

## **After the 8th: Re-Visioning Reproductive Rights**

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I am so pleased to accept the invitation to deliver this lecture from President Brian MacCraith. Dublin City University was the academic home of my late beloved spouse, Dr. Ann Louise Gilligan.

It was Ann Louise who first introduced me to the impact of the 8th amendment on young women's lives in Ireland. Not long after the amendment was inserted into the Irish Constitution, Ann Louise listened to the story of one of her young students, a woman starting out on a career to become a primary school teacher in Catholic Ireland. She found herself pregnant because her contraceptive method had failed her. Her entire future was at stake.

Ann Louise listened with empathy and love, and supported this young woman to take the boat to England.

If 'the authorities' had found out, the young woman would have lost her career and Ann Louise would have lost her job. Nothing about this circumstance was right. Not then, not now. Thankfully, no one did find out about this trespassing of Irish law. The woman graduated, and Ann Louise continued her radical way of teaching, practicing the vision of freedom she offered to her students.

So, I offer these words in memory of Ann Louise.

## **INTRODUCTION**

In my work as an academic, a human rights advocate, a Senator, and now a TD and Independent member of Cabinet, I have thought carefully about what the state's role is in women's reproductive lives, and about how law can help us to achieve it.

Entering government in 2016 added a new dimension to that life-long task of mine. It opened up new opportunities to make a difference, and new responsibilities to think carefully about the kind of place that we want Ireland to be, now and in the future.

In our Republic, I think that the state's role is to support a society within which everyone can flourish.

To achieve that requires us to take seriously equality, democracy, and human rights. It requires us to see these not as end points, or things that are bestowed by the state to the people, but as values that underpin all that we do and that, when honoured, can help us to fulfil our collective purpose and aspirations.

This requires us to engage constantly in asking ourselves 'are we doing the right things to maximise the welfare of all? Are we living up to our core values?'

In the year that we celebrate the 80th anniversary of our Constitution, I find myself returning to the Preamble, where those values are clearly articulated. The Preamble commits us to the task of “seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured”.

For me, this tells us something important about the kind of state we want to be: it marks Ireland as aspiring to be a republic of justice, a republic of equals, a republic of empathy, a republic of love.

In the 80 years since the Constitution was passed, our understanding of what these values of justice, equality, empathy and love require of the state have changed, just as our society has.

As time goes by, we can see within previously accepted institutions and ideas a deep inequality that we recognise as a

source of injustice. When we do, we have a collective duty to try to change that.

I have been the beneficiary of our ability to undertake such reflection, and to make that change. The introduction of marriage equality in 2015 demonstrated our ability to recognise unfairness and injustice, and to change our foundational law in a way that enables and compels the state to treat each of us with the love, empathy and equality that together create a condition that we might call justice.

It is time for us to come together and to do this again.

It is time to address another constitutional exclusion that creates inequality, that does not reflect the reality of people's lives, and that turns a cold shoulder to people who need bountiful care for their health and well-being.

It is time to repeal the 8th Amendment; to reclaim women's bodies from the state.

Our bodies. Ourselves. Our reproductive lives.

What I want to do this evening is to outline my thinking on why the 8th Amendment produces injustice and stops us from being a republic of justice, equality, empathy, and love.

I will argue that the 8th Amendment must be repealed completely. That we must simply take it out.

After repeal, we must then make law on abortion that is designed to enable women to make free decisions about our reproductive lives and futures, and that empowers doctors and mid-wives to help women rather than making them into guardians of the state's interest in the continuation of pregnancy.

It is time for the state to get out of the business of controlling reproduction.

It is time for us to re-vision reproductive rights; to commit to a system of reproductive justice in which women who wish to remain pregnant are supported, and women who do not can exercise their choice safely and with the aid rather than the condemnation of our Republic.

It is time for pregnancy in Ireland to be liberating, safe, and above all *voluntary*.

## **A REPUBLIC OF JUSTICE**

My starting place for this argument is an ethical duty to justice.

I do not propose, here, to engage in a long discussion of what justice means. Let us, instead, start from an instinctive sense that a just state is a fair state; a state in which inequity is recognised and extracted. Traditionally, states concerned themselves with justice and fairness in the public sphere, but

we know that life does not take place in the public sphere alone.

Indeed, it is often in the private sphere that people experience the sharpest and most invasive abuses of their dignity and rights at the hands of others. As we know, this happens most often to women and girls, to people with disabilities, to the sick, to the old, to the disabled, to the very young.

One of the great achievements of feminism has been the acknowledgment that the state must attend to the private, as well as the public, if it is to be just.

Where, though, do we place the body--and especially the pregnant body--between these spheres?

States have historically thought they could both control and should not touch the body. They found no irresolvable inconsistency in at once denying women access to contraception and turning a blind eye to vicious physical

violence within a marriage. The body was public when it was about reproduction; private when it was about physical domination.

Although we have moved closer to a republic of justice with the introduction of laws and supports to protect people from indignities and abuses of their bodies, even in the private spaces of marriage and the home, we in Ireland have only partly liberated the body.

For most people, gender identity is now a matter of self determination and not merely of biology. The legalisation of contraception, and its widespread availability, has empowered us to exercise control and ownership over our bodies.

But under the 8th Amendment, the pregnant body remains a national concern. Under the 8th Amendment, the decision to remain pregnant is not ours alone.

Instead, as soon as a woman in Ireland becomes pregnant, the Constitution regards her as a “mother” and intervenes to protect her “unborn child”.

That is so two days after conception, just as it is two days before birth. From the moment that pregnancy begins, women in Ireland lose the ability to write the stories of our own lives while remaining in good standing within our state. The only way in which a person who is pregnant and who does not want to be can exercise agency in her decision to bring her pregnancy to an end is either by leaving the state or by breaking its laws.

In either case she is exiled, physically or symbolically, from our state; from our society. The physical exile may be temporary, but the symbolic one is not. She has failed as a constitutional mother.

Failed by exercising agency over the private place that is her own body.

This lack of agency denies to women full citizenship in a republic of justice.

For many women, this injustice is exacerbated by their social and economic resources and status. Not only do we impose stigma, criminalisation, exile, and isolation of the woman who leaves either the state or the law to end her pregnancy, but for more than three decades we have tolerated a situation in which many woman can do neither.

To leave the state you need money, time, passports, mobility, and more. To leave the law you need the internet, a credit card, information, and privacy. Many women lack these resources.

So many women have told us--all of us--that they could not go, that they did not know pills existed, that they could not determine their own life paths, that they stayed pregnant simply because they had no other choice. Any time that our ability to narrate our own life stories differs because of how

much money we have, our immigration status, our age, our disability and so on, our antennae should be raised.

This is social injustice writ large.

As long as we maintain a law that means that only people who have resources can exercise reproductive freedom we are consciously maintaining a condition of injustice.

Ayaan Hirsi Ali wrote “some things must be said, and there are times when silence becomes an accomplice to injustice”. We have surely reached that time in Ireland.

If we are to redress this, then we need to rethink our approach to abortion, including our Constitution. Neither constitutional change nor subsequent law on access to abortion would alone make good this injustice.

But they would express in important ways the state’s recognition that women’s claim to our part in those

foundational aspirations--prudence, justice, charity, dignity, and individual freedom--requires a commitment to reproductive freedom as a core component of justice.

## **A REPUBLIC OF EQUALS**

Reproductive freedom matters for justice, because its absence is a source of profound inequality for women. Reproductive freedom is not only the freedom to decide whether to remain pregnant or not; it is also about access to contraception, and dignity and bodily integrity in pregnancy and labour.

Where reproductive freedom is denied or constrained by law, this has its heaviest impact on people who become pregnant, almost all of whom identify as women. While recognising the need of all people who can become pregnant for reproductive freedom, its absence is primarily something that impacts on women. Reproductive inequality is a problem of sex inequality.

There are some who argue that because only women can get pregnant, the lack of access to abortion or self-determination during labour cannot be a problem of inequality; there is no group of people against whom to compare, and thus no unequal treatment. This is just part and parcel of womanhood, the argument goes. But this is a profoundly inadequate account of equality.

Equality does not require us to treat everyone in exactly the same way. Even our Constitution recognises that we can have due regard to differences of physical capacity while pursuing equality. But this doesn't mean that how we treat women when it comes to reproduction is unproblematic from an equality perspective.

If in our laws we fail to recognise the burdens that attend to the exclusive capacity for reproduction that almost always comes with having a womb, then we are failing in our commitment to equality.

Equality demands that we recognise that this reproductive capacity holds within it the potential for suffering, pain, unhappiness, isolation, destitution and harm, just as it does the potential for emancipation, happiness, togetherness, enrichment, love, and care.

Equality demands that we eradicate laws or structures that deny women the ability to assess the potential impact of pregnancy on our bodies, lives, sense of selves, relationships, and futures.

Equality demands that we enable women to determine the number and spacing of any children that we may decide to have.

That is the key to unlocking the vast potential that resides in all those in this country with the capacity for pregnancy. The 8th Amendment has broken the lock to which that key belongs.

The 8th Amendment means that women cannot decide whether to stay pregnant in Ireland. The 8th Amendment means that women do not have the same right to refuse consent to medical treatment when pregnant as they do in all other situations of medical care.

The 8th Amendment means that maternal medical care is provided in a medical culture within which pregnant women are to be minded and directed, sometimes even subjected to extreme indignities in labour, because the baseline for constitutionally sufficient care is simply care from which both mother and baby emerge alive.

Equality demands more than that. It demands that we recognise that life is not simply something other than death. Life has to it a quality, a richness, a meaning and a dignity that is different before and after birth.

This is not to say that the foetus does not have value. Of course it does. It is a form of early human life and as pregnancy progresses that potential comes closer to its realisation.

We have a duty to recognise that value by providing and supporting healthy, voluntary pregnancy and appropriate medical care, and perhaps by placing further limitations on access to abortion as pregnancy progresses. But foetal life is not the same as the life of a pregnant woman.

To treat the foetus and the pregnant woman as if their lives are equal is to create a false equivalence that produces and perpetuates gender inequality. It is to fail in our aspiration to be a republic of equals.

## **A REPUBLIC OF EMPATHY**

Instead of a law that perpetuates inequality and injustice, we need a law that reflects the real life needs and experiences of women in Ireland.

Instead of starting, as we did in 1983, with a fear and abhorrence of abortion, we need to start with the experience of making a decision about whether to remain pregnant. Instead of starting with the “unborn child”, we need to start with the pregnant person.

Our national imagination is filled with myths about abortion. The myth that Ireland is an abortion free land. The myth that abortions are primarily late term. The myth that the decision to end a pregnancy is casually made. But what would happen if, instead of myths, we started with experience? If we listened to what women who have had, and not had, abortions in Ireland tell us about how they make this decision? I think that by truly listening to these stories empathy will well up within us.

And, as Martha Nussbaum has told us, empathy is the key to moral imagination.

When we listen to these stories, we realise that decisions about whether to have abortions are ethical decisions. They are often complicated. They are frequently decisions borne of love; love for existing children, for the pregnancy, for future potential children, for one's partner, for one's parents, for one's self.

The thousands of submissions to the Citizens' Assembly included dozens of personal stories about the decision to end a pregnancy.

When we read them, and when we listen to the testimony to the Joint Committee on the 8th Amendment, or the stories people share in newspapers, on twitter, in living rooms, in pubs, on trains and planes and in their doctors' surgeries, our social bonds are renewed. We cannot but see that people end pregnancies for all kinds of reasons, and that all of these reasons demand our respect.

Sometimes people end their pregnancy because the foetus has been diagnosed with a serious anomaly and they do not want

to put this child that they love through an agonising birth and a life filled with pain.

I respect that.

Sometimes women end their pregnancy because they already have children at home and they cannot provide them with the emotional, spiritual and material resources they believe will best equip them for their future lives if they have another child.

I respect that.

Sometimes women end their pregnancies because when their contraception failed they remained resolute in their judgement that this was not the right time for them to become a parent.

I respect that.

Sometimes people end their pregnancies because their partner suffers from a serious mental illness and they cannot bear to impose on them the pain and suffering that comes with the responsibilities and realities of parenting.

I respect that.

Perhaps they end their pregnancies because they are young and ill-prepared and they cannot become the person, and the future parent, they want to be if they have a child now.

I respect that.

Sometimes people end their pregnancies because they are not physically or mentally able to bear the bodily, spiritual, emotional and life-long costs of parenthood.

I respect that.

There are as many reasons for ending a pregnancy as there are pregnancies that women choose to end.

Women are moral agents.

I trust women to think carefully about their decisions and to make decisions that are right for them. I respect women's right

to make those decisions. I think a republic of empathy should do the same.

As the submissions to the Citizens' Assembly show, some people say that their abortion saved their life. Others say that they live with deep regret for that decision. I respect women's ability to make their own decisions about what they can and cannot bear in this, as in all other areas of life, even if in time they come to regret it.

In a republic of empathy this is what our fundamental social bond demands of us. It challenges us to recognise that the decision to remain pregnant can be hard, as is the decision not to.

A true republic of empathy would respect the fact that only we know the right answers for our reproductive lives, and that the role of the state is to support us in pursuing the decision that we think is the best for us at the particular time when we find ourselves needing to make it.

The role of a true republic is to support each of us to flourish; to provide contexts in which we can make and pursue decisions about our reproductive lives. It is not to take hard decisions away and make them for us, as the 8th Amendment attempts to do.

Empathy, then, helps us to bust the myth that choosing to have an abortion is a selfish, casual, or unloving choice. When we understand the relational and ethical nature of abortion decisions we are forced to rethink the 'disgust' that the criminalisation of abortion suggests should attend to it. Instead of disgust and stigma, empathy points us towards love.

## **A REPUBLIC OF LOVE**

True reproductive justice requires a politics of love for, as bell hooks wrote, love is the practice of freedom.

Under the 8th Amendment, abortion is stigmatised. Doctors cannot talk about it openly and honestly with their patients. Women are made into criminals by taking control of their own lives. People often live their lives never revealing to anyone that they have had an abortion.

Until relatively recently, people hardly even said the word 'abortion' in Ireland.

In Ireland, as in many places, abortion is treated as a political debate. But what a focus on justice, equality and empathy tells us is that abortion is not a battlefield; abortion is a part of life. We do not need to treat one another as adversaries, any more than the law needs to set a pregnant woman and the foetus up as such.

When we approach abortion as a debate, a battle, and a contest of rights we blind ourselves to abortion as part of a rich tapestry of reproductive decision making that has at its heart an aspiration to freedom. When we truly listen to what women

are telling us about how and why they decide whether to stay pregnant, a different perspective dawns. Indeed, it dawned for me.

I have always thought myself pro choice, and always thought the 8th Amendment should be repealed. But it took me time to come to the realisation that if I was truly committed to choice--to freedom--I had to come to this from a place of love. I had to listen.

I had to understand. I had to read first person narratives. I had to absorb them. And once I did that I knew that a loving, empathetic, equal and just approach demands a law that maximises women's reproductive agency. A law under which abortion is safe, legal, and available to all who need it.

In coming to that conclusion I was supported by the writing, in a different context, of Ann Louise Gilligan. Writing about approaching teaching from a place of love, Ann Louise

advocated “an empathy of difference” in order to “celebrate some differences [and see that] there are others that should be denounced and transformed”.

If we repeal the 8th Amendment and follow it with a very limited and restrictive law allowing abortion only in exceptional cases we will fail to denounce and transform those differences in reproductive agency that exist between well off and poor women, women with EU citizenship and women in direct provision, young girls and adult women, women with unlimited mobility and women without.

Because what we know is that women of all ages, abilities, ethnicities, economic means, nationality and status need abortion in all kinds of situations.

We also know that when a woman feels she needs an abortion she will do anything she can to try to acquire one; she will break the law, she will harm herself, she will beg and borrow, she will try to find a way.

When that is what we know--when all of our experience tells us that this is true--a politics of love demands that we make a law that frees women from these non-choices and lets them make decisions in the open, with support, in their country, in their home.

## **CONCLUSION**

Where, then, does this bring us in practical terms?

First, we need to repeal the 8th Amendment, and not to replace it with other constitutional text.

The Constitution is simply not the place to regulate abortion. In my view, most people recognise and agree with that.

As I learned from Ann Louise in the marriage equality campaign, it is critical to image what we want in the struggle to achieving it.

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So, what do we want after the 8th?

I believe that after repeal we will need to replace the Protection of Life During Pregnancy Act 2013 with a new piece of law, designed with the experiences and needs of pregnant people at its heart.

This new law should maximise reproductive freedom. It should never be a crime to have an abortion, and doctors should be freed from providing medical care in what Rhona Mahony called 'the shadow of a custodial sentence'.

If there is medical malpractice that should be dealt with by the Medical Council; if there is a non-consensual abortion that is an assault. Criminalising abortion only hurts women and stigmatises their decisions. Decriminalisation is vital.

The new law should not demand a pregnant person justify herself, or fall on the mercy of a handful of doctors in order to give effect to her private decision about whether to remain pregnant or not.

As a result, I agree with the Citizens' Assembly that abortion should be available on request in early pregnancy, at least until the 12th week. During that time, a woman should not have to justify herself to anyone, and should simply be able to access abortion pills or surgical abortion on the basis of her decision alone.

After early pregnancy, there may be an argument for limiting access to abortion to some extent, but I reject entirely any suggestion that after 12 weeks abortion should only be available in the extreme, exceptional, and deeply difficult situations of risk to life, fatal foetal abnormality (so called), rape, and incest.

As I wrote in the *Irish Independent* over a year ago, such restricted grounds would help almost none of the pregnant people in Ireland who seek abortion care every day. If we want to address the socio-economic injustice of the 8th Amendment we simply cannot do so with such a limited law. Instead, we have to recognise the many impacts of pregnancy on women's physical, mental, and material well-being.

Our new law must ensure that whenever she is of the view that continuing with pregnancy would damage her health and well-being a pregnant person is not compelled to remain pregnant against her will.

Later in pregnancy, abortion will be rare, as it is now. Even in countries where there is no restriction on access to lawful abortion, so-called late term abortion is truly exceptional. The reality is that in later pregnancy, abortion is almost always the product of terrible circumstances: a devastating foetal diagnosis, a risk to the woman's life, an illness so serious that we cannot wait.

Late term abortions are not political footballs to be kicked around in debates; they are personal tragedies deserving of our compassion and support. That is what a politics of love requires of us, and our new law should recognise this and ensure that women who need late term abortion are not forced to run the gamut of endless certifications and qualifications to prove that they are sick enough, or that their foetus is sick enough, to be allowed to have a freely chosen abortion.

After the 8th Amendment, our re-visioning of reproductive rights also needs to go beyond abortion. We must do a wholesale review of our systems and practices of maternal

medical care: the availability of foetal anomaly scanning, the freedom to make decisions about labour and birth plans, the right to refuse consent to medical treatment, the physical and emotional impact of how we 'manage' labour in Irish hospitals.

We need to have a consistent, objective, accurate and unbiased system of personal and sexual education that is delivered by the state and not by charities and NGOs.

We need to make contraception freely available.

We need to make sex a space free of coercion between the sexual partners themselves and between a woman who might get pregnant and the state that might determine her ability to bring that pregnancy to an end.

We need to make accurate, non-directive information about reproduction and sexual life available to all.

We need to support people in making choices about sex, reproduction, pregnancy, and parenting; the choices they think are the right ones, not the ones that we think are right.

Women know themselves. We know what we can bear. We know what we cannot. We know the impact of decades of reproductive coercion, and of the ways in which stereotypes, myths and assumptions about womanhood, motherhood, reproduction and pregnancy have underpinned that coercion. And we know that we can bear no more.

In the essay from which I drew inspiration for the title of this lecture--Adrienne Rich's *When We Dead Awaken: Writing as Re-Vision*--Rich wrote "Re-visioning-the act of looking back, of seeing with fresh eyes, of entering an old text from a new critical direction-is...an act of survival. Until we can understand the assumptions in which we are drenched we cannot know ourselves."

It is time that we re-vision our Constitution; that we reshape assumptions about the meaning of the Preamble's commitment to the common good, Prudence, Justice, Charity, and the dignity and freedom of the individual. As Rich says, this is an act of survival; survival of our claim to be a republic of justice, a republic of equals, a republic of empathy, a republic of love.

If we are to be the republic to which we aspire, we must repeal the 8th Amendment, we must make abortion lawfully available, and we must commit ourselves fully to reproductive rights for all.

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