

The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience

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A. Introduction

The issue of abortion in Ireland has generated a great deal of passion, anxiety and confusion over the last two decades. In that time, the Irish people have been asked to vote in five different referenda in which change to Ireland's abortion laws was proposed. On the latest occasion, 6 March 2002, a proposal to completely reform the law on abortion by, for example, removing the threat of a mother's suicide as valid grounds for an abortion, was defeated by a slim majority. While to outsiders, this demonstrates a trend towards a more liberal, pro-abortion attitude in Ireland, a closer examination reveals that the result raises more questions than it resolves, and may in actual fact generate greater doubt and confusion as to the status of – and the support for – abortion in Ireland.

This article provides an explanation of this latest referendum on abortion in Ireland. The article begins with a discussion of the history of abortion law in Ireland up to the time of the referendum, followed by an explanation of the proposed *Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill 2001* which voters were asked to approve or reject in the referendum, and an outline of the referendum result. The article then analyzes the reasons for the referendum result, and looks at the implications of the result, from both a legal and socio-political perspective.

B. History of Abortion Law in Ireland

Up until 1967,¹ under English common law abortion was a misdemeanour. As

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¹ In 1967, Great Britain passed the Abortion Act, which allowed for abortions in certain circumstances: see N. Klashtorney, 'Ireland's Abortion Law: An Abuse of International Law' in (1996) 10 *Temple International and Comparative Law Journal* 419 at 422.

historically English law was also the law of Ireland due to Great Britain's dominance of the Irish Parliament until the creation of the Irish Free State in 1921, this meant that abortion was also a misdemeanour in Ireland. In 1861, the Irish Parliament passed the *Offences Against the Person Act 1861*, in which section 58² and section 59³ made the act of performing or undergoing an abortion a felony, punishable by between three years and life imprisonment. The offence created by this Act was termed 'procuring a miscarriage' rather than 'abortion', and there was no separate definition of what constituted an abortion. These sections in the Act remain intact today, despite the fact that no one has been charged with a criminal offence under these sections since the 1950s.⁴

While Ireland had a very conservative abortion policy at this time, a number of events in the 1960s and 1970s raised concerns within the anti-abortion movement. The main event that triggered this concern was the 1967 enactment of the *Abortion Act* in Great Britain. The *Abortion Act* legalized abortions performed during the first trimester if the pregnancy would be harmful to the physical or mental health of the woman or her family. The Act also legalized abortions performed in the second trimester if the foetus was severely handicapped. Then in 1973, Ireland joined the European Economic Community ('Community'). Conservative groups in Ireland saw this as a further threat to Ireland's restrictive abortion regime, by bringing Ireland closer socially and culturally to its European neighbours – most of whom had much more liberal abortion regimes. As a condition of becoming a Community member, Ireland was required to diminish part of its sovereignty by amending the Constitution to state that its own laws would be subordinate to Community law. Ireland also had to relinquish the right to interfere with the freedom of movement of services, people, capital and goods between Member States pursuant to the Treaty of Rome – a fundamental part of Community law.

Anti-abortion advocates were afraid that liberal abortion laws in Great Britain, combined with the right to freedom of movement between Member States protected under Community law, would allow Irish women to travel to Great Britain or other

² S. 58 provides: '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 whomsoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to 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.'

³ S. 59 provides: 'Whomsoever 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 not be with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude.'

⁴ Referendum Commission of Ireland, 'Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill 2001 – Explanatory Booklet', 2002, at 3.

Member States in order to obtain an abortion. Anti-abortion advocates were also concerned that liberalization of abortion laws within other Member States would result in a more liberal abortion policy being adopted in Ireland. This led to an intensified campaign by conservatives for an amendment to the Irish Constitution to guarantee a right to life for the unborn, which resulted in the 1983 referendum – the first of five referenda on abortion in Ireland.

The 1983 referendum resulted in a two-thirds majority of those that voted approving the Eighth Amendment to the Constitution of Ireland. The Eighth Amendment inserted a new article 40.3.3 into the Constitution, providing that:

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

The main reason why the right to life of the unborn was incorporated into the Irish Constitution as an amendment to Article 40 was that, apart from the fact that constitutional provisions are entrenched and can be changed only by being approved by a majority of Irish voters who participate in a referendum,⁵ the amendment was seen as a method of ensuring that the rights of the unborn were not jeopardized by the Irish judiciary. The Irish judiciary was becoming more liberalized in its interpretation of the fundamental rights section of the Irish Constitution, in particular Article 40 which deals with personal rights.⁶ For example, in the case of *Ryan v. Attorney General*,⁷ the Irish High Court held that Article 40 provides for a general right to bodily integrity, a decision which alarmed conservatives due to the potential implication that abortion could be considered to be exercising one's right to bodily integrity. An express provision confirming the right to life of the unborn was considered the most effective way to address this uncertainty.

Another reason why an amendment to Article 40 was seen as an appropriate mechanism to constitutionally entrench the rights of the unborn was because of the historical connection between Catholic social teaching and the Constitution's articles on fundamental rights. The articles on fundamental rights (Arts 40 to 44),⁸ in addition to the preamble to Ireland's Constitution, are considered to be a reflection of the importance of God and the tenets of Catholicism in Irish society. Article 40.3.3 was supported by the Catholic Church in Ireland and the Vatican, given the strong position against abortion adhered to by the Church. The anti-abortion movement also won another victory when in 1991 the Irish Government negotiated a Protocol to the Maastricht Treaty of the European Union specifying that its strict

⁵ In accordance with Arts. 46 and 47 of the Irish Constitution.

⁶ See Klashtorny, *supra* note 1 at 423.

⁷ [1965] I.R. 294.

⁸ Art. 40 deals with personal rights, Art. 41 deals with rights in relation to the family, Art. 42 deals with rights in relation to education, Art. 43 deals with private property rights and Art. 44 outlines one's rights in relation to religion.

abortion laws would not be affected. This addressed the movement's concerns that a stronger relationship between Ireland and its European neighbours would inevitably result in more liberal abortion laws in Ireland.

The force of change appeared to be clearly favouring the anti-abortion movement. In 1992, however, an event occurred that opened the abortion debate afresh. In the matter of *The Attorney-General v. X*,⁹ an injunction was granted to the Attorney-General of Ireland preventing a 14-year-old girl from procuring an abortion. The girl had become pregnant as a result of being raped by the father of her best friend. Deciding that the best outcome for the girl would be an abortion, her parents took her to England in order to have the pregnancy terminated. Before doing so, they notified a member of the Irish police force (the Gardai) in case the aborted foetal tissue was needed for DNA testing in the prosecution of the alleged rapist. The Gardai notified the Attorney-General of the impending abortion. The Attorney-General immediately sought an *ex parte* injunction from the High Court ordering the girl to return to Ireland, and remain there for the remainder of the pregnancy.

The decision of the Irish High Court to grant the injunction was based on an interpretation of Article 40.3.3 of the Constitution.¹⁰ In considering that Article 40.3.3 seeks to evenly balance the rights of the unborn child and the mother, the High Court determined that a decision other than to grant the injunction would undermine the rights of the unborn given that the risk that the girl might have committed suicide if the injunction was granted was far lower than the certainty that the unborn child's life would be terminated if the order was not made.

The decision of the Irish High Court intensified the abortion debate in Ireland, and generated worldwide protests. A poll taken shortly after the decision showed that approximately two-thirds of those surveyed supported changing Article 40.3.3 to make abortion more freely available to Irish women. Inevitably, the High Court's decision was immediately appealed to the Irish Supreme Court.

Two weeks after the High Court decision, the Supreme Court – by a 3:2 majority – upheld the appeal and ordered that the injunction be lifted. In arriving at this

⁹ [1992] 1 IR 1. The judgment is available on-line at: < <http://www.bailii.org/ie/cases/IESC/1992/1.html> >.

¹⁰ The order of the High Court was in the following terms:

IT IS ORDERED

(a) that the defendants their servants or agents or anyone having knowledge of the order be restrained from interfering with the right to life of the unborn as contained in Article 40, s. 3, subs. 3 of the Constitution of Ireland;

(b) that the first defendant be restrained from leaving the jurisdiction of this honourable Court or the second and third named defendants their servants or agents or anyone having knowledge of the said order from assisting the first defendant to leave the aforesaid jurisdiction for a period of nine months from the date hereof;

(c) that the first defendant her servants or agents or anyone having knowledge of the said order be restrained from procuring or arranging a termination of pregnancy or abortion either within or without the jurisdiction of the Honourable Court: reproduced in *Attorney-General v. X* [1992] 1 IR 1, at para [7].

decision, the Supreme Court developed a rather vague principle, known as the 'real and substantial risk' test. According to the Supreme Court, in order to balance the rights of the unborn child and the mother as required by Article 40.3.3 of the Irish Constitution, an abortion will only be lawful when it is established that there is a real and substantial risk to the life, as distinct from the health, of the mother, and this real and substantial risk can only be averted through an abortion. Even then, however, Irish women were still required to travel abroad for an abortion, as no abortion is lawful in Ireland.¹¹ The Supreme Court concluded that it was an accepted fact that the girl had threatened to commit suicide if she had to carry the child to full term, and this constituted a real and substantial risk to her life. According to Finlay CJ: '... if it can be established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is possible.'¹²

Accordingly, a lifting of the injunction was ordered and the girl was entitled to proceed with the termination of the pregnancy. The Court confirmed, however, that a woman could still be prevented from travelling abroad to have an abortion if there was no real and substantial risk to her life, as the right to life of the unborn takes precedence over the mother's right to travel.¹³

The decision of the Irish Supreme Court in the X case was unsatisfactory to the various protagonists in the abortion debate. Anti-abortion advocates campaigned for an amendment to the Irish Constitution stating that the threat of suicide does not constitute a real and substantial risk to life, thus limiting the effect of the X case. Conversely, pro-abortion advocates sought the insertion of a constitutional provision guaranteeing the right of an Irish woman to obtain information about overseas abortion services, and to travel abroad for an abortion.¹⁴

In November 1992 the government, led by Albert Reynolds, put forward another abortion referendum in Ireland. The Irish people were asked to approve or reject three separate proposed changes to Article 40.3.3 of the Irish Constitution. These were to safeguard a mother's right to travel abroad to obtain an abortion, to safeguard the right to obtain or make available information relating to abortion services available overseas, and to limit the effect of the Supreme Court's decision in

¹¹ Klashtorny, *supra* note at 419.

¹² *Attorney General v. X* [1992] 1 IR 1, at para. 21, per Finlay CJ.

¹³ *Ibid.* at para. 53: 'Notwithstanding the very fundamental nature of the right to travel and its particular importance in relation to the characteristics of a free society, I would be forced to conclude that if there were a stark conflict between the right of a mother of an unborn child to travel and the right to life of the unborn child, the right to life would necessarily have to take precedence over the right to travel. I therefore conclude that the submission made that the mother of the unborn child had an absolute right to travel which could not be qualified or restricted, even by the vindication or defence of the right to life of the unborn, is not a valid or sustainable submission in law.'

¹⁴ See D. Cole, "'Going to England": Irish Abortion Law and the European Community' in (1993) 17 *Hastings International and Comparative Law Review* 113 at 131.

the X case. The Supreme Court's decision was to be limited by stating in the Constitution that it shall be lawful to obtain an abortion if continuing with the pregnancy would pose a real and substantial risk to the life of the mother, but that this did not extend to threats of suicide. While referenda relating to the right to travel and to obtain information were passed, the proposal to limit the effect of the X decision was defeated. Following the 1992 referendum, Article 40.3.3 of the Constitution then read:

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

This subsection shall not limit the freedom to travel between the State and another state.

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.

Although the attempt to overrule the decision in the X case was defeated, the finding in that case was so unsatisfactory to the Irish government that it was clear that further attempts would be made to reverse the decision. The main concern was that the Supreme Court's decision would cause many Irish women to falsely threaten suicide in order to gain an abortion.¹⁵ Following the High Court's confirmation in November 1997 of the principles established in the X case,¹⁶ the Irish Government established the Inter-Departmental Working Group on Abortion. The Group's task was to devise a set of options for dealing with the X case. In September 1999, a Green Paper on Abortion was released on behalf of the Government, which set out and discussed seven different options:

- i. an absolute constitutional ban on abortion;
- ii. an amendment of the constitutional provisions so as to restrict the application of the X case;
- iii. the retention of the status quo;
- iv. the retention of the constitutional status quo with legislative restatement of the prohibition on abortion;
- v. legislation to regulate abortion in circumstances defined in the X case;
- vi. a reversion to the pre-1983 position;
- vii. permitting abortion on grounds beyond those specified in the X case.¹⁷

¹⁵ CNN.com, 'Abortion referendum divides Irish', 7 March 2002, available on-line at: <<http://www.cnn.com/2002/WORLD/europe/03/04/irish.abortion/index.html>> .

¹⁶ See the decision by the Irish High Court in *A and B v. Eastern Health Board* [1997] IEHC 176 (28 November 1997).

¹⁷ The All-Party Oireachtas Committee on the Constitution Report, 1999, 12. This report is available on-line at: <<http://www.irlgov.ie/taoiseach/publication/abortion/fifth.htm>> .

In October 2001, the Irish President, Bertie Ahern, announced that he would implement option ii). The President said that a referendum would be held in March 2002 in which voters would be asked to support a constitutionally-entrenched Act that would allow for an abortion where there was a real and substantial risk to the life of the woman, other than by threat of suicide. In February 2002, the *Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill 2001* was introduced. At the referendum, voters were to be asked a simple question:

Do you approve of the proposal to amend the Constitution in the undermentioned Bill?

Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001.

Although the essential purpose of the Bill was to legislate to limit the effect of the X case in relation to suicide, the proposed provisions of the Bill clouded the issue, and as result generated a significant amount of confusion in the period leading up to the referendum.

C. Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill 2001

At the 6 March 2002 referendum, the Irish people were asked whether they wanted the existing criminal law on abortion to be replaced by the *Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill 2001*. If a majority voted in support of this Bill, then two new subsections (proposed subsections 40.3.4 and 40.3.5) would have been added to the Constitution immediately after the existing subsection 40.3.3, which provides for the equal rights of the unborn child and the mother.

Proposed subsection 40.3.4 stated: 'In particular, the life of the unborn in the womb shall be protected in accordance with the provisions of the Protection of Human Life in Pregnancy Act 2002'. Proposed subsection 40.3.5 in effect stated that the amendment procedures in Articles 46¹⁸ and 47¹⁹ of the Irish Constitution shall

¹⁸ Article 46 provides:

'1. Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.

2. Every proposal for an amendment of this Constitution shall be initiated in Dail Eireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.'

¹⁹ Article 47 provides:

'1. Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so

apply to any Bill proposing to amend the Protection of Human Life in Pregnancy Act 2002 (if enacted). This meant that the words of the Act itself would not be added to the Constitution, but they would have the same status as constitutional provisions, as the Act could only be changed if a majority of Irish voters agreed to the change in a future referendum.²⁰

The Bill was intended to provide a complete statement of the law on abortion in Ireland. The Bill provided for a law on abortion that would replace the existing criminal law, and to introduce a new definition of abortion. The law contained in the Bill would, if enacted, reflect the common law test in the X case – though remove the threat of suicide as justifiable grounds for an abortion.

Clause 2(1) of the Bill proposed to introduce a prohibition on abortion. Pursuant to Clause 2(3), a person who contravened or attempted to do so, or aided, abetted or procured any other person to do so would be guilty of an offence and liable to imprisonment for a term not exceeding 12 years, or a fine or both. Accordingly, through Clause 6, sections 58 and 59 of the *Offences Against the Person Act* would be repealed.

Subclauses 1(1) and (2) were extremely important. Subclause 1(1) provided a modern, clear definition of abortion, stating that ‘abortion’ means the intentional destruction by any means of unborn human life after implantation in the womb of a woman. The fact that the abortion was defined to apply from the moment of implantation rather than conception was interesting given that the conservative view is generally that life begins at the time of conception, and the government’s Working Group on Abortion had received numerous submissions stressing this very point.²¹ The main reason for this definition was that the government wanted to ensure that the morning-after pill (and similar devices) would have legal protection.²² While it was clear that using the morning-after pill would not constitute abortion, and

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submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.

2. Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall be held to have been vetoed by the people if a majority of the votes cast at such Referendum shall have been cast against its enactment into law and if the votes so cast against its enactment into law shall have amounted to not less than thirty-three and one-third per cent. of the voters on the register.

3. Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall for the purposes of Article 27 hereof be held to have been approved by the people unless vetoed by them in accordance with the provisions of the foregoing sub-section of this section.

4. Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at a Referendum.

5. Subject as aforesaid, the Referendum shall be regulated by law.’

²⁰ See Referendum Commission of Ireland, *supra* note at 3.

²¹ See The All-Party Oireachtas Committee on the Constitution Report, *supra* note at 13.

²² See ‘Chronology of the Abortion Debate in Ireland’, *The Irish Times*, 8 March 2002, available on-line at <<http://www.ireland.com/focus/abortion/issues/chronology.htm>> .

therefore would not be an offence under the proposed Act, the constitutional status of such devices has been, and would continue to be, unclear, as it is difficult to say whether use of these devices unfairly favours the rights of the mother to bodily integrity over the rights of the unborn – contrary to Article 40.3.3.²³

Subclause 1(2) sought to limit the effect of the X case, stating that abortion does not include ‘the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman’s life *other than by self-destruction*’. Subclause 1(3) defined a ‘reasonable opinion’ as a reasonable opinion formed in ‘good faith which has regard to the need to preserve unborn human life where practicable and of which a written record has been made and signed by the practitioner’. Clause 3 was designed to provide clarification to Clause 1 by protecting conscientious objectors, stating that there would be no obligation on anyone to carry out or assist in carrying out a procedure which may result in the death of a child – even if it is considered necessary to save the life of a mother.

The Bill also protected the freedom to travel abroad for an abortion, and the right to obtain information about overseas abortion services, in accordance with existing provisions under Article 40.3.3 of the Irish Constitution. This was contained in Clause 4 of the Bill.

While the Irish government made an effort to sell the measures contained in the Bill, the consensus was that it failed to explain clearly to the people why they should support its referendum proposal. Many voters did not have a full understanding as to what a ‘Yes’ or ‘No’ vote would actually mean. This was because of the nature of the referendum, which was to ask the people to approve a Bill which contained a number of different measures – some were rather liberal, while others were quite conservative. For example, a large percentage of anti-abortion advocates were unsure whether they should vote ‘Yes’ to the Bill because, although the Bill proposed to remove the threat of suicide as grounds for an abortion, there were concerns that the Bill did not protect the rights of a pre-implantation embryo by defining abortion as applying from the moment of implantation in the womb rather than the moment of conception.²⁴ Such complexity and inflexibility deterred many Irish people from participating in the referendum.

²³ It is submitted that the most likely judicial view would be that use of the morning-after pill and similar devices would offend Article 40.3.3 of the Irish Constitution. This is because of the statement by Geoghegan J of the Irish High Court in *A. and B. v. East Health Board* [1997] I IEHC 176, at para. 24 that Art. 40.3.3 ‘quite clearly not merely prohibits abortion but gives a positive right to life to the unborn, subject only to the exception where the mother’s life is endangered’. Applying this test, use of the morning-after pill would be illegal unless it could be demonstrated that the mother’s life is endangered.

²⁴ See B. O’Brien, ‘Message from the people still far from clear’, *The Irish Times*, 11 March 2002, available on-line at: <<http://www.ireland.com/newspaper/opinion/2002/0309/595551526OP09BREDA.html>> .

According to statistics supplied by Referendum Ireland, only 42.89 per cent of the nearly three million registered voters in Ireland participated in the referendum. The referendum was defeated by an incredibly slim majority – 50.42 per cent (or 629,041 voters) voted against the proposed Bill, while 49.58 per cent (or 618, 485 voters) voted in support of the proposed Bill. Turnout was the heaviest in urban areas with young, wealthy voters than in rural areas where support for the Government's proposals was said to be the strongest.²⁵ Irish President Bertie Ahern, a passionate anti-abortion advocate, professed disappointment at the result, but urged that the view of the Irish people be respected.²⁶

D. Reasons for the Defeat of the Referendum

A number of reasons have been given for the defeat of the latest abortion referendum in Ireland. These ranged from bad weather to fundamental changes in the psyche of Irish society. Below are some of the main reasons which the authors believe contributed to the outcome on 6 March 2002:

- Split within the anti-abortion movement. Given the very tight referendum result, if there had been unanimous support within the anti-abortion movement for the measures contained in the proposed Bill, the referendum would clearly have passed. As was explained above, many anti-abortion advocates decided to reject the Bill given that 'abortion' was defined to mean the intentional destruction of an unborn human life after implantation in the womb of a woman, rather than applying from the moment of conception. Many felt that this definition did not go far enough, and would not protect the rights of pre-implantation embryos, and thus felt compelled to vote 'No'.²⁷ Therefore, far from vindicating the position of pro-abortion campaigners, this latest referendum may in fact demonstrate that there remains an anti-abortion majority in Ireland – despite the Irish people having twice rejected any narrowing of the decision in the X case.²⁸
- Low voter turnout. The fact that only 42.89 per cent of registered voters participated in the referendum was a major factor behind the referendum's defeat. The outcome demonstrated not only the extent of the 'urban-rural'

²⁵ S. Pogatchnik, 'Abortion Amendment Defeated in Ireland', *The Washington Post*, 7 March 2002, available on-line at: <<http://www.washingtonpost.com/wp-dyn/articles/A54626-2002Mar7.html>> .

²⁶ A. Gerlin, 'Irish voters reject effort to strengthen abortion law', *The Philadelphia Inquirer*, 7 March 2002, available on-line at: <http://www.unison.ie/irish-independent/stories.php3?ca+9&si=709197&issue_id=7026> .

²⁷ Pogatchnik, *supra* note 25.

²⁸ O'Brien, *supra* note 24.

divide in Ireland, but also the apathy rural voters had towards the referendum. Voter turnout was highest in largely populated areas occupied predominantly by young, middle and upper income-earning groups that were generally against the government's proposal to limit the effect of the X case.²⁹ For example, in Dublin City, approximately 61 per cent of those who participated in the referendum voted 'No'.³⁰

- Confusion about the proposal. There was a feeling of confusion and misunderstanding amongst the Irish people as to how the Protection of Human Life in Pregnancy Bill 2001 would, if enacted, actually change the law of abortion in Ireland. It was generally known that a 'Yes' vote would remove the threat of suicide as grounds for an abortion, but people were confused as to the circumstances in which abortion would or would not be allowed. The main point of uncertainty was whether abortion would be allowed in the event of rape or incest of a woman who subsequently became pregnant, or in the case of a diagnosis of foetal abnormalities.³¹

E. Implications of the Referendum Result

The defeat of the referendum proposal on 6 March 2002 means that the test established by the Irish Supreme Court in the X case, and clarified in subsequent cases, continues to state the constitutional position of abortion in Ireland. Some of the main implications of this outcome are as follows:

- Legislative action required. As the test established in the X case was based on an interpretation of Article 40.3.3 of the Irish Constitution, the Irish Parliament cannot enact legislation that is inconsistent with this decision. This means that, to be constitutionally valid, any legislation passed with respect to abortion cannot remove the threat of suicide as justifiable grounds for an abortion. Following the referendum result, both sides of the debate agreed that legislation would be needed to clarify the existing state of the law on abortion, rather than leaving the issue to the Irish people through referenda or the judiciary.³² On this point, the Sunday Independent editorialized:

²⁹ C. Glennon, 'Backlash for Bertie', *Irish Independent*, 8 March 2002, available on-line at: <<http://www.unison.ie/irish-independent/stories.php3?ca=9&si=709197&issue-id=7026>>.

³⁰ CNN.com, 'Irish reject abortion change', March 7 2002, available on-line at: <<http://www.cnn.com/2002/WORLD/europe/03/07/ireland.result/index.html>>.

³¹ Editorial, 'Legislators must be responsible', *Sunday Independent*, 11 March 2002, available on-line at: <http://www.unison.ie/irish-independent/stories.php3?ca=36&si=709916&issue_id=7033>.

³² See Editorial, 'Legislators must be responsible', *Sunday Independent*, 10 March 2002.

Irish democracy is both a representative and a direct democracy. We elect Dail [lower house] deputies to act as national legislators, and then on occasion the people either give or withhold their consent to any proposed changes in our fundamental law, the Constitution. And they do so via national referendum. [...] It is also important to strike the right balance between the respective roles and responsibilities of both. On the issue of abortion, the legislators have passed too much responsibility either to the people, or the courts, and have assumed too little for themselves. It is time the balance was restored and the buck stopped where it belongs, with the Oireachtas [Parliament].³³

As there is now pressure on the Irish government from pro-abortion campaigners to introduce legislation to reflect the position in X, it will be telling to see what reform follows from the fifth referendum: A sixth referendum on the issue or comprehensive abortion legislation. Both present problems. Given the low turnout of voters in the 2002 referendum, it is unlikely that the Irish people would welcome another. Legislation may be equally problematic. According to Gerard Hogan, an Irish law lecturer from Trinity College, it will be an extremely difficult task to draft legislation that will survive constitutional challenge and at the same time provide for some degree of consensus.³⁴

- *Diminished influence of the Catholic Church in Ireland.* One point that commentators have consistently made following the 6 March 2002 result is the blow dealt to the Catholic Church by the defeat of the referendum. The Irish Catholic Church had provided strong support for the government's referendum proposal.³⁵ During the referendum campaign, Ireland's 35 Roman Catholic bishops urged church members to support the proposal,³⁶ and circulated widely an explanatory pamphlet in support of the 'Yes' campaign. It was widely felt that the referendum would provide a litmus test of the influence still wielded by the Catholic Church in Ireland. The result raises questions about the actual influence of the Catholic Church in contemporary Irish society. In addition, the political wisdom of the Church hierarchy coming out in support of a politically partisan proposal is open to question. As Dr Colum Kelly wrote in the *Sunday Independent*:

They [the Irish Catholic bishops] are now revealed as a weak force in Irish society, having wasted their authority on a foolish proposal that was seen by most political commentators as an opportunistic attempt by

³³ Ibid. [authors' interpolations]

³⁴ O'Brien, *supra* note 24.

³⁵ See C. Kenny, 'No vote a real disaster for the Pope's yes men', *Sunday Independent*, 10 March 2002.

³⁶ Gerlin, *supra* note 26.

Bertie Ahern to wrong-foot the Opposition in advance of a General Election ...

- Perhaps most disturbing of all has been their willingness to adopt the government's definition of abortion. The bishops' readiness to do so will come back to haunt them, as future legislation is very likely to include that same definition of abortion as the destruction of the unborn from the moment of implantation and not of conception.³⁷
- *Stronger pro-abortion movement.* One interpretation of the latest referendum result is that it continues a trend towards greater support in Ireland for a more liberal abortion regime. The referendum result is the second time the Irish people have rejected a proposal to limit the effect of the X case, and the latest result is consistent with the 1992 referendum outcome, in which a majority of Irish voters supported introducing a right to travel and to obtain information under Article 40.3.3 of the Constitution. Anti-abortion advocates are arguing already that these results provide a mandate for the introduction of legislation which safeguards the principles established in X, and are also beginning to campaign for the removal of Article 40.3.3 so as to allow for abortion to be available on much wider grounds. Some commentators have accordingly expressed their scepticism about the integrity of the pro-abortion referendum campaign, suggesting that the campaign was not about protecting suicidal women, but rather about setting in place a path towards abortion on demand in Ireland.³⁸

F. Conclusion

The 6 March 2002 referendum has done little to address the uncertainty of the status of abortion in Ireland. Had the 'Yes' vote been carried, the effect would have been to remove the threat of suicide as a ground for abortion; define abortion as the intentional destruction of human life after implantation in the womb; allow for medical procedures which would have involved ending a pregnancy to save a woman's life; and introduce a sentence of up to 12 years for procuring or aiding in an abortion. The result as it stands means that the constitutional position on abortion is governed by the decision of the Supreme Court in the 1992 X case. Thus, a pregnant woman or girl who is suicidal is entitled to an abortion in Ireland, but without the enactment of relevant legislation, will have to travel outside Ireland for it.

Both anti-abortion and pro-abortion advocates suggest that the referendum result provides a mandate for their respective positions. In reality, however, opinion was

³⁷ Kelly, *supra* note 35.

³⁸ See O'Brien, *supra* note 24.

split almost exactly in half. Thus, neither side can claim a mandate. This lack of mandate must be read as dictating a need for caution and discretion, and a respect for opposing views. A government of whatever political hue must look very closely, and delve deeply into every detail and every possible course of action before they go on, as they must go on, to legislate with precision and openness. Defining with certainty the future circumstances in which an abortion in Ireland may be permitted will take courage and a conviction not hitherto shown.