

**LEGAL CONSEQUENCES OF RETENTION, REPEAL, OR AMENDMENT  
OF ARTICLE 40.3.3 OF THE CONSTITUTION**

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## 1. Purpose and Context

1. The purpose of this paper is to consider the legal consequences of the repeal of, or amendment to, Article 40.3.3 of the Constitution.
2. In order to explain these consequences, it is necessary to revisit some basic principles of constitutional law.
3. As the Assembly has heard explained by earlier speakers, the Constitution operates to limit the power of the Oireachtas to legislate. One way it does this is by guaranteeing certain fundamental rights. The Courts have the power to consider whether legislation impermissibly interferes with rights guaranteed by the Constitution. If the Courts decide that legislation does impermissibly interfere with the constitutional rights of a person, they can declare that legislation to be invalid.
4. Many of the rights guaranteed by the Constitution are specified in the text of the document. So, the Constitution expressly refers to rights such as the right to freedom of expression and assembly, the right to personal liberty, and the right to own property (to name but a few).
5. The Courts have decided that the rights expressly referred to in the text of the document are not the only rights protected by the Constitution. Other rights have been implied into the Constitution. By this process of implication, the Courts have decided that the Constitution protects rights to privacy (including marital privacy), the right to bodily integrity and (at least in certain circumstances) rights to autonomy. These are three of the many rights the Courts have implied into the Constitution.
6. The Oireachtas can usually limit rights expressed in or implied into the Constitution by legislation. It frequently does so. However, it must have good reason for doing this and the limitations on the rights must not be

greater than are required to achieve that purpose. The extent to which the Oireachtas can limit particular rights will depend on the nature of the right, the manner in which it is affected by the limitation, and the reason for the limitation. Very often, rights are limited by reference to other rights. The Courts have an important role in deciding whether the Oireachtas has correctly struck the balance between different rights and the common good. In discharging that role, the Courts assume that the Oireachtas got the balance right. They only interfere with the decision of the Oireachtas where the Courts feel that the Oireachtas has clearly exceeded its authority.

## **2. The Right to Life of the Unborn**

7. As the Assembly has heard, Article 40.3.3 was inserted into the Constitution in 1983. The original text has changed since following further Referenda.
8. Before 1983, there was no express reference to the unborn in the Constitution. Article 40.3.2 of the Constitution refers to the State being obliged to protect and vindicate the life “*of every citizen*”.
9. However, some Judges had expressed the view prior to the Eighth Amendment that the unborn *were* protected by the Constitution, even though the Constitution did not expressly so state. Thus, in *McGee v. Attorney General* [1974] IR 284, 312, Walsh J. (Budd, Henchy and Griffin JJ. concurring) said :

*Any action on the part of either [a] husband or wife or of 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 guaranteed personal rights of the human life in question'*

10. In *G. v. An Bord Uchtála* [1980] I.R. 32 Walsh J. (Henchy and Kenny JJ. concurring) said at p. 69 :

*The right to life necessarily implies the right to be born, the right to preserve and defend (and have preserved and defended) that life ..*

11. Similar statements appeared in a number of other cases.<sup>1</sup> Indeed, following the adoption of the Eighth Amendment other Judges confirmed these statements (or some of them), observing Article 40.3.3 as acknowledging rather than introducing the right to life of the unborn.<sup>2</sup>

12. In *Re Abortion Information Bill* the Supreme Court stated, of the law before the Eighth Amendment, that:

*The right to life of the unborn was clearly recognised by the courts as one of the unenumerated personal rights which the State guaranteed in its laws to respect, and, as far as practicable, by its laws to defend and vindicate.*<sup>3</sup>

13. I have referred to these as 'statements'. It is important to emphasise that they thus represented no more than a view of the individual Judges as to the meaning of the Constitution. Lawyers distinguish between comments made by Judges in the course of deciding cases, which indicate how the Judges think the law may develop, and actual decisions, which are binding law. There was no case prior to 1983 in which the Courts ever had to decide whether the Oireachtas could pass

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<sup>1</sup> *Finn v. Attorney General and the Minister for the Environment* [1983] I.R. 154 per Barrington J. (High Court) at p. 160, *Norris v. Attorney General* [1984] IR 36, 103 (McCarthy J.).

<sup>2</sup> *(AG (SPUC) v. Open Door Counselling* [1988] IR 593, 599 (Hamilton P.), *Attorney General v. X* [1992] IR 1, 86 (O'Flaherty J.), *Re Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1, 28).

<sup>3</sup> *Re Art 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill, 1995* [1995] 1 IR 1, 28.

laws allowing abortion in a wider range of situations than was permissible under the then governing law, the Offences Against the Person Act 1861. Therefore, there was no binding case law on these issues.

14. However, prior to the adoption of the Eighth Amendment, there was a body of opinion that the right to life of the unborn was protected by the Constitution, even though not expressly stated there.<sup>4</sup> On this basis, there was a view that there was a real prospect that were laws to be passed allowing for abortion, those laws could have been declared unconstitutional by the Courts because they violated the right to life of the unborn. However, it must be repeated, such laws were never introduced, and therefore there was no case so deciding.

15. Once the Eighth Amendment was adopted, the question of whether the unborn enjoyed implied protection under the Constitution became of less significance : the right to life of the unborn was thereafter expressly protected by the text of the Constitution.

### **3. Options**

16. The Assembly has been asked to consider, to make such recommendations as it thinks fit and to report to the Houses of the Oireachtas on, the Eighth Amendment of the Constitution. Clearly, it is a matter for the Assembly how it discharges its remit. Nothing I say is intended to suggest any limitation on the options it may wish to address in this regard, or to suggest any options which the Assembly should recommend. The purpose of the following analysis is purely to assist the Assembly consider the implications of possible recommendations.

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<sup>4</sup> I will refer in the rest of this paper to the right suggested by these judicial comments as an 'implied right'. I use this term to distinguish it from the express right introduced by Article 40.3.3. Some might say that the right was not 'implied' at all, but inevitably followed from the right to life, which is expressed. The use of the term 'implied right' is not intended to take a position on that debate, but merely to distinguish it from the position post 1983.

17. However, there are some obvious options which the Assembly may wish to consider. At its very simplest, these are as follows :

- (i) Retaining Article 40.3.3 in its present form;
- (ii) Repealing Article 40.3.3;
- (iii) Amending Article 40.3.3.

18. The Assembly has already received a great deal of information explaining the legal effect of Article 40.3.3. In consequence, the Assembly will be aware that because of the Article, the level of protection granted by the Irish Constitution to the right to life (and possibly other rights) of the unborn, is extensive, and the power of the Oireachtas to legislate to allow for abortion is restricted. The legal, medical and practical consequences of the provision has been addressed at some length, and the Assembly is thus well familiar with the legal effects of Article 40.3.3 and, as a result, of its retention.

19. However, the Assembly has not heard any consideration of what the legal consequences will be if Article 40.3.3 is repealed or amended. Thus, whereas the legal implications of retention have been considered by the Assembly, the legal implications of repeal or amendment have not. They therefore merit separate consideration.

#### **4. Constitutional Implications of Repeal of the Eighth Amendment**

20. If Article 40.3.3 of the Constitution were repealed, and nothing put in its place, what would the consequence be ?

21. In answering that question, a number of issues present themselves. These include the following :

- Would the effect of such a repeal be that the Oireachtas was totally free to introduce whatever abortion laws it believed appropriate ?
- Would there be any constitutional limitation on the Oireachtas in this regard ?
- If there was such a constitutional limitation, from where would it derive and what would its effect be ?
- What about the right to life of the unborn acknowledged by some Judges before 1983 ? Were they correct in thinking that there was such an implied right ?
- If there was such an implied right in 1983, what is the effect of a repeal of the Eighth Amendment on that right ? Would that implied right remain in the Constitution if Article 40.3.3 was repealed ?
- What about the right to privacy or autonomy of a pregnant woman ? What would the effect of those rights be on any restrictions on abortion introduced by the Oireachtas following repeal ? Would those rights result in what is often referred to as a right to choose to have an abortion arising from the Constitution ?
- What implications would repeal have for issues other than abortion ?

22. The resolution of these questions will bring into play many of the issues I discussed in the first part of this paper. If the express constitutional protection of the unborn were removed from the constitution, legislation subsequently introduced to allow abortion might face two different (and opposing) types of challenge.

23. Some who felt that the legislation allowed abortion too freely, may say that the legislation infringes implied rights of the unborn.

24. Others who felt that the legislation was too restrictive, might say that it infringed the rights of privacy or autonomy of the woman.
25. In the event of cases of either of these kinds being brought before the Courts, the Courts would have to decide (a) was a constitutional right impaired by the legislation, (b) if so what was the justification for that impairment and (c) was the impairment greater than necessary to achieve the purpose ?
26. At present, cases of either of these kinds would be decided by the Courts by looking to the express language of Article 40.3.3 and by reference to the relationship between the phrases '*the right to life of the unborn*' and the '*equal right to life of the mother*'. If that provision was removed, how would the cases be resolved ?
27. This is a matter on which differing views have been expressed. I think that there are three broad views on these issues.

**(a) *Form of abortion legislation exclusively a matter for the Oireachtas:***

28. The first view is that upon repeal, the Oireachtas would become the sole judge of whether and in what circumstances, legislation should permit abortion. On this version, the People having made a decision to repeal the Eighth Amendment, would have effectively decided that they do not want the Constitution to regulate abortion any more, and that they want the decision as to when abortion will be permitted to be decided by Parliament. Lawyers taking this view would argue that the Courts should give effect to that decision of the People to repeal the Eighth Amendment by allowing the Oireachtas a broad remit in formulating and passing laws governing abortion. The decision of the People (it would be said) could only mean that any right to life of the unborn previously thought to be protected by the Constitution, was no longer so protected.

29. On this view, two things would follow from any repeal of Article 40.3.3.
30. First, the Constitution would not protect any rights of the unborn or, at the very least, that whatever residual protection there was for the unborn would not prevent the introduction by the Oireachtas of laws it deemed appropriate, enabling abortion.
31. Second, the Constitution would not protect any right to choose on the part of women that could constrain the Oireachtas from imposing restrictions on the availability of abortion.
32. If this view were to be accepted by the Courts, the consequence would be that following the repeal of Article 40.3.3 it would be solely the Oireachtas which would decide the form of abortion laws. The Oireachtas could decide to leave the law exactly as it is (i.e. the Protection of Human Life in Pregnancy Act 2013), or it could make abortion available in a wider range of circumstances than is currently the case, or it could make abortion available in a narrower range of circumstances than is currently the case, for instance by removing the suicide ground recognized in the *X case*.<sup>5</sup> Each of these decisions would (save for most exceptional circumstances) be exclusively a matter for the Oireachtas. It would not be limited by any constitutional protection of the unborn or any constitutional right to choose.

**(b) Pre-1983 position revives :**

33. However, there are those who suggest that there is a possibility that the legal consequence of a repeal might not be this simple. Thus, the argument would go, *before* 1983 the unborn had implied rights under the Constitution. In 1983, the People included in the Constitution an express

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<sup>5</sup> Although it is to be noted that removal of this ground would present the prospect of a challenge based on the right to life of the mother.

right of life of the unborn. If the People decide to repeal Article 40.3.3 and do not include any replacement provision in the Constitution, some may suggest that the pre 1983 situation revives, and the unborn continue to have a right to life under the Constitution, inherent in but not expressed by, the text. On this argument, if the People want to remove entirely the right to life of the unborn from the Constitution, they must clearly state this in the Constitution. If they do not do so, the implied right previously identified by some Judges, remains.

34. If the Eighth Amendment were to be repealed, and were this interpretation to be accepted by the Courts, the consequence would be most uncertain. It would be said that the Oireachtas in introducing legislation to allow abortion would have to have regard to the implied right to life of the unborn and in some sense balance this against any judgment made by the Oireachtas that abortion should be more freely available. This could limit the right of the Oireachtas to legislate freely to make abortion lawful in a broader range of circumstances than is presently permitted. The extent to which there would be any such limitation would be unclear.

35. One possibility is that the Courts would try to strike a balance : to say that the People clearly did not want the regime provided for by Article 40.3.3 to continue, but that they did not either state that the unborn had *no* rights in *no* circumstance. Thus, the Courts might allow the Oireachtas to make abortion more freely available than it presently is, but require it to impose restrictions and checks around when abortion could be permitted. However, it is unclear what the precise consequence of such a balancing exercise would be and what restrictions and checks would be viewed as necessary. Nevertheless, on this interpretation of the implications of repeal, it is possible that the courts could declare unconstitutional an Act of the Oireachtas that makes abortion widely available.

**(c) A right to abortion :**

36. There is a third body of opinion. It says that if the right to life of the unborn were removed from the Constitution, the consequence would not merely be that the unborn have no (or only limited) rights under the Irish Constitution, but that the rights of a pregnant woman to privacy, to bodily integrity and autonomy (which are implied rights under the Constitution) would now prevail over many countervailing circumstances. This would mean that the power of the Oireachtas to prohibit abortion would be limited to circumstances in which it could point to a clear public interest which outweighed those rights (such as the interests of society in the life of a foetus after a specific stage of gestation).

37. In other words, this argument would be that given that the unborn have no rights under the Constitution, it must follow that the rights of a woman to privacy, and to decisional autonomy give her a right to decide if and when to have an abortion. The countervailing right (the right to life of the unborn) would no longer operate to limit the woman's constitutional right to privacy or autonomy. If this argument were accepted, it would mean that the power of the Oireachtas to constrain the circumstances in which abortion could be prohibited, would be limited. It would also increase the power of the courts to regulate abortion provision through deciding how far the decisional autonomy rights of women extend.

**(d) Conclusion :**

38. Different lawyers have different views as to which of these outcomes is the most plausible. Some are more likely than others, but none is impossible. The precise consequence of simple repeal would have to be determined by the Courts in an appropriate case. This means that if a proposal to repeal the Eighth Amendment is put to the People, and no further amendment provided for, there are likely to be different views expressed as to what exactly the constitutional position will be following such repeal.

39. As noted above, repeal also has implications for issues other than abortion. You have today heard two papers on miscellaneous issues related to the Eighth Amendment. Because those areas of law are so uncertain, it is even more difficult to assess the implications of repeal. However, if Article 40.3.3 does imply more rights for the unborn other than the right to be born, and if Article 40.3.3 does affect medical decision-making, these areas of law would be affected in some way by the repeal of Article 40.3.3. If the effect of repeal is to widen the circumstances in which abortion is available, greater legal attention will have to be paid to the question of who gets to decide whether to have an abortion, whether the mother or both parents of the foetus, or the parents of a pregnant minor.

#### **5. Amendment of Article 40.3.3**

40. Clearly, the effect of amending – but not repealing – Article 40.3.3, will depend on the exact nature of the amendments proposed. There are a large number of possible forms an amendment could assume. The nature of these amendments will depend on whether the Assembly decides to make recommendations and if so, what those recommendations are.

41. The following appear to me to be the more obvious options. However, as I have said, there are many.

**(a) *Amend so as to increase constitutional protection given to the unborn :***

42. An amendment to increase protection for the unborn would be appropriate if it was felt that Article 40.3.3 at present did not adequately protect the unborn and/or allowed the Oireachtas to legislate too broadly for abortion. The consequence would be to limit further the circumstances in which abortion was permissible in Ireland.

**(b) Amend so as to allow more freedom to the Oireachtas to permit abortion but only in defined circumstances :**

43. An amendment to allow the Oireachtas more freedom to permit abortion in defined circumstances, would maintain a right to life of the unborn in the Irish Constitution, and would thus continue to limit the power of the Oireachtas to legislate in the area. However, by defining in the Constitution the circumstances in which abortion is permissible but expanding those circumstances beyond the present Constitutional position, it would become possible to have lawful abortion in Ireland in a broader range of situations than is presently possible. Just how broad those range of circumstances would be, would depend on the assessment of whether, and if so when, abortion should be permitted. What is important to emphasize about this option, is that the Oireachtas would not be free to define the circumstances in which abortion is permitted. These circumstances would be specified in the Constitution itself.

**(c) Amend so as to expressly remove the right to life of the unborn**

44. An amendment which removed Article 40.3.3 in its present form, and replaced it with (or otherwise inserted into the Constitution) a provision which stated that the unborn had no rights under the Constitution, would avoid the uncertainties associated with simple repeal, as outlined in the previous section. This option would make it clear that the Oireachtas was to be given the function of deciding when abortion would be lawful. The insertion of a clause into the Constitution of this kind would increase the likelihood that the Courts would find that a woman had the right to choose to have an abortion.

**(d) state that the Oireachtas shall have full power to decide on the scope of permissible abortion :**

45. An amendment giving the Oireachtas full power to decide on the scope of permissible abortion would free the Oireachtas from any constraint based either on the right to life of the unborn or a woman's decisional autonomy rights. It would probably leave unaffected those areas of law other than abortion that are potentially affected by Article 40.3.3.

**(e) *Repeal but provide in Constitution for law which could not be amended without Referendum***

46. It has been suggested that if the Government were to publish legislation outlining the circumstances in which abortion would be permitted at the same time as any referendum, and were the People to vote to repeal the Eighth Amendment, that the Courts might decide in future that abortion in circumstances other than those provided for in that legislation was not permissible. While this is possible, it is not certain that this is a correct view.

47. However, the same effect could be achieved by Article 40.3.3 being repealed, and a new provision inserted to the effect that specified legislation identifying the circumstances under which abortion was permissible could not be amended without the consent of the People in a Referendum. This would be an unusual, and cumbersome form of constitutional amendment. It is, however, legally possible.

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