

After repeal of the 8th, then, the PLDPA must be replaced by new abortion legislation. As we have already noted, it is unlikely that we can make a constitutional case for ‘unrestricted’ access to abortion at all points in pregnancy. As we have said, the constitutional rights to bodily integrity, equality and privacy can be subjected to proportionate restrictions. The state’s interest in protecting foetal life would likely permit imposing some legislative restrictions on abortion access, such as time limits, for example. In the next section, we explain how the state’s interest in protecting foetal life might be used to justify some forms of abortion regulation.

Valuing foetal life in the Constitution

Under the 8th Amendment, the foetus is a constitutional rights-bearer.⁷⁷ We assume that, after repeal, this would no longer be the case. As discussed in Chapter 2, it is generally understood that the unborn has an enumerated constitutional right to life, contained in the 8th Amendment, and may have some other unenumerated rights. Some people have expressed concern that even if the 8th were repealed, those unenumerated rights would remain, and could be further developed by a court in an appropriate case, even to the point of restricting the development of new abortion legislation. We think that this risk is very small. In most states, where the constitutional text does not provide for the right to life of the unborn, constitutional courts have been reluctant to enumerate one.⁷⁸ It is difficult to imagine a circumstance in which our Supreme Court could revive unenumerated foetal rights after repeal of the 8th without utterly disregarding the electorate’s

⁷⁷ See the discussion in Chapter 1.

⁷⁸ Where constitutions do not provide such an express right, most courts have been reluctant to create one, for example the Colombian Constitutional Court in Case T-355/06 (2006), discussed in Ngwena, Charles, ‘Conscientious Objection to Abortion and Accommodating Women’s Reproductive Health Rights: Reflections on a Decision of the Constitutional Court of Colombia from an African Regional Human Rights Perspective’ (2014) 58(2) *Journal of African Law* 183.

intent in voting for that repeal; that is, to make it possible to liberalise Ireland's abortion law to some degree. Moreover, even if the foetus does have such unenumerated rights, they could not replicate the 8th Amendment. For example, they would not necessarily be 'equal' to the rights of the pregnant person, or eliminate her rights from consideration.

In the remainder of this chapter, we work from the assumption that the foetus should not have rights under the Constitution, but that it should have value. This is consistent with the position under international human rights law.⁷⁹ That a state does not recognise a foetal right to life does not mean that the foetus has no constitutional value. Even without constructing the foetus as a rights-bearing constitutional person, the state can assert an interest in the preservation of foetal life through voluntary and consensual pregnancy. In the Slovak Republic,⁸⁰ the Czech Republic⁸¹ and Hungary,⁸² a clear distinction is drawn between a constitutional *right* (which is not enjoyed by prenatal life) and a constitutional *value*. As the Constitutional Court of the Slovak Republic has put it, in pursuing the goal of preserving foetal life, the state cannot interfere with the *essence* of a pregnant person's rights. Women, the court held, have rights to privacy, a private life, dignity and must therefore be constitutionally protected to decide on her own 'spiritual and physical integrity': '[b]y becoming pregnant ... a woman does not waive her right to self-determination'.⁸³

⁷⁹ See, for example, *Vo v France* [2005] 40 EHRR 12, [82]; *A, B and C v Ireland*, [227]-[228] (see note 9); *Open Door and Dublin Well Woman v Ireland* [1992] ECHR 68.

⁸⁰ Article 15(1), Constitution of Slovakia 1992 with amendments through 2014.

⁸¹ Article 6(1), Constitution of the Czech Republic 1993 with amendments through 2002: 'Everyone has the right to life. Human life is worthy of protection even before birth.'

⁸² Article 2, Constitution of Hungary 2011.

⁸³ Finding of the Constitutional Court of the Slovak Republic, Ref. No. I. ÚS 12/01 of 4 December 2007, published in the *Collection of Laws of the Slovak Republic* under no. 14/2008, volume 8), [13].