

Thirty-sixth Amendment of the Constitution Bill 2018

A guide to some of its possible legal effects

Introduction

This short guide seeks to provide an expert analysis of some of the constitutional law aspects of the proposed Thirty-sixth Amendment of the Constitution. It does not offer any commentary on other legal, medical, moral or social aspects of that proposal or on the outlines of a law on the termination of pregnancy that the Government has put forward.

The Bill on which the people will vote on 25 May 2018 would, if passed, replace the current text of 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 subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

with the following:

Provision may be made by law for the regulation of termination of pregnancy.

Readers are referred to the general explanation of the current law and the effect of the proposal given by the Referendum Commission. This guide does not seek to duplicate that explanation.

<https://refcom2018.refcom.ie/refcom-guide-2018-english.pdf>

Previous referendum guides from the Centre have aimed to provide accessible information to voters on the background to the proposed amendment(s). In the case of the forthcoming referendum, a considerable amount of public information already available. Readers are referred, in particular, to the documents and videos available on the Citizens Assembly website.

<https://www.citizensassembly.ie/en/>

This guide will therefore concentrate on some major issues that arise in relation to the possible legal effects of the Thirty-sixth Amendment of the Constitution Bill 2018, if it were adopted.

Aims of the Eighth Amendment

The Eighth Amendment of the Constitution is generally regarded as having two main aims:

1. to stop the Oireachtas from making any that would make termination of pregnancy lawful in circumstances in which it was not already in 1983
2. to prevent the courts from deciding that the law on abortion as it had been laid down in 1861 was inconsistent with the Constitution because it violated the rights of people who were pregnant.

If the Constitution were changed in the way proposed, what would be left of either of those aspects of the present Article 40.3.3°?

Power of the Oireachtas to make termination of pregnancy legal

The Supreme Court appeared to make clear recently that the unborn have no rights under the Constitution, except the right to life given by Article 40.3.3°. The courts are unlikely to take a different view if Article 40.3.3° is removed. A former Chief Justice has expressed the opinion that this might not be the case, given that the Supreme Court in that most recent case was careful not to express a view on what the law was before the Eighth Amendment of the Constitution was enacted and given that Article 40.3.3° “acknowledges” rather than creates the right to life of the unborn. While it is possible that he is correct about that, it seems like a highly unlikely outcome.

If the proposed amendment ends the right to life of the unborn entirely this would remove that obstacle to the Oireachtas making the termination of pregnancy lawful on grounds not previously been recognised in Irish law. Clearly, even apart from Article 40.3.3°, the Oireachtas may legitimately seek to protect human life before birth, as part of the common good. However, it would not be obliged to make such if the subsection is removed. If the unborn had no rights after the amendment, a law on the termination of pregnancy could no longer be challenged simply because it failed to protect human life before birth. The only challenge that could be made would be due to the law’s effect on the rights of others, such as medical practitioner with a conscientious objection to taking part in or assisting such a procedure.

Challenges to laws restricting termination of pregnancy

If the proposed Thirty-sixth Amendment of the Constitution were enacted, could those who thought that the law did not go far enough to make termination of pregnancy lawful to challenge such limitations in the courts?

The Citizen’s Assembly recommended that the Constitution should make clear that laws relating to termination of pregnancy could not be challenged on the basis that they interfered with the rights either of pregnant people or of the unborn. The proposed Thirty-sixth

Amendment seems much closer to what was proposed by the Joint Oireachtas Committee on the Eighth Amendment—a simple repeal of the existing Article 40.3.3°. The reason for giving an explicit power to legislate on this topic was merely to clarify that the rights of the unborn did not survive repeal in implicit form. This was unnecessary, as the constitutional rights of the unborn are limited to the right to life given by Article 40.3.3°. The Government has stressed that the proposed amendment would not oust the jurisdiction of the courts in this area.

A judge might conclude, after Article 40.3.3° had been amended, that the issue of termination of pregnancy is so controversial and so profound that there were no legal standards for judging whether a law in relation to it was valid or not. Supporters of the right to choose to end a pregnancy could not then challenge a law they believed to be too restrictive of that right.

It is unlikely that the courts would go that far to avoid deciding that a law that restricted the rights of pregnant people was unconstitutional. While any constitutional right to life of the unborn would cease, pregnant people would retain all their constitutional rights (to life, health and bodily integrity, marital privacy and so on.) Although the European Court of Human Rights has only ever found one aspect of the Irish law on termination of pregnancy in Ireland to be a violation of the European Convention on Human Rights, it has not held that pregnant people lack rights under the Convention in these situations but instead that Ireland's approach was within a state's very wide margin of appreciation to make its own laws on such matters. The Irish courts would probably say the same. When it comes to other highly sensitive moral or social questions (such as assisted suicide, assisted human reproduction, marriage equality or the sexual behaviour of teenagers) the Irish courts often show a high of deference to the Oireachtas and allow it to make policy in such areas. It is unlikely that the courts would put termination of pregnancy in a different category, by surrendering all power to hold a law, however harsh or disproportionate, to be invalid.

Anyone claiming that a law excessively restricted the termination of pregnancy would probably bear a very heavy burden to satisfy a court that the Oireachtas went beyond the limits of what was reasonable and proportionate, particularly given the State's interest in protecting human life before birth. However, such challenges might succeed, particularly if based on the rights to life, bodily integrity or health of pregnant people. Prohibiting termination of a pregnancy in the case of a life-threatening foetal abnormality might also be unconstitutional; the Constitution guarantees to protect "the person" of every citizen, which probably includes psychological as well as physical integrity and thus freedom from unjustified psychological trauma.

Conclusion

The amendment of Article 40.3.3° now proposed would give the Oireachtas the power to make laws to regulate the termination of pregnancy without facing any challenge on the ground that they did not sufficiently protect human life before birth.

By adopting the amendment now proposed, it seems very unlikely that the People would be taking away or limiting any of the constitutional rights that pregnant people would enjoy if Article 40.3.3° were simply deleted.

Therefore, as compared with simply repealing the sub-section, the proposed new Article 40.3.3° is not likely to stop constitutional challenges to laws on the ground that they excessively restrict termination of pregnancy.

This does not mean that the Constitution as amended could be relied on to guarantee unlimited or even very broad access to lawful termination of pregnancy within the State. The Irish courts would be likely to treat this question as largely one of policy for the Oireachtas to determine.

While there is a degree of uncertainty about whether there would be successful constitutional challenges to laws regulating the termination of pregnancy claiming that they were too restrictive, it is clear that there could be no direct challenges in the opposite direction—on the ground that a law was too permissive in relation to termination of pregnancy.