

# Fatal Foetal Abnormality, Irish Constitutional Law, and Mellet v Ireland

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**FATAL FOETAL ABNORMALITY, IRISH CONSTITUTIONAL LAW, AND  
*MELLET V IRELAND***

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**Abstract**

Under the Irish Constitution abortion is available only where the life of the pregnant woman is at risk. The provision has long been criticized for failing to respect women's autonomy, and in *Mellet v Ireland* the UN Human Rights Committee found that Amanda Jane Mellet, who traveled to Liverpool to access abortion following a finding that her foetus suffered a fatal abnormality, had suffered a violation of her rights under the ICCPR. In this commentary I demonstrate the value of *Mellet* when compared to the possible legal findings in such circumstances under both the Constitution and the European Convention on Human Rights, and argue that the findings are not restricted to cases of fatal foetal abnormality. Rather, the Committee's decision illustrates the suffering that all women in Ireland who travel to access abortion experience, arguably constituting a violation of their right to be free from cruel, inhuman and degrading treatment. On that reading, *Mellet* signifies the need to implement a comprehensive rethink of Irish abortion law including, but going beyond, access to abortion in cases of fatal foetal abnormality.

**Keywords**

Abortion—Irish constitution—international human rights law—the 8<sup>th</sup> Amendment

Ireland's abortion law regime is notoriously restrictive. Shaped by a constitutional provision inserted by referendum<sup>1</sup> in 1983 (Article 40.3.3, or the 8<sup>th</sup> Amendment), Irish law permits abortion only where the life, as opposed to the health, of the woman is at real and substantial risk, where that risk can in probability only be averted by termination of the pregnancy, and where the foetus has not reached viability.<sup>2</sup> From this it is clear that women in Ireland can access lawful abortion only in the very rarest of circumstances. Whether a woman 'qualifies' is

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<sup>1</sup> According to Article 46 of the Constitution of Ireland, referendum is the only mechanism for formal amendment of the constitutional text.

<sup>2</sup> *Attorney General v X* [1992] 1 IR 1.

determined by application of the procedural and substantive rules in the Protection of Life During Pregnancy Act 2013, which was introduced following both the death of Savita Halappanavar<sup>3</sup> and the European Court of Human Rights decision in *A, B & C v Ireland*.<sup>4</sup> While that Act (finally) clarified how decisions as to access to constitutionally permitted abortions are to be made,<sup>5</sup> the process it imposes is onerous<sup>6</sup> and the substantive limitations of the 8<sup>th</sup> Amendment are, of course, not addressed by its content. Irish women, in other words, remain extremely restricted in terms of their ability to make real choices as to whether to continue a pregnancy in circumstances other than the (rare) cases where their lives are in danger and they happen to be pregnant (the pregnancy does not have to be the cause of the risk to life to ‘qualify’ for access to abortion under Article 40.3.3 or under the 2013 Act).

While this is clearly problematic in and of itself, one of the key areas in which the unreasonable constraints imposed by the constitutional provision are now being widely acknowledged is that of so-called ‘Fatal Foetal Abnormalities’. This paper considers the situation of women in Ireland who find themselves carrying a foetus with such conditions and, in particular, the recent decision of the UN Human Rights Committee in *Mellet v Ireland*<sup>7</sup> finding that in such circumstances women’s human rights under the International Covenant on Civil and Political Rights may be violated. In doing so, I argue that *Mellet* demonstrates the incompatibility of Irish law with international human rights law in and beyond circumstances of fatal foetal abnormality, adding weight to the call for substantial and comprehensive constitutional change in this field in Ireland.

## I. THE RIGHT TO LIFE OF “THE UNBORN”

The background and implications of the 8<sup>th</sup> Amendment to the Irish Constitution are generally well known and in any case widely reported,<sup>8</sup> so that only a short account is required here. In

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<sup>3</sup> R Lentini, “a woman died: abortion and the politics of birth in Ireland” (2013) 105 *Feminist Review* 130.

<sup>4</sup> [2010] ECHR 2032. On the background to the introduction of the legislation see C O’Sullivan, J Scheppe & E Spain, “Article 40.3.3 and the Protection of Life During Pregnancy Bill 2013: The Impetus for, and Process of, Legislative Change” (2013) *Irish Journal of Legal Studies* 1.

<sup>5</sup> Since 1983 it has been clear that women were entitled to access abortion in at least some cases in Ireland, but there was no way for medics to properly assess whether a patient fell into those circumstances and, thus, to determine whether they would be working lawfully should they provide abortion care. This caused what the European Court of Human Rights described as a “chilling effect” on medical practice in *A, B & C v Ireland* *supra* n 4).

<sup>6</sup> For critiques of the Act see, for example, C Murray, “The Protection of Life During Pregnancy Act 2013: Suicide, Dignity and the Irish discourse on abortion” (2016) *Social and Legal Studies* (forthcoming); F de Londras, “Constitutionalizing Fetal Rights: A Salutary Tale from Ireland” (2015) 22 *Michigan Journal of Gender and the Law* 243, 249-252 (“Constitutionalizing Fetal Rights”); M Enright et. al., “Abortion Law Reform in Ireland: A Model for Change” (2015) 5 *feminsits@law*

<sup>7</sup> *Amanda Jane Mellet v Ireland*, UNHRC decision, CCPR/C/116/D/2324/2013, 9 June 2016.

<sup>8</sup> See generally J Scheppe (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: 25 Years of Protection?* (2008, Dublin; Liffey Press); R Fletcher, “Reproductive Justice and the Right to Life of the Unborn” in J

1937, when the Irish Constitution was introduced following a plebiscite of the people, there was no mention of a foetal right to life in the text. This is hardly surprising; such a right did not figure explicitly in any constitutional text at that time. Furthermore, there was a clear criminal prohibition on abortion in the form of the Offences against the Person Act 1861 so that, even in the post-colonial ascent of Catholic constitutionalism that was evident in the text of the Constitution and in constitutional practice in Ireland, abortion did not figure heavily as a topic for consideration. So it remained until the late 1970s and early 1980s. By that time, the Irish Supreme Court had made two extremely important developments in constitutional jurisprudence.

First, in the case of *Ryan v Attorney General*,<sup>9</sup> it had confirmed the concept of unenumerated rights in Ireland, i.e. rights that although not mentioned in the text of the Constitution have constitutional protection because they are antecedent (sometimes ‘natural’) rights that can be identified by reference to the spirit of the Constitution (and its preambular concentration on prudence, justice and charity<sup>10</sup>). This case demonstrated the ‘activist’ capacities of Irish judges;<sup>11</sup> or what others might call their willingness to recognise, embrace and act upon their role in shaping a developing constitutional order.<sup>12</sup> The second development was the ‘discovery’ within the enumerated right to privacy of a right to marital privacy, encompassing a right not to be unduly interfered with by the state when making decisions as to family planning. In the case of *McGee v Attorney General*<sup>13</sup> the Court had struck down the criminalisation of the importation of spermicidal jelly on the grounds that it violated this constitutionally protected right.

For conservative lawyers and activists who were keen observers of other courts, and particularly the United States Supreme Court, these two developments posed a clear and particular risk: that the Irish Supreme Court might strike down the criminalisation of abortion in the 1861 Act on the basis of a progressive interpretation of the right to privacy following on from *McGee* (which they analogized to *Griswold v Connecticut*<sup>14</sup>), leading to an ‘Irish’ *Roe v Wade*.<sup>15</sup> And so they organised,<sup>16</sup>

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Schweppe (ed), *The Unborn Child, Article 40.3.3 and Abortion in Ireland: 25 Years of Protection?* (2008, Dublin; Liffey Press); R Fletcher, “Pro-Life Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986–1992” (1998) 36 *Osgoode Hall Law Journal* 1; J P O’Carroll, “Bishops, Knights—and Pawns? Traditional Thought and the Irish Abortion Referendum Debate of 1983” (1991) 6 *Irish Political Studies* 53; U Barry, “Abortion in the Republic of Ireland” (1988) 29 *Feminist Review* 57.

<sup>9</sup> *Ryan v Attorney General* [1965] 1 IR 264.

<sup>10</sup> The Preamble to the Irish Constitution notes that the Constitution is adopted, *inter alia*, as part of the People’s attempt to “promote the common good, with due observance of Prudence, Justice and Charity”.

<sup>11</sup> D Gwynn Morgan, *A Judgment too Far? Judicial Activism and the Constitution* (Cork, Cork University Press; 2001).

<sup>12</sup> F de Londras, “In Defence of Judicial Innovation and Constitutional Evolution” in Laura Cahillane, James Gallen & Tom Hickey, *Judges, Politics and the Irish Constitution* (Manchester, Manchester University Press; 2016) *forthcoming*.

<sup>13</sup> *McGee v Attorney General* [1974] IR 284.

<sup>14</sup> *Griswold v Connecticut* 381 US 479 (1965).

and a key focus of their organisation was to advocate for a referendum that would place foetal rights into the Constitution thus absolutely foreclosing any possibility of a *Roe*-like decision. This ambition, the pervasiveness of Catholicism (as an institution and a mindset) across political, medical, legal and everyday life, and a period of intense political upheaval in Ireland all conspired to lead to the 8<sup>th</sup> Amendment being proposed to the People, and to its adoption by a healthy majority in the referendum itself.<sup>17</sup> As a result, Article 40.3.3 was inserted into the Constitution, where it remains. It 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.

Since then explicit rights to travel for the purposes of accessing abortion, and to access information about abortion (both of which had been restricted as a result of expansive judicial interpretation of the 8<sup>th</sup> Amendment<sup>18</sup>) have been added to the Constitution in 1992. However, the core purpose of the 8<sup>th</sup> Amendment—preventing access to abortion in the Republic of Ireland—has largely been achieved. As a result of it, women cannot ordinarily access abortion in Ireland, abortion is framed as a clash of *foetal human rights* and *maternal human rights*, and no amount of judicial innovation or activism can effectively mitigate the implications for women.

## II. FATAL FOETAL ABNORMALITIES

That is not to say, however, that the circumstances in which women's choices are so fundamentally constrained by the 8<sup>th</sup> Amendment are homogenous, or are considered thus by politicians and others. In Ireland, as elsewhere, there is a discursive distinction between what are implicitly considered to be 'good' (or at less 'less bad') abortions and others ("abortion on demand", as the phrase goes). The former category includes abortions accessed by women who find themselves in situations where the foetus they are carrying has what has come to be known as a 'fatal foetal abnormality'.<sup>19</sup> For reasons that are, of course, not unproblematic, the political

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<sup>15</sup> *Roe v Wade* 410 US 113 (1973).

<sup>16</sup> J P O'Carroll, "Bishops, Knights—and Pawns? Traditional Thought and the Irish Abortion Referendum Debate of 1983" (1991) 6 *Irish Political Studies* 53.

<sup>17</sup> T Hesketh, *The Second Partitioning of Ireland: The Abortion Referendum of 1983* (Dublin, Brandsma Books; 1990).

<sup>18</sup> For a full account of the jurisprudential development of Article 40.3.3 see F de Londras, "Constitutionalizing Fetal Rights", *supra* n 6.

<sup>19</sup> This phrase is not universally accepted in Ireland. For example, (now former) Senator Paul Bradford has described the phrase as "a very strong weapon" in campaigns for abortion law reform. According to him, "There are no such babies as babies with fatal foetal abnormalities. There are babies with serious, profound, life-threatening and life-limiting conditions, but they are still human beings". Order of Business,

establishment and large parts of the public have become especially aware of and inclined towards resolving the difficulties caused by the 8<sup>th</sup> Amendment for women in these situations.<sup>20</sup>

This is not without dissenters, of course; for the architects and staunch supporters of the constitutional status quo there is no differentiation in either the constitutional position or the moral analysis between these pregnancies and others; and thus there is no reason why a pregnant woman should be able to exercise a choice to terminate a pregnancy because of the fatal foetal abnormality.<sup>21</sup> This position has the merit of moral consistency, but the demerit of apathy towards the pregnant woman who is perceived by many or presented as making a more difficult, upsetting, and blameless (or morally unblameworthy) decision when she elects to abort than a woman who is not in this situation. Notwithstanding that apparently widespread perception, and support for women in these situations being able to choose abortion should they wish to,<sup>22</sup> the law as it stands is considered to prohibit access to abortion in cases of fatal foetal abnormality, although it is not entirely clear that the 8<sup>th</sup> Amendment actually requires this.

The text of the 8<sup>th</sup> Amendment clearly requires the state to “defend and vindicate” the right to life of the unborn only “so far as it is practicable to do so”. It is at least arguable that where the foetus has a condition that is, as the phrase goes, “incompatible with life” there would be no constitutional imperative for the state to protect it to the detriment of women’s constitutional rights taken *in toto* (rather than focusing only a narrow foetal right to life v woman’s right to life construction). This is further suggested by the fact that it has been established in the jurisprudence of the superior courts that the state is not required to do that which is futile in order to fulfill Article 40.3.3.<sup>23</sup> And so, at least on a textual basis, one might argue that there is space to permit abortions in cases of fatal foetal abnormality within the current constitutional arrangement.<sup>24</sup> However, that argument holds only if Article 40.3.3 is considered as protecting *life* as opposed to *being born* for the foetus, and a *quality of life* as opposed to *not dying* for the pregnant

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Seanad Éireann, 1 December 2015. The phrasing is widely rejected by anti-abortion campaigners. See, for example, N Uí Bhriain, “Changes to abortion law should be decided by referendum—with balanced information for voters”, *TheJournal.ie*, 16 October 2014. Available at <http://www.thejournal.ie/readme/abortion-laws-ireland-fatal-foetal-abnormality-1726193-Oct2014/> (2 July 2016).

<sup>20</sup> In a Red C poll in January 2016 61% of respondents supported permitting abortion in cases of fatal foetal abnormality, as opposed to 48% who supported removal of the 8<sup>th</sup> Amendment per se, 78% supporting permitting abortion in cases of rape or incest, and 41% supporting permitting abortion whenever the pregnant woman considered it necessary: D Buckley, “78% of Irish people in support for abortion change”, *The Examiner*, 22 January 2016.

<sup>21</sup> *Supra* n 19.

<sup>22</sup> *Supra* n 20.

<sup>23</sup> See, for example, *PP v Health Service Executive* [2014] IEHC 622.

<sup>24</sup> See “Ruth Fletcher’s Submission to the Oireachtas Joint Committee on Health”, Human Rights in Ireland, 22 May 2013. Available at <http://humanrights.ie/criminal-justice/guestpost-ruth-fletchers-submission-to-the-oireachtas-abortion-hearings/> (2 July 2016). But c.f. *Roche a Roche* [2010] 2 IR 321

woman. Lamentably, however, that is not how Article 40.3.3 has been developed, interpreted, applied, and embedded in Irish medico-legal practice.<sup>25</sup> The right to life of the foetus is, more accurately put, a right to be born so that if there is any chance whatsoever—no matter how slim—that the foetus might be born alive, that is sufficient to engage the protection of the state for its rights under Article 40.3.3.<sup>26</sup> Irish courts have made it abundantly clear that this is so even if the foetus will live only for a split second, and quite regardless of the quality of life that the born child will have as a result of its medical condition.<sup>27</sup> A moment's breath is enough to realise the foetus' status as a constitutional rights bearer.

While this is not an inevitable interpretation of the Constitution, it is a culturally embedded one. Bills proposing to allow abortion in these situations have come before the Oireachtas (Irish Parliament) on a number of occasions,<sup>28</sup> but the government appears to be of the view that it should follow the (unpublished) advice of the Attorney General that this would be unconstitutional, presumably based on an analysis very similar to the one just outlined.<sup>29</sup>

There is, it seems, little governmental attitude for passing one of these Bills and allowing the Irish Supreme Court to decide whether the law as it stands can accommodate it. In spite of the general (and advisable) disinclination to legislate against the advice of the Attorney General, in some ways this is a surprising decision. Not only would legislating resolve an immediate issue on which there is something close to unanimity without the need for a (no doubt ugly) referendum and thus, potentially, buy the Government some time (so to speak), but the Irish constitutional architecture offers what seems an ideal vehicle for legislating in such constitutionally ambiguous areas without introducing mass uncertainty through the Article 26 procedure.

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<sup>25</sup> For a full articulation of this see F de Londras, "Constitutionalizing Fetal Rights", *supra* n. 6.

<sup>26</sup> *PP v Health Service Executive*, *supra* n 23.

<sup>27</sup> *Ibid.*

<sup>28</sup> Protection of Life During Pregnancy Act (Amendment) 2013, Bill No. 115/2013 introduced by Clare Daly TD; Protection of Life During Pregnancy Act (Amendment) 2015, Bill No. 20/2015 introduced by Michael McNamara TD. Following *Mellet* Mick Wallace T.D. introduced a private members bill that had precisely the same wording as that of Clare Daly TD: Protection of Life During Pregnancy Act (Amendment) (no 2) 2013 Bill. This was also defeated.

<sup>29</sup> Since the spring of 2016 the Irish government has been a loose coalition of Fine Gael and a number of independent deputies some of whom are members of Cabinet. It is widely reported that while the Attorney General's advice has not changed (i.e. remains that a law to allow abortion in cases of foetal fatal abnormality would be unconstitutional), a number of these members of Cabinet are not entirely in agreement. See, for example, N O'Connor & P Ryan, "Cabinet split as Independents want free vote on abortion bill", *Irish Independent*, 29 June 2016. Nevertheless, when a vote was called (after *Mellet*) on the Protection of Life During Pregnancy Act (Amendment) (no 2) 2013 Bill (*ibid.*), some Independent members of the Cabinet voted to support it: M O'Halloran & S Bardón, "Fatal foetal abnormalities Bill defeated in Dáil vote", *Irish Times*, 7 July 2016.

Article 26 of the Irish Constitution allows the President, following consultation with his Council of State, to send a Bill to the Supreme Court before he signs it into law. The Supreme Court, sitting in a panel of five, would then undertake an anticipatory constitutional review under Article 26, i.e. appoint lawyers for all potential interests that might be invoked should the law be introduced, who then work up and argue all possible claims for unconstitutionality that they can imagine. The Supreme Court would then decide whether the Bill, if passed into law, would be unconstitutional or not based on these abstract and hypothetical arguments. No witnesses are heard, a single judgment is issued by the Court, and the decision is made within sixty days of Article 26 being invoked. If the Bill survives this scrutiny not only is it signed into law, but its constitutionality can never again be disputed in court; it is immune from future challenge. If the Bill does not survive, it is struck down and the government has a choice: to abandon the proposal, to adjust the proposal to fit the constitutional standards in place, or to propose constitutional change through a referendum to adjust those standards and permit introduction of the law (or its equivalent) in the future.

The Article 26 procedure is not without its challenges and idiosyncrasies, but leaving to one side the debates about its *general* appropriateness and workability within the constitutional framework,<sup>30</sup> it seems to have a clear clarificatory potential in the case of abortion for fatal foetal abnormalities. However, the government appears resolute in its position that it ought not to legislate against the advice of the Attorney general, the Attorney seems certain in her position that such legislation would be unconstitutional, and so the space for reimagining the constitutional contours of abortion law has been shrunk. Without a referendum, it seems, the Constitution offers no respite for women in situations of fatal foetal abnormality.

### III. THE EUROPEAN CONVENTION ON HUMAN RIGHTS

For these women, too, the European Convention on Human Rights has little to offer by means of a resolution, notwithstanding its incorporation into Irish law by the ECHR Act 2003. Although the European Court of Human Rights' decision in *A, B & C v Ireland*<sup>31</sup> can be credited in part with leading the Irish legislature to introduce the Protection of Life During Pregnancy Act 2013, it did not aid women in terms of challenging the very limited grounds upon which the Constitution permits access to abortion violated the Convention.

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<sup>30</sup> On Article 26 see, for example, L. Cahillane, "The Council of State and the Referral of Bills to the Supreme Court", *Constitution Project @ UCC*, 29 July 2013. Available at <http://constitutionproject.ie/?p=269> (2 July 2016).

<sup>31</sup> *Supra* n 4



This will not have been particularly surprising to anyone familiar with the Strasbourg Court's abortion jurisprudence, which might be most politely described as a 'fudge'.<sup>32</sup> On the one hand, the Court claims that matters of intimacy related to people's private decisions should generally be protected from state interference to the extent possible, so that states usually enjoy only a narrow Margin of Appreciation in the context of such matters.<sup>33</sup> Abortion, however, is exempted from that narrow Margin of Appreciation. Instead, the Court has repeatedly found that the question of whether and, if so, in what situations abortion will be available is one on which states can decide without any effective supervision from the European Court,<sup>34</sup> except to say that should a state decide to permit abortion it must ensure that abortion is actually accessible should a woman meet the domestic legal requirements.<sup>35</sup> In other words, the Convention does not require abortion to be available; neither does it clearly establish that a total (or near total) ban on abortion (such as Ireland's) would violate the Convention per se. It merely requires that a state must make sure that abortion is accessible to women who qualify for it under domestic legal rules.

The Strasbourg jurisprudence on abortion shows little intellectual consistency with the generally narrow margin of appreciation for intimate decisions, as if abortion were not an intimate, private decision. Furthermore, the abortion jurisprudence confounds the general European consensus jurisprudence inasmuch as the Court appears to allow the "profoundly held" moral positions of the domestic polity (such as, in the Court's estimation, that of the Irish people expressed in abortion referenda<sup>36</sup>) to override, or trump, clear European consensus towards a more liberal abortion regime.<sup>37</sup> The Court, quite simply, has not yet figured out how to reconcile the multiple claims for rights (of women, and of fetuses whose rights-bearing status under the Convention has never been settled) and for sovereignty (of states to decide for themselves) in the fraught context of abortion.

The European human rights system, then, holds no real potential for women in Ireland who are claiming a right to access abortion in cases of fatal foetal abnormality (or, indeed, more broadly): under the current jurisprudence any claim would fail in Strasbourg, suffocated by the Margin of Appreciation reasoning the Court uses to effectively avoid deciding on these difficult questions.

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<sup>32</sup> For a comprehensive analysis see D Fenwick, "Abortion jurisprudence' at Strasbourg: deferential, avoidant and normatively neutral?" (2014) 34 *Legal Studies* 214.

<sup>33</sup> See, for example, *Handyside v. the United Kingdom* [1976] ECHR 5.

<sup>34</sup> See for example *Tysiac v Poland* [2007] ECHR 212; *A, B & C v Ireland supra* n 4.

<sup>35</sup> *Ibid.*

<sup>36</sup> *A, B & C v Ireland, supra* n 4.

<sup>37</sup> F de Londras & K Dzethsiarou describe this as the development of a 'trumping internal consensus': "Grand Chamber of the European Court of Human Rights, *A, B and C v Ireland*" (2013) 62 *International and Comparative Law Quarterly* 250.

#### IV. ENTER THE HUMAN RIGHTS COMMITTEE

Both domestic constitutional challenges and European Convention on Human Rights challenges seem, then, unlikely to provide the legal ammunition needed to help shape and, indeed, cajole the political conversation around constitutional and legal reform in respect of fatal foetal abnormalities in Ireland. And so to international human rights law. Over recent years abortion reform activists have excelled in ensuring that the 8<sup>th</sup> Amendment and its implications for women are on the agenda when Ireland reports to international human rights treaty bodies and the Universal Periodic Review procedure in the United Nations.

The Human Rights Committee,<sup>38</sup> the Human Rights Council,<sup>39</sup> the Committee on Economic, Social and Cultural Rights,<sup>40</sup> the Committee on the Elimination of all form of Discrimination against Women,<sup>41</sup> the Committee on the Rights of the Child,<sup>42</sup> and the UN Committee against Torture<sup>43</sup> have all encouraged the Irish government to revisit and revise the constitutional position on abortion in recent years. The Irish government, in contrast, has continued to argue that the *status quo* represents the profound moral choice of the Irish people and must be respected. What has been lacking up to now, however, is a concrete factual scenario in which the rights violations caused by the constitutional *status quo* can be identified. The recent decision of *Mellet v Ireland*,<sup>44</sup> decided by the Human Rights Committee pursuant to the First Optional Protocol to the International Covenant on Civil and Political Rights, is that case.

In the 21<sup>st</sup> week of her pregnancy, Amanda Mellet was informed that the foetus she was carrying had congenital heart defects that might be fatal. She was also informed that abortion in her circumstances was not permitted in Ireland, but that “[s]ome people in [her] situation may choose to travel”.<sup>45</sup> Very shortly thereafter she was further informed that the foetus had trisomy 18 and would die either before or shortly after birth; again she was informed that she could either carry her pregnancy to term or “travel”.<sup>46</sup> To travel, in this context, is a euphemism widely used

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<sup>38</sup> Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland, CCPR/C/IRL/CO/4, 19 August 2014, para 9.

<sup>39</sup> K Holland, “Government to consider UN abortion law recommendations”, *Irish Times*, 13 May 2016.

<sup>40</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the third periodic report of Ireland, E/C.12/IRL/CO/3, 8 July 2015, para 30.

<sup>41</sup> Committee on the Elimination of Discrimination against Women, Concluding Comments: Ireland, CEDAW/C/IRL/CO/4-5, 22 July 2005, paras 38-39.

<sup>42</sup> Committee on the Rights of the Child, Concluding observations on the combined third and fourth period reports of Ireland, CRC/C/IRL/CO/3-4, 1 March 2016, paras 57-58.

<sup>43</sup> Committee against Torture, Concluding observations of the Committee against Torture: Ireland, CAT/C/IRL/CO/1, 17 June 2011, para 26.

<sup>44</sup> *Supra* n 7.

<sup>45</sup> Quotation from doctor as reported in *Mellet v Ireland*, [2.1].

<sup>46</sup> Quotation from midwife as reported in *Mellet v Ireland*, [2.2].

in Ireland for going abroad to access an abortion that is not available in Ireland. As it is prohibited for medical practitioners in Ireland to refer women to abortion providers elsewhere,<sup>47</sup> Ms Mellet was not offered a referral, but once she had decided to terminate her pregnancy a family planning organization provided her with information and contact details for Liverpool Women's Hospital. The same organization faxed her medical records to the Liverpool Women's Hospital. Before going to Liverpool, Ms Mellet confirmed whether a foetal heartbeat was still discernible. Had it not have been (i.e. had the foetus died without intervention) her medical care would have proceeded in Ireland, but when the foetal heartbeat was found Mellet's GP reportedly discouraged her from accessing abortion.<sup>48</sup> Notwithstanding that, however, Ms Mellet travelled to Liverpool Women's Hospital where, following a course of treatment to end foetal life, she had a 36-hour labour resulting in delivery of a stillborn baby girl. As a result of financial limitations, she returned to Ireland with her husband just twelve hours later. Because the Irish hospital she had been attending, the Rotunda Hospital in Dublin, provided a bereavement service only to people who had suffered a spontaneous stillbirth and not to those who terminated their pregnancy having discovered a fatal foetal abnormality, she could not access such counseling, although she was given post-abortion counseling at the family planning organisation she had attended. Ms Mellet claimed that the grief and trauma she experienced was exacerbated by having to "endure the pain and shame of travelling abroad".<sup>49</sup>

Mellet argued that the result of Ireland's abortion law was that her rights under Article 7 (the right to be free from torture, cruel, inhuman or degrading treatment or punishment), Article 17 (the protection from arbitrary or unlawful interference with privacy, family, home or correspondence and from unlawful attacks on honour and reputation), Article 19 (the right to freedom of expression including the freedom to seek, receive and impart information and ideas), and Articles 2(1), 3 and 26 (the rights to non-discrimination and to the equal enjoyment of other rights on the grounds of sex and gender) had been violated. The Irish government's response hinged fundamentally on the claim that Article 40.3.3 "represents the profound moral choices of the Irish people" who have also recognised the right to travel to another jurisdiction in order to avail of abortion. The legal regime, the government claims, reflected "the nuanced and proportionate approach to the considered views of the Irish Electorate on the profound moral question of the extent to which the right to life of the foetus should be protected and balanced against the rights of the woman".<sup>50</sup>

### *The Article 7 Claim*

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<sup>47</sup> Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995

<sup>48</sup> *Mellet v Ireland*, [2.3].

<sup>49</sup> *Ibid*, [2.5].

<sup>50</sup> *Ibid*, [4.2].

Article 7 of the ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Mellet argued that the Irish state had subjected her to cruel, inhuman and degrading treatment in four ways: (i) by failing to provide her with the reproductive health care and bereavement care she needed, (ii) by forcing her to carry a dying foetus, (iii) by compelling her to travel abroad to terminate her pregnancy, and (iv) by subjecting her to intense stigma.

In response, the Irish government expended significant energy on establishing that this case was materially different to others the Committee had decided before. In particular, it distinguished this case from the Committee's previous decision in *KL v Peru*<sup>51</sup> as in this case Mellet had not been denied access to a procedure that was lawfully available, and that she had not experienced actions by state agents that could be said to be based on the personal prejudices of officials. There was, thus, no *arbitrary* interference with any right leading to cruel, inhuman and degrading treatment. The state also argued that any finding to the contrary would represent a step change in the Committee's approach to the Covenant by holding the state accountable where there was "no act of 'infliction' by any person or State agent".<sup>52</sup> In essence, therefore, the State's response to the Article 2 claim was to argue that because all that happened here was the application of law, embedded in the Constitution, there could be no violation of Article 2; it took no real account of the impact of this law on Ms Mellet, which had been at the core of her claim that there was a violation.

#### *The Article 17 Claim*

Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Mellet argued that under Irish law she effectively "had to choose between...letting the state make the deeply reproductive decision for her to continue with a non-viable pregnancy under conditions of unimaginable suffering and...having to travel abroad for a termination".<sup>53</sup> Neither option respected or preserved her reproductive autonomy and, because she could not choose to terminate the pregnancy in Ireland, the State had arbitrarily interfered with her personal decision

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<sup>51</sup> **Communication No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005).**

<sup>52</sup> *Mellet v Ireland* [4.7].

<sup>53</sup> *Ibid*, [3.5].

making. In sum, she argued, “[d]efining the moral interest in protecting foetal life as superior to the author’s right to mental stability, psychological integrity and reproductive autonomy”<sup>54</sup> was a disproportionate interference with her Article 17 rights.

In response, Ireland argued that any interference with privacy experienced by the author was proportionate to the legitimate aims of the Covenant and of taking into account “a careful balance between the right to life of the foetus with due regard to that of the woman”.<sup>55</sup> The Government reiterated that both the Irish electorate (in numerous referenda) and the European Court of Human Rights (in *A, B & C v Ireland*) had approved of how Irish law strikes this ‘balance’.<sup>56</sup> Because the law that is said to reflect this balance applies equally to all those experiencing pregnancy in Ireland, there was no arbitrariness. Thus, any interference was proportionate and permissible.

Once again, in respect of this claim, the Irish government’s response seems essentially to be that if it is lawful in domestic law (in this case, constitutionally provided for), then a law criminalizing abortion cannot be violatory of the international right in question. There is little if any engagement with the substance of the arguments made by Ms Mellet.

#### *The Article 19 Claim*

Article 19(2) of the ICCPR provides

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Mellet argued that the right to freedom of information includes information critical for making informed decisions about reproductive health. She argued that as the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 prohibits the distribution of information to the public without solicitation (thus requiring women to specifically request information in order to receive it), and as the Act has been interpreted as effectively censoring health care providers from distributing even rudimentary information thus creating a “chilling effect”<sup>57</sup> in which health care providers are reluctant to provide any information, her Article 19

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<sup>54</sup> *Ibid*, [3.6].

<sup>55</sup> *Ibid* [4.9].

<sup>56</sup> *Ibid* [4.10]

<sup>57</sup> This phrase was used by the European Court of Human Rights when considering what was then the lack of legislation by which medical professionals could assess whether a woman could access a constitutionally permitted abortion in Ireland: *A, B & C v Ireland*, above n 4 [254].

right was violated. She further argued that this restriction on the Article 19 right was discriminatory and disproportionate given its effects on women and its detrimental impact on her health and well-being.

The Irish government offered only a brief response to this claim, arguing that it was insufficiently substantiated and in any case that by virtue of a midwife referring Ms Mellet to a family planning organization where she could acquire the information she sought there was no restriction on her right to freedom of information. Again, the state did not engage effectively with the claims made by Ms Mellet and, in particular, her arguments as to the impact of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995 on both medical practice and women's experience of maternal healthcare in Ireland.

*The Article 2(1), 3 and 26 claims*

Article 2(1) of the ICCPR provides

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 provides:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Mellet argued that the criminalization of abortion violates the Convention rights to non-discrimination and equal enjoyment of other rights, which she argued required that health

services recognise and accommodate fundamental biological differences between men and women as regards reproduction. She further argued that the criminalization of abortion is discriminatory per se because it “den[ies] women moral agency that is closely related to their reproductive autonomy”.<sup>58</sup> Mellet further argued that in her case the discrimination was refined further because “she was a woman who needed this medical procedure in order to preserve her dignity, physical and psychological integrity, and autonomy” and that the criminalization of abortion in Ireland “traumatizes and ‘punishes’ women who are in need of terminating their non-viable pregnancies”.<sup>59</sup> In criminalizing abortion, even in cases of fatal foetal abnormalities, she argued that Ireland prioritized the protection of the unborn over her health needs, and subjected her to the gender-based stereotype that women should continue with their pregnancies in all cases and regardless of their wishes or needs. In other words, she argued, she had been “stereotyp[ed]...as a reproductive instrument”<sup>60</sup> so that having terminated her pregnancy she was not considered deserving of the counseling that women whose pregnancies resulted in foetal death were said to be deserving of.

In response the State denied that Ms Mellet had suffered any discrimination and argued, in any case, that if she had it should be regarded as a reasonable and objective differentiation in treatment directed towards achieving a legitimate purpose. As to the former, this rested on the fundamental claim that there can be no invidious discrimination in relation to a woman who is pregnant given her “inherently different”<sup>61</sup> physical circumstances during pregnancy to the physical circumstances of a man. Even if there is a difference in treatment that might be said to be *prima facie* discriminatory, Ireland argued that any such differentiation is in pursuit of protecting foetal life and proportionate to that objective. Rather than stereotype the author, the state argued, its laws reflect “the inherent differentiation between a man and a pregnant woman [which] requires the careful balancing of rights of the foetus which is capable of being born alive, and the rights of the woman”.<sup>62</sup>

#### *The Committee’s Decision*

In a very significant decision, the Committee considered that Amanda Mellet had indeed suffered from violations of her ICCPR rights. It strongly rejected the core underpinning argument from the state—that Article 40.3.3 of the Irish Constitution effectively determined the compatibility of Irish law with the ICCPR. In a particularly important finding, the Committee concluded that the existing legal framework in Ireland did indeed subject Ms Mellet to “intense physical and mental suffering”. The restrictive legal framework exacerbated her anguish upon finding that her

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<sup>58</sup> *Mellet v Ireland* [3.15].

<sup>59</sup> *Ibid*, [3.16].

<sup>60</sup> *Ibid*, [3.19].

<sup>61</sup> *Ibid*, [4.13].

<sup>62</sup> *Ibid*, [4.15].

pregnancy was not viable by preventing her from receiving medical care and insurance coverage in Ireland, by forcing her to choose between continuing with the pregnancy or going abroad “while carrying a dying foetus”<sup>63</sup> in order to access abortion without familial support and at considerable expense, by requiring her to return when not fully recovered (because of financial constraints), by the failure of the state to provide her with appropriate post-abortion and bereavement care, and by subjecting her to “the shame and stigma associated with the criminalization of abortion of a fatally ill foetus”.<sup>64</sup> The restrictions on the provision of information, including on forms of abortion, further exacerbated this so that in sum these circumstances resulted in Amanda Mellet having suffered cruel, inhuman and degrading treatment in violation of Article 7. This is the first time that the Committee has found that the criminalization of abortion *per se* can result in violations of the ICCPR.

The Committee also found that Mellet’s Article 17 rights had been violated. In this respect, the fact that the pregnancy was not viable was material. While the Committee accepted that the Article 17 right could be limited, it found that the limitations here were not reasonable taking into account the negative consequences to the author of having to travel to access abortion and the fact that the pregnancy was not viable.

As to the discrimination claim, the Committee found a violation of Article 26 and then declined to consider the further claims under Articles 2(1), 3 and 19. In respect of Article 26, the Committee found that the relevant comparator was other “similarly situated women”<sup>65</sup> and that when compared to them the differential treatment to which Ms Mellet was subjected failed to take adequate account of both her medical needs and her socio-economic circumstances so that it was not sufficiently reasonable, objective and pursuant of a legitimate purpose to excuse the differential treatment.

A number of Committee members gave individual opinions, arguing that the Committee should also have found a violation of Articles 2(1) and 3., i.e. should have made a broader discrimination finding.

Yadh Ben Achour noted that there is no similar restriction to the criminalization of abortion imposed on men, and that such legislation “denies women their freedom of choice in this domain”.<sup>66</sup> For Ben Achour, then, the criminalization of abortion *per se* violates the right to be free from discrimination. Sarah Cleveland reached a similar conclusion in her individual opinion.

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<sup>63</sup> *Ibid*, [7.14].

<sup>64</sup> *Ibid*, [7.14].

<sup>65</sup> *Ibid*, [7.11].

<sup>66</sup> Concurring opinion of Yadh Ben Achour, para 4.



She strongly refuted the Irish government's claim that there can be no discrimination where differential treatment is based on biological differences between men and women, stating baldly that such a view "is inconsistent with contemporary international human rights law and the positions of this Committee".<sup>67</sup> Drawing on General Comment No. 28, Cleveland noted that the nondiscrimination obligation requires states to adopt measures for the "effective and equal empowerment of women".<sup>68</sup> Making a clear finding of discrimination against women (and not only discrimination against Amanda Mellet when compared to "similarly situated" women), Cleveland wrote "Ireland's near-comprehensive criminalization of abortion services denies access to reproductive medical services that only women need, and imposes no equivalent burden on men's access to reproductive health care. It thus clearly treats men and women differently on the basis of sex for the purposes of article 26".<sup>69</sup> She was more receptive to Mellet's argument that Irish law is based on stereotyping than were the majority of the Committee. Indeed, for Cleveland, "[r]equiring the author to carry a fatally impaired pregnancy to term only underscores the extent to which the State party has prioritized (whether intentionally or unintentionally) the reproductive role of women as mothers, and exposes its claimed justification in this context as a *reductio ad absurdum*".<sup>70</sup> In their joint concurring opinion Victor Rodriguez Rescia, Olivier de Frouville, and Fabián Salvioli also opined that the Committee should have made a more comprehensive finding of discrimination, arguing that Irish law "is, in itself, discriminatory because it places the burden of criminal liability primarily on the pregnant woman".<sup>71</sup>

## V. *MELLET* AND THE NEED FOR COMPREHENSIVE CONSTITUTIONAL CHANGE

It is clear from the preceding section that *Mellet* is a significant decision not only for abortion law in Ireland but more broadly. At the very least, it suggests that expansive criminalization of abortion to prohibit abortion in cases where the pregnancy is not viable violates the ICCPR, but it also has a broader reach. As further elaborated on below, the decision at least implies—and many of the concurring opinions establish—that criminalization of abortion *per se* can violate Covenant rights well beyond the specific conditions of fatal foetal abnormalities. However, within Ireland the immediate reaction to *Mellet* focused, as might be expected, on its implications for women whose pregnancies are not viable.

The decision resulted in what has, by now, become a well-worn trend in Irish social and political commentary. Pro-reform advocates argued that this further reinforced the need for a referendum

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<sup>67</sup> Concurring opinion of Sarah Cleveland, para 6.

<sup>68</sup> UNHRC, General Comment No. 28, Equality of rights between men and women (2000), para. 8.

<sup>69</sup> Concurring opinion of Sarah Cleveland, para 13.

<sup>70</sup> *Ibid*, para. 14.

<sup>71</sup> Concurring opinion of Victor Rodriguez Rescia, Olivier de Frouville, and Fabián Salvioli, para. 8.

on the 8<sup>th</sup> amendment and urgent reform of the law.<sup>72</sup> Anti-choice and anti-reform advocates argued that this was decision was not binding on Ireland (so that no legal change was required by it),<sup>73</sup> and that what mattered was respect for the constitutional position as an expression of sovereign popular will.<sup>74</sup> Politicians expressed regret, shock and sympathy, promised to carefully and unhurriedly consider change, and reinforced the “tragedy” of the case,<sup>75</sup> but nevertheless noted that the Committee’s decision was “not binding”.<sup>76</sup> They reinforced their position that legislative change on fatal foetal abnormalities was not possible in the absence of constitutional change. They established a Citizens Assembly to consider the possibility and form of constitutional change.<sup>77</sup> The Minister for Health ensured that bereavement counseling and other supports would be made available to women who terminated their pregnancies in cases of fatal foetal abnormalities (although they still could not access abortion in Ireland).<sup>78</sup> Women continued to “travel” at a rate of around a dozen a week, and the domestic discussion zoned in ever-further on fatal foetal abnormalities as situations where the ability to access abortion in Ireland might be ‘acceptable’.

There was little consideration, however, of whether and to what extent the reasoning in *Mellet* might extend beyond fatal foetal abnormalities, and reinforce the experiential claims of rights violation made by women in Ireland who seek, have sought, have accessed, and have been unable to access abortion since 1983. In reaching its conclusions, the Human Rights Committee repeatedly expressed its cognisance of the exacerbated suffering experienced by Amanda Mellet as a result of the fact that her foetus suffered a fatal abnormality. However, in spite of how it has

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<sup>72</sup> See for example, Abortion Rights Campaign, *Press release: UN Human Rights Committee says Ireland’s prohibition on abortion violates human rights*, 10 June 2016; F de Londras, “Referendum required as UN move confirms abortion law is unsustainable”, *Irish Times*, 10 June 2016; Letter to the editor from 61 human rights lawyers outlining six policy and legal reasons for compliance with *Mellet v Ireland*, *The Irish Times*, 23 June 2016.

<sup>73</sup> See, for example, David Quinn, “UN abortion ruling given undeserved credence”, *The Irish Catholic*, 16 June 2016.

<sup>74</sup> See for example the letter to the editor of P Burke, *Irish Times*, 11 June 2016 claiming the importance of “asserting Ireland’s sovereignty and our right as a people to make our own decisions democratically”.

<sup>75</sup> For an eloquent rejection of the language and concept of tragedy in the context of fatal foetal abnormality see M Enright, ‘Amanda Jane Mellet v Ireland—The Key Points’, *Human Rights in Ireland*, 9 June 2016. Available at <http://humanrights.ie/uncategorized/amanda-jane-mellet-v-ireland-the-key-points/> (2 July 2016).

<sup>76</sup> P Leahy, “UN abortion ruling is not binding, Enda Kenny says”, *The Irish Times*, 15 June 2016. For a clear explanation of the status of the decision in international and domestic law see, for example, S Mullally, “Mellet v Ireland: Legal Status of the UN Human Rights Committee’s ‘Views’”, *CCJHR Blog*, 16 June 2016. Available at <http://blogs.ucc.ie/wordpress/ccjhr/2016/06/16/mellet-v-ireland-legal-status-un-human-rights-committees-views-2/> (2 July 2016).

<sup>77</sup> The Citizens Assembly was part of the overall programme of government, and scheduled to be established in any case, but its actual establishment came in the late summer of 2016 and the timing seemed influenced by the *Mellet* decision.

<sup>78</sup> E Coyle, “New bereavement help for overseas abortions”, *The Times*, 10 August 2016.

been received, it is not at all clear from the decision that the Committee's conclusions are limited to situations of fatal foetal abnormality.

While the Committee's finding of discrimination is sustained by explicitly comparing the situation of women whose fetuses have fatal abnormalities and who choose to terminate their pregnancies as opposed to those who choose not to, the finding as to inhuman and degrading treatment under Article 7 does not rest on the particular circumstance of fatal foetal abnormalities. Many of the facets of Amanda Mellet's experience that are picked up upon by the Committee are experienced by women who wish to access abortion for reasons other than fatal foetal abnormality. The Committee especially notes the negative implications of Mellet's inability to continue to receive medical treatment and health insurance coverage in Ireland, the expense and isolation of travelling for an abortion, the need to return to Ireland before she had fully recovered from her abortion, the "shame and stigma associated with the criminalization of abortion",<sup>79</sup> and the state's refusal to provide her with necessary post-abortion care. To be sure, in the Committee's decision all of these elements are framed as being exacerbations of the trauma associated with the pregnancy not being viable: not only did she have to travel, but she had to do so "while carrying a dying foetus"; not only did she lack appropriate post-abortion care but also bereavement care; not only did she have to return before being fully recovered but she had "to leave the baby's remains behind and later [have] them unexpectedly delivered to her by courier".<sup>80</sup>

Even without these additional conditions, the inability of medics to make referrals as a result of the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995, the need to travel, the expense and isolation associated with travel, the frequency with which women return "home" before having fully recovered from their abortions, the stigma, the lack of care, the difficulties in accessing medical care after abortions abroad: these are all common experiences of abortion for women in Ireland and all, at least arguably, result in inhuman and degrading treatment as prohibited by Article 7 of the ICCPR. As the concurring opinions of individual members of the Committee also show, they can be constructed as a form of gender based discrimination against women, and not only against women in situations of fatal foetal abnormality. In other words, *Mellet v Ireland* illustrates how the current constitutional and legislative framework in Ireland create conditions in which women who, for whatever reason, do not longer want to continue with their pregnancies routinely experience cruel, inhuman or degrading treatment in their attempts to make decisions as to their own reproductive autonomy, to access abortion elsewhere, and to access whatever supports they may need (for those who do

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<sup>79</sup> *Ibid*, [7.14].

<sup>80</sup> *Ibid*.

need them) when they return to Ireland. *Mellet*, then, not only further reinforces the need for constitutional change in Ireland in situations of fatal foetal abnormality, but in *all* situations where abortion is sought.

The political clock is clearly ticking on the 8<sup>th</sup> Amendment; there is a popular appetite for change, but little consensus on what that change should be. It would be too easy for the government to put only a minimal change to the People; to ensure the Constitution allowed for abortion in cases on which there seems to be general agreement (rape, incest, risk to life, fatal foetal abnormalities, possibly serious risks to health) but to leave the general restriction on abortion undisturbed. What *Mellet v Ireland* shows is that such an approach would not resolve the deep-seated difficulties with Irish abortion law. Now is the time to address the reality that women in Ireland access abortion, but that in doing so they must take risks, endure suffering, and bear cruelty imposed not by circumstance or “tragedy”, but by the law. Only an approach to abortion law reform that recognises women’s human rights and autonomy can ever hope to address that.