

Analysis: A Human Rights Perspective on Ireland’s Referendum

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By: Sylvie McCallum Rougerie

On May 25, 2018, Ireland voted to amend its Constitution to lessen restrictions on women’s access to abortion. From the perspective of international human rights law, such reforms are long overdue. This article highlights human rights considerations that should guide the Irish government as it develops its new abortion legislation and policies.

As most readers will know, on May 25, 2018, Irish constituents voted overwhelmingly to repeal art. 40.3.3 of the Irish Constitution, which “acknowledges the right to life of the unborn” and requires the State to “defend and vindicate that right.”[1] For decades, this constitutional amendment, alongside criminal prohibitions on seeking and performing abortions, has rendered the right to safe and legal abortion illusory for Irish women ? unless they are willing and able to travel abroad. While much has already been said on the implications of the referendum, this comment aims to add an international human rights law perspective to the discussion.

The human rights community has known for years that Ireland’s stance on abortion is contrary to its international human rights obligations. In 2016, the UN Human Rights Committee, which monitors States’ implementation of the *International Covenant on Civil and Political Rights*, found in *Mellet v. Ireland* that the Irish State had violated the Covenant’s prohibition of cruel, inhuman and degrading

treatment and punishment (CIDTP), as well as the rights to privacy and to equality before and under the law.[2] After being informed that her foetus suffered from a fatal condition, Ms. Mellet had been forced to choose between traveling to the United Kingdom for a termination or seeing the non-viable pregnancy to term. The Committee agreed with Ms. Mellet that Ireland had subjected her to "conditions of intense physical and mental suffering" rising to the level of cruel, inhuman and degrading treatment, because she was "denied the health care and bereavement support she needed in Ireland; compelled to choose between continuing to carry a dying fetus and terminating her pregnancy abroad; and subjected to intense stigma."[3] The Human Rights Committee reaffirmed these findings in 2017 in *Whelan v. Ireland*, which once again involved an applicant who had been forced to travel to the UK to terminate a non-viable pregnancy.[4]

The UN Committee on the Elimination of Discrimination against Women (CEDAW) has also taken the position that criminalization of abortion, forced continuation of pregnancy, and denial or delay of safe abortion or post-abortion care are forms of gender-based violence that can amount to torture or cruel, inhuman and degrading treatment and punishment (CIDTP).[5] In its most recent periodic review of Ireland, the CEDAW called on the government to amend s. 40.3.3 of the Constitution and to repeal the *Abortion Information Act*, which makes it unlawful to promote abortion and restricts the ability of health care providers to inform women of abortion services available in other countries.[6]

The European Court of Human Rights has taken a more deferential approach to Ireland's abortion laws, but nevertheless found a violation of a claimant's right to private life in the 2010 landmark judgment of *A, B and C v. Ireland*.[7] To the disappointment of many pro-choice advocates, the Grand Chamber of the Court decided to afford Ireland a wide margin of appreciation in determining how to balance the rights of mothers with its desire to limit abortion on moral grounds, invoking "the acute sensitivity of the moral and ethical issues raised by the question of abortion."[8] As a result, while acknowledging that "the process of travelling abroad for an abortion was psychologically and physically arduous," the Court concluded that Ireland had struck a fair balance by permitting women to travel abroad for abortions.[9] However, the Court did find that the lack of clarity in Irish law, namely the absence of "an accessible and effective procedure by which [a woman] could have established whether she qualified for a lawful abortion in Ireland," violated the right to private life of one of the applicants.[10] In response, Ireland introduced the *Protection of Life during Pregnancy Act* in 2013, which sought to clarify the circumstances in which a woman can obtain an abortion on Irish soil.[11]

Will the Proposed Reforms Fulfill Ireland's Human Rights Obligations?

Leading up to the referendum, the Irish government made clear that, if the Irish people voted in favour of reform, it intended to introduce legislation that would permit abortion unrestricted until 12 weeks of pregnancy, up to 24 weeks where there is a risk to the mother's life or a serious risk to her health or fatal foetal abnormality, and beyond 24 weeks in cases of fatal foetal abnormality.[12] The Government has also stated an intention to repeal the 1995 *Abortion Information Act*.[13]

While such legislation will certainly mark an important step in the direction of realizing the sexual and reproductive rights of Irish women, the contours of the new regime have yet to be defined, making it difficult to assess whether Ireland's new approach will comply fully with its international human rights obligations.

For instance, the government has not yet announced whether it intends to retain a criminal prohibition on seeking or performing abortions outside the legalized circumstances being carved out. Earlier this year, the CEDAW took its strongest stance yet against the criminalization of abortion, taking the view that criminalization of abortion in all cases constitutes discrimination and that "States parties are obligated not to penalise women resorting to, or those providing such services."[14]

The Irish government further faces the task of regulating the conduct of conscientious objectors to abortion. In its General Recommendation No. 24 on Women and Health, the CEDAW made clear that States have an obligation to put in place procedures to ensure that, if a health care provider objects to performing abortions, women in that provider's care are referred to other providers willing to perform the service.[15] Some outlets are reporting that Ireland's new legislation will impose a legal obligation on doctors to provide such referrals.[16]

Finally, in addition to removing the restrictions contained in the *Abortion Information Act*, full compliance with international human rights law may require positive measures to educate Ireland's population, including youth, on reproductive options. This obligation is rooted in article 16(1)(e) of the CEDAW ? which guarantees women, on an equal basis with men, the right to have access to the information, education and means necessary to help them decide freely on the number and spacing of their children ? in conjunction with articles 2 and 12. In its General Recommendation No. 24, the CEDAW affirms that States should "ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes."[17]

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Sylvie McCallum Rougerie **About the Author**

Sylvie McCallum Rougerie is counsel with the Human Rights Law Section of the Department of Justice Canada. She holds a J.D. from the University of Toronto and an LL.M. in Advanced Studies in European and International Human Rights Law from Leiden University. Sylvie has a long-standing interest in the rights of women and girls. She is a member of the Law Society of Ontario.

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