

## Irish Constitution.

Eighth Amendment. – added in **1983**. Amending Art.40. Amendment by national referendum, 67% in favor.

*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.*

Subsequent amendments in **1992** altered the text:

*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 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.*

The death of **Savita** Halappanavar in **2012** led to widespread protests and a new referendum campaign.



The Thirty-sixth Amendment of the Constitution was approved by referendum in **2018**. 66% voting in favor. It removed the language of the 1983-92 amendments and replaced it with this text:

*Provision may be made by law for the regulation of termination of pregnancy.*

Subsequent legislation allowed abortion in a variety of circumstances: risk to woman's mental or physical health, foetus likely to die in any case, medical emergency, and up to 12 weeks for any reason. Outside of those conditions abortion is a criminal offense.

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Excerpt from. **Fiona De Londras, Constitutionalizing Fetal Rights: A Salutary Tale from Ireland, 22 Mich. J. Gender & L. 243 (2015)**

The constitutionalization of fetal rights creates many medical difficulties particularly for women who require medical treatment during their pregnancy. Where women who are pregnant require medical treatment that may result in the death of the fetus but where there is not (yet) a real and substantial risk to life, the “chilling effect”<sup>140</sup> of the criminalization of abortion can operate to

determine medical decision-making. This chilling effect has pervaded medical decision-making in Ireland in such a way that fetal life is saved at the expense of the pregnant woman's health. In some cases, even though termination of the pregnancy would be best for the health of the pregnant woman, current medical practice in Ireland leans toward preserving the pregnancy and risking the woman's health.<sup>141</sup> As Dr. Rhona Mahony, the Master of the National Maternity Hospital, has stated:

*From a medical perspective, [Article 40.3.3] creates difficulty in its presumption that the implications of a range of complex medical disorders can be reduced to a matter of individual right. \*274 If the legal world explores the balance of rights, the medical world explores the balance of risk . . . The wording of the Eighth Amendment is sufficiently ambiguous that there is a real risk that medical imperative could be hindered by an emphasis on balance of rights rather than survival [of the pregnant woman].<sup>142</sup>*

This was starkly illustrated by the death of **Savita** Halappanavar.

.... Ms. Halappanavar was admitted to hospital while suffering a miscarriage 17 weeks into her pregnancy; there was no prospect of the fetus surviving, although there was a fetal heartbeat at the time. Reports suggest that she requested termination of the pregnancy by means of abortion as soon as the diagnosis became clear. However, because her life was not in “real and substantial danger” at the time, and the fetus still had a heartbeat, this request was denied. This continued over a period of almost three days, during which time the clinical approach was “to ‘await events’ and to monitor the fetal heart in case an accelerated delivery might be possible once the fetal heart stopped.”<sup>143</sup> Due to the delay in treatment, Ms. Halappanavar developed a very serious form of sepsis, a “[s]ystemic illness caused by microbial invasion of normally sterile parts of the body”.<sup>144</sup> The advance of the sepsis was not adequately diagnosed or treated. Although the fetal remains were removed on October 24, the infection worsened and she died on October 28, 2012.

An independent inquiry found that multiple factors were relevant in this case, including the lack of clear clinical and legal guidance. The inquiry, thus

*[S]trongly recommend[ed] and advise[d] the clinical professional community, health and social care regulators and the Oireachtas to consider the law including any necessary constitutional change and related administrative, legal and clinical guidelines in relation to the management of inevitable miscarriage in the early second trimester of a pregnancy including with prolonged rupture \*275 of membranes and where the risk to the mother increases with time from the time that membranes are ruptured including the risk of infection and thereby reduce risk of harm up to and including death.<sup>145</sup>*

Although some claimed that this case illustrated failures in medical care rather than a difficulty with the 8th Amendment, Enright and de Londras have argued that the constitutional position was relevant in the clinical decisions taken in this case and the death of Savita Halappanavar:

*This case was dominated by the sense that even an inevitable miscarriage could not be terminated as long as there was foetal heartbeat on the basis that a real and substantial risk to the life of the pregnant woman must first arise. This interpretation of the Constitution clearly played into both Savita Halappanavar's protracted suffering and her death . . . the reality is that the threshold for access to abortion in Ireland is so high that even a serious illness is likely to be managed along similar lines, regardless of the outcome for the woman.<sup>146</sup>*