Thirty-sixth Amendment of the Constitution Bill 2018

An analysis of the possible legal effects of the proposed amendment

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Introduction

This guide is intended to provide an expert analysis of some of the constitutional law and human rights law aspects of the amendment of the Constitution that is proposed in the Thirty-sixth Amendment of the Constitution Bill 2018. It does not offer any commentary on other legal. medical, moral or social aspects of that proposal or of the outlines of a law on the termination of pregnancy that the Government has put forward.

The Bill on which the people will vote on 25 May 2018 would, if passed, replace the current text of Article 40.3.3°:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

with the following:

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

Readers are referred to the general explanation of the current law and the effect of the proposed amendment that has been given by the Referendum Commission established in connection with the current referendum.

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

This guide does not seek to duplicate that explanation.

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

Rather than duplicate the information available, it was considered more useful on this occasion to provide an analysis of some the more technical issues that may arise in relation to the effect of the proposed amendment in the event that it is passed.

The double effect of the Eighth Amendment

In assessing what the effect of the proposed Thirty-sixth Amendment of the Constitution it is useful to look separately at the two main purposes of the Eighth Amendment, as they were described by the Supreme Court in *Roche v Roche* [2010] 2 IR 321 (SC):

1. to specifically prohibit the enactment by the Oireachtas of any legislation that would make termination of pregnancy lawful in circumstances in which it was not under the Offences Against the Person Act, 1861

2. to forestall any decision that the courts might have made that the law in relation to abortion contained in the 1861 Act was inconsistent with the Constitution on the ground that it was an unjust attack on the personal rights of people who were pregnant.

Constitutional limitation of the power of the Oireachtas to make termination of pregnancy lawful

As the Referendum Commission's guide notes (p 4) the Supreme Court clarified in the recent *M v Minister for Justice and Equality* [2018] IESC 14 decision that, as the Constitution now stands, the only constitutional right that the unborn enjoy is the right to life that is expressly acknowledged and guaranteed in the current Article 40.3.3° of the Constitution. It is therefore seems very likely that should this provision be replaced by the proposed new wording there would be no basis, as such, for challenging the constitutional validity of a law on the ground that it permitted the termination of pregnancy in too wide a set of circumstances. The first original purpose of the Eighth Amendment would thus no longer be fulfilled, even to a limited degree.

Former Chief Justice Ronan Keane has dissented from the widespread assumption that, should the proposed Thirty-sixth Amendment be made, the unborn would no longer have any constitutional right to life ("Ronan Keane: Repeal of Eighth does not mean unborn have no right to life" *Irish Times* 16 May 2018). His argument has three main limbs.

Firstly, he emphasises that the Supreme Court in *M v Minister for Justice* specifically reserves its position as to what the law was before the Eighth Amendment was enacted and accepts that there may have been an unenumerated right to life for the unborn before that point. However, it does not follow that this right would be revived once the current Article 40.3.3° had been replaced by the new version. The Supreme Court makes clear in *M v Minister for Justice* that the Constitution must always be interpreted as it stands after each amendment and taking the purpose of that amendment into account. The former Chief Justice's published argument does not address the fact that the Supreme Court in *M v Minister for Justice* held (para 10.57) that the changes made by the Thirteenth and the Fourteenth Amendments of the Constitution made it clear, from 1992 on, that the only right of the unborn under the Constitution is the right to life of the unborn under Article 40.3.3°. Even if that were not the case, the Constitution would have to be interpreted as it stood after the Thirty-sixth Amendment was enacted and in light of the courts' understanding of what the purpose of that amendment had been, not on that basis that the clock could simply be put back to 1983 in order to assess what rights the unborn might have. In addition, while the Supreme Court in *M v Minister for Justice* in one place reserves its position as to what might have been the correct interpretation of the Constitution before the Eight Amendment was adopted, in another it analyses and appears to reject (paras 10.39 to 10.42) the argument that Article 40.3.1° and Article 40.3.2° are drafted in such a way that the unborn could enjoy the rights to which they refer.

Secondly, the former Chief Justice notes that the State "acknowledges" the right to life of the unborn in Article 40.3.3° and that the sub-section does purport to confer that right, instead treating it as being pre-existing. In the first place, it is not clear how this aspect of the wording of the sub-section could be relevant in the event that it was replaced by the new formula proposed. It is also unclear whether a right can any longer be one of "certain fundamental rights [treated] as anterior to and not merely deriving from the Constitution". Since constitutional rights can no longer be derived based simply on an invocation of natural law (as the Supreme Court emphatically reaffirmed in *M v Minister for Justice*) it is unclear whether that category of rights still exists. There are clearly still *unenumerated* personal rights. However, these are only those "which could be reasonably implied from and [are] guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity" (*Re Information (Termination of Pregnancies) Bill, 1995* [1995] 1 IR 1 (SC) 43). The issue therefore remains one of how the provisions of the Constitution, as they might be amended, should be interpreted and the fact that the Constitution *previously* stipulated that a right was "pre-existing" does not seem to have much relevance to that. Furthermore, these unenumerated personal rights of "the citizen" and, as already noted, the Supreme Court in *M v Minister for Justice* expresses the view that such rights are not available to the unborn.

Thirdly, the Chief Justice expresses the view that it is not plausible that the courts would not still, even after the proposed replacement of the existing Article 40.3.3°, hold that laws relating to the termination of pregnancy "must strike the correct balance between the right to life of the unborn and the constitutional rights of the mother, including not merely her right to life but also her right to health, bodily integrity, privacy and personal autonomy" and that it "passes … comprehension" that the courts "would be unable to hold that the Constitution as amended recognised in even the most highly qualified form any right of the unborn to life". To begin with, in a case involving a conflict of rights, it is not the function of the courts to decide whether or not the Oireachtas has struck the correct balance between competing constitutional rights, but rather "to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights" (*Tuohy v Courtney* [1994] 3 IR 1 (SC) 47.) In addition, there are reasons to doubt that it is as obvious as the former Chief Justice thinks that the courts would identify an unenumerated right to life for the unborn. In *Roche v Roche*, great stress was laid on the need for there to be justiciable standards to enable courts to decide, as legal issues, what the resolution of a case should be; in that case, the issue of when human life begins was not one for the courts to address, but instead a matter for legislation to deal with. The issue of the interpretation of "the right to life of the unborn", in contrast, was a question of law arising under Article 40.3.3°. A similar approach can be seen in the decision of the majority in *OR v An tArd Chláraitheoir* [2014] 3 IR 533 (SC): in the context of surrogacy, the question of who can legitimately claim to be a child's true mother is one of profound moral significance, but there is no legal answer to it and the choice must be left to the Oireachtas. If the courts were faced with the argument that they should give some unspecified and perhaps fluctuating weight to a claimed unenumerated right to life of the unborn, compared with the range of competing rights identified by the former Chief Justice, it would not be surprising if they were to hold that they were being invited to enter an area where claims should properly be addressed to legislators and not to judges.

In *M v Minister for Justice and Equality* the Supreme Court decided that the Constitution must always be interpreted as it currently stands (including any amendments made to it) and in its entirety. Therefore, as the former Chief Justice points out, it is theoretically possible that a court could hold in future that the amended constitution, in contrast to the present one, does *implicitly* protect the right to life of the unborn in some way. In addition to the specific reasons already mentioned, that seems extremely unlikely, since most of the grounds that the Supreme Court gave for holding that the Constitution (apart from the current Article 40.3.3°) does not protect that the rights of the unborn would still seem just as applicable to the amended constitution as to the current one. Furthermore, the proposed Thirty-sixth Amendment of the Constitution was drafted at a time when it was not clear whether the unborn had constitutional rights independently of Article 40.3.3° and with the intention of putting it beyond doubt that the power of the Oireachtas to legislate on this topic would supersede such rights, to the extent that they existed. Just as the Supreme Court took into account the aims behind the Eighth Amendment in the *M v Minister for Justice and Equality* decision, it is likely that the courts would do the same in relation to the Thirty-sixth Amendment of the Constitution, in the event that it is adopted.

In *M v Minister for Justice and Equality* the Supreme Court did note that respect for life (including unborn human life) is an aspect of the common good that the State may take into account when making laws. To this extent, the Supreme Court did make clear that, as a matter of policy, the Oireachtas is entitled to impose restrictions on termination of pregnancy in the interests of preserving the life of the unborn. However, that is an unsurprising conclusion. The Constitution does not lay down some fixed catalogue of elements of the common good which can be the basis for legislation; it is primarily the task of the Oireachtas to identify these and the role of the courts is merely secondary, that of reviewing whether the legislators' conclusion had a reasonable basis or not. In addition, in cases such as *Fleming v Ireland* (dealing with assisted suicide) the Supreme Court has made it clear that the Constitution of Ireland is not based on a libertarian concept of rights. For that reason, there seems to be no fundamental objection, as a matter of constitutional law, to legislation that restricts the termination of pregnancy being based on moral opinions about the practice that are the subject of strong disagreement within Irish society.

Even if the unborn no longer had any constitutional rights, it could be arguable that a law that allowed for the termination of pregnancy might be held to be a violation of some other constitutional right and to be invalid, or at least restricted in its effect for that reason. This would depend on whether the law in question could be said to impact on an identified constitutional right. There has, for example, been some debate about the guarantee of freedom of conscience under Article 44. 2. 1 of the Constitution and the rights of the parent of a pregnant child who was under the age of sixteen might also be affected. If so, the issue would be whether the impact of the law on those rights was so unjust or disproportionate as to be unconstitutional.

Constitutional limitation of the power of the Oireachtas to make termination of pregnancy unlawful

If Article 40.3.3° were amended so that it read that "provision may be made by law for the regulation of termination of pregnancy" that does not imply that the Oireachtas would have an unlimited authority to impose restrictions on the termination of pregnancy without paying any regard to the constitutional rights of people who are pregnant. As has been noted, the new sub-section proposed was expressed as a grant of power to the Oireachtas to regulate the termination of pregnancy in order to forestall any argument that, even without the current sub-section (as inserted by the Eighth Amendment and modified by the Thirteenth and Fourteenth Amendments of the Constitution) the Constitution still guaranteed the right to life of the unborn in such a way as to remove the power to pass such laws. Following the decision of the Supreme Court in *M v Minister for Justice and Equality* [2018] IESC 14 it is clear that such caution was unnecessary and that simple repeal of Article 40.3.3° would have left the Oireachtas with a very wide power to make the termination of pregnancy lawful.

Could the proposed wording, however, have the opposite effect? Could it be interpreted as denying the right to people who are pregnant to assert any constitutional right to choose to terminate their pregnancies or as allowing those rights to be restricted to a greater extent than would have been the case if Article 40.3.3° have simply been repealed?

Clearly, this is not the aim of those who drafted and are advocating adoption of the proposed Thirty-sixth Amendment of the Constitution. The Citizens' Assembly recommended that the Constitution be amended to "make it clear that termination of pregnancy, any rights of the unborn, and any rights of the pregnant woman are matters for the Oireachtas. In other words, it would be solely a matter for the Oireachtas to decide how to legislate on these issues." The Joint Oireachtas Committee on the Eighth Amendment of the Constitution disagreed with this recommendation, on the basis that it would be a radical departure from the separation of powers created by the Constitution to remove "the … supervisory jurisdiction of the Courts … in an area which … would so clearly fall within their jurisdiction". The Joint Committee therefore recommended simple repeal, without any replacement for Article 40.3.3°. The fact that the Thirty-sixth Amendment of the Constitution Bill 2018 did not follow the recommendation made by the Joint Committee in this respect is not a sign that the Houses of the Oireachtas preferred the Citizens' Assembly's approach to the nature of the amendment that should be made. It reflects rather the Attorney General's caution as to whether simple repeal was guaranteed to remove the limitation that is currently placed on the power of the Oireachtas to make the termination of pregnancy lawful. The Minister for Health placed on record in both Houses his view that the proposed Thirty-sixth Amendment of the Constitution "would not oust the jurisdiction of or restrict the right of access to the courts. Any legislation that may be enacted post referendum would, like any legislation, remain subject to review by the courts."

The courts can review the validity of legislation only on the basis that it is repugnant to some specific provision of the Constitution (a principle that *M v Minister for Justice and Equality* strongly reaffirms). Given the kind of legislation involved here, the provisions that are most relevant are those that guarantee constitutional rights. Following the decision in *M v Minister for Justice and Equality* it is clear that, were the proposed Thirty-sixth Amendment of the Constitution to be enacted, the only directly relevant constitutional rights would be the rights of people who are pregnant and the rights of others (such as medical professionals) who are assisting them to exercise such rights (although others' constitutional rights might obliquely limit the circumstances in which a termination might be lawful, as in the case of parental rights.) It thus seems likely that the proposed Thirty-sixth Amendment of the Constitution would not prevent a constitutional challenge to legislation being brought on the grounds that it is too restrictive as to circumstances in which termination of pregnancy is lawful that could have been brought if Article 40.3.3° had simply been repealed.

What are the prospects that pregnant people or those who share a common interest with them in challenging restrictions on the termination pregnancy would be able to succeed in doing so

on constitutional grounds in the event that the proposed Thirty-sixth Amendment of the Constitution were enacted?

There are some clearly established rights that pregnant people enjoy, on which they might rely to challenge restrictions placed on the termination of pregnancy. These include the right to life, the right to protect one's health, the right to bodily integrity and the right to marital privacy. Whether the general right to privacy would be interpreted by the Irish courts as including autonomy as to the continuation of pregnancy is less clear. The Supreme Court held in *M v Minister for Justice and Equality* that it was not appropriate (and perhaps not possible) to decide whether the constitutional right to privacy (or other similar rights) could in any circumstances have entitled those who were pregnant to a termination of pregnancy before the Eight Amendment was adopted.

One way of pre-empting such challenges even after the Thirty-sixth Amendment of the Constitution were adopted would be to hold that because of the differences of opinion in Irish society over the moral status of the unborn these constitutional rights should be understood, by definition, as not including a right to terminate the life of the unborn, although the Oireachtas could, as a matter of policy, decide to confer such a right by law. It has already been noted that it seems likely that reasoning of this kind would be one of the courts would give for holding that there was no longer an implied right to life for the unborn, in the event that the Thirty-sixth Amendment of the Constitution were adopted. However, it is not clear why it would be justifiable to take such approach to the express right to life (under Article 40.3.2°) of someone who is pregnant, if the countervailing right to life of the unborn had been removed. To adopt former Chief Justice Keane's plausibility test, is it likely, for example, that it would be constitutional for the Oireachtas to remove the risk of suicide as a ground for making the termination of a pregnancy lawful, merely because there continues to be widespread and deep disagreement over the morality of the practice in those circumstances?

In relation to rights of other kinds, an Irish court might rely on the decision of the majority of the Grand Chamber of the European Court of Human Rights in *A, B and C v Ireland* (2011) 53 EHRR 13 that Ireland was not in breach of Article 8 of the European Convention on Human Rights by prohibiting any termination of pregnancy based on the health or welfare of the person who was pregnant. However, on that general issue of principle, the Grand Chamber was split nine-to-eight and there is clearly some chance that a different view might be taken in a future case. Much would depend on the facts presented to the court in a future case. Furthermore, the European Court of Human Rights did not reach its conclusion on the basis that the rights of pregnant people were not affected by the sweeping Irish prohibition on the termination of pregnancy. The majority accepted that their right to respect for the private life was affected but held that Irish law was a proportionate restriction of those rights, in view of the margin of appreciation to be accorded to a state that is a party to the Convention when there is such deep and widespread disagreement about the morality of abortion. If the Irish courts were to adopt a similar approach to that of the European Court of Human Rights, they would be likely to find that a pregnant person's constitutional rights could be infringed by a

restriction on the ability to terminate the pregnancy lawfully. However, the pregnant person would also bear a particularly heavy burden to prove that the restriction was not a proportionate means of respecting unborn human life as an aspect of the common good. This approach would be consistent with that followed by the Irish courts in other circumstances where they have declined to interrogate claims based on constitutional or human rights on matters of policy that fall within the wide scope for the exercise of legislative judgement by the Oireachtas on controversial social or moral questions. This sort of deference has recently been on display in cases relating to donor-assisted reproduction (*Roche v Roche* [2010] 2 IR 321 (SC), *McD v L* [2010] 2 IR 199 (SC) and *OR v An tArd Chláraitheoir* [2014] 3 IR 533 (SC)), assisted suicide (*Fleming v Ireland* [2013] 2 IR 417 (SC)), marriage equality (*Zappone and Gilligan v Revenue Commissioners* [2008] 2 IR 417 (HC)) and sexual relations between adolescents (*MD (a minor) v Ireland* [2012] 1 IR 697 (SC)). There seems no reason to think that it would be any easier (or harder) to succeed in a challenge to a law on the ground that it restricts the termination of pregnancy too much than it was for the plaintiffs in these cases. One of the purposes of the proposed Thirty-sixth Amendment of the Constitution seems to be to "normalise" the treatment of abortion within the Constitution, in the sense of putting it on the same general footing as all these other issues. ("If the amendment is adopted by the People, the Oireachtas would have an express power to legislate to regulate termination of pregnancy as it considers appropriate, in the same way as it legislates in every other area of policy." (Department of Health, Information note on legal advice received on options for a Referendum on Article 40.3.3 of the Constitution (30 January 2018) para 8.) This implies that such claims, while they face many legal hurdles, are not doomed to fail. *CC v Ireland* [2006] 4 IR 1 (SC) demonstrated this, in relation to legislation protecting young adolescent girls from sexual exploitation, which was found to be inconsistent with the Constitution, with the Supreme Court striking a very different note from that of its subsequent decision in *MD (a minor) v Ireland*.)

While the Oireachtas would therefore be likely to have a very wide range of options as to how it regulated the termination of pregnancy under the proposed Thirty-sixth Amendment of the Constitution, it could not be guaranteed that people who were pregnant would never be able to challenge such legislation successfully on constitutional grounds. Any attempt to reverse *Attorney General v X* [1992] 1 IR 1 (SC) by removing a real and substantial risk of the death of the pregnant person through suicide is likely to be an example of legislation that would be outside the scope of the power the Oireachtas would have. Likewise, if future legislation did not contain the equivalent of Head 6 of the Government's general scheme for a Bill (condition likely to lead to death of foetus) it seems plausible that a constitutional challenge to such an omission could be challenged successfully on constitutional grounds. The same is probably true of an exclusion of the health of the pregnant person as a ground on which termination could be lawful. It is less clear whether Head 7 (early pregnancy – termination up to 12 weeks) is the type of provision that the Oireachtas could choose not to include in future legislation. It is plausible that this would lie within the area that the Irish courts would regard as being one of policy in relation to the termination of pregnancy, something to be determined in Leinster House rather than in the Four Courts. However, any challenge to a law on the grounds that it did not provide for termination on request up to a point (or on the ground that this point was set too early pregnancy) is unlikely to be rejected

simply on the grounds that none of the rights of pregnant people are interfered with, as opposing to a finding that the interference is a proportionate to the State's interest in protecting the life of the unborn. Taking this kind of approach to the General Scheme for a Bill regulating the termination of pregnancy that the Government has published there do not appear to be many grounds for saying that an Act based upon it could ever successfully be challenged in the courts on the ground that it did not go far enough to decriminalise the termination of pregnancy. Perhaps the proposal to prohibit any "late-term" terminations (because termination is unlawful in all circumstances past the point of viability) might be open to constitutional challenge. However, any challenger would be likely to face a heavy burden in satisfying a court that the Oireachtas was unreasonable in concluding that there is never a medical necessity for such a termination in the interests of preserving the life or health of the person who is pregnant. Any such case would probably come down to an assessment of expert medical evidence rather than any general point of legal principle (in much the same way as the Supreme Court emphasised in *Ryan v Attorney General* [1965] IR 294 in relation to water fluoridation.)

An issue might arise in relation to any gap between the enactment of the proposed Thirty-sixth Amendment and the subsequent repeal of the Protection of Life During Pregnancy Act 2013 and its replacement by new legislation. Even if the Oireachtas had a very broad latitude to regulate the termination of pregnancy as it saw fit, it seems unlikely that legislation as restrictive as the 2013 Act could survive a constitutional challenge if a litigant with appropriate standing to bring one were to emerge within that time interval. If a challenge was brought to the validity of the Act by someone who was pregnant (for example, with a foetus which had the kind of abnormality that it is envisaged would be ground for termination in future) then it is likely that such a case could be determined by the courrs within a matter of weeks or even days; in *Attorney General v X* only nineteen days elapsed between the start of proceedings and the Supreme Court's decision. In another case that related to someone who was pregnant at the time, *PP v Health Service Executive* [2014] IEHC 622 the High Court made its within eleven days of the matter being brought before it. One could thus foresee circumstances in which the courts struck down the 2013 Act before new legislation was enacted to replace it and it is hard to see, in circumstances where a case was brought be someone who was pregnant that the effect of such an order could be postponed. On the other hand, if a challenge to the 2013 Act were brought by a woman who is not currently pregnant or by a medical practitioner or some other person who has a legitimate interest in bringing such a challenge, those proceedings might well not have been concluded by the time new legislation was enacted, in which case they would be likely to become moot.

Therefore, there would be some urgency in replacing the 2013 Act if the proposed amendment of the Constitution were adopted, as it may be vulnerable to a successful constitutional challenge.

Conclusion

It seems clear, following the decision of the Supreme Court in *M v Minister for Justice* [2018] IESC 14, that a simple repeal of Article 40.3.3° would have been sufficient to give the Oireachtas a power to make laws to regulate the termination of pregnancy without facing any challenge to those laws on the ground that they did not give sufficient protection to the unborn. This is because, without Article 40.3.3°, it is highly likely that the unborn would have no rights under the Constitution.

To give the Oireachtas this power, it was therefore probably not necessary to propose to replace the existing Article 40.3.3° with a provision that states expressly that the Oireachtas may legislate to regulate the termination of pregnancies. The Oireachtas would have had that power even if Article 40.3.3° had simply been repealed and, in exercising it, lawmakers could have shown due respect for unborn human life, as an aspect of the common good.

A question which remains is whether by adopting the amendment now proposed, the People would be taking away from people who are pregnant rights which the Constitution would otherwise have given them and which they would enjoyed (or enjoy more fully) if Article 40.3.3° were simply repealed.

It seems very unlikely that the proposed new Article 40.3.3° would restrict the rights of those who are pregnant in this way. This was not the intention of those who drafted or who have advocated the adoption of the new wording and that wording was deliberately chosen as an alternative to wording that would have subordinated the rights of pregnant people (as well as the rights of the unborn) to whatever the Oireachtas chose to enact.

Therefore, the proposed new Article 40.3.3° is not likely to preclude any constitutional challenges that could have been brought after a simple repeal of the subsection to laws on the ground that they restrict termination of pregnancy too much. While the constitutional right to life of the unborn would cease on the enactment of the proposed Thirty-sixth Amendment of the Constitution, the rights of those who are pregnant would not be affected and would, indeed, emerge from under the shadow cast on them by the Eighth Amendment.

This does not mean that the Constitution could then be relied on to guarantee unlimited or even very broad access to lawful termination of pregnancy within the State. The Irish courts would be likely to leave this question as largely one of policy for the Oireachtas to determine. However, this would not be because the issue of termination of pregnancy was given some special treatment but rather because this is the approach that the courts have usually demonstrated towards “controversial social, economic and medical matters on which it is

notorious views change from generation to generation" (as Kenny J put it in 1963, in *Ryan v Attorney General*, speaking about water fluoridation.) A consequence of this is, however, that some constitutional challenges to a law regulating termination of pregnancy on the ground that it was too restrictive might succeed—for example, in cases where the right to life was at stake or where the emotional burden of requiring a person to continue a pregnancy in a case of foetal abnormality was deemed to violate the guarantee of her "person" under Article 40.3.2°. How the courts approached these questions would also depend on their general view of the separation of powers and whether they continue to show the same degree of deference the Oireachtas as they have on topics such as donor-assisted reproduction and assisted suicide.

While there is a degree of uncertainty about whether there would be successful constitutional challenges to laws regulating the termination of pregnancy on the ground that they were too restrictive, it is clear that there could be no direct challenges in the opposite direction—on the ground that a law was too permissive in relation to terminations. The most that is likely in that regard is that other constitutional rights (such as the rights of the parent of a pregnant child who was under the age of sixteen) could be an oblique limit on the operation of the legislation, even if now a basis for holding it to be invalid.