnancy. In

¹ The quote is from “Recovery Room, Maternity Ward (for Savita Halappanavar)” by Doireann Ní Ghríofa, available at: <http://movingpoems.com/2014/03/waking-by-doireann-ni-ghriofa/> [last accessed September 9 2014].

² [1992] 1 I.R. 1.

³ R. Fletcher, “‘Pro-Life Absolutes’, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986–1992” (1998) 36(1) *Osgoode Hall Law Journal* 1 at 31–53.

⁴ (2011) 53 E.H.R.R. 13

her case, there was no prospect of the foetus surviving. It is reported that she requested termination of the pregnancy by means of abortion as soon as she entered the hospital and the diagnosis became clear. She was refused this, apparently on the basis that—because her life was not in “real and substantial danger” at the time, and the foetus still had a heartbeat—there was no legal entitlement to an abortion. This continued over a period of almost three days, during which time the clinical approach was “to ‘*await events*’ and to monitor the fetal heart in case an accelerated delivery might be possible once the fetal heart stopped”.⁵ While this approach may be clinically appropriate in some cases, in this case, Ms Halappanavar developed a very serious form of sepsis, the advance of which was not adequately diagnosed or treated. Although a diagnosis of septic shock led to foetal remains being removed on October 24th, the infection worsened and she died on October 28, 2012.

An independent inquiry found that a mixture of factors combined to lead to this death, one of which was the lack of clear clinical guidance and the legal situation as it then stood. Reflecting on this, the inquiry

“... strongly recommend[ed] and advise[d] the clinical professional community, health and social care regulators and the Oireachtas to consider the law including any necessary constitutional change and related administrative, legal and clinical guidelines in relation to the management of inevitable miscarriage in the early second trimester of a pregnancy including with prolonged rupture of membranes and where the risk to the mother increases with time from the time that membranes are ruptured including the risk of infection and thereby reduce risk of harm up to and including death”.⁶

This case was dominated by the sense that even an inevitable miscarriage could not be terminated as long as there was foetal heartbeat on the basis that a real and substantial risk to the life of the pregnant woman must first arise. This interpretation of the Constitution clearly played into both Savita Halappanavar’s protracted suffering and her death. While it has been argued that her death was attributable to poor clinical practice rather than to the law, the reality is that the threshold for access to abortion in Ireland is so high that even a serious illness is likely to be managed along similar lines, regardless of the outcome for the woman.

⁵ Health Service Executive, *FINAL REPORT: Investigation of Incident 50278 from time of patient's self referral to hospital on the 21st of October 2012 to the patient's death on the 28th of October, 2012* (June 2013), p.5.

⁶ Fn.5 above, p.6.

Although Miss Y's case is subject to heavy reporting restrictions, sufficient details have emerged in the media to create a broad picture of her experience of the Irish abortion law regime.⁷ Miss Y arrived in Ireland seeking asylum and discovered she was pregnant shortly afterwards in the course of a routine medical examination. The pregnancy was a result of a rape prior to her arrival in Ireland. She immediately made it clear that she would rather die than carry the pregnancy to full term. What then happened is currently unclear and is the subject of a HSE investigation, but it would appear that there was a very substantial gap in time between that representation and the time when she was able to make a formal request for abortion under s.9 of the PLDPA. Although the panel of three medics accepted that there was a risk to her life from suicide that could only be averted by termination of the pregnancy, the foetus was considered to be viable. This meant that termination by means of abortion was considered impermissible.⁸

Miss Y appears to have been led to believe that if she accepted hydration and nutrition voluntarily (rather than under a court order that had been issued in respect of her) she would be granted an abortion. In fact, a baby was delivered by C-section in the 25th or 26th week of her pregnancy. The C-section ultimately performed on Miss Y falls outside the scope of the PLDPA, which only deals with medical procedures that result in the destruction of human life.⁹ Thus, although the request for an abortion was assessed under the PLDPA, Miss Y failed a *de facto* viability test, which meant that the procedure performed to terminate the pregnancy did not fall to be regulated by the PLDPA itself.

These two cases clearly and starkly illustrate the inadequacy of Irish abortion law as currently interpreted and applied.

Accessing an Abortion in Ireland and Abroad

The Miss Y case demonstrated how various cleavages of vulnerability exacerbate the difficulty of accessing abortion either in Ireland or abroad. Notwithstanding the introduction of the PLDPA, women in Ireland who wish to access abortion outside of the very narrow circumstances allowed for in the Act must travel abroad to do so. They do this in significant

⁷ See <http://criticallegalthinking.com/2014/08/20/finding-hidden-constitution-explaining-irelands-abortion-law/>, summarising <http://www.rte.ie/news/player/2014/0819/20634959-kitty-holland-reacts-to-abortion-case/> [last accessed September 24, 2014].

⁸ On the viability threshold as an implicit test for access to abortion, see F. de Londras & L. Graham, "Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate" (2013) 3(3) *Irish Journal of Legal Studies* 54 at 60–62.

⁹ PLDPA ss.7–9.

numbers: between 1980 and 2011, at least 152,061 women reporting an Irish address accessed abortion care in the UK.¹⁰ The requirement to travel abroad for an abortion has a number of serious consequences.

Delay

Irish women tend to have later abortions because they need to organise travel and accommodation, time off work, finances (on average it costs a woman €1,000 to go to the UK for an abortion¹¹), the abortion itself (it is illegal for a doctor to make an appointment for a woman at a clinic abroad¹²), and alternative care for other children they may have. Irish women seeking an abortion abroad will often be aware of a persistent social stigma surrounding abortion,¹³ which may mean they struggle to make these arrangements without disclosing their intention to have an abortion to family, friends and medics at home. Vulnerable or marginalised women, and women in violent or unsupportive family relationships, are likely to find these difficulties compounded by other factors. Arguably, the State's reliance on extra-territorial abortion indirectly discriminates against women who find it more difficult to travel for reasons of poverty, disability or migration status.¹⁴

Cost

Although some women receive financial assistance from voluntary services such as the Abortion Support Network, the State does not reimburse any costs associated with seeking a termination abroad. Thus, poorer women take longer, or risk more, to raise the money to fund a termination and inevitably have later abortions, which are in turn more expensive.¹⁵ Asylum-seeking women must apply and pay for an emergency visa from the Department of Justice, as well as a visa to enter the UK: a process that can take up to eight weeks and adds €120–€240 to the cost of abortion care.¹⁶ Visas may be refused.¹⁷ The weekly payment to

¹⁰ See National Women's Council of Ireland, *Policy Paper on Abortion*, p.16, available at: http://www.nwci.ie/download/pdf/nwci_policy_position_paper_on_abortion_final.pdf [last accessed September 24, 2014].

¹¹ See further <https://www.abortionsupport.org.uk/>.

¹² Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 s.8.

¹³ See Human Rights Watch, *A State of Isolation: Access to Abortion for Women in Ireland* (New York: Human Rights Watch, 2010), available at: www.hrw.org/sites/default/files/reports/ireland0110webwcover.pdf [last accessed September 24, 2014].

¹⁴ See CEDAW Committee, *Concluding Observations: Ireland* (UN Doc. CEDAW/C/SR.440 and 441, 1999), para.185; CAT Committee, *Concluding Observations: Ireland* (UN Doc. CAT/C/IRL/CO/1, 2011), para.26, noting the discriminatory impact of the requirement to travel.

¹⁵ An abortion performed after 15 weeks can cost over €900: Human Rights Watch, fn.13 above, p.31.

¹⁶ *Comments of the Irish Family Planning Association (IFPA) in respect of the Fourth Periodic Review of Ireland under the International Covenant on Civil and Political Rights (ICCPR)* (Dublin: IFPA, 2014), p.7,

adults living in direct provision is €19.10, and they do not have the right to work. Language barriers and lack of access to information may prevent women from accessing appropriate support.¹⁸ As the case of Miss Y illustrates, these barriers are such that asylum-seeking women may simply not be able to access abortion abroad and may instead be reliant on the PLDPA.

Information deficits

The distress caused to women by the practical difficulties of accessing abortion abroad is exacerbated by the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995. Not only does this Act require the woman to arrange the termination for herself, but it also makes it a criminal offence for a doctor or service provider to “promote” abortion,¹⁹ so that women are unable to receive frank advice from their doctors and may be unable to access reliable information about abortion services abroad.²⁰ The onerous provisions of this Act appear to have had a chilling effect on doctors’ capacity and willingness to engage constructively with women in respect of their options in pregnancy.²¹ Indeed, even though doctors have a duty to provide women with abortion aftercare, the stigma surrounding abortion often deters women from seeking such care when they return home, at appreciable cost to their health.²²

available at:

http://www.ifpa.ie/sites/default/files/documents/submissions/irish_family_planning_association_re_4th_periodic_review_of_ireland.pdf [last accessed September 24, 2014].

¹⁷ See L. O’Donnell, “Asylum seeker beaten by the system, shackled by the past”, *Irish Independent*, August 23, 2014, available at: <http://www.independent.ie/opinion/columnists/liz-odonnell/asylum-seeker-beaten-by-the-system-shackled-by-the-past-30530059.html> [last accessed September 24, 2014].

¹⁸ See Human Rights Watch, fn.13 above, pp.22 and 33–34. See further, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/23/41) at paras 72–74, noting the particular difficulties which migrant workers’ experiences in accessing abortion. Report available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A_HRC_23_41_ENG.pdf [last accessed September 24, 2014].

¹⁹ Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 s.5. The Act, at ss.3 and 4, also makes provision for censorship of information about abortion at public meetings and in publications. Information may not be provided on the phone. See Center for Reproductive Rights, *Abandoned and Stigmatized: The Effect of the Irish Abortion Law on Women* (2014), p.22, available at: http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/INT_CCPR_CSS_IRL_17442_E.pdf [last accessed September 24, 2014]. Contrast Committee on Economic, Social and Cultural Rights, “General Comment 14: The right to the highest attainable standard of health” (E/C 12/2000/4, August 11, 2000), para.36, emphasising women’s right to access abortion-related information.

²⁰ Human Rights Watch, fn.13 above, p.23.

²¹ See IFPA, fn.16 above, p.6.

²² This was the case for Ms A in *A, B & C v Ireland* (2011) 53 E.H.R.R. 13. See also Doctors for Choice, *Submission to the United Nations Human Rights Committee for Ireland’s Review under the ICCPR* (June 12,

Limited abortion availability in Ireland

The difficulties of travelling for abortion arise for everyone who cannot access abortion in Ireland: a wide category given how limited access is within the jurisdiction. Under Irish law, women who have become pregnant from rape and incest, those whose pregnancies pose a serious risk to their health but not to their lives, and those who wish to terminate their pregnancies where there is no prospect of the child surviving outside of the womb, are required to undertake all of the burdens outlined above and travel abroad for the purposes of an abortion. This may result in extreme stress for the pregnant woman and, moreover, is inconsistent with Ireland's international human rights obligations. The UN Committee Against Torture, for example, has argued that when a woman who is pregnant as a result of rape is denied a termination, "this situation entails constant exposure to the violation committed against her and causes serious traumatic stress and a risk of long-lasting psychological problems such as anxiety and depression".²³

The consequences of enforced distress are particularly difficult in circumstances of fatal foetal abnormality,²⁴ not least because such conditions are often not diagnosed until late in pregnancy, when obtaining a termination can take several days and become very expensive and distressing.²⁵ Due to the financial burdens of travelling abroad, it is reported that women increasingly have the first part of the procedure undertaken in the UK and then "deliver" the deceased foetus in an Irish hospital, resulting in discontinuities of care.²⁶ Although there were good constitutional arguments for permitting abortion in Ireland in cases of fatal foetal abnormality,²⁷ the Government chose not to legislate to this end. The former Minister for Justice himself acknowledged that this narrow interpretation of the constitutional position inflicts "great cruelty" on women.²⁸ The Irish Human Rights Commission²⁹ and, more

2014), pp.16–17, available at http://www.ccprcentre.org/doc/2014/06/INT_CCPR_CSS_IRL_17440_E.pdf [last accessed September 24, 2014].

²³ UN Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Concluding Observations of the Committee against Torture: Nicaragua* (CAT/C/NIC/CO/1, June 10, 2009), para.16.

²⁴ See *KL v Peru* (2005), Comm. No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003, in which the UN Human Rights Committee found that compelling an adolescent to continue with a pregnancy when her foetus had been diagnosed as anencephalic amounted to inhuman and degrading treatment.

²⁵ See Center for Reproductive Rights, fn.19 above, pp.12–17.

²⁶ S. Mitchell, "UK Hospitals Move to Limit Irish Abortions", *Sunday Business Post*, August 24, 2014.

²⁷ See *D v Ireland*, App. No. 26499/02 at para.69, in which the Attorney General argued that it was possible that an Irish court could find that a foetus incapable of being born alive did not attract the protection of the Constitution.

²⁸ *Speech by the Minister for Justice, Equality and Defence, Alan Shatter, TD, during the debate on the Protection of Life During Pregnancy Bill 2013: Report Stage—10/11 July 2013*, available at: <http://www.justice.ie/en/JELR/Pages/SP13000294> [last accessed September 24, 2014].

recently, the UN Human Rights Committee (UNHRC),³⁰ have recommended that, at the very least, Irish abortion law should be expanded to provide for women in these situations. Although that would bring Irish law closer to international and comparative standards, limiting reform to these extended grounds would be highly problematic, not only from the perspective of recognising women's bodily integrity and autonomy, but also from a practical perspective: would we, for example, somehow require a woman seeking an abortion to "prove" that she was raped? And, if so, how?

Privileging of conscientious objection

For those women whose circumstances suggest an entitlement to access abortion under the PLDPA, the apparent privileging of conscientious objection over access to abortion poses potentially serious barriers. Medical practitioners are not obliged to carry out or assist with terminations to which they have a conscientious objection.³¹ A medic who does not wish to participate in an abortion procedure must make alternative arrangements for the pregnant woman's care; however, no criminal sanction attaches if the doctor refuses to do so, or unconscionably delays a woman's access to treatment because of a religious commitment.³² A refusing doctor is not obliged to declare his or her conscientious objection to employers in advance and so there is no clear way of ensuring that all hospitals in which abortion may be carried out in fact have sufficient numbers of practitioners on staff to ensure practical availability. There is also a danger that, because the PLDPA does not explicitly rule out

²⁹ *IHRC Observations on the Protection of Life in Pregnancy Bill 2013, July 2013*, pp.48–50, available at: <http://www.ihrc.ie/publications/list/ihrc-observations-protection-of-life-during-pregna/> [last accessed September 24, 2014].

³⁰ Concluding Observations of the UNHRC, 111th session, July 23, 2014 (CCPR/C/IRL/CO/4), para.9. The UNHRC found potential violations of arts 2, 3, 6, 7, 17, 19 and 26 of the International Covenant on Civil and Political Rights. See "UN Human Rights Committee Chairman says Irish law treats raped woman as a 'vessel'", available at: <http://www.rte.ie/news/2014/0715/630888-un-human-rights/> [last accessed September 23, 2014].

³¹ PLDPA s.17(3). The right does not apply to emergency terminations.

³² See arguments in *RR v Poland* [2011] ECHR 828; *P and S v Poland*, App. No. 57375/08, October 30, 2012 that a woman's rights under the European Convention on Human Rights (ECHR) are breached where conscientious objection leads to significant delays in accessing legally available medical treatment. The Court has repeatedly held that "once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion" (*P and S v Poland*, [99]) and applied this principle to assessing whether legal arrangements for conscientious objection are appropriately organized to ensure Convention rights are effective and not illusory.

institutional assertions of a right to conscientious objection, abortion might become effectively unavailable in particular Catholic hospitals.³³

Although this did not clearly arise in these cases, it is worth noting a further challenge in respect of availability and the PLDPA: there is no obstacle to a doctor who conscientiously objects to abortion participating in the assessment of a woman who is attempting to access a life-saving abortion (including as members of the review panel). Concern has been expressed that the PLDPA enables anti-choice psychiatrists to obstruct women's access to life-saving abortion.³⁴ Although medical practitioners have a right to religious conscience that ought to be protected, the current legislative scheme fails to adequately balance that right against women's rights to access abortion and, in its design, the State has failed to fulfil its duty of due diligence to ensure that women's rights are effectively vindicated within institutions under its control.³⁵

Heartbeat, Viability and a Presumption in Favour of Live Birth

Both the *Miss Y* and *Savita Halappanavar* cases raise questions of how the "equal right" to life of the woman and the unborn are weighed against each other when doctors are faced with the possibility of providing an abortion in Ireland. Although the PLDPA was characterised as "legislating for *X*", the *X* case provides very limited guidance in these sorts of cases. *X* was a case about travelling for abortion, involving a suicidal 14-year-old girl who was just 12 weeks pregnant. Although it has been read and interpreted as being effectively the definitive statement of the meaning of Art.40.3.3°, this may have as much to do with the dearth of jurisprudence on that provision as with the generalisability of the principles laid down in the case, which could be read as confined to its particular facts. The judgments were not written with guidance to doctors in mind. The PLDPA, by contrast, was written for doctors, but the

³³ For a summary of these issues, see E. Daly, "Religious freedom arguments in the abortion debate", available at: <http://humanrights.ie/civil-liberties/religious-freedom-arguments-in-the-abortion-debate/> [last accessed September 24, 2014]. Daly notes that in *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 231, the Supreme Court upheld the exemption of denominational schools from a statutory prohibition on religious discrimination in the employment context. However, Daly argues that the Irish constitutional jurisprudence on religious freedom is too limited to draw any broader conclusions. It may be that this position can be reconciled with that under the ECHR by distinguishing between matters of ethos and internal religious doctrine, and matters of service provision.

³⁴ *Doctors for Choice*, fn.22 above, pp.18–21

³⁵ See *O'Keefe v Ireland* [2014] ECHR 96. See similarly, *da Silva Pimentel v Brazil*, Communication 17/2008, UN Doc. CEDAW/C/49/D/17/2008 (CEDAW, July 25, 2011). On the argument that the State bears such a duty, see *RR v Poland* [2011] ECHR 828; *P and S v Poland*, App. No. 57375/08, October 30, 2012; and *International Planned Parenthood Federation European Network v Italy*, Complaint No. 87/2012 (European Committee of Social Rights) at para.48.

core tests it requires them to apply in determining whether a woman is entitled to a life-saving abortion are an unvarnished transplant of the *X* test.

In *X*, the Supreme Court held that a pregnant woman is entitled to obtain an abortion where it is established “as a matter of probability” that there is a “real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy”.³⁶ Section 7 of the PLDPA directs doctors affirming a woman’s entitlement to access a termination under the PLDPA to certify that: (i) there is a real and substantial risk of loss of the woman’s life from a physical illness; and (ii) in their reasonable opinion (being an opinion formed in good faith which has regard to the need to preserve unborn human life as far as practicable), that risk can only be averted by carrying out the medical procedure. Section 9 of the PLDPA applies similar language to suicide, as does s.8 relating to emergencies. As is clear, the only significant gloss placed on the *X* case in these sections is the references to “good faith” and “reasonableness”. The panels of doctors applying ss.7, 8 and 9 of the PLDPA are applying *X* across a myriad of different clinical circumstances. Of course, under the PLDPA, they form those interpretations under the shadow of the criminalisation of abortion. There are three problems here, which are clearly illustrated by the Miss Y and Savita Halappanavar cases.

The first turns on the gravity of risk to life which a woman must demonstrate before she can meet the test under s.7 or s.9. The danger is that a woman whose condition is likely to worsen might be required to deteriorate to the point where her life is definitely at risk before anything can be done to end her pregnancy. When would Miss Y, in William Wall’s words, be “suicidal enough to spare her”?³⁷ Would she have been granted a termination at eight weeks, when she was suicidal, or only at 16 weeks when she had already made a failed attempt on her life?³⁸ In the case of Savita Halappanavar, it appears that medics considered they could not provide an abortion until she had become so ill that there was a manifest risk to her life, rather than an illness that, if left untreated, would give rise to such risk. Although the legal standard does not require the risk of death to be imminent, it must be “real and substantial”, raising practical difficulties for medics. When is a risk of death sufficiently real and substantial to allow for an abortion? The vagueness of the legal test enunciated in *X* and then

³⁶ [1992] 1 I.R. 1 at 53-54.

³⁷ <http://www.irishleftreview.org/2014/08/18/island-saints-sadists-ireland-2014/> [last accessed September 24, 2014].

³⁸ See H. McDonald, “Pregnant Women Face Abortion Ban in Ireland, Even if they’re a Suicide Risk”, *Guardian*, August 7, 2014, available at: <http://www.theguardian.com/world/2014/aug/07/pregnant-women-ireland-abortion-ban-suicide> [last accessed September 24, 2014].

enshrined in the PLDPA fails to offer sufficient guidance to doctors in this context and, given the severe penalties for providing an abortion outside of these legal parameters, it is reasonable to suggest that doctors may take a risk-averse approach and delay terminations until it is, effectively, too late.

The second issue turns on whether an unviable foetus can assert the right to life as against the pregnant woman in circumstances where the pregnancy is putting her life at risk. In the Savita Halappanavar case, it appears that medical staff did not feel able to intervene in any way that would jeopardise the life of a 17-week-old foetus which, although it had a heartbeat, was incapable of surviving an ongoing miscarriage. This problem may also be relevant in the context of fatal foetal abnormality.

The third issue is that of viability and the extent to which the doctor's obligation to preserve unborn human life as far as practicable means that measures may be taken to ensure a viable foetus has the opportunity to be born alive. In the Miss Y case, a baby was delivered after 25 weeks by Caesarean section, in circumstances in which it appears medics agreed Miss Y was entitled to a termination at 22 weeks under s.9 of the PLDPA. It is not clear whether the PLDPA will be read to require birth, even of a very premature but viable infant, in similar circumstances.

All three of these problems are products of the constitutional balancing test that gives equal constitutional status to the foetus and the pregnant woman regardless of how advanced a pregnancy might be, and regardless of the health of the foetus and the health of the woman, unless her life is in real and substantial danger.

Reforming the Constitution

Even having established that the current constitutional framework inflicts serious harm on women, some will argue that there is nothing to be done. An assortment of arguments about "political will" assume that because the electorate has voted on "the abortion issue" three times, there is no legitimate scope for a referendum. It is possible to unpack these arguments. We could point to the dysfunctional political processes that generated the Eighth Amendment in the first place, to the limitations of the referendum questions put to the electorate, or to the expanse of time and cultural change that stands between us and 1983. All of these are, in a sense, backward-looking arguments, in that they are about how the constitutional text was originally generated. But given the limited space available, we take for granted, for the

purposes of this article, that the Eighth Amendment and subsequent referenda were legitimate expressions of political will.

Our argument is a simple one of constitutional renewal: a forward-looking argument. When we have faced positions like the current one before, in which stagnant processes of constitutional interpretation by the judiciary or by other State agents have produced an unworkable legal framework not in-keeping with the broader spirit of the Constitution, we have held referenda to begin again. This is how we added the rights to travel and the rights to information to the Constitution.³⁹ The Children's Rights Referendum is one key recent example. The Citizenship Referendum in 2003 was, arguably, another. Furthermore, where a constitutional status quo seems considerably at odds with popular demands for a revised constitutional settlement, the principle of popular sovereignty upon which the Irish Constitution rests, and which was reflected in the Constitutional Convention, militates towards reform. It seems incongruous to accede to popular demands for referenda on minor changes to voting age and presidential term, for example, and to simultaneously continue to refuse the people an opportunity to vote in a liberalising abortion referendum.

Furthermore, the current operation of the Eighth Amendment is the product of suffocating trends in interpretation of the constitutional text, both in the courts and elsewhere. We appear to have developed a constitutional regime that allows women's lives to be put at risk in ways that are very difficult to justify except outside a very restrictive reading of the Constitution. Arguably, phrases such as "equal right to life" and "as far as practicable" could be interpreted in a more imaginative and liberal way to deal with, for example, fatal foetal abnormality and abortion in situations of clear unviability.⁴⁰ However, interpretive interventions of this kind seem improbable, and mere adjustment of the PLDPA cannot adequately address the problems outlined above. In addition, and as already noted, the limited availability of abortion contravenes Ireland's international obligations.

Thus, there are compelling democratic, practical and legal reasons for holding a constitutional referendum to reform Irish abortion law; however, the question of the form that such a referendum might take remains an open one. There are two clear options for effective reform by means of constitutional referendum: (1) a "simple" repeal of relevant constitutional

³⁹ See McAvoy, "Vindicating Women's Rights in the Foetocentric State" in Giffney and Shildrick (eds), *Theory on the Edge: Irish Studies and the Politics of Sexual Difference* (2013, New York; Palgrave Macmillan), p.39.

⁴⁰ See <http://humanrights.ie/criminal-justice/guestpost-ruth-fletchers-submission-to-the-oireachtas-abortion-hearings/> [last accessed September 24, 2014].

provisions; and (2) a replacement of current provisions with new provisions expressly outlining the availability of abortion in Ireland. Both options raise some particular questions and challenges, and both would require legislation in order to give them proper effect should the referendum in question be successful.

Option 1: “simple” repeal

Some pro-choice campaigners advocate a simple repeal of the Eighth Amendment, in the hope that this would de-constitutionalise abortion and return it to the legislative sphere. In effect, the argument goes that removal of Art.40.3.3° would leave the Constitution protecting a general right to life, without express reference to unborn life, and that in any subsequent litigation the Supreme Court would take the referendum result as indicating an intention to abolish the constitutional prohibition on abortion. Excising the constitutional provision would rid Art.40.3.3° of any further effect, ostensibly leaving the contours of abortion law for political settlement in the Oireachtas.⁴¹

However, it is not necessarily clear that the effect of repeal would be quite as straightforward as this suggests. It may well be the case that the Constitution contains loose threads which might influence judges in a later case so that the Constitution may be said to contain a meaning not anticipated by the repeal campaign. Assuming that the effect of repeal is prospective only, there is an argument, based on dicta from a number of cases, that the foetus *in utero* enjoyed a constitutional right to life prior to the insertion of Art.40.3.3°.⁴² Should Art.40.3.3° be removed from the Constitution, there is a possibility that this might be revived to assert a constitutional right to life of the unborn. Although unlikely—given that the express purpose of a repealing amendment would be to de-constitutionalise abortion—this nonetheless remains a possibility. The *X* case illustrates the practical, political and legal challenges that can flow from judicial interpretation of constitutional texts relating to abortion, and indeed the possibility of unanticipated consequences of seemingly straightforward constitutional amendments, so that a “simple” repeal without the insertion of any clarifying provisions carries with it remote, but real, risks of the judicial re-constitutionalisation of abortion.

Option 2: repeal and replacement

⁴¹ The Fifth Amendment to the Constitution acts as a useful analogy.

⁴² See *G v An Bord Uchtála* [1980] IR 32, and the judgments of Walsh J. in *McGee v Attorney General* [1974] 1 I.R. 284, McCarthy J. in *Norris v Attorney General* [1984] I.R. 36, and Barrington J. in *Finn v Attorney General* [1983] I.R. 154.

The second option for constitutional reform is the repeal and replacement of Art.40.3.3° in order to make clear the constitutional position relating to abortion in a manner similar to the 15th Amendment (on divorce). Bearing in mind that an overly detailed constitutional provision can hamstring subsequent legislative efforts making later law reform burdensome, a relatively modest approach to a replacement provision would seem advisable. This could be achieved by expressly protecting rights to life *and* to bodily integrity—which the State would pledge to vindicate and protect—followed by a secondary provision employing the “Nothing in this Constitution shall operate ...” formula to explicitly permit the introduction of abortion. A formulation of this kind should place beyond doubt the de-constitutionalisation of abortion *per se*, while leaving the precise parameters for the provision of abortion to be determined through the political sphere and for subsequent revision and reform, if appropriate and desired. It should also preclude the State from upholding a law which is inconsistent with international human rights law and comparative practice in the field of abortion law, on the basis that it represents the “will of the People”. It should ensure, accordingly, that governments must take full political responsibility in domestic and political spheres for their decisions as to the availability of abortion in Ireland.

Conclusion

The cases of Miss Y and Savita Halappanavar demonstrate that the Eighth Amendment has been reduced, over the years, to a catalogue of anomalies, unexplained readings, missed opportunities and speculative silences. Although the constitutional text might be applied in a manner that more appropriately recognises women’s autonomy as well as their rights to health, bodily integrity and privacy, this would require a fundamental shift in the interpretation of Art.40.3.3°, led either by the judiciary or the Oireachtas. This is a highly unlikely prospect owing to a likely reluctance by the judiciary to engage in such activism in the field of abortion jurisprudence, given the political fallout from the *X* case, probable political resistance to grasping the nettle of abortion law reform and cross-party disagreement on the appropriate legal regime in Ireland. In this sort of instance, constitutional reform by means of a referendum is clearly required. The shape of such reform might be decided following a period of consultation, perhaps by means of a specially-convened constitutional convention. However, before that can happen, we must agree, in principle, that the status quo is unsustainable. The cases of Miss Y and Savita Halappanavar, which frame this article, bring the hardship caused by the Eighth Amendment into stark relief.