

The implications of the abortion referendum in Ireland

Pierre Mallia

Abstract

This paper reviews the implications of the abortion referendum in Ireland along with the background that led to the referendum.

Review

This paper concerns the implications of the abortion referendum in Ireland, or rather, to be precise, a vote in favour of the Thirty-sixth Amendment of the Constitution of Ireland Bill 2018,¹ which was intended to repeal the Eight Amendment of the same constitution which guarantees the unborn child for the right to life unless the pregnancy is life threatening. The current Bill will (by an act of parliament) replace Article 40.3.3 of the Constitution which was added in 1983 and subsequently amended in 1992.²

One must immediately point out that the 1983 amendment made no reference to the philosophical doctrine of double effect whereby harm can be caused even if it is foreseen but is not intended and indirect. As we will see this has important consequences in a Catholic Hospital which was accused, rightly so, of a medical misadventure in Ireland causing the death of a woman who was 17 weeks pregnant, where the termination could have been done also on principle of double effect.

The death of Savita Halappanavar

Savita Halappanavar was 31 years old and 17 weeks pregnant. She died on 28th October 2012 after being admitted a week before when it was diagnosed that she would miscarry. She requested a termination at that stage; a request which was denied as she was not deemed to be in danger of losing her life. During the subsequent seven days she developed sepsis. By the time it was diagnosed and an attempt to treat with misoprostol was started, she had already delivered the baby but the ongoing sepsis caused a cardiac arrest later. Indeed the doctors were accused in the Coroner's Inquest that there was poor communication in the case, poor management, poor record keeping, and indeed a poor system which led to a failure to diagnose the sepsis early enough. This could have saved the patient's life.³

The death is said to have caused an arousal by the public and media which led to the 36th amendment of 2018. It is important therefore to understand why a law which allows the termination of pregnancy if the life of the woman is in danger can cause, even if other issues which were criticised by the coroner were correctly in place, doctors to hesitate and wait for complications like sepsis to develop. There is an interplay between understanding the law and indeed understanding moral issues, especially, in the case the hospital in Galway being a Catholic Hospital, a clear understanding of the principle of double effect which is enshrined in the magisterium of the Catholic Church and written clearly in the Church's Catechism available for the public, and supposedly within the realm of a medical curriculum. If a Law deliberately leaves something out, it is done with intention and therefore the principle of double effect is accepted under its aegis.

Clearly enough gynaecologists do not hesitate to remove ectopic pregnancies and a cancerous pregnant uterus which would involve the removal of the unborn child. This follows the doctrine of double effect, which has the following conditions:⁴

Pierre Mallia M.D., M.Phil., Ph.D.(Nijmegen),Dip. Ther.I.C.G.P.,C.Biol.,M.I.Biol.,F.R.C.G.P.(U.K.)
Bioethics Research Programme
University of Malta
Msida, Malta
pierre.mallia@um.edu.mt

1. That the action itself be good or at least neutral
2. The good effect is the intended outcome and not the bad (which is seen as indirect)
3. The good must not be brought about by a bad (or evil) effect
4. That there be a proportionately grave reason for permitting the evil.

So this raises the question, even if the doctors were correct in assuming that the life of the woman was in danger, whether such a case could have been more effectively (and efficiently) handled by invoking this principle. Clearly:

1. The diagnosis that the baby was going to be miscarried was made.
2. The request of the patient was ignored, or at least not considered in its possibility by thinking about double effect; something which ought to be in every doctor's duty.
3. Doctors took a risk by waiting for a 'natural' outcome.
4. It was clear that the death of the baby was foreseen and accepted.

At the end of life, when one gives morphine, it is clearly understood that even if this hastens death, once death is accepted as the outcome, this can be done. This specific case is even (for Catholics) listed in the Catechism (5) under *Ordinary Care*. When death is an outcome therefore, the comfort of the patient is not only paramount, but also seen as a 'charitable' thing to do. So why did the Irish doctors fail in this case? Clearly there can only be two reasons, the first being that abortion is a very contended and controversial issue in a Catholic Country, and secondly (as the HSE in Ireland recommend) there was a lack of training of health professionals about the law – which usually clouds, out of fear of breaking the law, the judgement of doctors.

Clearly the law would not allow termination unless there was an immediate physiological threat. It will also allow for termination if there is a risk of suicide. Such calls are not that easy to follow. Can one give the benefit of the doubt. It is clear however that the law uses the term 'physiological' and not 'pathological'. Following philosophy of law, these terms have a clear intention. One need not wait for a physiological condition to develop into a pathological one. There was in this case a clear physiological process of miscarrying (even

though this can clearly be defined as pathological). One notes that the termination was inevitable and that the request for an abortion was made after the patient had broken her waters. What was required was expediency.

Clearly, administering misoprostol early would have satisfied the principle of double effect:

1. The action would have been good (or at least indifferent) since the waters were already broken, the delivery had started, and the miscarriage process had been diagnosed.
2. The good effect was the intended outcome (it could never have been to kill a baby whose death was the inevitable outcome – as in the morally equivalent case of administering morphine at the end of life).
3. The good effect could not have been brought about by the evil effect, which was already in process.
4. There was clear proportionality.

Even if there can be doubt to the third condition, it would have only been a charitable thing to do to a mother whose baby is dying to hasten the process, once labour had started. Moreover avoiding risk falls under the *primum non nocere* doctrine which includes avoiding harm and injury⁴

One can tentatively conclude that either fear of the law or over-enthusiastic of the application of catholic-moral principles could have been the overall cause.

Implication for Ireland

One of the biggest questions is whether the abortion law in Ireland will be as liberal as that of Britain? In matter of fact abortion in the UK is illegal. There is however an abortion Act⁶ which allows termination of pregnancy up to 24 weeks' gestation if there is a serious health issue. The document needs to be signed by two doctors, although recently it was contended that this ought to be reduced to one, raising the question whether it will then be easier, but also an issue of trust. Health is a broader term than 'medical', as it includes not only the biological issues, but also psychosocial ones. Therefore someone who has three children and is a working mother in a difficult socio-economic situation will qualify for a termination. Moreover the abortion Act has an amendment which also allows for the termination of fetuses

with congenital anomalies.

That the law in the UK actually makes it illegal to have an abortion unless for health reasons, is clear from the fact the Society for the Protection of the Unborn Child (SPUC) had taken to court a drug company which produced the emergency contraceptive pill which was claimed to possibly also cause a miscarriage. The court decided in favour of the drug company as the term miscarriage implies that the woman is 'carrying' and that therefore implantation has occurred. Emergency contraception does not cause a miscarriage. Of course the term miscarried fell into the trap of philosophy of language as clearly the SPUC did not imply that. The British Episcopal Conference then made a statement on when emergency contraception can be used.

A second example of the illegality of abortion is the guideline of the Royal College of Obstetricians and Gynaecologists on laparoscopic removal of ectopic pregnancies.⁷ This method of removing the embryo in an ectopic pregnancy whilst preserving the tube has been seen in some circles as a 'direct' destruction of the embryo and therefore laparoscopic removal cannot satisfy the principle of double effect. The 'pound of flesh' is necessary. The guidelines will recommend laparoscopic removal only under certain circumstances, for example that only one tube is remaining.

Nevertheless the broad definition of 'health' and the termination of foetuses with congenital anomalies have given rise to quite a liberal law. There is clearly a danger for Ireland that this can be the case unless it restricts the law only to medical reasons, albeit not necessarily life threatening. This would bring about certain problems: which medical reasons is one to accept? Will gestational induced diabetes or hypertension count? If one cannot restrict oneself to medical, what constitutes a 'serious risk' to health has to be defined if Ireland is not to follow the UK. As pointed out, if the law deliberately fails to define this, it will have done so with an intention to leave it open to interpretation.

Moral issues

Clearly laws of abortion do not (or need not) question that an embryo is a human life. Whilst philosophical some say that one cannot see the deliberate killing of a two year old child and that of a fertilized egg as morally equivalent, others

(especially the more conservative) do. But no law has equated this, not even locally. In the local scenario the woman is given the benefit of the doubt that she may have been psychologically affected and the maximum sentence is three years (and not life) imprisonment. No other law makes this kind of exception.

Clearly abortion is more about women's rights. Often the term 'innocent child' is used. This is mostly rhetoric and cannot hold either philosophical or legal ground. Everyone is innocent until proved guilty in the eyes of the law. If a woman has to have a right to an abortion, clearly one would have to either over-ride the right to life of the woman over that of the foetus, or see the moral weight of a developing human as increasing over time. Theologically and for conservative philosophy this will not do. But many do see reason behind the greater gravity of killing an eight month from a two week gestation. The question then becomes *when does the moral value of the foetus outweigh the right of the woman to abort it*. This certainly would not be an easy question to answer and many countries have defined it arbitrarily and at different stages. Clearly the fact that all European countries except Malta are now in favour of abortion has its weight, if anything because it shows what 'reasonable society' (Defining 'reasonable' through the eyes of the law from 'reasonable person standard') has seen fit.

Local Implications

Can one see emergency contraception (EC) as having opened the window for abortion? Clearly this has been pointed out even in the Parliamentary Social Affairs Committee⁸ but probably not. Abortion is a much larger issue than emergency contraception. The latter was about preventing pregnancy and not about terminating it. The argument in fact centred around whether EC was abortifacient – some arguing that it was and others that it was not. The principle of not killing a baby was accepted. Of course political arguments are not only emotive but often deliberately deceptive. The true argument should have been, 'even if EC was possibly abortifacient, what are the chances that it will'. Here WHO rates of pregnancy could have helped to show that after 12 hours (hence morning after) the chances of a pregnancy are 0.5%. The question then would have been one of when this small chance outweighs any risk for an (unknown)

abortion.

The question of abortion can only come about with a government which has the confidence it will remain in place notwithstanding opposition. There is also no guarantee that all parliamentarians of each side will vote the same. Local women can easily have access to abortion, and if it is seen that this is a women's health issue, the EU may even intervene to have governments pay for abortions abroad (although up till now the European Court of Justice has upheld Member States' laws). Probably no one can oblige a woman to remain pregnant; one can only appeal to women to *think* about the child they are carrying. Conversely one ought to seriously consider terminations when the life of the woman is seriously in danger in order to avoid what can be a very complicated interpretation of the principle of double effect.

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