

## Procedural abortion rights: Ireland and the European Court of Human Rights

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**Abstract:** *The Irish Protection of Life During Pregnancy Act seeks to clarify the legal ground for abortion in cases of risk to life, and to create procedures to regulate women's access to services under it. This article explores the new law as the outcome of an international human rights litigation strategy premised on state duties to implement abortion laws through clear standards and procedural safeguards. It focuses specifically on the Irish law reform and the jurisprudence of the European Court of Human Rights, including A. B. and C. v. Ireland (2010). The article examines how procedural rights at the international level can engender domestic law reform that limits or expands women's access to lawful abortion services, serving conservative or progressive ends.* © 2014 Reproductive Health Matters

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On 1 January 2014, a new abortion law came into effect in Ireland.<sup>1</sup> With the *Protection of Life During Pregnancy Act*, abortion remains criminally prohibited in the country except where pregnancy endangers a woman's life, including through a risk of suicide. The new law and its regulatory instruments seek to clarify this narrow exception, and create procedures to regulate women's access to services under it.

This article explores this new Irish law as the outcome of a transnational litigation strategy premised on state duties to implement abortion laws through clear standards and procedural safeguards.<sup>2,3</sup> The strategy recognizes that no criminal abortion law – however restrictive or liberal in its grounds – can ensure access to services without implementing standards and procedures. This is because legal grounds tend to be written in vague terms, which breeds both uncertainty and disagreement among women and doctors, and rarely is any opportunity provided for review or appeal.

Advocates have thus turned to procedural rights on behalf of women as a means to implement legal grounds for abortion and to secure their access to services. This article focuses on the turn to procedure at the European Court of Human Rights. In a series of cases beginning in 2007, the Court affirmed positive obligations on

the state to ensure that women can access services to which they are lawfully entitled. This case law includes *A. B. and C. v. Ireland* (2010),<sup>4</sup> where the European Court held the state in violation of its human rights obligations for failing to provide effective and accessible procedures that allow a woman to establish her right to a lawful abortion in Ireland. The new law responds to this judgment.

All of the European Court's procedural cases concern access to services in two countries, Ireland and Poland, where abortion carries a symbolic importance, bound to conflicts over the very identity of the nation-state. These cases raise a fundamental question of how an international human rights court can engender change on an issue of deep democratic conflict. Procedural rights are offered in answer. By obligating states to make effective rights to abortion already recognized in national law, procedural rights allow the European Court to work through rather than against the state, and to enlist its democratic forces and institutions in the effective protection of reproductive rights.

This article tests the theory of procedural abortion rights against the recent legal reform in Ireland. It examines the *Protection of Life During Pregnancy Act*, legislation designed to implement the European Court judgment in *A. B. and C.* Less than one year since enactment, the article explores public debate and controversy over the law. Liberalization

advocates fear the law re-entrenches the criminalization of abortion and that its procedural defeat whatever minimal access the law formally allows. Conservative critics fear the law is a ‘Trojan Horse,’ which women and health professionals will use to progressively expand access into a liberal regime. The legacy of procedural abortion rights hangs in the balance.

### ***The procedural abortion rights jurisprudence of the European Court***

In *Tysi c v. Poland* (2007),<sup>5</sup> a woman claimed that she was wrongfully denied a lawful therapeutic abortion in violation of her human rights. Ms. Tysi c, fearful of losing her eyesight after a third delivery, claimed that doctors had wrongly denied her an abortion to avert a risk to her physical health as allowed by Polish law.<sup>6</sup> In its judgment, the European Court did not address whether Ms. Tysi c was entitled to an abortion under Polish law, nor whether the European Convention on Human Rights itself guarantees any right to abortion. Rather the Court reasoned that because Polish law recognized a right to therapeutic abortion, the case was better decided from the perspective of what the state is positively required to do to effectively guarantee this right.

Polish law provided women with no opportunity to challenge a denial of services, nor did it offer physicians any security against criminal prosecution for the provision of services. These circumstances, the European Court reasoned, both allowed doctors to deny services arbitrarily and, in what is referred to as the “chilling effect”, made doctors cautious and reluctant to provide services. Viewed as a whole, the legal system worked to deny rather than protect women’s access to lawful services. The European Court thus declared the Polish state in violation of its human rights obligations, reasoning that “[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it... the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman’s legal position” (para 116).

In *A. B. and C. v. Ireland* (2010),<sup>4</sup> Applicants A and B argued but lost a challenge to broaden the legal grounds for abortion. In Ireland, prior to the *Protection of Life During Pregnancy Act*, there was no statutory exception to a strictly worded criminal prohibition.<sup>7</sup> Fearing that a court might read liberal exceptions into the prohibition, the

Constitution of Ireland was amended in 1983 by popular referendum. By Article 40.3.3, what is known as the 8th Amendment, the Constitution now provides: “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.”<sup>8</sup> As interpreted by the Supreme Court of Ireland, this provision allows for abortion only if there is a real and substantial risk to life, as distinct from the health of the woman.<sup>9</sup>

Applicant C in the case suffered from a rare form of cancer, but because of the chilling effect of the law, could not receive accurate information about the risks of pregnancy for her prognosis and treatment. Believing that without this information she could not qualify for a lawful abortion in Ireland, she travelled to England to terminate her pregnancy. The European Court held the Irish state in violation of its human rights obligations, once again for failing to provide criteria or procedures that would allow a woman to establish her right to a lawful abortion in Ireland.

After *A. B. and C.*, the European Court decided two more cases in the procedural paradigm: both successful and both against Poland. In *R.R. v. Poland* (2011),<sup>10</sup> the applicant was denied information about the risks of her pregnancy, specifically the risks of fetal impairment, which is a ground for abortion under Polish law. Her persistent efforts to access antenatal tests were marred by procrastination, confusion and deliberate obstruction by doctors and hospital administrators. This delayed the diagnosis and so disqualified her from a lawful abortion within the statutory time limit. Though recognizing that the delay of services came at the hands of reticent doctors, the European Court attributed the rights violation to the state, its failure to protect women against the obstructive actions of private actors. The Court again affirmed, “If the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus’ health is available to pregnant women” (para 200).

*P. and S. v. Poland* (2012)<sup>11</sup> concerned a 14-year-old girl whose formal right to access a lawful abortion for reason of rape was uncontested, though she encountered resistance in what the European Court called the “procedural and practical modalities of exercising this right” (para 83). These

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