

**Discussion Paper presented by Ruadhán
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1. Three issues arise in the context of the 8th Amendment and maternity care:
 - i. The Courts interpretation of the 8th amendment in context of maternity care and medical treatment.
 - ii. What will be the impact if the 8th Amendment is removed
 - iii. What can be done to improve and strengthen mother and babies rights and lead to better outcomes

Issue 1

2. Although recent case law has referred to the rights of the unborn there has been little by way of analysis about the impact of 8th Amendment on women's constitutional rights and in what circumstances does rights of the unborn warrant intervention against the wishes of the mother.
3. In ***PP v Health Service Executive*** the High Court declined to compel the maintenance of life support for a pregnant woman who had suffered brain damage. While this case turned on medical evidence about the likelihood of the baby surviving at 13 weeks gestation, the High Court did note that this case might have been decided differently if there been a prospect of survival.
4. More recently, in September 2016 the High Court refused orders sought by the HSE to compel a woman to undergo Caesarean section. In this case, the HSE argued that the mother and baby's lives were at risk and that she lacked capacity. There was also an argument by Counsel for the unborn, that even if the Court did not accept that the mother lacked capacity to consent, that she should still be forced to undergo a Caesarean even on account of the rights of constitutional rights of the unborn child.
5. In the High Court Judge Twomey rejected the argument that this woman lacked capacity and affirmed that although the Court thought that the mother was taking an unnecessary risk,

she still had the right to take this decision and that this was not a case of such an exceptional nature that warranted the type of intervention demanded by the HSE. It is also important to note that the court said that the rights of the unborn should not be seen any greater than the rights of a child.

6. While these two decisions are somewhat reticent about the extent of the rights of the unborn, a decision by Judge Humphreys gives far more explicit recognition to the rights of the unborn which includes the “the health and welfare of the unborn child”.
7. If Judge Humphrey’s approach was adopted to a medical intervention case, we might have seen a different outcome to the one that transpired.
8. What we can say about all of this is the following:
 - i. There is a good deal of uncertainty about the extent of the rights of the unborn in the constitution and we have yet to see any meaningful analysis about the conflict of rights in medical intervention cases.
 - ii. Jurisprudence from other countries cannot influence the Irish because of the special position of the unborn in our constitution. In other words, there are a number of other countries that have dealt medical intervention cases e.g. the UK, America and Canada, but they are of little use since because Article 8 takes centre stage in any consideration of constitutional rights.

Jurisprudence before the 8th Amendment

- 9 Walsh J in the Supreme Court in *G v An Bord Uchtála* [1980] IR 32 at 69 is significant:

“The child’s natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child’s natural right to life and all that flows from that right are independent of any right of the parent as such.” (Emphasis added).

International jurisprudence

- 10 Even in countries with so-called liberal views on abortion, there is still recognition of rights of the foetus. In *in St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936 at 952, the English Court of Appeal stated that “*whatever else it may be a 36-week old foetus is not nothing; if viable it is not lifeless and it is certainly human.*” They nevertheless held that a forced caesarean was unlawful. the US cases of *Roe v Wade* 410 US 113 (1973) and *Planned Parenthood v Casey* 505 US 833 (1992), while protecting a right to an abortion, also recognise a State interest in protecting unborn life that grows stronger as the pregnancy progresses.

Replacing or repealing the 8th

- 11 The 8th amendment is an obstacle to developing better and more human rights based decisions, which will improve outcome for mothers and children. Replacing the 8th with another provision on the rights of the unborn will lead to more uncertainty.

Improving human rights and outcomes in maternity care

- 12 More needs to be done at a national level to empower expectant mothers and to also inform medical practitioners about how to respond positively in a situation where consent may be an issue. The St George's NHS Trust gives very good guidelines on the right procedures to follow where any conflict arise. At present in Ireland, there is very little procedure. Papers are usually served at the last moment.