Address by Professor Gerry Whyte - Repeal or replace? The legal implications of amending Article 40.3.3

In this paper, I propose to examine the various options in relation to constitutional change to abortion policy currently being considered by the Joint Committee on the Eighth Amendment, though focusing primarily on the proposal that the provision introduced in 1983 simply be deleted from the Constitution. (Though it seems to me that such a move would also require minor consequential amendments to the provisions on the freedoms to travel and to obtain and disseminate information introduced in 1992 if only to avoid the retention of a puzzling provision in the Constitution.)

Repeal the Eighth

Just over a year ago, I argued that, just as one cannot step into the same river twice, a simple repeal of the Eighth Amendment will not take us back to the constitutional position on abortion that obtained in 1983 prior to the enactment of Art.40.3.3. In particular, the act of repeal will not give the Oireachtas a free hand to legislate in relation to abortion as the Constitution will remain an important factor shaping abortion policy in a very liberal direction. I want to explain this argument and also to take account of subsequent reaction to it.

To begin to do so, we need to ask, what was the constitutional situation on 6 October 1983, the day before the Eighth Amendment came into effect? While the Constitution contained no explicit provision in relation to abortion, it was clear that it had potential to shape the development of national policy on this question. On the one hand, the courts had identified a right of marital privacy that, according to supporters of Art.40.3.3, might at some point be interpreted by the courts to encompass the right of a woman to terminate her pregnancy. On the other hand, in a number of cases, some members of the judiciary had made non-binding statements to the effect that the Constitution implicitly protected the right to life of the unborn. Had Art.40.3.3 not been enacted in 1983, the courts might have shaped abortion policy by ruling definitively, in an appropriate case, as to how these competing rights were to be balanced (and, indeed, the possibility that the courts might liberalise the law on abortion was arguably a key factor leading to the enactment of Art.40.3.3). An alternative possibility, at least in theory, was that the Oireachtas might have legislated on this issue. In particular, the Oireachtas could have decided that a balance had to be struck between the mother's unquestioned constitutional rights to bodily integrity, privacy and autonomy and the constitutional right to life of the foetus. Had that happened, the likelihood is that such legislation would have been upheld by the courts unless it was "so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights". (This is the formula subsequently adopted by the Supreme Court in Tuohy v Courtney (1994) for determining when the courts could intervene to set aside legislation that seeks to balance competing constitutional rights.)

The decision of the People to enact the Eighth Amendment significantly changed the constitutional situation. Now any legislation had to comply with the principle that the right to life of the foetus was equal to that of the mother. By implication, a pregnant woman could not rely on her other constitutional rights, such as the rights to bodily integrity, privacy and autonomy, in support of a claim to be permitted to terminate her pregnancy. As the Supreme Court majority held in *Attorney General v X*, a pregnancy could only be terminated under Irish law where this was necessary to avert a real and substantial risk to the life of the mother.

Supporters of the current campaign to repeal the Eighth Amendment argue that the simple deletion of the Amendment from the Constitution will essentially take us back to the

constitutional position that obtained on 6 October 1983, to a situation in which proportionate limitations on the constitutional rights of the mother to have an abortion may be justified by an objectively justified interest in preserving foetal life. While I accept that this correctly describes the situation that obtained prior to the enactment of the Eighth Amendment and while I accept that the text of the Constitution following any deletion of the Eighth Amendment would, of course, be the same as it was before that Amendment was enacted, a closer examination of the situation reveals a new element present following the deletion of the Eighth Amendment that was not present in 1983. This is the explicit decision of the People to remove constitutional protection from the unborn. In my opinion, that factor has to be taken into account by both the Oireachtas and the courts in evaluating what might constitute an objectively justified interest in limiting the constitutional rights of the mother. In particular, I contend that it means that the Oireachtas would not have the same freedom of manoeuvre post any deletion of the Eighth Amendment as it had in 1983.

Simply abolishing equivalence of right to life of mother and unborn?

In the first place, in my opinion, a decision to delete the Eighth Amendment removes all constitutional protection from the right to life of the unborn and it is not the case that it merely removes the existing constitutional equivalence between the right to life of the unborn and that of the mother, leaving some residual constitutional protection for the right to life of the unborn. The Eighth Amendment has two elements. First, it acknowledges the right to life of the unborn and, second, it provides that the State has to have regard to the equal right to life of the mother in its laws defending and vindicating the right to life of the unborn. Deletion of the Eighth removes both elements; in particular, it withdraws constitutional protection from the right to life of the unborn. A more limited objective of removing the equivalence between the right to life of the mother and that of the unborn could be achieved by simply repealing or replacing the word "equal" in the existing text.

Continued existence of right to life of unborn?

Moreover it should be noted that Art.40.3.3 provides the sole constitutional protection for the right to life of the unborn and, in my opinion, it is not possible to argue, post deletion of the Eighth Amendment, that the right to life of the unborn still enjoyed some residual constitutional protection by virtue of other provisions of the Constitution. In Roche v Roche [2010] 2 IR 321, dealing with the constitutional status of IVF embryos, Hardiman J in the Supreme Court took the view that Art.40.3.1 guaranteeing, inter alia, the right to life of each citizen, did not apply to a fertilized in vitro embryo and his reasoning on this point also appears to cover the situation of an implanted embryo. More recently, Humphreys J in *I.R.M. v Minister for Justice and Equality* [2016] IEHC 478, (29 July 2016) expressed the view that the unborn enjoys constitutional rights protected by Art.42A. However this decision dealt with what possible constitutional rights of an unborn child the Minister had to take account of when deciding whether or not to deport its father and did not concern the actual right to life of the unborn. (Other High Court decisions deny that the unborn enjoys any constitutional rights other than the right to life.)

The only way it would seem possible to impose some limits on the right to abortion would be to read the decision of the People to remove constitutional protection for the unborn as somehow still subject to an implicit right to life of the unborn. However the argument that the power of the People to amend the Constitution was subject to the natural law rights of the unborn was rejected by the Supreme Court in the Abortion Information Bill reference in 1995. In the course of its judgment, the Supreme Court said:

> "The people were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended by the Fourteenth Amendment is the fundamental and supreme law of the State representing as it does the will of the people."

Unless one can draw a relevant distinction in this context between natural law and some other possible restriction on the People's power to amend the Constitution, it seems to me that this decision means that the simple deletion of the Eighth Amendment will have to be interpreted as an unqualified decision to remove constitutional protection from the unborn.

Doctrine of proportionality

Thus any legislation enacted following the deletion of the Eighth Amendment would no longer be seeking to balance the competing constitutional rights of the mother and the unborn and therefore would not enjoy the benefit of the very deferential test of judicial review contained in *Tuohy v Courtney.*Instead, the constitutional validity of such legislation would depend on whether restrictions on the mother's constitutional rights were rationally connected to a legitimate objective, impaired the mother's rights as little as possible and were such that the effects on the mother's rights were proportional to the objective. This proportionality approach is generally understood to require a more searching judicial scrutiny of legislation than the reasonableness approach of *Tuohy v Courtney*. It seems to me, moreover, that in deciding what is a legitimate objective and in deciding whether restrictions on the mother's rights were proportional to that objective, the courts (and the Oireachtas) would have to take account of the decision by the People to remove constitutional protection from the unborn. So, for example, while the Oireachtas in 1983 could arguably have legislated for the restrictive abortion regime that currently applies in this jurisdiction, I consider that if the Eighth Amendment was deleted, any such statutory regime would probably be regarded as a disproportionate interference with the mother's constitutional rights where the pregnancy posed a serious risk to the mother's health, as distinct from a risk to her life (and, *a fortiori*, where the mother was pregnant as a result of rape or where there was a diagnosis of fatal foetal abnormality.) It is also arguable that in that situation, the courts could strike down any restriction on the mother's right to an abortion (provided that the carrying out of the abortion did not endanger the mother's health).

Reaction to my argument

When I advanced this argument over a year ago, it was challenged by a number of letter writers to The Irish Times, one of whom accused me of "scaremongering". I note that since then, presentations to the Citizens' Assembly and, more recently, to the Joint Committee on the Eighth Amendment, now see the outcome I have described as possible but unlikely. I further note, however, that none of these presentations have adequately addressed my argument that a popular decision to withdraw constitutional recognition from the right to life of the unborn would tie the hands of the Oireachtas (and the judiciary) when it comes to the question of protecting foetal life. Commentators referred to the experience in other jurisdictions where abortion law does take some account of the value of foetal life. However no jurisdiction has yet been identified in which a conscious decision was made to remove explicit constitutional protection from the unborn. Thus the experience in these jurisdictions might well have been relevant to a discussion of Irish law up until 6 October 1983 (when the Irish Constitution was silent on the issue of abortion and when the views of the People had not been formally expressed in a constitutional context) but is not directly relevant to the situation obtaining here after a repeal of the Eighth Amendment where the text would again be silent on the issue of

abortion but only because the People explicitly decided to withdraw constitutional protection from the right to life of the unborn.

A number of these commentators also raise the possibility that the unborn might continue to enjoy an implied constitutional right to life but, for the reasons I have outlined above, I do not think that this outcome would be possible if the People decided to delete the Eighth Amendment. Even if, which I doubt, the unborn was deemed to enjoy an implied right to life following deletion of the Eighth Amendment, it is unlikely in the extreme that repeal would be interpreted as simply resurrecting an implied right to life that has the same application as the explicit right that is removed. The procedures in Arts.46 and 47 are designed to amend the Constitution so if the People rely on those provisions, as they must, to repeal the Eighth Amendment, it seems to follow that they must be intended to effect some change in the constitutional position to the detriment of the unborn. Moreover a decision to remove explicit reference to a constitutional right can surely only be understood as downgrading that right.

Some commentators have also pointed to the fact that the current generation of Irish judges are very deferential to decisions of the Oireachtas on matters of social controversy, arguing that the courts would be unlikely to invalidate any future legislation that sought to balance the rights of the mother with the interests of the unborn. It is certainly the case that Irish judges are currently very restrained when it comes to challenging legislation on controversial social matters. However two points are worth making in this context. First, legal history shows that periods of judicial restraint and judicial activism may alternate. This has certainly been the case in relation to judicial interpretation of the Irish Constitution. From 1937 until the mid-1960s, the courts generally took a very restrained view of the Constitution but then from 1964 to the early 1980s, Irish judges were quite active in recognizing implied rights that enjoyed constitutional protection. Since the early 1980s, that trend has admittedly diminished considerably but my point is that the fact that the current generation of judges may be very deferential to the Oireachtas when it comes to the protection of constitutional rights is no guarantee that a future generation of judges take the same approach and would eschew a liberal interpretation of the mother's rights to privacy, autonomy and bodily integrity in the context of abortion. The second point is to repeat what I have already said, namely, that an explicit decision by the People to withdraw constitutional protection from the right to life of the unborn would be a distinctive feature in the Irish situation and would offer protection to a future Supreme Court if it decided to interpret the mother's rights to privacy, autonomy and bodily integrity in an expansive manner.

But if I am wrong on this and if it is the case that the Oireachtas may have regard to the social value of foetal life when legislating on abortion, the experience in the US suggests that this might not afford much protection to the unborn. In case of *Roe v Wade* in 1973, the US Supreme Court struck down a Texas law that was equivalent to our Art.40.3.3 in that it banned all abortions other than those necessary to save the life of the mother. However in the companion case, *Doe v Bolton*, the Court also struck down a more liberal law from Georgia that permitted abortion where the pregnancy would seriously and permanently injure the health of the mother, or where the foetus would be born with a grave, permanent and irremediable mental or physical defect or where the pregnancy resulted from rape. Even this more permissive abortion regime was deemed by the US Supreme Court to infringe the mother's right to privacy. This decision has attracted some criticism from some academics, even some who are pro-choice generally, on the ground that the Supreme Court exceeded its constitutional authority in this case by invalidating a law that represented what those commentators would consider to be a reasonable attempt to balance the competing constitutional interests at stake.

However if a future Irish Supreme Court struck down such a law in the aftermath of a repeal of the Eighth Amendment, it could argue, unlike its US counterpart, that the Irish People had indicated that the foetus was to enjoy no constitutional protection and that the Supreme Court was simply giving effect to that decision.

Other options

Simple repeal of the Eighth Amendment is one of apparently six options currently being considered by the Joint Committee on the Eighth Amendment and I turn now to consider briefly the five other alternatives to straightforward repeal. I deal with these briefly simply because, unlike the position with regard to the proposal for simple repeal, there is a general consensus as to what each of these alternatives would entail in terms of how malleable future abortion laws would be under each alternative. As a preliminary remark, it should be noted that the Citizens' Assembly recommended that Art.40.3.3 be deleted from the Constitution and replaced by a provision that would make it clear that the regulation of abortion law would be solely a matter for the Oireachtas, i.e., that any subsequent legislation could not be constitutionally challenged.

(i) Repeal the Eighth Amendment in light of proposed legislation published before the holding of the referendum – The publication of legislation in conjunction with, but not referred to in, a proposal to amend the Constitution does not impose any legal obligation on the Oireachtas to enact such legislation. Moreover, even if enacted, such legislation could be amended in the future without having to have recourse to the electorate.

(ii) Permit abortion in prescribed circumstances set out in the Constitution – Depending on the circumstances in which it would be proposed to permit abortion, this could result in a restrictive or a liberal abortion regime or anything in between. Moreover some of the likely grounds to be covered, such as rape or incest, might give rise to practical difficulties in determining when those grounds apply in a particular case. (However it would not be necessary to require that the crime of rape or incest be established through the criminal process before permitting an abortion to take place on these grounds and accompanying legislation could set out civil procedures for determining when such grounds existed). Any change to the prescribed circumstances would require a further referendum.

(iii) Provide constitutional immunity for a particular legislative regime – It would be possible for any proposed new text to refer explicitly to a specific piece of legislation that would regulate the provision of abortion. (This was attempted in the unsuccessful Twenty-Fifth Amendment to the Constitution on abortion that was defeated in 2002.) Any change to such legislation would probably require a further amendment. (The Twenty-fifth Amendment to the Constitution expressly provided that any proposal to amend the legislation referred to therein would require a further amendment.)

(iv) Provide constitutional immunity for any legislative regime – The Constitution could be amended in such a way that any legislation on abortion, even if not specifically referred to in the Constitution, would be immune from constitutional challenge by analogy with the current manner in which emergency legislation enacted pursuant to Art.28.3 of the Constitution cannot be constitutionally challenged. Any legislative regime would be immune from constitutional challenge and could also be amended in the ordinary way without recourse to the People.

(v) Replace the Eighth Amendment with text providing for abortion on broad grounds and/or expressing a rebalancing of rights – According to The Irish Times, this is the sixth option being

considered by the Joint Committee on the Eighth Amendment. One would have to wait and see any proposed text before being able to offer a view as to its likely impact.

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