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Constitutional Rights Law and its Limitations: Topical Examples

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One consequence of the post-World War II 'rights revolution' is the ever growing use of constitutional law to protect fundamental rights. The goal of this is not only to protect such rights by judicial enforcement, at which it can be relatively successful, but to ultimately place them beyond political contestation.^[1] However, it is regularly argued that placing rights beyond political contestation is very difficult to achieve where deep and sustained disagreement over rights exists.^[2]

While this issue has been debated *ad nauseum* elsewhere, this post aims to highlight how looming re-ignition of the abortion controversy in the US and Ireland provides a timely example to support the arguments of Mark Tushnet and others. In comparison with other issues, this also underlines the importance of these arguments for those advocating the 'constitutionalisation' of socio-economic rights in some jurisdictions, or the adoption of constitutional Bills of Rights in countries such as Australia, where none currently exists.

Roe v Wade and Continued Opposition to Legalised Abortion in the US

Opposition in the US to the infamous *Roe v Wade* judgment of 1973 has maintained traction in a way that few other issues have. By extending a constitutional right to privacy to choice surrounding abortion, the case prevented state governments from outlawing abortion prior to foetal viability. Though it was an attempt to use constitutional law to place a putative right beyond politics, *Roe* has resulted instead in four decades of legislative attempts to undermine it.

An [upcoming Supreme Court decision](#) now presents a real possibility of *Roe* being stripped of any practical effect. Due to be decided by the Court this June, *Whole Woman's Health v Hellerstedt* concerns a Texas law (known as HB2) which places onerous restrictions on the operation of abortion clinics, in the name of protecting women's health. Seen as making the provision of abortion services largely unfeasible, it is one of the most far-reaching restrictions on abortion providers in the US. The Court must decide whether HB2 complies with the principle in its 1992 decision in *Planned Parenthood v Casey*, that while states may place restrictions on access to abortions (prior to foetal viability), they may not place an 'undue burden' on pregnant women seeking them. If the Court finds that HB2 does not create 'undue burdens', other states will be free to enact similar provisions. *Roe* would then be little more than theoretical in effect, as state legislatures seeking to prohibit abortion could do so by less explicit means than formally outlawing it.

The potential outcome is complicated by Justice Antonin Scalia's death, but the effects of *Roe* nevertheless remain in a precarious position. Supporters of *Roe* can undoubtedly celebrate its success at striking down and preventing outright bans on abortion in the US. However, the perpetual vulnerability of *Roe*'s precedent highlights a failure of constitutional law to completely insulate a putative right from sustained political disagreement.

This can also be seen in a mirror phenomenon occurring in Ireland.

The Mirror Image

The Eighth Amendment to Ireland's Constitution confers a right to life on what it calls the 'unborn'. Passed with overwhelming support in 1983, its purpose was to use constitutional rights to preclude the legalisation of abortion, whether by legislation or an equivalent Irish case to *Roe v Wade*.

However, attitudes have changed, and a referendum on its repeal seems [increasingly likely](#). Key to this have been practical consequences of the Amendment, and it's imperative that abortion may only be legislated for as a means of protecting pregnant women's lives. This is alleged to invite a complex legal framework for doctors, while [numerous tragedies](#) have also been attributed to it. These issues and the lack of [further exceptions for rape and fatal foetal abnormalities have been catalysts for the current movement to repeal the provision](#).

While a recent election upset has made the timeline for such a referendum [less certain](#), there nevertheless appears to be significant momentum behind the movement to repeal the provision. While successful in preventing legalisation of abortion thus far, the fact that constitutions may always be amended means the Eighth Amendment has been unsuccessful in putting the rights it contains beyond political contestation. The constitutional right to life in Ireland thus appears to be in a similarly precarious position to the constitutional right to choice in the US.

Wider Significance

As noted above, these examples provide a timely illustration of a point frequently made by jurists engaged with these issues; i.e. that while constitutional recognition of fundamental rights has tangible effects by providing greater legal protection through judicial enforcement, rights become truly entrenched only when attitudes and power structures have shifted in ways that make them politically irreversible. A thorough treatment of this argument is beyond this post, but further illustration is provided by contrasting the abortion controversy with more settled rights issues in the countries discussed above.

In the US, the right to sexual privacy which *Roe* expanded on was first grounded in the right to contraception access (*Griswold v Connecticut*), which came in the 1960s alongside the sexual revolution of that era. Likewise, in Ireland, the right to privacy in reproductive matters was recognised by the Supreme Court in *McGee v Attorney General*. However, it was only legislated for gradually over the next two decades or so as public support increased. Without this growing public support, *McGee* could well have become similar to *Roe v Wade* in terms of having a precarious legacy.

Another example of this phenomenon in the US is the striking down of laws criminalising homosexual activity in *Lawrence v Texas* (2003), and more recently in the same-sex marriage decision of *Obergefell v Hodges* (2015). This has also been true of Ireland, where the decriminalisation of homosexual activity in 1993 followed ECHR litigation and shifting social attitudes, and where a 2015 referendum gave constitutional validity to same-sex marriage following further evolution of attitudes surrounding homosexuality. In both cases, the particular processes of change (i.e. litigation or popular mobilisation) varied, but the changes themselves have come to be seen as irreversible as much because of changed attitudes as because of constitutional law in its own right.

These examples are worth bearing in mind by those advocating a constitutional Bill of Rights in Australia, or the constitutionalising of socio-economic rights in other jurisdictions. Advocates of such measures would do well to recognise the limits of constitutional law, as these examples once again highlight the important political context in which constitutional law operates.

[1] A notable exception is the development of the 'New Commonwealth model' for judicial protection of human rights in countries such as Canada, New Zealand and the UK.

[2] Mark Tushnet, for instance, points to how rarely supreme or constitutional courts deviate greatly from accepted or consensus views in society. In addition, Jeremy Waldron argues that where there is sustained disagreement in a democracy over applying human rights instruments to particular issues, the delicate considerations involved can leave reasonably well-functioning parliaments no less likely to reach certain decisions than courts.

Note: The author does not assume a particular stance on the wider abortion debate. The post is not intended to be a discussion of any particular rights controversy, but instead an observation of the trends identified to add to a wider legal debate.

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