

THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN: WHAT IMPACT, IF ANY, HAS IT
HAD ON REPRODUCTIVE HEALTH AND ABORTION RIGHTS AROUND
THE WORLD?

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I. INTRODUCTION: A BRIEF HISTORY OF WOMEN’S RIGHTS
AROUND THE WORLD

The women’s rights movement has been at the forefront of conversation around the world for the past several decades. Although it has become more prominent in recent years, the movement began

much earlier, going back to the late 1700's.¹ Despite the fact that gender inequality has been an issue for more than 200 years, more recently, nations and governments around the world have taken steps to minimize those inequalities and move towards total equality.

When the United Nations was established in 1945, equality for women became a basic principle within the Charter.² The United Nations' Charter sets forth "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."³ The Charter became the first international instrument that specifically referred to human rights together with gender equality, as it made the member States "legally bound to strive towards the full realization of all human rights and fundamental freedom. The status of human rights, including the goal of equality between women and men, is thereby elevated: a matter of ethics becomes a contractual obligation of all Government and of the UN."⁴

Following the Charter, the International Bill of Human Rights further emphasized the importance of women's rights, and the Universal Declaration of Human Rights extended equality before the law and the right to "the enjoyment of human rights and fundamental freedoms without distinction of any kind."⁵ Despite the passage of these and other bills and declarations, "women's humanity proved insufficient to guarantee them the enjoyment of the internationally agreed rights."⁶ Eventually, the United Nations established the Commission on the Status of Women (the "CSW" or the "Commission"), which "is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and empowerment of women."⁷ This

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¹ Rachel B. Vogelstein, *Landmarks in the Global Movement for Women's Rights: A Timeline*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2017), <https://www.cfr.org/blog/landmarks-global-movement-womens-rights-timeline>.

² UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, SHORT HISTORY OF CEDAW CONVENTION, <http://www.un.org/women-watch/daw/cedaw/history.htm>.

³ U.N. Charter preamble.

⁴ SHORT HISTORY OF CEDAW CONVENTION, *supra* note 2.

⁵ *Id.*

⁶ *Id.*

⁷ UN WOMEN, COMMISSION ON THE STATUS OF WOMEN, <http://www.un-women.org/en/csw>.

Commission is the platform on which women's rights treaties and platforms would be established in the future.

One prominent issue around the world, which is distinctly related to women's rights, is the topic of abortion and reproductive rights. Despite the creation of many international treaties on women's rights and human rights, reproductive rights remain extremely restricted. The Office of the High Commissioner of Human Rights got it right when they said: "women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to privacy, the right to education, and the prohibition of discrimination."⁸ The Office of the High Commissioner also stated that "States have obligations to respect, protect and fulfill rights related to women's sexual and reproductive health," and further, "women are entitled to reproductive health care services, goods and facilities that are: (a) available in adequate numbers; (b) accessible physically and economically; (c) accessible without discrimination; and (d) of good quality."⁹ Despite these obligations, women around the world are constantly subjected to sexual and reproductive health rights violations. Among these violations include: "denial of access to services that only women require, or poor quality services, subjecting women's access to services to third party authorization, and performance of procedures related to women's reproductive and sexual health without the woman's consent, including forced sterilization, forced virginity examinations, and forced abortion...female genital mutilation (FGM) and early marriage."¹⁰

On December 18, 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (the "Convention" or "CEDAW").¹¹ Often described as an "international bill of rights for women, [...] [CEDAW] defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination."¹²

⁸ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, <https://www.ohchr.org/en/issues/women/wrgs/pages/healthrights.aspx>.

⁹ U.N. General Assembly, *The right of everyone to the enjoyment of the highest attainable standard standard of physical and mental health*, ¶ 6-7, U.N. Doc. A/61/338 (Sept. 13, 2006).

¹⁰ SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, *supra* note 8.

¹¹ G.A. Res. 34/180, (Sept. 3, 1981).

¹² UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION

CEDAW was based off the work of the CSW, which was founded in 1946 and first met in February of 1947 to monitor and promote women's rights. The CSW is part of the Economic and Social Council ("ECOSOC") within the United Nations and has been supported by a unit within the United Nations called the Division for the Advancement of Women ("DAW") which is part of the United Nations Secretariat and was established by ECOSOC Resolution 11(II) in 1946. According to Resolution 11, the function of the CSW is to "prepare recommendations and reports to the Economic and Social Council on promoting women's rights in political, economic, social, and educational fields. The Commission shall also make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights."¹³ The CSW, which meets annually for two weeks, adopts "multi-year work programmes to appraise progress and make further recommendations to accelerate the implementation of the Plan for Action. A 1996 resolution expanded the CSW's mandate to include reviewing and monitoring progress of the implementation of the Beijing Declaration and Platform for Action, and "mainstreaming a gender perspective in UN activities."¹⁴

Prior to drafting the Convention on the Elimination of All Forms of Discrimination against Women, the Commission on the Status of Women drafted the Convention on the Political Rights of Women in 1953, which was the first international document recognizing and protecting political rights of women.¹⁵ In 1957, the Commission drafted the Convention on the Nationality of Married Women, and in 1962, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.¹⁶ Additionally, the Commission worked on the 1951 Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, "enshrin[ing] the principle of equal pay for equal work."¹⁷ And after creating the Convention on the Elimination of All Forms of Discrimination against

AGAINST WOMEN: OVERVIEW OF THE CONVENTION, <http://www.un.org/women-watch/daw/cedaw/>.

¹³ Economic and Social Council Res. 1946/24 (July 13, 1946). [http://www.un.org/women-watch/daw/csw/pdf/CSW_founding_resolution_1946.pdf].

¹⁴ COMMISSION ON THE STATUS OF WOMEN, *supra* note 7.

¹⁵ *A Brief History of the Commission of the Status of Women*, UN WOMEN, available at <http://www.unwomen.org/en/csw/brief-history>

¹⁶ *Id.*

¹⁷ *Id.*

Women, in 1995, the Commission was considered the “preparatory body” for the Fourth World Conference on Women, which adopted the Beijing Declaration and Platform for Action (the “Platform”)—a platform built on both the Convention on the Elimination of All Forms of Discrimination Against Women, among other conferences, and ECOSOC resolutions.

The Platform’s single purpose was “gender equality and the empowerment of all women, everywhere,”¹⁸ and is considered “the most progressive blueprint ever for advancing women’s rights.”¹⁹ The Plan for Action established twelve areas of critical concern: (i) women and poverty; (ii) unequal access to education and training; (iii) unequal access to health care and other services; (iv) violence against women; (v) the effects of armed conflict on women; (vi) economic inequality; (vii) inequality in decision-making; (viii) insufficient means to promote equality; (ix) inadequate protection of human rights of women; (x) women and media; (xi) women and the environment; and (xii) discrimination against and violation of the rights of the girl child.²⁰ According to the Platform’s mission statement, its goal was to

remov[e] all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making. This means that the principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities. Equality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development and peace. A transformed partnership based on equality between women and men is a condition for people-centered sustainable development.²¹

Later in the mission statement, the Platform discusses how to succeed in implementing the Declaration. Calling on governments, international organizations, and institutions at all levels, the Platform

¹⁸ *The Beijing Platform for Action: Inspiration Then and Now*, UN WOMEN, available at <http://beijing20.unwomen.org/en/about>.

¹⁹ *Id.*

²⁰ The United Nations Fourth World Conference on Women, *Action for Equality, Development and Peace: Platform for Action* (Sept. 15, 1995), https://www.un.org/en/events/pastevents/pdfs/Beijing_Declaration_and_Platform_for_Action.pdf.

²¹ *Id.* at Mission Statement (1).

required, among other things, the “establishment or strengthening of mechanisms at all levels for accountability to the world’s women.”²²

Despite the fact that these organizations, arms of the United Nations, and treaties exist that are meant to protect women and promote gender equality around the world, they are not the *primary* reason that inequality around the world has improved as time has gone on, though they have had some impact.

This paper will discuss what impact, if any, the Convention on the Elimination of All Forms of Discrimination Against Women specifically had on Ireland’s recent vote to repeal their Eighth Amendment and legalize abortion in a country that has historically had some of the strictest abortion laws in the world. This note will also address abortion in the United States and will conclude with the view that the U.S. *should* ratify CEDAW, if not for its potential impact on promoting equality, then to legitimize the United States’ claims that it is a leading nation in the fight to defend the rights of women in the U.S. and around the world.

II. THE SIGNIFICANCE OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

CEDAW, although not actually the first treaty concerning the equal rights of women and men, was revolutionary in paving the way for other equality platforms. The Convention is a comprehensive document highlighting the many areas of inequality between men and women.²³ The United Nations Human Rights Office of the High Commissioner explains:

the spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women. The present document spells out the meaning of equality and how it can be achieved. In doing so, the Convention establishes not only an international bill of rights for women, but also, an agenda for action by countries to guarantee the enjoyment of those rights.²⁴

²² *Id.* at Mission Statement (5).

²³ Convention, *supra* note 11 at Introduction.

²⁴ *Convention on the Elimination of All Forms of Discrimination against Women* New York, 18 December 1979, UNITED NATIONS HUMAN RIGHTS, <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>.

What makes this convention perhaps different from other human rights treaties before it, is that it not only deals with civil rights and the legal status of women, but also discusses human reproduction, reproductive rights, and the impact of different cultures on gender equality.²⁵

The Convention consists of 30 Articles covering a variety of issues. Article one provides a definition of discrimination. Articles two through sixteen set out a “comprehensive framework for tackling gender inequality,”²⁶ addressing the following topics: the duty of states, equality, special measures, stereotyping and cultural prejudices, trafficking and prostitution, political and public life, participation at the international level, nationality, education, employment, health, economic and social benefits, women in rural areas, equality before the law, and marriage and family life.²⁷

The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination against Women (the “Committee”). The Committee is comprised of 23 experts of “high moral standing and competence in the field covered by the Convention.”²⁸ These experts are nominated by their home countries and are officially elected onto the Committee by the states party to the Convention. Articles 17 through 30 of the Convention describe the Committee’s role in implementing and monitoring the progress of the Convention. Articles 17-24 explain the “composition and procedures of the CEDAW Committee, the relationship between CEDAW and national and international legislation and the obligation to States to take all steps necessary to implement CEDAW in full.”²⁹ Articles 25-30 discuss more of the administration of the Committee including

²⁵ Convention, *supra* note 11 at Introduction.

²⁶ Government Equalities Office, *Policy Paper: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Articles*, GOV UK (June 22, 2011), <https://www.gov.uk/government/publications/convention-on-the-elimination-of-all-forms-of-discrimination-against-women-cedaw-articles>.

²⁷ *Id.*

²⁸ UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, <https://www.un.org/women-watch/daw/cedaw/committee.htm>.

²⁹ *Id.* at Articles 17-24.

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administrative procedures regarding enforcement of CEDAW, and ratification.³⁰

The Convention was initially adopted by the United Nations General Assembly on December 18, 1979.³¹ There are currently 99 signatories and 189 parties to the convention.³² The United States is *not* among the countries who have signed, ratified, and/or implemented the treaty.³³ The only other countries who have not ratified the Convention are Iran, Sudan, Somalia, Palau, and Tonga.³⁴

On October 6, 1999, the General Assembly adopted the Optional Protocol to the Convention (the “Optional Protocol”), which added 21 Articles “recogniz[ing] the competence of the Committee on the Elimination of Discrimination against Women—the body that monitors’ States parties’ compliance with the Convention – to receive and consider complaints from individuals or groups within its jurisdiction.”³⁵ Optional Protocols follow many human rights treaties and generally provide procedures to address a specific area within the treaty or an issue related to the treaty. Article 2 of the Optional Protocol created the following communications procedure:

communications may be submitted by or on behalf of individuals or groups of individuals under jurisdiction of a State Party, claiming to be victims of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.³⁶

The second procedure included in the Optional Protocol, this time under Article 8, is the “inquiry procedure,” which details

³⁰ *Id.* at Articles 25-30.

³¹ *Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women*, United Nations Treaty Collection, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

³² *Id.*

³³ *Id.*

³⁴ *US: Ratify Women’s Rights Treaty: 30 Years on, Obama Administration, Senate Leaders Should Press for Action*, HUMAN RIGHTS WATCH (July 15, 2010), <https://www.hrw.org/news/2010/07/15/us-ratify-womens-rights-treaty>.

³⁵ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 6 Oct. 1999, 2131 U.N.T.S. 83.

³⁶ *Id.* at Article 2; *See generally* What is an Optional Protocol?, *infra* note 38.

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[...] If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned. 2. Taking into account any observations that may have been submitted by the State Part concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory. 3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Part concerned together with any comments and recommendations. 4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee. 5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.³⁷

The preamble of the Optional Protocol explains the purpose of the protocol as, “reaffirm[ing] the determination of the States parties which adopt the protocol to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms.”³⁸

Prior to passing the Optional Protocol, there were two ways that the treaty’s obligations were enforced within the countries that ratified it. First, there was a reporting procedure.³⁹ Under this procedure, States submitted a report to the Committee within one year of ratifying CEDAW and would need to submit a new report every four years. Within these reports, the States discuss how they are implementing and giving effect to the Convention’s provisions.⁴⁰ The Committee then reviews the report and considers options for further action. The second means of enforcement is known as the “interstate procedure,” and is explained in Article 29 of the Convention.⁴¹ In addition to maintaining the two previous forms of enforcement that were written

³⁷ *Id.* at Article 8; *See generally* What is an Optional Protocol?, *infra* note 38.

³⁸ *Id.* at Preamble.

³⁹ UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: WHY AN OPTIONAL PROTOCOL? <http://www.un.org/womenwatch/daw/cedaw/protocol/why.htm>.

⁴⁰ *Id.*

⁴¹ *Id.*

into the original articles of the Convention, CEDAW's Optional Protocol is the first protocol following human rights treaties that addresses gender-specific complaints and provide a procedure for making those complaints, by including the aforementioned Articles 2 and 8.⁴²

A. *CEDAW and Reproductive Rights*

CEDAW, known as the 'international women's bill of rights,' "represents the most comprehensive global consensus on promoting and protecting women's rights and the associated obligations of both governments and private actors."⁴³ In fact, the introduction to the Convention explains that this Convention is the only human rights treaty that mentions family planning. The Preamble of the Convention states "bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination...".⁴⁴

More specifically, Article 10(h) of the Convention states:

State Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.⁴⁵

Article 4(2) states, "adoption by State Parties of special measures...aimed at protecting maternity shall not be considered discriminatory." Article 16(e) of the Convention guarantees women the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and

⁴² *Id.*

⁴³ Heidi Nichols Haddad, *The U.S. Hasn't Signed the World's Foremost Women's Rights Treaty. Activists Have Gotten Local Versions Passed Instead*, WASH. POST (Mar. 8, 2020), <https://www.washingtonpost.com/politics/2020/03/08/us-hasnt-signed-worlds-foremost-womens-rights-treaty-activists-have-gotten-local-versions-passed-instead/>

⁴⁴ Convention, *supra* note 11, at Preamble.

⁴⁵ Convention, *supra* note 11, at Article 10(H).

means to enable them to exercise these rights.”⁴⁶ More generally, the Convention maintains “provisions for maternity protection and child-rearing” by both sexes. Accordingly, provisions for maternity protection and child-care are proclaimed as essential rights and are incorporated into all areas of the Convention, whether dealing with employment, family law, health care, or education.⁴⁷

B. CEDAW and Ireland’s Compliance

Ireland ratified the Convention in 1985. In 2017, the Committee on the Elimination of Discrimination against Women released their “concluding observations on the combined sixth and seventh periodic reports of Ireland,” (the “Report”) which was adopted by the Committee at its 66th session in February/March 2017.⁴⁸

In their Report, the Committee first referenced some “positive aspects,” since its prior review of Ireland in 2005⁴⁹ (although notably, the 2017 report was strikingly similar to that which was included in the 2005 report). Among these included the passage of many acts promoting gender equality: The Paternity Leave and Benefit Act (2016) which introduced paid leave for new fathers; The Gender Recognition Act (2015), which provided that at age 16, the individual’s preferred gender will be recognized by the State; The Children and Family Relationships Act (2015), which protects children in “diverse families... in relation to guardianship and custody;” and The Criminal Justice (Female Genital Mutilation) Act (2012).⁵⁰

Additionally, the Committee indicated which treaties Ireland recognizes: The Optional Protocol to the Convention on the Rights of the Child (2014); The Domestic Workers Convention (2011) of the International Labour Organization (2014); The United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime (2010).⁵¹ Finally, the Committee welcomed Ireland’s

⁴⁶ Convention, *supra* note 11, at Article 16(E).

⁴⁷ Convention, *supra* note 11, at Introduction.

⁴⁸ Comm. on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reps. of Ireland, CEDAW/C/IRL/CO/6-7 (2017)

⁴⁹ *Id.* at 1-2.

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 2.

effort to improve “its policy framework aimed at accelerating the elimination of discrimination against women and promoting gender equality,” in referring to Ireland’s National Action Plan on Women, Peace and Security (2015-2018); and The National Health Strategy (2015-2020).⁵²

After commending Ireland for its “positive aspects” and improvements since 2005, the Report discusses “principal areas of concern and recommendations.” In regard to women’s reproductive rights, the report first addresses Ireland’s Constitutional and legislative framework.⁵³ The Report indicated that although the Committee previously recommended that Article 40.3.3 of Ireland’s Constitution (the Eighth Amendment, their law on abortion) be amended, Ireland did not do so. The Committee wrote about its concern “that access to abortion in the State party is restricted to cases where there is a real and substantial risk to the life of the pregnant woman under the Protection of Life During Pregnancy Act of 2013... and that this exception is interpreted in a very restrictive manner.”⁵⁴ Furthermore, the Committee notes its concern with Ireland’s Regulation of Information (Services Outside the State For Termination of Pregnancies) Act of 1995, which criminalizes healthcare providers and advocates who give information about abortion and offers the option to get an abortion.⁵⁵

The Committee expressed concern with four potential results of such restrictive legislation:

- (a) Abortion in all cases other than where there is a real and substantial risk to the life of the pregnant woman is criminal and carries a maximum penalty of 14 years imprisonment;
- (b) Women and girls are compelled to travel outside the State party to obtain an abortion in countries where it is legally available on wider grounds;
- (c) Women and girls without means to travel outside the State party to obtain an abortion...may be forced to undertake unsafe abortion, which may lead to severe mental pain and suffering; and
- (d) Health-care providers and pregnancy counsellors cannot freely provide information on abortion for fear of being prosecuted for violating the Regulation of the Information Act of 1995.⁵⁶

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 12.

⁵⁶ *Id.* at 12.

After noting these concerns, the Committee provided recommendations to the State about what Ireland should do to prevent these outcomes. First, the Committee recommended the repeal of the Protection of Life During Pregnancy Act.⁵⁷ Doing this, the Committee explains, would “legalize the termination of pregnancy at least in cases of rape, incest, risk to the physical or mental health or life of the pregnant women, and severe impairment of the foetus, and decriminalize abortion in all other cases.”⁵⁸ The Committee also recommended the intensification of programs that ensure “availability, accessibility and use of modern contraceptives.”⁵⁹ This recommendation was previously made in a Committee Report from 1999.⁶⁰ Thirdly, the Committee recommended the repeal of the Regulation of Information (Services Outside the State For Termination of Pregnancies) Act of 1995.⁶¹ The Committee insisted that doing this would ultimately result in women having free access to sexual and reproductive health information and would allow health-care providers to “not operate under a constant fear that their services may be subject to criminal investigation.”⁶² Finally, the Committee requested that the State ensure post-abortion health-care services, regardless of whether the woman has undergone a legal or illegal abortion.⁶³

III. THE HISTORY OF REPRODUCTIVE RIGHTS IN IRELAND

A. Background

A woman’s right to abortion in Ireland has always been extremely restricted. Section 58 of Ireland’s Offences Against the Person Act of 1861, states:

every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall

⁵⁷ *Id.* at 12.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 12-13.

unlawfully administer to her or cause too be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable...to be kept in penal servitude for life...⁶⁴

In addition, Section 59 states:

whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable...to be kept in penal servitude...⁶⁵

When the Irish Constitution was passed in 1937, the Constitution in Article 50.1 made a provision for the continuation of these laws from 1861, stating

subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in [Ireland] immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of [Parliament].⁶⁶

The result of this provision was the continued criminalization of abortion in Ireland.

The Eighth Amendment of Ireland's Constitution, which was passed in 1983 with a 67% vote in favor of the amendment's passing, added a new subsection three to Article 40.3 stating: "The State acknowledges the right to life of the unborn and, with due regard to the equal right of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."⁶⁷ This

⁶⁴ Offences Against the Person Act 1861 (Art. 58) (Ir.), <http://www.irishstatutebook.ie/eli/1861/act/100/section/58/enacted/en/index.html>.

⁶⁵ Offences Against the Person Act 1861 (Art. 59) (Ir.), <http://www.irishstatutebook.ie/eli/1861/act/100/section/59/enacted/en/html>.

⁶⁶ Constitution of Ireland Jul. 1, 1937, art. 50.1 (Ir.), <http://www.irishstatutebook.ie/eli/cons/en#part17>.

⁶⁷ Constitution of Ireland 1937 art. 40.3, <http://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/print>.

law on abortion, nearly a total ban, gave Ireland the reputation of having one of the strictest abortion laws in the world.⁶⁸ Before this Amendment was passed, abortion had been considered a criminal offense in Ireland since 1861.⁶⁹ Ireland had, since its passage in 1937, the only Constitution in Europe that “grant[ed] the right to life prenatally, never mind on an equal basis with a woman.”⁷⁰

Just prior to the Amendment being passed, in 1967 the United Kingdom legalized abortion up to 28 weeks, and countries around the world, including the United States with its holding in *Roe v. Wade*, began reforming their abortion laws. As a result, Ireland’s anti-abortion groups and the Catholic Church began a campaign to pass an Amendment preventing any attempt to loosen the Irish ban that already existed within the country⁷¹—thus came about the successful campaign to pass the Eighth Amendment.

B. 1988: The Attorney General Ex Rel The Society For The Protection Of Unborn Children Ireland Limited v. Open Door Counselling Limited And Dublin Well-Woman Centre Unlimited

After successfully passing the Eighth Amendment, Ireland’s High Court had its first legal challenge to the new amendment in the case of *The Attorney General ex rel. The Society for the Protection of Unborn Children Ireland Limited v. Open Door Counselling Limited and Dublin Well-Woman Centre Limited*.⁷² This case presented the “first test of the scope of the Eighth Amendment.”⁷³ The defendants, Open Door Counselling Limited and Dublin Well-Woman Centre Limited, were family planning clinics that provided counselling on pregnancy options.⁷⁴ If a client wanted to undergo an abortion, these

⁶⁸ Ciara Nugent, *Ireland May Be About to Repeal One of Europe’s Strictest Abortion Laws. This is the History Behind the Referendum*, TIME (May 23, 2018), <http://time.com/5286910/ireland-abortion-laws-history/>.

⁶⁹ *Id.*

⁷⁰ *She is Not a Criminal: The Impact of Ireland’s Abortion Law*, AMNESTY INTERNATIONAL 20 (2015), https://www.amnesty.org.uk/files/she_is_not_a_criminal_report_-_embargoed_09_june.pdf.

⁷¹ Nugent, *supra* note 68.

⁷² Jeffrey A. Weinstein, *An Irish Solution to an Irish Problem: Ireland’s Struggle with Abortion Law*, 10 ARIZ. J. INT’L & COMP. L. 165, 174 (1993).

⁷³ *Id.* at 174.

⁷⁴ *Id.*

clinics would refer them to clinics in England or Wales, where it was legal to obtain an abortion.⁷⁵

The plaintiff, The Society for the Protection of Unborn Children Ireland Limited (“S.P.U.C.”), sought an injunction to prohibit the clinic’s activities, claiming their actions were unlawful under Article 40.3.3 of the Constitution and stating that the “activities amounted to a conspiracy to corrupt public morals.”⁷⁶ Ireland’s High Court held that there was no actionable criminal conspiracy but did hold that defendants’ actions, counselling and assisting women in traveling to obtain an abortion, constituted a conspiracy under Article 40.3.3, and the court issued an injunction prohibiting the clinics from “counselling or assisting pregnant women within the Court’s jurisdiction to obtain further advice on abortion or how to obtain an abortion.”⁷⁷ When the defendants appealed the injunction to the Supreme Court of Ireland, the Court upheld the injunction, causing defendants to

be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of the method of communication with specified clinics or clinics or otherwise.⁷⁸

Appellants raised five potential issues⁷⁹, and the Supreme Court dismissed them all, finding that “freedom of expression was secondary to the unborn fetus’ right to life.”⁸⁰ The results of this case were ultimately appealed to the United Nations Human Rights Committee.

⁷⁵ *Id.*

⁷⁶ *Id.* at 175.

⁷⁷ *Id.* at 176.

⁷⁸ *Id.* at 177.

⁷⁹ *Id.* at 174-76 (discussing that the five issues raised on appeal in *S.P.U.C. v. Open Door*, 1988 I.R. 619 (Ir.S.C.), are as follows: (1) the Attorney General did not have standing to maintain this action; (2) the finding that the defendants’ activities constituted counselling and assisting pregnant women to go abroad for the purpose of having an abortion was not supported by the evidence; (3) the injunction would be ineffective in preventing abortion abroad and was, therefore, not an order which the Court should have issued; (4) the right to receive and impart information was an unenumerated constitutional right; and (5) the Supreme Court was bound by Article 177 of the Treaty of Rome to request a ruling from the European Court of Justice on the issue of whether women residing in Ireland had a right to travel to another Member State for the purpose of seeking an abortion).

⁸⁰ *Id.* at 178.

C. 1992: Attorney General v. X and Others

In 1992, the Supreme Court of Ireland had the opportunity to define and interpret the Eighth Amendment in *Attorney General v. X and Others*. Here, a 14-year old girl, X, became pregnant after being raped.⁸¹ She became suicidal, and her parents wanted to take her to England to obtain a first-trimester abortion, which was illegal in Ireland.⁸² Upon leaving for England, the Attorney General obtained an injunction preventing X and her parents from leaving the country for nine months.⁸³ The family appealed the injunction and the Supreme Court held that an abortion in X's case would not be unlawful and lifted the injunction. The judge in this case stated:

in my opinion the true test should be that a pregnancy may be terminated if its continuance as a matter of probability involves a real and substantial risk to the life of the mother. The risk must be to her life but it is irrelevant, in my view, that it should be a risk of self-destruction rather than a risk to life for any other reason. The evidence establishes that such risk exists in the present case.⁸⁴

In short, the court held that the abortion would be lawful because there is a substantial risk to the mother, which, according to the Eighth Amendment, allows the mother to get a legal abortion. This is seen through the Eighth Amendment's words that state: "the State acknowledges the right to life...with due regard to the equal right of the mother. . ." The Judge further stated, "I would regard it as a denial of the mother's right to life if there was a requirement of certainty of death in her case before a termination of the pregnancy would be permissible."⁸⁵ While the lower court insisted that a suicide was not enough of a risk to the mother to allow the abortion, the higher court reversed that view and stated that it was enough to make the abortion lawful.

This case is known for "first identif[ying] criteria for lawful abortion in Ireland," and reiterated that an abortion was only lawful in

⁸¹ Att'y Gen. v. X and Others [1992] IR 1 (Ir.).

⁸² *Att'y Gen. v. X and Others*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/women-and-justice/resource/attorney_general_v_x_and_others.

⁸³ *Id.*

⁸⁴ Att'y Gen. v. X and Others [1992] IR 1, 32 (Ir.).

⁸⁵ *Id.*

Ireland where there is a “‘real and substantial risk’ to the woman’s life as opposed to her health.”⁸⁶

D. The Thirteenth and Fourteenth Amendments and the Regulation Of Information (Services Outside the State for Termination of Pregnancies) Act 17

In 1992, as a result of the outcomes in *The Attorney General Ex Rel The Society For The Protection Of Unborn Children Ireland Limited v. Open Door Counselling Limited And Dublin Well-Woman Centre Unlimited* and *Attorney General v. X and Others*, and in response to the European Court of Human Rights’ decision that “‘this prohibition on abortion information constituted a violation of the right to freedom of expression,”⁸⁷ Ireland passed the Thirteenth and Fourteenth Amendments to their Constitution, both of which were applied to Article 40.3.3. Under the Thirteenth Amendment, women would not be prevented from leaving the country to obtain an abortion: “‘this subsection shall not limit freedom to travel between the State and another state.”⁸⁸ The Fourteenth Amendment allowed for the provision of information on abortion services abroad: “‘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.”⁸⁹

Following the passage of the Thirteenth and Fourteenth Amendments, Ireland then passed the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, which “‘sets forth the circumstances in which information, advice and counselling about abortion services that are legal in another State can be made available in Ireland.”⁹⁰ Essentially, the regulation indicates that “‘the provision of information, advice or counselling about abortion services overseas is unlawful if, inter alia, it advocates or promotes the

⁸⁶ Heike Felzmann, *Bringing Abortion to Ireland? The Protection of Life During Pregnancy Act 2013*, 7 INT’L J. OF FEMINIST APPROACHES TO BIOETHICS 192, 192-193 (2014).

⁸⁷ AMNESTY INT’L, *supra* note 70, at 66.

⁸⁸ Case of A, B and C v. Ireland, App. No. 24479/05, Eur. Ct. H.R. at 11 (2010).

⁸⁹ *Id.*

⁹⁰ Human Rights Comm., Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014, at 5 (2017).

termination of pregnancy.”⁹¹ Additionally, the Act regulates information that is “likely to be required for a woman for the purposes of availing herself of services provided outside the State for the termination of pregnancies.”⁹² The result of this Act was a serious restriction on information given during face-to-face counselling and the information made publicly available.

E. 2010: A, B and C v. Ireland

In 2005, three undisclosed women, A, B, and C, filed a claim with the European Court of Human Rights challenging the Irish law on abortion.⁹³ The three women were forced to travel to England in order to receive an abortion and were contesting “Ireland’s failure to implement its existing abortion law, which only authorize[d] abortion if a woman’s life is at risk, and also challenged this restrictive law as such.”⁹⁴ The European Court of Human Rights declined to hold that Ireland’s strict abortion laws were in violation of the European Convention of Human Rights, but did hold that in a case “in which abortion is legal in Ireland...Ireland had failed to adopt legislation and establish an effective and accessible procedure for women to access lawful abortions.”⁹⁵ Such a failure *was* a violation of Ireland’s obligations under Article 8 of the European Convention of Human Rights which establishes “the right to respect for private life.”⁹⁶ Although it was a major case, the holding did not really have much of an impact on women’s right to access abortions, despite the fact that the punitive laws in Ireland severely criminalizing unlawful abortions were criticized by the European Court of Human Rights in this case.⁹⁷

⁹¹ *Id.*

⁹² AMNESTY INT’L, *supra* note 70, at 66.

⁹³ CENTER FOR REPRODUCTIVE RIGHTS, *Fact Sheet: A, B and C v. Ireland* (2013), <https://www.reproductiverights.org/document/fact-sheet-a-b-and-c-v-ireland>; *see also Case of A, B and C*, Eur. Ct. H.R. at 1-2.

⁹⁴ *Fact Sheet*, *supra* note 93.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Heike Felzmann, *supra* note 86.

F. 2013: Protection of Life During Pregnancy Act

In 2013, following the decision of the European Court of Human Rights in *A, B and C v. Ireland*, and the 2012 death of Dr. Savita Halappanavar, who died after contracting an infection when doctors denied her an abortion even though she was having a miscarriage, the Ireland parliament passed the Protection of Life During Pregnancy Act. This Act, although passed at a time which would have allowed the country to come into compliance with internationally recognized human rights standards, did little to assist women and girls in lawfully accessing an abortion.⁹⁸ The Act instead created barriers to qualifying for a legal abortion and threatened anyone who helps a woman get an abortion with up to 14 years in prison.⁹⁹ The Act did not mention any other circumstances allowing abortions other than “real and substantial” risks to a woman’s life, and more notably did not mention “provisions for rape, [or] fatal fetal abnormality.”¹⁰⁰

Additionally, the Act allowed for a limited number of hospitals to perform abortions and maintained severe penalties for abortions conducted illegally.¹⁰¹ “Beyond extreme emergency situations, the legislation require[d] assessment of the woman by up to four assessors, including two or three specialist doctors and, where feasible, the woman’s general practitioner.”¹⁰² If a decision is appealed, the levels of the review multiply.¹⁰³ The legislation distinguishes mental health and physical health in determining whether an abortion would be allowed and has different requirements for each.¹⁰⁴ In consideration of mental health, the protocol put in place through the Act was not intended to assist and provide support for women in “crisis” situations, but instead to protect the unborn fetus.¹⁰⁵

⁹⁸ AMNESTY INT’L, *supra* note 70 at 35.

⁹⁹ *Id.* at 39.

¹⁰⁰ Heike Felzmann, *supra* note 86 at 194.

¹⁰¹ *Id.* at 195.

¹⁰² *Id.* at 195.

¹⁰³ *Id.* at 195.

¹⁰⁴ *Id.* at 195- 96.

¹⁰⁵ Heike Felzmann, *supra* note 86, at 196.

G. 2016: MELLET V. IRELAND

In 2016, the United Nations Human Rights Committee made a groundbreaking decision in holding for the first time, that a law that criminalizes abortion is a violation of a woman's human rights. Furthermore, the Committee indicated that "Ireland's abortion laws subjected a woman to cruel, inhuman and degrading treatment."¹⁰⁶

The case that brought about this monumental holding was the case of Amanda Mellet, a woman "who was denied access to an abortion in Ireland in 2011 after learning her pregnancy involved a fatal foetal impairment and found the prospect of continuing her pregnancy unbearable."¹⁰⁷ Because Ireland outlawed abortion in most circumstances, Mellet was forced to go to the United Kingdom to end the pregnancy.¹⁰⁸ After undergoing the procedure, Mellet flew back to Ireland, weak and bleeding, because she couldn't afford to stay longer. Mellet filed an individual complaint to the Human Rights Committee.¹⁰⁹

The Human Rights Committee's holding "represent[ed] the first unequivocal condemnation by an international legal authority, in response to an individual complaint, of the country's prohibition and criminalization of abortion."¹¹⁰ Furthermore, it was the first time "any international court or committee has explicitly held that criminalizing and prohibiting abortion violates international human rights law."¹¹¹

H. 2017: Whelan v. Ireland

In 2010, defendant Ms. Whelan found out that her pregnancy involved a fatal impairment to the fetus. Her doctors informed her that the fetus would likely die "in utero or soon after birth."¹¹² Ms. Whelan,

¹⁰⁶ *Mellet v. Ireland*, CENTER FOR REPRODUCTIVE RIGHTS (Jul. 8, 2016), <http://www.reproductiverights.org/case/mellet-v-ireland>.

¹⁰⁷ *Id.*

¹⁰⁸ *Mellet v. Ireland: Ireland Must Legalize Abortion to End Violations of Women's Human Rights*, CENTER FOR REPRODUCTIVE RIGHTS, https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/GLP_Europe_MelletvIreland_FS_09%2006_Web.pdf.

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.* at 1.

¹¹¹ *Id.* at 1.

¹¹² *Whelan v. Ireland: Ireland Must Reform its Abortion Law to Prevent Violations of Women's Human Rights*, CENTER FOR REPRODUCTIVE RIGHTS,

upset about her situation, spoke with her doctor about ending the pregnancy. However, when she made this request, her doctor informed her “that as a result of Irish law on abortion her only option in Ireland was to continue with the pregnancy and wait for nature to take its course.”¹¹³ Her doctor told her if she truly wanted to end the pregnancy, she would need to travel to another country where abortion was legal but would not provide her with advice or information about how or where to travel to get a legal abortion.¹¹⁴ Subsequently, Ms. Whelan travelled to the United Kingdom where she had the procedure.¹¹⁵

In 2014, the Center for Reproductive Rights filed a complaint to the Human Rights Committee on Ms. Whelan’s behalf, stating that her rights under the International Covenant on Civil and Political Rights (“ICCPR”) were violated when she was forbidden from obtaining an abortion in Ireland. The Committee held “that Ireland had violated Ms. Whelan’s rights under Article 7 (right to be free from cruel, inhuman or degrading treatment), Article 17 (right to privacy), and Article 26 (right to equality before the law) of the ICCPR.” The Committee held that: (i) “Laws prohibiting abortion can result in cruel, inhuman or degrading treatment,”¹¹⁶ explaining that Article 7 is “absolute in nature and allows for no limitations;”¹¹⁷ (ii) “Laws prohibiting abortion can cause serious harm to women by severing the continuum of reproductive health care,”¹¹⁸ as she had to leave the country to end her pregnancy causing additional suffering that could have been mitigated; (iii) “Laws that force women to choose between continuing a pregnancy and travelling to another country to access safe and legal abortion care can cause anguish and suffering;”¹¹⁹ (iv) “Laws criminalizing abortion can subject women to harmful stigma and shame,” as Ireland’s law “targets women, by virtue of being women, and places them in a

<https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP-Europe-WhelanvIreland-FS-Final-Web.pdf>

¹¹³ *Id.* at 1.

¹¹⁴ Human Rights Comm. International Covenant on Civil and Political Rights, Views adopted by the Comm. under article 5(4) of the Optional Protocol, concerning comm. No. 2425/2014, CCPR/c/119/D/2425/2014.

¹¹⁵ *Id.* at 2-3.

¹¹⁶ *Whelan v. Ireland*, *supra* note 112 at 2.

¹¹⁷ *Whelan v. Ireland*, *supra* note 112 at 2.

¹¹⁸ *Whelan v. Ireland*, *supra* note 112 at 2.

¹¹⁹ *Whelan v. Ireland*, *supra* note 112 at 2.

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particular situation of vulnerability;”¹²⁰ (v) “Laws criminalizing abortion can subject women to harmful stigma and shame;”¹²¹ and (vi) “Laws prohibiting abortion can create impermissible distinctions between similarly situated women and fail to take into account medical needs and socioeconomic circumstances,” further explaining “the failure to provide Ms. Whelan with the health care she required was discriminatory and denied Ms. Whelan equal protection of the law in violation of Article 26 of the Covenant.”¹²²

As in the *Mellet* case, the Committee explained that pursuant to Article 2(3)(a) of the Covenant, Ireland “is obligated to provide Ms. Whelan with an effective remedies.”¹²³ This requires it to make full reparation to individuals whose Covenant rights have been violated.”¹²⁴

IV. DR. HALAPPANAVAR AND IRELAND’S 2018 VOTE TO REPEAL THE EIGHTH AMENDMENT

In 2012, 31-year-old Dr. Savita Halappanavar died from septicemia- an infection she contracted when she miscarried and was denied an abortion.¹²⁵ Dr. Halappanavar was 17 weeks pregnant when she checked into a hospital with back pain and the doctors informed her she was having a miscarriage.¹²⁶ Despite the fact that the fetus wasn’t going to survive, doctors refused to provide her with an abortion because when she went to the hospital, the fetus still had a heartbeat.¹²⁷ Dr. Halappanavar had to wait until the heartbeat stopped and was then permitted to obtain the abortion. But at that point, it was too late, and she had already contracted an infection and soon after that died from septicemia.¹²⁸ Dr. Halappanavar and the cases above that led up to the

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Human Rights Comm., *supra* note 114 at 17.

¹²⁵ Megan Specia, *How Savita Halappanavar’s Death Spurred Ireland’s Abortion Rights Campaign*, N.Y. TIMES (May 27, 2018), <https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

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2018 vote were in the mind of Irish voters when they voted to legalize abortion in May 2018.¹²⁹

In April 2017, the Citizens' Assembly (the "Assembly") in Ireland voted in favor of introducing unrestricted access to abortion.¹³⁰ The Assembly had its first inaugural meeting on the 15 October 2016 and is made up of 99 members, chosen at random, "to represent the views of the people of Ireland, and were broadly representative of society as reflected in the Census, including age, gender, social class, regional spread, etc."¹³¹ The Assembly was mandated to cover five specific issues, including the Eighth Amendment's abortion rights.¹³² The Assembly's vote in 2017, 64% to 36% were in favor of having no restrictions on access to abortion.¹³³

The chairperson of the Assembly, Justice Mary Laffoy, explained:

the members voted that they wanted to remove Article 40.3.3 [the Eighth Amendment] from the Constitution, and for the avoidance of doubt, to replace it with a provision of the Constitution, which would make it clear that termination of pregnancy, any rights of the unborn, and any rights of the pregnant woman are matters for the Oireachtas (Irish Parliament).¹³⁴

Essentially, she said that it is up to the Parliament to ultimately decide how to move forward with legislating the issue but that the Assembly supported a repeal. The same year, an Oireachtas Committee recommended substantial change to the abortion law, in line with requests from the Citizens' Assembly.

In March 2018, Eoghan Murphy, the Irish Housing Minister, signed an order to set a date for an abortion referendum.¹³⁵ On May

¹²⁹ *Id.*; see also *Timeline: Ireland and Abortion*, BBC NEWS (May 26, 2018), <https://www.bbc.com/news/world-europe-43962738>.

¹³⁰ *Id.*

¹³¹ *Who are the Members*, THE CITIZENS' ASSEMBLY, <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/Who-are-the-Members/>.

¹³² *Fact Sheet*, THE CITIZENS' ASSEMBLY (June 2018), <https://www.citizensassembly.ie/en/About-the-Citizens-Assembly/CA-Fact-Sheet-June-2018.pdf>.

¹³³ *Irish Abortion Law: Citizens' Assembly Recommends Unrestricted Access to Terminations*, BBC NEWS (Apr. 23, 2017), <https://www.bbc.com/news/world-europe-39687584>.

¹³⁴ *Timeline*, *supra* note 129.

¹³⁵ *Timeline*, *supra* note 129.

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25, 2018, Irish voters had a 64.51% turn out to vote whether Irish citizens wanted to approve the 36th Amendment, which would repeal the Eighth Amendment's ban on abortion.¹³⁶ The country had an official result of 66.4% in favor of repealing the Eighth Amendment and 33.6% voting against the repeal.¹³⁷ On September 18, 2018, the Eighth Amendment was officially repealed when President Michael D. Higgins signed the 36th Amendment.¹³⁸

V. CEDAW'S IMPACT ON IRELAND'S VOTE TO REPEAL THE EIGHTH AMENDMENT

Despite the fact that CEDAW reports insisted Ireland change its laws preventing abortions, it wasn't the report that primarily lead to the Eighth Amendment's repeal. Although there was a possibility that individuals could have brought cases before the CEDAW committee arguing violations of the treaty, that did not occur. Instead, people and organizations took to human rights committees to encourage change.

There are many reports saying it was the story of Dr. Halappanavar that really "hit home" to people in Ireland. Many news sources explained that it was the first case that people, especially young women, could relate to.¹³⁹

There have been very few cases before the Convention's Committee that have addressed abortion and reproductive rights specifically. Two noteworthy cases include one where the Committee held India accountable for "failing to address human rights violations, associated with child marriage and high rates of maternal death resulting from lack of access to modern contraceptives and safe abortion

¹³⁶ *Timeline*, *supra* note 129.

¹³⁷ *Ireland's Abortion Referendum Result in Five Charts*, THE IRISH TIMES (May 26, 2018), <https://www.irishtimes.com/news/social-affairs/ireland-s-abortion-referendum-result-in-five-charts-1.3509845>.

¹³⁸ Ailbhe Conneely, *Eighth Amendment Repealed After Bill Signed into Law*, RADIO TEILIFIS EIREANN (Sept. 18, 2018), <https://www.rte.ie/news/ireland/2018/0918/994438-cabinet/>; <https://data.oireachtas.ie/ie/oireachtas/act/2018/C36/mul/enacted/36th-amdt-of-the-constitution-act-2018.pdf>.

¹³⁹ *How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign*, N.Y. TIMES (May 27, 2018) <https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html>

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services,”¹⁴⁰ and another in Peru, in which the Committee held in favor of a woman who “became pregnant at the age 13 and attempted suicide... by jumping from a building.”¹⁴¹ Still, cases regarding abortion and reproductive rights seem to not be brought before the Convention’s Committee. The reason for that is not clear, but that seems to be the general trend. Is there a way that this could be changed? What would cause more individuals and organizations to bring their cases regarding equality and promoting reproductive rights and access to abortion to before the Convention’s Committee?

It is obvious that based on what occurred in Ireland, despite the CEDAW committee’s holdings in their reports that Ireland’s laws were in violation of the Convention and needed to be changed, it wasn’t the Committee’s holdings that solely led to the repeal of Ireland’s strict Eighth Amendment. What would make countries take these Committee reports more seriously? There isn’t a clear solution to this question.

VI. ABORTION IN THE UNITED STATES

Compare Ireland’s recent vote to legalize abortion and repeal their Eighth Amendment to what is available to women in the United States, one of the few countries that *has not* ratified the Convention on the Elimination of all Forms of Discrimination Against Women but a country that claims to be a defender and promoter of women’s rights.

Abortion was legalized in the United States in 1973 when the Supreme Court held 5-4 in *Roe v. Wade*¹⁴² that a woman’s right to privacy extended to medical issues, including abortions.¹⁴³ In the case, Roe sought to challenge a Texas law which prohibited abortion except

¹⁴⁰ Center for Reproductive Rights, *CEDAW Committee holds India Accountable for Failure to Prevent and Prosecute Cases of Child Marriage, and Ensure Access to Reproductive Health Services*, reproductiverights.org (2014), <https://www.reproductiverights.org/feature/cedaw-committee-holds-india-accountable-for-failure-to-prevent-and-prosecute-cases-of-child->

¹⁴¹ Comm. on the Elimination of Discrimination Against Women, Views adopted by the Committee on its fiftieth session, 3 – 21 Oct. 2011, CEDAW/c/50/D/22/2009 (Nov. 4, 2011).

¹⁴² *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴³ Meghan Keneally, *Where US abortion laws stand 45 years after Roe v. Wade*, ABC NEWS (Jan. 22, 2018), <https://abcnews.go.com/US/us-abortion-laws-stand-45-years-roe-wade/story?id=52462955>.

where a doctor made an order to save the woman's life.¹⁴⁴ Ultimately, the Supreme Court explained that the Due Process Clause of the Fourteenth Amendment contains a "fundamental 'right to privacy' that protects a pregnant woman's choice whether to have an abortion. . . . A state law that broadly prohibits abortion without respect to the stage of pregnancy or other interests violates that right [to choose to have an abortion]."¹⁴⁵ Despite this holding however, over the years states have passed their own laws that have severely restricted a woman's right to abortion, including "401 state-level abortion restrictions enacted from 2011 through 2017."¹⁴⁶ 42 states require the abortion to be performed by a licensed physician.¹⁴⁷ Further restrictions in other states include requiring the abortion to be performed in a hospital after a specified point in the pregnancy and requiring a second physician after a certain point in the pregnancy.¹⁴⁸ 43 states prohibit abortions unless necessary to protect the woman's life or health, after a certain point in the pregnancy.¹⁴⁹ South Dakota completely defies federal law and limits state funding for "medically necessary abortions" to cases of life endangerment only.¹⁵⁰ There are 45 states that permit individual health care providers to refuse participation in abortions, 18 states have mandated counseling before an abortion which will discuss the following topics: "the purported link between abortion and breast cancer (5 states), the ability of a fetus to feel pain (13 states), or long-term mental health consequences for the women (8 states)."¹⁵¹ Additionally, there are certain mandated "waiting periods" between counselling and the

¹⁴⁴ *Roe*, 410 U.S. at 120.

¹⁴⁵ *Id.* The court laid out a trimester framework. During the first trimester, the state cannot regulate a woman's choice to get an abortion. "In the second trimester, the state may impose regulations on abortion that are reasonably related to maternal health. In the third trimester, once the fetus reaches the point of 'viability,' a state may regulate abortions or prohibit them entirely, so long as the laws contain exceptions for cases when abortion is necessary to save the life or health of the mother."

¹⁴⁶ Keneally, *supra* note 143.

¹⁴⁷ *An Overview of Abortion Laws*, GUTTMACHER INSTITUTE (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

procedure, and in certain states there is a requirement that women make separate trips between the counselling and the operation.¹⁵²

The above restrictions exist in a country where abortion is theoretically legal. Would the United States' ratification of the Convention on the Elimination of All Forms of Discrimination Against Women change these restrictions within states? Organizations in favor of the ratification of the Convention explain

formally embracing the internationally accepted minimum standards pertaining to women's human rights would send a powerful message to the rest of the world that the U.S. stands behind its commitment to providing equal opportunities for all- a commitment that is part of our Constitution and laws... Participation in the CEDAW process would also create an opportunity for the U.S. to benefit from open dialogue and the exchange of ideas about ways that we could continue to enhance women's equality at home.¹⁵³

In 2005, Amnesty International released a "Fact Sheet on CEDAW" which offered recommendations and reasons why the United States' Senate should ratify CEDAW, specifically citing myths about the Convention that those against its ratification have argued.¹⁵⁴ Notably, one of these arguments against the ratification of the Convention is that the Convention supports abortion. Abortion is highly politicized around the world, and this is no different in the United States. Those individuals against ratification and who see CEDAW as requiring abortion insist that ratifying the Convention would show to the world that the United States fully supports abortion. However, the U.S. State Department has stated that the Convention is "abortion neutral,"¹⁵⁵ meaning it neither approves nor disproves of abortion. Does this help in answering the question of whether the ratification of the Convention would make abortion more accessible for women, as it should be?

¹⁵² *Id.*

¹⁵³ Lenora M. Lapidus & Vania Leveille, *Ratify CEDAW, Because Women's Rights are Human Rights*, ACLU (Nov. 17, 2010), <https://www.aclu.org/blog/ratify-cedaw-because-womens-rights-are-human-rights>.

¹⁵⁴ *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY INTERNATIONAL (Aug. 25, 2005), https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf.

¹⁵⁵ *Id.*

Countries like Ireland (pre-Eighth Amendment vote in 2018), Burkina Faso, and Rwanda (until 2012), all ratified the Convention and continued to maintain that abortion be illegal.¹⁵⁶ Based off of this information, there isn't much optimism that ratifying the Convention really has any impact on abortion rights around the world. However, that doesn't mean that the United States shouldn't ratify the Convention—this bill of rights for women—especially as a country which claims to defend and protect women's rights.

VII. CONCLUSION

Over the past several decades, even centuries, countries around the world have made improvements with regard to women's rights. One of the most hotly contested rights is a woman's right to abortion—a right which should be considered basic, but which has become extremely politicized. In 2018, Ireland, a traditionally Catholic country, voted to repeal their Eighth Amendment, one of the strictest anti-abortion laws in the world, and officially legalized a woman's right to abortion. Ireland happens to also be a party to the Convention on the Elimination of All Forms of Discrimination Against Women—a treaty passed to protect and promote women's rights around the world.

No one will ever fully be able to determine what impact, if any, the Convention had on Ireland's awesome vote to legalize abortion, but it is known as a fact that this movement would not have occurred without support and encouragement from major international human rights bodies and organizations. The many cases that were cited did not bring claims to the Committee to the Convention, but instead brought their claims to human rights courts. The Committee's 2017 report indicated serious issues it had in regard to Ireland's Eighth Amendment, concern they also maintained in their 2005 report on Ireland. Perhaps this shows that Ireland did not really consider CEDAW's opinion in regard to its abortion laws. That begs an un-addressed question: how are countries with strict abortion laws able to escape the obligations they've made through international treaties?

The United States can, and should, learn from Ireland that having access to abortion, and reproductive rights more generally, are rights that aren't worthy of the strict state-wide restrictions that have been

¹⁵⁶ *Id.* at 2; see also *Abortion in Rwanda*, GUTTMACHER INSTITUTE (Apr. 2013), <https://www.guttmacher.org/fact-sheet/abortion-rwanda>.

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placed on them since the federal legalization of abortion via *Roe v. Wade*¹⁵⁷ in 1973.

As for CEDAW, despite the United States' failure to join the Convention, there have been many cities throughout the country that have adopted forms of CEDAW in their city legislation.¹⁵⁸ According to a study conducted by the Washington Post, cities that have adopted CEDAW ordinances have advanced equality amongst men and women. Although local ordinances don't have as strong an impact as federal implementation would have, it is a substantial start in the right direction.¹⁵⁹ While an entire other article can be dedicated to analyzing whether there are more liberal abortion laws in the cities with CEDAW ordinances, results of the studies have shown that gender equality in those cities is improving.¹⁶⁰ Perhaps this city approach is more feasible than appealing to the federal government, and often these city and county resolutions are the first step towards binding legislation throughout the country which may ultimately enhance women's rights and aid in access to abortion.

¹⁵⁷ *Roe*, 410 U.S. 113.

¹⁵⁸ Heidi Nichols Haddad, *The U.S. Hasn't Signed the World's Foremost Women's Rights Treaty. Activists Have Gotten Local Versions Passed Instead*, WASH. POST (Mar. 8, 2020), <https://www.washingtonpost.com/politics/2020/03/08/us-hasnt-signed-worlds-foremost-womens-rights-treaty-activists-have-gotten-local-versions-passed-instead/>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*