

Opening Statement to the Oireachtas Joint Committee on the Eight Amendment to the Constitution

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September 27th, 2017

I have been asked to address the Committee on enumerated and unenumerated rights in the Constitution as they relate to the Committee's work, and on the effect of either repealing or replacing Article 40.3.3. I will address these matters in turn.

Enumerated and Unenumerated Constitutional Rights

The Irish Constitution protects a variety of personal rights. Some are expressly set out (or enumerated) in the Constitution, mainly in Articles 40-44, including the right to life, good name, freedom of expression, etc. The courts have also recognised certain unenumerated or implied rights, which are protected notwithstanding that they are not specifically listed in the Constitution; for example, the right to bodily integrity, the right to travel, and the right to marital privacy. Though not listed specifically in the text, if recognised by the courts as being implied by the provisions and values of the Constitution, they are protected just as if they were enumerated in the text.

The Constitution empowers judges of the Superior Courts to judicially review laws, and invalidate them if they violate the provisions of the Constitution, which includes violation of express or unenumerated constitutional rights. It is permissible for laws to restrict rights, but this must be done in a proportionate manner; i.e. rights should not be restricted more than is necessary to achieve some other important objective, and overall the harm done by the restriction should not outweigh the benefit. The courts also defer to some degree to the legislature's determination about the need to restrict rights, and offer particular deference in instances where the legislature is balancing two rights against one another.¹ But courts can and do invalidate laws when it is shown the legislature restricted rights irrationally or disproportionately.

Before the insertion of Article 40.3.3, the Irish Constitution did not contain any express reference to the right to life of the unborn or to the regulation of abortion. The courts also never handed down judgments that directly addressed the constitutionality of any particular

¹ See *Tuohy v Courtney* [1994] 3 IR 1.

legal regulation of abortion. However, the courts did recognise several rights that might have had some significance for the constitutionality of abortion laws, and made some comments to this effect.

The courts suggested on several occasions in the 1970s and 80s that there was an unenumerated right to life of the unborn.² In 1995, reflecting on these comments, the Supreme Court suggested that the courts, before the insertion of Article 40.3.3, had recognised the right to life of the unborn as an unenumerated personal right.³

On the other hand, the courts had also recognised a right to bodily integrity, and a right to marital privacy that had encompassed a right to have some access to contraception. This might have grounded an argument that restrictive abortion laws could have been unconstitutional as a violation of these rights. However, the courts had given significant indications in the 1970s and 80s that this was not their view, and that the implied rights recognised by the courts could not be used to challenge a prohibition on abortion.⁴

Though we cannot know for sure - since no case was ever brought to test this - these comments suggest that, before 1983, a liberalised abortion regime, had it been enacted, might have been deemed unconstitutional as a violation of the unenumerated rights of the unborn child, whereas a strict limitation on abortion would probably not have been unconstitutional by reason of the privacy or autonomy rights of women.

² In the case of *G v An Bord Uchtála* [1980] IR 32 at 69 Walsh J in the Supreme Court said, in a non-binding statement, that a child “has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth.” This “necessarily implies the right to be born, the right to preserve and defend (and have preserved and defended) that life”. In *McGee v Attorney General* [1974] IR 284 at 312, Walsh J said that any action by parents or the State “to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the general guaranteed personal rights of the human life in question.”

³ *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1 at 28. Some have argued the right to life of the citizen, generally protected in Article 40.3, includes the right to life of the unborn. The courts have never spoken directly to this point.

⁴ The Supreme Court in *McGee v Attorney General* [1974] IR 284 at 305, 312-313 per Walsh J, recognising the right to marital privacy, expressly disclaimed that this right could be used to argue against criminalisation of abortion: “the rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life”; “this case is not in any way concerned with instruments, preparations, drugs or appliances, etc, which take effect after conception”. In *Norris v Attorney General* [1984] IR 36 at 102-103, McCarthy J. in dissent, recognising a broader right to privacy that would have invalidated the criminalisation on homosexual sodomy, commented that such a right could not be invoked in support of the proposition that prohibiting abortion was unconstitutional: “[N]or can I overlook the present public debate concerning the criminal law and arising from the statute of 1861 in regard to abortion - the killing of an unborn child. ...[I]t may be claimed that the right of privacy of a pregnant woman would extend to a right in her to terminate a pregnancy, an act which would involve depriving the unborn child of the most fundamental right of all - the right to life itself... Nothing in this judgment, express or in any way implied, is to be taken as supporting a view that the provisions of s. 58 of the Act of 1861 (making it a criminal offence to procure an abortion) are in any way inconsistent with the Constitution.”

With the insertion of Article 40.3.3 in 1983, the right to life of the unborn was given express textual recognition, and given equal weight to that of the mother, and the consequences of this are well known.

The Effect of Repeal or Replacement of Article 40.3.3 for Constitutional Rights and Judicial Intervention

I have been asked to comment on the difference between *repealing* and *replacing* Article 40.3.3, and what the consequence might be for relevant constitutional rights. I am taking replacement to mean, in this context, the replacement suggested by the Citizen's Assembly - replacing Article 40.3.3 with a provision empowering the Oireachtas to have some *exclusive competence* in this area. The question is: what rights might exist if Article 40.3.3 was simply removed, and what might this mean for laws passed in this area; and in light of this, should something be inserted in the Constitution to replace the Article?

First, it is crucial to stress that neither of these proposed changes to the Constitution would have an immediate or automatic effect on the legal position on abortion. The legal position will remain whatever is contained in law - currently the Protection of Life During Pregnancy Act 2013 - unless and until the law is changed by the legislature or is invalidated by the courts. However, as will be discussed, if the judiciary held a legislative solution was not compatible with the Constitution as amended, this could have the effect of altering the legal position.

1. Repeal without replacement

The first option is simply to remove the text of Article 40.3.3, and not put anything in its place. This seems straightforward, because if the Constitution says nothing explicit, it might be inferred that it will have no role to play, and the matter will be regulated by law. But it is not so simple. This outcome is certainly one possible consequence of repealing the Article without replacement, but there are other possible consequences as well.

The other possibility is that the repeal of Article 40.3.3 without replacement does not remove the issue from the bailiwick of constitutional rights, but rather leaves it to the courts to determine how constitutional rights should affect the regulation of abortion. The courts could hold that the right to life of the unborn continues to enjoy constitutional protection as an unenumerated right, as it did before the advent of Article 40.3.3, or as a facet of the rights of children under Article 42A or the right to life generally under Article 40.3. Or, on the other hand, the courts could hold that the right of autonomy, bodily

integrity or privacy of women extends to the question of abortion; or they could hold that both of these things are so. All of this turns on complex questions of constitutional interpretation of the meaning of repeal.

In the event of repeal, it would be open for a well-situated person to challenge the law on abortion as a violation of one of these sets of rights and ask the courts to find the law unconstitutional, and it is very hard to say with certainty what the courts would do. There are several possibilities:

- First, the courts could hold that one or both of these sets of rights exist, but decide that they will defer to the legislative determination of how to balance these rights;
- Secondly, the courts could hold that neither set of rights exists, and the Constitution does not speak to the question of abortion;
- Thirdly, the courts could hold that the right to life of the unborn - even when no longer expressly mentioned in the Constitution - was protected and strong enough to render a liberal abortion law unconstitutional;
- Fourthly, the courts could hold that the autonomy, privacy or bodily integrity rights of women were strong enough to render a restrictive abortion law unconstitutional.

In these latter two cases, the courts could rule that the rights were disproportionately infringed by the law, and this would limit the legislature in making a new law regulating the area, changing the scope and content of the regulation of abortion.

It is very difficult to say with certainty which of these options would prevail in the long run; any assertion to the contrary offers a certainty that is not, I think, available. For my part, in the short term, the first or second option seems most likely, based on the current viewpoints of courts and their attitude of respect for legislative determination of complex social issues.⁵ But in constitutional law, viewpoints change and shift; the composition of the courts is altered; and what seemed previously unlikely becomes plausible. Even if a court seems unlikely to intervene at the moment, we generally do not write constitutions for the here and now, but for the long run. The option of repealing Article 40.3.3 without replacement leaves the question of judicial intervention open in the future, with the possibility of courts invalidating a law regulating abortion, requiring either a more liberal

⁵ In a relatively recent case, the Supreme Court held that an area of regulation involving complex moral questions - that of assisted dying - is exclusively the purview of the legislature. See *Fleming v Ireland* [2013] IESC 19; [2013] 2 IR 417.

or a more conservative regime. If this were unpopular, it could only be changed by a referendum to change the Constitution to overturn the judicial decision. This creates uncertainty about what laws the legislature can pass, and whether the legislature alone will formulate the law in this area. It will be for this Committee to consider if the best course is to leave open this risk of judicial intervention or to try to reduce it.

2. Repeal and replace with an empowering provision/judicial exclusion

A way to limit this uncertainty is to remove Article 40.3.3 and replace it with a provision conferring upon the Oireachtas *exclusive* power to regulate this area and balance the competing rights involved, to foreclose or limit the possibility of judicial intervention. I take this to be the suggestion made by the Citizen's Assembly.

Rather than allow judicial intervention in this controversial area,⁶ this approach prefers that the legal position on abortion would be set by a democratically accountable legislature; that this legal position would be certain and not open to invalidation or restriction by the courts; and that the legal position could be changed using the ordinary process for amending laws if views and outlooks shifted. Again, it will be for the Committee to decide if these benefits would warrant adopting this approach.

It should also be noted that there is nothing *per se* improper about denying the judiciary power to intervene in certain areas. The Constitution excludes judicial consideration of several major matters, including emergency legislation; various matters related to the operation of the Houses of the Oireachtas (such as parliamentary privilege); and Article 45's directive principles of social policy.

There are several means by which this could be done, to different effect:

- First, to state that the Oireachtas is specifically empowered to legislate on this issue;
- Secondly, to state this and further state that it should be for the Oireachtas to balance the relevant rights involved;
- Thirdly, to state that the Oireachtas should be empowered to legislate on the issue and that judges cannot invalidate such a law on the basis of constitutional rights.

⁶ It should be noted that excluding judicial review of abortion laws for unconstitutionality would not exclude the judiciary entirely; judges would still have a role in interpreting the law in cases of dispute, as they always do. It would only exclude the judiciary from invalidating the law by reference to constitutional rights.

It is not clear that the first of these options would have the desired effect; specific empowerment to legislate for an issue does not immunise such legislation from judicial review. One would probably have to go further and suggest some exclusivity in respect of the legislature's power. The second option, by expressly giving the Oireachtas the job of balancing relevant rights, would strongly indicate to the judiciary that courts should not intervene to invalidate the legislature's solution. The third option might go further still, clearly excluding any judicial intervention. There are also various other options along this spectrum.

There are different forms of words that could be used to achieve these outcomes. Examples from our own Constitution,⁷ past amendment proposals,⁸ and the constitutions of other countries⁹ all provide possibilities.

In considering the removal of Article 40.3.3 and its constitutional regulation of abortion, a most important consideration is the role of constitutional rights and the judiciary in the aftermath of this change. Ultimately, this question requires careful consideration of democratic accountability, certainty and predictability, and the desirability of judicial intervention in the regulation of abortion. The question put to the people should be formulated with these matters in mind, so that the people can have a clear understanding of the possible consequences of their vote.

⁷ For example, Article 28.3.3's provisions on emergency powers; Article 45's provisions on the non-justifiability of the directive principles of social policy; Article 9.2's provision on citizenship as inserted by the Twenty Seventh Amendment to the Constitution Act 2004.

⁸ For example, the Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011, proposing to insert into Article 15 a provision which read: "It shall be for the House or Houses concerned to determine the appropriate balance between the rights of persons and the public interest for the purposes of ensuring an effective inquiry into any matter to which subsection 2° applies.". See also one of the alternative proposals made in Dáil for the wording of the Eighth Amendment: "Nothing in this Constitution shall be invoked to invalidate, or to deprive of force or effect, any provision of law on the ground that it prohibits abortion." 341 Dáil Debates col. 2002 (April 27th, 1983). This formula could be easily adapted to stop invalidation of a law on the grounds that prohibited *or allowed* abortion.

⁹ One of many examples would be s. 33 of the Canadian Charter of Rights and Freedoms, known as the "notwithstanding clause" or "override clause", which allows the national or regional parliaments to enact laws notwithstanding that they may violate rights contained in certain sections of the Charter once an appropriate declaration is made.