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When is a Foetus not an Unborn? Fatal Foetal Abnormalities and Article 40.3.3^o

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The inability of women carrying foetuses suffering from fatal abnormalities to access a termination in this jurisdiction has been discussed widely in the media and the political sphere in recent times. Diverging views have emerged on whether Article 40.3.3^o could accommodate terminations in these circumstances with the government taking the view that the termination of a pregnancy of this nature is not permissible under the Irish Constitution. This article proposes to unpick this presumption, focusing on three interpretations of Article 40.3.3^o which would permit terminations in these circumstances. The first argument is that the definition of the *unborn* does not include a foetus which does not have the capacity to survive outside the womb where such incapacity is not due exclusively to extreme immaturity. Secondly, it is argued that the life in question (that is, unviable life) can not be considered *equal to the right to life of the mother*. Finally it is argued that it is not *practicable* for the State to defend and vindicate this life. Essentially it is a question of whether there is a shift in the manner in which the two rights are balanced in these circumstances. Ultimately, it is argued that the termination of foetuses suffering from fatal abnormalities, such that they are incompatible with life outside the womb, is constitutionally permissible, and that a referendum to allow such terminations is not necessary. It is inevitable that a case involving circumstances such as these will appear before the Irish courts: we argue that the Government should pre-empt such a case, and legislate to allow for terminations where the foetus is suffering from a fatal abnormality.

I - Introduction

In recent months, the issue of the availability of terminations for women carrying foetuses, which are “incompatible with life”, or suffering from “fatal foetal abnormalities” has dominated the media. However, the issue has received little academic or legislative attention.¹ Arguments have been made that the termination of a pregnancy of this nature is not permissible under the Irish Constitution. This article proposes to unpick this presumption, ultimately arguing that the termination of foetuses who are suffering from a fatal abnormality, such that they are incompatible with life outside the womb, is constitutionally permissible, and that a referendum to allow such terminations is not necessary.

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¹ An exception being the Interdepartmental Working Group, *Green Paper on Abortion* (Dublin: Stationery Office, 1999) [hereinafter *Green Paper on Abortion*].

When considering legislating for termination of pregnancy where the foetus is suffering from a fatal foetal abnormality the question is the extent of the protection afforded to the unborn under Article 40.3.3°. The decision of the Supreme Court in *Roche v. Roche* that the right to life of the unborn is automatically and definitively engaged after implantation² may seem to lend support to the view that a constitutional amendment would be necessary to accommodate the termination of pregnancy in these circumstances. Further, it could be argued, by reference to the decision in *A.G. v. X.*, that before a termination of pregnancy is permissible, there is a requirement that there be a “real and substantial risk” to the life of the woman.³

However, we would suggest that these interpretations fail to take account of the broader context in which Article 40.3.3° operates. Court decisions, by their very nature, are confined to the facts of the case before the court, and we argue that if the issue of fatal foetal abnormalities were to be considered by a court, a more nuanced perspective could be taken of the constitutional provision. When the Eighth Amendment to the Constitution⁴ was passed, few foresaw that it would be interpreted as allowing a termination in circumstances where suicidal ideation posed a real and substantial threat to the life of the woman.

The courts are called upon to apply the law to difficult and troubling factual scenarios and it is certainly arguable that should a case of this nature be brought before the Irish courts in the future, the test as laid down in the *X.* case⁵ would be expanded upon and termination permitted in circumstances where the foetus was diagnosed with a

² *Roche v. Roche* [2009] I.E.S.C. 82, [2010] 2 I.R. 321, [2010] 2 I.L.R.M. 441 [hereinafter *Roche*]. For example, Denham J. held at 438 that “[t]he words of Art. 40.3.3° refer to a situation where the rights of the mother and the unborn are engaged. This occurs after implantation.”

³ [1992] 1 I.R. 1 [hereinafter *X.*]. In *Baby O. v. Minister for Justice* [2002] 2 I.R. 169; [2003] 1 I.L.R.M. 241 [hereinafter *Baby O.*] Keane C.J., giving the unanimous judgment of the court, said at 181-2:

[t]he passage from Article 40.3.3 on which counsel relied, as explained by the judgments of the majority in this court in *Attorney General v. X.* [1992] 1 I.R. 1, was intended to prevent the legalisation of abortion either by legislation or judicial decision within the State, except where there was a real and substantial risk to the life of the mother which could only be avoided by the termination of the pregnancy.

⁴ *Eighth Amendment of the Constitution Act 1983.*

⁵ *X.*, *supra* note 3.

fatal foetal abnormality. Indeed, in a submission to the European Court of Human Rights (E.Ct.H.R.) in *D. v. Ireland*, the Irish Government argued:

... it was an open question as to whether Art.40.3.3 could have allowed a lawful abortion in Ireland in the applicant's circumstances. The X case demonstrated the potential for judicial development in this area and, further, the X case did not exclude possible evolution in cases such as the applicant's: the foetus was viable in the X case whereas in the present case there might be an issue as to the extent to which the State was required to guarantee the right to life of a foetus which suffered from a lethal genetic abnormality.⁶

We argue that there are three different avenues of consideration, which could be taken which would allow termination in these circumstances, based on three distinct elements of Article 40.3.3^o: “[t]he 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.”⁷

The first question to be addressed is whether the definition of the “*unborn*” includes a foetus which does not have the capacity to survive outside the womb where such incapacity is not due exclusively to extreme immaturity.⁸ If this question is answered in the affirmative, then the second question is whether the life in question (that is, unviable life) can be considered “*equal to the right to life of the mother*.” If this question is answered in the affirmative, we finally argue that it is not “*practicable*” for the State to defend and vindicate this life. Ultimately, we are examining whether there is a shift in the manner in which the two rights are balanced in these circumstances. It is inevitable that a case involving circumstances of this nature will appear before the Irish courts: we argue that the Government should pre-empt such a case, and legislate to allow for terminations where the foetus is suffering from a fatal abnormality. We begin by defining the problem before examining each of these three arguments in detail in light of the rules of constitutional interpretation. We conclude by arguing in favour of legislative action and providing a draft amendment.

⁶ *D. v. Ireland*, no. 26499/02 § 4, E.C.H.R. 2006 (28 June 2006) at para. 60 [hereinafter *D.*].

⁷ Art. 40.3.3^o [emphasis added].

⁸ The constitutional protection afforded the unborn must cover those fetuses which have the capacity to be carried to term and to be born alive, subject to the exceptions laid out in *X.*, *supra* note 3.

II - What is a Fatal Foetal Abnormality?

Prior to examining the legal issues involved, we might pause for a moment to consider what a fatal foetal abnormality is. It is an unfortunate fact that approximately 1500 Irish women are informed each year that the foetuses which they are carrying are suffering from conditions which make the foetus incompatible with life.⁹ Such an incompatibility can stem from a variety of medical conditions which can be diagnosed at various stages during the pregnancy. In some of these situations, perinatologists can say with certainty that the foetus is incapable of sustaining life outside the womb; in others, women are told that while the foetus has the capacity to survive independently outside the womb, they are suffering from a medical condition such that its life will be very short, lasting anything from a few hours to a few days. For the purposes of this article, we use the term “fatal foetal abnormality” to mean those foetuses which have no capacity to survive outside the womb, though as we will see, our argument could be extended to those which have only limited capacity for independent life.

When diagnosed with such a pregnancy, due to the lack of availability of terminations in Ireland in these circumstances, women are faced with a stark choice: to travel to another jurisdiction to terminate the pregnancy or to continue to full term with the pregnancy, knowing that there is no possibility that they will have a baby at the end of the 40-week term. Of course, those women lacking the financial means to travel to terminate the pregnancy must, through economic necessity, continue with the pregnancy. For those women who decide to travel, they are obliged to locate a hospital in another jurisdiction which will treat them, arrange to travel and undertake the journey.¹⁰

⁹ Leaders' Questions Dáil Éireann, 26 June 2013 (John Halligan T.D.).

¹⁰ Many moving testimonies have been given by Irish women in the media recent months to this effect. For a sample see <www.irishtimes.com/news/social-affairs/anti-choice-logic-untenable-in-cases-of-fatal-foetal-abnormality-1.1412366>, <www.thejournal.ie/readme/fatal-foetal-abnormality-ireland-749010-Jan2013/?utm_source=shortlink>, <www.smh.com.au/lifestyle/damned-if-they-do-20121029-28e7r.html>, <www.washingtonpost.com/national/on-faith/irish-abortion-debate-reflects-growing-church-state-tensions/2013/03/27/03596fa4-96f6-11e2-a976-7eb906f9ed9b_story.html> and <www.euronews.com/2013/01/22/ireland-the-emotional-battle-of-abortion> (date accessed: 20 May 2013). See also *D.*, *supra* note 6 at para 58.

From a medical perspective, the impact of the current regime is stark. In the first instance, women are deprived of a full consultation with their medical practitioners in Ireland due to restrictions under the *Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995*.¹¹ Further, as was noted before the Oireachtas Committee on the Constitution in 2000,¹² “going abroad deprived a mother of a post-mortem on an aborted foetus and of full and proper advice and counselling on the source of the abnormality and the risk of recurrence in a future pregnancy”.¹³ The lack of follow-up care for women, both medical and psychological, upon their return to Ireland is also a cause of major concern.¹⁴ The fact that women have often felt obliged to hide the fact of the termination was highlighted in *D.* where it was noted that “Irish law on abortion contributed to the taboo surrounding the subject: [D] felt obliged to maintain the secrecy of her termination in Ireland even *vis-à-vis* a hospital treating her and her family doctor.”¹⁵

While some women may choose to continue with their pregnancies and who would continue with their pregnancies to full term even if a termination was permissible in Ireland, for those women who choose not to travel abroad for a termination, or are not in a position to travel, the emotional and mental impact of having to continue to carry a foetus without a prospect of life to term must also be borne in mind.¹⁶ This does not just affect the woman, but her partner, family and any other children she might have.

As the law currently stands, it is unclear whether the termination of a foetus suffering fatal foetal abnormalities, or one, which will inevitably miscarry, is

¹¹ As discussed in *D.*, *ibid.*

¹² The All-Party Oireachtas Committee on the Constitution, *5th Progress Report: Abortion* (Dublin: Stationery Office, 2000) [hereinafter *5th Progress Report*].

¹³ *D.*, *supra* note 6 at para. 40. Statements made by Dr. Declan Keane, Master of the National Maternity Hospital, Holles Street, Dublin before the All-Party Oireachtas Committee on the Constitution, *5th Progress Report, ibid.* at 66. See also *D.*, *ibid.* at para. 58.

¹⁴ *5th Progress Report, ibid.* at 67-68. See also *D.*, *ibid.*

¹⁵ *D.*, *ibid.* at para. 58.

¹⁶ See letter addressed to the Irish Government by the Termination for Medical Reasons Ireland Group for discussion of this <www.facebook.com/MakeTerminationForMedicalReasonsAvailableInIreland> (date accessed: 7 April 2013).

constitutional. In order to determine whether it is constitutionally permissible, we need to examine what exactly Article 40.3.3° provides. It states:

[t]he 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.

What we need to determine here is the extent of the “right to life of the unborn”, and the extent of the obligation on the State to “defend and vindicate” that right. This issue has not yet been examined in an Irish Court, but the decision of the E.Ct.H.R. and particularly the arguments made by Ireland, in the case of *D*.¹⁷ need close examination prior to our consideration of the extent of the protection afforded by Article 40.3.3°.

In the E.Ct.H.R. case, *D* was pregnant with twins, one of which had stopped developing at eight weeks gestation, the other of which had a severe chromosomal abnormality, Edward’s Syndrome, a lethal condition that would lead to the death of the child shortly after birth. She terminated her pregnancy outside the jurisdiction and brought an application to the E.Ct.H.R. seeking a declaration that Irish law was incompatible with the Convention due to the restrictive nature of Irish abortion law. In this case *D* argued that the failure to provide abortion services in the jurisdiction in a case of fatal foetal abnormality amounted to a failure to ensure that she was not subjected to “inhuman and degrading” treatment under Article 3.¹⁸ She also argued that her right to a private and family life under Article 8 had been disproportionately interfered with¹⁹ and that her right to receive information under Article 10 had been

¹⁷ *D.*, *supra* note 6.

¹⁸ *Ibid.* at para. 59, citing [Pretty v. United Kingdom \(2002\) 35 E.H.R.R. 1](#) at paras. 50, 52, and 55.

¹⁹ *D.*, *ibid.* at para. 59:

[s]he pointed out that she was the person primarily concerned with the pregnancy; that the State might have had a certain margin of appreciation but not an unfettered discretion in this area; that particularly serious reasons were required to justify an interference with “a most

violated. Finally, D argued that she was discriminated against as a pregnant woman or a pregnant woman carrying a foetus with a lethal abnormality as any other person would not have “encountered such difficulties in obtaining medical care and advice.”²⁰

The Irish Government argued in the case that it was “an open question” as to whether Article 40.3.3^o could have allowed a lawful abortion in Ireland given the circumstances of the woman. Noting that the decision in the *X.* case showed that the courts have expanded and interpreted the meaning of the constitutional provision, the Government argued, “there might be an issue as to the extent to which the State was required to guarantee the right to life of a foetus which suffered from a legal genetic abnormality.”²¹ Referring to arguments of counsel representing the Irish Government, the E.Ct.H.R. stated that it was argued that the Courts were unlikely to interpret the provision with “remorseless logic particularly when the facts were exceptional.”²² Ultimately, the E.Ct.H.R. was satisfied that the Irish Government had “discharged the burden on them to show that the proposed constitutional remedy as regards abortion was ‘accessible’, ‘capable of providing redress’ and ‘offered reasonable prospects of success’.”²³ The three grounds upon which we base our argument that a termination is available in this jurisdiction in the case of a fatal abnormality will now be discussed.

intimate part of an individual’s private life”; that she would have preferred to have had a full and open discussion with her specialist; and that she did all she could to respect the foetus (an induced labour, a coffin and a religious burial in Ireland). The foetus was condemned in any event and, in addition, she had her own physical and mental health together with her existing family responsibilities and interests to consider. By denying the few women in her situation an abortion in Ireland through the overall ban on abortion, the State put an unduly harsh burden on such women: it was arbitrary and draconian, made worse by the information restrictions set down by the 1995 Act. Ireland was, the applicant maintained, in a minority of European countries in these respects.

²⁰ *Ibid.* at para 60.

²¹ *Ibid.* at para 69.

²² *Ibid.*

²³ *Ibid.* at para. 86 referencing [Selmouni v. France \[G.C.\], \(2000\) 29 E.H.R.R at 403](#). It is interesting to observe that the facts of this case indicated that the foetus would in all likelihood be born alive, yet the court-referenced arguments by the State, which were restricted to the question of there being no prospect of life outside the womb. It is unclear if the State was accepting that there was no significant legal difference between the foetus, which has no prospect of survival outside the womb, and the foetus, which will be born alive but will survive for only a short period.

III – Interpreting Article 40.3.3°: A Three-Step Analysis

Were a case similar to *D.* to come before the Irish courts, or if any legislation permitting terminations where the foetus is suffering from an abnormality such that it is incompatible with life were the subject of constitutional challenge, we argue that there are three distinct arguments that can be made which would allow terminations in these circumstances.

(i) Option 1: The definition of “unborn” does not include foetuses, which lack a capacity to become a life in being²⁴

The first option for the court would be to find that a foetus suffering from a fatal foetal abnormality does not fall within the term “unborn” as understood by Article 40.3.3°. There is currently no legislative definition of unborn, though the Heads of the *Protection of Life in Pregnancy Bill 2013* (Heads of Bill) defined it as human life “following implantation until such time as it has completely proceeded in a living state from the body of the woman”.²⁵ The wording adopted here specifically affords protection to a foetus until it has “completely proceeded in a living state.” From a consideration of the legislation on its own, it is open to question whether a foetus which does not have the capacity to proceed in a living state would be considered to be “unborn”. The definition was amended in the *Protection of Life in Pregnancy Bill 2013 (2013 Bill)* which defined the unborn as “such a life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman”.²⁶ This appears to be a narrower definition than that included in the Heads of Bill but nonetheless the requirement of the emergence of a “life” could be interpreted as requiring the unborn to have the capacity to be born alive in order to be subject to constitutional protection.

²⁴ Borrowing the terminology adopted by Hardiman J. in *Roche*, *supra* note 2 at 447.

²⁵ Head 1, Heads of Bill.

²⁶ *2013 Bill*, s. 2.

Apart from the *2013 Bill*, the question of what unborn means was examined by the Supreme Court in *Roche*.²⁷ Here, the Court found that “life” for the purposes of the Constitution means life within the womb. Mrs. Justice Denham held in that case that a capacity to be born is a necessary condition for constitutional protection to attach. In this context, Justice Denham stated, “[t]he concept of unborn envisages a state of being born, the potential to be born, the capacity to be born”²⁸ While this statement concerns the beginning of life, it is relevant here and two interpretations of this authority are possible. The first suggests that the term unborn encompasses all foetuses in the womb which necessarily have the capacity to be born, irrespective of whether they can achieve life outside the womb or not. The second possible interpretation would suggest that life, for the purposes of the Constitution, may be interpreted as constituting *viable* life: that is, life, which has the capacity to exist independently of the woman if brought to term. That is, a right to be born inherently implies a capacity to be born alive. This interpretation would suggest that a foetus, which does not have the capacity to be born alive, does not attract constitutional protection.

In support of this interpretation is the significance placed by on viability by other judges in this case. In his analysis of Article 40.3.3° Mr. Justice Geoghegan notes that “[t]he State is not conferring a right but rather acknowledging the majority view in the community that the baby in the womb has the right to be born alive but that this is not an absolute right”²⁹ He went on analyse the term “unborn” specifically, noting that “far from meaning an actual baby or foetus, it would tend to mean what I might describe as “the as yet unborn” or in other words future existences.”³⁰

Mr. Chief Justice Murray ultimately came to the conclusion, with the rest of the Court, that the fertilised ovum is not “unborn” and noted that “the fertilisation of the ovum is the first step in procreation and contains within it the potential, at least, for life”.³¹ While not affording the fertilised ovum constitutional protection before

²⁷ *Roche*, *supra* note 2.

²⁸ *Ibid.* at 438.

²⁹ *Ibid.* at 454 [emphasis added].

³⁰ *Ibid.* at 455.

³¹ *Ibid.* at 419

implantation, Mr. Justice Hardiman emphasised that “such embryos should ... be treated with respect as entities having the potential to become a life in being.”³² Both judges place significance on the potential to achieve an existence outside the womb. The foetuses in question in this article are of course in the womb and therefore may seem to come within the definition of “unborn” set out in *Roche*.³³ However, given that they do not have the potential to become a life in being it is argued that they are not to be considered to be unborn and therefore do not attract constitutional protection.³⁴

This interpretation is also reflected in the decision of *D.* where it was accepted that if it were to be established in an Irish court that there was no realistic prospect of the foetus being born alive: “there was ‘at least a tenable’ argument which would be seriously considered by the domestic courts to the effect that the foetus was not an ‘unborn’ for the purposes of Article 40.3.3.”³⁵

Should the court accept that a foetus with a fatal foetal abnormality is an “unborn” under Art 40.3.3°, it is still open to the court to find that the right to life of the “unborn” is not engaged in circumstances where there is no potential to become a life in being. In *D.* the European Court of Human Rights found that there was a tenable argument that, “even if it was an ‘unborn’, its right to life was not actually engaged as it had no prospect of life outside the womb.”³⁶ This argument was accepted by the Court in deciding that the case was inadmissible because the applicant had not exhausted all domestic remedies. However, as has been noted previously, in the recent case of *Roche* it was held that right to life of the mother and the unborn are engaged after implantation.³⁷ Any future court deciding upon this issue must consider whether the right to life of a foetus without the capacity to become a life in being is engaged or whether it constitutes a special case.

³² *Ibid.* at 448.

³³ *Ibid.*

³⁴ *Ibid.* at 448, *per* Hardiman J. See also comments of Denham J. at 438 regarding the Irish language text of the Constitution, which may also support this view. The Irish text for the unborn “na mbeo gan breith” translates literally as “the living without birth”. Would foetuses with no capacity to live outside the womb be considered to be “unborn”?

³⁵ *D.*, *supra* note 6 at para. 69.

³⁶ *Ibid.* at para. 69.

³⁷ *Roche*, *supra* note 2 at 438, *per* Denham J.

(ii) Option 2: The lives in question cannot be considered “equal”

The second ground upon which our argument rests relates to the balancing of rights. Article 40.3.3° states that the right to life of the unborn is to be protected with due regard to the “equal” right to life of the woman. Thus, the Constitution presumptively equates unborn life with human life, which is in one sense logical given the aim of the provision itself. However, in all previous cases in which Article 40.3.3° has been considered, where a woman sought to terminate her pregnancy, the pregnancy in question was a viable one, or at least the question as to viability was not in issue.³⁸ We argue here that to equate a woman’s life to that of an unviable foetus is constitutionally inappropriate.

Article 40.3.3° has been interpreted in the *X.* case as protecting the right to life of the unborn unless there is a real and substantial threat to the life of the mother.³⁹ The balance has been drawn in situations where there is a threat to the physical or mental wellbeing of a pregnant woman, but where the foetus is viable. We argue here that foetuses suffering from fatal foetal abnormalities constitute an exception to the prohibition on termination of pregnancy under Article 40.3.3° on the grounds that in these circumstances the balance between the right to life of a woman and the unborn shifts in favour of the woman. In *D.*, the E.Ct.H.R particularly stated: “[t]here is ... a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the ‘unborn’ suffered from an abnormality incompatible with life.”⁴⁰

It is certainly arguable that the fact of incompatibility with life is a factor which would influence the court in its decision. The government argued in *D.* that the *X.* case:

illustrated the potential of the constitutional courts to develop the protection of individual rights by way of interpretation and the consequent importance of

³⁸ The exception here is the decision in *D. v. Brennan and Ors.* (unreported, 9 May 2007), High Court, though this case seems to have been decided on the basis of the travel amendment, rather than whether the termination in question was constitutionally permissible.

³⁹ *X.*, *supra* note 3, *per* Finlay C.J., McCarthy, O’Flaherty and Egan JJ.

⁴⁰ *D.*, *supra* note 6 at para 90.

providing those courts with the opportunity to do so; this is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of country-specific values and morals. Moreover, it is precisely the interplay between the equal right to life of the mother and the “unborn”, so central to Art.40.3.3, that renders it arguable that the X case does not exclude a further exception to the prohibition of abortion in Ireland. The presumption in the X case was that the foetus had a normal life expectancy and there is, in the Court's view, a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the “unborn” suffered from an abnormality incompatible with life.⁴¹

Further, in *Roche*, Justice Denham held that “the relationship is viewed through the prism of the right to life. It applies to a relationship where one life may be balanced against another.”⁴² Can the life of a pregnant woman be balanced in any real way against that of a foetus that does not have the capacity to become a life in being? To adopt Justice Denham’s language, it is argued that this balance only applies, where both mother and unborn have the capacity to achieve an independent life.⁴³

(iii) Option 3: It is not “practicable” to vindicate this type of life

Given the nature of the relationship between a woman and her foetus, addressing the balance is a complex task and does not involve balancing the life of the unborn against the life of the woman in isolation.⁴⁴ The Constitution requires that the life of the unborn be defended “as far as practicable” and it may not be possible to defend and vindicate that right in every case.⁴⁵ When read in conjunction with other provisions of the constitution, particularly the other provisions of Article 40 and Article 41, it is suggested that in the circumstances we envisage here, the constitutional protection

⁴¹ *Ibid.*

⁴² *Roche*, *supra* note 2 at 437.

⁴³ *Ibid.* at 438. Denham J. held that:

[f]urther, the relationship is viewed through the prism of the right to life. It applies to a relationship where one life may be balanced against another. This relationship only exists, this balance only applies, where there is a physical connection between the mother and the unborn. This occurs only subsequent to implantation of the embryo. Thus, the balancing of the right to life described in Art.40.3.3° may only take place after implantation. Therefore an unborn under Art.40.3.3° is established after an embryo is implanted.

Ibid. at 437-438.

⁴⁴ *X*, *supra* note 3 at 81.

⁴⁵ *Ibid.*

shifts in favour of the woman. Commenting in the *X.* case Mr. Chief Justice Finlay noted:

that in vindicating and defending as far as practicable the right of the unborn to life but at the same time giving due regard to the right of the mother to life, the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur.⁴⁶

The final question then, is, whether it is “practicable” for the State to defend, protect and vindicate life which has no capacity for independent existence. In these circumstances, again we argue that the balance shifts in favour of the woman, and that to force a woman to carry an unviable pregnancy to term is not “practicable” and potentially engages in a violation of her Article 40 and 41 rights, as well as a possible infringement of her Article 8 of the European Convention of Human Rights.

IV – Constitutional Interpretation

In considering these three interpretive options, it also important to remember that the Irish Constitution, including Article 40.3.3^o should not be interpreted in a vacuum. The court will consider many factors when interpreting the precise wording of the Eighth Amendment and the impact of the failure to provide terminations in circumstances where the foetus is unviable would certainly be considered by a court in interpreting the Constitution. The Irish courts adopt a number of different approaches when interpreting the constitution, however, the broad and harmonious approaches are the most popular approaches taken by the courts.⁴⁷

The broad approach to interpretation involves interpreting the constitution in a “broad, purposeful manner which best advances the ‘intentions of the people embodied therein’ and which identifies the Constitution’s ‘purpose and objective in protecting

⁴⁶ *Ibid.* at 53.

⁴⁷ G. Hogan & G. Whyte, *J.M. Kelly: The Irish Constitution*, 4th ed. (Dublin: Butterworths, 2003) at 3 [hereinafter Hogan & Whyte]. The five approaches identified are the harmonious, broad (or purposive), historical, literal and ‘natural law.’ For full discussion of the various approaches to constitutional interpretation, see *ibid.* at 3-38.

human rights”.⁴⁸ This approach rejects the “excessive literalism”⁴⁹ of the literal approach, which has been subject to criticism as Clarke observes, “the expression ‘literal reading’ has no determinative meaning ... when essentially contested concepts are involved.”⁵⁰

In the context of Article 40.3.3^o, its purpose has consistently been interpreted as a ban on abortion,⁵¹ most recently in *Roche* Justice Geoghegan noted, “[n]obody could dispute that the primary purpose of the referendum was to prevent decriminalisation of abortion without the approval of the people as a whole.”⁵² We would argue that taking a purposive approach to interpret the Constitution on this issue, the purpose of Article 40.3.3^o was to ensure that, in so far as is practicable, foetal life should be protected to allow it to be born and attain human life. We would argue that it was not the purpose of the constitutional provision to protect life that has absolutely no prospect to survive outside the womb if brought to term. Much in the same way as it was found in *Roche* that the public did not have the process of I.V.F. on its mind in 1983,⁵³ it is certainly

⁴⁸ *Ibid.* at 5.

⁴⁹ *Ibid.*

⁵⁰ D.M. Clarke, “Interpreting the Constitution: Essentially Contested Concepts” in E. Carolan & O. Doyle, eds., *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 101 [hereinafter Clarke]. Adopting a literal approach to interpretation involves giving words their literal meaning and is considered to be more suitable to technical constitutional provisions rather than those concerned fundamental rights; Hogan & Whyte, *ibid.* at 4. Hardiman J. engaged in a linguistic analysis of Article 40.3.3^o in both Irish and English in *Roche*, *supra* note 2 at para. 447 discussing the Irish text which translates as “the living without birth” concluding that “the “unborn”, “na mbeo gan breith”, is the foetus *en ventre sa mere*, the embryo implanted in the womb of the mother. He noted that “on a purely linguistic analysis” that the of the sub-article in both the national languages: that it refers to a situation in which the unborn life and the equally valuable life of the mother are essentially integrated or at least linked, so that one may affect the other adversely.” at paras. 444-445. Clarke observes, “the expression “literal reading” has no determinative meaning ... when essentially contested concepts are involved.” Clarke, *ibid.* at 101.

⁵¹ *X.*, *supra* note 3 at 401, *per* McCarthy J. “[the amendment’s] purpose can be readily identified – it was to enshrine in the Constitution the protection of the right to life of the unborn, thus precluding the legislature from an unqualified repeal of s.58 of the Act of 1861 [*The Offences against the Person Act* of that year: the section prohibits abortions] or [from] otherwise, in general, legalising abortion.” In *Baby O.*, *supra* note 3 at 181-2, Keane C.J. noted:

[t]he passage from Article 40.3.3 on which counsel relied, as explained by the judgments of the majority in this court in *Attorney General v. X.* [1992] 1 I.R. 1, was intended to prevent the legalisation of abortion either by legislation or judicial decision within the State, except where there was a real and substantial risk to the life of the mother which could only be avoided by the termination of the pregnancy.

⁵² *Roche*, *supra* note 2 at 455.

⁵³ *Ibid.* at 457.

arguable that the public did not consider the case of foetuses lacking “the potential to become a life in being”.⁵⁴ However, Clarke dismisses this broad approach to interpretation as it looks to the intention of the legislators or the people:

... it makes no sense to speak about the singular intention of voters who enacted a constitution, and besides, there is no reliable method available by which the relevant intentions of people who are long dead could be discerned ... and even if such intentions could be discerned, they would not be binding unless one assumed that the standards that prevailed in 1937 must still be normative [today].⁵⁵

The popular alternative, the doctrine of harmonious interpretation, involves interpreting constitutional provisions in harmony with the rest of the Constitution, a doctrine emphasised by Justice Denham in *Roche*, “[i]n constructing the Constitution it is appropriate to seek a harmonious construction of Art.40.3.3° in the context of the Constitution.”⁵⁶

In *X*, Mr. Justice O’Flaherty noted:

this provision ... must also be considered as but one provision in the whole Constitution. The Constitution has at its core a commitment to freedom and justice. It treats the family with such respect and in language of such clarity and simplicity that any attempt to summarise or paraphrase it must be inadequate. Can it be that a Constitution which requires the State to look to the *economic* needs of *mothers* is unconcerned for the health and welfare and happiness of mothers? I am certain that reading the Constitution as a whole, as I believe one must do, then the answer is clearly not. A broad dimension must be given to the Constitution and a narrow or pedantic approach to its provisions has to be put aside.⁵⁷

This evolving interpretation of the constitution was considered to be “peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which

⁵⁴ *Ibid.* at 448, *per* Hardiman J.

⁵⁵ Clarke, *supra* note 50 at 102. Indeed, referring specifically to the eighth amendment, Clarke observes that the insertion of such an “extremely complex and morally disputed issue” into the Constitution is inappropriate, particularly when “there is not sufficient political and moral agreement ... to support the kind of detailed legislation that is required.” *Ibid.* at 111.

⁵⁶ *Roche*, *supra* note 2 at 439. She continued, “I agree with the approach of Henchy J. who spoke of achieving ‘the smooth and harmonious operation of the Constitution’: *Tormey v. Ireland* [1985] I.R. 289 at 296. The interpretation and construction should not lead to conflict with other articles, as O’Higgins C.J. enunciated in *State (DPP) v. Walsh* [1981] I.R. at 412 at 425.” *Ibid.* at 439.

⁵⁷ *X*, *supra* note 3 at 86.

deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life".⁵⁸ Adopting the doctrine of harmonious interpretation in this situation would allow the court to consider the conflict with the rights of the family as guaranteed by Article 41 or right to privacy under Article 40.3.1°. ⁵⁹ Chief Justice Finlay noted in *X*:

[s]uch a harmonious interpretation of the Constitution carried out in accordance with concepts of prudence, justice and charity... leads me to the conclusion that ... the Court must, amongst the matters to be so regarded, concern itself with the position of the mother within a family group, with persons on whom she is dependent, with, in other instances, persons who are dependent upon her and her interaction with other citizens and members of society in the areas in which her activities occur.⁶⁰

These approaches to the interpretation of the Constitution could both be found to support in a general sense the contention that the Constitution would be interpreted as permitting a termination in circumstances where a foetus is unviable and should be borne in mind as the three separate arguments in support of this contention are considered.

V – Legislative and Constitutional Harmony

Finally, it should be noted that our arguments as to the proper interpretation of Article 40.3.3° are in harmony with the principle that liability for prenatal harm only exists when the baby is born alive. In both criminal and civil law traditionally a distinction has been made at law between a natural person, "in being" and a foetus, with a baby acquiring all the rights afforded to human beings upon birth, once it has achieved an independent existence from its mother.⁶¹ No criminal sanction is available against one who harms a foetus without intending to procure a miscarriage, unless a child is

⁵⁸ *Ibid.* at 53.

⁵⁹ In *McGee v. Attorney General & Anor.* [1973] I.E.S.C. 2, [1974] I.R. 284, the Supreme Court held that the ban on importation and sale of contraceptives was inconsistent with Article 40.3.1° of the Constitution as an unjustified invasion of right to privacy in marital affairs.

⁶⁰ *X*, *supra* note 3 at 53.

⁶¹ For an examination of the "born alive" rule, see J. Schweppe, "Revisiting Article 40.3.3°: Part One: Third Party Foetal Assault" (2005) 4 Irish Journal of Family Law 19.

born-alive.⁶² Writing in 1680, Coke defined murder as “when a man of sound memory, and of the age of discretion, unlawfully killeth ... any reasonable creature in *rerum natura*”⁶³ The requirement that the creature be “in *rerum natura*” was interpreted as a requirement that it be “born alive,” that is, have a separate and independent existence of its mother.⁶⁴ Civil liability for prenatal harm only arises where the resulting child is born alive: where a miscarriage or a stillbirth occurs, there is no liability.⁶⁵ Section 58 of the *Civil Liability Act 1961* now explicitly excludes liability for prenatal injuries unless the child is born alive: “[f]or the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided that the child is subsequently born alive.”

On this point at least, the criminal and civil law agree: liability for prenatal harm only arises where the resulting child is born alive: where a miscarriage or a stillbirth occurs, there is no liability. Of course, the Constitution should not be interpreted in order to ensure it complies with legislation: rather, we use this point to show that unviable foetal life is traditionally, and arguably correctly, treated differently to viable life.

VI - Proposed Legislation

On the basis of the above arguments, we argue that legislation should be introduced to allow terminations in cases of fatal foetal abnormalities. In such legislation, it would be important to define a fatal foetal abnormality accurately and narrowly: we suggest that it be defined as “a medical condition suffered by a foetus such

⁶² J. Kingston & A. Whelan with I. Bacik, *Abortion and the Law* (Dublin: Round Hall/Sweet & Maxwell, 1997). For full discussion, including the view that the common law position has been abrogated by Article 40.3.3° see E. Spain, “Pregnancy and Unwanted Third Party Interference: A Woman's Rights” in J. Schweppe, ed., *The Unborn Child, Art 40.3.3, and Abortion in Ireland: 25 Years of Protection?* (Dublin: Liffey Press 2008) 113.

⁶³ 3 *Co. Inst.* 47.

⁶⁴ It is only relatively recently that both the courts and legislature have recognised that a third party (or indeed, the pregnant woman) can be criminally liable for injuries sustained *in utero*. Thus, under the criminal law, when a child is born and has an independent existence from its mother, it then acquires all the rights afforded to human persons.

⁶⁵ *Civil Liability Act 1961*, s. 58.

that it is incompatible with life outside the womb.” The legislation might usefully provide:

It shall be lawful to carry out a medical procedure in respect of a pregnant woman in accordance with this section in the course of which, or as a result of which, a pregnancy is ended, where

- (a) the medical procedure is carried out by an obstetrician at an appropriate institution, and
- (b) two medical practitioners, having examined the pregnant woman, have jointly certified in good faith that the foetus in question is suffering from a fatal foetal abnormality.

This proposed section follows the wording of section 7 of the *2013 Bill*.⁶⁶ The section might also require that one of the medical practitioners in question is a perinatologist, with an expertise in foetal medicine. While it has yet to be conclusively established through the courts whether a termination is permissible where a foetus will not survive outside the womb, it is certainly arguable that this is the case under Article 40.3.3° and legislation should be introduced to provide clarity around the issue. Our analysis is of course speculative given the lack of authority on the point, however, it is important to remember that legislation put forward which includes provision for fatal foetal abnormalities, would be subject to a presumption of constitutionality, that is it would be “presumed to be constitutional unless and until the contrary is clearly established”.⁶⁷ Thus, should a Bill be passed to this effect, it burden to disprove the arguments raised herein would be high. Such legislation could be tested either by way of an Article 26 reference in the Supreme Court, or through the normal process of constitutional challenge in the High Court. It is unacceptable for legislators to wring their hands and say that nothing can be done.

VII - Conclusion

As outlined previously, there are three grounds on which it is submitted that the Irish courts may find that a termination is constitutionally permissible in a case where a

⁶⁶ Section 7 deals with the risk of loss of life from physical illness.

⁶⁷ *Pigs Marketing Board v. Donnelly* [1939] I.R. 413 at 417. See also *Re. Article 26 and the Offences Against the State (Amendment) Bill* [1940] I.R. 470.

foetus suffers from a fatal foetal abnormality, each of which have been considered in detail. Rather than waiting for the inevitable case to appear before the Courts, it is argued that legislative action should be taken to provide for termination of pregnancy on the grounds that the foetus is suffering from a fatal foetal abnormality.

We refine our analysis here to those cases in which the foetus is incompatible with life, but it is interesting to observe that the facts of *D*.⁶⁸ indicated that the foetus would in all likelihood be born alive, yet the court referenced arguments by the State which were restricted to the question of there being no prospect of life outside the womb.⁶⁹ It is unclear if the State was accepting that there was no significant legal difference between the foetus which has no prospect of survival outside the womb, and the foetus which will be born alive but will survive for only a short period. In previous discussions on this issue, there was a tendency to conflate foetuses suffering from abnormalities which deprived them of the capacity to survive outside the womb and abnormalities which impacted on the length or quality of life.⁷⁰

Limiting the scope of any such legislation to those foetuses which have no capacity for life outside the womb, while perhaps constitutionally necessary is not in any way ideal. Ultimately, we would argue that in circumstances where there is only limited capacity for life outside the womb, termination of pregnancy should also be permissible though this may require a constitutional referendum.

⁶⁸ *D.*, *supra* note 6.

⁶⁹ *Ibid.* at para. 3. The condition of 2nd twin was described as

a lethal genetic condition” and it is confirmed that “those affected will die from the condition” and that “the median survival age is approximately 6 days”. While there were rare reports of those surviving beyond one year, the report indicated this was “the exception rather than the rule”. Doctor Y in Hospital B gave the applicant the results on January 24, 2002 and explained the diagnosis (fatal). He also arranged for a further sample to be sent for a second test: on January 25, 2002 the second amniocentesis confirmed the diagnosis.

⁷⁰ For example the *Green Paper on Abortion*, *supra* note 1.