

The Iona Institute

**Submission to the Citizens'
Assembly on Article 40.3.3**

Why it is intrinsically wrong to hold a referendum on a fundamental right

Article 40.3.3 of our Constitution gives legal protection – at the level of fundamental rights – to human beings before birth. In this submission, we want to suggest that it is intrinsically wrong to propose a referendum to strip this tiny, uniquely vulnerable category of human being of its rights. To explain why this is so, we propose some questions to inform how we think about the issue of abortion. But before we turn to those questions, we think it is important to address the following matter:

We are, all of us, pro-woman. We fully support the legal status quo in which doctors are obliged to do everything they can to protect and save the lives of both mother and baby. Article 40.3.3 protects, in no uncertain terms, the right to life of the woman. There is no disagreement on that issue. The disagreement lies rather in the approach taken to the unborn baby.

As to the questions; in order to think clearly about the issue of abortion, we need to ask ourselves:

Is the baby in the womb a human being? If not, what is it?

Do we have a right to kill or take the life of another human being? If so, in what circumstances?

Is the baby in the womb a human being? Clearly it conforms to the scientific definition of a living thing – the question then remains: what manner of living thing is it? The only rational answer is that it is a human child: it can be no other form of life and no one has ever offered a satisfactory alternative. However, those who would legalise abortion refuse to acknowledge the humanity of the child; they seem content – although they so often claim they rely on science only – to be mystified as to what is growing inside the womb of a woman. Science seeks to find answers to everything else, to classify every living thing – except in this instance, where some are content to settle for ignorance. Why? Because so long as the child in the womb is not acknowledged as human, we can do whatever we like to “it”.

Some pro-choice advocates have given up trying to deny that the life in the womb is a human life and instead say it is not a ‘person’, and then offer a definition of ‘personhood’ that conveniently leaves out the unborn child. However, ‘personhood’ is a subjective concept, but who is a human is much more objective.

Do we have a right to take the life of other human beings? Would we even consider holding a referendum to remove the right to life of any other category of human being? If we tried, we might first strive to convince ourselves that they are not human or that it is a matter of opinion whether they are human.

This debate is often framed in terms of the right to life, but in truth, it would be more accurate to speak of the right to kill. All human beings have a right to life –

the issue of abortion however raises the question: is it permissible to kill another human being? And if so, in what circumstances?

Throughout history and through many different cultures and legal systems, the killing of a human being is invariably recognized as a very grave matter and is generally outlawed. There are, in many societies, limited circumstances in which the deliberate killing of a person is permissible, but it is almost invariably in circumstances either of self-defence, or where the person to be killed has committed and been convicted of a serious crime after due process and a fair trial, in other words, the death penalty, which most of us now believe is unjust precisely because it kills a human being when alternative forms of punishment are available. How is it possible to say that the child in the womb is a guilty party or is anything other than completely innocent? What justification can our society offer for the deliberate killing of an innocent unborn child, whether by means of a surgeon's implements, by chemical means or by lethal injection?

In order to support a call for the legalisation of abortion, it is necessary to say the child in the womb is not a human being, or that its identity is a matter of opinion, and we therefore have the right to take the life of another human being. However, shouldn't we instead affirm the humanity of the unborn child?

Some might say: Why not let a referendum decide the matter? After all, don't we live in a democracy?

A democracy is rule by the majority. But to prevent a 'tyranny of the majority', we have fundamental rights, including the most fundamental right of all, the right to life. Sometimes courts have overridden the majority view in the name of fundamental rights.

That is why the idea of holding a referendum to remove a fundamental right from the Constitution is so wrong. It puts the power in the hands of the majority to vote away *the only defence* a given vulnerable minority has from that same majority. It paves the way for the majority not just to ignore the minority's rights, but worse, to remove them altogether.

The objective of those calling for a referendum is that we should forget the other human being – the new life that is hidden from view, but who is nonetheless human. Most countries that have introduced abortion set out to "help" women in difficult circumstances. None has been able to stem the steady flow of and demand for abortion. Though abortion in the UK is still – on paper – limited, the reality is that almost 200,000 babies are aborted every year, 98% of them for social reasons. Should Article 40.3.3 be repealed, it will only be a matter of time before more, and more wide-ranging, abortion is sought, until it is available for any reason whatsoever. Without any constitutional protection for babies before birth, there would be nothing to prevent this from happening. With no fundamental right to act as a bulwark, the vulnerable minority comprised of babies before their birth would be at the mercy of the majority.

How strong is public demand for a referendum?

We also question the extent to which there is real public demand for a referendum on abortion. Opinion polls measure breadth of opinion, not depth. Therefore, opinion polls showing a majority of respondents want a referendum on the pro-life amendment, are not to be taken as the last word.

We know there is real public demand for something when politicians hear about it consistently on the doorstep, by email, and in their constituency offices.

During the last General Election, demand for a referendum came up far less on the doorsteps than issues like water charges. Politicians with a record of campaigning against the 8th Amendment did hear it raised on the doorsteps because they would naturally attract the attention of pro-choice voters. But most of these politicians were not returned at the last election.

Nor were some politicians with a proven pro-life record. This is because at election time people vote on bread and butter issues mainly. An RTE-commissioned exit poll (see link below) at the time of the election showed that only 2pc of voters said abortion was their overriding issue when they decided who to vote for. Some of the 2pc in question would have been pro-life and others pro-choice. (The top issue was health services and hospitals, named by 20pc of respondents).

Pressure from campaign groups, often backed by editorial writers, is not to be confused with real public demand.

We believe, therefore, that the Citizens' Assembly should seriously consider whether holding a referendum is really justified. We believe it is not, on grounds of pure principle as explained above. But we also believe that no referendum should be held until, at a minimum, politicians are consistently hearing demand for a referendum from ordinary voters on the doorsteps who are as concerned about this matter as they were about water charges or hospital waiting times.

Constitutional referendums should be held sparingly because the Constitution is our fundamental law. It is said that the 8th amendment has created legal difficulties. But so has the property rights section of our Constitution, or the section dealing with freedom of association, or education. This is in the nature of law itself. The law is often difficult to interpret and to apply.

It has also been said that people should have a chance to vote on something that was last voted on in 1983. The logic here is strange. The Irish Constitution itself is 80 years old, while the American Constitution is more than 200 years old. Is the passing of time alone reason to put something to a vote again? We suggest the answer is no. Leaving aside issues of principle for a moment, a constitutional referendum should only be held if there is real

and genuine public demand for it, or if a particular section is giving rise to genuinely insuperable legal difficulties. We believe neither of these conditions holds true.

Assembly meeting of November 26 and 27: some concerns

On a separate issue, we also wish to raise concerns about the meeting of the Citizens' Assembly held on the weekend of November 26th and 27th. Delegates heard from experts invited in by the Assembly leadership. This gave those experts a particularly trusted and privileged place in the process.

Delegates were entitled to hear from a wider range of expert opinion than was on offer. The ethicist, for example, took a mostly cost/benefit approach to moral questions, we believe. He did not consider whether certain actions are simply wrong in themselves or right in themselves regardless of the costs or the benefits. The Assembly should also have invited an ethicist who would have taken the view that some actions are intrinsically right or wrong, rather than what seemed to be a purely utilitarian approach to ethical questions.

For the most part, the Assembly that weekend heard about the point of view of women facing an unplanned pregnancy. The point of view, so to speak, of the unborn child was not properly represented. This unavoidably skewed the discussion.

The very heart of this debate is that two rival views of human rights are on offer and two human beings, two patients, are to be considered.

The presentation by Dr Brendan O'Shea of the Irish College of General Practitioners considered almost exclusively the point of view of women with an unplanned and unwanted pregnancy. Little if any consideration was given to the rights, if any, of the second patient, the unborn child. A doctor surely has a duty to consider both patients. This is certainly the current position in Irish law.

Why didn't the Assembly invite in a doctor who would offer this point of view?

The Assembly also heard from two experts about the operation of the Protection of Human Life During Pregnancy Act. The direct relevance of this to the 8th Amendment is open to question. Nothing in the 8th Amendment prevented the passage of that Act, so why was so much time given to it?

One expert said that predictions by pro-life campaigners that the 'floodgates' would open if this Act was passed had proven to be unfounded. But only some pro-life campaigners made this prediction. The point was also made by pro-life advocates that the passage of this Act would inevitably strengthen calls to permit abortion on wider grounds, which is exactly what has happened, and it is why the Assembly has been established. A more permissive abortion law will inevitably lead to more abortions.

We believe, therefore, that the Assembly should have allowed delegates to hear from a broader range of invited experts in November. Delegates were entitled to that.

It might be said that a wider array of voices is being heard now. But that is not the same thing. We will be seen as coming from a particular point of view and therefore our voices will carry less weight than the experts invited by the Assembly to offer a supposedly neutral and detached point of view.

Conclusion

In summary, we hope that delegates will give real consideration to whether a referendum on this matter is actually justified. We also believe the leadership of the Assembly must give the same time to the rights of the unborn that it has given to the rights of women facing an unplanned pregnancy through its own invited experts.

The Assembly, and Ireland, have an opportunity to continue to do something wonderful – to continue to recognise the right to life of all human beings, regardless of their age or status. Let us have the courage to recognise that ideological tides will ebb and flow, but some values are worth preserving forever.

ENDS

(Link to RTE exit poll: <http://www.rte.ie/news/election-2016/2016/0304/772641-rte-exit-poll-election-2016/>)