

**Transcript of Q&A Session following Presentation by Mr Brian Murray S.C.**

**Saturday 4<sup>th</sup> March, 2017**

**Justice Laffoy –**

Very good very good. Yes we'll start on the questions and answers and we have 30 minutes approximately left. Yes, and we'll take as many questions as we can in the 30 minutes. So hands up.

**Facilitator Table 6 –**

Hi I'm the Facilitator for Table 6. First feedback was the citizens at this table found Mr Murray's talk extremely helpful and they felt that it would have been helpful to hear from Mr Murray earlier in the process.

The Citizens have 2 questions. Paragraph 35 of your paper, the last line says "on this interpretation of the implications of repeal, it is possible that the Courts could declare unconstitutional an Act of the Oireachtas that makes abortion widely available". If you could give us a hypothetical example of that. And the second question is with regard to the Amanda Mellett case, the EU indicated that we need to address our abortion laws so regardless of whether we choose to repeal or amend can the EU overrule?

**Justice Laffoy –**

I think that was the UN actually but that's a small point.

**Brian Murray SC –**

OK, well to take those in turn. The comment I made in paragraph 35 is in the context of an argument to the effect that the implied right to life of the unborn which had been acknowledged by some Judges prior to 1983 revives. So I'm talking about a situation in which the amendment is repealed, in which the Oireachtas introduces legislation which allows for abortion in a broader range of circumstances than is presently the case and in which a litigant goes to court and says this is unconstitutional because the unborn has a right to life and even though the Eighth Amendment was repealed, that right had been acknowledged as implied by the Constitution before the Repeal .

The Eighth Amendment on this argument didn't actually introduce a right-to-life for the unborn, it merely expressed something which was already there. So that's the context in which this argument arises and in which the statement is made and it's important just to understand that.

In that situation and you've asked me just to give you a hypothetical (example) and let's perhaps take this one....

Imagine you had, following the Eighth Amendment, the introduction by the Oireachtas of the lifting of the criminal prohibition in the 1861 Act, thereby allowing for abortion lawfully without regard to any temporal considerations, any trimesters, any point in pregnancy. Just take that example. It's an extreme one but it's probably the best way of trying to explain in theory how the argument would arise in that situation.

And that is not unlike what the United States Supreme Court had to do in *Rowe and Wade* or did in *Rowe and Wade*. The Courts will say no, we are going to draw lines and identify particular points in time where the rights of the unborn become activated and outweigh other rights in the balance. So that's an example, that is actually what the United States Supreme Court did without there being any rights to an unborn under their Constitution but that's a different context.

And then, the hypothetical changes, depending on how strong these rights are, to the extent that if the unborn were held to have an absolute right to life equivalent to that in the Eighth Amendment then, any expansion of abortion law beyond the present parameters would be vulnerable if that construction were accepted. Now I've given you my view which is that I don't believe that is the construction that would be accepted and have explained to you why that is the case.

But just bear this in mind - the reason I have that view is that I think the Court would ultimately have to say, look, if the people have taken out an express right to life of the unborn it most follow that they intended to take out the implied right as well. That's the reasoning that I think that would be followed. But I've seen other people, other lawyers say well maybe the Supreme Court wouldn't say that, maybe they would say if that's what you intended, why didn't you say it. If the people intended that the unborn would have no rights under the Constitution they could easily have said it and not having said it you've left us, the Supreme Court, in a position where we have to engage in this balancing exercise, having regard to what the legal position was under the Constitution before then.

#### **Facilitator Table 14 –**

The members at Table 14 just asked me the Table 1 question.....

#### **Justice Laffoy –**

Sorry, I think there's another question – the Mellett question.....

#### **Brian Murray SC –**

Sorry sorry, I'll have to give shorter answers and then I'll remember all the questions....

Mellett was a decision of the United Nations Commission on Human Rights not of the EU and that has no legal effect in domestic Irish law. It has an impact on Ireland at the international level and unless I am very much mistaken and I will be corrected if I'm wrong, when Eileen Barrington addressed this issue she may have been asked a question very like that and I thought the answer she gave was that if the people decided that they did not want to change the Eighth Amendment, Ireland would have to go back to the UN Committee and say, look the Irish people have adopted this position because of their moral judgment as to the position of the unborn and that must now be re-evaluated by the UN HCR. That I think, is how that dynamic would work but it's almost at a level that's outside my expertise because it's almost a diplomatic rather than strictly legal issue. But I would agree with her if I've correctly understood what she said in response to that.

### **Sharon Finegan –**

Now Table 14 and then Table 5

### **Facilitator Table 14 –**

The members at Table 14 have one question for Brian.

If the Eighth Amendment is repealed completely and all matters subsequently in relation to abortion, protection of the unborn, are going to be dealt with by the Houses of the Oireachtas through legislation, are there mechanisms in place or can mechanisms be put in place to stop subsequent administrations just changing the law willy nilly as they go from one administration to another.

### **Brian Murray SC –**

Well, the answer to that question is yes, but the mechanisms would have to be built into the Constitution itself because the starting position is that the Oireachtas is free to legislate in such manner as it thinks fit, subject only to the intrusion of the Constitution and if you want or if people decided that they wanted there to be a fixed abortion law, if I can use that phrase, and it's not perhaps the best phrase, but if the people wanted there to be a fixed abortion law that could not be changed, then the way to do that is actually to make that law itself part of the Constitution, which I think was the very last option I addressed. That's a cumbersome process that has many disadvantages attached to it. I think that legally or constitutionally it's possible, indeed legally and constitutionally, you the people can do as you wish with the Constitution provided any changes are sanctioned by the people themselves.

### **Facilitator Table 5 -**

I'm the facilitator for Table 5. Two questions arise from the table. The first one is in regards to the phrase "as far as practicable" contained within the Amendment. Is this

legal speak for something specific? If yes, what is that? If not, can legislation decide what exactly “practicable” means or can it define the word practicable?

The second question is in regards to father's rights. If abortion was made legal does it mean that the opportunity of the father to defend the rights of the unborn would be lost?

**Brian Murray SC** –

Well, just to take those in turn.

Insofar as the phrase “as far as practicable” is concerned, yes I suppose it is legal speak in one way because it’s not a phrase that people would use in ordinary conversation and so in that sense that's the answer your question.

What it means is that it envisages a margin of judgment by reference to which the phrase “governed by as far as practicable” falls to be measured, so the State acknowledges the right to life of the unborn, it has due regard to the equal right to life of the mother – it guarantees to respect it, it guarantees to vindicate and defend that right - but that the obligation is limited to what is practicable or possible I suppose, or reasonably possible.

And the object of that is that is to say that you have to, in any Constitutional system the Courts and therefore the Constitution itself has to give what lawyers in another piece of legalese call a margin of appreciation or discretion to the Oireachtas, to Parliament, to go about its business and not to interfere simply because they have a different view as to how it may be done.

And phrases like that mirror that constitutional separation of powers almost.

In relation to father's rights, I mean the answer to that question was I understand, issues like that were touched on this morning. The answer to that question depends on the following, none of which are certain –

1. Do fathers have any rights in respect of the termination of pregnancy at all under the Constitution?
2. If they do, to what extent are those rights affected by article 40.3.3? and
3. If they do, in other words if the answer to 1 is affirmative, then what would the effect of any amendment be?

And I think you need to work backwards from those because if you say well, the Constitution is going to be changed so that it’s made clear that the Oireachtas has free, has a wide berth, if I can use that expression, in formulating abortion law and policy. If that’s what you decide, well then father’s rights are going to be, if they are present and protected, are going to be subordinated to that constitutional expression of the supremacy of the Oireachtas.

If you simply repeal the Eighth Amendment well then you leave matters more or less as they are, except that the express protection for the right to life of the unborn and express reference to the equal right of the mother are taken out of the calculus as it were.

So you have to start off with whether fathers have rights at the moment in the area of termination of pregnancy and I have to say my view and again, other smarter people may have different views, but my view would be that they do not.

But as I said others, and I'm not even sure if that's what other people have said to you, but that would be my own opinion.

### **Facilitator Table 11 -**

Thank you Judge. I'm the facilitator at table 11. Some of the members at this table have asked me to ask two questions on their behalf.

Q1 - In Mr Murray's opinion what scenario would give Ireland a similar legal situation to England?

Q2 – If the desire was to repeal 40.3.3, would there be a need to amend the 1861 Act?

### **Brian Murray SC –**

Well, in order to achieve a position similar to England the first thing that is absolutely clear is that Article 40.3.3 could not stand in its present form. So it would either have to be removed or replaced and to remove it would I suppose, have the various potential consequences which I've identified in my paper to you.

The securest way of allowing the Oireachtas to legislate in the same way as the English Parliament has done would be, the securest way would be to repeal the Eighth Amendment and stipulate either that the unborn have no rights or to stipulate that abortion legislation and policy is a matter for the Oireachtas and only the Oireachtas. That is how, as I see it, is the securest way of achieving that objective because in the absence of those two steps you will face the various arguments I have considered in respect of any such legislation were it to be introduced.

In relation to the decision to repeal Article 40.3.3, would that mean that the 1861 Act had to be repealed, I don't believe so, I think the probability is for the reasons I have explained, that the 1861 Act would and could remain subject obviously to the changes introduced in 2013 and it would then be a matter for the Oireachtas to decide if it wanted to introduce new legislation I think.

**Facilitator Table 1 -**

Judge I'm the facilitator here at Table 1. One of the Citizens has the following two questions.

Q1 –Since the Eighth Amendment was put in statute, has any circumstance arisen where the Eighth Amendment was unjustifiable in your opinion.

Q2 –Would you trust the Oireachtas to legislate correctly in the event of an appeal.

**Brian Murray SC –**

Well I'm not going to answer either of those questions but I suppose it's worth a try..

**Justice Laffoy –**

We'll go to Table 3

**Facilitator Table 3 -**

I'm the facilitator for Table 3 and the Citizens at this table have asked me to put two questions to you.

Q1 – If it is the recommendation of this Assembly that there be an amendment to Article 40.3.3, who decides on the wording of the Article and how does the Assembly recommendations influence that wording?

Q2 – Where is the implied right to life captured within the Constitution other than 40.3.3? In the pre 1983 environment which Articles specifically were deemed to have that implied right to life?

**Brian Murray SC –**

I think Judge would you like to deal with the first one because it's more of a procedural one.

**Justice Laffoy –**

Yes, seems to me that if we were going the recommendation of an amendment route, I think we would have to specify what we would regard as the appropriate amendment. We can't just say "amend", "we recommend amend" , we're going to have to go further than that I think. This is something I will discuss with the Expert Advisory Group but that's my instinct about it.

**Brian Murray SC –**

In terms of implied and I think it's important to observe this, when the Courts imply a right into the Constitution and that there's even an issue as to whether "imply" is the correct word it's one I think I refer to this in a footnote I'm using because it's convenient shorthand but to infer from the Constitutional right, they don't actually

look at a particular Article and say this is the one that it arises from. Usually, and maybe privacy is a very good example of this, usually what happens is that the courts deduce from a range of considerations within the Constitution, the fact, and this is not insignificant, in terms of the derivation of the right to life of the unborn,

- the fact that the Constitution proclaims the State to be Christian and democratic,
- the fact that there are certain values associated with liberty, the freedom of people themselves which is of fundamental constitutional value although not expressed in those terms ,
- the fact that in, and I'm just using privacy as an example, the fact that in Article 40.5 of the Constitution, there is an express guarantee to be for the inviolability of the dwelling. My recollection is that even in the early privacy cases the courts looked at the fact that there is references to secrecy in certain circumstances even if I recall,

the electoral circumstances all of which come together to the view that there are certain values which are so fundamental that even though they're not expressed in the Constitution they can be derived from it and it's usually from a range of different articles and also from other Constitutional instruments. Do other Constitutional Courts, other countries with similar cultures recognise particular value?

So that's the sort of canvas that's used. So when you say well where they get the right to life of the unborn from those Judges who believe that it was there, well Article 40.3.3 itself has a right to life in it although referenced to the citizen. And the view would have been taken that the nature of the State and the nature of the society which it had established was one which led to the conclusion that there was that protection.

It's not really in any particular provision of the Constitution per se. It follows from the general guarantee of personal rights provided by the Constitution.

### **Facilitator Table 9 -**

Good afternoon, I am the facilitator from Table 9. The citizens have a couple of questions for Mr Bailey (...Murray...) from the citizens here. The first part of the question is in regard to would the legal question in regard to the issues that we've been listening to here, be clearer if the Eighth Amendment was removed altogether.

And the second question. Should the wording of the Eighth Amendment, and it was following on maybe from Table 3's aspect in regard to the wording that might be used by the legislature in regard to putting the right to life of the mother paramount acknowledging the right to life of the unborn as a secondary aspect because the citizens here felt personally that maybe that is rather confusing and it leads to more issues than it actually solves – just like to get your views...

**Brian Murray SC** –

Just so I can understand the question – would the legal position be clearer if the Eighth Amendment was removed?

**Facilitator Table 9** -

Yes, in other words the whole idea of having the confusion if you like, the Eighth Amendment causes in the number of Judges and the application of the law. We talked about or listened to this this morning regarding immigration and deportation and so on. It doesn't seem to be a very decisive amendment in that it causes more confusion than what it solves. It was really to get your opinion on if we took it out altogether first of all, would it make the legal process easier because it seems again to the citizens here that before the 1983 Act came in, the situation was rather clearer.

**Justice Laffoy** –

Well I think this arises out of the discussion we had this morning about the rights other than the right to life. That's from the IRM case and cases like that...are there different rights other than the right to life...

**Brian Murray SC** –

Certainly, I hope this answers your question. The existence of an express right to life for the unborn makes it easier for it to be asserted that there are other necessary, other rights in the Constitution for the unborn. And that that in turn presents a range of possible arguments that lawyers may feel it necessary to deploy in particular cases and I'm sure it was referenced this morning. The immigration context is one, for example, where that issue has arisen relatively recently. So the short answer to the question I think is that the existence of that express right in the Constitution makes those arguments easier to advance. And I hope that to some extent answers the question.

If the Eighth Amendment, Article 40.3.3 is removed would those arguments still apply? Well, they would be more difficult to make but how difficult they would be to make would depend on what exactly replaced it, if anything. And I suppose we're back then to the various issues which I discussed in terms of the possible implications repeal in the course of my paper.

**Justice Laffoy** –

In a sense in terms of our task that is peripheral really. That would be my view.

Any more questions?

**Facilitator Table 8 -**

I am the facilitator for Table 8. One member here had a question in relation to at the option of amending the Amendment – an option C or D. Is it not effectively repealing Article 40.3.3?

**Brian Murray SC –**

So then the question then is whether in paragraph – the options considers paragraphs 36...sorry....

**Facilitator Table 8 -**

Sorry....44 and 45, option 3

**Brian Murray SC –**

Yes and so it's the options of expressly removing the right-to-life of the unborn and the option of stating that the Oireachtas should have full power to decide. And the question is whether is that not effectively a repeal of Article 40.3.3? Absolutely, that's exactly what it is. It is a repeal, accompanied by another provision which makes the effect of the repeal clear in those respects.

**Justice Laffoy –**

Any other questions?

Just one point – I got a prompt. Sections 58 and 59 of the Offences Against the Person Act 1861 were repealed (Brian Murray – the 2013 Act, that's what I said....as effected by the 2013 Act) so that's what we're talking about – such offences were thereby created.

This has been a most helpful session, I'm sure you'll all agree and show your appreciation.

[clap]

I've no doubt that we will be resorting to this paper night, noon and morning on the next weekend.

Thank you very much Brian, that was very, very helpful.

[ENDS]