

## The gender injustice of abortion laws

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**Abstract:** *This commentary is a response to Katarzyna Sękowska-Kozłowska's article on the treatment of criminal abortion laws as a form of sex discrimination under international human rights law through a study of the communications, Mellet v. Ireland and Whelan v. Ireland. The commentary offers a reading of these communications, and specifically the sex discrimination analysis premised on inequalities of treatment among women, as an engagement with the structural discrimination that characterises abortion laws, and as a radical vision for gender justice under international human rights law.* DOI: 10.1080/26410397.2019.1626181

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### Introduction

This commentary responds to Katarzyna Sękowska-Kozłowska's insightful article on the treatment of criminal abortion laws as a form of sex discrimination under the *International Covenant on Civil and Political Rights* (hereafter the ICCPR).<sup>1</sup> Her analysis focuses specifically on the views of the UN Human Rights Committee (hereafter the Committee) in *Mellet v. Ireland*<sup>2</sup> and *Whelan v. Ireland*.<sup>3</sup>

Both communications involved pregnant women who received diagnoses of fatal foetal conditions, but who were compelled by threat of the criminal law then in effect in the Republic of Ireland to continue their non-viable pregnancies or to seek an abortion abroad.<sup>4</sup> Both women travelled to the UK to end their pregnancies. Mellet and Whelan alleged that the prohibition on abortion in their circumstances contravened the ICCPR in violation of the right to be free from cruel, inhuman or degrading treatment ("ill treatment") (Article 7), the right to privacy (Article 17), the right to seek and receive information (Article 19), the right to equal protection of the law without discrimination (Article 26), and the right to enjoy these rights on a basis of equality [Articles 2(1) and 3].

In a rare instance under international law, the Committee declared the criminalisation of abortion a human rights violation, specifically a

violation of Articles 7, 17 and 26 of the ICCPR. More significantly, the Committee addressed the sex discrimination that underlies abortion criminalisation and its harms. Sękowska-Kozłowska endorses these views of the Committee as undeniably progressive, yet she finds lingering fault in its equality and non-discrimination analysis. I share some of her concerns, but disagree with others.

### The constraints of formal equality

I agree with Sękowska-Kozłowska that ideas of formal equality constrained the Committee, and most directly in its decision to forgo examination of the allegations under Articles 2(1) and 3. These articles ensure the "equal right of men and women" to the full enjoyment of all civil and political rights set forth in the ICCPR "without distinction on the basis of sex." The Committee declined to consider whether the criminalisation of abortion in cases of a non-viable pregnancy violates Articles 2(1) and 3. This was a missed opportunity because much of the Committee's reasoning under the universal rights to be free from ill treatment and to privacy (Articles 7 and 17) reflects a gendered analysis. In her partly dissenting opinion, Anja Seibert-Fohr observed that because the grounds of these violations were so similar to those of the Committee's discrimination analysis, no useful purpose was served in running an equality rights

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analysis at all (see Annex V of Ref. [2], Annex IV of Ref. [3]).

Seibert-Fohr failed to see that the purpose in reading universal rights against an equality guarantee is precisely to ensure their genuine universality; that the human rights set forth in the ICCPR are indeed fully enjoyed by all.<sup>5</sup> In conventional interpretation, the universal protection against ill treatment under Article 7 was applied exclusively in contexts of state interrogation and detention, thereby neglecting violations of the right disproportionately suffered by women, such as mistreatment and abuse in reproductive health care settings.<sup>6</sup> Today reproductive harms still elude recognition because gender norms minimise or deny the existence or extent of inflicted pain and suffering as natural to women's biology or social roles.<sup>7</sup>

To gestate and to birth a child is a profound act, enlisting the whole of a person, their faculties of mind and body. The decision to do so carries serious consequences for a person in their self-worth, stability and security, and in the ways they think about themselves and how they relate to others and to society. In his separate opinion in *Whelan*, *Yadh Ben Achour* thus referred to criminal abortion laws as imposing an “existential burden” in their mandate of continued pregnancy and birth (see Annex I, para. 5 of Ref. [3]). Yet pregnancy and its termination traditionally have not been seen or treated as aspects of personal integrity, security and freedom in international human rights law. Rather framed as a profound moral or social issue, human reproduction has warranted all forms of state intervention into the lives of people. Reproductive rights violations were normalised: they raised no legitimate claim, required no justification and merited no redress under law.

The Committee's application of Articles 7 and 17 to the reproductive context marks significant progress towards gender-inclusive human rights protection under the ICCPR. In its views, the Committee acknowledged the profound harms caused by the Irish law, which forced *Mellet* and *Whelan* to deliver a stillborn child, or to travel outside the country while carrying a dying foetus, separated from the support of family, abandoned by the Irish health care system, shamed by its laws, and refused any trust or respect in their decision about how best to cope with a non-viable pregnancy. These harms sustained violations of the right to be free from ill treatment and the right

to privacy, which the Committee supported by reference to its general comment on equality rights.<sup>5</sup> Nonetheless, the Committee refused to expressly and formally apply these rights.

*Sękowska-Kozłowska* explains the Committee's refusal as confusion over equality rights. Despite strong commitments to substantive equality in its general comments, the Committee labours under constraints of formal equality in its individual communications. *Sękowska-Kozłowska* defines formal equality as equality of treatment rather than equality of result rooted in a comparative stance. Formal equality asks whether a person has been treated adversely on the basis of a prohibited ground, i.e. sex, as compared to a similarly situated person. Formal sex equality claims thus usually result in a comparison of treatment between women and men, and as such, the problems for sex equality rights claims in reproduction become obvious. *Sękowska-Kozłowska* asks: “when claiming gender discrimination in access to abortion how could a man be considered as a comparator to a pregnant woman?” (see page 27 of Ref. [1]). Where there is no male norm against which to compare, under a formal analysis, sex equality claims become impossible.

The Committee did not, however, abandon the cause of sex equality in *Whelan* and *Mellet*. While it refused to engage Articles 2(1) and 3, the Committee declared a violation of Article 26, which recognises that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” Article 26 guarantees an independent right against sex discrimination in any field regulated and protected by law: “When legislation is adopted by a State party ... its content should not be discriminatory” (see para 12 of Ref. [8]).

Under Article 26, the Committee directly confronted the question: Does a criminal prohibition on abortion in cases of fatal foetal impairment discriminate on the basis of sex? The Committee answered this question affirmatively, but in a controversial way. It declared the Irish prohibition discriminatory based on a comparison between women. The Committee compared the treatment to which *Mellet* and *Whelan* were subjected by law to the treatment of women who decided to continue their non-viable pregnancies, and declared this difference in treatment discriminatory.

*Sękowska-Kozłowska* critiques the Committee's analysis as another confused retreat into formal

equality and its comparison test: “It seems that the Committee, being helpless (for obvious reasons) in finding a male comparator in both Mellet and Whelan, but nevertheless wishing to examine the cases in the context of equality, decided to identify other females as comparators.” (see page 27 of Ref. [1]) I disagree with Sękowska-Kozłowska. I would not characterise the Committee’s discrimination analysis under Article 26 as a retreat into formal equality, the search for a comparator, any comparator to run the test. I read the Committee’s sex discrimination analysis premised on the inequalities of treatment among women as an engagement with the structural discrimination that characterises abortion law, and as a radical vision for gender justice under international human rights law.

### *The justice of structural equality*

The Committee began its structural discrimination analysis by rejecting the claimed gender neutrality of the Irish law. If a man procured or carried out an abortion in circumstances not contemplated by the law, the State Party claimed, he too would be guilty of an offence. While formally true, the Committee noted, the prohibition on abortion in cases of fatal foetal impairment has a distinct and specific effect on women. The law not only renders women guilty of a criminal offence, it denies them access to a needed medical service. Under a substantive equality approach, this is reason enough for Sękowska-Kozłowska to call the law discriminatory. She cites approvingly the separate opinion of Sarah Cleveland who located the sex discriminatory impact of the law in the denial of “reproductive medical services that only women need” with “no equivalent burden on men’s access to reproductive health care” (See Annex II, para. 13 of Ref. [2]).

Unlike Sękowska-Kozłowska, I am troubled rather than persuaded by this reasoning. Cleveland borrowed heavily from CEDAW jurisprudence in claiming that abortion services are “services that only women need,” and in supporting the claim by reference to the “fundamental biological differences between men and women in reproduction,” and the unique medical needs they create (See para. 16 of Ref. [9]). This claim is false because people who do not identify as women need abortion services, and dangerous because it sources sex discrimination in some “pre-existing gender-based disadvantage and inequality that women face” (See para. 5 of Ref. [9]). On this claim, the

disadvantage or inequality to be remedied is inherent to women and their fundamental differences from men. Yet if such differences can justify the differential protections of law, can they not also justify its differential burdens, as argued by the Irish state?

Even if the abortion law burdens men and women differently, the State Party conceded,

*[t]here can be no “invidious discrimination” in relation to a pregnant woman, as her physical capacity or circumstances in a state of pregnancy are inherently different to those of a man. This differentiation is a matter of fact and can only be accepted as axiomatic. (See para 4.13 of Ref. [2]; para 4.13 of Ref. [3])*

Differential sex treatment under abortion laws is not merely reasonable and objective, as required by Article 26, but *axiomatic*: self-evident and unquestionable. The anchoring of sex differences in a biological substratum provides a legitimating subtext for the legal ordering of our social world. There can be no injustice in a law that merely reflects these differences and the unique needs they create, including the need to respect and protect the right to life of the unborn, the stated aim of the Irish law.

Cleveland understood the dangerous appeal of this logic, recognising that “women’s unique reproductive biology traditionally has been one of the primary grounds for... discrimination against women,” and protested against it as “inconsistent with contemporary international human rights law” (See Annex II, para 7, 12 of Ref. [2]). Yet her colleague Seibert-Fohr faithfully rehearsed the claim that while “it is true that it [the law] only affects women, the distinction is explained with a biological difference between women and men” (See Annex V, para. 7 of Ref. [2]). Indeed beyond these communications, the axiom of inherent sex differences anchors a powerful global movement. Anti-gender or gender ideology mobilisations first became visible in the mid-1990s at the UN conferences in Cairo and Beijing, and since 2010 have gained momentum across Europe and Latin America.<sup>10</sup> These mobilisations are rooted in the resistance of the Catholic Church and its political allies to what it indeed sees as a modern invention of feminist politics: gender as an analytical tool to contest the essential truth of sex differences as social destiny, and to thereby radically reform laws and social policy premised on it.<sup>11</sup>

In refusing to use a male comparator in its discrimination analysis, the Committee made an ingenious intervention against the naturalisation of sex differences and its essentialist categorisation of men and women. By deciding that the abortion law created sex discriminatory distinctions between women, the Committee affirmed that the future of gender justice in international human rights law would not be tied to a gender binary or any essentialist worldview that it entails.

The radical nature of the Committee's analysis can again be seen in the objections raised among its own members, who claimed that a difference in treatment among women is not gender-based discrimination. The ICCPR does not define the term "discrimination" nor indicate what constitutes discrimination,<sup>8</sup> but the Committee has acknowledged gender as social structure, that is, the use of gender to structure the experiences of people in social life.<sup>5</sup> International human rights jurisprudence elaborates on this structural understanding by referring to "gender" as "socially constructed identities, attributes and roles for women and men," and to "gender-based discrimination" as the rules, practices and other assignments of privilege and liability that make these norms socially meaningful.<sup>9</sup> This entrenchment of gender norms in law and other social institutions explain why some forms of sex discrimination are so pervasive and persistent.<sup>12</sup>

More than disavow the gender neutrality of the Irish prohibition in Mellet and Whelan, the Committee showed the inscription of gender norms into the abortion law to the distinct and specific disadvantage of women, even if not all women. Heterogeneity does not defeat a claim of structural discrimination, because gender as a ground of discrimination is not tied to any identity characteristic or group category. Rather gender refers to a set of social norms that define and shape human experience. On a structural understanding, it is entirely predictable and often the intended effect of gender-based discrimination to create privileges for some women, and disadvantages for others. Being a woman matters, but what kind of woman matters too.

By running its Article 26 discrimination analysis on a comparison of treatment between women, the Committee advanced a structural understanding of gender as a ground of discrimination. It made gender as an identity characteristic or group category immaterial to the analysis because it was

shared by all women, and it made gender as a social structure more visible in the analysis because it was a source of differentiation and inequality among women. The Committee's structural analysis focused on the use of gender in the Irish law to construct the reproductive choices of Mellet and Whelan into a substantive disadvantage.

In applying the analytical test for discrimination under Article 26, the Committee asked: What is a reasonable and objective purpose, legitimate under the ICCPR, for treating these women differently?<sup>8</sup> Why are those who choose to continue their non-viable pregnancies entitled to receive the full protection of the public health care system, to benefit from continuity of care throughout their pregnancy, and to receive any needed post-natal and bereavement care? Why are those who choose to terminate a non-viable pregnancy denied these compassions and protections, forced outside the public health care system, required to travel abroad for care, and left to endure all the economic and social hardships of such efforts? Why are these women treated so differently when there is no relevant difference in the state protection of prenatal life between them, but only shared need and vulnerability?

This legal distinction between similarly situated women and the disadvantages it created are explainable only by the introduction of gender into the analysis, specifically, that the "criminalization of abortion" subjected Mellet and Whelan "to a gender-based stereotype according to which the primary role of women is reproductive and maternal" (2, para 7.11; 2, para 7.12). The Irish law promoted and perpetuated a stereotyped view of what a woman should do when faced with a non-viable pregnancy, namely to let nature run its course regardless of the suffering this may entail. The law conscripted all women into this maternal identity and role, the giving of birth to and the caring for children, and then treated women in accordance with it. The decision to end a pregnancy, on a person's own terms and in pursuit of what is most worthwhile or meaningful for them, challenged this stereotype and the self-sacrifice and subordination it demanded. Denial of public care and compassion, and the socioeconomic burdens this imposed, were punishment for the transgression.<sup>13</sup> Sękowska-Kozłowska and I agree that to acknowledge gender as the formative structure of the Irish law, and as the basis of its discriminatory character, is the Committee's most decisive act.

## Conclusion

By focusing on the gender stereotype that anchored the Irish prohibition in *Mellet and Whelan*, the Committee moved beyond ideas of substantive equality to tackle the structural discrimination that characterises abortion law. These communications are not about comparing women to men, or comparison at all. They concern foremost the use of gender in law to rationalise inequality and injustice. Unconventional in its approach but radical in its vision, the Committee's engagement with the structural discrimination of the Irish abortion prohibition opens international human rights law to a range of gender injustices. The Committee set out to remake gender from a set of fixed categories and essential identity traits

into a source of equality and liberation for all. "Inherent to the principle of ... gender equality," as expressed under CEDAW, "is the concept that all human beings, regardless of sex, are free to ... make choices without the limitations set by stereotypes, rigid gender roles and prejudices" (See para. 22 of Ref. [9]). *Mellet and Whelan* are important legal precedents for the decriminalisation of abortion as a human rights imperative. Yet they are also case studies in a vision of gender justice under international law.<sup>14</sup>

## Disclosure statement

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## References

1. Sękowska-Kozłowska K. A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of *Mellet v. Ireland* and *Whelan v. Ireland*. *Reprod Health Matters*. 2018;26(54):25–31.
2. HRC. *Mellet v. Ireland*. Communication No. 2324/2013. Geneva: United Nations Human Rights Committee; 2016.
3. HRC. *Whelan v. Ireland*. Communication No. 2425/2014. Geneva: United Nations Human Rights Committee; 2017.
4. Offences Against the Person Act, ss. 58–59 (1861), reprinted in 7 *The Statutes* 266 (3rd ed. 1950).
5. HRC. General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), UN Doc CCPR/C/21/Rev.1/Add.10; 2000.
6. Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/22/53; 2013.
7. Sifris R. Reproductive freedom, torture and international human rights: challenging the masculinisation of torture. New York (NY): Routledge; 2014.
8. HRC. General Comment No. 18: Non-discrimination, UN Doc HRI/GEN/1/Rev.9 (Vol. I); 1989.
9. CEDAW. General recommendation no. 28. On the core obligations of states parties under article 2 of the convention on the elimination of all forms of discrimination against women, UN Doc CEDAW/C/GC/28; 2010.
10. Kuhar R, Paternotte D, editors. *Anti-gender campaigns in Europe: mobilizing against equality*. London: Rowman & Littlefield; 2017.
11. Case MA. The role of the popes in the invention of complementarity and the Vatican's anathematization of gender. *Religion Gender*. 2016;6(2):155–172.
12. CESCR. General comment no. 20: non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), UN Doc E/C.12/GC/20; 2009.
13. Smyth L. Ireland's abortion ban: honour, shame and the possibility of a moral revolution. In: Quilty A, Conlon C, Kennedy S, editors. *The abortion papers Ireland: Volume 2*. Cork: Cork University Press; 2015 p. 167–178.
14. Browne J, ed. *The future of gender*. Cambridge: Cambridge University Press; 2007.