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International human rights law, devolution and democratic legitimacy: the case study of abortion reform in Northern Ireland

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ABSTRACT

This article uses the case study of abortion law reform to critically assess what is required to secure democratic legitimacy in complying with international human rights law (IHRL) obligations. The case study exposes the inadequacy of the devolution arrangement. The article critiques the methodology through which the views, interests and priorities of the two systems are upheld and protected: a mere bifurcation of competence over law and decision-making. The devolution framework frames democratic legitimacy as requiring the representation of interests of only two governance systems to be balanced – the devolved people of Northern Ireland versus the collective interests of the United Kingdom (UK). Other systems of people with separate interests should be identified and represented.

The article assesses the role and challenges that IHRL presents in securing democratic legitimacy. On the one hand, it feeds into an iterative process of ensuring that the voices of those most affected by the law at issue are at the forefront of the law-making process – it facilitates their engagement with the state apparatus. On the other hand, the incorporation of IHRL must be consistent with the aims of the devolution framework: to balance the democratic will of the people of Northern Ireland and the collective will of the UK.

If we work from the premise that IHRL is democracy-enhancing in itself, then we need to prioritise inclusive processes for deciding the content of those norms and ensuring they are practically implemented. Devolution politics should not form a barrier to this overall goal.

Keywords: abortion; Northern Ireland; democratic legitimacy; devolution; international human rights law; CEDAW.

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INTRODUCTION

The Northern Ireland devolution legislation presents challenges to compliance with, and implementation of, international human rights law (IHRL). It lacks clarity on who has competence to legislate and implement law in the area at issue: the Northern Ireland legislature and executive or the United Kingdom (UK) Parliament and executive. Recent experiences of law reform in Northern Ireland in areas such as abortion, same-sex marriage, and domestic abuse have exposed ambiguities regarding compliance with IHRL obligations in the Northern Ireland devolution framework.[1] These legislative reforms have taken place in a context where the Northern Ireland state apparatus has been unwilling and/or unable to implement IHRL as a result of the Northern Ireland Assembly (the Assembly) and executive not being in operation,[2] stalemate induced by the consociational constitutional arrangement, or lack of political will in the Assembly to prioritise the issues that implicate IHRL.[3] When the Northern Ireland state apparatus has been unwilling and/or unable, Westminster has stepped in to legislate for Northern Ireland in areas that would otherwise be classified as devolved – ie within the legislative competence of Northern Ireland legislature and executive – in order to secure practical realisation of IHRL protections.

In a multilevel governance context, the current devolution framework relies on a concept of democratic legitimacy that aims to balance the views, interests and priorities of the people of Northern Ireland and the people of the UK. The devolution arrangement frames these issues as a power struggle between the two governance systems

1 Northern Ireland (Executive Formation etc) Act 2019, s 9 (NIEFA), Abortion etc: implementation of CEDAW recommendations; NIEFA, s 8: same-sex marriage and opposite-sex civil partnership; Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 (introduced 19 December 2019, in force on 13 January 2020); Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 SR 2022/57, aims to ensure incorporation of the Convention on Preventing and Combating Violence Against Women and Domestic Violence, otherwise known as the Istanbul Convention (adopted 11 May 2011, entered into force 1 August 2014). For discussion of issues regarding devolved and UK competence, see: The Pre-legislative Scrutiny Committee of the Domestic Abuse Bill England and Wales: Joint Committee on the Draft Domestic Abuse Bill, Draft Domestic Abuse Bill, First Report of Session 2017–2019; Ronagh J A McQuigg, 'Northern Ireland's new offence of domestic abuse' (2021) Statute Law Review 1–19.

2 The Assembly was suspended in January 2017 until 10 January 2020. At the time of writing, the Northern Ireland Assembly has been suspended since 10 May 2022.

3 See eg Ronan Kennedy, Claire Pierson and Jennifer Thomson, 'Challenging identity hierarchies: gender and consociational power-sharing' (2016) 18 British Journal of Politics and International Relation 618.

over who gets control over the law and decision-making in a particular subject area. It does not foresee overlap in a subject matter over which the UK has competence and an area over which Northern Ireland has competence. Further, it omits any concept of responsibility towards the people whose interests, priorities and views it avers to represent.[4]

This article uses the case study of abortion law reform to critically assess what is required to secure democratic legitimacy in that context. The case study exposes the inadequacy of framing democratic legitimacy as merely requiring the interests of two governance systems to be balanced – the devolved people of Northern Ireland versus the collective interests of the UK. It also critiques the methodology through which the views, interests and priorities of the two systems are upheld and protected: a mere bifurcation of competence over law and decision-making.

The article assesses the role and challenges that IHRL presents in securing democratic legitimacy. On the one hand, it feeds into an iterative process of ensuring that the voices of those most affected by the law at issue are at the forefront of the law-making process – it facilitates their engagement with the state apparatus. On the other hand, observance and implementation of IHRL must be consistent with the aims of the devolution framework: to balance the democratic will of the people of Northern Ireland and the collective will of the UK.

The next section of this article analyses the existing devolution framework on compliance and implementation of IHRL: the Northern Ireland Act 1998 (NIA), the Human Rights Act 1998 (HRA) and the Sewel Convention. It highlights the limited clarity in the wording of specific provisions regarding division of competence. Further, the legislative framework alludes to designating responsibility in the multilevel state apparatus for securing human rights protections to the people. The devolution framework comes under strain as its provisions cannot simultaneously recognise the constitutional significance of human rights; split up subject matter between UK and Northern Ireland institutions according to whether the issue implicates rights; and present human rights compliance as allocation of power rather than responsibility. The devolution arrangement recognises that human rights should be observed and complied with but leaves open the question of who should decide the normative content of indeterminate human rights obligations, which is the first step in securing their observance and implementation.

4 But see ss 5(6), 28(7), 28D, 28E, 107(5) of the Northern Ireland Act 1998 (NIA). See further, Anurag Deb, 'Devolved primary legislation and the gaze of the common law: a view from Northern Ireland' (2021) 3 Public Law 565. Deb notes that there are no general positive duties on the Assembly, except for two specific positive obligations to adopt the Irish language and Ulster Scots and to adopt strategies to tackle poverty, social exclusion and deprivation.

The third section of this article critically evaluates the concept of democratic legitimacy as a first step in addressing the question of who should decide the content of human rights norms. It argues that the constituent power is the source of legitimacy for the power exercised by the state. Democratic legitimacy requires identification of constituent power. There are transnational constituent powers within the UK that transcend devolved nation territorial boundaries that can be identified around the processes of deciding the content of indeterminate human rights norms. In this context the human rights regime provides a process that invites engagement from plural perspectives. Those most directly affected should be prioritised but others more indirectly affected can form part of the process too. At the edges of a constituent power are those who understand their identity as collective, connected with subscription to the core premises of the human rights norms at issue.

The fourth section introduces the case study of abortion reform in Northern Ireland. It looks briefly at the Northern Ireland legislature and devolution framework's treatment of abortion to critically reflect on its democratic credentials. It then elucidates the various ways in which domestic human rights litigation on IHRL and judicial review have enhanced democratic accountability by prioritising the voices of those for whom the law directly implicates, ensuring that a plurality of experiences is encompassed in the process of working out the content of indeterminate international obligations.

The fifth section argues that the normative content of the Convention on the Elimination of all forms of Discrimination Against Women[5] (CEDAW) Committee decisions and reports have encompassed a plurality of experiences of those most affected by criminalisation of abortion and lack of provision of abortion services, thus providing a starting normative framework upon which to work out the detail of abortion provision in Northern Ireland. On the other hand, the European Court of Human Rights (ECtHR) did not begin to engage with the lived experience of those who were criminalised and could not access services, abdicating any oversight of member state provision of reproductive health. The section then considers the processes that were used to legislate for the CEDAW Inquiry Report recommendations[6] – a further iterative process in working out the practical realisation of abortion provision based on the recommendations, which arguably do

5 CEDAW (adopted 18 December 1979, entry into force 3 September 1981) UNTS vol 1249, 13.

6 Report of the Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/C/OP.8/GBR/1) published on 6 March 2018 (CEDAW Inquiry Report).

not go as far as what was intended under CEDAW but take into account different perspectives as much as possible. This section also considers the attempts to challenge the introduction of abortion on grounds of severe foetal impairment (SFI). It considers the role of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) in prioritising and centralising the voice of disabled persons and its interrelationship with CEDAW.[7]

The article aims to highlight the deficiencies in the current devolution legislation in Northern Ireland on compliance with IHRL. It uses the case study of abortion reform in Northern Ireland to demonstrate the role that IHRL plays in enhancing democratic legitimacy in multilevel governance. This should inform how we go about assigning the allocation of responsibility and competence for deciding the content of IHRL standards. If we work from the premise that IHRL is democracy-enhancing in itself, then we need to prioritise inclusive processes for deciding the content of those norms and ensure they are practically implemented. Devolution politics should not form a barrier to this overall goal.

NORTHERN IRELAND ACT 1998, HUMAN RIGHTS ACT 1998 AND PARLIAMENTARY SOVEREIGNTY

This section demonstrates that the devolution framework divides the competence to make laws and decisions between the Northern Ireland and UK institutions according to different subject matter. The lack of clarity in the wording of specific provisions on compliance with IHRL is highlighted. Further, in dividing competence by subject matter, the devolution framework fails to provide clarity when there is overlap between subject matter over which competence has been given to the UK on the one hand, and Northern Ireland on the other. Third, by only providing rules on institutional powers, a vacuum arises with regard to responsibilities that should be incumbent upon the state. For example, taking measures to ensure that their people benefit from the human rights treaty protections to which the state is party. At present, the devolution framework is deficient in regulating compliance with IHRL.

Devolution legislation in Northern Ireland, Scotland and Wales aims to enhance democratic legitimacy by ensuring that the people in those nations can exercise control over particular areas of governance. This ensures decentralisation of power from the UK legislature and executive, wherein English MPs control the majority and effectively make decisions for all four nations. Devolution aims to give recognition

7 UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entry into force 3 May 2008) UNTS vol 2515, 3.

to the distinct democratic will of the people of each devolved nation, whilst simultaneously recognising the UK as a collective people in which the four nations have shared interests, goals and priorities.

Wales, Scotland and Northern Ireland have reserved models of devolution.[8] For Wales and Scotland, this means that subject matters not listed as reserved fall within the competence of the devolved institutions – decisions about the content of legal rules and how they are implemented.[9] For Northern Ireland, a distinction is made between transferred, excepted and reserved matters. Excepted matters under the NIA more closely resemble reserved matters in the Welsh and Scottish context, including international relations.[10] They are areas that may become transferred in the future but are at present within the competence of Westminster.[11] While Welsh and Scottish legislation contains detail on what constitutes a devolved issue, the NIA does not.[12] International law obligations give rise to an overlap in competence between Westminster and the devolved nations, between international relations and devolved matters.

Schedule 2, para 3(c), section 6 and section 26 NIA are under consideration here as the most significant for regulating compliance with IHRL. Schedules 2 (excepted matters) and 3 (reserved matters) provide that the Northern Ireland Assembly is empowered to make laws on issues that are not categorised as 'excepted' or 'reserved' to the competence of the Westminster Parliament. Brice Dickson notes that 'identifying whether a particular matter is transferred or not in Northern Ireland can be a time-consuming exercise'.[13] Schedule 2, paragraph 3, states that excepted matters include 'international relations ... but not (c) observing and implementing international obligations and obligations under the Human Rights Convention'. This provision could be interpreted as saying that implementation and observance of human rights is not within the exclusive competence of Westminster. However, this does not mean it intends that human rights are within the exclusive competence of devolved institutions. For example, subsidiarity to Northern Ireland was absolutely crucial

8 See eg NIA, s 4; Wales Act 2017, s 3(2)(c); Scotland Act 1998, s 29(2)(b).

9 Scotland Act 1998, sch 5; new sch 7A to the Government of Wales Act 2006 in sch 1, Wales Act 2017.

10 NIA, sch 2; NIA sch 3: reserved matters included seabed resources, civil aviation and the postal service.

11 NIA, s 4(2).

12 See eg Wales Act 2017, pt 2; Scotland Act 1998, chs 2–7, as amended by Scotland Act 2012 and 2016.

13 Brice Dickson, 'Devolution in Northern Ireland' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* 9th edn (Oxford University Press 2019) 239, 249.

for formulating counterterrorism and policing regulation in the post-conflict context of Northern Ireland.[14] But other actors in the multilevel governance system play a role in deciding the content, including the UK courts and the ECtHR. The meaning of 'implementation and observance' is ambiguous. Any information on the multilevel nature of deciding the content of an obligation under the European Convention on Human Rights (ECHR) is omitted. It is not clear whether the content of indeterminate IHRL obligations has been predetermined or whether that forms part of the process of observance and implementation.

Section 6(1) provides that 'A provision of an Act [of the Northern Ireland Assembly] is not law if it is outside the legislative competence of the Assembly', including when the issue the Assembly has legislated upon is not a devolved issue. The Assembly acts outside its legislative competence when legislation is 'incompatible with any of the [ECHR] rights' which are incorporated into domestic law through the HRA.[15] This provision implies it is not within the exclusive competence of the Assembly to decide the content of laws which implicate human rights. An actor or institution outside the Assembly has the ability to pronounce on the content of human rights, but it does not specify who that actor or institution is.

The HRA explicitly states that the continuing operation or enforcement of incompatible subordinate legislation will be affected if it is incompatible with human rights as decided by UK domestic courts.[16] The HRA incorporates the ECHR into UK domestic law. This means the ECHR is justiciable in UK courts.[17] The ECHR has a distinct constitutional status within the UK and devolution arrangement. The provisions of the HRA cannot be repealed by a devolved institution.[18] The HRA characterises an 'Act of the Parliament of Northern Ireland' and an 'Act of the Northern Ireland Assembly' as subordinate

14 See further, Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press 2010).

15 NIA, s 6(1)(c). NIA, s 24 states further that '[a] Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act – (a) is incompatible with any of the Convention rights'. It is important to note that the meaning of subordinate legislation under the NIA is different from its meaning under the HRA. The HRA meaning includes Acts of the Northern Ireland Assembly, the NIA definition does not.

16 HRA, s 3(2)(b).

17 See further, Roger Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' (2004) 12 Public Law 725.

18 NIA, s 7(1)(b), states that the HRA 'cannot be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland department'.

legislation.[19] Jack Simson Caird acknowledges that UK courts can issue a nonbinding declaration of incompatibility under section 4 HRA. However,

> [t]he devolution statutes go further. Courts can rule that provisions enacted by any of the devolved legislatures is legally invalid, if it is outwith competence ... This can be either because the legislature has legislated on a subject matter that has not been devolved, or because a provision is not compatible with Convention Rights.[20]

Legislation can be referred to the UK Supreme Court and challenged for falling outside the devolved legislature's competence, including on the grounds that it is incompatible with the ECHR.[21] There is therefore evidence from the NIA and HRA that the UK Supreme Court plays a significant role in deciding what is required by the HRA and that has a bearing on the content of rights. The ECHR breaks free of the bifurcated framing of competence. There are provisions in the HRA and NIA which strongly imply that UK domestic courts have the last word on the content of laws that implicate human rights under the ECHR. However, the devolution framework does not explicitly acknowledge this reality when ECHR obligations overlap with subject area that is described as within the competence of devolved or UK institutions. It does not explain the relationship between the multilevel courts, state actors and individuals affected by those laws. There is no explanation or justification for this role that has been accorded to the courts within the political constitution.

Section 26 of the NIA gives the Secretary of State for Northern Ireland (the S0S) the power to direct action to be taken by a minister or a Northern Ireland department if such action, in the view of the SOS,

> is necessary in order to comply with any international obligations, or defence or national security or the protection of public safety or public order. 'Action' includes making, confirming or approving subordinate legislation and, ... includes introducing a Bill in the Assembly.[22]

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19 HRA, s 21. *Re E's application* [2007] NIQB 58, [2008] NI 11 [62] (Gillen J): 'the [HRA] clearly contemplates that subordinate legislation which is incompatible with Convention rights may be quashed'.

20 Jack Simson Caird, 'The Supreme Court on Devolution' (House of Commons Library, Briefing Paper Number 07670, 27 July 2016).

21 Scotland Act 1998, sch 6; Government of Wales Act 2006, sch 9; NIA, sch 10; *The Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1015; *AXA General Insurance Limited v The Lord Advocate and others (Scotland)* [2011] UKSC 46, [2012] 1 AC 868; *Salvensen v Riddell* [2013] UKSC 22. This was the first time that the UK Supreme Court held that primary legislation enacted by a devolved legislature was outside its competence.

22 NIA, s 26(3).

Here we see that there is a power granted to the SOS to take action to ensure compliance by the Northern Irish Assembly and Government with international obligations. This provision implies that if the devolved institutions fail to observe or implement international obligations the UK Government may take practical measures to facilitate compliance. But there is no explicit explanation as to the relationship of this provision with schedule 2, paragraph 3(c), section 6, or the HRA. The language is framed in bifurcation of competence. It does not provide any information on when it may be 'necessary' for the SOS to intervene. It is not clear what is understood by 'comply' – whether it means domestic legislation, or the introduction of practical infrastructure and decisions over resource allocation to facilitate observance and implementation. There is a clear sense that there is a responsibility for someone to act to ensure compliance with international obligations. But the circumstances around which that takes place are not clear.

The UK Parliament has 'the right to make or unmake any law whatever; and, further, no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[23] Under the Sewel Convention, 'the UK Parliament will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'.[24] This Convention has been placed on a legislative footing in Scotland and Wales,[25] and recognised as applicable to Northern Ireland.[26] The UK Supreme Court has clarified that, despite the fact that Sewel has been placed on a legislative footing, it is only a 'statement of political intent' and does 'not create legal obligations'.[27] This is contentious, particularly in instances where Westminster unilaterally deprives a devolved nation of human rights protections despite an express lack of consent by the devolved nation legislature.[28] The breach of the Sewel Convention is met with great consternation from devolved nations threatening the fabric of the union as it undermines the multilevel democracy that the devolution

23 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1982) 3–4.

24 Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, October 2013, para 14.

25 Scotland Act 2016, s 6; Wales Act 2017, s 2.

26 'Devolution Guidance Notice 8 on Post Devolution Primary Legislation Affecting Northern Ireland'.

27 *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, [2018] AC 61, para 139.

28 See eg Christopher McCrudden and Daniel Halberstam, 'Miller and Northern Ireland: a critical constitutional response' (2016–2017) 8 UK Supreme Court Yearbook 299–343.

framework seeks to uphold. Westminster intervention in devolved subject matter needs much greater justification from a democratic legitimacy point of view than, simply, Parliament is sovereign.

With regard to compliance with IHRL obligations the devolution framework comes under strain as its provisions cannot simultaneously recognise the constitutional significance of human rights; split up subject matter between UK and Northern Ireland institutions according to whether the issue implicates rights; and present human rights compliance as allocation of power rather than responsibility. The devolution arrangement recognises that human rights should be observed and complied with but leaves open the question of what that means. The first step in observing and implementing IHRL is translating the indeterminate IHRL into specific rules, by gradations of specificity. This can be done through a process of legislation, regulation and practical application of the rules to different circumstances. Who gets to decide the content of indeterminate human rights norms at different stages of working out the specificity of those laws? The next section critically evaluates the concept of democratic legitimacy to begin the inquiry into who should decide the content of IHRL.

DEMOCRATIC LEGITIMACY: WHAT DOES IT REQUIRE?

In liberal constitutionalism, the constituent power is the source of legitimacy for the power exercised by the state. It is necessary to identify who will be the source of legitimacy for the constitutional arrangement and who can legitimately make decisions about its content and how it is changed.[29] They 'choose the form and substantive character of the governance system under which they wish to be governed and live cooperatively'.[30] Constituent power should be held by the 'people'.[31] The constituted power is the actor who alleges legitimate centralisation and use of its legal and political power to the benefit of all constituent powers. If the holders of constituent power remain unidentified and thus cannot exercise their warrant, the exercise of constituted power is inevitably constitutionally illegitimate.[32] As a first step, therefore, democratic legitimacy requires identification of the constituent power.[33]

29 Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) 90.

30 Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press 2014) 54.

31 Martin Loughlin, 'The concept of constituent power' (2014) 13(2) European Journal of Political Theory.

32 O'Donoghue (n 30 above) 201.

33 Samantha Besson, 'Whose constitution(s)? International law, constitutionalism, and democracy' in Jeffrey Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 394.

Democratic rule 'implies endowing those affected by that decision with the most voice, but it also implies listening to them'.[34] Identifying constituent power is recognised as a challenge in global governance where there are multifarious and overlapping sites of governance.[35] There needs to be a similar recognition, and attention given to, the overlapping and plural constituent power within the devolution framework in the UK. The devolution legislation facilitates greater democratic participation in local decision-making. The decentralisation of legislative and executive power facilitates decision-making that improves representation of the interests, priorities and viewpoints of those most directly affected at a local level. However, there needs to be a de-territorialised conception of constituent power when considering human rights and the voice that it gives to people, vis-à-vis the state, for shaping their lived experience.

Anthropomorphising England, Wales, Scotland, Ireland and the UK by according each state actor a voice through the devolution framework to represent the democratic will of the people can only go so far in securing democratic legitimacy. There are cross-sections of groups with specific characteristics and needs across the devolved nations who are not explicitly represented in the devolution framework, but implicitly in the idea of protection of human rights. People with disabilities, people capable of getting pregnant, victims of gender-based violence and domestic abuse, children – these groups are not localised in one devolved territory. The needs of these people cannot be differentiated depending upon which UK territory they are located in.

The human rights regime provides a process that invites engagement from plural perspectives. At the core of the process of constituent power ignited by human rights are those with the lived experiences for whom more is at stake. Those most directly implicated by the human rights norms should be prioritised in the iterative process of norm creation. From this core, the process moves out in concentric lines to people who level their own humanity on whether those human rights protections are secured to people directly implicated. The constituent power encompasses those indirectly affected. At its edges are those who feel the creation or destruction of a collective identity depending upon whether human rights protection is granted or not. In terms of the relationship between human rights and democratic legitimacy, human rights is not merely a counter-majoritarian discourse. It shapes and defines the governance order of a people and to which the people consent, reflecting the collective conscience and identity.

Feminist utopian narratives provide alternative methods beyond the electoral system, and the legislature, to identify and manage the

34 Ibid 399.

35 See eg O'Donoghue (n 30 above).

multiple and overlapping constituent powers upon which the state's claim to legitimacy rests. It identifies 'The People' as a 'series of persons in dialogue, rather than a homogenous whole'.[36] Ruth Houghton and Aoife O'Donoghue use Sally Miller Gearhart's *The Wanderground* as an illustration of identifying the constituent power through bringing together 'seemingly disconnected episodes the women had pieced together' of what happened.[37] All stories were collected, 'however dramatic or mild, however heroic or horror-ridden'. These past moments inform the identification of constituent power-holders. Constituent power becomes something that is 'tangible and experienced' between people.[38] Another metaphor used to help understand this construction of the collective or constituent power is taken from Naomi Alderman's *The Power* wherein the women (re)discover that they have a bar of static electricity in their collar bone and can give electric shocks. The separate stories of a number of female characters, who do not know each other, and operate individually, nodal characters, in different countries, collectively bring about change that results in a female-dominated society.[39] The force of the electricity, and therefore the 'power', is felt in the interrelation between the person giving off the spark and the other receiving it. Electricity is a powerful metaphor for a belief, instinct, empathy, sensibility that characterises the collective in the constituent power and not necessarily those directly affected. The concept of constituent power expressed here builds on this. It considers a process of constituent power ignited through human rights standards, recognising those most affected, but also wider groups of people forming a collective whose identity and existence rely on the fundamental promises of the human rights norm at issue.

Abortion reform in Northern Ireland has exposed the deficiencies of the devolution framework in failing to fully acknowledge the potential for overlapping constituent power in the devolution context. It demonstrated the role that IHRL played in identification of constituent power vis-à-vis the state. IHRL procedures, mechanisms, institutions and norms enhanced democratic accountability by prioritising the voices of those directly implicated by the human rights norms at issue.

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36 Ruth Houghton and Aoife O'Donoghue, '"Ourworld": A feminist approach to global constitutionalism' (2020) 9(1) Global Constitutionalism 38, 47.

37 Ibid 52 citing Sally Miller Gearhart, *The Wanderground* (The Women's Press 1985) 24.

38 Houghton and O'Donoghue (n 36 above) 55.

39 Ibid 53.

DEMOCRATIC LEGITIMACY: ABORTION LAW IN NORTHERN IRELAND

Prior to reform, abortion law in Northern Ireland was highly restrictive. In England, Wales and Northern Ireland, abortion was recognised as a criminal offence under sections 58 and 59 of the Offences Against the Person Act 1861 (OAPA), as it is in common law in Scotland.[40] Sections 58 and 59 of the OAPA made it an offence to procure a miscarriage or assist in procuring a miscarriage.[41] The only exception to the prohibition on abortion was when the continuance of the pregnancy posed a risk to the mental or physical health of a pregnant woman. This is enshrined in the Criminal Justice Act (Northern Ireland) 1945, section 25.[42] The risk needed to be probable[43] and the harm 'permanent or serious'.[44] The Northern Ireland legal framework on abortion is now in many respects the most progressive abortion regime in the UK as it is the only regime that decriminalises abortion with respect to the pregnant woman.[45]

There was limited progress in reform through the Northern Ireland Assembly. Sheldon et al provide a detailed description of voting practices on abortion in the Northern Ireland Assembly since 1984 which evidence a lack of willingness to legislate in this area.[46] On 10 February 2016, Members of the Northern Ireland Assembly (MLAs) voted, by 59 votes to 40, against legalising abortion in cases of fatal foetal abnormality (FFA), after an amendment was tabled by an MLA to the Justice (No 2) Bill.[47] Most opposition came from the Democratic Unionist Party (DUP) and Social Democratic and Labour Party (SDLP) while the Alliance and Ulster Unionist Party (UUP) were in favour of

40 See eg Jonathan Brown, 'Scotland and the Abortion Act 1967: historic flaws, contemporary problems' (2015) Juridical Review 2, citing John Fenton (1761), reported in J Burnett, *A Treatise on Various Branches of the Criminal law of Scotland* (Archibald Constable & Co 1811) 6; *Patrick Robertson and Marion Kempt* (1627) Hume I, 186.

41 Offences Against the Person Act 1861, ss 58 and 59.

42 Criminal Justice Act (Northern Ireland) 1945, s 25; *R v Bourne* [1938] 3 All ER 615.

43 *Northern Ireland Health and Services Board v A and others* [1994] NIJB 1.

44 *Western Health and Social Services Board v CMB* (unreported High Court, 29 September 1995).

45 Hannah Al-Othman and Laith Al-Khalaf, 'British women taken to court over abortions' *Sunday Times* (London 17 July 2022).

46 Sally Sheldon, Jane O'Neill, Clare Parker and Gayle Davis, '"Too much, too indigestible, too fast?" The decades of struggle for abortion law reform in Northern Ireland' (2020) 83(4) Modern Law Review 761.

47 A further amendment legalising it in cases of sexual crimes tabled by another MLA was also unsuccessful.

the legislation.[48] It is recorded in Hansard that the reason the DUP and SDLP voted against the FFA legislation was not because they were against reform, but because it required further 'careful consideration from the medical professionals, practitioners, families and ethics and legal experts to ensure that sufficient and proper clarity and guidance are the hallmarks of the way forward'.[49] The reasons for not voting in favour of reform differed between parties: there were those who felt it was not progressive enough. One cannot rely on a majority vote or lack thereof to substantiate the claim that abortion reform was not supported in the Assembly, never mind by the people of Northern Ireland.[50] The fact that the Northern Ireland Assembly did not vote in favour of abortion and may not have had any intention of doing so, does not make it illegitimate for these reforms to have taken place. A number of barriers were presented to reform within the Assembly.[51] The consociational arrangement in Northern Ireland prioritises ethno-religious and political representation which can mean that interests and issues falling outside this binary are not prioritised, such as issues relating to gender and race and socio-economic issues.[52] Further, abortion has never been adopted as a women's issue in the Assembly,[53] and 'debates at Stormont have been haunted by the spectre of the 1967 Abortion Act, which has been consistently presented as a thoroughly bad law and the antithesis of Northern Irish values'.[54] The electoral system thereby contributes to a marginalisation of the views and interests which fall outside the religious and political binary.[55]

Significant polling was undertaken in Northern Ireland that demonstrated a majority view that the people of that nation wanted to

48 At the time of the vote on the amendment, the make-up of the Assembly was DUP 38; Sinn Féin 29; UUP 16; SDLP 14; Alliance Party of Northern Ireland 8; Traditional Unionist Voice 1; Green Party 1; Independent 1.

49 Emma Little-Pengally (DUP), Justice (No 2) Bill Consideration Stage, 10 February 2016.

50 For the significance the UK Supreme Court placed on the Assembly vote in deciding, *obiter dicta*, that Northern Ireland abortion law breached art 8 ECHR see: *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27, [2019] 1 All ER 173, para 121 (*Re NIHRC 2018*).

51 See further Jane M Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82(3) Modern Law Review 525–548.

52 See eg Kennedy et al (n 3 above).

53 Sheldon et al (n 46 above) 778.

54 Ibid 779.

55 *Re NIHRC 2018* (n 50 above) para 110.

decriminalise abortion at least on certain grounds.[56] The polling was important for building political will and confidence in the UK Supreme Court when it decided *obiter dicta* that the present legislation violated the article 8 ECHR right to private life which in turn provided the political will for Westminster to intervene to legislate to repeal sections 58 and 59 OAPA.[57] However, we need to critically assess the idea that democratic legitimacy can be secured by a majority vote of a people defined by territorial boundary, regardless of the extent to which those people as individuals may be affected by the law. Further, it is not a yes or no vote on one rule or standard. Practical realisation of rights require detailed consideration of different factual circumstances that need a particular response or have different interests at stake.

Within the devolution framework, abortion is understood as a health and criminal law issue. Health and crime are not listed in the reserved or excepted matters in the NIA and are therefore devolved, 'transferred', and exclusively within the competence of devolved institutions.[58] Abortion as a human right complicates allocation of competence in the devolution framework. As noted previously, the NIA tends to bifurcate the question of competence between the Assembly and Westminster on who gets to decide the content of the rules and provides inconsistent answers to that question. It ignores other sources of information or democratic input, or at least does not explain how that may feature in an Assembly or Westminster intervention in a human rights issue.

The next section demonstrates how domestic human rights litigation and judicial review facilitated democratic participation by identifying the constituent power which would be affected by the law at issue. A process of identifying the constituent power took place in the lead-up to legislating (and continues in legislation and law-making) for abortion reform in Northern Ireland. This was through its courts, its legislatures, administrative processes and committees. Human rights

56 Northern Ireland Life and Times Survey: Ann Marie Gray, 'Attitudes to abortion in Northern Ireland' ARK Research Update' (ARK 2017) 115. See further Ann Marie Gray, Goretti Horgan and Paula Devine, 'Do social attitudes to abortion suggest political parties in Northern Ireland are out of step with their supporters?' (2018) Issue 7 ARK Feature.

57 *Re NIHRC 2018* (n 50 above) para 110, Lord Mance.

58 CEDAW Inquiry Report (n 6 above) para 53.

litigation facilitated, and continues to facilitate, the identification of the constituent power.[59]

Early litigation

Feminist cynicism towards the law, and pursuing feminist demands through the courts through judicial review, is justified. One need only look at the slow progress of abortion litigation over the last 20 years to share this cynicism.

In the early 2000s, the lack of guidance for those providing abortion care was subject to protracted litigation between the Department of Health, Social Services and Public Safety (DoH) and the Family Planning Association of Northern Ireland (FPANI).[60] The FPANI sought judicial review against the Minister of Health, Social Services and Public Health in respect of their alleged failure to discharge duties under the Health and Personal Social Services (Northern Ireland) Order 1972 for provision of adequate healthcare.[61] The applicants provided that women were not receiving abortions in Northern Ireland even when it was legally permitted because of the lack of guidance on legality of abortion and chilling effect on medical practitioners. They called for the SOS to ensure that guidance was put in place so that women could safely access an abortion in Northern Ireland where it was legally permitted. In that case, Nicholson LJ stated

> I am not saying that guidelines should be issued. I am saying that the department ought to investigate whether guidelines should be issued, by consulting the Royal College of Obstetricians and Gynaecologists and the Royal College of Psychiatrists and the medical practitioners, including GPs in Northern Ireland.[62]

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59 For further analysis on the identification of constituent power through human rights adjudication, see Jane M Rooney, 'The democratic function of extraterritorial human rights adjudication' (2019) 6 European Human Rights Law Review 623. *In the Matter of an Application for Judicial Review by the Northern Ireland Human Rights Commission* [2015] NIQB 96 (*Re NIHRC 2015*); *In the Matter of an Application for Judicial Review by the NIHRC* [2017] NIQB 42 (*Re NIHRC 2017*); *R (on the application of A and B) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492; *Re NIHRC 2018* (n 50 above); *Ewart's (Sarah Jane) Application* [2019] NIQB 88; *In The Matter of an Application by Sarah Jane Ewart for Judicial Review (Relief)* [2020] NIQB 33.

60 *Family Planning Association of Northern Ireland v Minister of Health, Social Services and Public Safety* [2004] NICA 39 (*Re FPANI*); see further Fiona Bloomer and Eileen Fegan, 'Critiquing recent abortion law and policy in Northern Ireland' (2014) 34 Critical Social Policy 109–120.

61 At the time of the hearing, the duties fell to the SOS as a result of the reintroduction of Direct Rule. See further arts 4, 14, 15(1) and 51 Health and Personal Social Services (Northern Ireland) Order 1972.

62 *Re FPANI* (n 60 above) para 155.

In this 2004 litigation we see a reluctance on the part of Northern Ireland judges to compel the DoH to issue guidelines on existing legal grounds for abortion so that women can seek abortions when it is legal to do so. The decision merely requires an investigation into whether guidelines should be issued.

While the judicial decisions resulting from review were not satisfactory, the strategic litigation did perform alternative valuable functions in pursuing feminist demands. When eventually published, the 2013 Draft Guidance for medical professionals on the lawful termination of pregnancy from the DoH prompted 'mainstream human rights participation'.[63] Mairéad Enright, Fiona de Londras and Kathryn McNeilly write that feminist activists saw human rights litigation as one tool amongst many at their disposal in order to force the state to bring about legal change: 'a stick to beat the establishment with'.[64] Feminist activists refused law's respectability, and decentred law in their work. Strategic human rights litigation provided sites for 'politics by other means', a means to an end, and legal change was not an end in itself.[65]

Human rights litigation and judicial review

Susan Marks reminds us that democracy is not synonymous with elections. A procedural conception, 'centred on periodic elections which are free and fair and associated rights of political participation', falls short of a substantive conception that addresses equality guarantees and other issues of lived experience of the people that fall outside power politics.[66]

The Northern Ireland Human Rights Commission (NIHRC) litigation, challenging Northern Ireland abortion law through the UK courts, told the stories of pain and violence inflicted upon women and children as a result of that law.[67] The NIHRC argued that the prohibition of abortion in cases of FFA and sexual violence was a

63 Catherine O'Rourke, 'Advocating abortion rights in Northern Ireland: local and global tensions' (2016) 25(6) Social and Legal Studies 716, 730.

64 Linda Kavanagh quotation taken from Mairéad Enright, Kathryn McNeilly and Fiona De Londras, 'Abortion activism, legal change, and taking feminist law work seriously' (2020) 71(3) Northern Ireland Legal Quarterly 1.

65 Ibid.

66 Susan Marks, 'What has become of the emerging right to democratic governance?' (2011) 22(2) European Journal of International Law 507.

67 See further Bríd Ní Ghráinne and Aisling MacMahon, 'Abortion in Northern Ireland and the European Convention on Human Rights: reflections from the UK Supreme Court' (2019) 68 (2) International and Comparative Law Quarterly 477; Lynsey Mitchell, 'Reading narratives of privilege and paternalism: the limited utility of human rights law on the journey to reform Northern Irish abortion law' (2021) 72(1) Northern Ireland Legal Quarterly.

violation of a number of rights under the ECHR, incorporated under the HRA: article 8, right to private and family life; article 3, right against inhumane and degrading treatment and punishment, and torture; and article 14, right against discrimination. The NIHRC forced the state, and the public, to acknowledge and take responsibility for the law and political order. The litigation through the High Court, Court of Appeal and UK Supreme Court challenged the law by setting out the lived experience of that law through the stories of affected women. The constituent power of the governance framework in question was constructed through those stories and the sharing of these stories shook the conscience of 'the people'. While the litigation did not result in a legal victory, it played a role in highlighting the most harmful and violent encounters women and children faced with the law.[68]

Sarah Jane Ewart's story of the prohibition on abortion in cases of FFA was used to demonstrate the lived experience of those who had to travel to England to access abortion in cases of FFA.[69] Her story was set out in full by the High Court, Court of Appeal and UK Supreme Court. Sarah Jane Ewart was diagnosed with anencephaly which results in malformation of the brain and renders the child incapable of an independent life outside the womb. She was refused an abortion in Northern Ireland and had to travel at short notice and in great distress to England. She had to have a scan every two weeks to ensure that the foetus continued to survive because if the foetus had died inside her then it had the potential to poison her. Her distress was exacerbated by the fact that it could happen again if she were to become pregnant in the future. Her choice was to either carry the baby and face the possibility that it would die before it was born; a long and dangerous delivery knowing that the child would not survive; or go to England to have an abortion, outside the security and familiarity of her own health care system.

Dawn Purvis, Programme Director of the Marie Stopes International, provided two different stories of the violence endured as a result

68 In the High Court, Horner J found a violation of art 8 in respect of lack of provision of abortion in cases of FFA, rape and incest. The Court of Appeal did not find a violation of art 8 in this respect. However, it is important to note that Morgan LCJ found no violation because he reasoned that the existing regime at the time could be read as allowing for abortion in cases of FFA, rape and incest through the use of s 3 HRA. The UK Supreme Court found *obiter dicta* that there was a violation of art 8 in respect of FFA, rape and incest. See further, Rooney, 'Standing and the Northern Ireland Human Rights Commission' (n 51 above). The testimonies in this section are taken from *Re NIHRC 2015* (n 59 above) paras 24–29; *Re NIHRC 2017* (n 59 above) paras 14–32; *Re NIHRC 2018* (n 50 above) paras 85–91.

69 AT made an affidavit on behalf of Alliance for Choice speaking about her experiences of the prohibition on abortion in cases of FFA. Client A from Marie Stopes International also had an FFA. Her story was raised in the Court of Appeal.

of the law on reproductive rights in Northern Ireland. Client B had been raped by her partner. She did not want any more children but her partner refused to allow her to use any form of contraception. Her general practitioner (GP) refused to refer her to any healthcare provider for further assessment or assistance because abortion was illegal in Northern Ireland. She was distressed that she would have to travel to England. She was scared of the potentially violent reaction if her boyfriend found out that she was pregnant and planning a termination. Client C, 13 years old, was impregnated by a relative as a result of sexual abuse. She was beyond nine weeks and four days when she attended Marie Stopes International and was reported to the police. She had to travel outside Northern Ireland in a frightened and distressed condition due to her later gestation. The remains of the aborted foetus had to be retained for evidence in event of prosecution. She made a general statement to the affect that she had witnessed the 'severe levels of degradation, humiliation and pain that women have to endure in already emotionally painful circumstances'.[70] The financial costs, especially for children who had become impregnated, and the added distress caused by having to travel, were also recounted by the Director of Abortion Support Network.[71] Ms Purvis helped to identify the constituent power.

If the Supreme Court had made a declaration of incompatibility *ratione materiae*, the Northern Ireland Assembly would have been legally bound to change the law on abortion. As it stood, the decision was *obiter dicta* as a result of lack of standing of the NIHRC. Regardless of the legal outcome, the force of this litigation over a five-year period raised the consciousness of the state and led to the Women and Equality Committee report recommending that the SOS make provision for abortion in line with the CEDAW recommendations[72] and immediately in accordance with the UK Supreme Court judgment to legalise abortion in cases of FFA, rape and incest.[73] Human rights norms enabled for a section of those affected by abortion laws, a part of the constituent power, to identify themselves through the state apparatus which facilitated their participation in legal and political processes.

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70 *Re NIHRC 2017* (n 59 above) para 19.

71 Mara Clarke, the Director of Abortion Support Network, presented a number of stories regarding the financial abuse caused by Northern Ireland abortion law.

72 'Abortion law in Northern Ireland', Women and Equalities Committee (House of Commons (*parliament.uk* 25 April 2019) ch 10, para 3.

73 Ibid para 4.

A judicial review case merits attention: *JR76*.[74] It demonstrates the shortcomings of the post-decriminalisation regulation of abortion as it fails to take into account the lived experience of those who require telemedical abortion. It exposes the fact that this is a shortcoming of provision of reproductive rights across the UK and the reality of the lived experience. The *JR76* judicial review concerned a mother who was prosecuted for unlawfully procuring and unlawfully subscribing a poison or other noxious thing (mifepristone and misoprostol), knowing that it was intended to be unlawfully used with intent to procure a miscarriage by her daughter contrary to section 59 of the OAPA. The daughter was 15 and in an abusive relationship at the time of getting pregnant. The mother obtained the pills through Women on the Web which is a charity that provides mifepristone and misoprostol to women under 10 weeks pregnant.[75] After taking the pills the daughter experienced heavy bleeding and went to her GP. The GP referred her to social services and the police were contacted. They decided to prosecute the mother in April 2015. As a result of the Northern Ireland Executive Formation and Exercise of Functions Act (NIEFA) coming into force on 22 October 2019, the charges against the mother were dismissed on 23 October 2019. The mother challenged the decision of the Director of Public Prosecution to prosecute arguing it was a breach of article 8 ECHR, and a breach of her daughter's rights under articles 8 and 3 ECHR. The decision of Morgan LCJ was handed down in December 2019. This was during the interim period between section 9 NIEFA decriminalising abortion and the new regulatory regime set out in the 2020 regulations.

In deciding whether there had been a breach of article 8, Morgan LCJ took into account the fact that the mother's conduct would have been contrary to the criminal law of all four nations in the UK because medical supervision is legally required for taking the first medication mifepristone before administering the second medication at home, misoprostol.[76] He found that the decision to prosecute in the circumstances was not unreasonable. While the decision ultimately went against the woman and child, it highlighted another story of violence committed against the woman and child as a result of abortion law: the prosecution of a mother for helping her child to end a pregnancy that resulted from non-consensual sexual relations, in what she thought was the safest, and least harrowing, means for her daughter.

74 *In the Matter of an Application for Judicial Review by JR76 and in the Matter of a Continuing Decision by the Director of Public Prosecutions to Prosecute the First Applicant* [2019] NIQB 103 (*Re JR76*).

75 Women on Web.

76 *Re JR76* (n 74 above) para 57.

The constituent power is also identified in judicial review proceedings on commissioning.[77] The NIHRC sought judicial review of the failure of the SOS, the Northern Ireland Executive Committee and the Northern Ireland Minister for Health to commission abortion services under the Abortion Regulations 2020. The DoH believed that it required executive committee approval in order to commission services.[78] In light of the fact that executive committee was withholding approval, the DoH communicated to the Northern Ireland Office that commissioning would require the SOS to direct action from the executive committee. Despite being made aware of these issues, the Northern Ireland Office did not take action. The court found that the DoH had not done anything to obstruct commissioning of services, that the executive committee had no executive power and the SOS did not have the power to direct the executive committee under the 2021 regulations as it was not a 'relevant person' against which action could be taken against for the purposes of commissioning abortion.[79] The court instructed the SOS to clarify to the DoH that they did not require executive committee approval in order to commission abortion services. On 19 May 2022, the SOS introduced further regulations, the Abortion (Northern Ireland) Regulations 2022, and the Abortion Services Directions 2022, stipulating that executive committee approval was not required for the DoH to continue with commissioning.

Again, an affected individual with a different story broadens our understanding of who is impacted by the lack of provision for abortion and how that impact affects their lives in tangible terms. The deponent was a woman in her mid-40s, married with four children. She resorted to early medical abortion with no medical assistance. At this time abortion was decriminalised in Northern Ireland and the pregnant woman could not be prosecuted for taking this action. She felt lucky that she had a supportive husband and money to pay for an early medical abortion:

> Nonetheless, having to deal with this unexpectedly and at short notice was extremely stressful and I do wonder what it would be like for other women facing different circumstances. I felt that it was deeply unfair that I could not access a service because of where I lived and that I had

77 *In the matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review – In the matter of the Failure by the Secretary of State, Executive Committee and Minister of Health to Provide Women with Access to Abortion and Post Abortion Care in All Public Health Facilities in Northern Ireland* [2021] NIQB 91 (*Re NIHRC 2021*).

78 NIA, s 20, s 28A; Ministerial Code.

79 Abortion (Northern Ireland) Regulations 2021 (SI 2021/365), 31 March 2021, reg 2(3). NIA, s 23(2), vests in ministers and Northern Ireland departments the right to exercise executive power.

> to go through this without local clinical support and ready access to after-care services if needed.[80]

Here we see a woman who sought abortion services because she did not want to have further children. She made her own decisions on family planning. She highlighted those women who would be more severely impacted by lack of commissioning, identifying a broader group of people affected who simply want to exercise a right to reproductive autonomy and not have further children. It also points to the importance of being able to access telemedical abortion in the context of no commissioning of services on the ground.

Democratic legitimacy requires that the subjects of a governance order, the constituent power, have to have a say in the way they are governed. It is important that, when constitutional lawyers speak about how reform of abortion law came about in Northern Ireland and its future commissioning, we remember the constituent power and their stories. A myriad of individual standpoints inform the constituent power: they form 'a unit, a conscious group', a community, and human rights litigation helped to facilitate an unearthing of that community. There are transnational constituent powers within the UK that transcend devolved nation territorial boundaries that can be identified around the processes of deciding the content of indeterminate human rights norms. In this context the human rights regime provides a process that invites engagement from plural perspectives. Those most directly affected should be prioritised, but others more indirectly affected can form part of the process too. At the edges of a constituent power are those who understand their identity as a collective as connected with subscription to the core premises of the human rights norms at issue. Human rights adjudication and mechanisms facilitated a joining together of narratives to produce a picture of constituent power that is affected by the legal framework regulating reproductive rights.

DEMOCRATIC LEGITIMACY: CEDAW

Section 9 NIEFA, 'Abortion etc: implementation of CEDAW recommendations', was voted in by a majority of the House of Commons in Westminster: 332 to 99 in favour of the amendment.[81] Section 9(10) clarifies that the CEDAW recommendations are those from the 2018 CEDAW Inquiry Report.[82] This section repealed sections 58 and 59 of the OAPA 1861 and required the SOS to direct action to commission abortion services. There was support for the proposition

80 *Re NIHRC 2021* (n 77 above) para 4.
81 See further, Sheldon et al (n 46 above).
82 CEDAW Inquiry Report (n 6 above) paras 85 and 86.

that Parliament should legislate to legalise abortion in cases of FFA and rape/incest, rather than to legislate the CEDAW recommendations.[83] It is considered here why the CEDAW requirements were better at that juncture in the iterative process for informing the content of the new legal framework for abortion in Northern Ireland rather than ECHR standards. Whilst the devolution framework distinguishes the ECHR and CEDAW, giving the former a higher authoritative legal status, CEDAW constitutes a more democratic framework. It encompasses a plurality of experiences of those most affected by anti-abortion laws. The ECHR does not sufficiently acknowledge the lived experience of criminalisation and lack of abortion services. Instead, it obfuscates any role it could potentially have in being a democracy-enhancing institution because it differs to the approach adopted by the outlier member state against which proceedings are brought.

Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) requires that 'any relevant rules of international law applicable in the relations between the parties' be taken into account in the interpretation of another treaty. *Lex specialis derogate legi generali* is a rule of treaty interpretation that requires that the treaty provision that 'approaches nearer to the point in question' applies over the more general rule.[84] CEDAW and UNCRPD provide more specific standards on reproductive rights and the rights of disabled people respectively. The UN Human Rights Committee General Comment No 36 demonstrates that the standards promulgated by CEDAW and UNCRPD are recognised as providing best practice on abortion law.

Deficiencies of ECHR protection

The deficiencies of the ECHR protection of reproductive rights are well known amongst feminist human rights scholars. For example, Lynsey Mitchell argues that the ECHR embodies a paternalistic conception of reproductive rights, seeing abortion as a privileged exception from criminalisation. UK courts similarly adopt these paternalistic narratives. In both ECtHR and domestic decisions, 'women need to make sure they fit the characterisation of victimised and desperate to invoke law's paternalistic permission'. They must 'position abortion as tragic but necessary for particular worthy groups of women who can be portrayed as unfortunate victims'.[85]

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83 See further Claire Pierson and Fiona Bloomer, 'Macro- and micro-political vernacularisation of rights: human rights and abortion discourses in Northern Ireland' (2017) Health and Human Rights Journal 173.

84 Emmerich de Vattel, *The Laws of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nation and Sovereigns*, bk II, ch XVII, paras 311, 316 (1793).

85 Mitchell (n 67 above) 115.

There is no right to abortion in any circumstances under the ECHR.[86] This is at odds with the UN Human Rights Committee,[87] Inter-American system,[88] and the African system,[89] which make provision for a substantive right to abortion to varying extents.[90] The ECtHR has found that when abortion is legal in a member state, that state has an obligation to make provision for abortion.[91] State obligations include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures.[92] This positive obligation requires that legislation clearly articulates when a woman can access an abortion, health services that provide abortions, and the prevention of intimidation, at least from the media, of women and girls who seek a legal abortion.[93] This means that the ECHR only requires the state to provide access to abortion that is legal in that member state with no judgement on whether it is permitted at all in that member state.[94]

The ECtHR has been criticised extensively in failing to recognise the most egregious circumstances of criminalisation of abortion as triggering the prohibition on torture and inhumane and degrading

86 *Tysiac v Poland* App No 5410/03, ECtHR, 20 March 2007. See further 'The right to abortion and the European Convention on Human Rights' (*Völkerrechtsblog* 19 March 2023).

87 See eg UN Human Rights Committee, General Comment No 36 on art 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para 8, which includes many requirements including the decriminalisation of abortion.

88 Inter-American Commission on Human Rights, Press Release 165/17, 13 October 2018: criminalisation is prohibited where the woman's life is at risk, when the pregnancy results from rape or incest, or imposes disproportionate burden on a woman's exercise of her rights.

89 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2005. Art 14(1) provides that: 'States Parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.' Art (2)(c) requires that states 'protect the reproductive rights of women by authorising the right to a medical abortion when the pregnancy she carries is the result of rape, forced sexual relations, incest … or when continuing with the pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.

90 See further Christina Zampas and Jaime M Gher, 'Abortion as a Human Right—International and Regional Standards' (2008) 8 Human Rights Law Review 249–294; Rachel Rebouché, 'Abortion rights as human rights' (2016) 25 Social and Legal Studies 765.

91 *A, B and C v Ireland* App No 25579/05, ECtHR, 16 December 2010.

92 *Tysiac* (n 86 above) para 110.

93 *RR v Poland* App No 27617/04, ECtHR, 26 May 2011.

94 Joanna N Erdman, 'Procedural abortion rights: Ireland and the European Court of Human Rights' (2014) Reproductive Health Matters 22.

treatment.[95] Article 3 can only be triggered when there is legal provision for abortion in the state but there is not adequate procedural mechanisms in place to ensure practical implementation.[96] For example, in *P and S v Poland*, a child aged 14 became pregnant due to rape. While the abortion was legal under Polish law and the child eventually received the abortion, it was only after misinformation, procrastination, refusals to conduct the abortion, public intimidation, including bringing criminal proceedings against the young girl, for unlawful sexual intercourse. The Polish state was found in breach of article 3 for the degrading treatment suffered by the girl. Limiting article 3 to cases in which abortion is legal in a state is both regressive and at odds with the UN Human Rights Committee.[97] The ECtHR does not consider that article 14 right against discrimination is relevant to the question of provision of abortion which is also at odds with the UN Human Rights Committee.[98]

The ECtHR offers a wide margin of appreciation to states in deciding on reproductive healthcare and the UK Supreme Court was able to decide that Northern Ireland abortion laws were in violation of human rights insofar as the law prohibited abortion in cases of FFA and rape or incest.[99] However, the prohibitive rules under the HRA on standing meant that this decision was only *obiter dicta*. The rules on standing reflect a male-oriented conception of human rights violations by defining the victim as one who has experienced an individualised unlawful act rather than systemic harm perpetuated through a legislative regime.[100] The 'ubiquitous' harm that women face through the criminalisation of abortion, the way it shapes female behaviour and choices, is not understood by the rules of standing in the HRA, which require the identification of a single incident at the direct hands of the state that a man might fear, such as torture in detention.[101] Keegan J noted in HRA proceedings brought by Sarah Ewart in the Northern Ireland High Court, following the decision on standing in the

95 See further Jane M Rooney, 'Abortion in Northern Ireland: a missed opportunity to consider article 3?' (2019) 41(2) Journal of Social Welfare and Family Law 1; Ruth Fletcher, 'Contesting the cruel treatment of abortion-seeking women' (2014) 22 Reproductive Health Matters 10.

96 *P and S v Poland* [2012] ECHR 1853.

97 *Mellet v Ireland* UN Human Rights Committee Decision CCPR/C/116/D/2324/2013, 9 June 2016; *Whelan v Ireland* CCPR/C/119/D/2425/2014, 12 June 2017; Fiona de Londras, 'Fatal foetal abnormality, Irish constitutional law, and Mellet v Ireland' (2016) 24(4) Medical Law Review 591.

98 Ibid para 13, concurring opinion of Sarah Cleveland.

99 Ghráinne and MacMahon (n 67 above).

100 Rooney, 'A missed opportunity to consider article 3?' (n 95 above).

101 Ibid.

UK Supreme Court, that taking the position that an unlawful act was required for an applicant to have standing in the current circumstances,

> throws up the prospect that some other young woman faced with this type of situation would be required to come forward and pursue litigation at a time when she would undoubtedly be faced with the trauma and pain associated with her circumstances.[102]

CEDAW Inquiry Report

> And the CEDAW investigators were, I think, it's fair to say just absolutely blown away... when you're actually here talking to people about what it's like, when you're talking to the women concerned who have had to jump through hoops or were denied an abortion and the impact of that ... So, whenever the CEDAW report came out, I just kept saying, 'They listened to us. They listened to us, and they got everything ...'[103]

The CEDAW inquiry facilitated a broader recognition of constituent power. CEDAW provides a legal and normative framework that invites a broader range of stories to be told beyond the instances of prohibition of abortion where the pregnancy results from sexual violence or where a person has to carry a pregnancy to term in cases of FFA.[104]

As well as hearing about the law and statistics on abortion in Northern Ireland, their visit to Northern Ireland also entailed hearing testimonies from women on the impact of the law on their lives. The CEDAW Inquiry Report notes what the Committee heard during that visit and how it informed their reading of the requirement of the CEDAW treaty obligations. They learned from the women who had undergone an abortion outside Northern Ireland about the post-procedure mental anguish they experienced. They were discharged on the day of the procedure and often, to economise, would immediately return to Northern Ireland despite their vulnerable physical and mental state.[105] Once returned, women described fearing community stigma and possible prosecution and hence remained secretive about the abortion, including from their doctors. In addition to descriptions of feeling 'dirty', 'shameful', 'pressured to just get on with it', these women described how the culture of silence impacted their health.[106]

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102 *Re Sarah Jane Ewart* (2019) (n 59 above) para 62; Jane Rooney, 'Abortion in Northern Ireland: the Ewart judicial review judgment' (*University of Bristol Law School Blog* 17 October 2019).

103 Interview conducted with Dr Fiona Bloomer, Ulster University, as part of the British Academy-funded Project: Bridging the Local and Global: Archiving Women's Collectives in Spaces of Action/Reflection – Durham University.

104 For a full explanation of the context under which the CEDAW special inquiry was requested see O'Rourke (n 63 above).

105 CEDAW Inquiry Report (n 6 above) para 30.

106 Ibid.

Testimonies revealed that the absence of any established protocols regarding the transfer of foetal remains had resulted in women resorting to undignified transporting practices, including in cooler boxes or hand luggage, at the mercy of airline personnel.[107] Furthermore, no protocol on the reception of foetal remains by Northern Ireland mortuaries existed.[108] Testimonies revealed that the stress of undergoing an abortion outside Northern Ireland was compounded by logistical arrangements, for example for women and girls who do not possess a driver's licence or passport, securing photographic identification for travel within the tight timeline in which an abortion can be performed was a challenge.[109] The CEDAW inquiry facilitated identification of the constituent power through enabling those affected by the law to tell their varied stories demonstrating the variety of harm as a result of having to travel outside the jurisdiction of Northern Ireland.

CEDAW in section 9 of the Northern Ireland Executive Formation Act 2019

The CEDAW Inquiry Report provided a positive normative framework upon which to start a consultation about practical detail of regulations. The abortion reform process is a positive example of a multilevel iterative process for enhancing democratic legitimacy. Momentum was ignited by human rights litigation and the CEDAW report. It instigated an inclusive process of formulating a considered policy and legal response to criminalisation and lack of commissioning. The provisions are deficient in many ways and there have been considerable delays in commissioning of abortion services. A ringfencing of funding for the services was imposed by the SOS on the Northern Ireland DoH in December 2022 following from judicial review of lack of commissioning.[110] But it represents an interpretation of the open-ended nature of certain NIA provisions that has led to positive reform and not stalemate.

The main substantive change made through section 9 NIEFA was to decriminalise abortion in Northern Ireland in accordance with paragraphs 85 and 86 of the CEDAW report.[111] Section 9(2) repealed sections 58 and 59 OAPA and section 9(3) required ongoing investigations and criminal proceedings brought under those sections of the OAPA to be discontinued. The SOS was not only empowered, but

107 Ibid para 32.
108 Ibid.
109 Ibid paras 25–29.
110 'DoH Statement' (Department of Health 2 December 2022); *Re NIHRC 2021* (n 77 above).
111 See further Elizabeth Rough, 'Abortion in Northern Ireland: recent changes to the legal framework' (House of Commons Library 1 June 2022)

also legally bound '[to] ensure that the recommendations in paragraphs 85 and 86 of the CEDAW report [were] implemented' to the extent that they believed it was 'necessary or appropriate'.

Paragraph 85 of the 2018 CEDAW Inquiry Report recommends that the UK 'urgently' adopt legislation to, first, decriminalise abortion:

> (a) Repeal sections 58 and 59 of the Offences against the Person Act, 1861, so that no criminal charges can be brought against women and girls who undergo abortion or against qualified health-care professionals and all others who provide and assist in the abortion.

Section 25 of the Criminal Justice (Northern Ireland) Act 1945 is not mentioned. But considering it criminalises women and third parties for procuring abortion in every instance except when there is a danger to the woman's life, the requirement to repeal this provision is implied. Second, the CEDAW Committee recommends the provision of abortion 'at least' in cases of a 'threat to the pregnant woman's physical or mental health, without conditionality of "long-term or permanent" effects';[112] provision of abortion in cases of rape and incest;[113] and in cases of SFI, including FFA, 'without perpetuating stereotypes towards persons with disabilities and ensuring appropriate and ongoing support, social and financial, for women who decide to carry such pregnancies to term'.[114] Criminal arrests, investigations and prosecutions had to cease in the interim between introducing this legislation.[115] This was complied with through the introduction of a moratorium when section 9(3) came into force on 22 October 2019. Legislation also had to provide 'evidence based' protocols to health professionals in provision of abortion in circumstances of harm to physical and mental health, and provide continuous training.[116] The CEDAW Inquiry Report also recommended an oversight mechanism which ensured that abortion was provided on these grounds and to ensure enhanced coordination between the DoH and the NIHRC.[117] Paragraph 86 makes recommendations, but in contrast to paragraph 85 does not characterise them as 'urgent'. The resulting regulations only address the urgent measures set out in paragraph 85 with much further scope for further regulations regarding the recommendations in paragraph 86.

On 4 November 2019, the SOS launched a six-week public consultation, 'A New Legal Framework for Abortion Services in

112 Ibid para 85(b)(i) (emphasis added).
113 Ibid para 85(b)(ii)).
114 Ibid para 85(b)(iii).
115 Ibid para 85(c).
116 Ibid para 85(d).
117 Ibid para 85(f) provided the state must: 'Strengthen existing data-collection systems and data sharing between the Department and the police to address the phenomenon of self-induced abortion.'

Northern Ireland'.[118] The Government response sets out the range of views expressed and evidence gathered through the consultation process under each element of the abortion framework, and the supporting rationale for the final decisions made.[119] The Abortion (Northern Ireland) Regulations (No 1) 2020 came into effect on 31 March 2020.[120] They are the results of extensive consultation and detailed consideration of what the CEDAW Inquiry Report requires for practical implementation.

The Regulations make considerable advances in securing reproductive rights in Northern Ireland. However, it is clear that the consultation did result in an erosion of the CEDAW recommendations to take into account the views which fed into the discursive process and in certain respects the Regulations fall short of the CEDAW recommendations.[121] There are three examples noted here: decriminalisation; abortion on health grounds without conditionality; and conscientious objection.

The 2020 Abortion Regulations legalise abortions where the pregnancy is up to 12 weeks' gestation,[122] but only if a registered medical professional is of the opinion, formed in good faith, that the pregnancy has not exceeded its 12th week.[123] This measure is introduced to allow abortions in cases of 'victims of sexual crime (ie rape and incest) to access services while avoiding any requirements that would lead to further trauma or act as a barrier to access in Northern Ireland'.[124]

The CEDAW Inquiry Report requires that there are abortion services where there is a 'threat to the pregnant woman's physical or mental

118 Explanatory Memorandum to the Abortion (Northern Ireland) (No 2) Regulations 2020 (SI 2020/503).

119 See 'A New Legal Framework for Abortion Services in Northern Ireland: UK Government Consultation Response' (25 March 2020).

120 Abortion (Northern Ireland) Regulations 2020 (SI 2020/345) 25 March 2020; Abortion (Northern Ireland) (No 2) Regulations 2020 (SI 2020/503) 13 May 2020 (2020 regulations). The Abortion (Northern Ireland) (No 2) Regulations 2020 were made on 12 May 2020 and came into force on 14 May 2020. The Abortion Regulations No 2 are materially identical to the Abortion Regulations No 1 but corrections are made in the cross-referencing.

121 Sheelagh McGuinness and Jane M Rooney, 'A legal landmark in reproductive rights: the Abortion (Northern Ireland) Regulations 2020' (*University of Bristol Law School Blog* 1 April 2020).

122 11 weeks and 6 days.

123 SI 2020/503 (n 120 above) reg 3.

124 Explanatory Memorandum to the Abortion (Northern Ireland) (No 2) Regulations 2020 (SI 2020/503) para 7.9. A specific barrier in Northern Ireland is s 5 of the Criminal Law Act (Northern Ireland) 1967 which criminalises an individual of knowing of a crime but not reporting it. This may have created a chilling effect for someone seeking an abortion on grounds of sexual assault.

health, without conditionality of "long-term or permanent" effects'.[125] Under the Regulations, a woman can only seek an abortion on health grounds without conditionality of 'long-term permanent' effects up until 12 weeks' gestation.[126] Regulation 5 provides that a pregnancy may be terminated where a registered medical professional is of the opinion, formed in good faith, that the termination is immediately necessary to save the life, or to prevent grave permanent injury to the physical or mental health, of the pregnant woman (immediate necessity ground).[127] Regulation 6 provides for abortion in circumstances where there is a

> risk to life or grave permanent injury to physical or mental health of the pregnant woman exists; or where the continuance of the pregnancy would involve risk to the life of the pregnant woman which is greater than if the pregnancy were terminated.[128]

Regulation 4 allows an abortion up until 24 weeks' gestation in cases where the pregnancy 'would involve a risk of injury to the physical or mental health of the pregnant woman which is greater than if the pregnancy were terminated'.[129] While the condition is not 'long-term or permanent effects', there is a conditionality attached to whether a woman can access an abortion on health grounds. The decision is taken away from the woman and left in the hands of medical practitioners.

Paragraph 85 requires decriminalisation with regard to 'women and girls undergoing abortions, qualified health-care professionals and all others who provide and assist in abortion'.[130] It is still a criminal offence for a person to intentionally terminate or procure a termination of a pregnancy otherwise than in accordance with regulations 3 to 8.[131] The pregnant woman cannot be held criminally liable in any circumstances, but the person procuring the abortion can be held criminally liable, unless it was done in good faith for the purpose only of saving the woman's life or preventing grave permanent injury to the woman's physical or mental health.[132] Under the regulations, early medical termination (nine weeks and six days) is permitted in relation

125 CEDAW Inquiry Report (n 6 above) para 85(b)(i).
126 Explanatory Memorandum (n 124 above) para 7.9.
127 Ibid reg 5.
128 Two registered medical professionals must form an opinion in good faith whether either of the two factual circumstances exist.
129 2020 Regulations (n 120 above) reg 4. Reg 4(2) states that account may be taken of the pregnant woman's 'actual or reasonably foreseeable circumstances'.
130 The International Covenant on Civil and Political Rights also requires decriminalisation of abortion: General Comment No 36 (n 87 above) para 8.
131 Explanatory Memorandum (n 124 above) para 7.26.
132 Ibid para 7.33.

to treatment consisting of the drugs mifepristone and misoprostol.[133] Mifepristone has to be taken in a hospital, clinic or GP practice while misoprostol can be taken at home. This implies that third parties, such as doulas, may still be held criminally liable for providing telemedical abortion which does not require a medical professional to administer the first drug.[134] The Regulations therefore do not comply with the recommendation to decriminalise abortions in relation to 'all others who provide and assist in abortion'. The reason put forward is to make it in conformity the rest of the UK, prioritising the UK governance system over the constituent power process around formulating the CEDAW rights.

There are no recommendations in the CEDAW Inquiry Report on conscientious objection. Regulation 12 introduces a statutory protection for conscientious objection. Conscientious objection is not permitted when the 'treatment is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman'.[135] McGuinness notes the absence of an obligation on the conscientious objector to refer on those who refuse to provide care to other medical practitioners who will perform the abortion.[136] While not explicitly referred to in the CEDAW Inquiry Report, the CEDAW Committee imposes this obligation on member states in Recommendation 24.[137] A recent study has concluded that 'many clinicians who report a religious affiliation are also supportive of decriminalisation … and are willing to provide care, countering the assumption that those of faith would all raise conscientious objections to service provision'.[138]

This section addressed concerns regarding the legitimacy of implementation of the CEDAW Inquiry Report. The recommendations prioritise the voices of those most affected by the law. However, the

133 Ibid para 7.20.

134 A distinction can be made between full and partial telemedicine, with full telemedicine referring to the entire process available remotely: the consultation, obtaining the pills, taking the pills, and the provision of pre- and post-abortion information and care. See further Jordan Parsons and Chloe Elizabeth Romanis, *Early Medical Abortion, Equality of Access, and the Telemedical Imperative* (Oxford University Press 2021).

135 2020 Regulations (n 120 above) reg 12(3).

136 McGuinness and Rooney (n 121 above).

137 General Recommendation 24 CEDAW (para 11). Also note the UN Human Rights Committee General Comment No 36.

138 n=46, 51% Catholic; n=53, 45% Protestant. Fiona Bloomer, Jayne Kavanagh, Leanne Morgan, Laura McLaughlin, Ralph Roberts, Wendy Savage and Colin Francome, 'Abortion provision in Northern Ireland: the views of health professionals working in obstetrics and gynaecology units' (2022) 48(1) BMJ Sexual and Reproductive Health 35.

consultation process did result in a dilution of those protections in order to take into account other perspectives.

UNCRPD AND CEDAW

Regulation 7 permits abortions in cases of SFI and FFA.[139] Abortion on the ground of SFI has been met with challenges in the Assembly and the courts. A Private Member's Bill, the Severe Fetal Impairment Abortion (Amendment) Bill, was introduced to the Northern Ireland Assembly on 16 February 2021. The Bill sought to remove the grounds for an abortion in cases of SFI by amending the Abortion (Northern Ireland) (No 2) Regulations 2020. Ultimately, the Northern Ireland Assembly voted against this Bill (ayes 43, noes 45).[140] Abortion on the ground of SFI was challenged by the Society for the Protection of Unborn Children (SPUC) in judicial review proceedings in the Northern Ireland High Court.[141] This section considers the attempts to challenge introduction of abortion on grounds of SFI and the implications it has for democratic legitimacy. It considers the role of the UNCRPD in prioritising and centralising the voice of disabled persons and its interrelationship with CEDAW.

In the *SPUC* judicial review, the applicants argued that the UNCRPD prohibited abortion on the grounds of SFI under article 10, the right to life: 'every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others'.[142]

As a legal matter, Colton J correctly decided that this was not the position of the UNCRPD. He found that 'every human being' in article 10 did not include the unborn.[143] He noted that, when dealing with the issue of SFI, the CEDAW Committee provides that '[i]n cases of [SFI], the Committee aligns itself with the Committee on the Rights of Persons with Disabilities in the condemnation of sex selective and disability selective abortions'.[144] He acknowledged the joint statement

139 2020 Regulations (n 120 above) reg 7.

140 See further Rough (n 111 above).

141 *SPUC (Society for the Protection of Unborn Children) Pro-Life Limited's Application and the Secretary of State for Northern Ireland and Northern Ireland Human Rights Commission, Equality Commission for Northern Ireland and Rosaleen McElhinney Intervening and SPUC Pro-Life Limited Application for Judicial Review and the Minister of Health for Northern Ireland* [2022] NIQB 9. The judgment of the Northern Ireland Court of Appeal was handed down just as this article went to press: *SPUC Pro-Life Application for Judicial Review* [2023] NICA 35

142 Ibid.

143 Ibid para 134.

144 Ibid para 63.

of the UNCRPD Committee and the CEDAW Committee in August 2018 in finding that the provision of abortion on grounds of SFI was not prohibited by the UNCRPD.[145] The joint statement provided that states 'should ensure non-interference, including by non-State actors, with the respect for autonomous decision-making by women, including women with disabilities, regarding their sexual and reproductive health well-being'. They recommended that: 'States parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities.'[146]

The UNCRPD and CEDAW Committees have taken steps to ensure that they coordinate their position on this specific issue. This is conformity with the rules under article 31(3)(c) VCLT on systemic integration and treaty interpretation. It provides greater clarity for other IHRL treaties and states that aim to incorporate these standards.

The existence of multiple and overlapping sites of governance on the international plane, and how to reconcile competing claims, is examined in global constitutional literature through the lens of plural constitutionalism. Neil Walker posits that plural constitutionalism recognises the 'different epistemic starting point' with regard to each governance unit. There is a reflexive democratic justification for acknowledging competing values and claims.[147] He also claims that there is no neutral perspective from which their distinct representational claim can be reconciled. Gunther Teubner and Andreas Fischer-Lescano say the only realistic option for combating fragmentation is to 'develop heterarchical forms of law that limit themselves to creating loose relationships between the fragments'.[148] A 'weak compatibility between the fragments' is all that can be hoped for.[149] They propose a secondary set of 'collision rules' to settle the conflict between separate legal regimes.[150] The separate IHRL regimes start from a different epistemic point: UNCRPD prioritises the disabled person and CEDAW prioritises the woman. Both systems force state acknowledgment and interaction with those subjectivities. But this

145 Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women, 'Guaranteeing sexual and reproductive rights for all women, in particular, women with disabilities' 29 August 2018.

146 Ibid.

147 Neil Walker, 'The idea of constitutional pluralism' (2002) 65 Modern Law Review 317, 338–339.

148 Gunther Teubner and Andreas Fischer-Lescano, 'Regime-collisions: the vain search for legal unity in the fragmentation of global law' (2004) 25(4) Michigan Journal of International Law 99, 142.

149 Ibid 143.

150 Ibid 148.

does not make them autopoietic or require a set of secondary collision rules. They do not want to be instrumentalised to undermine the others' lived experience. Reconciliation is possible through a reflexive approach to democratic legitimacy.

IHRL, courts and Committees contribute to the iterative process of deciding the content of indeterminate IHRL obligations. The ECHR is anomalous with regional and international human rights treaties in its deference to a small minority of states that prohibit abortion. CEDAW and UNCRPD and their expert Committees provide more specific consideration of issues arising in the regulation of abortion law than the ECHR. Paragraphs 85 and 86 of CEDAW are a snapshot in the iterative process for working out the best abortion regime for Northern Ireland.

CONCLUSION

The current devolution legislation in Northern Ireland on compliance with IHRL is deficient. The case study of abortion reform in Northern Ireland demonstrates the role that IHRL played in enhancing democratic legitimacy in multilevel governance. It was shown that, in order to improve democratic legitimacy, people directly affected by criminalisation of abortion in Northern Ireland were given priority and placed at the forefront of discussions on abortion law regime. IHRL mechanisms played a role in platforming those stories vis-à-vis the state. The stories cut through the sanitisation and 'respectability'[151] of the law and politics of the state and forced the state to reckon with the violence encountered by women as a result of its law. It is not merely those directly affected that we should identify as constituent power. The human rights regime provides a process that invites engagement from plural perspectives. Those most directly affected should be prioritised but others more indirectly affected can form part of the process too. At the edges of a constituent power are those who understand their identity as a collective, connected with subscription to the core premises of the human rights norms at issue.

Devolved nations do not have the power to intervene in the governance of England when the Westminster Parliament and UK

151 Enright et al (n 64 above).

executive fail to realise its human rights protections.[152] The UK state apparatus may even be accused of feeling threatened by the progressive approach taken by a devolved nation in striving to comply with IHRL measures. It may take legal and political measures to limit implementation of IHRL standards in devolved nations when the UK Government is not willing to incorporate the human rights standards to achieve the same level of protection in England.[153] Notwithstanding this double standard regarding oversight and accountability for provision of human rights protection in the UK, IHRL's democracy-enhancing qualities should inform how we go about deciding the content of IHRL standards. Devolution politics should not form a barrier to this overall goal by obfuscating responsibility through the devolution framework or undermining human rights by not allowing the devolved or UK institutions from progressing with implementation. We need to prioritise inclusive processes for deciding the content of those norms and ensure they are practically implemented in order to enhance democratic legitimacy.

Abortion reform in Northern Ireland teaches us lessons about how we engage in effective democracy-enhancing processes. But the devolution legislation has at times formed a barrier to this progress rather than a facilitator because of its lack of clarity on compliance with IHRL.

152 However, there are examples of Parliament drawing upon the best practice of devolved nations to inform Westminster legislation. For example, the Pre-legislative Scrutiny Committee of the Domestic Abuse Bill England and Wales critiqued the Westminster Domestic Abuse Bill by comparing and contrasting with the Women, Domestic Abuse, and Sexual Violence (Wales) Act 2015. For example, the committee noted that the Domestic Abuse Bill differed from the Wales Act insofar as the Wales Act included all violence against women as well as domestic abuse, placing its response to domestic abuse firmly into the context of its violence against women strategy, whereas the Westminster Bill focused only on domestic abuse.

153 *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106. See further the contribution of Kasey McCall-Smith in this special issue.