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The Road Less Travelled: Examining Feminist Legal Strategies for Reforming Abortion Law in Ireland

Anna Nichols

It has been written that "the struggle for social change has time and again been diverted away from the reform of statutory law towards the use of the Constitution and the courts." The Irish experience of abortion law since the 1980s has been characterised by the enactment of the Eighth Amendment to the Constitution, several high-profile cases regarding the scope of protections afforded under the Constitution under the Eighth Amendment, and the late advent of statutory reform.

This essay seeks to examine that stance, its effect on abortion law and women in Ireland today, and the merits of different means possible for reforming Irish abortion law. It will be argued that reliance on the Constitution and courts to formulate abortion law has resulted in a significant problematic accumulation of case law on foetal rights, an inevitable need for constitutional reform, and a diminished legal status for women in Ireland.

In answering which strategy is best suited to advance change, the abortion rights experiences of other jurisdictions, most notably those of the United Kingdom (UK) and the United States (US), will be comparatively examined. Both the UK and US are common law jurisdictions with a relatively similar judicial system to Ireland. Furthermore, the UK has used statutory reform as its primary instrument for decriminalising abortion, and the US, its Constitution as per the Supreme Court judgment in Roe v Wade. The social, legal and practical implications both approaches have for women, women's access to abortion, and where relevant, the Irish case, will be examined. Such observations will be outlined to illustrate the shortcomings

of current Irish approaches for the reproductive rights of women in Ireland, and to illuminate which alternative legal strategies may be appropriate to pursue.

The following paragraphs will examine the realities and implications of the three jurisdictions' abortion regulation strategies, to conclude which approach would be most suitable for achieving social change in Ireland. Ultimately, this essay seeks to answer whether enshrining the right to choose, implementing legislation or combining both approaches is the best strategy for ensuring women in Ireland's reproductive freedoms.

Ireland's experience of strategies for attaining reproductive rights

The recent Irish experience of abortion can be understood to be primarily a product of Constitutional and court reform. Although abortion in Ireland has been a criminal offence since the enactment of Offences against the Person Act 1861 (OAPA 1861), the more recent addition of Article 40.3.3 to the Constitution has provoked a number of significant national and international arguments. These discussions tend to manifest themselves in cases taken by individuals or pro-life groups to domestic and international courts, attempting to define how the "equal balance" demanded by Article 40.3.3 should be struck between foetal and maternal rights. However, Ireland's constitutionalisation of foetal rights is prescient because of the effect such enshrinement has had on subsequent jurisprudence and reform attempts, particularly regarding the legal status of Irish women and a need for constitutional reform. Much of the literature on this area is highly critical of the subordination and marginalisation of women's reproductive freedoms by such constraints.

"Abortion is absolutely the most emotive, divisive issue in Irish society."

In framing this examination by those words, it can be argued that the perception of abortion in Irish society informs the channels through which its regulation and its laws are pursued. This occurred in 1983, when Ireland was the first country in the world to constitutionalise foetal rights with the enactment of the Eighth Amendment to the Constitution, making Ireland the only country in the world with a constitutional provision giving equal rights to the life of a pregnant woman and the foetus she carries. The amendment's rationale argued that without any explicit protection of the right to life of the unborn, no fundamental law would be capable of withstanding arguments favouring pro-choice social reforms. The Pro-Life Amendment Campaign (PLAC) led the insertion campaign, with a strategy that included selecting the Constitution as their instrument for imposing specific ideological views on the entire legal framework of the state.

PLAC's choice of the Constitution is significant for several reasons. Before 1983, the Irish Constitution contained no specific provision on abortion, nor had any Irish court been called upon directly to decide whether the Constitution prohibited or entitled women to abortion. Alongside liberal reforms for contraceptives, made possible by the Supreme Court ruling in McGee and the judgment in Roe v Wade, PLAC feared similar moves occurring for abortion in Ireland. Aside from the hierarchical position of the Constitution as a legal document, theoretical opinions point out that for many citizens constitutions represent an entity far less distant and anonymous than other, more technical areas of the law, and are thus are a far more accessible means of advocating for change. Given PLAC's core composition of doctors and civil society organisations, and fears of the possibility of pro-choice legal reform, its employment for such means may be intelligible, if still inherently problematic for women's reproductive freedoms in Ireland.

Jurisprudential implications for women's bodies flowing from judicial interpretations of Article 40.3.3 are strikingly constrained. By enshrining a foetal right to life in the Constitution, a corresponding responsibility is created on the State to protect and vindicate that right, whereby the only way to fulfil such a responsibility is through the instrumentalisation of the pregnant woman's body. It has been argued that Article 40.3.3 has conflated the meanings of foetus and child, thus ignoring the implications for women on whom the foetus is dependent. In doing so, the legal definition of "woman" is wholly diminished- attributing the foetus legal personhood has been denounced as an assertion of control over women, and a further diminution of women's independent, autonomous status. As much of the literature enunciates, the use of the Constitution by pro-life groups has resulted in a significant entrenchment of the oppression of women's reproductive and bodily autonomy in Ireland.

It can be submitted that Irish case law concerning Article 40.3.3 interpretations has acted to constrain women's reproductive rights in three waves – the Information Cases in the late 1980s, the permissibility of women trav-

elling for an abortion in the 1990s, most famously in the 'X Case', and the most recent controversies regarding the medical grounds under which abortion may be permissible. The Information Cases in particular demonstrate how restrictive constitutional entrenchments make other forms of social change increasingly difficult to exploit.

In the Information Cases, Hamilton J in Grogan ruled in the High Court that Irish student unions' provision of information regarding abortion clinics in Britain was unconstitutional since it undermined the right to life of the unborn. The Supreme Court confirmed this ruling in 1988 on appeal. The 1991 ruling by the European Court of Justice (ECJ) in favour of SPUC held that it was permissible for Ireland to prohibit students from disseminating abortion information in other countries where those clinics had no economic link to Ireland. In ruling this, the courts effectively excluded voluntary action from the scope of activities capable of receiving protection under EU law. Given the scope of female activity in informal economic spheres compared to notable female underrepresentation in formal economic sectors, judicial interpretation effectively denied a form of action most utilised by women, reinforcing a preference for male-orientated means of organisation and subordinating more female-represented approaches to social action.

A lack of judicial firmness becomes particularly problematic when even international judicial displacement of Irish legal norms appear to affect few concessions for abortion reform from the legislature. Furthermore, the reduction of the population at large to mere spectators, and the further relegation of the validity of women's stake in an issue that exclusively affects them, is a particularly notable consequence of bypassing the parliamentary process by bringing abortion issues through the courts. When legal rules encode the female body with meanings, but only a select few are given the platform to decide what those rules entail, as a volume of case law demonstrates, the reality of the Irish approach leaves the scope to effect change for women notably constrained.

It has been suggested that the struggle for attaining reproductive rights in Ireland can be perceived as a wider confrontation between the very status of Irish women and the nature of the society they inhabit. However, another notable pattern for discussion concerns the failure of successive Irish governments in legislating for the gaps in domestic and international judicial findings. It is not unheard of for a deepening contradiction between people's

lifestyles and the law to become so overwhelming that reform of legislation becomes imperative to rectify the issue. In the case of abortion, this meant no statutory provision to regulate abortion access existed until 2013.

From a feminist perspective, Irish law has historically acted as an instrument to silence and disempower women, with a conservative legislature unlikely to be the trailblazer of legislation pursuing social reform for women's reproductive rights. It is argued that the legislative framework of the state acts as an "ideal model" for citizen behaviour, while the everyday reality only partially conforms to such a standard. Despite the criminalisation of abortion throughout the island of Ireland, women residing there still manage to access abortion services – in reality, abortion happens anyway. Some have argued that this situation, despite its publicised troublesome lacuna for those who cannot travel, has allowed the Irish government to continuously avoid addressing abortion rights in Ireland. As Barry affirms:

"The practical effect of the anti-abortion amendment has not been to reduce the number of women from having abortions, but to ensure they are both isolated and vulnerable when implementing that decision."

Despite attempts at introducing legislative reform, and the eventual commencement of the Protection of Life During Pregnancy Act 2013 (PLDPA 2013) in January 2014, abortion is still only lawful in three very specific and strict circumstances. Furthermore, several commentaries note that the PLDPA's introduction has tended to be represented as a pressured governmental response to the European Court of Human Right's rulings in ABC v Ireland, rather than any sort of reflection of the will of the people regarding abortion reform. In the most recent national poll, 75% of respondents said they supported the repeal of the Eighth Amendment. However, existing legal constraints and a narrative of external imposition endemic of a lengthy public representation of abortion as "utterly alien to Irish morality" have condemned politicians to struggle in coming up with an imaginative or innovative proposals for reform and stunted the ability of the apparent widespread public view to invoke change. The sole effective means for unravelling years of reinforcing foetal reinforcement may be a referendum on repealing Article 40.3.3. Until the validity of such firmly established foetal jurisprudence is nullified, or at the very least significantly challenged, it may be difficult for any other means of social change to take root.

Lessons from the American legal model for abortion rights

For this essay, the most notable characteristic of the American approach to regulating abortion can be understood to be the use of its Constitution and Supreme Court. Like Ireland, American Supreme Court interpretations of constitutional provisions have played a critical role in shaping the abortion landscape for women. In the US, abortion is protected under the constitutional right to privacy, as interpreted in the landmark judgment of Roe v Wade in 1973. Here the right to privacy, and consequently, the right to choose, was carved out by the Supreme Court under the Due Process clause of the 14th Amendment.

This constitutional enshrinement of abortion rights has been espoused as an exemplary display of how a rights-based approach to developing the law of abortion may provide effective protections for the reproductive rights of women. Advocates of this approach declare that it allows for direct legal action in the courts and the effecting of unenumerated rights that may not exist explicitly within a constitution. It should be noted that a rights-oriented approach may also present certain challenges to the development of abortion law in achieving feminist objectives. Notable drawbacks include the diminished reality for certain groups in exercising those rights, and the potential problematic politicisation of an emotive issue when framed in a rights-based context. All three – protection, practicality, and politicisation- will be examined below.

In Roe, the US Supreme Court affected the legal right for women to decide whether to have an abortion if they so wished. The court held that the right to privacy shields women from undue state intrusion and external scrutiny of a very personal choice. As Clarke outlines, recognising legal right to choice is essential for ensuring the true equality and agency of women in making decisions on their reproductive health and futures. For comparison, the UK's Abortion Act 1967 recognises no right to abortion for women, only to doctors for forming an opinion as to the justifiability of an abortion. This means that even if a woman's circumstances fall within the statutory criteria, she may be unable to access an abortion (or conversely be forced to have one), if the doctors in question deem appropriate. Since 1975, legislative attempts to limit abortion in the US have been denied by the American Supreme Court on the basis that endorsing that equality cannot truly exist for women where they are denied freedom and privacy regarding the control of their fertility.

Despite this mindset ensconcing rights-protective measures as the harbinger of a pre-emptory basis for future abortion law models, the practical difficulties associated with the rights-based approach appear in subsequent judicial interpretations of Roe. Since the judgment's delivery in 1973, there have been numerous federal restrictions on abortion access implemented. These successive provisions can be understood to illustrate the disparity between the absolutism of rights philosophies and the realities of what those rights entail for the women hoping to exercise them. As McColgan notes, "the history of abortion access in the US illustrates the disparity between formal, legal right… and practical, enforceable, useful right."

To understand how such restrictions were initially legally feasible, it may be helpful to briefly note what Roe failed to secure in its judgment. By recognising reproductive rights vis-à-vis the right to privacy, no positive obligation on the State to provide services or access to services was ever judicially entrenched. Finding a right to privacy does not automatically confer a right to government aid or supports. Furthermore, the right to choose under Roe is only found to be permissible when exercised in conjunction with the woman's doctor.

The gradual introduction of restrictive legislation has constrained women's abortion rights to the point where for some American women, Roe may as well not exist as a legal protection. Casey qualified the applicability of Roe by giving states free reign to impose new conditions on the legal circumstances for permissible abortions. Though no state can criminalise abortion outright, it is still possible to go to considerable lengths to influence a woman's decision by making the process of obtaining an abortion as cumbersome as possible. In Harris v McRae¸ the Supreme Court refused to interpret funding refusals as restrictive on the right to choose. The accumulation of such precedent at a federal level has resulted in a steady curbing of women's access to abortion, by making procedures prohibitively expensive for poorer women, geographically inaccessible for isolated women and more physically risky for women and physicians.

These pragmatic issues for rights are not unique to the US context. As several feminist academics point out, rights do not exist in an ideological vacuum, thus making their philosophical underpinnings somewhat difficult to apply fully to the context of reality. Greenwood and Young affirm that

once a right to choice is situated in a sphere independent of social conditions, an "unbridgeable gap" between right and legal practice inevitably appears. Kingdom posits that the right to choice model is problematic in its suggestion that women have an ideal set of options at their disposal, when in reality, they may not. MacKinnon argues that increased privacy rights for women in a patriarchal system may be subverted or subordinated in favour of specific social imperatives. De Gama notes that when rights discourses act as an ideological underpinning of the law, they inhere to an individualising, competitive system of values that abstracts the individual from their social context.

Although the Supreme Court finding in Casey may be interpreted as heralding the beginning of hollowing out Roe's substantive content, it should also be noted that the range of Roe v Wade's applicability is precariously dependent on the political orientation of the nine presidentially appointed judges sitting in the Supreme Court. The practical provision of abortion, and of women's rights, has always turned upon the will of federal and state governments. As de Gama notes, the right to privacy is a right enjoyed and cherished by numerous interest groups aside from women. In the case of abortion, this includes assertions of rights that may be vindicated or compromised for foetuses, putative fathers and medical professionals, with each party of the belief that their particular rights should be extended at the expense of the others. A challenge to Roe appears before the Supreme Court almost yearly in this regard, while according to Gallup, 69% of the American electorate place their vote on the basis of a candidate's stance on abortion. In short, it would take only the election of a conservative Republican president, along with the death or retirement of any moderate or liberal Supreme Court judges to render the right to abortion "very vulnerable indeed." It can be concluded here that such vulnerability highlights the crux of the problem with the rights-based approach in the US. By having the scope of a right almost wholly contingent on political configurations, the right's protection is unstable, uncertain, and unable to be upheld effectively.

Though it may appear reasonable to discount issues of judicial politicisation as exceptional or limited to an American jurisdictional context, relevant similarities between the Irish and American legal systems should not be overlooked. Ireland's contemporary policy for dealing with abortion has thus far found itself rooted in a rights-based approach, while on several occasions, women's rights groups have struggled to find plaintiffs to undertake cases to challenge the legal status quo.

The Legislative Approach: Alternatives to a Rights-Based Strategy

In contrast to the Irish and American models, abortion in the UK is legalised and constrained through statute by the Abortion Act, which repeals ss 58 and 59 of the OAPA 1861. Rights are a secondary focus to statute in this model - no express right to abortion exists under the Abortion Act, and it is provided that an abortion may be "lawful" if two physicians in good faith certify that the pregnancy poses a sufficient risk under the conditions outlined in section 1(1). Unlike Ireland, no foetal rights exist during the pregnancy, while case law repeatedly affirms that such rights only "crystallise" on the birth on the infant. Although it may be perceived prima facie that the rights-based approach appears more robust than the statutory provisions above, the merits of such a claim may be tested by both the practical and theoretical benefits of a legislature-orientated approach.

The Abortion Act was introduced to the House of Commons as a Private Member's Bill on 27th October 1967 by Liberal MP David Steel with government backing, most notably from the medical profession concerned by the high number of deaths of women undergoing abortions in poor sanitary conditions. During the time in which the Bill was passed a wave of fundamental changes to abortion law occurred across Europe between 1967 and 1985, starting with the Abortion Act. From this it may be deduced that the lack of a residential requirement in the Abortion Act set the momentum for changes elsewhere – the rise of abortion tourism after the Abortion Act commenced brought about a heightened, more widespread awareness of the problems associated with legal abortions and the implications of travel for such a time-sensitive procedure, prompting fourteen European countries to change their abortion legislation pertaining by means of statutory reform in this frame. The use of legislature as a means of reform demonstrates a relative political consensus regarding social change, and has tended to leave women with a more comprehensive and clear understanding as to the scope of their reproductive rights. Furthermore, any potential incorporation of an absolute rights philosophy here may serve to undermine existing provisions in legislative models, given that an absolute right necessarily advocates for an ultimate deregulation of abortion.

Though a US-based approach appears to offer better protections because of its express endorsement of an elective right, it has been argued that the Abortion Act has proven to facilitate a relatively wide interpretation of the grounds for which women are permitted to have an abortion. Similarly, in several countries following a legislative model, significant discrepancies can occur between a country's legal norms and the practice of abortion that it actually tolerates – the broad interpretation of "health" in Belgian and Swiss statute has meant that legal abortions are relatively easy to obtain, despite laws that appear on the surface to enforce a similar severity to Irish restrictions. The contrasts here demonstrate that a judicial enshrinement of a right to privacy does not necessarily oblige a state to provide services for abortion. Statutory legislation conditions for decriminalising abortion, whose contents necessarily outline specifics regarding the scope of the liberalisation process, do.

Several influential feminist thinkers also advocate the use of alternative strategies to the rights-orientated approach. MacKinnon argues that feminist issues may be more appropriately framed in terms of hierarchy and power than equal rights. If women's bodies are the source of their oppression, then their current relationship to reproduction needs to be radically redefined to overcome this – when ideals for social change are tied to the vindication of specific rights, then their ability to break out of existing constraints is limited. This anti-rights approach is further supported by Greenwood and Young. They posit that since rights do not exist in a vacuum independent of prevailing conditions, they therefore must interact with the social, political and legal realities of the individuals to which they inhere. Consequently, any absolutist argument for abortion rights- ie advocating for a total right to abortion on demand - cannot be totally upheld by any realistic, actual means.

In what can be construed as a relatively consensual legal construction of a continuum of women's reproductive needs, is such statutory construction at risk of expansion or interpretation that may legitimate certain invasions or denials? Though it has been said that "the absence [of rights discourse] has until now spared us the judge in the delivery room", the Abortion Act does not enact any constitutional right to privacy, abortion, or reproductive rights generally. Though prima facie this may not appear legally problematic, Gibson points out that this absence of a basis for a rights-based claim confronts potential litigants with a "legal miasma". No direct legal action can be made available for subjects to enjoin and debate, leaving potential litigants at a loss as to how best to approach a case where the statute fails them.

Statutory failure is particularly notable where issues of access arise. A woman's ability to attain an abortion may be subject to the view of doctor or clinic to which she is referred. Differences in interpretation of family doctors and consultants, which mainly stem from non-medical factors, lead to an inequity of access. Economic equality also persists – those who can afford to travel elsewhere will always be able to obtain an abortion, meaning that inconsistencies of the Abortion Act are exacerbated, particularly where women may not be compelled to demand change from a doctor or clinic. It is submitted that this set-up does little to further social change benefitting women, and may only serve to further remove and isolate women from having any meaningful stake in reproductive social progress.

Furthermore, the preclusion of more general, public rights-based discourse on abortion in the UK has also seen a rise of legal actions regarding abortion by men, where putative fathers have attempted to construct notions of legal parties to a pregnancy. This was most notable in Paton v Trustees of the British Pregnancy Advisory Service , where the applicant sought an injunction restraining his wife from obtaining an abortion without his consent, and C v S, where the father sought an injunction on behalf of the foetus. Though both applicants were unsuccessful because of a lack of rights in the statute, the emergence of such claims can be understood as a further assertion of male control on the crystallisation of male fear of and alienation from reproduction. These cases are indicative of the male-held perception that the growth of medical reproductive procedures may challenge assumptions that genetic parenthood necessarily implies a familial relationship, prompting the disintegration of the traditional patriarchal trinity of family, sex and marriage. Without the use of rights as an "ideological weapon" to facilitate a moral climate where public opinion can be more orientated towards a pro-choice view, potential future attempts at male control risk going unchallenged from a social justice perspective.

Conclusion: What's next for Ireland?

From the analysis of the three jurisdictions outlined above, it can be concluded that the legal consequences for social progress are characterised by

the way in which abortion was initially decriminalised, liberalised or regulated in each jurisdiction.

In Ireland, the use of the Constitution as a blockade to advancing women's reproductive rights with the insertion of Article 40.3.3 has resulted in subsequent attempts to reform the law being primarily executed through constitutional challenges in the courts, most notably in the cases concerning information, travel and grounds for abortion. However, the conflictual rights model embraced by the Irish experience has demonstrated a failure to acknowledge the connection between a pregnant woman and the foetus. The subordination of women's status in Irish law, particularly since these restrictive provisions apply exclusively to women, has not stopped women in Ireland from obtaining abortions, but has merely made them more isolated and vulnerable in carrying out the decision on whether or not to obtain an abortion, while constitutionalising foetal rights leaves scant room for meaningful and progressive judgment at either a political or personal level. Though some limited grounds for abortion in Ireland now exist under the PLDPA 2013, such statutory reform should not be overestimated as a sign of social progress. As medicine continues to improve, advances in abortion technology mean that fewer and fewer women are having abortions for health reasons. It is submitted that in its current state, Irish law does not account for that reality, and the reality of the twelve women who leave Ireland every day to access an abortion.

From the conclusions drawn above, it is clear that no meaningful reform of Irish abortion law is possible without constitutional change, but the importance of the form such constitutional change takes should not be underestimated. Subsequently, it is submitted that most effective means for securing further social progress lies in exploiting the variety of ways such a battle can be fought. Combining the use of the courts and constitution, in order to vindicate and uproot rights for specific parties, with the pragmatic and precise formulation elements of statutory reform in order to give women a practical expression of the right to choose would allow pro-choice activists in Ireland to exploit the advantages presented in both of the other approaches to regulating abortion law.

Examinations of the abortion law experiences in the US and UK outline the reality and merits of enshrining constitutional rights and drafting specific legislation respectively. In the US, state restrictions and post- Roe case

law have demonstrated that the upholding of absolute rights transcend the reality of reform. The politicisation of its Supreme Court illuminates the vulnerability of the right to choose in America and the rapid thinning of the "slender thread" from which the right to abortion in the US hangs. In the UK, the lack of an express right to choose for women in the Abortion Act has helped sidestep issues such as the cluttering of precise drafting with abstract reasoning that cannot be realised. However, although a lack of direct legal action has helped stem the flow of claims asserting men's control over women's reproductive decisions, as in Paton and C, that same absence of claim may also fail women, and particularly women unable to travel, should they be denied an abortion if they seek one. In all three jurisdictions, the principal difficulties for women stem from a legal failure to guarantee availability. From this convergence, it can be posited that without sufficient safeguards to access, social progress in attaining any collection of women's reproductive rights lacks long-term or substantive meaning.

Although it is accepted that public and political climates may arise where only one of these avenues is feasibly open for exploitation, it is also acknowledged that winning the rights debate may risk being only a moral victory for feminism, and that the drafting of legislation may risk being too shaped by the ruling class, rather than women's interests. However, judicial decisions cannot be relied upon to safeguard women's reproductive autonomy any more than those of elected representatives.

In her more recent writing on the economic and social realities for women in Ireland, Barry declared that the Irish position "is a definite reminder that women's legal status within this State is uncertain and ambiguous – a situation which no amount of equality legislation can fully redress." From this assertion, it is clear that those campaigning for progress for abortion law reform and social progress in Ireland will have to exploit as many avenues as possible for achieving substantive change.

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