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

Katarzyna Sękowska-Kozłowska

Institute of Law Studies of the Polish Academy of Sciences, Poznań Human Rights Centre, Poznań, Poland. Correspondence: k.sekowska-kozlowska@inp.pan.pl

Abstract: This paper comments on the views of the UN Human Rights Committee (hereafter the Committee) in the cases Mellet v. Ireland [1] and Whelan v. Ireland [2]. It focuses on the Committee's findings regarding a violation of the prohibition of discrimination. The interpretation presented by the Committee, although much welcomed and undeniably tackling reproductive health and rights in a progressive way, still leaves room for future improvements. It is argued herein that the Committee's reasoning is marked by some inaccuracies due to its inconsistent approach regarding gender equality. Whereas the Committee seems to have fully integrated a "substantive equality" approach when providing general interpretation of States' obligations under the International Covenant on Civil and Political Rights (hereafter the ICCPR), its assessment of individual cases remains to some extent influenced by the "formal equality" approach. DOI: 10.1080/09688080.2018.1542911

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Introduction

The Human Rights Committee is now one of the leading actors in shaping access to abortion in the context of universal human rights. The Committee is a body of 18 independent experts that monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR) by its States Parties. Operating within the UN structure, it has a mandate to examine reports of the States Parties and to consider individual communications. It also delivers its interpretation of the content of the ICCPR by issuing documents called "General Comments". In 2016 and 2017, the Committee concluded on two ground-breaking cases, finding that the Irish anti-abortion law violated women's rights under the ICCPR. These twin decisions are landmark cases for Ireland, which has been in the process of overturning its abortion law since its referendum of 25th May 2018, as well as for other countries with anti-abortion laws.

In the two Irish cases, the Committee found that the applicants were discriminated against in the enjoyment of their rights. This conclusion, although welcomed, seems to be based on reasoning which is not fully comprehensible. It demonstrates that the Committee is torn between a formal and a substantive approach to equality, which results in a lack of coherence in its practice. Distinction between formal and substantive equality has been debated in legal discourse for a long time. The concept of formal equality is associated with the Aristotelian formula that "people who are alike should be treated alike". By this approach, equality is achieved when the same subjects are treated equally. Whether they are treated equally well or equally badly is irrelevant from this perspective, since equality of treatment is the goal per se, with no substantive underpinnings. Thus when assessing whether somebody was discriminated against, it is necessary to identify a comparator, i.e. a similarly situated person who does not share the characteristic in question (such as sex) and who has been treated more favourably than the applicant. The substantive equality approach does not focus on equality of treatment as an autonomous value, but on the results of this treatment and its consequences for equal enjoyment of human rights by individuals. This approach is...
clearly visible in the Committee’s General Comment No. 28 (2000)\(^3\) which reads:

“Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant”. [3, para. 2]

This article will explore the differences and usage of these concepts of equality in the context of the cases being discussed.

**Factual and legal background**

The cases of both Mellet v. Ireland and Whelan v. Ireland have a very similar factual background. Communications to the Human Rights Committee were lodged by women who received, during their pregnancies, diagnoses about serious, if not fatal, foetal impairments (congenital heart defects in the case of Mellet and holoprosencephaly in the case of Whelen). Under Irish law, abortion is only permitted when it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the pregnant woman; thus legal termination of the pregnancy in Ireland was impossible. Both applicants were informed by the medical personnel of public hospitals that if they wanted to have an abortion, they could “travel”. This is the option of travelling abroad to have an abortion, which is explicitly permitted by the Irish Constitution. The applicants subsequently travelled at their own expense to the United Kingdom, where they underwent the procedure. They claimed before the Committee that the application of the abortion law of Ireland subjected them to a violation of their rights enshrined in the ICCPR, namely: the right to freedom from cruel, inhuman and degrading treatment (Article 7); the right to privacy (Article 17); the right to have access to information (Article 19); and their rights to non-discrimination and equal enjoyment of other rights on grounds of sex (Article 2 para. 1, Article 3, Article 26).

The Committee focussed on the claims under Articles 7, 17 and 26. In light of the findings, they decided not to examine separately the applicants’ allegations under articles 2(1), 3 and 19 of the Covenant. The Committee concluded that, due to Ireland’s legislation, the applicants, who were pregnant women in a highly vulnerable position after learning that their much-wanted pregnancies were not viable, were submitted to treatment which amounted to a violation of Article 7 of the ICCPR. Specifically, the women were forced to choose between continuing non-viable pregnancies and travelling to another country while carrying a dying foetus, at their own personal expense and separated from the support of their families. Due to financial reasons they had to return shortly after the procedure while they were not yet fully recovered. They were thus deprived of necessary and appropriate post-abortion and bereavement care. In addition, the women suffered the shame and stigma associated with the criminalisation of abortion of a fatally ill foetus and had to leave the remains in a foreign country to be received later via delivery by courier. On rights to privacy, the Committee stated that the state’s interference in the applicants’ decisions on how to best cope with their non-viable pregnancies was lawful under domestic law, but was nevertheless unreasonable and arbitrary, and thus in violation of Article 17 of the ICCPR.

**The discrimination claims and the Committee’s views**

Both Mellet and Whelan raised claims of violations of their rights to equality and non-discrimination. These claims were brought under Article 2 para. 1, Article 3 and Article 26 of the ICCPR, which all offer protection against gender discrimination but are formulated for different contexts. Article 2 para. 1 secures prohibition against gender discrimination and is a free-standing guarantee of non-discrimination, including that based on sex, in enjoyment of rights as recognised in the ICCPR. Article 3 of the ICCPR is reinforced by Article 3 which explicitly addresses gender equality by stating “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”.

The applicants claimed that these provisions were violated, in conjunction with articles 7, 17 and 19 of the ICCPR, since they could not enjoy their rights set in these articles because of their sex. They also alleged violation of Article 26, which is a free-standing guarantee of non-discrimination, including that based on sex, in relation to all rights, not only those recognised in the ICCPR. The applicants did not, however, raise any specific allegations regarding Article 26, thus this claim was
covered by the same arguments as presented in relation to violation of Article 2 para. 1 and Article 3 of the ICCPR.

The applicants argued that the criminalisation of abortion in cases of foetal impairment affected them disproportionately, because they were women who wanted to have an abortion to save their dignity, autonomy and their physical and psychological integrity. They pointed out that there were no similar restrictions on health services that were needed only by men. In addition, they raised the concern of the structural and pervasive character of the discrimination. As stated by the applicants, the abortion regime discriminated against them, both as individual women, and against women as a group.

Although the gender context of discrimination was raised by the applicants, the Committee focussed its considerations on a different area. It examined the treatment that the applicants were subjected to and compared it to the treatment experienced by women who, in case of a non-viable pregnancy, decided to carry the foetus to term. These women continued to receive the full protection of the public health system and all their medical needs, including post-natal and bereavement care, were covered by health insurance. The applicants who decided to abort had to travel abroad at their own expense and were deprived of any care from the public health care system. Accordingly, the Committee concluded that

“the differential treatment to which the applicant was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socioeconomic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose”.

[4, para. 7.11; 5, para. 7.12]

It should be noted that the Committee made its observation under Article 26 and decided not to examine separately the applicants’ allegations under Article 2 para. 1 and Article 3 of the ICCPR. Hence, its consideration did not focus on discrimination in enjoyment of the rights set forth in the ICCPR (particularly freedom from cruel, inhuman and degrading treatment and right to privacy), but in access to health care which falls outside the scope of the ICCPR. This is an important development for litigating reproductive rights as economic, social and cultural rights. Article 26 offers great potential to tackle cases in the context of discrimination and the Committee should be commended for doing so. On the other hand, these views are marked by some deficiencies when analysing the problem in the context of gender equality. As discussed in the following section, comments presented by some of the Committee members in their individual opinions demonstrate that the Committee’s views reflected a compromise between recognising the concerns in terms of formal equality, and tackling it in a more progressive fashion, through the lens of substantive equality.

The formal versus substantive equality approaches

The formal equality approach focuses on equality of treatment, rather than equality of results. A typical test applied by the Committee and other judicial or quasi-judicial bodies while dealing with discrimination cases aims to establish if an applicant was treated less favourably, because of his/her specific characteristic (e.g. sex), than a comparator, i.e. a similarly situated person or a group of different status. It is then examined whether this differential treatment meets requirements of reasonableness, objectivity and legitimacy of purpose. But when claiming gender discrimination in access to abortion how could a man be considered as a comparator to a pregnant woman?

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. These were hypothetical women in the same situation of having a non-viable pregnancy but treated more favourably by the state due to their decision to continue their pregnancy. The Committee focussed on the deprivation of benefits of public health care and the financial burden of terminating the pregnancy abroad. This is the important finding that opens room for future discussion before the Committee on socioeconomic obstacles in access to reproductive services and their impact on enjoyment of women’s human rights. This development also demonstrates the Committee’s readiness to use an intersectional approach while dealing with discrimination. In these cases, however, although true, socioeconomic circumstances were of secondary importance.

The applicants claimed to be discriminated against, not because they were indigent, but because they were women. In finding violations of Articles 7 and 17, the Committee based its
considerations on human dignity, integrity, and autonomy. Thus even if Ms. Mellet or Ms. Whelan were wealthy persons who could easily have travelled and paid for their medical services, their rights would still be violated. Moreover, as the Committee member Anja Seibert-Fohr indicates in her partly dissenting opinion, the Committee failed to specify the grounds for the alleged discrimination. In addition, in her very strict scrutiny of the alleged difference in treatment, Seibert-Fohr demonstrates the weakness of the Committee’s reasoning. She is right that neither a comparison to men, nor a comparison to other women could reveal discrimination in these cases [4, Annex V; 5, Annex IV]. But was it necessary to make the comparison test at all to find that the Irish abortion law results in gender discrimination? As it has been voiced in feminist legal discourse for decades, comparison (particularly between man and woman) constrains our understanding of equality and limits women’s access to justice:

“When women are compared to men, their opportunity to be treated as equal is limited to the extent that they are the same as men. This standard of comparison severely limits and circumscribes women’s equality claims. Issues such as pregnancy, discrimination, rape, sexual harassment, wife abuse, prostitution and pornography fall outside equality considerations because men have no comparable need. The similarly situated test is not met and thus, there is no legal basis for complaint. In other words, ‘[i]f men don’t need it, women don’t get it.’ Many legally sanctioned abuses women suffer are not considered equality issues at all. In this way, the formal equality theory effectively works to obscure the systemic, historically embedded, disadvantaged status of women.”

Here the concept of substantive equality comes into play. According to Sandra Fredman, “substantive equality is born out of disappointment and frustration at the limits of formal equality. It aims to take up the baton where formal equality leaves off”. This concept is built mostly on the shortcomings of formal equality which ignores the socio-economic disadvantage of belonging to a particular group. Formal equality is based on an assumption that “the individual can be abstracted from her gender, race or other status and dealt with entirely on merit”. In addition, “the abstract individual is clothed with the characteristics of the dominant group, which are then asserted as if they were universal”. In the case of gender, “equal treatment” means equalising the position of women to the “masculine norm”. On the other hand, the substantive equality approach assumes that for a variety of reasons the needs of specific groups, such as men and women, may differ and these differences should be accommodated to achieve the desired result, which is the full enjoyment of human rights.

By using the substantive equality approach, comparison may be replaced by other categories, such as disadvantage. It allows us to work out legal tools aiming to assess whether, according to the wording of Article 3 of the ICCPR, the “equal right of men and women” was ensured, rather than whether women were treated equally with men. This could be for instance, the four-dimensional concept of right to equality proposed by Sandra Fredman which aims to redress disadvantage: address stigma, stereotyping, prejudice and violence; enhance voice and participation; accommodate difference; and achieve structural change. A substantive equality approach was strongly incorporated in some individual opinions of the Committee members issued in the Mellet and Whelan cases. This was clearly pointed out by another Committee member, Sarah Cleveland, who noted that “women’s unique reproductive biology traditionally has been one of the primary grounds for de jure and de facto discrimination against women”. [4, Annex II, para. 12]

She demonstrated, in a very comprehensive comment, that the substantive equality approach is a prerequisite for modern gender discrimination law and fully justified in provisions of the ICCPR, as well as other treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (1979, hereafter CEDAW). Another Committee member, Yadh Ben Achour, stated unequivocally that “through its binding, indirectly punitive and stigmatizing effects, the prohibition of abortion in Ireland targets women, by virtue of being women, and places them in a particular situation of vulnerability, which discriminates against them in relation to men (…) The act of reducing the author to an instrument of procreation constitutes discrimination and infringes at once her freedom of self-determination and her right to gender equality and personal autonomy”. [5, Annex I, para. 7–9]

Similar views were presented by three other Committee members [5, Annex IV]. It is also worth noting that the Committee itself endorsed the applicant’s claims in Mellet and Whelan that
“criminalization of abortion subjected her to a gender-based stereotype according to which the primary role of women is reproductive and maternal” [4, para. 7.11; 5, para. 7.12]. This is probably one of the most important passages in these decisions, since the Committee clearly acknowledged that gender-stereotyping and the role of women in society stand behind bans of abortion. The Committee thus addressed the substance of gender inequality in these cases, but then turned to analyse differential treatment in which applicants were subjected to comparison with other women. This shift is not easy to understand. Perhaps there is some link in the Committee’s reasoning that is missing. It looks as though the Committee was about to undertake a substantive equality approach, then changed course half-way through. The Committee’s interpretations could have been developed further, since their decisions may serve in future as an important source and inspiration for legal claims on national levels. Reference to its own practice where the substantive equality perspective has already been integrated may be very beneficial.

The Committee’s general comments and concluding observations

The core provision of the ICCPR on gender equality is Article 3, which stipulates that “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”. The Committee provided an interpretation of this article in its General Comment No. 28 (2000).10 Although the comment did not refer to the substantive equality approach, it stated:

“The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant”. [3, para. 2]

The Committee subsequently identified several factors affecting the equal enjoyment by women of their rights under the ICCPR, frequently referring to reproductive topics. In relation to Article 6 (right to life), the General Comment demands that States Parties “give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions” [3, para. 10]. To assess a State’s compliance with Article 7 (prohibition of cruel and inhuman treatment) the Committee wanted to know whether the State gives access to safe abortions to women who have become pregnant from rape [3, para. 11]. Reproductive matters are also widely addressed in connection with Article 17 (right to privacy) [3, para. 20].

It should also be noted that in its General Comment No. 18 (1989) on non-discrimination, the Committee endorsed the definition of discrimination against women contained in Article 1 of CEDAW, which stipulates that discrimination:

“shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. [10, para. 6]

Thus, in addition to the formal equality approach, CEDAW, the cornerstone of women’s human rights, requires States Parties to take all appropriate measures to ensure substantive equality between women and men.11

The Committee also applies the approach undertaken in its General Comments in its concluding observations, presenting its assessment of the implementation of the ICCPR by the state parties. It recommends that States Parties should intensify their efforts to ensure substantive equality between men and women in all areas covered by the ICCPR.12 Access to reproductive health services, including abortion, is a matter of concern in numerous countries. These recommendations are formulated under the chapeau of several provisions of the ICCPR, including the anti-discrimination provisions, i.e. Articles 2, 3 and 26.13 The Committee’s concluding observations demonstrate that when it comes to a general assessment of a State’s law or practice concerning abortion, the Committee is accustomed to examining it in terms of a violation of gender equality.

The Committee’s case law

Mellet and Whelan are not the only cases where the Committee has had to deal with access to abortion as an equality matter. It was challenged for the first time with a gender discrimination claim regarding reproductive rights in Llantoy Huamán v. Peru
That case concerned a 17-year-old girl carrying an anencephalic foetus, denied an abortion by the public medical authorities and thus forced to give birth to a dying baby. In her communication to the Committee, she claimed gender discrimination in the exercise of her rights, since she was entitled to a therapeutic abortion, which was not carried out because of social attitudes and prejudices, thus preventing her from enjoying her rights to life, health, privacy and freedom from cruel, inhuman and degrading treatment on an equal footing with men. In her view, the fact that the state lacked any means to prevent a violation of her right to a legal abortion on therapeutic grounds, which is applicable only to women, together with the arbitrary conduct of the medical personnel, resulted in discriminatory practice that violated her rights. The Committee considered that her claims of alleged violations of Articles 3 and 26 of the ICCPR had not been properly substantiated, since she had not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the Articles in question. It appears that the Committee was expecting evidence that it could use to compare the treatment experienced by the applicant with the treatment experienced by a male comparator (who of course could not exist).

The Committee entirely changed its approach in its decision in *L.M.R. v. Argentina* (2011).15 In this case, the denial of access to an abortion was also at stake. The applicant submitted a claim of violation of Article 3 based on the same arguments presented in *Llantoy Huamán v. Peru*. The Committee considered that this allegation was closely related to those made under other Articles of the ICCPR and that they should therefore be considered together. As a result, it did not perform any comparison test aiming to establish gender discrimination. At the same time, however, neither did it make any assessment of the arguments presented by the applicant. It focussed mostly on her claims that she did not have access to an effective legal procedure that could safeguard her rights, and found a violation of Article 2 para. 3, in relation to Articles 3, 7 and 17 of the ICCPR. Although this was a commendable decision, being the first time the Committee had identified gender discrimination in access to reproductive services, it is unsatisfactory that the decision was not supported by a more profound analysis that could be used to guide future applicants, national bodies and other stakeholders.

**Conclusion**

In the cases of *Mellet v. Ireland* and *Whelan v. Ireland*, the Human Rights Committee found that human rights of individual women seeking access to abortion were violated as a consequence of anti-abortion law. These are ground-breaking findings of global significance. The Committee also considered the prohibition of abortion in terms of equality and found a violation of Article 26 of the International Covenant on Civil and Political Rights. It failed, however, to fully recognise these cases from the gender perspective and based its reasoning on other grounds. In consequence, the interpretation presented in the cases is somewhat unclear and leaves room for future interpretations. The views of the Committee, together with the individual opinions submitted by the Committee’s members, demonstrate a split in this body between the formal and substantive equality approaches. Although in both its General Comments and concluding observations the Committee recognised reproduction in the context of gender discrimination, finding evidence of gender discrimination in individual cases remains a challenge.

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Résumé

Cet article commente les avis du Comité des droits de l’homme (ci-après le Comité) dans les affaires Mellet c. Irlande [1] et Whelan c. Irlande. [2]. Il se concentre sur les conclusions du Comité concernant une violation de l’interdiction de la discrimination. L’interprétation présentée par le Comité, même si elle est très satisfaisante et conçoit indéniablement la santé et les droits reproductifs de manière progressiste, peut encore être améliorée. L’article affirme que le raisonnement du Comité est marqué par certaines inexactitudes dues à son approche incohérente de l’égalité entre hommes et femmes. Si le Comité semble avoir pleinement intégré une approche « d’égalité effective » lorsqu’il publie des observations générales sur les obligations des États en vertu du Pacte international relatif aux droits civils et politiques, son évaluation des affaires individuelles demeure dans une certaine mesure influencée par l’approche de « l’égalité formelle ».

Resumen

Este artículo comenta sobre los puntos de vista del Comité de Derechos Humanos de la ONU (en adelante el Comité) en los casos de Mellet contra Irlanda [1] y Whelan contra Irlanda. [2] Se centra en los hallazgos del Comité acerca de la violación de la prohibición de discriminación. La interpretación presentada por el Comité, aunque muy bien recibida, e indiscutiblemente dirigida a la salud y los derechos reproductivos de una manera progresista, aún deja margen para futuras mejoras. Aquí se argumenta que el razonamiento del Comité está marcado por algunas inexactitudes debido a su enfoque incoherente en la igualdad de género. Mientras que el Comité parece tener un enfoque de “igualdad sustantiva” plenamente integrado al ofrecer una interpretación general de las obligaciones de los Estados bajo el Pacto Internacional de Derechos Civiles y Políticos, su evaluación de casos individuales continúa siendo influenciada, en cierta medida, por el enfoque de “igualdad formal”.

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