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Commentary on *Attorney General v X*

SHEELAGH MCGUINNESS

Introduction

This commentary reflects on the feminist judgment of Ruth Fletcher in the landmark case of *Attorney General v X*.¹ This case involved an attempt to prevent a 14-year-old girl who was pregnant as a result of being raped from travelling to England in order to access abortion care.

It is impossible to engage with this decision without a broader consideration of the harm that is wrought on the lives of women in Ireland by the Eighth amendment to the Irish Constitution: Article 40.3.3. The content of my commentary uses two frames of analysis developed in the work of academic Robin West.² First, I consider West's concept of 'gendered harms' in the spheres of reproduction and pregnancy. Joanne Conaghan summarises the concept of 'gendered harms' as 'but one way of recognising that injury has a social as well as an individual dimension' and an acknowledgement of the way in which harms can impact particular group members.³ Legal systems can compound and legitimate harms that are experienced disproportionately or solely by women, especially in the sphere of reproduction.⁴ This harm plays out differently depending on how gender interacts with other social dynamics such as ethnicity in the regulation of reproduction.⁵ As is detailed by Fletcher J in her analysis, Article 40.3.3 is a clear instance of law's ability to be an instrument of harm. Second, I illustrate the way in which Fletcher J's decision is an example of what West describes as 'progressive constitutionalism', which contrasts with the 'conservative constitutionalism' evident in much of the legal discussion of 40.3.3. West suggests that it is '[o]nly by reconceptualising the Constitution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, [that we] can we make good on its richly progressive promise'.⁶ Fletcher J, in keeping with the aims of the feminist judgment endeavour, confines herself to a realistic adjudicative role that remains faithful to the impartial and neutral role of the judge. In doing so she accepts the legal form of the judge but her judicial craft is an instance of 'controlled creativity' that:

¹ *Attorney General v X* [1992] 1 IR 1.

² Robin West, *Caring for Justice* (New York, New York University Press, 1997) ('gendered harm'); 'Progressive and Conservative Constitutionalism' (1989-1990) 88 *Michigan Law Review* 641-721 ('progressive constitutionalism').

³ Joanne Conaghan 'Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment' (1996) 16(3) *Oxford Journal of Legal Studies* 407-31.

⁴ West, above n 2 ('gendered harm').

⁵ See Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York, Vintage, 1997); Jael Silliman, Marlene Gerber Fried, Loretta Ross and Elena Gutierrez, *Undivided Rights: Women of Color Organize for Reproductive Justice* (Cambridge MA, South End Press, 2004); Ruth Fletcher 'Reproducing Irishness: Race, Gender, and Abortion Law' (2005) 17(3) *Canadian Journal of Women and the Law* 365-404.

⁶ West, above n 2 ('progressive constitutionalism') 651. Although West is speaking here in the US context, this framing applies well to Fletcher J's engagement with the Irish Constitution.

views law as an open set of possibilities, and thus a vehicle for change, growth, and authenticity, rather than the static product of an unambiguous past historical process, and thus a vehicle for obedience.⁷

In her re-visioning of the decision, Fletcher J harnesses the disruptive potential of the Constitution to address the power imbalances perpetuated by Article 40.3.3. Contrasting her judgment to the original ‘expose[s] the contingency and biases of existing decisions and disrupt[s] the unique authority of the courts and legal decision-making’.⁸ In my commentary I bring together the work of Fletcher J, the feminist judge, and Ruth Fletcher, the feminist academic, to critique the existence and impact of 40.3.3. Reading the judgment in light of Fletcher’s academic work merges aspects of critique and law reform which are central to the feminist judging methodology.

The Emergence of Article 40.3.3

In order to understand the decision in *Attorney General v X* it is necessary to consider the historical and jurisprudential context within which the case arose. At that time abortion in Ireland was regulated within a web of Constitutional, legislative, and common law provisions originating with the Offences Against the Person Act 1861 (OAPA), sections 58 and 59, which prohibit procuring or attempting to procure a miscarriage.⁹ Sections 58 and 59 of the OAPA were reaffirmed in the Health (Family Planning) Act 1979.¹⁰ In England, the OAPA was interpreted to allow for an exception to the general prohibition when the life or health (physical or mental) of the pregnant woman were likely to be severely impacted.¹¹ However, it is clear that even prior to the insertion of 40.3.3 into the Irish Constitution, such an interpretation was unlikely to be permissible in Ireland.¹² Evidence for this proposition can be traced through the statements of Kenny J in *Ryan v Attorney General*¹³ to its clearest exposition in the judgment of Walsh J in *G v An Bord Uchtála*, when he held that a child:

has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth The right to life necessarily implies the right to be born...¹⁴

Notwithstanding the prevailing jurisprudence, a concern emerged that the Constitution could provide an avenue through which abortion would become

⁷ *ibid*, 688

⁸ Rosemary Hunter ‘The Power of Feminist Judgments’ (2012) 20(2) *Feminist Legal Studies* 137-48.

⁹ James Kingston, Anthony Whelan and Ivana Bacik, *Abortion and the Law* (Dublin, Round Hall Sweet and Maxwell, 1997) ch 1. It should be noted that the Protection of Life During Pregnancy Act 2013 repealed ss 58 and 59 of the Offences against the Person Act 1861, however, s 22 of this latter statute recriminalises the destruction of unborn human life.

¹⁰ Health (Family Planning) Act 1979, s 10.

¹¹ *R v Bourne* [1939] 1 KB 687.

¹² See Kingston, Whelan and Bacik, above n 9.

¹³ *Ryan v Attorney General* [1965] IR 294.

¹⁴ *G v An Bord Uchtála* [1980] IR 32; see also the *obiter dicta* of Keane J in the case of *Society for the Protection of the Unborn Child (Ireland) Ltd (SPUC) v Grogan and Ors* [1989] IR 753.

permissible in Ireland.¹⁵ Unease grew at the prospect that abortion might fall within the sphere of Constitutional privacy rights as happened in the USA in *Roe v Wade*.¹⁶ In 1974, the Irish Supreme Court in the decision in *McGee v Attorney General* had found that the right to marital privacy was implicit in the Constitution and as such married couples should be allowed to import contraception for personal use.¹⁷ Conservative lawyer William Binchy stated that ‘the concept of privacy espoused by that decision is a timebomb which, with changing attitudes, may yet explode in a manner which most of our citizens would deeply regret’.¹⁸ Here Binchy espouses the sort of constitutional conservatism that West places in opposition to the constitutional progressivism of which I suggest Fletcher J offers an example. Binchy is concerned that the ‘majority’ carries the danger of being or becoming an irresponsible and excessively egalitarian, or ‘leveling,’ mechanism bent on the redistribution of social wealth, power, and prestige’.¹⁹ In order to fend off the possibility of abortion as a personal right, Binchy and others established the Pro-Life Amendment Campaign, which successfully lobbied for a Constitutional clause that guaranteed specific and explicit protection for unborn foetal life: the Eighth amendment to the Irish Constitution.

The Harm of Article 40.3.3

Carol Smart warns of the juridogenic potential of law. She characterises the ‘term *juridogenic* to apply to law as a way of conceptualising the harm that law may generate as a consequence of its operations’.²⁰ Article 40.3.3, and its subsequent interpretation in the Courts, is a clear example of what Smart is here referring to. Fletcher summarises the situation as follows:

Through constitutionalisation, the right to life of the "unborn" had been legally recognised as an important interest of Irish society. ... through the judicial interpretation of Article 40.3.3, that right had acquired a status that rendered it more important to Irish society than other constitutionally endorsed interests.²¹

This amendment, and the interpretation of it, have served to perpetuate and assure harms to women; it is an instance of law purporting to legitimate gendered harm.

In claiming to find legitimacy, Article 40.3.3 rests on an antagonistic framing, meaning the Constitution creates a conflict model of maternal-foetal relations. It gives rise to a legal culture in Ireland that has attributed subjectivity to the foetus. Susan Bordo presents the effect of such framing as follows:

¹⁵ Kingston, Whelan and Bacik, above n 9; see also Ivana Bacik ‘Legislating for Article 40.3.3’ (2013) 3(1) *Irish Journal of Legal Studies* 18-35.

¹⁶ *Roe v Wade* 410 US 113 [1973].

¹⁷ On McGee, see further this collection, ch 5.

¹⁸ William Binchy ‘Marital Privacy and Family Law: A Reply to Mr. O’Reilly’ (1977) 66 *Studies: An Irish Quarterly Review* 330-335, 333.

¹⁹ West, above n 2 (‘progressive constitutionalism’) 645.

²⁰ Carol Smart *Feminism and the Power of Law* (New York, Routledge; 1989) 12

²¹ Ruth Fletcher ‘“Pro-Life” Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986-1992’ (1998) 36(1) *Osgoode Hall Law Journal* 1-62.

The essence of the pregnant woman... is her biological, purely mechanical role in preserving the life of another. In her case, *this* is the given value, against which her claims to subjectivity must be rigorously evaluated, and they will usually be found wanting insofar as they conflict with her life-support function. In the face of such conflict, her valuations, choices, consciousness are expendable.²²

Through the attribution of subjectivity, the status of the foetus is elevated to that of a separate and distinct individual of equal moral worth to the woman. That this conflict model of maternal/foetal relations was the impetus for the litigation in *X v AG* is evident in the following statement from Harry Whelehan; the Attorney General who initiated the proceedings. During an interview for the *Scannal* programme, Whelan was asked about his perspective on the decision looking back to which he said:

I don't want this to sound harsh but where the mother of the child, who is entitled to have its life protected, decides to seek an abortion the only mechanism in our system is for the attorney general to intervene and make a case for the child to be born alive.²³

Here Whelehan is advocating for an approach which affords protection to the foetus through the constitutionalisation of foetal rights.²⁴ Constructions of maternal/foetal conflict acknowledge the embodied nature of pregnancy only to the extent that the pregnant woman is viewed as a threat to the foetus. This framing leads to the position of the woman as an aggressor and the foetus as an innocent party rather than a dependent, such as was evident in the approach of some of the original judgments in *X*. As Bordo summarises: 'as the personhood of the pregnant woman has been drained from her and her function as fetal incubator activated, the subjectivity of the fetus has been elevated'.²⁵ Indeed it is interesting to note that one of the key legitimating narratives associated with the decision in *X v AG* is that of her innocence. This is vividly summarised by Fletcher as follows:

A famous cartoon in the *Irish Times* in February 1992 clearly depicts the enforcement of the Eighth amendment in nationalist terms. It represents *X*, who was stopped by injunction from travelling to England for an abortion, as a young girl with a teddy bear on a fenced-in map of the Republic of Ireland. The cartoon clearly plays with Irish nationalist iconography by describing the child as being interned in the twenty-six counties of Ireland as a result of the High Court decision in the *X* case. By depicting the *X* case decision in terms of Ireland's virtual imprisonment of a young vulnerable child, the cartoon criticises the Irish state in terms that used to be reserved for the British state when it imprisoned Northern Irish republicans without trial.²⁶

²² Susan Bordo, *Unbearable Weight Feminism: Feminism, Western Culture, and the Body* (Berkeley, CA, University of California Press, 1993) 79.

²³ *Scannal* programme, available at: www.rte.ie/tv/scannal/xcase.html (last accessed 27 March 2016); as detailed in *The Sunday Times* 'X case judge Harry Whelehan: I was only doing my duty' (21 February 2010). Available at: <http://www.timesonline.co.uk/tol/news/world/ireland/article7035006.ece> (last accessed 27 March 2016).

²⁴ Fletcher, above n 20; Fiona de Londras 'Constitutionalizing Fetal Rights: A Salutary Tale from Ireland' (2015) 22(2) *Michigan Journal of Gender and Law* 243-89.

²⁵ Bordo, above n 22, 85.

²⁶ Fletcher, above n 5 384.

I will return to the linkage between Irish nationalism and reproductive politics below.²⁷ For now, I wish to focus on how the acceptability of letting X travel to have a termination is reliant on a framing which reduces the ‘threat’ that X is seen to pose. She is depicted as another ‘innocent’. The outcome of this case cannot be understood as ‘empowering’; rather the justifications invoked legitimate and reproduce structural subordination of women in being reliant on her diminished agency.

Attorney General v X Reimagined

Article 40.3.3 therefore serves as a tool of subjugation and oppression. Furthermore, it is not just pregnant women who are impacted by this provision, but rather all those with the capacity to become pregnant. Article 40.3.3 ensures that this group lives with the spectre of the unborn; their agency is contingent on a state (pregnancy) that they may never enter. As Drucilla Cornell tells us:

The very constitution of selfhood cannot be separated from the protection of the future projections of the woman’s self as a whole body. The threat takes effect before any woman actually has to face an unwanted pregnancy. Here we have an important example of how the symbolisation of a woman’s “sex” has a constitutive effect on what we have come to think of as selfhood. Not only is a woman’s individuality not just given, it is limited in its very definition by certain symbolisations of her “sex” in the law.²⁸

As is clear in the decision of Fletcher J, and the range of abortion and maternity care cases that have arisen since its insertion in the Constitution, Article 40.3.3 is an instrument of law with serious juridogenic effect: it ‘poses an impracticable burden on the woman’s rightful life’ and as such limits her capacity to act as a full citizen. The absence of access to safe and legal abortion services means the absence of full recognition of the bodily integrity of the pregnant woman. Again, in the words of Cornell:

Understood through the rubric of bodily integrity, the wrong in denying a right to abortion is not a wrong to the “self,” but a wrong that prevents the achievement of the minimum conditions of individuation necessary for any meaningful concept of selfhood.²⁹

The first challenge then for Fletcher J’s feminist re-imagining is to respond to the limiting impact of Article 40.3.3. She does this by highlighting that even if women cannot ground a claim to access abortion based in dignity it is possible to limit the impact of Article 40.3.3 through the invocation of a range of other constitutionally protected rights. Specifically, Fletcher J rejects the ‘bright line’ distinction that has

²⁷ See also Eithne Luibheid, ‘Sexual Regimes and Migration Controls: Reproducing the Irish Nation-State in Transnational Contexts’ (2006) 83(1) *Feminist Review* 60-78; Siobhán Mulally ‘Debating Reproductive Rights in Ireland’ (2005) 27(1) *Human Rights Quarterly* 78-104.

²⁸ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harrassment* (New York, Routledge 1995) 52.

²⁹ *ibid* 33.

been drawn between ‘life’ and ‘health’ in Irish pregnancy and abortion jurisprudence. Here the feminist judge attempts to limit the juridogenic potential of Article 40.3.3 not just with regard to access to abortion care but also to limit the detrimental effect that the Article has had on maternity services generally.³⁰ In keeping with West’s account of progressive constitutionalism, Fletcher J here is interpreting the Constitution to ensure the minimum conditions for a flourishing or in Fletcher’s words ‘rightful’ life.³¹

Since its insertion in 1983, Article 40.3.3 has been interpreted in a range of cases related to access to abortion and maternity care as a mechanism through which the status of the foetus has been elevated to that of ‘super subject’. This elevation of the status of the foetus robs the pregnant woman of her own subjectivity and reduces her to the physicality of her role as foetal incubator.³² Again our feminist judge is both creative and subversive in her approach. She rejects the construction of the foetus as ‘super subject’ and emphasises the ‘life in being’ of the pregnant woman:

The unborn’s right to life is to ‘bare’ biological life. That right may impose an obligation on others to support it, but when there is a conflict, the woman’s fuller, rightful life may merit more legal weight than the unborn’s bare life.

Fletcher J restores the subjectivity of the pregnant woman and emphasises the contingent and dependent status of the foetus rejecting the hitherto ‘fundamentalist’ approach to valuing foetal life.³³ This construction is not an attempt to denigrate the status of the foetus but rather demonstrates the reality that separated from the body of the pregnant woman the foetus has no possibility for selfhood, and in doing so emphasises that the well-being of the foetus cannot be disentangled from the well-being of the pregnant woman ‘of whose body it is part’.³⁴

‘One step forward...’³⁵

In considering the progressive judgment of Fletcher J it is worth asking whether such a decision in 1992 would have prevented the series of terrible decisions which followed in its wake. Probably it would not have done, because to be successful it needs to be part of a broader socio-legal consensus that pregnant women’s right to life entitles them to more than bare existence.³⁶ It is not just the existence of Article 40.3.3 that diminishes the status of women but also the way in which it is interpreted.

³⁰ For further detail on this see Máiréad Enright and Fiona de Londras, “‘Empty Without and Empty Within’: the Unworkability of the Eighth Amendment after Savita Halappanavar and Miss Y’ (2014) 20(2) *Medico-Legal Journal of Ireland* 85-92.

³¹ West, above n 2 (‘progressive constitutionalism’) 697.

³² A particularly egregious example of this is the case of *PP v HSE* [2014] IEHC 622 discussed in Máiréad Enright ‘*PP v HSE: Practicability, Dignity and the Best Interests of the Unborn Child*’ (26 December 2014) *Human Rights In Ireland*. Available at: <http://humanrights.ie/gender-sexuality-and-the-law/pp-v-hse-futility-dignity-and-the-best-interests-of-the-unborn-child/> (last accessed 27 March 2016).

³³ Fletcher, above n 20.

³⁴ Cornell, above n 27, 32.

³⁵ Mulally, above n 26.

³⁶ See further Reva Siegel ‘The Constitutionalization of Abortion’ in Rebecca Cook, Joanna Erdman and Bernard Dickens (eds) *Abortion Law in Transnational Perspective: Cases and Controversies* (Philadelphia, PA, University of Pennsylvania Press, 2014) ch 1.

In 1998 Fletcher published a detailed consideration of how the protection of the foetus as a fundamental value within the Irish legal system and within Irish society had created the conditions for such a case occurring. Fletcher sees the potential impact of *X* as drawing a line under the sort of 'fundamentalist' narratives that had defined litigation (and societal discourse) on 40.3.3 until this point. Fundamentalist narratives in this context are simply the absolutist expression of the ideal of protecting foetal life as a constitutional value above and beyond the protection of other values. She summarises the impact of this fundamentalist approach as follows:

When the fundamentalist narrative assumed legal authority and became a legal narrative as well as a social narrative, the legal conditions were created that would give rise to the *X* case. By bringing "pro-life" absolutism to a climax, and thus exposing the actual consequences of legal endorsement of a fundamentalist narrative for women's lives, the *X* case also brought that legal narrative to a close and stripped fundamentalism of legal authority.³⁷

As has been discussed in this commentary the maternal/foetal conflict model of understanding the relationship between the foetus and the pregnant woman have the effect of foreclosing the possibility of equal consideration; when understood as being in opposition to each other the value of respecting one trumps the value of respecting the other. In conceptualising the pregnant woman and the foetus as separate and with the potential of competing interests we accept the fiction that in cases of conflict we are simply 'balancing' two sides equally. *X v AG* brought all of this to our attention:

The violation of women's rights through the prioritisation of fetal life became tangible for the Irish public as it took shape in Irish law's victimisation of a particular young woman.³⁸

However, *X v AG* signifies only the possibility of a more progressive approach to understanding the relationship between the rights of the pregnant woman and the rights of the foetus in the context of 40.3.3. In a later article, published in 2005, Fletcher picks up on this analysis with a consideration of the circumstances and conditions that made the outcome in *X v AG* possible and she contrasts these with two other cases; the *C* case³⁹ and the *O* case.⁴⁰ I will focus primarily on the *C* case. The decisions in *C* and *O* evidence how the legacy of *X v AG* is not a legal and societal awakening about the value of equal citizenship and consequent limitations on the interpretation of 40.3.3. Rather the decisions (and the associated societal discourse) continue to diminish the subjectivity of the pregnant women involved and also of migrant women and those from minority ethnic groups. In her article, Fletcher describes the extent to which discourses which provided a legitimating narrative in *X v AG* were not applicable in *C* and *O*. Her analysis describes a failure of progressive thinking not just within the legal system but in society generally.

The *C* case involved a 13-year-old who was pregnant as a result of rape. *C* was a member of the travelling community. *C* also wished to travel to England to have a termination but one of the distinguishing features of her situation and that of *X* was

³⁷ Fletcher, above n 20, 8.

³⁸ *ibid* 58.

³⁹ *A and B v Eastern Health Board* [1997] IEHC 176.

⁴⁰ *Baby O (Suing by Mother and Next Friend IAO) v Minister for Justice, Equality and Law Reform* [2002] IESC 53.

that she had been taken into care following the rape. This meant that the Court did not just have to decide to let her travel to access abortion care but rather they had to positively assist her to do so, which they did. It may be imagined at this point that the outcome marks a progressive extension of *X v AG*. Although, as Fletcher details, there are progressive aspects to the judgment which could be co-opted in this way, this is ultimately not the driver for the outcome reached. As mentioned above, the discursive justifications for the outcome in *X v AG* were reliant on a depiction of X as a diminished subject, an innocent, and as such less of a threat to her foetus. While the discursive justifications for C are consistent in reproducing structures which diminish the subjectivity of women and girls, they do so in a different way. For C, she was not capable of constituting a threat – she was ‘unfit’. As Fletcher summarises: ‘While X was to be spared motherhood because of her innocence, C was to be spared motherhood because she was unfit for it.’⁴¹

Pervasive in the consideration of the prospects for C and her ‘unborn child’ if the pregnancy were to continue is the undesirability of the Traveller lifestyle and consequent inability to control reproductive decision-making:

[A] young Traveller woman was represented as a less worthy bearer of Irishness in circumstances that celebrated the modernity of the settled Irish population by contrasting it with the backwardness and excessive fertility of Irish Travellers.⁴²

In this case, concerns about the protection of foetal life are hierarchised through the lens of ethnicity and its contribution to Irishness. The facts of C highlight the increased burden experienced by women and girls of limited financial means and for whom travelling to access abortion is not straightforward. It also illustrates the complex and heightened possibilities for individuals who are marginalised in multiple ways to experience harm. These interactions culminate in the case of Miss Y.⁴³ Miss Y’s story evidences the extent of the harm that can be experienced as a result of 40.3.3 in a societal context that is suspicious of women, asylum seekers, and maternal decision making. Y was an asylum seeker who was pregnant as a result of rape in her country of origin; she found out that she was pregnant at a health check upon arriving into Ireland. Y was deeply distressed by the pregnancy and wished to have a termination. She was informed that this would not be possible in Ireland and she would need to travel to England – Y had neither the financial nor legal means to travel to England.⁴⁴ It is beyond the scope of this chapter to discuss this case in detail suffice to note that Y is transformed from a woman who is harmed through the refusal of care consequent to 40.3.3 to a woman who is harmed by enforced medical care in the interests of the foetus consequent to 40.3.3. Y is violated and harmed first through rape, then through enforced pregnancy, and finally through enforced medical treatment.

⁴¹ Fletcher, above n 5, 390.

⁴² Fletcher, above n 5, 390.

⁴³ *Ms Y v Health Service Executive & Ors* [2016] IEHC 136. See further Ruth Fletcher ‘Contesting the cruel treatment of abortion-seeking women’ (2014) 22(44) *Reproductive Health Matters* 10–21.

⁴⁴ Notwithstanding these barriers, under circumstances that still remain unclear, Miss Y manages to get a ferry to Liverpool only to be returned to Ireland upon her arrival there due to her lack of documentation; see *Irish Times* ‘Report on Ms Y case to include journey to Liverpool to seek abortion’ (7 November 2014). Available at: <http://www.irishtimes.com/news/social-affairs/report-on-ms-y-case-to-include-journey-to-liverpool-to-see-abortion-1.1991580> (last accessed 25 March 2016).

Concluding Remarks

West describes the experience of rape and unwanted pregnancy as ‘defining harmful experiences for women’.⁴⁵ X, C and Y experienced both; the harm which X experienced under intense media and legal scrutiny is unimaginable. Subsequent to the reversal of the High Court injunction prohibiting her to leave Ireland, X travelled with her parents to England in order to have the termination she had first requested two months earlier. However, after undergoing chorionic villus sampling, in order to obtain genetic material which could be used in the prosecution of X’s rapist, X experienced a miscarriage.⁴⁶ C did go on to have a termination.⁴⁷ In sentencing her rapist Quirke J emphasised the grave harm he had caused not just in his violation of C but in also causing the death of a child by abortion.⁴⁸ He thereby provided an example of the way in which abortion continues to be cast as an independent harm to a foetal subject, rather than necessary medical care for a pregnant woman.

In his judgment in *X v AG McCarthy* J stated: ‘[t]he failure of the Legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable’.⁴⁹ Notwithstanding this declaration it was not until the passing of the Protection of Life During Pregnancy Act (PDLPA) 2013 that the Irish government ‘legislated for X’. Therefore, although in the wake of *X v AG* it was accepted that abortion was permissible when the life of the pregnant woman was threatened (including when the threat to life is from suicide) government inertia and unwillingness to confront the issue of abortion meant that how and when women are able to access abortion remained unclear.⁵⁰ The failure to provide clarity to the law in this area has been emphasised over the years through a series of high profile cases including (but not limited to) the *C* case;⁵¹ Miss D’s case;⁵² *D v Ireland*;⁵³ *ABC v Ireland*;⁵⁴ the death of Savita Hallapanavar; and most recently the treatment of Ms Y.⁵⁵ During this time McCarthy J’s sentiments have been echoed by many judges; most famously by Geoghegan J who expressed dissatisfaction that that the courts should be considered as ‘some kind of licensing authority for abortions’.⁵⁶ However, as Marie Fox and Therese Murphy caution:

⁴⁵ West, above n 2 (‘gendered harm’) ch 4.

⁴⁶ *Irish Independent* ‘Whelehan ‘regrets’ hurt caused in X case’ (21 February 2010). Available at: <http://www.independent.ie/irish-news/whelehan-regrets-hurt-caused-in-x-case-26634293.html> (last accessed 27 March 2016).

⁴⁷ *Irish Independent* ‘C-Case mum: I grieve for my lost baby every day’ (5 May 2013). Available at: <http://www.independent.ie/lifestyle/health/ccase-mum-i-grieve-for-my-lost-baby-every-day-29241584.html> (last accessed 27 March 2016).

⁴⁸ *Irish Independent*, ‘Judge jails C case rapist for “dreadful evil act”’ (18 December 1998). Available at: <http://www.independent.ie/irish-news/judge-jails-c-case-rapist-for-dreadful-evil-act-26165826.html> (last accessed 27 March 2016).

⁴⁹ *Attorney General v X* [1992] 1 IR 1, 147.

⁵⁰ For a full discussion of the journey from *X* to the PDLPA, see Bacik, above n 15.

⁵¹ Above n 39.

⁵² For details, see *Irish News* ‘Miss D: my story’ (12 May 2007). Available at: <http://www.independent.ie/irish-news/miss-d-my-story-26288744.html> (last accessed 27 March 2016).

⁵³ *D v Ireland*, App No 26499/02 (28 June 2006).

⁵⁴ *A, B and C v Ireland* [2011] 53 EHRR 13.

⁵⁵ For a discussion of these cases see Fletcher, above n 43.

⁵⁶ *A and B v Eastern Health Board* [1998] 1 IR IR 464, as per Geoghegan J.

Around the world, political careers lurch precariously, and 'passing the buck' becomes the solution when the personal becomes political, especially if the personal in question is abortion. It seems that there is nothing quite like it to bring out depoliticisation by delegation strategies or the seeking of 'refuge in a jurisprudence of doubt'.⁵⁷

It is becoming increasingly clear that the PDLPA does not provide the clarity that is necessary to ensure that women in Ireland receive safe and appropriate maternal and reproductive health care. As we enter 2016, some 33 years after the insertion of 40.3.3, there is hope that the Irish people may finally get an opportunity to vote to remove this clause from our Constitution and in doing so remove a key stumbling block to the achievement of full emancipation for Irish women thus ending a 'struggle ... equivalent to the "heroic and unremitting struggle to regain the rightful independence of our Nation"'.⁵⁸

⁵⁷ Marie Fox and Therese Murphy 'Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation' (1992) 19(4) *Journal of Law and Society* 454-66.

⁵⁸ As per Fletcher J, below.

THE SUPREME COURT

The Attorney General

(Plaintiff)

v.

X. and Others

(Defendants)

1992 No. 846P

[5th March, 1992]

Status: Reported at [1992] 1 IR 1

Fletcher J.

The facts and issues

The facts of this case are well known. The parents of a fourteen-year-old rape victim sought information from the Gardaí in an effort to support their daughter through the prosecution of the man who had assaulted her. In good faith, they asked if the DNA from an aborted foetus could be used as evidence in a rape trial. This question was referred to the Director of Public Prosecutions and then to the Attorney General. The Attorney General interpreted the question in a different way. He asked if he had a duty to try and stop the planned abortion given the obligations imposed by Article 40.3.3° of the Irish Constitution. The High Court held that there is such an obligation and that it extends to an injunction stopping Ms X and her parents travelling abroad for the purposes of securing abortion care. It falls to this Court to consider on appeal whether this is a sound legal interpretation.

Finlay C.J. has helpfully outlined the 22 grounds of appeal in this case and classified them as concerning four distinct legal issues, namely whether the trial judge erred in law and in fact because:

1. The court does not have jurisdiction to enforce Article 40.3.3° in the absence of legislation
2. Due regard to the pregnant woman's life under Article 40.3.3° means that abortion is permissible in these circumstances
3. Ms X's right to liberty would be unjustifiably infringed
4. Her right to receive services abroad under EC law makes an injunction unlawful

Interpreting Article 40.3.3°

In a sense, we are being asked whether the Attorney General's belief that he was constitutionally obliged to seek an injunction against Ms X and her parents was a reasonable interpretation of Article 40.3.3°. That article, as adopted by the Eighth Amendment to the Constitution, provides:

“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.”

The terms of Article 40.3.3° have not been implemented by legislation. The courts, state officials, healthcare providers and pregnant women have received no legislative statement from the Oireachtas as to how the constitutional balance between the right to life of the ‘unborn’ and the right to life of the pregnant woman, referred to in the Constitution as the ‘mother’, is to be drawn.

Nonetheless the Supreme Court has twice declared that the right to life of the unborn in Article 40.3.3° is self-executing (*The Attorney General (SPUC) v. Open Door Counselling* [1988] IR 593, hereinafter *Open Door*, and *SPUC v. Grogan* [1989] IR 753, hereinafter *Grogan*) drawing on *The State (Quinn) v. Ryan* [1965] IR 70 and *The People v. Shaw* [1982] IR 1 in so doing. This means that Article 40.3.3° is directly enforceable without the benefit of legislation. However, it does not tell us how exactly Article 40.3.3° should be enforced. That will have to be decided on a case-by-case basis in light of the particular facts and legal issues raised.

In *Open Door* and *Grogan* the Supreme Court decided that it was justifiable to stop pregnancy counselling agencies and student unions from providing information on abortion services abroad. The courts were not asked to consider the legal issues in relation to any particular pregnancy. In this instance Ms X’s right to life, as protected by Article 40.3.3° in harmony with other provisions in the Constitution, is directly engaged. As Mr Rogers argued on behalf of Ms X and her parents, given the absence of legislation on how to balance these rights, which are in conflict in this instance, the court has to “make law on this point”. HLA Hart would have said this is one of those occasions when law “runs out” and judges are required to exercise discretion in making a decision (Hart, *The Concept of Law*, 1961, pp. 123-124).

Impartiality

In exercising judicial discretion, we are required to act with objectivity and impartiality in service of the people. O’Higgins C.J. said in *Norris v. The Attorney General* [1984] IR 36 (hereinafter *Norris*) at p. 53:-

“The sole function of this Court, in a case of this nature, is to interpret the Constitution and the law and to declare with objectivity and impartiality the result of that interpretation on the claim being considered.”

Judges are not automatically objective and impartial by virtue of being appointed judges. These are qualities of adjudication that we aspire towards and develop over time. One lesson I have learned along the way is that objectivity is more likely to be achieved by recognising the limits of judicial knowledge. I may have a great deal of legal expertise on human rights and principles of consent, but that does not mean I am expert in the significance of a particular rights protection for a person or group of persons. Ignoring certain life experiences, which may be unfamiliar to us, is likely to produce a rather partial account of law and life. Being objective and impartial about interpreting Article 40.3.3° presents a particular challenge because there is so much silence and stigma about abortion experiences and decisions. In aiming for impartiality and objectivity we have to navigate uneven and obscured terrain as we come up against the partiality of our expertise and experience of legal rules and human life. We have to be wary of the potential for injustice, or legal hypocrisy as McCarthy J. might say (*Norris*, at p. 102), if we develop and apply the law as if ordinary women did not make abortion decisions every day.

In order to become impartial – to rise above our partiality – we draw on a diversity of human experience and expertise. This is what the Court does when it calls on personal and expert evidence in seeking knowledge which is vital to legal,

including constitutional, interpretation. But ‘rising above our partiality’ ought not to mean that we stay above legal process somehow, or that we adopt a bird’s eye view. Rather rising above our partiality has to be reflective. We try and imagine ourselves in the position of the litigant, and yet take a long view of the problem. In short, we judges regularly have to put ourselves ‘in other people’s shoes’ as we adjudicate and come to a legal ruling, often in haste and under pressure. We need to “assess the actual and potential effects” of this injunction on this appellant, as Henchy J. said *obiter* in *Norris* at p. 69.

Sometimes judicial empathy is helped along by the familiarity of certain experiences. In this context, abortion seems such an unfamiliar experience that it is difficult for judges to put themselves in the shoes of Ms X or of other women who decide that abortion is the best resolution for them. And yet, we know that many thousands of Irish women have had abortions before and after the Eighth Amendment. Indeed folklorists and historians tell us that St Brigid herself performed an abortion at a time when restoring a woman’s menses and preventing the development of a pregnancy was not seen as a moral or legal sin. We know that unsafe abortion has been a feature of Irish women’s lives, particularly during World War II as the traditional escape path to England became difficult to access (Jackson, *Outside the Jurisdiction: Irish Women Seeking Abortion Abroad*, in *Gender in Irish Society*, Galway University Press, 1987), and including the 1939, 1945 and 1956 convictions of midwife and abortionist Mamie Cadden.

The courts have been saved the experience of dealing with unlawful abortion practice since then because women have travelled to safe and legal services elsewhere. More stories are surfacing everyday about the ways in which pregnant women have been mistreated and undervalued as some were sent away to Magdalene laundries and had their children taken from them. We do not have the benefit of solid research evidence on women’s experiences of and reasons for pregnancy and abortion. But objectivity and impartiality cannot be achieved by ignoring this common knowledge of women’s struggle to gain reproductive self-determination and full citizenship, a struggle which I believe will one day be seen as equivalent to the “heroic and unremitting struggle to regain the rightful independence of our Nation”, as acknowledged in the Preamble.

Another feature of this case, which makes the terrain uneven and difficult in the search for impartiality, is the different public roles and responsibilities of the parties in this case. I cannot fail but to observe that this case comes before us because one family called on the Guards for help in their time of need. They did not receive the help they asked for but instead the full power of the state through the Attorney General’s request for an injunction was brought to bear on their situation. As a result, although their anonymity has been maintained, they have had to endure this threatening disruption to their care plan for Ms X while the international and national media pour over the details of her case. I for one find it extremely troubling that the effect, whatever the intention, of the Attorney General’s actions as guardian of the Constitution has been to expose ordinary people to coercive scrutiny and disruption, when surely our first intuition is that a prudent, just and charitable Constitution requires the opposite.

I am also conscious that this particular family has endured this response while showing remarkable faith in and openness with the legal system. Given what we now know about the past treatment of women such as Joanne Hayes by the authorities, I am mindful of the possibility that Article 40.3.3° could be used to license invasive treatment of women and their loved ones, some of whom may have good reason to be

less trusting of the legal system. As we judges strive for objectivity and impartiality in our constitutional interpretation we have an obligation to address gaps in our knowledge, and to consider the effects of uneven legal power on the parties before us.

Harmony

In exercising my judicial discretion to interpret Article 40.3.3° I will apply the doctrine of harmonious interpretation (*Quinn's Supermarket Ltd v. Attorney General* [1972] IR 1). Henchy J. explained the doctrine in these terms in *The People v. O'Shea* [1982] IR 384 at p. 426:-

“Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that ‘the letter killeth, but the spirit giveth life.’”

The requirement that the state defend and vindicate the right to life of the unborn with due regard to the equal right to life of the mother, needs to be interpreted firstly, in light of the commitments in the constitutional Preamble (see Walsh J. in *McGee v. The Attorney General* [1974] IR 284 (hereinafter *McGee*); O’Higgins C.J. in *State (Healy) v. Donoghue* [1976] IR 325), and secondly in light of the other provisions of the Constitution, including women’s fundamental rights under Article 40 (see Budd J. in *McGee* at p. 322).

The Preamble, in language which is similar to many other constitutional and human rights documents across the world, commits to promotion of “the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured”. The difficulty of course lies in deciding the proper legal meaning of “the common good”, “prudence” “justice”, “charity” “dignity”, and “freedom”, among other constitutional matters, how to weigh them when they come into conflict with each other, and which mechanisms and standards are appropriate in achieving these constitutional values. Although working out the detail falls to the legislature and the courts, it is clear that the Constitution envisages a people with dignified, free and just lives. Dignity, freedom and justice require that individuals be enabled to make their own lives, apart and together, subject to an obligation not to harm others. As Thompson saw, communities of shared power are vital to remedying the uneven distribution of happiness and enabling everyone to become “fabricators of [their] own destiny” (*Labour Rewarded*, Hunt and Clarke, 1827, at p. 118).

It is true of course that the Preamble also makes reference to the existence of God and acknowledges the people’s obligation to “our Divine Lord, Jesus Christ”. This constitutional language has been drawn on, most notably in *Norris* at p. 64, to declare the people’s intention to “adopt a Constitution consistent with that conviction and with Christian beliefs”. In *Norris*, the Supreme Court found that the impugned buggery and indecent assault offences were constitutional because they conformed with long established laws “which had existed for hundreds of years prohibiting unnatural sexual conduct which Christian teaching held to be gravely sinful”.

However, coherence with Christian teaching was not sufficient to save the legislation prohibiting the importation of contraceptives in *McGee*. Therefore, conformity with Christian teaching is not, in itself, sufficient to find legislation or

legal actions constitutional. In other words, the truth of the matter is that the Preamble lends itself to a variety of possible ways of harmonising these commitments to the dignity and freedom of the individual, to the common good, and to the Christian and democratic nature of the State. Therefore, I shall attempt to do justice to objectivity and impartiality by explaining how I approach the different legal pathways which harmonious interpretation provides.

Text

Precedent and practice tell us that there are three key elements to constitutional interpretation: text, evidence and craft. Each element will be in play as a judge considers the constitutional text, assesses evidence and crafts her judgment as a contribution to living law. Depending on the circumstances, some elements will be more emphasised or obvious than others in particular cases. For example, although constitutional scholars usually emphasise the innovative textual interpretation in *Ryan v. Attorney General* [1965] IR 294 (hereinafter *Ryan*) most of the judgment itself is actually concerned with the evidence on fluoridation in weighing whether there was any infringement of bodily integrity. Each element contributes to the ebb and flow of constitutional interpretation and to the judicial carving out of a legal pathway along the constitutional shoreline.

The doctrine of harmonious interpretation is one kind of textual approach. Harmonious interpretation reflects a coherence approach to textual meaning in holding that it is impossible to derive the meaning of one piece of text without considering how it coheres with the whole. In the process, the meanings of some words are so popularly accepted that they become common sense and are taken as the plain meaning of words. This is what the literal rule of interpretation captures. It is not that the words speak for themselves. Rather the audience is so familiar with the words and there is such a degree of consensus that the meaning becomes plain. But as authors such as Joyce have shown us, plain meanings become less plain when words are re-arranged and their usual pattern disrupted. In a sense, the adoption of the Eighth Amendment was a significant moment in the disruption of the plain meaning of key constitutional terms. The generation of this new constitutional term the unborn has re-arranged and disrupted the plain meaning of birth as the moment when legal personhood and rights normally begin. It falls to the courts to respond to this legal innovation and determine the constitutional meaning of the unborn as a new kind of rights-bearer, even as it is still a piece of the constitutional ensemble.

Evidence

The second element of constitutional interpretation is an evidence-based approach. In *Ryan* O'Dálaigh J., in the Supreme Court (affirming Kenny J. in the High Court), held that there would be times when constitutional meaning cannot be determined in the absence of evidence-based knowledge. He was referring not just to the material factual evidence, which gives rise to the legal issues in every case before a court, but also to the research-based evidence, which may be necessary for determining whether an action is integrity-violating and unconstitutional. *Ryan* then is authority for the role of evidence-based interpretation in assisting a court to decide where the threshold for a constitutional violation is and whether it has been met.

The evidence considered included evidence of Mrs Ryan's views and wishes in relation to her and her children's ingestion of fluoridated water and evidence of scientific research into the question of whether fluoridation could be harmful. In circumstances where there was a conflict between Mrs Ryan's evidence and that of the scientific establishment on the question of the harmfulness of fluoridation and

related violation of bodily integrity, the Court relied on the scientific evidence and found that there was no violation of bodily integrity because there was no objective evidence that fluoridation caused any harm (beyond some discoloration of teeth some cases).

Just as the court in *Ryan* had to rely on public health evidence in order to answer the question as to whether fluoridation was dangerous, so a court may rely on public health evidence, among other things, in determining whether pregnancy can be dangerous. Many pregnancies in modern times will be harmless and indeed beneficial to the women that carry them. They may not even require medical attention. But some pregnancies may be harmful for women because they threaten their health, dignity and well-being.

Furthermore, evidence of pregnancy's effects is likely to distinguish it from fluoridation in at least two ways. Pregnancy asks a lot of a woman's body and is therefore a greater incursion on bodily integrity than the ingestion of fluoride. Secondly, the pregnant woman's subjective experience of pregnancy has a known impact on the objective question of whether a pregnancy is harmful or not. Therefore a court may be entitled to give more weight to the wishes and concerns of a pregnant person vis-a-vis the general scientific evidence about pregnancy, than it would to the wishes and concerns of a woman who feels her body to be violated by the ingestion of fluoride, vis-a-vis the general scientific evidence about the effects of fluorides.

In this case before us, the High Court has appropriately relied on personal, parental and professional evidence of an individual risk of self-destruction as that goes to the primary legal issue before us. Here I am making the broader legal point that there are likely to be occasions when more general evidence about pregnancy, or other constitutional matters, will be helpful and even necessary for interpretative purposes. While *Ryan* emphasized the need for scientific public health evidence, as well as personal evidence, in evaluating the question of bodily harm, *Norris* required the submission of many different kinds of evidence in order to consider the question as to whether continued criminalisation of buggery and indecent assault could be constitutionally justifiable in the common good. The *Norris* court, whose judgment that continued criminalisation was justified is on its way to the European Court of Human Rights, heard from sociological, theological and psychiatric experts as well as from Mr. Norris himself.

As Henchy and McCarthy J.J. point out in dissent, a majority of the *Norris* court went against all of the evidence, as this evidence was uniformly of the view that criminalisation was not in the common good. Rather the majority found that criminalisation was justified on grounds of conformity with Christian teaching and given the Christian nature of the state. The aspect of *Norris* which concerns me here, however, is not the decision on criminalisation, but the interpretative rule which was relied on in producing that decision. A wide range of social, moral, medical and personal evidence may well be relevant in deciding whether a particular form of criminalisation is constitutional. I would add that evidence from the person affected is particularly important when fundamental personal rights are at issue.

Craft

The third key aspect of constitutional interpretation is the need for judicial craft itself, particularly given the status of our Constitution as a "living document". McCarthy J. expressed the point eloquently in *Norris* at 96 when he said:

“I find it philosophically impossible to carry out the necessary exercise of applying what I might believe to be the thinking of 1937 to the demands of 1983... Suffice it to say that the Constitution is a living document; its life depends not merely upon itself but upon the people from whom it came and to whom it gives varying rights and duties.”

McCarthy J. made these comments in dissent but they capture an approach to constitutional interpretation, which is supported by significant constitutional precedent (cf O’Higgins C.J. in *The State (Healy) v. O’Donoghue* at p. 347 and Kenny J. in *Ryan* at pp. 312-3).

The metaphorical depiction of the Constitution as a living document draws our attention to the subtleties involved in reading the tone and texture of law. This can be particularly demanding of judicial attentiveness when there are significant silences in relation to constitutional matters. In short, judicial craft has to be attentive to the fact that we know very little about pregnant women’s decision-making and that significant stigma and stereotyping attach to women’s practices of determining their own reproductive lives. It may take considerable experience of drawing out the significance of silences and discordant tones in order for constitutional interpretation to be crafted in a way that preserves democratic values and promotes public trust. We would do well to remember that our constitution, indeed our legal system, has been brought into being with joy and with pain. When judges are tasked with the job of giving life to law, of caring for its intricacies and deciding what to do with its rough edges, they must tread gently on the people’s dreams.

Article 40.3.3° limits reproductive choices and denies abortion as a personal right

I turn now to the evaluation of Costello J.’s test - whether there is a real and imminent danger to unborn life justifying the injunction and whether the risk that the girl might take her own life is of the same order as the risk of abortion to the unborn - and the clarification of the rules by which such an evaluation will be done, in light of the above. The text of Article 40.3.3° does not refer to abortion specifically. Rather Article 40.3.3° identifies the unborn as the bearer of a right to life. It imposes a positive obligation on the state to defend and vindicate that right “as far as practicable”. It imposes an obligation on the state to have “due regard to the equal right to life of the mother” when defending and vindicating the unborn’s right.

The language of Article 40.3.3° raises several questions. The unborn is a new constitutional term, whose plain meaning is not yet clear. For example, it is not clear at which point exactly in the development of pregnancy that the unborn comes into being and has a constitutional right to life. Is implantation enough? Secondly, the language of Article 40.3.3° implies that the positive obligation to defend and vindicate the unborn’s right to life is not an absolute one. This position is consistent with the other fundamental rights in the Constitution, which are generally regarded as being non-absolute and capable of limitation in the common good and given the rights of others (cf *Ryan*). It is also consistent with the common law position on the right to life, which does not normally protect life absolutely, and recognises that there may be circumstances in which the ending of human life is justifiable.

Does the particularity of Article 40.3.3° imply any other particular legal considerations? When will it be impracticable to defend and vindicate the unborn? If an unborn has a significant anomaly, e.g. anencephaly, and is unlikely to survive past birth, do such circumstances make it impracticable to defend and vindicate the unborn? Finally, the text raises questions about the appropriate threshold for due

regard to the equal right to life of the mother. When is “due regard” shown to the pregnant woman’s life? Does a threshold which requires a risk to a woman’s health to become a risk to her life before action is taken violate due regard? What difference do the particular circumstances of pregnancy make to the evaluation of due regard?

In order to answer these questions we need to consider how the other provisions of the Constitution may help in providing a harmonious interpretation of Article 40.3.3°, we need to consider the personal, social, medical, and philosophical evidence which is necessary for determining its meaning, and we need to come to a prudent, just and charitable judgment about which interpretation is best in light of living law. Before we do so, I think it worth noting that this case presents an interesting example of an occasion when the purpose of the amendment will be particularly helpful in defining constitutional meaning (cf Costello J. *The Attorney General v. Paperlink* [1984] ILRM 373, at p. 385). Abortion was a criminal offence under the Offences against the Person Act 1861 s. 58 when the Eighth Amendment was adopted. The amendment did not change the legal landscape by making abortion unlawful. There was also significant obiter commentary implying that abortion was unconstitutional (Budd J. in *McGee* at p. 335; Walsh J. in *G. v. An Bord Uchtála* [1980] IR 32 at p. 69; O’Higgins C.J. in *Norris* at p. 64). The Eighth Amendment made constitutional protection of unborn life explicit, but such protection was implicit before 1983.

That is not to say that this constitutional protection had ever been tested in such a way as to require the elaboration of its specific remit, nor to doubt that whatever constitutional protection existed would of course always have to be weighed with other constitutional interests, including women’s fundamental rights and the pursuit of the common good. The addition of the right to life of the unborn to the constitutional ensemble means that any court would have to take that protection into consideration when faced with a particular question about the permissibility of abortion. As a result, it would be impossible, or at least highly improbable, for a court to find that abortion was available to women as of right. Abortion, as such, certainly abortion on request, is not something that can be legalised in this jurisdiction under Article 40.3.3°. Therefore, Ms X does not have legal permission to have an abortion on grounds of a right to abortion simpliciter because this is exactly what Article 40.3.3° prevents.

Article 40.3.3° permits abortion where this vindicates a woman’s right to life

Nonetheless, as both counsel accepted, Article 40.3.3° does anticipate that a woman may have an abortion in some circumstances, notably when her right to life is at risk. Counsel differ however, as to the test that should be applied, with the Attorney General upholding the test that Costello J. applied, where the woman’s life is in imminent and inevitable danger of death. Mr Murray argues, on behalf of the appellants, for a test of real and substantial risk to the woman’s life.

One of the difficulties in determining the meaning of Article 40.3.3° according to the doctrine of harmonious interpretation is that we have a conflict in constitutional rights. One approach to the question of how to determine the balance between the conflicting rights of woman and unborn is the hierarchical approach, or the “hierarchy of constitutional norms” per McCarthy J. in *Murray v. Ireland* [1991] ILRM 465, at p. 476, with the abstract right to life at the top of the hierarchy. Precedent seems to favour such a hierarchical approach to a conflict between a right to life and another constitutional right, but only when a harmonious interpretation is not possible (see

McGee, The State (Healy) v. Donoghue [1976] IR 325 and *The People v. Shaw* [1982] IR 1).

But I do not believe that precedent *requires* the hierarchical approach, for the following reasons. Although the majority in *Shaw* claimed to be taking a hierarchical approach, the judgment actually involved a *reconciliation* of conflicting rights. The Court of Criminal Appeal (O'Higgins C.J., Finlay P. and McMahon J.) was satisfied "that, if it needs to be excused, the interference with the applicant's right to liberty is amply excused by the circumstance that the paramount and primary purpose for continuing his detention was the hope of saving the life of the woman from imminent peril"(at p. 23).

In other words, the violation of liberty was justified in concrete circumstances where that violation had a reasonable chance of saving the life of a woman who was in danger. In circumstances where there seems to be a conflict between what a court says and what it does, we are entitled to follow what it does i.e. reconcile rights which conflict in particular concrete circumstances, rather than apply an abstract hierarchy of rights.

Secondly, the judgment in *Shaw* cannot be taken to mean that an immutable list of precedence of rights can be formulated. The right to life of one person (as in *Shaw's* case) was held to be superior to the right to liberty of another but, quite clearly, the right to life might not be the paramount right in every circumstance. If, for instance, it were necessary for a mother to defend her daughter by attacking a person who was assaulting that daughter, and if she killed that person in the process, I have no doubt but that the right of the girl to bodily integrity would rank higher than the right to life of the person assaulting her. It may be justifiable or excusable for one person to kill another when that act is done in defence of another, subject to proportionate use of violence. In other words, it will not always be the case that a right to life takes precedence over another constitutional right, such as the right to liberty, or to bodily integrity. The reconciliation approach is a better fit with what the majority actually reasoned in *Shaw*. It also has the merit of enabling a fact-specific case-by-case approach to rights conflict.

Before elaborating how the various interests at stake in Article 40.3.3° should be reconciled, I need to address another preliminary issue of interpretation. How should the court approach Article 40.3.3°'s reference to "equality" between the "life" of the unborn and the "life" of the pregnant woman? Are there any significant differences between each form of life that should be taken into consideration when determining equal treatment? Clearly, as I have already stated, the purpose of Article 40.3.3° was to make any implicit commitment to protecting a foetal right to life explicit. But I find it difficult to countenance that the purpose of Article 40.3.3° could have been to devalue the life that sustains the unborn, much less to put it in danger. There is a substantive difference, one that has been long recognized by law, between the two lives. The right of Ms X here is a right to a life in being. The right of the unborn is to a life contingent, contingent on survival in the womb until successful delivery. It is not a question of setting one above the other but rather of vindicating, as far as practicable, the right to life of the pregnant woman, whilst vindicating, as far as practicable, the right to life of the unborn.

Why does this matter? It matters because we need to take the value of constitutional life into account when deciding how to treat the unborn and the pregnant woman as bearers of a right to life (in harmony with the other commitments in the Constitution). For the pregnant woman this means that we need to take her

needs seriously as a human being who requires the basics of life to survive – oxygen, food, shelter, rest. But it also means that we need to take into account her life interests as a creative, cultural human being. Moreover, if we value the creative role which women's bodies play in bringing new people into being, then we need to show legal respect for that role.

For the unborn, the situation is different. The unborn is a biological human and a social being, but not yet creative, sentient and conscious. Foetal dependence on the pregnant woman for the basics of life – oxygen, food, shelter and rest – in order for it to become creative, sentient, conscious and capable of independent interaction with others, is unique and vital. To compel a pregnant woman to provide that sustenance to a foetus within her body devalues the significance of pregnancy. To treat the unborn and the pregnant woman as if they were the same forms of life would be disrespectful and dignity-violating because it misrecognises each kind of life.

The equality guarantee in Art 40.1 recognises that differences in capacity, physical, moral and social function matter. As philosophers since Aristotle have recognised, equality is not achieved by treating different entities as if they are the same. Given the substantive differences between an unborn life and a pregnant woman's life and given the need to treat the bearer of a right to life with dignity and freedom and in light of the Christian and democratic nature of the state, it is permissible in principle to authorise the ending of unborn life in order to respect the pregnant woman's life.

Further support for this differentiation between the conflicting rights to life may be found in the constitutional text's explicit recognition of a pregnant woman's personal rights as distinct from the unborn's right to life. Ms X has a right to bodily integrity, a right to liberty, a right to privacy, a right to be free of inhuman and degrading treatment and a right to equality, among other interests. In short, her right to life is to a 'rightful' life that is to a life whose specific texture and tone is protected and enabled by these other rights. The unborn's right to life is to 'bare' biological life. That right may impose an obligation on others to support it, but when there is a conflict, the woman's fuller, rightful life may merit more legal weight than the unborn's bare life.

Ms X's right to life ought to be interpreted in light of the principle established in *The State (C) v. Frawley* [1976] IR 365, at p. 372, that the Executive "may not, without justification or necessity, expose the health of that person to risk or danger". For this reason, I find it impossible to draw sharp lines between life and health. Indeed Kenny J himself did not make any bright line distinctions between life and bodily integrity, or between life and health, when he was considering whether a violation of bodily integrity had taken place in *Ryan*. Rather he asked whether the plea that fluoridation was dangerous amounted to a plea that the Oireachtas had failed to respect the rights to life *and* bodily integrity (emphasis added).

McGee established a right to marital privacy, and the Eighth Amendment was adopted in part to prevent that right to marital privacy grounding an explicit right to abortion, as happened in the U.S. case of *Roe v. Wade* 410 U.S. 113 (1973). The right to marital privacy is not relevant to Ms X given she is not married. However, the right to marital privacy is one particular instance of a more general right to privacy in one's intimate life. She has a right to be free from unnecessary and excessive scrutiny in her intimate life, including her reproductive life. This is not an absolute right (cf *Ryan*), but it is a right which certainly needs to be weighed in the balance when deciding the extent of any duty to sustain foetal life under Article 40.3.3°.

Ms X also has a constitutional right to liberty. One of the issues before the Court is whether stopping Ms X from travelling for an abortion is a disproportionate violation of her constitutional right to liberty. Counsel maintained that the right to travel, as recognised in *The State (M) v. The Attorney General* [1979] IR 73 at p. 80 and in *Ryan* at p. 311, was an aspect of the right to liberty. I find it difficult to see why the right to liberty is only being considered in relation to the issue of travel out of the jurisdiction and not in relation to the issue of continuing or ending a pregnancy. It's as if counsel cannot imagine liberty applying to pregnancy as distinct from travel. If her legal right to travel to another jurisdiction and have an abortion is being contemplated as an aspect of her right to liberty, then why not a legal right to have a pregnancy terminated on Irish soil? If the state cannot, without just cause, use its coercive power to stop her from leaving its territory, then surely the state cannot use its coercive power to stop her from leaving pregnancy, without just cause. Preserving the bare biological life of the unborn against the will of a pregnant woman who sustains that unborn with her conscious and sentient life, may not always be just cause, particularly when the woman's life is at risk.

Ms X has a right to be held equal as a person before the law under Article 40.1°. To deny women a say in their own reproductive futures treats them as if their views, wishes and feelings do not matter. Telling someone that her views, wishes and feelings about her own life do not matter is a denial of the very essence of personhood, a denial which men, who also contribute to reproduction, are not required to accept. It is 167 years since Irish philosophers Thompson and Wheeler criticised society for encouraging women to repress their sexuality and for denying women civil rights on the basis of their capacity to bear children (*Appeal of One-half of the Human Race, Women, Against the Pretensions of the Other Half, Men, to Retain Them in Political, and Thence in Civil and Domestic Slavery*, Longman, Hurst, Rees, Orme, Brown and Green, 1825). Surely as this court considers how to balance the right to life of the unborn against the right to life of the pregnant woman, it cannot allow the right to life of the unborn to become the means by which women's equal personhood is denied? Such an outcome would be unjust and unreasonable, if not necessarily arbitrary, and therefore a violation of the equality guarantee (see *O'B v. S* [1984] IR 316).

Given the implications of women's constitutional rights, the social value of their voluntary reproductive contributions, and their status as persons of equal value and individuals bearing dignity and freedom, I cannot accept that there is a clear hierarchy of rights with 'bare biological life' at the top. Rather I would say that the first part of the test for lawful abortion is whether there is a risk to the pregnant woman's rightful life that is, to a life lived with bodily integrity, privacy, liberty and equality. The evidence presented to the court by Ms X's mother, by the Garda and by the clinical psychologist was clear and unchallenged in finding that there was a risk of self-destruction. While it was not possible to hear from Ms X directly in this instance, the evidence provided the Court with a clear account of her views, wishes and feelings in relation to this pregnancy. Assessments of the violation of fundamental personal rights should give significant weight to the person most affected. The grounds for a lawful abortion on this first element of the Article 40.3.3° test are more than made out.

Article 40.3.3° permits abortion when vindicating the right to life of the unborn is an impracticable burden on a woman's life

The next question for the Court is when does the right to life of the unborn justify the state in acting to prevent abortion even if a woman's right to life is engaged. Our common and constitutional law recognizes that there are circumstances in which the ordinary right to life is justifiably infringed, notably in self-defence. Secondly, the value of life does not usually justify compelling people to take extraordinary measures to sustain someone else's life against their own will (*McFall v. Shimp* 10 Pa D & C 3d 90; July 26, 1978), or against their own interest where their will cannot be expressed. The legal protection of the ordinary right to life acknowledges that life may be justifiably taken in self-defence, or denied the sustenance of involuntarily donated organs, blood and tissue. Therefore, the starting point for determining the scope of an unborn's right to life is that it at least has similar limits.

Article 40.3.3° refers to the right to life of the unborn, it does not refer to all the rights which a born person has. The text seems to imply a distinction between the unborn as the bearer of right to life as far as practicable, and the born as the bearer of a rightful life, a life of rights to bodily integrity etc. Secondly, there are good evidence-based reasons why the unborn's right to life ought to be recognised as more limited than the ordinary right to life. Unborn life has particular characteristics – non-viable, non-sentient, developmental – which differentiate it from the ordinary right to life and the obligations such a right can impose on others. Unborn life is notoriously fragile and contingent, with one in five pregnancies ending in spontaneous miscarriage. Nature itself decides that a significant number of unborns will not survive pregnancy.

There is extensive medical evidence that before viability (approx. 24 weeks gestation), the foetus could not be capable of sustaining life without the support of the pregnant woman because its lungs are not developed to the point of being capable of resuscitation. The only one who can assist this life in sustaining it to viability is the pregnant woman. This is not the same as born life, which can be assisted by anyone. There are times when an unborn has significant developmental anomalies, such as anencephaly, literally 'without a brain', which mean that even if a child is born alive and capable of drawing its own breath, it will not be able to survive long. In such circumstances, it would simply be futile to recognise unborn life, which cannot sustain itself or cannot be technologically sustained, as imposing obligations of sustenance on a pregnant woman.

Unborn human life is in the process of becoming a legal person, an important legal and social process, which ought to be supported. But to treat the process of becoming a person as if becoming has already been achieved misrecognises the nature of becoming. Women's contributions in pregnancy are necessary for the process of becoming a legal and social person. Women have undertaken them voluntarily with joy and happiness, as well as sometimes with fear and anxiety. To compel these contributions by law is to do a terrible dis-service to the history and future of voluntary reproduction.

In summary, where the unborn is unlikely to be born alive, implementing the right to life of the unborn and stopping a woman from having an abortion is likely to be an impracticable burden on a woman's rightful life. Where the unborn is non-viable or non-sentient, preventing an abortion, which would reduce harm to the viable, sentient pregnant woman, is likely to be an impracticable and disproportionate burden on a woman's rightful life. Preventing an abortion, which would implement

the reproductive wishes of a pregnant woman, *could* logically be seen as an impracticable burden on a rightful life of dignity and freedom. Who but she can judge whether pregnancy and motherhood fit her life plan, and all the dreams and hopes for the future that fill that plan? My conscience tells me that this life's voluntary contribution to the common good ought to be respected. But I accept that the effect of the Eighth Amendment is to limit women's reproductive choices, qualify their constitutional dignity and freedom, and deny them access to abortion as of personal right.

There was no evidence presented to the court on the material scope of the unborn's right to life. Therefore, the extent to which it is practicable to implement a right to life of the unborn in light of foetal anomalies, viability or sentience, was not tested or proved fully. It remains for the Legislature, or another case before another court, to debate or test those issues and establish binding rules thereon. Although the issues of viability and sentience were not argued fully before the court, this was because the legal assumption was that the unborn was neither viable nor sentient given the early stage of pregnancy. Therefore, the second stage of the test for lawful and constitutional abortion has been made out on the evidence in this case. Ms X is clearly distressed, suffering and being harmed by the continuation of the pregnancy, whereas there is no evidence that the unborn's life is one of distress and suffering since it is incapable of feeling. In these circumstances, sustaining the right to life of the unborn imposes an impracticable burden on the woman's rightful life and she is legally entitled to withdraw her sustenance of the unborn and to any necessary assistance in doing so.

Article 40.3.3° permits consideration of the particular circumstances of pregnancy e.g. maturity, vulnerability, experience of rape or assault, when deciding whether a particular pregnancy has become too burdensome

The test adopted by Costello J. is too narrow for another reason. It is insufficiently attentive to life circumstances that may contribute to a pregnancy becoming too burdensome. Circumstances or conditions, which make the pregnancy more difficult to bear, are relevant to the 'impracticable burden' test. Indeed, youth or experience of sexual assault, are circumstances which *prima facie* may make a particular pregnancy burdensome enough to justify an abortion. They are likely to make a pregnancy harmful for that woman in the sense of causing her pain and suffering. In some circumstances such pain and suffering may amount to inhuman and degrading treatment, and be in breach of her constitutional right to be free of such treatment, as established in *The State (C) v. Frawley* [1976] IR 365 at p. 374. The woman's views as to her experience of pregnancy will be pivotal in such instances however. Some women would rather continue a pregnancy even if young and distressed, or if pregnant as a result of non-consensual sex. This is another example of how the subjective experience of human conditions such as pregnancy, has a material bearing on objective assessment, including assessment as to whether someone is being degraded.

Kenny J.'s obiter comments in *Ryan*, as approved by the Supreme Court, provide support for taking the particular circumstances of the pregnant woman into account with a view to deciding whether a pregnancy is too burdensome on her life. When he was assessing whether the effect of fluoridation was a possible infringement of bodily integrity, he specifically mentioned different groups of people, namely the old, the young, the sick and the healthy. There was no reason on the evidence in that case to find that the young or the sick were in danger, even if the healthy were not.

But Kenny J. clearly contemplated a situation where the bodily integrity of the young and sick could be violated even though that of the healthy was not. Similarly, if a pregnant woman is vulnerable or distressed because of her immaturity, ill health, or experience of assault or violence, carrying a pregnancy may be more burdensome for her and more likely to violate her rights to life and to bodily integrity, as compared with a woman who is mature, healthy and free from experiences of violence. In this instance, it is clear that Ms X's youth, suicidal feelings and experience of rape contribute to her pregnancy being impracticably burdensome and mean that her right to life would be violated if she was denied access to abortion.

This Court is aware that rape victims are often reticent to report their experiences to the police partly as a result of the trauma usually caused by rape itself, and partly because of a fear that they will not be believed. The Court has a responsibility to develop its legal rules in a way which supports rape victims in accessing justice. For the purposes of assessing whether a particular pregnancy may be terminated because it imposes an impracticable burden on a woman's rightful life, any claim that the pregnancy resulted from non-consensual sex ought to be assumed to be truthful, unless evidence rebutting such an assumption is presented in court.

Article 40.3.3° imposes public duties to support pregnant life

This Court has focused on the obligations which Article 40.3.3° imposes on the pregnant woman in relation to the sustenance of unborn life, and the circumstances in which those obligations may legitimately end. Article 40.3.3° raises another set of obligations however, as it envisages a positive role for the State in the vindication of the right to life of the unborn through the provision of the necessary agencies to help, counsel and encourage pregnant women in making a decision in accordance with the Constitution and the law. In *Norris* at p. 103, McCarthy J. spoke of the right to life of the unborn as "a sacred trust to which all the organs of government must lend their support". If the Eighth Amendment had not been adopted, it is certainly arguable that compelling a woman to bear all the responsibility of that public trust would be a breach of the constitutional values of dignity and freedom.

Since the Eighth Amendment was adopted, a woman bears the lion's share of that responsibility since her reproductive choices are curtailed. In these circumstances, it is all the more necessary for the state to play a positive role in sharing some reproductive responsibility and supporting women. To do otherwise would be to completely privatise the public duty to defend and vindicate the right to life of the unborn, by locating all responsibility on the individual pregnant woman.

Decision

I have not addressed the issue of E.U. law because I do not consider it necessary, since the issues can be resolved in a manner that is consistent with freedom of movement on the basis of domestic law. But for the sake of clarity I agree with McCarthy J. on that issue.

The injunction is unjustified and the Attorney General was not constitutionally required to act in the way that he did. Ms X has a right to abortion in the Irish health care system on the ground that her pregnancy imposes an impracticable burden on her rightful life. This is a practicable and proportionate interference with the right to life of the unborn, given the distinction between a life contingent and a life in being and given the aggravating circumstances which make Ms X's pregnancy particularly burdensome. The state has a positive duty to support her in accessing that abortion care, in terms that respond attentively to her situation as a woman who is pregnant

through non-consensual sex and as a young person whose welfare may require added support, subject to her consent.