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delivered to

The Citizens' Assembly

on

04 March 2017

The Unborn, within and beyond the Eighth Amendment

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Introduction

This paper will consider the constitutional protection for the unborn, touching upon several issues of constitutional interpretation that have not yet been resolved by the courts. It will consider the role of the history of the Eighth Amendment in judicial interpretation, aspects of the decision of the Supreme Court in *Roche v Roche*, the extent to which a constitutional right to life for the unborn was recognised prior to the Eighth Amendment, and competing judicial views on the content of the constitutional rights of the unborn.

In summary—

1. There were many judicial statements made before the Eighth Amendment to the effect that the unborn already had a right to life protected by the Constitution. This understanding was affirmed by the Supreme Court in 1995. However, these judicial statements may not be binding, as they were not necessary for the decision of any of these cases.
2. Although there are some judicial statements to the contrary, there are few indications that the unborn were recognised as having any constitutional rights other than the right to life (and whatever necessarily flows from that) before the Eighth Amendment.
3. There is disagreement among judges as to whether the Eighth Amendment replaces whatever rights the unborn previously had with the express right to life mentioned therein and whether that right life exists only in relation to the specific topic of the voluntary termination of pregnancy.
4. In the *Roche* case the Supreme Court held that the protection of the “unborn” under the Eighth Amendment does not apply to embryos that have been created outside a woman’s body. This was explained by stating “the unborn” comes into existence only upon implantation in the womb. It was not necessary to be so specific in order to decide *Roche*, so other judges remain free to decide otherwise. Nevertheless, at least three of the judges in *Roche* made their views on this issue quite clear.
5. There are many legal provisions, outside the Constitution, that confer rights on children by reference to events that occurred when they were unborn. It is not clear that this in any way depends on their status before they were born. There is disagreement amongst judges on the question of whether the unborn has further *constitutional* rights outside Article 40.3.3°.

It is crucial to note that not every statement a judge makes when explaining the reasons for his or her decision in a case is binding on later judges. This is particularly

the case where statements relate to an issue which did not have to be decided in that case; these can be treated as opinions about the meaning of the Constitution that the judge expressed, but that were not necessary for his or her ruling. The decision of the Supreme Court in *Roche v Roche* is a very good example of this. All the judges were required to decide in that case was whether embryos which had been created outside a woman's body were among "the unborn" whose right to life is recognised by Article 40.3.3°. The Supreme Court's decision that they were not is certainly binding on the High Court and the Court of Appeal should that specific issue come before them. However, the fact that, as will be discussed, four of the five judges commented that the "unborn" only comes into existence upon implantation in the womb is not binding on other courts in that way, because it was not necessary to be so specific in order to reject the claim that the would-be mother had made in that case.

How does the Supreme Court use its history when interpreting the Eighth Amendment?

Judges have expressed various opinions about the broad purpose for which the Eighth Amendment was enacted and how this should effect its interpretation. In *Roche v Roche*, three Supreme Court judges said that the central aim of the Eighth Amendment was to prevent decriminalisation of abortion, and further said that the Court could have regard to that aim.¹ In contrast, Murray CJ felt that the debates that occurred from 1981 to 1983 showed an intention to address the status of unborn life, at a constitutional level, through a positive provision that went beyond merely copper-fastening the existing criminal prohibition.² Fennelly J came to the same conclusion, on that specific point.³

The wording that the Pro-Life Campaign (PLAC) submitted to the Government in April 1982 proposed an amendment as follows:

The State acknowledges the right to life of the unborn child from the moment of fertilisation and guarantees to protect that right by its laws.⁴

The wording proposed by the Government (which is that ultimately adopted by the People in the Eighth Amendment) was published in November 1982 and differed from this, in that it did not specify "the moment of fertilisation" as the starting point for

¹ [2010] 2 IR 321 (SC) 370, see the judgments of Denham J, Hardiman J and Geoghegan J. O'Flaherty J made a similar observation in *AG v X* [1992] 1 IR 1 (SC) 87: "Abortion, as such, certainly abortion on demand, is not something that can be legalised in this jurisdiction." The Supreme Court's very brief consideration of this issue in *Baby O v Minister v Minister for Justice* [2002] 2 IR 169, 181-82 points in the same direction.

² *ibid* 347-48.

³ *ibid* 395. In the High Court in *Roche* McGovern J also considered that the history of the Amendment's enactment provided guidance as to its interpretation: *ibid* 331-32. He noted that there had been no evidence presented to him "that it was ever in the mind of the People voting on the Eighth Amendment to the Constitution that "unborn" meant anything other than a foetus or child within the womb: *ibid* 338.

⁴ Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* (Brandsma Books, 1990) 190.

the protection to be given and it referred to “due regard to the equal right to life of the mother” and contained the phrase “as far as practicable”.⁵

What did Roche v Roche decide?

In *Roche v Roche* the Supreme Court had to determine whether a woman was entitled to have embryos created by the fertilisation of her ova with her husband’s sperm implanted, even though he did not consent to such implantation taking place. One ground on which she relied was that the right to life of the unborn was at stake, namely that of the embryos in dispute. The High Court (McGovern J) and, on appeal, the Supreme Court unanimously rejected this argument, though with some contrasts in the reasons given for so doing.

Most of the judges considered that the case did not turn on when human life begins but on the narrower issue of what “unborn” means as the term is used in Article 40.3.3°. However, Murray CJ did think that these two questions could not be disentangled, as the purpose of Article 40.3.3° was to protect human life before birth. He stressed that Article 40.3.3° “is resoundingly silent as to when human life should be deemed to begin for the purposes of enjoying its protection.”⁶ In that context, he held that the issue of whether the plaintiff’s frozen embryos were “life of the unborn” was not justiciable (that is, not something a court is equipped to decide).

The Chief Justice was, however, by no means, saying that the Oireachtas has a free hand to define the unborn as it pleases (for example, by making viability the decisive point or providing that the unborn does not exist until after the first twelve weeks of pregnancy.) He had earlier observed that it is an “obvious and accepted” truth that a foetus of three months constitutes a human life and that there is “a broad consensus ... that human life begins at least at implantation of the embryo in the womb or not long thereafter.”⁷

How much scope the phrase “or not long thereafter” leaves remains unclear.

The other judges did distinguish more clearly between stating when human life begins and the narrower issue of what the term “unborn” means in Article 40.3.3°. For a variety of reasons, they suggested that the latter should be interpreted as not applying where implantation had not yet occurred. Some of these related to the normal process of gestation, which starts with implantation and normally leads to a

⁵ In *Roche v Roche* Murray CJ observed: “I think it is safe to assume that at the time when the proposed amendment to the Constitution was being debated and its form being decided by the Oireachtas there was no clear view or consensus on the question of when human life begins, or perhaps more importantly, when it can be deemed or treated as having begun.” [2010] 2 IR 321 (SC) 350. In an early case *AG (SPUC) v Open Door Counselling Ltd* [1988] IR 593 (HC) Hamilton P did state “the right to life of the foetus, the unborn, is afforded statutory protection from the date of its conception.” However, this has subsequently been interpreted as referring to the unborn in the womb. *Roche v Roche* 334-35 McGovern J.

⁶ *ibid* 350.

⁷ *ibid* 349-50.

live birth. Others related to the physical connection between the embryo (or foetus) and the woman who is carrying it.⁸ Given that all of these four judges expressed the opinion that the unborn does not come into existence without implantation of the embryo *in the womb*, it seems that it was the former set of reasons rather than the latter which was decisive.

Furthermore, the term “implantation” is ambiguous here. Given the context of the case, it may be that the only thing that the judges meant was that if embryos have been created outside a woman’s body such embryos cannot become “the unborn” until they have been implanted in a woman’s womb. There is another sense of “implantation”, namely that when an ovum is fertilised in a woman’s body a period of several days elapses before it implants, as a purely natural process, in the wall of the womb (if it does so at all.)⁹ That was not the case in *Roche* and no argument was addressed to the Supreme Court concerning it. Nevertheless, three of the judges made statements that strongly suggest that had such a decision to be made they would extend the notion of “implantation in the womb” to the natural process as well as the artificial one, so that—for example—doubts about the legality of emergency hormonal contraception (“the morning after pill”) would be removed. In this regard, Denham and Geoghegan JJ’s endorsement of *R (Smeaton) v. Secretary of State for Health*¹⁰ suggests that they were specifically ruling that the unborn does not in any circumstances come into existence until implantation (in either sense) has taken place.¹¹ *Smeaton* held that no offence is committed under the Offences Against the Person Act, 1861 by administering emergency hormonal contraception (“the morning after pill”) because even if it did act to prevent the implantation of a fertilized ovum this was not done with intent to procure miscarriage, because “miscarriage” can take place only *after* implantation has occurred. However, for the reasons given at the outset of this paper, these statements are not binding on judges in other cases.

Even if *Roche v Roche* does not settle the question of whether, inside a woman’s body, the unborn can exist before it has reached the womb, the Protection of Life During Pregnancy Act 2013 may be based on the assumption that the unborn does not exist before that point.¹² This is a definition given for the purposes of that Act only, so it could also be that the Act is intended merely to confine the protection given by the criminal law so that it applies to one category of the unborn only, even if that concept is in fact wider under the Constitution. Similarly, the legal status of emergency hormonal contraception (“the morning after pill”) has never been the subject of any Irish court decision, even though a judicial review of the Irish

⁸ Denham J speaks of “an attachment between the mother and an unborn” *ibid* 373.

⁹ It is less easy to read Murray CJ’s judgement as leaving this question open because he says specifically that “[o]utside the womb, [the embryos] have the same qualities as they would have in the womb” *ibid* 349 and “human life begins in the womb” *ibid*.

¹⁰ [2002] EWHC 610 (Admin) and [2002] EWHC 886 (Admin), [2002] 2 FLR 14.

¹¹ Hardiman J concurred with Denham J on this point: *ibid* 381.

¹² In the Act “unborn”, in relation to a human life, is a reference to such a life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman’s 2(1).

Medicines Board's decision to licence such a product was threatened in 2002 and despite the fact that such treatments became available without prescription in Ireland in 2011.¹³ The statements made about the English *Smeaton* decision by three of the judges in *Roche* imply that the IMB had good legal grounds for their decision.

A right recognised prior to 1983

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.¹⁴

Various formulations were used by judges prior to the Eighth Amendment in 1983 to describe the type of constitutional protection that human life might receive before birth. In *McGee v AG* Walsh J stated "any action on the part of either the husband and 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."¹⁵ Walsh J returned to this point in *G v An Bord Uchtála*:

The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary, natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such.¹⁶

Both cases were cited by the Supreme Court in *Re Abortion Information Bill*. Another cited to them by counsel (but not discussed in the decision) was *Finn v AG*. In that

¹³ Cathal T Gallagher, Alice Holton, Lisa J McDonald, Paul J Gallagher 'The Fox and the Grapes: an Anglo-Irish perspective on conscientious objection to the supply of emergency hormonal contraception without prescription' (2013) 39(10) *Journal of Medical Ethics* 638-42.

¹⁴ *Re Art 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill*, 1995 [1995] 1 IR 1, 28. Cooke J reached an opposite conclusion in *Ugbelase v Minister for Justice, Equality and Law Reform* [2010] 4 IR 233 (HC) 248, at least in terms of whether there was a "definitive ruling amounting to a binding precedent" on this issue before the Eighth Amendment; *Re Abortion Information Bill* was not cited to him. In addition to *McGee* and *G v An Bord Uchtála*, the Supreme Court referred to the dictum of McCarthy J in *Norris v AG* [1984] IR 36 (SC) 103 that "the right to life of the unborn is a sacred trust to which all the organs of government must lend their support". See also *Finn v AG* [1983] IR 154.

¹⁵ [1974] IR 284 (SC) 312. In contrast, Griffin J stated merely: "... this judgment is confined to contraceptives as such; it is not intended to apply to abortifacients, though called contraceptives, as in the case of abortifacients entirely different considerations may arise." *ibid* 335.

¹⁶ [1980] IR 32 (SC) 69.

case, in the High Court, Barrington J (in rejecting an attempt to prevent a referendum taking place on the proposed Eighth Amendment) reviewed previous cases and, despite the difficulty that the use of the word “citizen” in Article 40.3.1° might raise for the argument that the unborn was constitutionally protected, concluded:

I would have no hesitation in holding that the unborn child has a right to life and that it is protected by the Constitution.¹⁷

Disagreement at High Court level about the content of the unborn’s rights

In *Roche v Roche* Murray CJ observed that—

... the Eighth Amendment to the Constitution ... effectively extended in express terms to the “life of the unborn” or “mbeo gan breith chun a mbeatha” the constitutional protection for the personal rights of citizens referred to in Article 40.3.1°.¹⁸

Similarly, in *AG v X* it was noticeable that Hederman J sought to emphasise the breadth of the right to life enjoyed by the unborn, suggesting that its application was not limited to the creation or destruction of life, but could be invoked in other circumstances, for example by the mother of an unborn child or others to protect it from injury due to adverse environmental conditions or other situations posing a risk to health or life. Hederman J said, “[i]t is a protection which all lives may invoke or have invoked on their behalf.”¹⁹

High Court judges have disagreed over whether the right to life of the unborn should be read in such an expansive manner, so as to affect situations not connected with the deliberate termination of a pregnancy at the instance of the mother in question. These have all been cases concerning immigration status and so are coloured to some extent by disagreements between judges as to how far non-nationals are entitled to rely on the Constitution to assert an entitlement to remain in the State.²⁰ In the first two such cases, it appears that the child in question was already born at the time the case was brought, though not at the time of the immigration decision to which the case related. In the most recent case, however, the case began before the child was born, though a decision was not given until after birth.

In *E(O) v Minister for Justice, Equality and Law Reform*, what was essentially being safeguarded were the rights of a child once he or she has been born to benefit from events that occurred before birth. A deportation order was made at a time when the

¹⁷ [1983] IR 154 (HC) 160. The Supreme Court did not address this aspect of the case in *Finn*.

¹⁸ *ibid* 346. He repeats this claim at p 348 referring to “the constitutional protections available to life after birth already provided for in Article 40.3.1°”. If it were not for the earlier “protections” this latter observation might be understood to relate the distinction between life itself being “respected”, “defended” and “vindicated”.

¹⁹ [1992] 1 IR 1 (SC) 72. .

²⁰ See cases such as *Cosma v Minister for Justice Equality & Law Reform* [2006] IEHC 36; *Osayande and Lobe v Minister for Justice* [2003] 1 IR 1 (SC); *H(N) v Minister for Justice and Equality* [2016] IECA 86; *Baby O v Minister v Minister for Justice* [2002] 2 IR 169 (SC).

man to whom it was addressed was about to become a father (outside marriage).²¹ The Minister conceded that the validity of the order should be assessed as if the child in question had already been born at the time the order was made and enjoyed all the constitutional rights a child would in that situation. Nevertheless, Irvine J considered whether this was in fact the legal position and concluded that it was. She concluded that

... little would be achieved by enshrining the right of the unborn to be born if such a right did not ensure that when ultimately born that infant would enjoy the constitutional rights and protections so carefully enshrined in the Constitution for the benefit of Irish citizen children.²²

Furthermore, she was influenced by the fact that an unborn child was recognised as having legal rights established by judicial decisions not concerning the Constitution, such as the right to sue in the case of injury or disability caused prior to birth by the negligence of others.²³

In *Ugbelase v Minister for Justice, Equality and Law Reform*, Cooke J reached the opposite conclusion, in a case where the facts were similar to those in *E(O)*.²⁴ He considered that since 1992 one had to read Article 40.3 as a whole, taking account of the limitations that the Thirteenth and Fourteenth Amendments placed upon the right to life of the unborn. In his view, this meant that the only provision of the Constitution that deals with that right is Article 40.3.3° and thus Article 40.3.1° could not be relevant to the unborn.²⁵ He further said:

... the right to be born includes the right to be born in the natural course and to be protected against any unnatural intervention short of termination which might harm or jeopardise the expectation of the unborn being born in normal good health and condition.²⁶

The most comprehensive and far-reaching attempt to address these issues thus far is in Humphreys J's judgment in *M(IR) v Minister for Justice and Equality*.²⁷ As noted

²¹ [2008] 3 IR 760 (HC).

²² *ibid* 776.

²³ *Ibid* 777 citing *Burton v Islington Health Authority* [1993] QB 204 (CA).

²⁴ [2010] 4 IR 233.

²⁵ The reason why Cooke J held the Thirteenth Amendment to be relevant appears to be that to subordinate the unborn's right to life to the mother's freedom to travel excludes the possibility that the unborn could have some other kind of constitutional right that could restrict that freedom.

²⁶ *ibid* 250. The qualification and "unnatural" was included in this formulation of the unborn's rights most likely because Cooke J considered that the constitutional right to life, whether for the born or unborn, does not include the right to be protected against the risk of disease in circumstances where adequate medical treatment is not available. See *O(ME) v Minister for Justice, Equality and Law Reform* [2012] IEHC 448. Support for this view might be sought in *Baby O v Minister for Justice* [2002] 2 IR 169, where the Supreme Court gave a cursory dismissal to the notion that pre-natal mortality and morbidity rates or the standard of ante or post-natal care in Nigeria could have any bearing on the lawfulness of a decision to deport a pregnant woman. Hogan J followed *Ugbelase* in *A (a minor) v Minister for Justice, Equality and Law Reform* [2011] IEHC 397. In another case, Hogan J did acknowledge the relevance of threats to the "life or health" of the unborn in immigration matters: *Aslam v Minister for Justice, Equality and Law Reform* [2011] IEHC 512 para 33.

²⁷ [2016] IEHC 478.

already, the child was not born until after proceedings had commenced, although before judgment was given. On the issue of whether the unborn has a range of constitutional rights that the Minister must consider when deciding whether or not to deport the father, Humphreys J reached a very definite conclusion that the unborn did enjoy this much wider range of rights.

A key starting point for this conclusion is his premise that, before the Eighth Amendment, there were “a number of judicial decisions to the effect that the rights of the unborn were in any event protected by Article 40.3”.²⁸ Proceeding on the basis that the unborn already had constitutional rights under Article 40.3, Humphreys J rejects the notion that the Eighth Amendment should be interpreted as taking those rights away and substituting the specific right to life mentioned there as the only right possessed by the unborn.²⁹

As to the substance of the matter, Humphrey J’s key premise is that

Since we were all unborn at one point, it is illogical to be dismissive of the natural, human and biological reality that there is continuity between the rights to be enjoyed before birth and those after birth.³⁰

Humphreys J reviews a series of legal entitlements (some established in judicial decisions, some created by legislation) that confer benefits based on events that occur before a person’s birth.³¹ With only a few exceptions all of these concern entitlements that the child has after his or her birth, based on events that occurred before that point.³² He also finds that the unborn child is within the scope of Article 42A of the Constitution.³³ This Article commences with the statement that:

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

However, he concluded that Article 42A was not intended to confer any rights in relation to immigration, so his view on the application of Article 42A to the unborn is not part of his decision in the case.³⁴

It seems clear, however, that in substance Humphreys J is concerned with the need for the Minister to consider the prospective effect of a deportation decision on the

²⁸ *ibid* para 56.

²⁹ He is particularly vehement in his criticism of Cooke J’s reasoning on this point: para 56. This is echoed in para 85.

³⁰ *ibid* para 57.

³¹ paras 60-69.

³² para 69. The main potential exception is the registration of stillbirths, though it is not clear the providing for that necessarily presuppose any rights on the part of the unborn.

³³ paras 82-83.

³⁴ paras 84, 101. Article 42A.4 is drafted so that the requirement that “the best interests of the child shall be the paramount consideration” and that his or her wishes shall be ascertained does not apply when decisions are being taken about the immigration status of the child or anyone related to him or her.

child after birth.³⁵ Understood in this way, the decision in *M(IR)* can be seen as one of administrative law—in relation to the relevant matters that the Minister must consider when making a decision in relation to a deportation order—rather than one that really goes to the root of what are the rights of the unborn as such and where they are grounded in the Constitution.

One specific point arising out of *M(IR)* does deserve some mention. Humphreys J refers briefly to the position of the unborn in the criminal law and specifically to the decision of the House of Lords in *Attorney General's Reference (No 3 of 1994)*.³⁶ He cites this case for the proposition “that the unborn child may be the object of an unlawful act”.³⁷ What the House of Lords decided is where a foetus has been injured in the womb it is only if it is subsequently born and then dies that the crime of murder (or manslaughter) might have been committed. If life is terminated before birth then it seems that in this jurisdiction the only criminal offence that is clearly applicable is the one created by the Protection of Life During Pregnancy 2013 section 22. The offence of intentionally destroying human life differs from both murder and manslaughter in that it carries a maximum penalty of imprisonment of only fourteen years (as opposed to life as a mandatory or a maximum penalty) and from manslaughter in that it can be committed only with intention to destroy the life in question. The question of whether Article 40.3.3° means that the offences of murder and manslaughter can also be committed in relation to ending the life of the unborn has been canvassed on some occasions.³⁸

A determination is awaited as to whether the State can appeal the decision of Humphreys J in *M(IR)* by going directly to the Supreme Court, bypassing the Court of Appeal.³⁹

³⁵ para 88. Emphasis supplied. Similar formulations recur later in the decision (“the rights which that child will probably enjoy into the future in the event of being born” para 90; “the prospective legal rights and (where raised in submissions) interests that a child will acquire on birth are matters that the Minister must consider” para 92.)

³⁶ [1998] 2 AC 245.

³⁷ [2016] IEHC 478 para 70.

³⁸ eg Liz Campbell, Shane Kilcommins and Catherine O'Sullivan *Criminal Law in Ireland: Cases and Commentary* (Clarus Press, 2010) paras 17-03 to 17-05.

³⁹ Mary Carolan “Leapfrog’ appeal sought on ruling over rights of the unborn” *Irish Times* 14 February 2017 <http://www.irishtimes.com/news/crime-and-law/courts/high-court/leapfrog-appeal-sought-on-ruling-over-rights-of-the-unborn-1.2975303>