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Current Law on Article 40.3.3 of the Constitution

Introduction

This paper is intended to complement the paper concerning the history of Article 40.3.3 of the Irish Constitution by giving a brief statement of the current law related to Article 40.3.3. It should be read in conjunction with that paper, and in light of additional legal material that may be covered later in the Assembly's work.

The Constitution

The Constitution is the fundamental law of Ireland. It is an important statement of what the Irish people consider to be fundamental values. It was adopted in 1937 and can only be amended by the people in a referendum. It gives powers to different institutions. For instance, the Oireachtas (the Dáil and Seanad are the two Houses of the Oireachtas) has the power to enact laws (sometimes called 'legislation' or 'statutes'). The courts interpret the laws. The Constitution prohibits the Oireachtas from making laws that infringe or breach any constitutional provision. If somebody claims that the Oireachtas has enacted an unconstitutional law, the courts consider that case and can strike down the law if they decide it is unconstitutional.

Article 40.3.3

In 1983, the People amended the Constitution to insert the following provision (Article 40.3.3):

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.

This is sometimes referred to as the Eighth Amendment to the Constitution. The courts have considered the meaning of Article 40.3.3 in several different contexts.

The Supreme Court has held that Article 40.3.3 does not apply to issues about artificial human reproduction (IVF, etc) before an embryo is transferred into the

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womb. In other words, embryos fertilised outside the womb do not benefit from the 'right to life of the unborn' mentioned in Article 40.3.3.

The courts have considered whether Article 40.3.3 has implications for the decisions a pregnant woman may lawfully make: for instance, can she refuse treatment that might be necessary to protect the right to life of the unborn? These cases may be considered at a later point during the work programme of the Assembly.

The courts have considered whether the unborn child has rights other than the right to life, as well as whether the unborn child's right to life has implications for decisions made by the State about pregnant women. For instance, must the State consider additional factors before deciding to deport a woman who is pregnant? These cases may be considered at a later point during the work programme of the Assembly.

The biggest impact of Article 40.3.3 to date has been in connection with abortion. The rest of this paper addresses that issue.

Article 40.3.3. and Abortion

In the simplest terms, Article 40.3.3 (as currently interpreted by the Supreme Court) does at least two things in relation to abortion. (1) It prevents the Oireachtas from enacting legislation that would make abortion generally available. (2) It prevents the courts from reinterpreting the Constitution in a way that would allow for abortion to be generally available.

Because of the Eighth Amendment, abortion can be legally permissible in Ireland only in very limited circumstances.

Section 22 of the Protection of Life During Pregnancy Act 2013 provides that it is a criminal offence to intentionally destroy unborn human life. This replaces an earlier offence in the Offences Against the Person Act 1861. The maximum penalties are an unlimited fine and/or 14 years imprisonment. Under general criminal law rules, any person who assists another to commit this offence (an accessory) could also be found guilty of the offence.

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Lawful Abortion in Ireland

However, abortion is lawful in Ireland in certain circumstances, which were initially set out by the Supreme Court in 1992 in its decision in the X case. In that decision, the Supreme Court interpreted Article 40.3.3 to permit an abortion if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy. The Supreme Court decided that the threat to the mother's life could be physical or could derive from a risk that the mother would commit suicide if the pregnancy proceeded. Thus, in that case, the Court held that a pregnant girl who was suicidal was allowed to have an abortion in Ireland.

In the X case, the Supreme Court did not stipulate any limit on the time during which an abortion could be carried out.

The Protection of Life During Pregnancy Act 2013 seeks to implement the Supreme Court's decision in the X case by laying down more detailed processes and rules for deciding whether there is a threat to a mother's life that should allow for an abortion.

It provides that an abortion can be carried out where it has been certified by two medical practitioners (one obstetrician and one medical practitioner with relevant expertise) that it is necessary to avert a real and substantial risk of loss of the woman's life from a physical illness.

Where the risk of loss of life relates to suicide, the Act requires three medical practitioners (one obstetrician and two psychiatrists) to certify that an abortion is necessary to avert a real and substantial risk to the life of the mother.

In both of these cases, the woman's GP is to be consulted where possible.

In cases of an emergency, an abortion can lawfully be carried out once one medical practitioner believes that there is an immediate risk of loss of life from a physical illness.

A medical practitioner who has a conscientious objection to abortion cannot be required to carry out a lawful abortion under any of these circumstances.

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If a woman disagrees with the conclusion reached by the relevant medical practitioners concerning whether an abortion can be carried out, she can apply for a review of that decision by a panel of medical practitioners appointed by the HSE.

The Protection of Life During Pregnancy Act 2013 does not stipulate any limit on the time during which an abortion can be carried out.

Rights to Information and Travel

In 1992, the people amended the Constitution to clarify that Article 40.3.3 did not limit the freedom to make information available in Ireland about services that were lawfully available in other states.

The Oireachtas enacted The Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 to lay down more detailed rules about the provision of information. 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. 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.

The people also amended the Constitution in 1992 to provide that Article 40.3.3 did not limit the freedom to travel between Ireland and another State. This means that women who are free to travel to another state cannot be prohibited from travelling simply because they intend to have an abortion, although they might potentially be prohibited from travelling for other reasons (e.g. because they are in prison or seeking asylum in Ireland).