

THE IRISH LAW ON ABORTION A YEAR AFTER ITS APPROVAL

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INTRODUCTION

After several lively debates and judicial decisions, the Irish Parliament passed a law on abortion in July 2013, the *Protection of Life During Pregnancy Act 2013*, which has not put an end to the discussion on this topic. This paper aims, first, at examining the legal aspects of abortion's history in Ireland, highlighting those that make the Irish situation unique compared to that of other European countries. Second, it addresses the question of the legal status of the human embryo in the Irish legal system regarding both abortion and assisted reproductive technologies; and finally, this paper aims to propose some concrete steps forward to protect unborn human life.

In July 2013, the Irish Parliament (Oireachtas) passed the *Protection of Life During Pregnancy Act 2013*,¹ ending a long and heated discussion on abortion, existing in the country since 1983.² It has been resulted in referenda, national and international court decisions, studies, and reports.³ An examination of what occurred in the past and what is currently occurring today is of particular cultural and practical interest not only for Ireland, but also for other European countries. For this reason, we have decided to track back into the history of abortion and the law in Ireland in order to discover any guiding criteria that could be useful in the current epochal and

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¹ See Catherine O'Sullivan et al., *Article 40.3.3 and the Protection of Life During Pregnancy Bill 2013: The Impetus for, and Process of, Legislative Change*, 3(3) IRISH J. LEGAL STUD. 1 (2013) (It was signed by Irish President Michel D. Higgins on 30 July 2013) (This law and the legislative process that preceded it have been much debated.); Shane N. Glackin & Simon Mills, *Termination of Pregnancy, Article 40.3.3, and the Law of Intended Consequences*, 3(3) IRISH J. LEGAL STUD. 76 (2013).

² *Id.*

³ *Id.*

planetary debate between the so-called “culture of life” and “culture of death.”

II. THE RIGHT TO LIFE IN THE IRISH CONSTITUTION

Art. 40.3.3^o of the Irish Constitution reads: “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.”⁴

Ireland is certainly not alone in granting some measure of constitutional protection to the right to life of the unborn child.⁵ Additionally, it is also possible to find rulings of Constitutional Courts that make explicit what is only implicit in other national constitutions. This can be seen in Germany⁶, Italy⁷ and Poland⁸. It is, however,

⁴ IR. CONST., 1937, available at <http://www.irishstatutebook.ie/en/constitution/index.html> (last visited April 22, 2014).

⁵ The Slovakian Constitution (1992), as well as the Charter of rights and fundamental freedoms issued based on the Constitution of the Czech Republic (1993), also included recognition of the right to life from conception. While Poland and Malta have strong prohibitions in place regarding abortion, both nations do so through criminal legislation rather than Constitutional proscription (Chapter 9, Sub-title VII, Articles 241-244A of the Criminal Code 1854) for Malta and the Family Planning Protection of the Human Foetus, and Conditions Permitting Pregnancy Termination Act of 1993 for Poland.

⁶ See Constitutional Court of the Federal Republic of Germany, judgments dated 25th February 1975, 4th August 1992 and 28th May 1993 on the subject of abortion. The first of these three decisions 39 BVerfGE 1 (1975) contains just such a statement. Responding to the possible observation that, “in other democratic countries of the Western World in recent times the penal provisions regulating the interruption of pregnancy have been ‘liberalized’ or ‘modernized’” and that “[D]isregarding the fact that all of these foreign laws in their respective countries are sharply controverted, the legal standards which are applicable there for the acts of the legislature are essentially different from those of the Federal Republic of Germany. Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced, that human beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially ‘worthless’, and which therefore excludes the destruction of such life without legally justifiable grounds.” *Translated in* John D. Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9(3) J. MARSHALL J. PRAC. & PROC. 551, at 662 (1976).

⁷ See the famous ruling no. 27 of 18th February 1975 of the Constitutional Court, which established that the constitutional foundation for the protection of the unborn child is grounded not only in Art. 31/1 Const. (*Maternity Protection Act 1979*), but also in Art. 2 which, “recognizes and guarantees the inviolable rights of a human being which cannot fail to include unborn children, albeit with their own particular characteristics.” Above all it is Constitutional Court

significant that the Irish text is explicit in acknowledging “the right to life of the unborn” with that very wording being the subject of a national referendum in 1983.⁹

At a first glance, it may appear that the new Hungarian Constitution¹⁰ of April 18, 2011, in force from January 1, 2012, includes a similar provision stating: “Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and fetal life shall be subject to protection from the moment of conception.”¹¹ While undoubtedly similar, the Irish wording is stronger in one way because it guarantees a full-fledged right to life to a specific subject, an unborn child.¹² While the human dignity that Hungary recognizes for the unborn child could be indissolubly linked to the existence of a human individual, it could also be argued that dignity simply relates to quality of life and not grounds for the right to life itself. Moreover, the Irish Constitution is

judgment no. 35 of 10th February 1997 which, after a long period in which the Court avoided reflecting on the right to life of the unborn child, looked for new clarity. The Court observed that, “should be found amongst the inviolable rights, i.e. amongst the rights that occupy what could be called a privileged position in the system since they belong . . . to the essence of supreme values on which the Italian Constitution is founded.”

⁸ The Polish Constitutional Court, in its decision of 28 May 1997 (no. K 26/96 OTK ZU No. 2, Constitutional Tribunal) anchors the constitutional basis of the right to life of the unborn to the democratic principle of the ‘State of Law’ present in the Constitution: “The constitutional rules currently in force in Poland do not contain an explicit defence of life. However this does not mean that human life is not a protected constitutional value. The basic rule from which we can deduce the constitutional defence of life is . . . the principle of the democratic State of Law. A State is realized only as a community of human beings and only human beings can be subjects of rights and duties. The fundamental value of a human being is his life; depriving a human being of his life is equivalent to destroying him as a subject of rights and duties. If the content of the State of Law is the basic guidelines set deriving from the essence of the law, democratically established, which ensures the minimum of its righteousness, then the first rule must be the respect for the value of human life without which any legal subjectivity is destroyed, and that is human life from its conception. The democratic State of Law puts the human being at the centre and as its most valuable asset. The first good is human life which the democratic State of Law must put under the protection of the Constitution at every stage of its development. In the framework of the legal protection of human life, even human life before birth cannot be discriminated against. There aren’t sufficiently precise criteria that allow such discrimination in reference to the various stages of human development. This means that human life from the very beginning is a value protected by the Constitution.” At the time that the Constitutional Court passed its judgment, the Constitution of 1952 was still in force, whereas the new Constitution of 2 April 1997 would come into effect shortly thereafter. That said, the constitutional principle of the democratic State of Law pervades both.

⁹ IR. CONST., 1983, available at <http://www.irishstatutebook.ie/en/constitution/index.html> (last visited Sept. 1, 2015).

¹⁰ Fundamental Law of Hungary (Hungarian: *Magyarország Alaptörvénye*) is available, translated into English, at: <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf> (date accessed: 23 April 2014).

¹¹ *Ibid.*, Article 2.

¹² IR. CONST., 1983, *supra* note 9.

particularly powerful because it states that the unborn child and the mother have equal rights,¹³ whereas in some legal systems the rights of the unborn child, despite being recognized, are subjected to a balance that gives prevalence not just to the mother's right to life but also her health.¹⁴ That can become particularly problematic for an unborn's right when "health" is construed as widely as it has been, for example, in the United Kingdom.

Before the referendum in 1983, abortion was illegal in Ireland under the *Offences Against the Person Act 1861*.¹⁵ The reason why this protection was elevated to a constitutional level was due to the perceived threat posed by the liberalization of abortion laws in the United Kingdom in the preceding years,¹⁶ along with the 1973 decision of the United States Supreme Court in *Roe v. Wade*.¹⁷

There are a number of unique features that make the apparent resilience of Art. 40.3.3°, in that international climate, worthy of study. With the exception of Malta, the Republic of Ireland is the only European country that continues to consider voluntary abortion to be a severely punishable crime, except in the case of danger to the mother's life.¹⁸ Further reason for study flows from the fact that it was not only introduced by popular referendum on September 7, 1983 with a very large majority consensus,¹⁹ but then subsequently defended by the Irish people in the referenda of 1992 and 2002, rejecting attempts to significantly alter it. The country's cultural, linguistic, and geographical proximity to the Anglo-Saxon culture makes the continued resistance of Irish law even more significant,²⁰

¹³ IR. CONST., 1983, *supra* note 9.

¹⁴ See discussion in Appendix 1, The All-Party Oireachtas Committee on the Constitution, Fifth Progress Report – Abortion (2000), available at <http://archive.constitution.ie/reports/5th-Report-Abortion.pdf> (last visited April 22, 2014).

¹⁵ See discussion in Appendix 1, The All-Party Oireachtas Committee on the Constitution, Fifth Progress Report – Abortion (2000), available at <http://archive.constitution.ie/reports/5th-Report-Abortion.pdf> (last visited April 22, 2014).

¹⁶ *Id.* at 57.

¹⁷ *Id.* at 93.

¹⁸ *Id.* at 622.

¹⁹ 1,265,994 electors (53.67%) voted in the 1983 referendum 841,233 citizens voted in favour of the proposal, 416,136 citizens voted against it. The referendum of 1983 on the "right to life of the unborn" created the eighth amendment to the Constitution, which was signed by the President of the Republic on 7 October 1983 and promulgated as law. The data are taken from Department of The Environment, Community and Local Government, *Referendum Results 1937 – 2012* (Dublin) 34, 35, available at <http://www.environ.ie/en/Publications/LocalGovernment/Voting/FileDownload,1894,en.pdf> (last visited April 25, 2014).

²⁰ Abortion in England, Scotland and Wales is governed by the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990), one of the first abortion legalizations in

particularly when considered within the European context of an increasingly broader de-penalization/legalization of abortion, albeit with different forms and limits.²¹ Against all this, Art. 40.3.3° of the Irish Constitution looms large.

A further point of interest is that before the new law, voluntary abortion was severely punished in accordance with sections 58 and 59 of a law dating back to the 1861 sections,²² which were still in force until their repeal by section 5 of the 2013 legislation which came into effect on January 1, 2014. Those sections still extend to the neighboring Northern Ireland²³, which remains part of the United Kingdom. It is truly remarkable that a region of a state that wide permits abortion, and which was among the first to legalize the same in Western Europe, should have maintained a strongly anti-abortion law. Despite this law's popular mandate, reaffirmed in subsequent referenda, many attempts have been made to reduce its scope through case law.

III. VTOP (VOLUNTARY TERMINATION OF PREGNANCY) FOR IRISH WOMEN IN THE UNITED KINGDOM

The neighboring United Kingdom, which allows abortion, is an obvious destination for Irish women who wish to terminate their pregnancies.²⁴ In a country such as Ireland, where abortion is prohibited with the support of a constitutional provision, it is unsurprising that these women are the face of pro-abortion propaganda.²⁵ Groups in other European countries also advocate for

Western Europe. A few years later, the U.S. Supreme Court legalised abortion in the United States with the well-known judgments, *Roe v. Wade* and *Doe v. Bolton* on 22 January 1973.

²¹ See <http://www.hsph.harvard.edu/population/abortion/abortionlaws.htm> (last visited: April 21 2014).

²² The Offences Against the Person Act, 1861, § 58, 59, available at http://www.legislation.gov.uk/ukpga/Vict/24-25/100_ (last visited: April 22, 2014).

²³ Though subject now to the provisions of § 26(1) – (2) of the Criminal Justice Act (Northern Ireland) 1945 which provide a defense where the procedure was carried out in “good faith for the purpose only of preserving the life of the mother.”

²⁴ Abigail-Mary E.W. Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L COMP. L. REV. 385 (1997); Allison M. Clifford, *Abortion in International Waters off the Coast of Ireland: Avoiding a Collision between Irish Moral Sovereignty and the European Community*, 14(2) PACE INT'L L. REV. 385 (2002), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1201&context=pilr> (last visited" April 24, 2014); Mary Gilmartin & Allen White, *Interrogating Medical Tourism: Ireland, Abortion and Mobility Rights*, 2 SIGNS 275 (2011).

²⁵ Abigail-Mary E.W. Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L COMP. L. REV. 385 (1997); Allison M. Clifford, *Abortion in International Waters off the Coast of Ireland: Avoiding a Collision between Irish Moral Sovereignty and the European Community*, 14(2) PACE INT'L L. REV. 385 (2002), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1201&context=pilr> (last visited"

the possibility of Irish women going abroad to have abortions, especially in the neighboring United Kingdom.²⁶

The latter has resulted in the involvement not just of the Irish legal authorities, but also the involvement of the European Court of Human Rights (EHCR) in Strasbourg and the Court of Justice in Luxembourg in two parallel cases: *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd and Others vs Ireland*²⁷ and *Society for the Protection of Unborn Children Ireland (SPUC) vs Grogan and Others*.²⁸ Even after the 1983 referendum, some organizations (*Open Door Counselling Ltd* and *Dublin Well Woman Centre Ltd*) continued to provide information on how to go to the United Kingdom in order to terminate a pregnancy.²⁹ The Irish Society for the Protection of Unborn Children (SPUC) asked that the activities of *Open Door* and *Dublin Well Woman* be prohibited pursuant to Article 40.3.3° of the Irish Constitution.³⁰ SPUC sought an injunction to prevent organizations charged with providing advice or assistance to pregnant mothers from advising or facilitating abortion practices.³¹ The Irish Supreme Court unanimously confirmed the decision of the High Court which forbade

April 24, 2014); Mary Gilmartin & Allen White, *Interrogating Medical Tourism: Ireland, Abortion and Mobility Rights*, 2 SIGNS 275 (2011).

²⁶ *Id.*

²⁷ *Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88 and 14235/88, Eur. Ct. H.R., 29 October 1992, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57789#{"itemid":\["001-57789"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57789#{) (last visited: April 23, 2014).

²⁸ Case C-159/90, *Society for the Unborn Children Ireland Ltd. v. Grogan*, 1991 E.C.R., available at http://www.biicl.org/files/1944_c-159-90.pdf (last visited: April 24, 2014).

²⁹ As prohibited by section 16(1) of the *Censorship of Publications Act 1929* provided: "It is shall not be lawful for any person, otherwise than under and in accordance with a permit in writing granted to him under this section: to print or publish or cause or procure to be printed or published, or to sell or expose, offer, or keep for sale, or to distribute, offer or keep for distribution any book or periodical publication (whether appearing on the register of prohibited publications or not) which advocates or which might reasonably be supposed to advocate the unnatural prevention of conception or the procurement of abortion or miscarriage or any method, treatment, or appliance to be used for the purpose of such prevention or such procurement", *Censorship of Publications Act 1929* (Act No. 21/1929) (Ir.), available at <http://www.irishstatutebook.ie/1929/en/act/pub/0021/sec0016.html#sec16> (last visited: April 25, 2014). Section 16 was modified by s. 12 of the *Health Family Planning Act 1979* in the following way: "Section 16 (1) of the *Censorship of Publications Act, 1929*, is hereby amended by the deletion of "the unnatural prevention of conception or" and "such prevention or" and the said section 16 (1), as so amended, is set out in the Table to this subsection", *Health (Family Planning) Act 1979*, (Act No. 20 of 1979), available at <http://www.irishstatutebook.ie/1979/en/act/pub/0020/sec0012.html#sec12> (last visited: April 25, 2014)

³⁰ Allison M. Clifford, *Abortion in International Waters off the Coast of Ireland: Avoiding a Collision between Irish Moral Sovereignty and the European Community*, 14(2) PACE INT'L L. REV. 385 (2002), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1201&context=pilr> (last visited April 24, 2014);

³¹ Allison M. Clifford, *supra* note 31.

the activities of the two “pro-abortion” associations, both of which later appealed to the European Court of Human Rights.

The ECHR, applying art. 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,³² with judgment n. 246, dated October 29, 1992, recognized that “the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life” and that, therefore, “the restriction pursues the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect,” deeming the restriction of the freedom of information to be “disproportionate.”³³

Almost at the same time, SPUC had sought an injunction against a certain Stephen Grogan and fourteen other heads of student associations that were circulating advertising materials regarding clinics in the United Kingdom specialized in carrying out abortions.³⁴ This time the Supreme Court preferred to refer a preliminary question to the European Court of Justice regarding whether the legal practice of abortion in the United Kingdom could be deemed to be a “service” in accordance with EC law, and as such subject to the principle of free provision of services guaranteed by the founding treaties of the European Community.³⁵ With a judgment dated October 4, 1991, the Luxembourg Court replied that in the United Kingdom abortion clinics certainly constituted a “service,” but the activity of the students in Ireland could not be deemed to be part of this service given the absence of proof of a link between the British hospitals and the Irish students, neither of whom were acting as foreign economic operators, but merely providing information independent from the activities of the clinics.³⁶ Therefore the question, the Court established, could not be examined because the regulations on abortion and freedom of information did not at that time fall within its jurisdiction as defined by EC treaties.³⁷

³² Article 10 concerns the freedom of expression which includes “the freedom to receive or to communicate information or ideas without any interference from the public authorities”. *Convention for the Protection of Human Rights*, Eur. Conv. on H.R.

³³ Allison M. Clifford, *supra* note 31.

³⁴ Allison M. Clifford, *supra* note 31.

³⁵ The proposal was rejected by 1,079,297 votes against (68.16%) and 572,177 in favour. See Department of The Environment, Community and Local Government, *supra* note 11.

³⁶ Allison M. Clifford, *supra* note 31.

³⁷ See D.M. Curtin, *Case C-159/190 The Society for the Protection of Unborn Children v. Grogan*, 29(3) COM. MAR. L. REV. 585 (1992); See S. O’Leary, *The Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of Abortion information Case*, 16 EUR. L. REV. 138 (1992); See James Kingston & Anthony Whelan, *The Protection of the Unborn in Three Legal Orders*, 93 IR. L. T. AND

IV. THE X CASE, THE RISK OF SUICIDE AND THE 1992 REFERENDUM

In order to properly understand the situation in the run-up to the 1992 referendum, it is necessary to recall a case—well known as “the X case”³⁸—brought before the Irish courts which influenced the public debate on abortion.³⁹ In December 1991, the parents of a 14-year-old girl who became pregnant by a friend of her father reported the incident to the police and made known their intention to go to the United Kingdom in order to terminate the pregnancy.⁴⁰ However, before being able to undergo the procedure, they received notice of an Irish injunction enjoining her from having an abortion.⁴¹

The family appealed the injunction which went as far as the Supreme Court.⁴² In its ruling of March 5, 1992,⁴³ amongst the various grounds for appeal, the Court dealt with the fact that after she came back from the United Kingdom, the girl disclosed her desperation and expressed the intention of committing suicide.⁴⁴ The Supreme Court held that the risk of suicide rendered Art. 40.3.3° inapplicable with regard to the protection of the unborn child because Art. 40.3.3° obliges the State to also protect the life of the mother, and that of the child “only to the extent that is possible.”⁴⁵ Attention is often paid to the statement of Chief Justice Finlay which says that: “if it can be established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such

SOLIC. JOUR. (1992), *available at*

<http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1541&context=ilr>.

Jour. 476; See Diarmuid Rossa Phelan, *Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union*, 55(5) MOD. L. REV. 670 (1992); See Cathleen M. Colvin, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan and the Free Movement of Services in the European Community: Irish Abortion Law*, 15(2) FORDHAM INT’L L.J. 476 (1991).

³⁸ Lisa Smyth, *Narratives of Irishness and the Problem of Abortion: the X Case 1992*, 60 FEM. REV. 61, 83 (1998).

³⁹ R.A. Pearce, *The Irish Abortion Controversy*, 142(3) NEW L.J. 283, 285 (1992); *Id.* *Abortion and the Right to Life Under the Irish Constitution*, 15 J. SOC. WELFARE & FAM. LAW 386 (1993); M. Fox & T. Murphy, *Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation*, 19 J.L. & SOC. 454 (1992); J. A. Weinstein, *An Irish Solution to an Irish Problem: Ireland’s Struggle with Abortion Law*, 10 ARIZ. J. INT’L. COMP. L. 165 (1993); Rick Lawson, *The Irish Abortion Cases: European Limits to National Sovereignty?*, 1 EUR J. HEALTH L. 167 (1994).

⁴⁰ *See supra* note 1.

⁴¹ Allison M. Clifford, *supra* note 31.

⁴² *Att’y Gen. v. X and Others*, [1992], 1 I.R. 1 (Ir.), *available at* <http://www.bailii.org/ie/cases/IESC/1992/1.html> (last visited: April 23, 2014).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Att’y Gen. v. X and Others*, [1992], 1 I.R. 1 (Ir.), *available at* <http://www.bailii.org/ie/cases/IESC/1992/1.html> (last visited: April 23, 2014).

termination is permissible.”⁴⁶ It is evident that this judgment could have opened the door to the legalization of abortion by means of the simple assertion of a mental illness that could lead to suicide and even abortion on demand under the guise of a statement of suicidal intent. In fact, how can a party prove the effective, real, and imminent possibility of suicide in a manner sufficient to satisfy the kind of lethal balancing exercise anticipated by the Chief Justice?

The Irish government tried to prevent this with a constitutional amendment that explicitly excluded threatened suicide as grounds for an abortion.⁴⁷ Nine months after the decision, in December 1992, three distinctive referenda were submitted to voters, all on abortion.⁴⁸ The first of these—in which the “no” vote won⁴⁹—was aimed at amending Art. 40.3.3° to protect against effects of the ruling in the X case and any potential for the legalization of abortion by the Judiciary. The amendment proposed replacing Art. 40.3.3° with the following wording: “It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.”⁵⁰

Predictably, those seeking the liberalization of abortion law in Ireland were among those voting against the amendment, but they were joined by at least some of the pro-life groups who considered that the amendment was not clear enough or did not go far enough.⁵¹ We could, therefore, ask ourselves whether the result of the 1992 referendum, in rejecting the proposal, should be interpreted as a success for the pro-life movement or for the rival faction. Certainly the wording introduced by the people in 1983 remained in its entirety.⁵² We should remember that the 1983 referendum was called in order to avoid the 1861 Act being interpreted in a permissive manner as had

⁴⁶ *Att’y Gen. v. X and Others*, [1992], 1 I.R. 1 (Ir.), available at <http://www.bailii.org/ie/cases/IESC/1992/1.html> (last visited: April 23, 2014).

⁴⁷ *Ibid.*, sch. 2, s. 1(1).

⁴⁸ Referendum on the right to life [1992] (Twelfth Amendment of the Constitution Bill 1992); Referendum on travel [1992] (Thirteenth Amendment of the Constitution Bill 1992); Referendum on information [1992] (Fourteenth Amendment of the Constitution Bill 1992).

⁴⁹ The proposal was rejected by 1,079,297 votes against (68.16%) and 572,177 in favour. See: Department of The Environment, Community and Local Government, *supra* note 19.

⁵⁰ IR. CONST., 1937, available at <http://www.irishstatutebook.ie/en/constitution/index.html> (last visited Sept. 1, 2015).

⁵¹ I. Bacik, *Legislating for Article 40.3.3°*, 3(3) I. J. LEGAL STUD. 18, 26 (2013); D. Madden, *Medicine, Ethics and the Law in Ireland*, Dublin: Bloomsbury Professional, at 238 (2011).

⁵² B. Kennelly & E. Ward, *How Ireland Voted 1992: The Abortion Referendums* 115 (M. Gallagher & M. Laver eds., 1993).

occurred in England and Wales in the case *R. v. Bourne* in 1939.⁵³ It is therefore possible to understand the particular affection of the Irish people for the text that it had previously introduced into the Constitution. It seems that some people voted “yes” because they feared a slide towards abortion on demand would take place if the solution given by the Supreme Court in the *X* case was not cancelled. But others voted “no” to maintain the rigor of sections 58 and 59 of the 1861 Act, and because they feared that making abortion legal not just in the event that the pregnancy itself caused the immediate risk of death of the mother, but also in the event that another mortal illness was in progress, independent from the pregnancy, could uncontrollably extend the legitimacy of abortion.⁵⁴

The second and third questions posed to the nation in December 1992 stemmed from the cases discussed above with the second specifying that the prohibition on abortion would not limit freedom of travel in and out of the state, and the third similarly codifying the right to distribute information about abortion services in foreign countries.⁵⁵ Both of these constitutional amendments were passed.⁵⁶

As a result, art. 40.3.3. of the Constitution now:

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

⁵³ *Rex v. Bourne* [1938] 3 All E. R. 615 (K.B.) The *Bourne* judgment of 1939, in which a London gynaecologist was found not guilty of an offence under this Act for performing an abortion on a 14 year old who was pregnant as a result of rape, was based on an interpretation of the word “unlawfully” in this Act. The defence argued, and the judge accepted, that in the particular circumstances of the case, the operation was not unlawful since continuation of the pregnancy would severely affect the young woman's mental health. In reaching this decision, the judge turned to the wording of the Infant Life (Preservation) Act 1929 which gave protection from prosecution if the act was carried out in good faith “for the purpose only of preserving the life of the mother.” This formed the basis of the judgment and extended the grounds for a lawful abortion to include the mental and physical well-being of the woman.

⁵⁴ *Rex v. Bourne* [1938] 3 All E. R. 615 (K.B.)

⁵⁵ *Id.*

⁵⁶ *Id.*

down by law, information relating to services lawfully available in another state.⁵⁷

V. THE PROBLEM OF THE BEGINNING OF HUMAN LIFE AND THE 2002 REFERENDUM

After a series of studies and public debates,⁵⁸ in 2002 the Irish government felt it necessary to propose a new constitutional amendment in order to remove the uncertainties caused by the decision in the X case. A special bill on the “Protection of Human Life During Pregnancy”⁵⁹ was prepared that excluded the risk of suicide as grounds for a legal abortion, but permitted “the carrying out of a medical procedure by a medical practitioner at an approved place in the course of which or as a result of which unborn human life is ended where that procedure is, in the reasonable opinion of the practitioner, necessary to prevent a real and substantial risk of loss of the woman’s life other than by self-destruction.”⁶⁰ It also stated, “in this Act, ‘abortion’ means the intentional destruction by any means of unborn human life after implantation in the womb of a woman.”⁶¹ The legislature wanted to give constitutional force to the provisions in this bill, and therefore it came into force following the approval of the additional amendment to Art. 40.3.3° of the Constitution: “[I]n particular, the life of the unborn child in the womb shall be protected according to the provisions of the law on the Protection of Life During Pregnancy 2002.” The constitutional referendum of the March 6, 2002, therefore, concerned the content of the ordinary law that would not enter into force without a prior constitutional guarantee.⁶²

The explicit reference to the womb left those embryos conceived in vitro unprotected. Many pro-life supporters considered this to be a serious limitation on protection because it would have brought Irish legislation into line with the UK Warnock Report of 1984.⁶³ This Report, commissioned by the British government,

⁵⁷ IR. CONST., 1983, available at <http://www.irishstatutebook.ie/eli/cons/en/html#part13> (last visited Sept. 1, 2015).

⁵⁸ *Supra* note 1.

⁵⁹ Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Act 2001 Act 2001 (Act No. 25/ 2001) (Ir.) available at <http://www.oireachtas.ie/documents/bills28/bills/2001/4801/b48b01d.pdf>.

⁶⁰ *Ibid*, sch 2, s. 1(2).

⁶¹ *Ibid*, sch 2, s. 1(1).

⁶² K. Birchard, *Ireland Prepares for Referendum on Abortion*, 359 *Lancet* no. 9305, 505 (2002).

⁶³ M. WARNOCK, *THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY* (Oxford and New York: Basil Blackwell, 1984); *Id*; see also, *The Warnock Report* 291 *BRIT. MED. J.* 187 (1985).

theorized that life begins for a human individual on the fourteenth day after fertilization (thus, the term “pre-embryo”⁶⁴), which—although lacking any scientific basis⁶⁵ and now largely abandoned⁶⁶—legitimized all kinds of destructive manipulation of human embryos conceived *in vitro*.

The amendment was rejected by a narrow majority of voters⁶⁷ and, once again, the complexity of the subject⁶⁸ and the tangle created by the positive and negative press divided pro-life voters.

VI. FERTILIZATION AND IMPLANTATION BEFORE THE SUPREME COURT: THE CASE OF *ROCHE VS. ROCHE*

In 2009, the increasing popularity of *in vitro* fertilization gave rise to another legal case which has become intertwined with the subject of abortion. A problem not new to case law in other States⁶⁹

⁶⁴ A. McLaren, *Embryo Research*, 320 *Nature* 370 (1986). The term “pre-embryo” was proposed by the mouse embryologist A. McLaren, a member of the Warnock Committee, after the work of the aforementioned Committee had come to an end which she criticized for not having officially accepted this definition. *Id*; see also THE CIBA FOUNDATION-HUMAN EMBRYO RESEARCH: YES, OR NO?: PRELUDE TO EMBRYOGENESIS. (London: Tavistock Publications, 1986).

⁶⁵ M. Warnock, THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY (Oxford and New York: Basil Blackwell, 1984); *Id*; see also, *The Warnock Report* 291 *BRIT. MED. J.* 187 (1985). In fact, in chapter XI of the Final Report, the Warnock Committee concludes as follows: “follows: “While, as we have seen, the timing of the different stages of development is critical, once the process has begun, there is no particular part of the developmental process that is more important than another; all are part of a continuous process, and unless each stage takes place normally, at the correct time, and in the correct sequence, further development will cease. Thus biologically there is no one single identifiable stage in the development of the embryo beyond which the *in vitro* embryo should not be kept alive.” Due to strong pressure from experimenters, the Warnock Committee concluded: “However, we agreed that this was an area in which some precise decision must be taken, in order to allay public anxiety.” As a result, “despite our division on this point, a majority of us (16 out of 23) recommend that the legislation should provide that research may be carried out on any embryo resulting from *in vitro* fertilisation, whatever its provenance, up to the end of the fourteenth day after fertilisation . . .”

⁶⁶ It should be remembered that immediately after the Warnock Report, the “Benda Report” in Germany and the “Santosuosso Report” in Italy rejected the “preembryo category. See E. Benda, AD HOC COMMITTEE OF EXPERTS ON PROGRESS IN THE BIOMEDICAL SCIENCES (CAHBI): REPORT OF WORKING GROUP ON IN VITRO FERTILIZATION, GENOME ANALYSIS AND GENE THERAPY (Strasbourg 1986); *Santosuosso Committee*, 2 *Giur. It.* 57 (1986). See M. Ferrer Colomer, Luis Miguel Pastor, *The Preembryo’s Short Lifetime. The History of a Word.* 23 *Cuad. Bioét.* 677, 677-694 (2012).

⁶⁷ 629,041 votes against, 618,485 in favour. See Department of The Environment, Community and Local Government, *supra* note 11.

⁶⁸ E. Mills & L. McConvill, *Irish Abortion Referendum: A Question of Constitutionalism and Conscience*, 3 *EUR. J. LAW REFORM* 481 (2002).

⁶⁹ J. E. Chapman & M. Zhang, *Davis v. Davis* (1992). Embryo Project Encyclopedia <http://embryo.asu.edu/handle/10776/6320> (last visited: 25 April 2014). Within the sphere of artificial fertilisation, after initiating an *in vitro* fertilisation procedure and producing some cryo-preserved embryos, what if a couple breaks up: separates or divorces? Resolving this question has led to legal cases considering the future of the embryos? A well-known early case dates back to 1989 in Maryville, Tennessee when it was necessary to decide on what to do with cryo-

was presented to the Irish Supreme Court: It regarded the fate of embryos that had been frozen following *in vitro* fertilization in the light of the subsequent divorce of the parents where the woman made a request to proceed with the transfer to the uterus and the ex-husband refused.⁷⁰ The woman invoked, amongst other arguments, the State's duty to protect unborn life.⁷¹

On December 15, 2009, in the case of *Roche vs. Roche*,⁷² the Irish Supreme Court, having examined and rejected all the other arguments, carried out a lengthy study of Art. 40.3.3^o.⁷³ According to the judges, the objective of the constitutional amendment was to maintain the ban on abortion and could not, therefore, be related to the case of an embryo produced *in vitro*.⁷⁴ In essence, the Court considered that the constitutional text only referred to the case in which the life of the child is necessarily intertwined with that of the mother.⁷⁵ Until being transferred to the mother's uterus, the cryopreserved embryo does not condition the mother's life in any way.⁷⁶

With regard to the moment in which human life begins—decisive for establishing when the unborn child acquires legal protection—the Court considered whether the law has to be responsible for taking a position when faced with divergence among

preserved human embryos upon the separation of the spouses. The great geneticist, Jérôme Lejeune, was called upon to testify about the nature of the embryo: a human being or what? Quite rightly, the lower court judge considered that his court's answer to this question was preliminary, but he ruled for the mother who was asking for the embryos to be transferred to her uterus, not just because of a prevalence of the woman over the male with regard to procreation, but because that was the only way to protect the right to life of the child. Unfortunately, on appeal, the judges ruled that the former spouses should decide by common assent, but the father did not want his former wife to have children that were also his, so the embryos remained frozen. Similar, albeit less well known legal stories have also occurred in Italy, frequently resolved by giving the father the right to veto the woman's request to have the embryos transferred, as in the case examined in 2000 by the Court of Bologna, C. Casini, *Controversia: tre figli sotto azoto liquido*, 6 *Medicina e Morale* 1193 (2000). The question also reached the European Court of Human Rights with the case *Evans v. U. K.*, [GC], (No. 6339/05) Eur. Ct. H.R. (2006) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80046#{"itemid":\["001\]80046"}\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80046#{) (last visited: 27 April 2014).

⁷⁰ *Roche v. Roche*. IESC 82. Record Number: 469/06 & 59/07, (2009) available at <http://www.bailii.org/ie/cases/IESC/2009/S82.html> (last visited: April 26, 2014).

⁷¹ *Roche v. Roche*. IESC 82. Record Number: 469/06 & 59/07, (2009) available at <http://www.bailii.org/ie/cases/IESC/2009/S82.html> (last visited: April 26, 2014).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ E. Scot Sills & S.E. Murphy, *Determining the Status of Non-Transferred Embryo in Ireland: A Conspectus of Case Law Implications for Clinical IVF practice*, 4 *PHIL. ETH. AND HUM. IN MED.* 8 (2009) available at <http://www.peh-med.com/content/4/1/8>. (last visited: April 25, 2014).

⁷⁵ *Roche v. Roche*. IESC 82. Record Number: 469/06 & 59/07, (2009) available at <http://www.bailii.org/ie/cases/IESC/2009/S82.html> (last visited: April 26, 2014).

⁷⁶ *Id.*

scientists and philosophers.⁷⁷ It stated, therefore, “[T]he onus rests on the Oireachtas to make the initial policy determination so as to define by law the precise point at which ‘the life of the unborn’ begins to enjoy constitutional protection.”⁷⁸ In coming to this decision, the Court decided that the question as to whether the frozen embryos constituted unborn life, such as would attract protection under Art. 40.3.3°, was not justiciable.⁷⁹ An important consequence of this was the exclusion from the constitutional protection of the embryo before implantation.⁸⁰

VII. THE CASE OF *A. B. C. VS. IRELAND* BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

On December 16, 2010 the Grand Chamber of the European Court of Human Rights decided the case of *A. B. and C. vs. Ireland*⁸¹ in which three women claimed the right to have an abortion. Two of these, A and B, complained that, in Ireland, abortion is not permitted for reasons concerning the health or well-being of the mother.⁸² The third, C, complained that, in Ireland, there is no law implementing Art. 40.3.3° of the Constitution in the case of a risk to the life of the mother.⁸³

The application lodged by A and B asked for recognition of a breach of Art. 8 of the *European Convention on Human Rights and Fundamental Freedoms*.⁸⁴ This article guarantees the right to respect for private and family life.⁸⁵ The applicants argued that the restraints placed on abortion in Ireland constituted illegal interference in their private freedom.⁸⁶

⁷⁷ Roche v. Roche. IESC 82. Record Number: 469/06 & 59/07, (2009) available at <http://www.bailii.org/ie/cases/IESC/2009/S82.html> (last visited: April 26, 2014).

⁷⁸ Roche per Chief Justice Murray, *supra* note 82.

⁷⁹ *Id.*

⁸⁰ Andrea Mulligan, *Roche v. Roche: Some Guidance for Frozen Embryo Disputes*, 13, TRINITY C. L. REVIEW 168 (2010).

⁸¹ A, B and C v. Ireland, 2010 2010 EUR. CT. H.R. No. 25579/05.

⁸² *Id.* at para. 3.

⁸³ *Id.* at para. 154.

⁸⁴ *Id.* at para. 167.

⁸⁵ B. Daly, *Access to Abortion Services: The Impact of the European Convention on Human Rights in Ireland*, 2 Med. & Law 267 (2011).

⁸⁶ Shannon K. Calt, *A., B. & C. v. Ireland: “Europe’s Roe v. Wade”?*, LEWIS & CLARK L. REV. 1189, 1223 (2010); Stephen Donoghue & Claire-Michelle Smyth, *Abortion for Foetal Abnormalities in Ireland; The Limited Scope of the Irish Government’s Response to the A, B and C Judgment*, EUR. J. HEALTH L. 117 (2013).

The Court rejected the first two complaints referring to its consolidated case law regarding the “broad margin of appreciation,” which states the subjects that touch on the profound moral values of a nation.⁸⁷ In particular, it recalled its previous judgment in *Open Door and Dublin Well Woman Ltd v. Ireland*, in which it recognized that “the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum.”⁸⁸ The Court concluded that the prohibition against abortion did not, “based as it is on the profound moral views of the Irish people as to the nature of life . . . exceed the margin of appreciation accorded in that respect to the Irish State.”⁸⁹

The European Court came to a different conclusion in respect to the third applicant’s complaint. According to the Court, Art. 40.3.3° had modified the legal system of abortion which was previously totally prohibited by the 1861 Act, permitting the same in the event of risk to the life of the mother.⁹⁰ However, this general rule, established by the Constitution, should have been better specified by an ordinary law. In the absence of this, there was legal uncertainty “and, more particularly . . . the lack of effective and accessible procedures suited to recognize the existence of a right to an abortion” which “has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman’s life, and the reality of its practical implementation.”⁹¹

The Court concluded that “the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure in Ireland by which the third applicant could

⁸⁷ Shaun de Freitas & Ewelina Ochab, *A, B & C v. Ireland: The Unborn and an Appreciation of the Margin of Appreciation*, AVE MARIA INT’L L. J. 1, 4 (2012); Stijn Smet, *A., B. and C. v. Ireland: Abortion and the Margin of Appreciation*, STRASBOURG OBSERVERS, (Dec. 17, 2010), <http://strasbourgoobservers.com/2010/12/17/a-b-and-c-v-ireland-abortion-and-the-margin-of-appreciation/>; Alexandra Timmer, *S.H. and Others v Austria: Margin of Appreciation and IVF*, STRASBOURG OBSERVERS, (Nov. 9, 2011), <http://strasbourgoobservers.com/2011/11/09/s-h-and-others-v-austria-margin-of-appreciation-and-ivf/>; THE LISBON NETWORK, *The Margin of Appreciation*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last visited Nov. 15, 2014).

⁸⁸ *Supra*, note 27.

⁸⁹ *A., B., and C. v. Ireland*, *supra* note 84 at para. 180.

⁹⁰ *Id.* at para. 147.

⁹¹ *A. B. and C. v. Ireland*, *supra* note 84 at para. 264.

have established whether she qualified for a lawful abortion in Ireland in accordance with Art. 40.3 of the Constitution.”⁹² To conclude, the Court unanimously stated that, with regard to the third applicant, the Irish state had violated Art. 8 of the European Convention.⁹³

We will not enter here into a detailed critique of this long judgment⁹⁴ except to highlight that the starting viewpoint is the woman’s right to have an abortion, which can, in different circumstances, be more or less extensive but, in any case, is a right that a State has to guarantee by arranging procedures that control, authorize the carrying out, and guarantee the satisfaction of the same.⁹⁵ The starting viewpoint presented is not that of the life of the unborn child. In that case, the legality of the abortion would have been established not as the exercising of a right but as the assessment of a state of necessity.

Furthermore, it should be noted that the applications were ripe with procedural problems. An institutional question exists as to why the three applications were referred to the Grand Chamber when a similar case two years earlier and which received an oral hearing was deemed inadmissible.⁹⁶ In the case of *D. v. Ireland*, the applicant (similar to the three applicants in *A., B., and C.*) did not avail herself of domestic courts before filing with the European Court of Human Rights.⁹⁷ The Fourth Section of the European Court of Human Rights held that the Irish Courts were ready and able to handle timely cases involving pregnancies, citing three examples of cases which were resolved within either less than a month (the “X” case) or within a

⁹² *Id.* at para. 267.

⁹³ Elizabeth Wicks, *A, B, C v Ireland: Abortion Law under the European Convention on Human Rights*, 3 HUM. RTS. L. REV. 556, 564 (2011).

⁹⁴ We have appreciated the Amicus Briefs of Alliance Defense Fund. *Family Research Council, People for the American Way*, <http://www.rightwingwatch.org/category/organizations/family-research-council> (last visited Nov. 14, 2014); EUROPEAN CENTRE FOR LAW AND JUSTICE, PEOPLE FOR THE AMERICAN WAY, <http://www.rightwingwatch.org/category/organizations/european-centre-law-and-justice> (last visited Nov. 14, 2014); SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (SPUC), <https://www.spuc.org.uk/> (last visited Nov. 14, 2014).

⁹⁵ *Family Research Council, People for the American Way*, <http://www.rightwingwatch.org/category/organizations/family-research-council> (last visited Nov. 14, 2014); EUROPEAN CENTRE FOR LAW AND JUSTICE, PEOPLE FOR THE AMERICAN WAY, <http://www.rightwingwatch.org/category/organizations/european-centre-law-and-justice> (last visited Nov. 14, 2014); SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN (SPUC), <https://www.spuc.org.uk/> (last visited Nov. 14, 2014).

⁹⁶ *D. v. Ireland*, 2006 EUR. CT. H.R.

⁹⁷ *Id.* at para. 4.

matter of a few days (the “C” case and an unreported case involving a Ukrainian asylum seeker).⁹⁸ As was further held in *D. v. Ireland*:

[I]t is an established principle, that in a legal system providing constitutional protection for fundamental rights, it is incumbent on the aggrieved individual to test the extent of that protection and, in a common law system, to allow the domestic courts to develop those rights by way of interpretation. In this respect, it is recalled that a declaratory action before the High Court, with a possibility of an appeal to the Supreme Court, constitutes the most appropriate method under Irish law of seeking to assert and vindicate constitutional rights (*Patrick Holland v. Ireland*, no. 24827/94, Commission decision of 14.4.1998, DR 93, p. 15 and *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, no. 55120/00, (Dec.) 19 June 2003).⁹⁹

The Court has also held that mere doubts about the chances of success of a Constitutional action do not exempt the applicant from the requirement to exhaust domestic remedies.¹⁰⁰

Finally, Ireland’s medical guidelines are very specific as to the requirement to both provide care where there is a real and substantial risk to the life of the mother, or after-care where complications arise for women having received an abortion in another jurisdiction.¹⁰¹ With regard to after-care, objective policy, as determined by published and respected Council guidelines, establishes the reality of the precision of the treatment guidelines in Ireland and must be accepted over the subjective stigma a woman may feel in seeking treatment for post-abortion complications.¹⁰² The fact that such guidelines are in place,¹⁰³

⁹⁸ *Id.* at para. 96.

⁹⁹ *Id.* at para. 85.

¹⁰⁰ *A., B., and C. v. Ireland*, 2009 EUR. CT. H.R. No. 25579/5, 1 (citing *K.F. and P. v. the U. K.*, App. No. 10789/84, EUR. COMM’N H.R. DEC. & REP. 298 (1984)).

¹⁰¹ THE MEDIA COUNCIL, A GUIDE TO ETHICAL CONDUCT AND BEHAVIOUR § 24.6 (6th ed. 2004), available at <https://www.medicalcouncil.ie/News-and-Publications/Publications/Professional-Conduct-Ethics/Ethical%20Guide%202004.pdf>; THE ALL-PARTY OIREACHTAS COMMITTEE ON THE CONSTITUTION, FIFTH PROGRESS REPORT ABORTION, 11 (2000), available at <https://www.constitution.ie/Documents/Oireachtas%205th-Report-Abortion%202000.pdf>.

¹⁰² THE MEDIA COUNCIL, A GUIDE TO ETHICAL CONDUCT AND BEHAVIOUR § 24.6 (6th ed. 2004), available at <https://www.medicalcouncil.ie/News-and-Publications/Publications/Professional-Conduct-Ethics/Ethical%20Guide%202004.pdf>.

¹⁰³ *Id.*

that no domestic litigation was ever contemplated by the three applicants in *A., B., and C.*,¹⁰⁴ the applicants were free to travel to the United Kingdom to procure abortions, and not a single medical opinion was sought within Ireland prior to filing the claims in Strasbourg,¹⁰⁵ evidences that the Grand Chamber's hearing of the case was dubious at best.

Equally important, judgments of the European Court of Human Rights can neither cancel the domestic laws of a State, nor mandate the enactment of the same.¹⁰⁶ As a former Vice-President of the Court, Judge Françoise Tulkens, has herself stated that the European Court is not a Constitutional Court, but a human rights supervisory organ.¹⁰⁷ The only immediate consequence is to dictate that a state fairly indemnify the applicant whose right has been deemed to have been violated. This is what occurred in the case summarized above, the Court had no power to impose any other obligation on the Irish State. The supremacy of national constitutional law over European Court of Human Rights judgments has been upheld in a number of jurisdictions as well. For example, the Italian Constitutional Court has held on several occasions that rights and principles enumerated in the Italian Constitution supersede any international commitments over its domestic law. Most recently, the Constitutional Court held that decisions of the European Court of Human Rights may assume the rank of a supplementary source of Constitutional limits, but is secondary to Italian Constitutional law itself.¹⁰⁸ Similarly, the Constitutional Court held in its 1973 *Frontini* decision that Article 11 of the Constitution, which governs when Italy may relinquish partial sovereignty through international agreements, requires that international obligations never interfere with the fundamental precepts set forth in the Italian Constitution.¹⁰⁹ The Constitutions of Bulgaria,¹¹⁰ the Czech Republic,¹¹¹ Slovenia,¹¹² and

¹⁰⁴ *A., B., and C., v. Ireland*, *supra* note 84.

¹⁰⁵ *Id.*

¹⁰⁶ See: Dr. Grégor Puppink, *Abortion and the European Convention on Human Rights*, 3(2) IRISH J. LEGAL STUD. 142 (2013) (For a systematic analysis of European Court of Human Rights' jurisprudence on abortion).

¹⁰⁷ See Françoise Tulkens, *The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism*, 30:6 CARDOZO L. REV. 2575, 2576-77 (2009).

¹⁰⁸ Corte Cost. 16 novembre 2009, n.311 (It.).

¹⁰⁹ See Francesco P. Ruggieri Laderchi, *Report on Italy*, in THE EUROPEAN COURTS AND NATIONAL COURTS (Anne-Marie Slaughter, Alec Stone Sweet, & Joseph H. H. Weiler eds., Oxford: Hart Publishing 1998).

¹¹⁰ CONSTITUTION OF THE REPUBLIC OF BULGARIA Jul. 13, 1991, art. 149(4).

¹¹¹ CONSTITUTION OF THE CZECH REPUBLIC Dec. 16, 1992, art. 87

¹¹² OFFICIAL GAZETTE OF THE REPUBLIC OF SLOVENIA [Constitution] Dec. 23, 1991, art. 160.

Poland¹¹³ all explicitly enumerate the supremacy of Constitutional Court rulings over European Court of Human Rights rulings.

However, the fact remains that an established international court had given Ireland, we suggest, an authoritative invitation to legislate which cannot be regarded as having no weight at all. In this way, the requests were reinforced of those who wanted a law to extend the sphere for legal abortion. Indeed, just months after the European Court decision, a new government (a Fine Gael-Labour coalition) was elected in February 2011 which committed to establishing an Expert Group to review the judgment and its implications for drawing up the framework for legislation clarifying the criteria under which termination of pregnancy might be carried out in order to save a woman's life.

In advance of the Expert Group's findings, a private members' bill on abortion was introduced in the Dáil Éireann in April 2012. The bill was defeated by the government on the basis that it would preempt the report of the Expert Group.¹¹⁴

In that context, the pressure for enacting the legislation called for by the European Court was only increased by the death of an Indian woman, named Savita Halappanavar, occurring a short time before the publication of the Expert Group Report. She died on October 28, 2012 at the University College Hospital Galway (UCHG) while suffering a miscarriage. A widespread discussion followed the tragic death of Mrs. Halappanavar and her unborn baby. According to the press, the death was the result of the denial of an abortion.¹¹⁵ This

¹¹³ THE CONSTITUTION OF POLAND Apr. 2, 1997, art. 188.

¹¹⁴ GOV'T OF IR., OIREACTHAS COMMITTEE ON HEALTH AND CHILDREN. REPORT ON PUBLIC HEARINGS ON THE IMPLEMENTATION OF THE GOVERNMENT DECISION FOLLOWING THE PUBLICATION OF THE EXPERT GROUP REPORT ON A, B, & C V IRELAND (Vol. I, 2013), http://www.oireachtas.ie/parliament/media/Volume_1_142239.pdf.

¹¹⁵ E.g., Henry McDonald & Ben Quinn, *Ireland abortion policy under scrutiny after woman's death*, *The Guardian* (Nov. 14 2012), <http://www.theguardian.com/world/2012/nov/14/ireland-abortion-scrutiny-death>; Una Mullally, *Savita story resonates around the world* *The Irish Times* (Nov. 17 2012) <http://www.irishtimes.com/news/savita-story-resonates-around-the-world-1.552977>; Barry Roche & Jason Kennedy, *Vigils and protests over Savita held*, *The Irish Times* (Nov. 14, 2012) <http://www.irishtimes.com/news/vigils-and-protests-over-savita-held-1.748946>; Kerry McDermott, *Miscarrying mother dies after Irish doctors refuse abortion, saying: "This is a Catholic country"*, *Daily Mail* (Nov. 14, 2012) <http://www.dailymail.co.uk/news/article-2232676/Savita-Halappanavar-dies-Irish-doctors-refuse-abortion-saying-This-Catholic-country.html>; Douglas Dalby, *Inquiry Sought in Death in Ireland After Abortion Was Denied*, *N.Y. Times* (Nov. 22, 2012) <http://www.nytimes.com/2012/11/23/world/europe/inquiry-sought-in-death-in-ireland-after-abortion-was-denied.html?pagewanted=print>; Andy Rudd, *Savita Halappanavar: Husband claims pregnant wife would still be alive if doctors hadn't refused her an abortion*, *The Mirror* (Nov. 14, 2012) <http://www.mirror.co.uk/news/uk-news/savita-halappanavar-husband-claims-pregnant-1435830>; *Termination would have saved Savita' - heartbroken husband*, *The Independent* (Nov. 15, 2012) <http://www.independent.ie/irish-news/termination-would-have-saved-savita-heartbroken-husband-28901882.html>

is a dramatic case but many questions concerning the actual events have been raised. Was media coverage biased in a way that emotionally influenced public opinion?¹¹⁶ Certainly some weight might be afforded to an answer in the affirmative by the later revelation that abortion campaigners held a meeting to discuss how the story should be shaped and used two days before the story broke.¹¹⁷ The clinical director of UCHG called for an investigation that culminated in a report dated June 7, 2013.¹¹⁸ The report itself was not able to definitively answer the question as to whether an abortion would have prevented Mrs. Halappanavar's tragic death, but rather identified three key causal factors: "1) Inadequate assessment and monitoring that would have enabled the clinical team to recognize and respond to signs that the patient's condition was deteriorating due to infection . . . 2) Failure to offer all management options to a patient experiencing inevitable miscarriage . . . 3) Non adherence to clinical guidelines related to the prompt and effective management of sepsis."¹¹⁹

In the aftermath of this case and the publication of the Expert Group Report in November 2012,¹²⁰ the Government announced an intention to legislate to provide for the implementation of the ECHR ruling in *A, B & C* so as to provide an "accessible and effective procedure." Following this decision, extensive hearings on the proposed legislation were held by the Oireachtas Health Committee in Leinster House in January 2013.¹²¹

¹¹⁶ Caroline Farrow, *The real story of Savita Halappanavar's tragic death*, NATIONAL RIGHT TO LIFE NEWS (April 26, 2013) <http://www.nationalrighttolifenews.org/news/2013/04/the-real-story-of-savita-halappanavars-tragic-death>; Uno Di Noi, *L'Irlanda tifa Uno di noi*, SI ALLA VITA (June 2013), <http://www.mpv.org/mpv/s2magazine/AllegatiTools/20470/10-13.pdf>.

¹¹⁷ Jerome Reilly, *Pro-choice activists got tip-off on tragic death*, IRISH SUNDAY INDEPENDENT (December 18, 2012) <http://www.independent.ie/irish-news/prochoice-activists-got-tipoff-on-tragic-death-28902755.html>.

¹¹⁸ Health Service Executive, *Investigation of Incident 50278 from time of patient's self referral to hospital on the 21st of October 2012 to the patient's death on the 28th of October, 2012*. (June 2013), <http://www.hse.ie/eng/services/news/nimreport50278.pdf>.

¹¹⁹ *Ibid.* 118, p. 11.

¹²⁰ Department of Health and Children, *Report of the Expert Group on the Judgment in A, B and C v. Ireland*, (October 6, 2012), http://health.gov.ie/wp-content/uploads/2014/03/Judgment_ABC.pdf.

¹²¹ E.g. Seán Ó Domhnaill, *Representing Life Inst., Submission to Health Committee* (Oct. 01, 2013), http://www.thelifeinstitute.net/amcms_media/uploaded/l/0e2140971_lihealth-committee-submission-january.pdf.

VIII. THE PROTECTION OF LIFE DURING PREGNANCY ACT 2013

At the end of this long and tangled story, the draft legislation became the *Protection of Life During Pregnancy Act 2013* in July 2013.¹²² Despite a large majority vote in the Dáil Éireann (227 in favor and 31 against), the text has been criticized both by pro-life and pro-choice campaigners.¹²³ The latter complain that abortion is allowed only in the case of danger to the mother's life and lament that justifications permissible in other jurisdictions such as sexual violence, malformation of the child, economic, and social or family difficulties, are excluded.¹²⁴ On the other hand, many pro-lifers indicate two negative aspects.¹²⁵ Additionally, the repeal of sections 58 and 59 of the Law of 1961, which penalized abortion with the utmost severity, has seriously undermined the defense of human life.

Above all, the deepest critique focuses on the limitation of the legal protection of the unborn only as from the time of implantation in the womb and lack of protection when there is a declared risk of suicide of the mother. It was for these reasons that the Minister for European Affairs, Lucinda Creighton, voted against this law which ultimately resulted in her expulsion from the Fine Gael party.¹²⁶

A. Critical Aspects: "The Suicide Clause"

¹²² *The General Scheme of the Protection of Life during Pregnancy Bill 2013* (Apr. 4, 2013), <http://www.merriestreet.ie/en/wp-content/uploads/2013/04/protection-of-life-during-pregnancy-bill-plp-30-04-13-10-30.pdf> (published by the Irish Government, Department of Health and Children); See generally, *The Protection of Life During Pregnancy Bill 2013* (July 30, 2013), <http://www.oireachtas.ie/viewdoc.asp?DocID=23800&&CatID=59> (following the publication, a month later, a series of hearings were held by the Oireachtas Health Committee on July 14, 2013 and the legislation was approved by both Houses, Dáil Éireann and Seanad Éireann, on 23 July 2013).

¹²³ Joseph Meaney, *Ireland: The Victim of Orwellian Deceit*, CRISIS MAG., July 16, 2013, available at <http://www.crisismagazine.com/2013/ireland-the-victim-of-orwellian-deceit>; See also, Fiona Bloomer & Eileen Fegan, *Critiquing recent abortion law and policy in Northern Ireland*, 34 CRITICAL SOC. POL'Y. 109, 313 (2014).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Lucinda Creighton T.D., Representative, Statement on the Protection of Life During Pregnancy Bill 2013 (July 1, 2013) (transcript available at <http://www.lucindacreighton.ie/speech-statement-on-the-protection-of-life-during-pregnancy-bill-2013-second-stage/>); See also, Mary Katherine Haley, *Irish politicians expelled from their party after opposing abortion bill*, CATHOLIC HERALD July 3, 2013, available at <http://catholicherald.co.uk/news/2013/07/03/irish-politicians-expelled-from-their-party-after-opposing-abortion-bill/>; Garreth MacNamee, *Lucinda Creighton expelled from Fine Gael over abortion legislation*, IRISH MIRROR July 11, 2013 available at <http://www.irishmirror.ie/news/irish-news/politics/lucinda-creighton-expelled-fine-gael-2046224>; Mary Regan & Catherine Shanahan, *Creighton expelled*, IRISH EXAMINER July 12, 2013, available at <http://www.irishexaminer.com/ireland/creighton-expelled-236703.html>.

Within articles 7, 8 and 9, of the Act, the “[r]isk of loss of life of the pregnant woman” is divided in three differently regulated situations: physical illness,¹²⁷ physical illness in an emergency,¹²⁸ and suicide.¹²⁹

In the first case, joint certification by two doctors, acting reasonably and in good faith, is required stating that the risk can only be averted by carrying out an abortion.¹³⁰ In the second case, just one doctor can decide to carry out the procedure.¹³¹ This doctor, however, must document and communicate the performed act.¹³² In the third case, it is necessary to have the joint opinion of three medical practitioners, an obstetrician, and two psychiatrists.¹³³ In the first and second case, in the event of the refusal to provide the certification permitting the abortion, the woman, or a person acting on her behalf, may apply for the decision to be reviewed by a special review panel which shall make its decision within seven days from the time the application was made.¹³⁴

Since the law cannot demand heroism, and a “state of necessity” is generally a justifying cause for actions or omissions that would otherwise constitute a crime—subject to the existence of proportionality between the offended good and the defended good—there is no overwhelming legal argument to object to the logic of legal abortion in the event that the elimination of the child were a necessary condition for saving the life of the mother. However, the case of threatened suicide is far too subjective to meet this criterion. This could open the door to *de facto* abortion on demand because anybody can threaten to commit suicide in order to obtain an abortion and psychiatric tests do not seem able to ascertain the objectivity of the risk.¹³⁵ In any case, whenever a person, whether pregnant or not, manifests concrete self-destructive intentions, it must be incumbent on society to provide measures to prevent the threatened lethal gesture. It is unclear, under the new law, on how the abortion would prevent the

¹²⁷ *Protection of Life during Pregnancy Act of 2013*, 8-9 available at <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf>.

¹²⁸ *Id.* at 9-10.

¹²⁹ *Id.* at 10-11.

¹³⁰ *Id.* at 8.

¹³¹ *Id.* at 9.

¹³² *Id.* at 15-16.

¹³³ *Id.* at 10-11.

¹³⁴ *Id.* at 11.

¹³⁵ Patricia Casey, *Suicide in Pregnancy and Abortion: Considering the Expert Group Report to the ABC Ruling by the ECHR*, ORIEACTAS.IE (Jan. 2013), <http://www.oireachtas.ie/parliament/media/committees/healthandchildren/PatriciaCaseySubmission.pdf>.

woman's suicide. As a matter of fact, reliable statistics exist show that suicide is more frequent among women who have had an abortion rather than those who gave birth.¹³⁶

Turning briefly to another jurisdiction, the Italian Constitutional Court in its judgment n. 27 of 18 February 1975 observed that the danger to the mother's life had to be real and serious, but not necessarily immediate¹³⁷. This applied when the pregnancy was the direct cause of the danger.¹³⁸ However, there are some illnesses – typically some tumors – which can only be treated with surgery or drugs that cause the death of the child.¹³⁹ One positive element of sections 7 and 8 of the Irish law¹⁴⁰ is that it only legitimizes abortion if the risk to the life of the mother is caused by a physical illness.¹⁴¹ However, mental illness is taken into consideration in the case of the risk of suicide under section 9.¹⁴²

In each case, the law shows a tendency to recognize a limited right to abortion, rather than tolerance in extreme cases in which heroism cannot be expected. This is demonstrated by allowing the woman the right to appeal to a higher medical level in the first and third cases, in the event that the risk to her life is denied and, as a result, the abortion is prohibited.¹⁴³ The omission of the possibility of a decision being overturned is striking because in the event an abortion has been allowed, somebody—for example, the father of the unborn child or a special guardian of the interests of the unborn child (a kind of “*curator ventris*” in the Roman Law tradition)—may consider the first decision unfair and plead for a more in-depth examination of the case in defense of the unborn child.

It is noteworthy that the initial government proposal was amended by introducing in each of the three sections the requirement of those making the determination to “take into account the need to preserve human life not yet born, as far as possible.”¹⁴⁴ The pro-life

¹³⁶ Mika Gissler, Elina Hemminki, & Jouko Lonnqvist, *Suicides after pregnancy in Finland, 1987-94; Register Linkage Study*, BRIT. MED. J. [1996], 313 1431 available at <http://www.bmj.com/content/313/7070/1431>; Elliot Inst., *Women's Suicide Rates Highest After Abortion: New Study*, AFTER ABORTION (Nov. 29, 2005), <http://afterabortion.org/2005/womens-suicide-rates-highest-after-abortion-new-study/>.

¹³⁷ Corte Cost. [Constitutional Court], 18 Febbraio 1975, n. 27, Foro it. I 1975 (It.).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Protection of Life during Pregnancy Act of 2013*, 8-10, available at <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf>.

¹⁴¹ *Id.*

¹⁴² *Id.* at 11.

¹⁴³ *Protection of Life during Pregnancy Act of 2013*, *supra* note 154 at 12-13.

¹⁴⁴ *Id.* at 8-10.

movement should work to ensure that this obligation to avoid, as far as possible, the child's death might not be understood solely by reference to the case of the survival of an aborted fetus, or even to the decision on when to abort the pregnancy. A culture of life, arguably supported by the spirit of the Irish Constitution, would interpret the case of risk to the woman's life in the sense that it may be acceptable to postpone the surgical intervention until the moment in which an induced premature birth could save the life of the child while still allowing for the necessary treatment for the mother. It is to be hoped that the need to preserve human life is included also in the same assessment of the risks of maternal death, resulting in extreme rigor in the assessment of the situation and in the search for therapeutic alternatives to voluntary interruption of pregnancy. Such an attitude might make it virtually impossible to perform an abortion motivated by the danger of suicide.

B. Critical Aspects: The Definition of "Unborn"

Section 2 (1) of the act sets out the definition of *unborn*: "unborn, in relation to human life, is a reference to 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."¹⁴⁵ In passing, the difference in language from Art. 40.3.3°, should be noted, which recognizes "the right to life of the unborn child." In the 2013 law, "child" becomes "life."¹⁴⁶ However, a bigger issue is whether the new law will also capture the unborn child in the pre-implantation phase.

This issue concerns both children conceived in vitro before transfer to the uterus and also the embryo conceived naturally but not yet implanted in the uterus. Hanging in the balance are the methods of artificial procreation and the use of such contraceptives that prevent embryo implantation in the endometrium. At first glance, the 2013 Act seems to subscribe to the theory of the so-called *pre-embryo*, which was first set forth for explicitly utilitarian reasons in the Warnock Report (1984),¹⁴⁷ and rejected several times by the scientific community, as well as the 1997 *European Convention on Human Rights and Biomedicine*

¹⁴⁵ *Id.* at 7.

¹⁴⁶ *Protection of Life during Pregnancy Act of 2013, supra* note 154 at 7.

¹⁴⁷ M. WARNOCK, *THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY* (Oxford and New York: Basil Blackwell, 1984).

(Oviedo Convention), and the judgment of the European Court of Justice in the *Brüstle-Greenpeace* case in October 2011.¹⁴⁸

This present state of the law in Ireland is objectionable, not just because it opens the door to chemical abortions carried out using products that prevent the implantation in the uterus of the human embryo, but also because it legitimizes every possible destruction and manipulation of embryos produced in vitro. This is even more serious in a legal system, such as Ireland's, where there is no law regulating assisted procreation techniques and where, as a result, everything is *de facto* permitted.

This is even more startling as deliberations regarding the definition of the "unborn" occurred within a similar time frame as the Court of Justice's ruling in *Brüstle*. To understand the wider implications of the *Brüstle* judgment, we need to place it within the context of other case law and define it in terms of other Member States' treaty obligations. The importance of the *Brüstle* decision is two-fold: first, it is the first intergovernmental court ruling stating that life must be protected from conception, even if the context is only within the sphere of patent law. Second, the judgment helps to inform how the European Community is to define human dignity within Article 1 of the Charter of Fundamental Rights of the European Union.¹⁴⁹ To this extent, we must also look to the Oviedo Convention on Human Rights and Bio-medicine.¹⁵⁰ Article 1 of that treaty calls for the protection of human dignity and guarantees to everyone respect for their physical integrity within the context of biology and medicine.¹⁵¹

We must also note that the *Brüstle* judgment was not drafted in a vacuum. The guidelines of the European Patent Office were amended several years prior to having the identical protections put in place to protect the human embryo and not to commoditize

¹⁴⁸ Case C-34/10, *Oliver Brüstle v. Greenpeace e.V.*, 2011 E.C.R.; Marina Casini, *La Corte Europea di Giustizia e il superamento della c.d. "teoria del pre-embrione (nota a sentenza n. C-34/10 18 ottobre 2011, 1 IL DIRITTO DI FAMIGLIA E DELLE PERSONE 38 (2012) (It.)*; Antonio Tarantino, *Sulla nozione di embrione umano in senso ampio. A proposito della sentenza della Corte di giustizia dell'Unione Europea del 18 ottobre 2011*, AA.VV. VITA, RAGIONE, DIALOGO. SCRITTI IN ONORE DI ELIO SGRECCIA 499 (2012)(It.).

¹⁴⁹ Charter of Fundamental Rights of the European Union art. 1, Dec. 7, 2000, O.J., available at <http://www.unhcr.org/refworld/docid/3ae6b3b70.html> (last visited 9 November 2011)

¹⁵⁰ Council of Europe, Convention on Human Rights and Biomedicine, Apr. 4, 1997, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>.

¹⁵¹ *Id.*

components of the human body.¹⁵² The Oviedo Convention, noted above, in a similar vein prohibits the commoditization of the human embryo and forbids the creation of embryos for research purposes.¹⁵³ What we are therefore seeing in the development of law for the scientific community is an ever-increasing and robust protection of the unborn child from conception, and an extremely conservative definition of human dignity.

The case law of the European Court of Human Rights in areas dealing with procreation has likewise been more or less conservative. In October 2011, for example, the Grand Chamber took the identical position in finding that Austria did not violate the Convention by prohibiting the use of sperm from a donor for in vitro fertilization and ova donation in general.¹⁵⁴ Its reasoning, in part, was that the best interests of the unborn child were compelling enough to prohibit these two forms of artificial procreation.¹⁵⁵

When we review these decisions all together, having come from the two most authoritative courts in Europe, and all within a time frame of less than one year, we see a major paradigm shift in how we define human life and human dignity and the legal protections that stem therefrom.

Precisely stated, only the assertion of the human identity of the unborn child from fertilization and not from implantation can lead to rules and behaviors that can avoid or at least reduce the suppression of human lives.¹⁵⁶ It is also true that the law being examined refers to pregnancy and not artificial procreation. However, it was an extraordinary opportunity to specify the broadness of the constitutional protection of the right to life. It should not be forgotten

¹⁵² *Convention on the Grants of European Patents*, EUROPEAN PATENT ORGANIZATION, Oct. 5, 1973, art. 53¶ a (“European patents shall not be granted in respect of: (a) inventions the commercial exploitation of which would be contrary to “ordre public” or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States.”)

¹⁵³ *Convention on Human Rights and Biomedicine*, COUNCIL OF EUROPE, Chapter V. art. 18 ¶ 1, Apr. 1997, O.J. available at <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>. (“(1) Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. (2) The creation of human embryos for research purposes is prohibited.”)

¹⁵⁴ *S.H. and others v. Austria*, 52 Eur. Ct. H.R. 6, ¶¶105, 115 (2011).

¹⁵⁵ *S.H. and others v. Austria*, 52 Eur. Ct. H.R. 6, ¶¶105, 115 (2011).

¹⁵⁶ D.M. 5 gennaio 1995, n. 4 G.U.(It.).(This involves using the force of the law to define that a human being as a subject in law from conception. In Italy, for example, the legislative recognition of the legal subjectivity of the unborn child can be found in art. 1 of the law on “medically assisted procreation” (no. 40 dated 19th February 2004) and is the basis of a proposed amendment to art. 1 of the Italian Civil Code. This proposal was launched for the first time in 1995 by the “Movimento per la Vita” in the form of a popular initiative found in *Gazzetta Ufficiale*).

that in the *Roche v. Roche* judgment it was claimed that the duty of the Irish Supreme Court was not to define the moment at which human life begins, but just to interpret Art. 40.3.3° of the Constitution. The Court said that only the Oireachtas can define by positive law the status of the embryo, in particular with regard to the question of when life begins.¹⁵⁷ That provision, the judgment went on to say, was introduced by the people without taking into account cryo-preserved embryos but, instead, only the conflict between the life of the mother and that of the child that occurs during pregnancy.¹⁵⁸ In short, Art. 40.3.3° only ever anticipated cases in which the life of the mother and child were intertwined.

According to the judgment in *Roche v. Roche*, Art. 40.3.3° does not extend to the recognition of the human being from fertilization.¹⁵⁹ It is for lawmakers to decide authoritatively the beginning of human life. Therefore, in the drafting of the 2013 act, the Irish Parliament had an extraordinary opportunity: to establish full protection of the right to life from conception. While it is true that in the three previous referenda on unborn life, particularly the 2002 referendum, the Irish people had certainly implicitly reaffirmed the right to life from fertilization, the Irish legislature in 2013 could have dispelled any uncertainty. Instead, the Oireachtas preferred to leave human life in the pre-implantation phase in a legal limbo. Of course, the 2013 Act, in force since January 1, 2014, can be changed, but it is difficult to do so as demonstrated by the history discussed above. In any case, the lawyer must ask the question whether in Ireland today, under the current law, the right to life is recognized from conception.

It is a matter of concern that human life remains legally unprotected before implantation. We can accept that pre-implanted life be protected in a different way compared with life that subsequently develops, but not that it should have no protection at all. Some of those seeking wider availability of abortion rely on equality-based arguments¹⁶⁰ grounded in human rights principles. It is unacceptable that discrimination be introduced as between a person who has been born and one who has not yet been born. Furthermore, discrimination against the un-implanted embryo is objectionable with respect to the child who is already implanted in the mother's body.

¹⁵⁷ *Roche v. Roche*, *supra* note 73.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ N. S. Siegel & R. B. Siegel, "Equality Arguments for Abortion Rights" 60 *UCLA L. Rev. Disc.* 160 (2013) <http://www.law.yale.edu/documents/pdf/Faculty/EqualityFrontiers_REVA.pdf> (date accessed: 25 April 2014).

CONCLUSION

It is hoped that the commitment to life in Ireland will develop in the direction of imposing the constitutional recognition of the right to life from fertilization. Although it is significant and troubling that the 2013 act does not capture embryos before they are implanted, an even broader and more foundational goal must be the acknowledgment of the full humanity of the human embryo from conception. At the extreme, even in a system with broader legitimacy of abortion than in Ireland, a public, solemn, legal recognition of the right to life from conception may play a role in the containment of aggression against life that is more effective than strong penalties would be. For that, civil society must demonstrate that human dignity is always present and that, therefore, it is the same for all human beings, from conception, has the right to life.