

Article 40.3.3 and the law on abortion: A history

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A. The 1937 Constitution

What did the 1937 Constitution say about abortion?

At the time of the coming into force of the current Constitution in 1937, the law dealing with abortion was found in sections 58 and 59 of the Offences Against the Person Act 1861. These sections created two criminal offences. Section 58 made it unlawful for a woman to intentionally bring an end to her pregnancy. Section 59 made it unlawful for a person to provide materials to a woman which they knew would be used to end a pregnancy.

The basic effect of the 1861 Act, therefore, was to criminalise abortion in Ireland. This was generally understood to be the legal position when the 1937 Constitution came into effect.

It was not clear what implications the 1937 Constitution had for the law on abortion. Several judges suggested that at least some of the rights protected by the Constitution might apply before birth. For example, Walsh J. expressed the view in 1980 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”.¹

If this was correct, this meant that the Constitution required that abortion be prohibited in at least some cases. However, the courts never authoritatively decided whether or not this was the case.

As a result, it could not be stated with certainty how the law on abortion was affected by the Constitution.

¹ G. v An Bord Uchtála [1980] IR 32, at 69.

B. The referendum on the Eighth Amendment

How was this constitutional position affected by the Eight Amendment?

This ambiguity provided the constitutional background to a public debate in the 1970's and 1980's about how the Constitution related to the law on abortion. This debate ultimately led to a change in the Constitution. A referendum in 1983 to include a new Article 40. 3. 3 in the Constitution was approved by a majority of those who voted. This is sometimes referred to as the Eight Amendment.

The new Article 40. 3. 3 stated clearly that the unborn had a right to life under the Constitution. This imposed limits on the powers of both the Oireachtas and the courts when dealing with abortion. They are obliged to comply with Article 40. 3. 3. Like other parts of the Constitution, Article 40. 3. 3 can only be amended by a majority vote in a referendum.

Summary

The main effect of Article 40. 3. 3 was to make it clear that the Constitution “prevent[ed] decriminalisation of abortion without the approval of the people as a whole”.²

Why was it decided to have a referendum?

While there were various factors that contributed to the decision to hold the 1983 referendum, the Supreme Court in a 2010 decision³ expressed the view that two developments in other countries had a particular influence.

1. R. v Bourne:

First of all, an English court in a 1939 ruling called R. v. Bourne decided that a doctor would not be acting unlawfully if he carried out an abortion in good faith for the purpose of preserving the life of the woman. In the judge's view, this meant that a jury could find a doctor was acting to preserve the life of a woman if “he was of the

² Geoghegan J. in Roche v Roche (Supreme Court) at paragraph 210.

³ Roche v Roche [2010] 2 IR 321.

opinion on reasonable grounds that the probable consequence of the continuance of the pregnancy would be to make the woman a physical or mental wreck”⁴.

This decision was partly based on the same 1861 Act that was the law in Ireland. As a separate legal system, the decision of the English court had no direct influence on Irish law. It was also never applied by the Irish courts.

However, because it involved the same legislation, there was a concern amongst some (although others disagreed⁵) that an Irish court might in the future follow the example of R. v. Bourne and interpret the 1861 Act in the same way.

2. Roe v Wade

The second factor that influenced the debate in Ireland was a decision by the United States Supreme Court in a 1973 case called Roe. v. Wade that the constitutional right to privacy meant that a woman had a constitutional right to have an abortion carried out in certain situations, especially in the early stages of a pregnancy.

Irish constitutional law protects the individual right to privacy. Some people expressed the view therefore that an Irish court might in the future follow the example of Roe v Wade and decide that the right to privacy included a right to have an abortion carried out in some circumstances.

R v. Bourne and Roe v Wade were both examples of courts in other countries deciding that the law permitted abortion in more circumstances than some people had thought. There was a concern amongst some commentators that an Irish court might do the same thing. In their view, this was a particular concern because of the close similarities between parts of Irish law and the laws considered by the courts in R. v. Bourne and Roe v. Wade.

⁴ [1939] 1 K.B. 687 at 694.

⁵ Keane J. (Supreme Court) later summarised this debate this way: “[D]iffering views were expressed in this Court in Attorney General v. X. [1992] 1 I.R. 1, as to whether, prior to the enactment of the Eighth Amendment to the Constitution, the interpretation given in R v. Bourne [1939] 1 K.B. 687, to the Act of 1861 represented the law in Ireland. All one can say with confidence at this stage is that the preponderance of judicial opinion would suggest that the Bourne approach could not have been adopted in this country consistently with the Constitution prior to the Eighth Amendment”. (SPUC v Grogan (no. 5) [1998] 4 I.R. 343, 381-382.

One of the reasons the Eight Amendment was proposed was therefore to prevent an Irish court from giving a decision like *R. v Bourne* or *Roe v Wade*. Denham J., summarised its aims as follows:

“The Amendment ... was to copperfasten the protection provided in the statutory regime, to render unconstitutional the procuring of a miscarriage. It meant that any expansive interpretation of the Act of 1861 was precluded.”⁶

The Eighth Amendment imposed similar limits on the Oireachtas. Before the 1983 referendum, it was not clear whether, and to what extent, the Oireachtas was able to make changes to the 1861 Act. After the referendum, there was – as with the courts – a specific constitutional restriction on its power to legislate in this area. This meant (to use an example given by some Supreme Court judges in describing the effect of Article 40. 3. 3) that the Oireachtas did not have the power to generally legalise abortion.

Summary

In summary, therefore, a key purpose of the amendment was “to prevent the introduction of abortion either by legislation by the Oireachtas or by judicial decision”.⁷

⁶ Roche v. Roche at paragraph 130.

⁷ Hardiman J. in *Roche v Roche* at paragraph 181.

C. After the referendum: some areas of uncertainty about Article 40. 3. 3

What does Article 40. 3. 3 mean?

The new Article 40. 3. 3 stated that:

“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.”

The language of the Article is relatively general in that it acknowledges the right to life of “the unborn” and “the mother” and describes them as equal without giving detailed guidance about how to give effect to these rights and values. Constitutions often deal with broad principles and are often expressed in general language so Article 40. 3. 3 is not, from that point of view, that unusual.

What this general language means is that Article 40. 3. 3 is only part of the story of Ireland’s law on abortion. Because it is in the Constitution, it is the most important of the rules on abortion in Ireland. However, it does not state what should happen in every situation. This means that, while it gives important guidance to the Oireachtas and the courts, there can be uncertainty about what the Constitution means in specific cases.

This kind of uncertainty is usually dealt with in two ways. One is for the Oireachtas to pass legislation which provides more detailed rules as to what should happen in certain circumstances. The other is for the courts to provide guidance as to what the Constitution means and/or whether any rules passed by the Oireachtas comply with the Constitution.

Since 1983, there have been a number of situations where the Oireachtas and the courts have addressed uncertainties about what exactly the Irish law on abortion was. These were cases where the language of Article 40. 3. 3 provided general

guidance but not a direct answer. The rest of this memo looks at some of these questions and how they have been dealt with.

However, it is important to bear in mind that there may be other areas of constitutional ambiguity that have not been authoritatively addressed by either the Oireachtas or the courts. For example, different High Court judges have expressed different views about whether other constitutional rights (such as the rights of children under Article 42A) may also apply to the unborn.⁸ The Assembly may wish to consider this at a later session. The purpose of this memo is only to provide an historical account of how Article 40. 3. 3 has been applied and interpreted so far.

Does Article 40. 3. 3 only apply to abortion?

Article 40. 3. 3 uses quite general and broad language. This means that it is not clear whether, for example, “the right to life of the unborn” applies to issues other than abortion.

Some consideration was given to this issue by the Supreme Court in the Roche v Roche case (referred to above). This related to a dispute between a couple over the use of embryos which they had frozen during IVF treatment. This required the Supreme Court to consider whether the “unborn” included a frozen embryo which had not been implanted into a mother.

The Supreme Court decided that the frozen embryo was not “unborn” within the meaning of Article 40. 3. 3.

Some Supreme Court judges expressed the view that the Eighth Amendment had been intended to deal with abortion so that it would not have been expected by voters to apply to other matters like IVF or embryo research which were not very well known in 1983. Some of the judges used broad language⁹ which could suggest that Article 40. 3. 3 may have implications for issues other than abortion.

⁸ O.E. v. Minister for Justice, Equality and Law Reform [2008] 3 I.R. 760; Ugbelase v. Minister for Justice, Equality and Law Reform [2010] 4 I.R. 233; IRM v Minister for Justice and Equality [2016] IEHC 478.

⁹ For example, Murray CJ expressed the view that “the provision of the Constitution was intended to embrace human life before birth and to extend to it, in express positive terms, the constitutional protections available to life after birth already provided for in Article 40.3.1”.

The Supreme Court in *Roche v Roche* therefore did not come to a definitive conclusion on the question of whether Article 40. 3. 3 only relates to abortion.

Does Article 40. 3. 3 ban abortion in all circumstances?

Although the aim of the Eight Amendment was to prevent the law on abortion being changed by the courts or Oireachtas to allow abortion, the text of Article 40. 3. 3 does not refer to abortion at all. Instead, it refers to the right to life of the mother and unborn as being equal. That left open the question of whether there were some cases where an abortion would be legal under Irish law.

The Supreme Court had to consider this issue in 1992 in the *AG v X*¹⁰ case (more commonly known as the X case). This concerned a 14 year old girl who was found by the High Court to have become pregnant as the result of rape. She decided with her parents to travel to England for an abortion.

Her parents informed the Gardai of this decision and asked whether there was any scientific evidence that might be obtained in the course of the abortion which would assist in the prosecution of the alleged rapist. The Gardai asked the Attorney General for legal advice. Having been informed of the situation, the Attorney General decided that it was necessary to apply to the High Court for an order preventing her from travelling. This was done on the basis of the Attorney General's obligation to uphold the Constitution which, because of Article 40. 3. 3, included an obligation to respect, defend and vindicate the life of the unborn.

The case raised an important question which the text of Article 40. 3. 3 did not answer: what does the "equal right to life" of the mother and the unborn mean in a situation where there might be a conflict between the two rights?

The High Court accepted, based on the evidence presented to it, that there was a risk that the girl could commit suicide if the pregnancy continued. The Court also accepted that there was a threat to the life of the unborn if she was allowed to travel.

¹⁰ [1992] 1 IR 1.

In other words, the High Court was faced with a situation where granting the order would mean there was a risk to the life of the mother while not granting the order would threaten the life of the unborn.

The High Court granted an order preventing her from leaving Ireland. On appeal, the majority of the Supreme Court took a different view. The Court decided that abortion was allowed under the Constitution in certain circumstances. These were that:

- (i) There is a real and substantial risk to the life, as distinct from the health, of the mother;
- (ii) The risk could only be avoided by the termination of her pregnancy.

What happened after the decision in AG v X?

Since 1992, a number of proposals have been put forward to change the legal position as summarised by the Supreme Court in X.

The Twelfth Amendment:

The first one came immediately after the Supreme Court decision. A referendum was held on a proposed amendment to the Constitution. This was called the Twelfth Amendment. This proposed that Article 40. 3. 3 would be amended to specifically allow for abortion where there was a real risk to the life of the mother but that this would not include a threat of suicide. In other words, this would have permitted abortion in more limited circumstances than those allowed by the Supreme Court in X. This was rejected by the People.

The Twenty-fifth Amendment:

A second attempt to change the law was made in 2002. The proposal here was a relatively complex one which would have amended the text of Article 40. 3. 3 to refer to a proposed Act of the Oireachtas called the Protection of Human Life in Pregnancy Act, 2002. This would have provided for a more detailed legal regime for abortion. Unlike normal Acts of the Oireachtas, this Act could only have been changed by referendum.

Most of the discussion around the referendum focused on the proposal that abortion would continue to be allowed in cases of a real and substantial risk of loss of the mother's life but would no longer be allowed where the risk was one of suicide. In other words, this would – like the Twelfth Amendment proposed in 1992 – have permitted abortion in more limited situations than the Supreme Court decision in the X case. This was rejected by the People.

Therefore, the law on this issue remains the same as it was after the Supreme Court's decision in X: an abortion can legally be carried out in Ireland where there is a real and substantial risk to the life of the mother which can only be avoided by termination of the pregnancy. The risk to the life of the mother can come from a physical condition or from a risk of suicide.

How do you know if an abortion can legally be carried out?

The decision in X identified when an abortion could be lawfully carried out. For a long time, this was the main guidance available to a person who wanted to find out how the law applied to them. However, there were still many areas of uncertainty about how the law would affect people whose situations were somewhat different to that of the girl in AG v X.

In AG v X and in Roche v Roche, some judges suggested that the passing of legislation on abortion by the Oireachtas would help to address some of the uncertainty over Irish law.

The European Court of Human Rights also decided in a 2010 decision (A, B & C v. Ireland) that this uncertainty in Irish law was a breach of the rights of one of the three women (Ms. C) who made a complaint in that case. Ms C feared that her pregnancy constituted a risk to her life for reasons relating to her previous treatment for cancer. This meant that she might be entitled to an abortion under Irish law. The European Court of Human Rights felt that, while the decision in the X case meant that it was theoretically possible for an abortion to be carried out under Irish law where there was a real and substantial risk to the life of the mother, it was difficult for a person in practice to find out if Irish law allowed an abortion in her case.

In 2013, the Oireachtas passed legislation to deal with the uncertainty of Irish law on this issue. This was known as the Protection of Life During Pregnancy Act 2013.

What does the 2013 Act say about abortion in Ireland?

This Act sets out the procedures for deciding whether or not a woman was lawfully entitled to an abortion in Ireland. As is usually the case with an Act, it is more detailed than Article 40. 3. 3 and lays down specific rules and procedures for a number of different factual situations.

For example, the Act allows an abortion to be carried out where it has been certified by two medical practitioners that it is necessary to avert a real and substantial risk of loss of the woman's life from a physical illness.¹¹ Where the risk of loss of life relates to suicide, the Act requires three medical practitioners (two of whom must be psychiatrists) to certify that it is necessary to avert that real and substantial risk.¹² In cases of an emergency, an abortion can be carried out once one medical practitioner believes that there is an immediate risk of loss of life from a physical illness.¹³

The Act repeals section 58 and 59 of the 1861 Act. Section 22 of the Act creates a criminal offence of "intentionally destroying unborn human life". This carries a maximum penalty of a fine and/or 14 years imprisonment.

The Act also sets out other rules about how this system should operate. These include how a woman can apply for a review of a decision not to certify; how such a review should take place; and when and to what extent a medical practitioner, nurse or midwife can opt out of assisting with a medical procedure to which he or she has a conscientious objection.

The Act also requires a report to be given to the Minister for Health each year on the operation of the system. The most recent report stated that 26 terminations were carried out under the Act in 2015. 14 of these related to section 7 (a risk from a

¹¹ Section 7.

¹² Section 9.

¹³ Section 8.

physical illness), 9 related to section 8 (an emergency involving a risk from a physical illness) and 3 related to section 9 (a risk from suicide).

Are there any other constitutional provisions relating to abortion in Ireland?

Another uncertainty in Irish law which was highlighted by the X case was whether Article 40. 3. 3 meant that a pregnant woman could be prevented from leaving Ireland because of a concern that she might have an abortion elsewhere.

A question was also raised as to whether a pregnant woman could lawfully get information in Ireland about an abortion in another country.

After the case, a referendum was held (alongside the referendum on the Twelfth Amendment) to consider these issues.

The Thirteenth Amendment:

This proposed that Article 40. 3. 3. would be amended to state that it did not limit freedom to travel between Ireland and another state. In other words, a person who was otherwise free to travel in and out of Ireland could not be stopped from doing this on the basis that they might have an abortion in another country. This was approved by the People.

The Fourteenth Amendment:

This proposed that Article 40. 3. 3 would be amended to state that it did not limit freedom to obtain or make available, in Ireland information relating to services lawfully available in another state. This freedom was stated to be subject to conditions laid down by law. In other words, this guaranteed that Article 40. 3. 3 would not prevent people from having access to certain information about abortion services in other countries. This was approved by the People.

These referendums meant that Article 40. 3. 3 was amended so that it now specifically states that it does not limit either freedom to access certain information about overseas abortion services, or to travel for an abortion.

The Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995:

In 1995, the Oireachtas introduced legislation to provide more detailed rules about the type of information which could be made available in Ireland. This was known as the Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995. In particular, the Act does not allow a person providing advice or counselling to promote or advocate abortion.¹⁴ Any information, counselling and advice given directly to the woman must be truthful and objective, fully inform the woman of all the courses of action that are open to her in relation to her particular circumstances, and cannot advocate or promote the termination of pregnancy.¹⁵ People giving advice are not allowed to have any direct or indirect financial interest in either giving information to a pregnant woman, or in her having an abortion outside Ireland.

¹⁴ Section 5 (a).

¹⁵ Section 5 (b).