

Contesting the cruel treatment of abortion-seeking women

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Abstract: *This article draws on legal arguments made by civil society organisations to challenge the legal reasoning that apparently produced the decision in the Ms Y case in Ireland in August 2014. I show how legal standards of reasonableness and practicality ought to be interpreted in ways that are respectful of the patient's wishes and rights. The case concerned a decision by the Health Service Executive, the Irish public health authority, to refuse an abortion to a pregnant asylum seeker and rape survivor on the grounds that a caesarean section and early live delivery were practicable and reasonable alternatives justified by the need to protect fetal life. I argue that the abortion refusal may not have been a reasonable decision, as required by the terms of relevant legislation, for four different reasons. First, the alternative of a caesarean section and early live delivery was not likely to avert the risk of suicide, and in fact did not do so. Second, the consent to the caesarean section alternative may not have been a real consent in the legal sense if it was not voluntary. Third, an abortion refusal and forcible treatment fall below the norms of good medical practice as interpreted through a patient-centred perspective. Fourth, an abortion refusal that entails forms of cruel, inhumane and degrading treatment ought not to be a reasonable action under the legislation. © 2014 Reproductive Health Matters*

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When cases like that of Ms Y come to public attention, they provoke outrage and dismay as people respond to the effects of abortion restrictions on real women's lives.^{1,2} How could a health care system treat a distressed pregnant asylum-seeking rape survivor so badly? Why weren't her requests for help in accessing an abortion acted on more quickly and effectively? The story of Ms Y, like that of Savita Halappanavar, "Beatriz", Sarah Catt³⁻⁵ and many other women before them, draw people into the international struggle for reproductive rights. But they also remind us of the harsh effects of the legal gaze on individual women. As this issue of RHM reflects on the use of law, I want to consider how we might pull that gaze away from the scrutiny of individual women like Ms Y. How can we draw on civil society engagement with sexual and reproductive rights to redirect that gaze so that it lights up more respectful pathways for all abortion-seekers?

Ms Y had the full force of law brought to bear on her reproductive body as a caesarean section was performed on her at 25 weeks

gestation in spite of her request for an abortion.⁶⁻⁸ The denial of her request to control her reproductive life is problematic enough, but this response seems particularly cruel.⁹ How could a public responsibility to care become a licence to torment? Why have feminist advocates, activists and academics not been more successful in changing practice, policy and law? Irish society found itself asking these questions a year after the adoption of its first abortion legislation¹⁰ and almost two years after the death of Savita Halappanavar.^{11,12*} In this article I want to identify some of the problematic forms of legal thinking that have led the Irish state down this path and suggest alternative routes that might have been, and might yet be, taken. In doing so, I will draw on legal arguments that have been made across Irish civil society for

*The Health Information and Quality Authority found numerous failures, including 13 missed chances to save her life.¹¹

many years,^{13,14*} but do not yet seem to have permeated state thinking.^{15†}

As of the end of November 2014, we have no official record of what happened and are still reliant on journalistic accounts.¹⁶ The Health Service Executive has set up an inquiry to investigate the factual circumstances of this case, which was initially due to report by the end of September but has been delayed.^{17,18} There was a High Court hearing which gave an order permitting the forcible hydration of the pregnant woman, but it has not been officially reported.^{6,16} The Health Service Executive report should provide us with a fuller picture of the factual details that gave rise to this case, while protecting the anonymity of Ms Y. But it is worth noting that this process of investigation is likely to be found wanting as a form of inquiry into possible wrongdoing to patients.

The report itself has been limited to identifying the factual circumstances of Ms Y's treatment. There is to be no investigation of the clinical decisions themselves and no qualitative appraisal of the standard of care provided to Ms Y. A second problem concerns the process of producing the report. If inquiries into health care problems are to have legitimacy, they need to hear the evidence of those who appear to have been wronged. According to media accounts, the report was drafted and circulated to relevant agencies before Ms Y and her legal representatives were consulted.^{19,20**} As a result the Health Service Executive report into Ms Y's case

looks like it will adopt some of the poor reporting practices evident in other investigations into women's historical mistreatment.^{21–23} Given the limitations of the scope of this report, a number of civil society organisations have called for an independent inquiry along the lines of that conducted into the circumstances surrounding Savita Halappanavar's death.²⁴

The facts that seem to have given rise to this problematic decision to refuse an abortion appear to be the following. Ms Y found out that she was pregnant shortly after arriving into Ireland as an asylum seeker. She was staying in Ireland's much-critiqued system of "direct provision" for asylum seekers²⁵ when she discovered that she was about 8 weeks pregnant during a medical examination.^{16,18} Her pregnancy had resulted from rape in her home country, and she said that the pregnancy was very hard to bear. She was clearly distressed and made her wish to have an abortion known. Given her status as an asylum seeker, she would have been trying to find out about abortion while negotiating with various state and independent agencies on an income of €19 a week, with no knowledge of how things work in Ireland, with little in the way of a support network, and with no freedom of movement given her precarious migration status.^{26,27}

In the Republic of Ireland,^{28,29††} when women such as Ms Y are considering abortion they have three options. Like abortion-seeking women the world over, they solve their problem by travelling to another jurisdiction where abortion is more accessible.^{30,31} Irish women usually travel to the UK but also to other countries such as the Netherlands. Feminist volunteers and service providers have organised to support them at home and away.^{32–34} Secondly, women order the abortion pill online from services such as Women on Web,³⁵ but usually have to make arrangements to travel to Northern Ireland to collect it at a post office or equivalent. This is because customs in the Republic have the power to seize the pills. Supply of prescription medicines by mail order is a criminal offence under the control of medicines legislation.³⁶ Thirdly, women in Ireland can now try and access domestic abortion care on the grounds that their life is at risk under the newly adopted Protection

*See for example a clip from the Today Tonight Referendum Special on the Eighth Amendment, Radio Telefís Éireann (the public broadcaster of radio and TV) featuring Mary Robinson of the Anti-Amendment Campaign and William Binchy of the Pro-Life Amendment Campaign.¹³ For a recent example of civil society critique of Irish state practices, see the submissions to the UN Human Rights Committee for Ireland's review under the International Covenant of Civil and Political Rights, including six pro-choice submissions from the Abortion Rights Campaign, Centre for Reproductive Rights, Doctors for Choice, Irish Council of Civil Liberties, Irish Family Planning Association and Women's Human Rights Alliance.¹⁴

†There does seem to have been conflict within the Department of Health and the Health Service Executive over how to respond to the case.¹⁵

**The draft report was featured on *Prime Time*, a leading current affairs programme, before Ms Y was consulted or interviewed, and before she received a copy of it.²⁰

††Women in Northern Ireland are in a similar situation given the failure to extend the Abortion Act 1967 to that part of the United Kingdom.²⁹

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