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Pádraig McCarthy

Unjust Law and False Truth

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INTRODUCTION

‘False Truth’ is clearly a contradiction in terms. It presents, under the guise of truth, something which is in reality false.

Law is important in human society; but what is presented as law may sometimes be unjust.

‘An unjust law is not law (*Lex iniusta non est lex*).’ This saying is attributed to St Augustine (A.D. 354 – 430). He wrote: ‘*It does not appear to me that it is in fact a law, when that law is not just.*’ (*On the Freedom of the Will*, 1. 5.11). St Thomas Aquinas says it is “not law but a perversion of law.” (*Summa Theologiae* I-II, q95, a2).

Legislators have a difficult job. The formulation of legislation can be difficult and demanding. Where laws are found deficient they need to be amended. It is particularly serious if false truth influences our legislation and those entrusted with formulating legislation.

Can law really be unjust? ‘*The law is wrong and we need to change it.*’¹ Taoiseach Leo Varadkar said this on 1 March 2019, with reference to two fishermen from Kilkeel, Co Down who were detained for fishing illegally. The campaign to repeal the Eighth Amendment to the Irish Constitution argued that the Amendment was unjust. As I write, the Oireachtas is struggling with legislation to rectify a situation where a person found guilty of the death of a spouse is still legally entitled to inherit their property.

In this article I want to address the matter in the light of the repeal of the Eighth Amendment which acknowledged the equal right to life of the unborn and the mother and guaranteed by its laws to defend and vindicate that right.

The article will not deal with the arguments for and against abortion. *Part 1* will deal with the matter of unjust law. *Part 2* will look at serious defects in the debate leading up to the repeal of the Eighth Amendment. *Part 3* will comment on the law in the

1 <https://www.rte.ie/news/ulster/2019/0301/1033620-fishing-trawlers/>

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aftermath of the referendum. The account is necessarily brief. I do not have a legal qualification but I am a citizen of Ireland. I believe that there is a strong *prima facie* case that our law may be unjust. I believe that there are important questions that need to be addressed.

I: UNJUST LAW

Any presumption that law is just is only safe as long as we are prepared to examine and, if necessary, challenge legislation, both in the process of considering it before it is enacted and after it takes effect. The Latin maxim '*FIAT JUSTITIA RVAT CAELUM*' is carved over the façade on the Bridewell Garda station at the Four Courts in Dublin: '*Let justice be done (even if) heaven falls!*'

No legal system can always guarantee justice. Many miscarriages of justice are documented; there must be many more about which we hear nothing. Here I want to address not failings in the administration of justice but the question of law which is itself unjust.

EXAMPLES OF UNJUST LAWS

We have had the injustice of the Penal Laws in Ireland. Also laws which enable torture, or slavery, or discrimination on the basis of skin colour or nationality or sex; laws promoting genocide, or which deprive any human being of the necessities for dignified living; enforced sterilisation laws as enacted in 32 states of USA and in some European jurisdictions and elsewhere in the 20th century.

The challenge is a perennial one. Greek dramatist Sophocles about 442 BC has Antigone face the dilemma of being prohibited from the sacred task of burying her slain brother under pain of death. The Book of Tobit, about 200 BC, recounts a similar story (Ch.2) of Tobit defying authority to bury the dead. Plato, Aristotle, Cicero, St Augustine, St Thomas Aquinas, Henry David Thoreau, Martin Luther King, John M Kelly, Declan Costello and many others have written of it. Martyrs ('witnesses') down the ages have refused to comply with unjust laws and decrees. Austrian Franz Jägerstätter was executed for opposing the Third Reich. The Nuremberg trials following World War II faced the problem that appalling injustices were done in accordance with law.

No law can be its own justification: there is a more fundamental standard to be met. '*Barbarous acts which have outraged the conscience of mankind*' in World War 2 led to the Universal Declaration of Human Rights in December 1948. The Preamble

acknowledges the ‘inherent dignity’ and the ‘equal and inalienable rights’ of all members of the human family as the foundation of freedom, justice and peace in the world. The Constitution of Ireland points to this. Article 41, 1.1° states: *‘the state recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.’*²

A provision of the Constitution which is democratically accepted may be unjust. The campaign to repeal the Eighth Amendment argued that the Amendment was unjust to women, even though it had been accepted in 1983 by a 2:1 majority of the people. We may therefore validly ask whether the Thirty Sixth could be unjust. Injustice may occur in the process of bringing about the legislation. If important relevant information is slanted or withheld from the legislature or the electorate, or if disinformation is employed, we must question the validity of the result.

2: THE DEBATE ON THE REPEAL OF THE EIGHTH AMENDMENT

Argument for repeal of the Eight Amendment centred on a very valid motive of compassion for women in crisis pregnancy. There was a serious question to be addressed. We expect truth, without evasion, from our elected legislators. There was, however, a great deal of disinformation and ‘false truth.’

THE TAOISEACH

Taoiseach Leo Varadkar made some statements relating to the Eighth Amendment which are not borne out by the facts. They may sound good, but they are false. He has also evaded the truth. These are in the public domain. I cannot say what led him into error; I can only point to the facts.

‘If we don’t remove the Eighth Amendment from the Constitution, nothing can change for Irish women,’ the Taoiseach said.³ *This is untrue.* The Joint Oireachtas Committee (at 2:38 of their Report) said: *‘What became clear during evidence is that the majority of terminations are for socio-economic reasons that are unrelated to foetal abnormality or to rape.’* We can identify those socio-economic difficulties and act on them. When the difficulty with the pregnancy is medical there is a great deal of support we can provide, without intentionally ending a human life.

2 <https://www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/>

3 <https://www.irishtimes.com/news/ireland/irish-news/madigan-to-lead-fine-gael-group-seeking-repeal-of-abortion-law-1.3449471>

In a radio interview with Seán O'Rourke on 18 May 2018⁴ he said: 'The Eighth Amendment has failed.' *This is not true.* The fault did not lie in the amendment, but in failure by successive governments to honour the guarantee 'to respect, and, as far as practicable, by its laws to defend and vindicate that right' to life of mother and unborn. Judge Niall McCarthy said in the X case in 1992: 'the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable.' That legislation could have ensured that no woman in crisis pregnancy would feel her only remedy was abortion.

It is as if the government bought a fine new car in 1983, parked it in the driveway for 35 years, and never put fuel in it. When it was pointed out as an obstruction they said effectively, 'It never worked. It's blocking the way.'

Seán O'Rourke put it to him: '*The termination of a pregnancy means taking a life. Effectively you're talking about a proposal that involves taking lives.*' Three times the Taoiseach ignored the question. He knew the answer. His government had already agreed in draft legislation that '*termination of pregnancy ... means a medical procedure which is intended to end the life of a foetus.*' Yet he could not bring himself live on-air to acknowledge the truth that abortion is the taking of a life.

On 29 January 2018, following a Cabinet meeting, Mr Varadkar made a statement announcing that there would be a referendum to repeal the Eighth Amendment.⁵ Presumably that statement was approved by the cabinet. There are many questionable elements in the statement. Consider the following:

'We cannot continue to export our problems and import our solutions ... I became convinced that abortion had no place in our Constitution... A balance between the rights of a pregnant woman and the foetus or unborn...' These words present at least four problems.

- a. We did not '*export our problems.*' Women who travelled abroad for abortion are *not* the problem. The failure to make provision for support is the real problem; that remains at home.
- b. '*Import solutions.*' We did not import our solutions. But now we do, on the model of other countries. We have enrolled our country with the 66 million procured abortions every year in the world – two every second of every day of the year.

4 Audio: <https://www.rte.ie/radio1/today-with-sean-o-rourke/programmes/2018/0518/964401-today-with-sean-o-rourke-friday-18-may-2018/?clipid=102815789>
Video: <https://www.facebook.com/rteradio1/videos/1750737358317293/>

5 <https://static.rasset.ie/documents/news/2018/01/statement-by-taoiseach-leo-varadkar.pdf>

- c. *‘Abortion has no place in our Constitution.’* This is true. The problem here is that he and the government urged the people to do what he said should not be done: to put it in the Constitution! Further, replacing the Eighth Amendment at Article 40:3.3^o, it was put into the section *Fundamental Rights*.⁶ As defined by law, it is declared a fundamental right ‘to end the life [i.e., cause the death] of a foetus.’
- d. *‘A balance between the rights of a pregnant woman and the foetus or unborn.’* It is not ‘balance’ when it is always ‘the foetus’ or ‘the unborn’ whose life is ended. We may look for balance in our budget, or in sharing out chocolates. With human lives, we don’t balance one against the other – we do all in our power to safeguard both where possible.

THE MINISTER FOR HEALTH

Minister for Health Simon Harris prepared the General Scheme of a bill to regulate termination of pregnancy in the event of the Referendum being passed. He did *not* prepare a General Scheme of a bill to defend and vindicate the right to life of both mother and unborn child (as the Eighth Amendment guaranteed the State would do) in the event of the Referendum not passing. The people were to choose abortion or nothing.

On 25 April 2018 the Minister issued a challenge to those wanting to retain the Eighth Amendment to indicate alternative action (Irish Times, 26 April 2018). On 27 April I wrote to him pointing out what was already in our power to do. The reply from his Department, dated 24 May (the day before the Referendum!), said: *‘For the duration of the referendum campaign, the Department of Health is not in a position to answer queries on matters directly or indirectly related to the referendum, nor is the Department in a position to redirect these queries.’* So much for his challenge!

THE MEDIA

The media have a vital role in society, both in communicating what happens and in holding those in authority to account. If the Taoiseach made similar false statements about Brexit or some other issue, it seems likely that some of our excellent investigative journalists would point to the anomalies. If they have not done so in relation to the Eighth Amendment and abortion, one must wonder why.

6 <https://www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/>

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THE MEDICAL PROFESSION

The medical profession offers remarkable service in safeguarding human life. The position taken by the medical profession was a significant factor in the abortion debate. Some high-profile medical professionals strongly supported legalising abortion. Others strongly oppose it. If I understand it correctly, not one of the professional medical organisations in Ireland has stood against it. How is it that, when the government legalises abortion, a profession dedicated to safeguarding human life complies?

Abortion turns medicine on its head. Normally the birth of a living child is success; the death of the child is a tragedy. With abortion, the intended death of the child is the success; a living child means a failed abortion.

Medical professionals were involved in many horrendous violations of human rights in World War II. In 1948 the World Medical Association (WMA), with good reason, adopted the Declaration of Geneva, similar to the ancient Hippocratic Oath. It stated: *“I will maintain the utmost respect for human life from the time of conception.”* This has been gradually eroded; the revised 2017 version omits those final five words, *“from the time of conception.”* We have forgotten the “barbarous acts” of World War II.

3: OUR SITUATION AFTER THE REFERENDUM

The people voted for the change. They voted on what was put before them. They were repeatedly told: “There can be no change unless the Eighth Amendment is repealed.” Abortion or nothing. There were false truths, evasion of facts, and real alternatives were ignored. Some say we must respect the referendum result. I acknowledge the result, but I can no more respect that decision, than I would respect a decision to terminate the life of even one child after birth.

It is of great concern that the Oireachtas is given unrestricted power. We were all unborn at our initial stages. The Oireachtas has been given authority to define who has the right to life. The *Health (Regulation of Termination of Pregnancy) Act 2018* has been enacted, which does put some restrictions on the termination of pregnancy. However given the remarkable conversions among Oireachtas members to repealing the Eighth, there seems little hope those restrictions will survive.

When we fail to address the reasons why women feel abortion is the only remedy, we deny women the right to the support they need. We fail if we focus only on the pregnancy. It is essential

to address these social determinants of health, the social and economic factors, which form the context, and which are a cause of severe distress and desperation for those who see abortion as the only remedy. We fail to address the factors in our society which penalise women in pregnancy and motherhood.

Professor John M Kelly, in the introduction to the second edition of his *Fundamental Rights in the Irish Law and Constitution*, addressed the question of *unjust law*. I suspect he deliberately used humorously exaggerated language to convey a deadly serious truth:

‘...the ultimate protection of human rights in a democracy lies with the people themselves. If they allow villains into government, a piece of paper will not protect them from the consequences, nor must they expect a few learned men in wigs and gowns to save the fools from the knaves that they have elected.’

It may be difficult to recognise ourselves there. But in this dangerous amendment and unjust legislation, and in so compromising our respect for human life, we have taken an emphatic step in that direction.

A Game-Changer! The descent of the Holy Spirit on that Pentecost morning was a game-changer. Filled with zeal, strengthened by grace and motivated by love, they left the Upper Room and went out into the world, with their hearts on fire with his presence. They were unstoppable. They could not keep the good news of the Resurrection to themselves: - they had to share it with the whole world.

– ÉAMONN P. BOURKE, *Mercy in All Things*. (Dublin: Veritas), p. 49.