



# International human rights law and devolution in the UK

Jane Rooney

Durham University

Conor McCormick

Queen's University Belfast

Correspondence emails: [jane.rooney@durham.ac.uk](mailto:jane.rooney@durham.ac.uk); [c.mccormick@qub.ac.uk](mailto:c.mccormick@qub.ac.uk)

## INTRODUCTION

This volume is the product of a collaborative project on International Human Rights Law (IHRL) and devolution in the United Kingdom (UK) which we initiated in 2020 in order to address three questions arising from gaps in the academic literature at that time. First, we aimed to examine the extent to which devolved nations had competence to decide upon the content of indeterminate international obligations within their own nation. Second, we aimed to explore the extent to which central government can and should intervene when a devolved nation fails to afford its inhabitants the rights ensuing from international treaties. Third, we sought to evaluate the extent to which devolution arrangements in the UK provide for fixed rules on the division of competences in the observation and implementation of international obligations.

When designing the project, both editors were highly motivated to explore these questions as a result of their engagement with the legalisation of same-sex marriage and the decriminalisation of abortion in Northern Ireland through the Northern Ireland (Executive etc) Formation Act 2019.<sup>1</sup> We were influenced by political and legal discourse regarding these case studies which queried whether Westminster could or should legislate for reform in these areas in Northern Ireland and under what circumstances.

This special issue brings together a much larger array of case studies from across the three devolved nations: Wales, Scotland and Northern Ireland. The broadening of the project contextualised our case studies within a much more complex geopolitical and legal landscape. It also complicated our understanding of IHRL as a cross-cutting set of indeterminate norms operating on a separate international plane,

1 Conor McCormick and Thomas Stewart, 'The legalisation of same-sex marriage in Northern Ireland' (2020) 71(4) Northern Ireland Legal Quarterly 557; Jane Rooney, 'Standing and the Northern Ireland Human Rights Commission' (2019) 82(3) Modern Law Review 525.

with the UK state drawing hard lines between its external and internal sovereignty.

The specialist workshops through which we conducted our project revealed that participants working on the implementation of IHRL in devolved nations all started from one normative premise: that the implementation of IHRL was something to aspire to. It became clear, as such, that the overarching research question we were all in fact addressing was how to facilitate the implementation of IHRL in devolved nations. Four sub-themes with related questions have emerged from this realisation when read with the papers included in this volume, which refine and complement the three agenda-setting questions noted above. First, we need to examine whether the devolution framework poses any obstacles to the successful implementation of IHRL. If they exist, what do these challenges entail? Second, we must better understand the meaning of IHRL implementation and its connection to the incorporation of IHRL treaties. What do we mean by implementation in this context? Third, it is important to consider who holds the authority to determine the normative content of IHRL for its implementation in devolved nations. Who has the final say and on what basis? Lastly, there is value in exploring the role played by IHRL treaty-monitoring bodies in facilitating the implementation of IHRL within devolved nations. How significant is their contribution to the implementation process and could their effectiveness be enhanced?

This introductory essay surveys the contributions made in this special issue and the answers they provide to all of these questions. The contributions mostly consist of observations made through analysis of specific case studies: prisoner voting in Wales, the decriminalisation and provision of abortion services in Northern Ireland, incorporation of the United Nations Convention on the Rights of the Child (UNCRC) in Scotland, and implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Scotland.<sup>2</sup> In relation to treaty-monitoring bodies, there is a case study of the UK's fifth Periodic Reporting Cycle (2016) for the UNCRC as it relates to Wales and another contribution that contains data from 10 UN treaty-monitoring mechanisms and seven Council of Europe monitoring mechanisms as they relate to the three devolved nations.

We trust that, by way of these case studies, this volume fills some significant gaps in the academic literature as regards the challenges posed by devolution; IHRL implementation; the authorities responsible for defining IHRL content, and, more particularly, the role of IHRL treaty-monitoring bodies in facilitating UK-based implementation.

---

2 UNCRC, United Nations, Treaty Series, vol 1577, 3 (adopted 20 November 1989, entry into force 2 September 1990); ICESCR, United Nations, Treaty Series, vol 993, 3 (adopted 16 December 1966, entry into force 3 January 1976).

However, it should be emphasised that the conclusions we draw from analysing these contributions are simply a starting point for further thought and inquiry. We encourage the development of new case studies which test the quality of our analysis and the reliability of our findings moving forward. In this sense, we hope that this volume will help to mark out and inspire further exploration in the fertile areas of research with which it is concerned. We are confident that there are many more perspectives on the relationship between IHRL and devolution in the UK to be mined with the benefit of the scaffolding in this collection.

The structure of this introductory essay is as follows. First, we identify the challenges posed by the devolution framework in so far as it relates to the implementation of IHRL. The challenges identified are: the overlap of devolved and reserved competences that creates practical obstacles for IHRL implementation in devolved nations (including resource allocation); the invocation of parliamentary sovereignty as an obstacle to IHRL implementation in the devolved nations, and the lack of a clearly articulated obligations or responsibility for devolved or UK institutions to implement IHRL with legislation. The introduction presents tentative suggestions for overcoming these challenges. Second, we look at what is meant by the concept of IHRL implementation in more substantive terms. Third, we consider who should get to decide the normative content of IHRL for the purposes of its implementation in the devolved nations. There is a consensus that IHRL provides normative benchmarks for their implementation in the devolved nations. But there is a distance between those benchmarks and the detailed working out of what they entail at a local level. This section considers the respective roles of the IHRL treaty-monitoring bodies, the UK institutions, the devolved institutions, and other non-state actors in deciding the content of indeterminate IHRL in need of implementation at the local level. The fourth section considers separately the role of IHRL treaty-monitoring bodies in facilitating the implementation of IHRL in devolved nations. Our introduction ends thereafter with a summary of its most practical conclusions.

## **CHALLENGES TO THE IMPLEMENTATION OF IHRL IN DEVOLVED NATIONS**

### **The overlap of devolved and reserved competences that creates practical obstacles for implementation**

Each devolved nation has its own unique political and legal relationship with the UK institutions – it is an asymmetrical devolution system.<sup>3</sup> Wales, Scotland and Northern Ireland have reserved models of devolution.<sup>4</sup> For Wales and Scotland, this means that subject matters not listed as reserved fall within the competence of the devolved institutions.<sup>5</sup> For Northern Ireland, a distinction is made between transferred, excepted and reserved matters. Excepted matters under the Northern Ireland Act 1998 more closely resemble reserved matters in the Welsh and Scottish context, including international relations.<sup>6</sup> While on the face of it Wales more closely resembles the Scotland and Northern Ireland devolution settlement since it acquired the reserved model in 2017, the list of reserved matters is so extensive that, in practice, the UK Government and legislature still exercise considerable control over Welsh decision-making.<sup>7</sup>

Gregory Davies and Robert Jones consider various obstacles to the introduction of prisoner voting legislation in Wales presented by an overlap in devolved and reserved competences. Their paper focuses on the implementation of article 3 of the First Protocol to the European Convention on Human Rights (ECHR), namely the right to free and fair elections, in Wales.<sup>8</sup> The European Court of Human Rights (ECtHR) has held that a blanket prohibition on convicted prisoner voting is a violation of the ECHR, which forms an important part of the IHRL backdrop to their analysis.<sup>9</sup>

The Welsh Government has devolved competence over local elections and is to this extent responsible for introducing reforms to prisoner voting. Following litigation at the ECtHR, England made

---

3 Hayley Roberts and Huw Pritchard, ‘Challenges for human rights treaty monitoring in a devolved UK: a case study’ (2023) 74(1) Northern Ireland Legal Quarterly 123, 131.

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

5 Scotland Act 1998, sch 5; Government of Wales Act 2006, new sch 7A, as inserted by the Wales Act 2017, sch 1.

6 Northern Ireland Act 1998, sch 2.

7 Gregory Davies and Robert Jones, ‘Prisoner voting in Wales: devolved autonomy and human rights at the jagged edge’ (2023) 74(1) Northern Ireland Legal Quarterly 1, 9–10.

8 Ibid 14.

9 *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

minor reforms to prisoner voting. In addition to existing categories of prisoners who had the vote (the unconvicted, the unsentenced, civil prisoners and prisoners released on home detention curfew), ‘prisoners on temporary release would be entitled to vote while physically outside of prison’.<sup>10</sup> The Welsh Government has proposed more extensive reforms which would enfranchise prisoners sentenced to less than four years.<sup>11</sup> However, as criminal law and sentencing policy in Wales is still reserved – unlike in Northern Ireland and Scotland – the ability of Wales to practically exercise its competence over prisoner voting is undermined. By way of example, one obstacle identified is that ‘[t]he UK Government retains control over the prison estate [and therefore] enfranchisement requires the cooperation of the Ministry of Justice and His Majesty’s Prison and Probation Service (HMPPS)’.<sup>12</sup> The significance of the practical obstacles presented by the UK Government’s control over the prison estate for prisoner voting are highlighted through the consideration of the dispersal of Welsh and English prisoners across the prison estate: ‘[i]n 2021 more than a quarter (27%) of Welsh prisoners were held in England, in over 100 English prisons, while English prisoners made up almost a third (32%) of the prison population in Wales’ and all female Welsh prisoners are currently held in English prisons.<sup>13</sup> In deciding whether convicted Welsh prisoners should cast votes inside English prisons and whether convicted English prisoners should cast votes inside Welsh prisons, the Welsh Government has proposed that Welsh prisoners should be allowed to vote if they have a ‘home address’ in Wales. This would require the full cooperation of HMPPS. There are a number of other practical issues identified in this very detailed analysis of the practical obstacles arising from an overlap in devolved and reserved competences in so far as the implementation of prisoner voting rights is concerned.

The issue of prisoner voting highlights that it is practically impossible, at times, to separate devolved matters from reserved matters. In this context, it could be suggested that the UK Government should take all reasonable measures to support and accommodate the implementation of human rights standards in devolved nations.

Katie Boyle and Nicole Busby also acknowledge how an overlap in devolved and reserved competences can give rise to obstacles as

---

10 UK Ministry of Justice, ‘Restrictions on prisoner voting policy framework’ (Ministry of Justice 2020).

11 Davies and Jones (n 7 above) 21 citing Welsh Government, ‘Prisoner voting plans unveiled’ (Welsh Government 8 March 2020).

12 Ibid 20.

13 Ibid 23.

regards the practical implementation of IHRL in devolved nations.<sup>14</sup> For example, in evaluating obstacles to the implementation of the ICESCR in Scotland, they note that equal opportunities are reserved under the Scotland Act 1998. England, Wales and Scotland share a common equality framework through the Equality Act 2010, while equality law is devolved in Northern Ireland. They criticise this approach in light of the ambitions of Scotland to implement the ICESCR because the Equality Act 2010 adopts a formal equality framework rather than a substantive equality framework. The distinction is that formal equality provides a ‘narrow interpretation of equal treatment so that “like should be treated alike”’<sup>15</sup> while substantive equality addresses ‘systemic and structural inequality beyond the paradigm of equal opportunity’.<sup>16</sup> Boyle and Busby do note, however, that there are exceptions to the reservation of equal opportunities that open a door to treating the formal equality framework as a floor (as opposed to a ceiling). The UK Government has devolved the competence to implement the socio-economic equality duty under section 1 of the Equality Act 2010. This is implemented in Scotland and Wales but not in England. However, without further devolution, the reservation of equality will pose restrictions on Scotland’s plans to incorporate international obligations under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the UN Convention on the Rights of Disabled People and the UNCRC. Specific examples of aspirations for bespoke human rights implementation in the Scottish context are provided. For example, Scotland would like to grant asylum seekers work visas.

Resource allocation and the funding of IHRL implementation frequently underscores the practical obstacles posed by overlaps in devolved and reserved competence. Boyle and Busby note that, in relation to resource allocation, ‘[i]n the wake of Brexit there has been a process of recentralising power even over devolved matters’, as exemplified by the Internal Market Act 2020:

Under the provisions of the Internal Market Act 2020 the UK Parliament has granted UK ministers the power to take budgetary decisions on devolved matters thereby bypassing the Scottish Parliament.<sup>17</sup> Such

---

14 Katie Boyle and Nicole Busby, ‘Subnational incorporation of economic, social and cultural rights – can devolution become a vehicle for progressive human rights reform?’ (2023) 74(1) *Northern Ireland Legal Quarterly* 63.

15 Ibid 78 citing Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15.

16 Boyle and Busby (n 14 above) 79 citing Catharine A MacKinnon, ‘Substantive equality revisited: a reply to Sandra Fredman’ (2016) 14(3) *International Journal of Constitutional Law* 739.

17 Boyle and Busby (n 14 above) 84 citing Scottish Government, ‘After Brexit: The UK Internal Market Act and devolution’ (Scottish Government 2021).

powers include the provision and operation of infrastructure in Scotland in relation to water, rail services, health care, education, court services and housing – all devolved areas ... The centralisation of decision-making regarding the prioritisation of funding in devolved policy areas enables the UK Government to exercise unilateral control over the Shared Prosperity Fund, the UK's replacement for the European Structural Funds.<sup>18</sup>

While considering prisoner voting in the Welsh context, Davies and Jones note that devolved institutions must find additional resources for additional human rights protections in the absence of specific funding for such measures in the block grant allocated by the UK Government:

[w]ith limited powers to generate their own funds through borrowing and taxation, their dependency on the block grant means that devolved human rights policy can be affected by variations in UK Government spending in England.<sup>19</sup>

Natasa Mavronicola notes the aversion of the UK institutions, and the UK Supreme Court in her specific case study, to funding the righting of historical wrongs despite the fact that: 'dealing with the past' in Northern Ireland (and elsewhere) is not about diverting resources better used for the protection of human rights in the present and future, but rather about better protecting human rights in the present and future.<sup>20</sup>

Where there is an overlap between devolved and reserved competences which gives rise to practical obstacles, it ought to be a constitutional principle that the UK should take reasonable steps to accommodate human rights implementation in the devolved nations. An alternative is that the UK institutions should aim to level up human rights protection in order to avoid obstacles arising from different regimes across borders.

There are different degrees of devolution as regards financial decisions across the contexts of Wales, Scotland and Northern Ireland. But the UK Government, and England, are omnipresent to the extent that they hold the purse strings. A suggestion from the editors is that the UK Government should agree to some financial flexibility as regards plans to fulfil the implementation of human rights norms in devolved nations. Those plans ought to be set out with sufficient clarity so as to ensure that IHRL implementation is appropriately targeted, costed effectively, feasible and executable rather than open-ended and vague.

---

18 Boyle and Busby (n 14 above) 84 citing Philip Brien, *The Shared Prosperity Fund* (House of Commons Library 2021) 29.

19 Davies and Jones (n 7 above) 9.

20 Natasa Mavronicola, 'Human rights and the righting of "historical" wrongs: the Supreme Court's judgment in *Re McQuillan, McGuigan, and McKenna*' (2023) 74(1) Northern Ireland Legal Quarterly 192, 208.

## **The invocation of parliamentary sovereignty as an obstacle to IHRL implementation**

The overlap between devolved and reserved matters represents a deficiency in the devolution model as a means of mapping and responding to the reality of everyday issues. It exposes practical restrictions on the ability of devolved nations to exercise decision-making in areas that are devolved. When overlaps arise, the reserved competence inevitably trumps the devolved competence and thereby blocks practical implementation. This phenomenon touches upon certain fundamental issues that call into question the concept of ‘devolved autonomy’.

An underlying issue that pervades each case study is that the devolution framework is set aside at the whim of the UK Government and Parliament through the invocation of parliamentary sovereignty. This is a power provided for in the devolution framework.<sup>21</sup> The Sewel Convention provides that ‘the UK Parliament will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature’.<sup>22</sup> This is merely a ‘statement of political intent’ and does ‘not create legal obligations’.<sup>23</sup> The setting-aside of the Sewel Convention so that the UK Parliament can legislate in devolved areas without devolved consent is considered throughout this issue. Notable examples include the UK Parliament passing the European Union (EU) Withdrawal Act 2018 without consent from the Scottish Parliament, and likewise the EU Withdrawal Agreement Act 2020 being passed at Westminster in the absence of consent from all three devolved legislatures.<sup>24</sup> Davies and Jones argue convincingly that devolved powers are not defined by their autonomous character, but by the ‘legal omnipotence of the Westminster Parliament to set them aside at will’.<sup>25</sup>

In the domain of competence to implement IHRL, Kasey McCall Smith considers Scotland’s path to facilitating implementation of the UNCRC through the UNCRC (Incorporation) (Scotland) Bill and the objections to that Bill that were raised by the UK Government in the

---

21 Scotland Act 1998, s 28(7); Northern Ireland Act 1998, s 5(6); Government of Wales Act 2006, s 107(5).

22 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.

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

24 Boyle and Busby (n 14 above) 83.

25 Davies and Jones (n 7 above) 7.

*Incorporation Reference* case.<sup>26</sup> The Bill excludes UNCRC provisions that cover areas exclusively reserved to Westminster. The UK Government challenged four sections of the Bill on the basis that the relevant sections interfered with the UK Parliament's ability to make laws for Scotland contrary to section 28(7) of the Scotland Act 1998, which provides that Acts of the Scottish Parliament may not modify the power of the UK Parliament to make laws for Scotland.<sup>27</sup>

In the *Incorporation Reference* case, the UK Supreme Court found a number of provisions in the Bill contrary to section 28(7) of the Scotland Act 1998 and therefore outside the competence of the Scottish Parliament. Those provisions required that, in the event of conflict with UNCRC provisions, 'the courts [should] modify the meaning and effect of legislation enacted by Parliament';<sup>28</sup> that the courts should 'strike down any provision of legislation passed by the UK Parliament prior to the Bill's enactment';<sup>29</sup> and that the courts should make a 'declarator of incompatibility in relation to pre-commencement legislation including an Act of Parliament'.<sup>30</sup> The decision has resulted in great consternation as a result of the UK Supreme Court's broad interpretation of the UK Parliament's 'residual power' to legislate under section 28(7) of the Scotland Act.<sup>31</sup> McCall-Smith, Boyle and Busby all agree that 'although the Supreme Court decided that the Bill requires technical changes relating to devolved competence, there is no 'issue with the Scottish Parliament's decision to incorporate the

- 
- 26 Kasey McCall-Smith, 'The devil is in the details: entrenching human rights protections in the UK's devolved nations' (2023) 74(1) Northern Ireland Legal Quarterly 95; United Nations Convention on the Rights of the Child (Incorporation) (Scotland), SP Bill 80B 2021 (UNCRC Scotland Bill); *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill*; *Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106 (*Incorporation Reference* case).
- 27 Scotland Act 1998, s 28 ('Acts of the Scottish Parliament'): (1) 'Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament'; (7) 'This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.'
- 28 *Incorporation Reference* case (n 26 above) para 28; UNCRC Scotland Bill, s 19(2) (a)(ii).
- 29 *Incorporation Reference* case (n 26 above) para 39; UNCRC Scotland Bill, s 20(10)(a)(ii).
- 30 *Incorporation Reference* case (n 26 above) para 39; UNCRC Scotland Bill, s 21(5) (b)(ii).
- 31 McCall-Smith (n 26 above) citing Aileen McHarg, 'Devolution: a view from Scotland' (*Constitutional Law Matters* 23 May 2022); see also Nicholas Kilford, 'The UNCRC Reference: what did we learn?' (*Constitutional Law Matters* 2 November 2021).

UNCRC' into devolved law.<sup>32</sup> But the judgment demonstrates the capacity and intention of central institutions to push back against the implementation of human rights in devolved nations when it may have consequences for the rest of the UK.

The *Incorporation Reference* litigation is a strong and recent example of this capacity and intent, but it is embedded in the devolution framework. Thus, Davies and Jones note that section 114 of the Government of Wales Act 2006 gives the UK Government a power to prevent a Senedd Bill from receiving Royal Assent if it has 'reasonable grounds to believe' that the legislation would have an 'adverse effect' on reserved matters; on 'the operation of the law as it applies in England'; or if it would conflict with international obligations or the interests of defence or national security. This is noted as an expansive veto power with significant consequences for the exercise of devolved competence.

Not covered as a case study in this special issue but worth noting is the push-back against the Gender Recognition Reform Bill in Scotland.<sup>33</sup> The Bill potentially conflicted with the Equality Act 2010, causing the UK Government to invoke section 35 of the Scotland Act 1998. This provision allows the Secretary of State for Scotland to make an order blocking a Bill from proceeding to Royal Assent when the Bill 'make[s] modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an adverse effect on the operation of the law as it applies to reserved matters'.<sup>34</sup> Chris McCorkindale and Aileen McHarg explain elsewhere that:

[t]he Bill intended to make it easier for transgender people to obtain a Gender Recognition Certificate (GRC) in Scotland, by removing the need for a medical diagnosis of gender dysphoria, substantially reducing the length of time that a person needs to live in their acquired gender before applying for a GRC, and reducing the minimum age (from 18 to 16) at which a GRC can be granted.<sup>35</sup>

---

32 Boyle and Busby (n 14 above) 67 citing Katie Boyle, 'Constitutional changes in Scotland – I: incorporation of international treaties, devolution and effective accountability' (*Oxford Human Rights Hub* 30 March 2021).

33 For a critique of the Bill, see Harvey Humphrey, 'Gender Recognition Reform (Scotland) Bill: GRA reform tries to right a wrong' (2022) 31(2) *Feminist Legal Studies* 265–272.

34 As well as when the Secretary of State has reasonable grounds to believe it would be incompatible with any international obligations or the interests of defence or national security.

35 Chris McCorkindale and Aileen McHarg, 'Rescuing the Gender Recognition Reform (Scotland) Bill? The Scottish Government's challenge to the section 35 Order' (*UK Constitutional Law Association* 25 April 2023).

Significantly, ‘this was the first time in the history of devolution that the UK Government has exercised its powers to block legislation made within devolved competence’.<sup>36</sup> They note that:

objecting in principle to the existence of different schemes for gender recognition north and south of the border ... suggests that the UK Government has taken a very expansive view of the scope of section 35, which threatens to render devolved competences which intersect with reserved areas practically unusable except where the UK Government agrees with or is indifferent to the policy objectives being pursued.<sup>37</sup>

We can see from these episodes that both the UK Government and the UK judiciary have reasserted the primacy of parliamentary sovereignty as a fundamental feature of UK constitutional law, notwithstanding the existence of conceptual overlaps and ambiguity within the devolution framework. This is a frequently recurring theme.

Mavronicola highlights the imperialist tendencies of UK institutions that pass with impunity vis-à-vis devolved institutions by examining aspects of the UK Supreme Court’s judgment in the *Hooded Men* case, and in particular its reasoning and findings in respect of the investigative obligation emanating from the right not to be subjected to torture or inhuman and degrading treatment or punishment as it relates to the case of the ‘Hooded Men’.<sup>38</sup> The Supreme Court found there was no basis for recognising the revival of an obligation on the UK authorities to investigate who was responsible for subjecting the Hooded Men to the ‘five techniques’ when they were under interrogation. The court found that although the acts would constitute torture today, they did not constitute torture in 1971 when the original ECtHR decision was made and that this was determinative of the outcome that the acts in question did not constitute torture under the ECHR.<sup>39</sup>

Mavronicola provides a detailed analysis of the cases on the temporal ‘boundaries’ of the investigative obligation, finding that the Supreme Court exercised great discretion in interpreting the tests laid out in the case law and in applying the law to the facts before them.<sup>40</sup> The Supreme Court quashed the decision of the Police Service of Northern

---

36 Ibid.

37 Ibid.

38 Mavronicola (n 20 above); *In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3)*; *In the matter of an application by Francis McGuigan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3)*; *In the matter of an application by Mary McKenna for Judicial Review (Northern Ireland) (Nos 1 and 2)* [2021] UKSC 55, [2022] AC 1063 (*Hooded Men* case).

39 Mavronicola (n 20 above) 201–202 citing the *Hooded Men* case (n 38 above) paras 186, 189.

40 Mavronicola (n 20 above) 199–202, 203–205.

Ireland (PSNI) to not conduct an investigation on narrow grounds. It noted that the investigation had not identified any evidence to support the allegation that the UK Government authorised the use of torture in Northern Ireland. Mavronicola points out all of the evidence to the contrary. She notes the role of the UK Supreme Court in immunising the UK state from allegations of torture.

What is significant, is that the Supreme Court pointed out all of the circumstances in which the PSNI could reasonably have decided not to conduct the investigation including ‘the passage of time since the ill-treatment of the Hooded Men in 1971, the fact that those who authorised the use of the five techniques were either dead or very elderly ... the new [evidence] did not add to a significant extent to what was known already at the time of the previous investigation in 1978, and the many competing demands on police resources’.<sup>41</sup>

The quashing of the PSNI’s decision is couched in terms that prescribe when it is permitted to decide not to investigate on ‘rational grounds’,<sup>42</sup> but Mavronicola views the Supreme Court’s judgment through a wider lens which sees it as ‘not only an instantiation but a virtually uninterrupted history of the British Government’s involvement in torture’.<sup>43</sup>

The invocation of parliamentary sovereignty to deny human rights implementation is of great concern. It weakens relationships between the devolved nations and UK institutions. There is a degree of complacency in the way that the UK exercises sovereignty over otherwise devolved issues. The parameters of section 28(7) and section 35 of the Scotland Act 1998 should be clearly defined and delimited so as to create greater transparency around the appropriate circumstances for invoking this power and to ensure that the UK courts and Government cannot be accused of an unaccountable abuse of power. We find ourselves in strong agreement with a recently published set of recommendations by Aileen McHarg, who has suggested among other things ‘enhancing the interpretive protection given to devolution by the courts’.<sup>44</sup> McHarg specifically proposes ‘a set of interpretive principles applicable to both devolved legislation and UK legislation affecting devolved matters’, which could include:

---

41 Ibid 203 citing the *Hooded Men* case (n 38 above) para 245.

42 Mavronicola (n 20 above) 203 citing Anurag Deb and Colin Murray, ‘[One date to rule them all: McQuillan, McGuigan and McKenna \[2021\] UKSC 55](#)’ (*UK Human Rights Blog* 7 January 2022).

43 Mavronicola (n 20 above) 205 citing Conor Gearty, ‘British torture, then and now: the role of the judges’ (2021) 84(1) *Modern Law Review* 118.

44 Aileen McHarg, *The Contested Boundaries of Devolved Legislative Competence: Securing Better Devolution Settlements* (Institute for Government and Bennett Institute for Public Policy 2023) 20.

setting out the implications of [the] reserved model of devolution in terms of the devolved legislatures having the fullest possible legislative freedom within the limits of their competence. A subsidiarity principle could also be adopted to guide the interpretation of competence limits, perhaps coupled with a set of 'principles of union' ... As far as UK legislation is concerned, a statutory presumption that it is not intended to apply in devolved areas or alter devolved competences could help to reinforce political constraints on legislating without devolved consent.<sup>45</sup>

The points and reasoning made by Mavronicola specifically in relation to allegations of torture by the UK Government in devolved nations should also be recognised and addressed in suitable litigation or legislation.

### **The lack of a clearly articulated obligation or responsibility for devolved or UK institutions to implement IHRL with legislation**

The devolution framework is not clear about what powers and obligations devolved nations hold in relation to the implementation of human rights.

Consistently across all three nations, international relations – including relations with international organisations – are a reserved competence for the UK Government and extend to treaty-making. It is not completely clear whether this extends to the transformation of treaties into domestic law or the incorporation of international law. From an international law perspective the UK state bears ultimate responsibility for compliance with its treaty obligations and cannot use its internal arrangement of subnational governments as an excuse for not complying with international law obligations.<sup>46</sup>

Roberts and Pritchard observe that the Concordat on International Relations 2012, a set of non-binding guidance, provides that the day-to-day responsibility for meeting treaty standards often lies with the devolved governments.<sup>47</sup> Jane Rooney argues that, while devolved nations act *ultra vires* if they do not comply with Convention rights as reflected in the Human Rights Act 1998, the Northern Ireland devolution framework omits any concept of responsibility to legislate

---

45 Ibid 21.

46 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 27, stipulates that, 'a Party may not invoke the provision of its internal law as justification for its failure to perform a treaty'.

47 Roberts and Pritchard (n 3 above) 132 citing the Memorandum of Understanding (n 22 above) [18], Supplementary Agreement D: Concordat on International Relations, D1.3, D2.3, D3.3, 21.

for human rights protection.<sup>48</sup> Davies and Jones provide that Welsh devolved institutions are not obliged to legislate to be compatible with human rights in their devolved area, but, if they do so, it must be compatible with human rights.<sup>49</sup> Similarly, McCall-Smith notes that the subnational governments of the UK may use their devolved competencies to respect, protect and fulfil existing rights and to raise the levels of individual protections as a means of strengthening human rights for their local populations.<sup>50</sup> But, again, there is no recognition of an obligation or responsibility on the part of the devolved nations in the devolution settlement.

The devolution framework does not appear to support *effective* IHRL implementation. While there exists an international obligation on the UK institutions to comply with such obligations, the practical implementation of the devolution framework evidences that, where a devolved nation has attempted to introduce legislation that complies with IHRL and there is an overlap between devolved and reserved competences, central institutions can and do intervene to prevent IHRL implementation in the devolved nation.

Moreover, Rooney reveals that, in the context of Northern Ireland, the devolution framework has been interpreted to impose an obligation on Westminster to incorporate where there are clear and detailed standards set out by the IHRL monitoring body, when a devolved nation is at odds with the protection of human rights vis-à-vis the rest of the UK, and when the devolved nation institutions are unwilling and unable to implement those human rights.<sup>51</sup>

The devolution framework should be revisited to ensure that reasonable steps are taken by central institutions when they are necessary to accommodate the implementation of IHRL. Further, where a devolved nation is unwilling or unable to implement IHRL obligations, there should be clear obligations placed on Westminster bodies, working with local institutions and non-state actors, to progress the implementation of IHRL in devolved nations when they are at odds with the rest of the UK as regards human rights protection.

---

48 Jane Rooney, 'International human rights law, devolution and democratic legitimacy: the case study of abortion reform in Northern Ireland' 74(1) (2023) Northern Ireland Legal Quarterly 28, 30.

49 Davies and Jones (n 7 above) 18.

50 McCall-Smith (n 26 above) 100.

51 See further, Colin Murray, Alexander Horne, Eleni Frantziou, Anurag Deb, Sarah Craig, Clare Rice and Jane Rooney, *EU Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland* (Equality Commission for Northern Ireland and Northern Ireland Human Rights Commission December 2022) ch 2.

## WHAT DOES THE 'IMPLEMENTATION' OF IHRL MEAN?

Dualist states recognise a distinction between external and internal sovereignty, and that international law obligations are only binding on the international plane and not binding in the domestic sphere. This means that a state may be held in violation of international law by an international institution, but not in violation of domestic law for breaching the international standard.<sup>52</sup> Incorporation of international law is understood as a process that must be undertaken in dualist states to make international law legally binding and justiciable within any given state.<sup>53</sup> The dominant method of incorporation is through legislation passed by a legislature. It is important that 'implementation' of international obligations is distinguished from 'incorporation', or at least that we reflect on the meaning of each of these terms as the language of implementation is used rather vaguely within the devolution framework when delineating competences with respect to international law obligations.<sup>54</sup>

McCall-Smith identifies three sub-categories of human rights implementation. First, she makes a distinction between direct and indirect incorporation. According to McCall-Smith, direct incorporation is the process that gives provisions of international law direct effect in national law and which ensures justiciability, including negative and positive obligations to fulfil human rights.<sup>55</sup> This means that the treaty takes effect through legal obligations and there is a suggestion that in order to be direct incorporation the treaty protection needs to be comprehensive and not piecemeal. For example, she identifies the incorporation of the ECHR through the Human Rights Act 1998 as the single example of direct incorporation of an IHRL treaty in the UK. This is contrasted with indirect incorporation which requires 'some measure of effect in national law', providing the example of a due regard duty, or a frame of reference for policy development.<sup>56</sup> For instance, Wales strengthened children's rights by indirectly incorporating the UNCRC in 2011. A Welsh Measure placed a duty on the Welsh legislature to have due regard to the UNCRC.<sup>57</sup> The third category put forward by McCall-Smith is sectoral incorporation, which entails 'integrating treaty provisions into national law on an *ad hoc*

52 Joseph Gabriel Starke, 'Monism and dualism in the theory of international law' (1936) *British Yearbook of International Law* 66.

53 Malcolm Shaw, *International Law* 8th edn (Cambridge University Press 2017) 97.

54 Rooney (n 48 above) 33–34.

55 McCall-Smith (n 26 above) 102.

56 Ibid.

57 Rights of Children and Young Persons (Wales) Measure 2011, s 1; Roberts and Pritchard (n 3 above) refer to this as an example of incorporation of the UNCRC.

basis often without an explicit reference to a treaty'.<sup>58</sup> This refers to instances of legal obligations created in legislation that non-explicitly enshrine an isolated legal obligation found in an IHRL treaty.

McCall-Smith recommends an approach to implementation that draws upon all three methods. The most desirable is direct incorporation, but if there are constitutional impediments, such as obstacles arising from the devolution framework, one should resort to indirect or sectoral incorporation. She argues that there must be ongoing, discursive consideration of the widely varied non-legal forms of implementation. Different methods of incorporation sit along a spectrum of implementation that contributes to human rights realisation. Examples of non-legal measures of implementation include the use of children's rights impact assessments (CRIAs), transparent child rights budgeting, widespread training and 'a commitment by government (at all levels) to develop a culture where CRIA is seen as a key aspect of policy decision-making'.<sup>59</sup>

Boyle and Busby consider the incorporation into Scots law of a number of IHRL treaties as recommended by the National Taskforce for Human Rights Leadership (NTF) which was set up by the First Minister's Advisory Group. They understand incorporation as a multi-institutional initiative.

The model of incorporation proposed is one in which the Parliament, the Government, the entire administrative decision-making sphere, non-judicial complaints mechanisms and the judiciary must all act as guarantors of human rights in a multi-institutional approach.<sup>60</sup>

The recommendations of the NTF go further and suggest that everyday accountability should occur in the administrative sphere and create a space for everyday implementation 'close to home'.<sup>61</sup> Regulators, inspectorates, ombudsmen, tribunals and local complaints mechanisms can bring justice closer to individuals.<sup>62</sup> In this way, Boyle and Busby agree with McCall-Smith in adopting a vision of incorporation that is not restricted to the legislature.

The core ideas are similar: there should not be reliance on a single institution to deliver human rights implementation through incorporation.

---

58 McCall-Smith (n 26 above) 102.

59 Ibid 117 citing Simon Hoffman, 'Ex ante children's rights impact assessment of economic policy' (2020) 24 *International Journal of Human Rights* 1333, 1334.

60 Boyle and Busby (n 14 above) 69.

61 Ibid 70.

62 Ibid 70 citing Mark Tushnet, *The Fourth Branch* (Cambridge University Press 2021).

While McCall-Smith noted culture change as an important aspect of implementation, Boyle and Busby argue that the cornerstone of implementation of IHRL is the provision of effective remedies in the event of a violation. International law obligations have not been fully incorporated without the provision of effective remedies.<sup>63</sup> They note the lack of effective remedies for violations of the ICESCR because of the intensified threshold required for courts to interfere with public authority decisions regarding issues that implicate the economy.<sup>64</sup> This is a threshold set by UK courts. The Scottish model aspires to a more prominent role for the judiciary that requires lower intensity of review and which ensures that there is a remedy when rights under the ICESCR are not delivered.

Thinking critically about the meaning of implementation, and the various ways in which devolved nations can act to realise human rights protections, from the hyper-local to the subnational without incorporation *per se*, in many ways subverts the obstacles presented by the devolution framework. This is something strongly suggested by McCall-Smith, whereas Boyle and Busby are more cognisant of the limits associated with wider, non-legal forms of implementation.

## DECIDING THE CONTENT OF INDETERMINATE IHRL PROVISIONS

It is clear that the state has ultimate responsibility under international law for ensuring that subnational entities comply with their IHRL obligations. The lack of clarity in the devolution framework raises questions about what implementation means, who has (as well as who should have) competence when there is an overlap between devolved and reserved matters, and who, if anyone, has an obligation or responsibility to implement or incorporate IHRL obligations. The technicalities of the devolution framework often detract from the substantive issues at hand, which is to say they can be used as a political tool to detract from the substance of human rights issues and the consideration of what is at stake for the lived experience of the people involved. It is evident from the case studies in this issue that, if there is a level of detail to be worked out regarding the implementation of any particular IHRL obligations, the execution of incorporation at the devolved level is less likely to meet resistance from central UK institutions. An important question arises, then, for the effective implementation of IHRL: who

---

63 Boyle and Busby (n 14 above) 69.

64 Ibid 74 citing *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2022] AC 223.

gets to decide the content of indeterminate IHRL obligations and how should this be done?

McCall-Smith notes how (legislative) incorporation processes can open up collaborative spaces and the opportunity to promote a human rights-based approach to governance.

The successful passage of the UNCRC Bill is attributed to the development of a strong platform for UNCRC understanding following years of campaigning, education and support delivered by children's rights organisations in Scotland as well as increased sectoral legislation delivering incremental implementation.<sup>65</sup>

McCall-Smith argues that there needs to be participation from civil society, professional bodies, and children themselves.<sup>66</sup> IHRL committees and treaty-monitoring bodies play a role in helping to define IHRL treaty obligations as they apply to the specific context at issue in the local and the subnational context. There needs to be a constant eye on developing international interpretations of human rights, with IHRL serving as a floor and not a ceiling.<sup>67</sup>

Boyle and Busby focus on multi-actor participation at the local level of subnational governance. They suggest that the content and implementation of human rights should be decided and executed at the local level by a variety of institutions in order to increase public participation in their own governance. Using the case study of progressive realisation under the ICESCR, recommendation 13 of the NTF states that:

there [should] be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights ... [a] participatory model would enable a relative interpretation that is benchmarked against international standards whilst also enabling the fruition of subnational and participatory input to how the rights should be interpreted substantively.<sup>68</sup>

The core ideas are similar again: there should be emphasis on increasing the extent to which the public can participate in law, policy and decision-making at all levels.<sup>69</sup>

---

65 McCall-Smith (n 26 above) 103.

66 Ibid 116 citing Ursula Kilkelly, 'The UN Convention on the Rights of the Child: incremental and transformative approaches to legal implementation' (2019) 23(3) *International Journal of Human Rights* 323, 325.

67 McCall-Smith (n 26 above) 97.

68 Boyle and Busby (n 14 above) 72.

69 Ibid 70 citing *National Taskforce for Human Rights Leadership Report* (Scottish Government 2021) 19.

Rooney uses the case study of abortion law reform in Northern Ireland to critically assess what is required to secure democratic legitimacy in the implementation of IHRL obligations.<sup>70</sup> Reform of abortion law in Northern Ireland took place through the Westminster Parliament in a context where the Northern Ireland state apparatus had been unwilling and unable to implement IHRL as a result of the Northern Ireland Assembly and Executive not being in operation.<sup>71</sup>

The division of legislative powers for the implementation of IHRL is considered by Rooney through the lens of democratic legitimacy. This forms a critique by framing the question as to whether Northern Ireland institutions or Westminster had the competence to legislate to incorporate CEDAW recommendations in their special inquiry report.<sup>72</sup> Democratic rule ‘implies endowing those affected by [a] decision with the most voice, but it also implies listening to them’.<sup>73</sup>

The article argues that 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 human rights protection: people with disabilities, people capable of getting pregnant, victims of gender-based violence and domestic abuse, children. The needs of these people cannot be differentiated depending upon which UK territory they are located in.

The article agrees with McCall-Smith and Boyle and Busby by suggesting that a multi-actor, multi-level, multi-institutional discursive process over a period of time is required for human rights implementation. But it acknowledges that at the core of this discursive and deliberative process the voice and participation of those for whom

---

70 Rooney (n 48 above).

71 The Assembly was suspended from January 2017 until January 2020. At the time of writing, the Northern Ireland Assembly has been suspended again since 10 May 2022. The Northern Ireland (Executive etc) Formation Act 2022 was passed to extend the period following the Northern Ireland Assembly election during which ministers may be appointed, to organise the exercise of functions in the absence of Northern Ireland ministers, and to confer certain powers on the Secretary of State for Northern Ireland in the absence of the Assembly. Most recently, the Northern Ireland (Interim Arrangements) Act 2023 was passed to make further provisions in response to this constitutionally fraught time for devolved governance in Northern Ireland.

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

73 Rooney (n 48 above) 37 citing 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) 392.

more is at stake in relation to a given human rights norm should be prioritised in that process. 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, and then those who feel the creation or destruction of a collective identity (in the context of devolved nations – the ‘nation’) depends upon whether human rights protection is granted or not.<sup>74</sup> The legislature of the devolved nation that represents the people of that nation plays a role in deciding the content. But the IHRL reports and instruments of expert bodies are important: these institutions have taken the time to collect testimonials over many years of the impact that lack of human rights protection has had on people’s lived experiences. Therefore, in line with McCall-Smith, Rooney argues that one needs to take into account the progressive development of the findings of those treaty bodies.

The courts, inter-governmental talks, contributions from non-governmental organisations (NGOs), National Human Rights Institutions (NHRIs), affected individuals, and, in the context of abortion reform, medical practitioners and law enforcement officials should all be included in the discussion. The voices of the potential victims need to be prioritised. The process is iterative in the multi-level context. As a result of the work of a multitude of many collaborative and different state and non-state actors, the legislative/devolution hurdle entrenched in the question of where competence lay to repeal sections 58 and 59 Offences Against the Persons Act 1861, which criminalised abortion in Northern Ireland, was overcome. The resulting regulations are inspired by the CEDAW special inquiry report but not fully aligned as a result of the input from many different stakeholders.<sup>75</sup>

These processes should form the basis for deciding the content of indeterminate IHRL treaties. They represent a democratically legitimate basis for implementing IHRL in the devolved nations.

Boyle and Busby and Mavronicola emphasise the importance of ‘dignity’ as an intuitive starting point for informing the purposive interpretation of IHRL obligations.<sup>76</sup> Dignity is at the core of critiquing the lack of a remedy for historical allegations of torture. Mavronicola notes that ‘[t]orture is about dehumanisation, the complete “negation” of the mutual humanity between the torturer and the person tortured’<sup>77</sup> and that the ‘five techniques’ inflicted on the Hooded Men should be seen as part of a continuum of torture, inhumanity and profound and

---

74 Rooney (n 48 above) 38.

75 Ibid 54–59.

76 Boyle and Busby (n 14 above) 77; Mavronicola (n 20 above) 204–208.

77 Mavronicola (n 20 above) 206 citing Jean Améry, *At the Mind’s Limits: Contemplations by a Survivor on Auschwitz and its Realities* (Indiana University Press 1980) 35.

pervasive dehumanisation. Mavronicola looks at the human rights edifice itself as a reason why dignity is denied to those in the case under consideration:

we should look to the human rights edifice itself, and interrogate how and why a positive obligation orientated at rendering human rights protections practical and effective has come to be the subject of such rigid line-drawing in respect of the rights, wrongs and values at play. And we should ask how and why the investigative obligation under such fundamental rights as the right to life and the right against torture and ill-treatment has come to be understood as being orientated primarily at prosecution and punishment, rather than at identifying both the circumstances in which abuse occurred and the patterns, systems and structures that enabled it, and seeking full accountability *as well as* effective guarantees of non-recurrence.<sup>78</sup>

These submissions suggest that the intuitive concept of dignity should be regarded as a guiding principle when delineating the content of indeterminate IHRL obligations, including the remedies that are available to victims when the state's obligations are breached.

## **THE ROLE OF IHRL TREATY-MONITORING BODIES IN THE IMPLEMENTATION OF IHRL IN DEVOLVED NATIONS**

Hayley Roberts, Huw Pritchard and Brice Dickson have contributed detailed examinations of the role that IHRL treaty-monitoring bodies play in the implementation of IHRL in the devolved nations.<sup>79</sup> Roberts and Pritchard have undertaken an exploration of UK state party reporting in a single-treaty monitoring 'cycle' to examine the representation of the devolved nations and to identify challenges or barriers to effective reporting.<sup>80</sup> The UK's fifth Periodic Reporting Cycle (2016) for the UNCRC was selected as their case study due to a significant number of those treaty rights cutting across devolved competences, such as education, health, and social care. This gave the authors the opportunity to analyse whether the UK and the treaty-monitoring body acknowledged divergences across the devolved nations. Their particular focus is Wales as a result of that nation's ambition to further integrate the principles of the UNCRC into its

---

78 Mavronicola (n 20 above) 207–208 citing Rashida Manjoo, 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21(9) *International Journal of Human Rights* 1193.

79 Roberts and Pritchard (n 3 above); Brice Dickson, 'Devolution and international human rights monitoring mechanisms' (2023) 74(1) *Northern Ireland Legal Quarterly* 155.

80 Roberts and Pritchard (n 3 above).

governance, as exemplified by a legislative Measure requiring that Welsh Ministers have ‘due regard’ to the UNCRC when exercising any of their functions.<sup>81</sup> Roberts and Pritchard’s key research questions relate to the state’s self-assessment report, namely the extent to which devolved nations are represented in the UK state’s report, why they are/are not represented and the potential impact this may have on IHRL implementation in the UK.

Dickson has contributed data on how the protection of human rights in the three devolved regions of the UK has been periodically monitored at the international level since devolution took effect in 1999. He considers the UK’s national reports, responses to lists of issues and replies to questionnaires regarding 10 UN monitoring mechanisms and seven Council of Europe mechanisms.

Roberts and Pritchard provide the following description of a treaty-monitoring exercise:

the state submits a self-assessment report to the treaty body detailing how it has implemented its obligations. The treaty body examines this report and conducts a dialogue session with the state party, but also invites input from NGOs, civil society, stakeholders, and can hold country visits. Treaty bodies issue recommendations to improve compliance following the review ... [but] these ‘concluding observations’ are non-binding.<sup>82</sup>

Both contributions acknowledge systemic issues at the international level that result in a deficit as regards treaty-body monitoring in respect of IHRL implementation in the devolved nations. They acknowledge the huge workload of committees and that resource limitations mean all state parties are restricted by short word limits for their reports; that there is only a brief time for dialogue sessions; and that there are long delays as regards the publication of concluding observations and recommendations. Indeed, both contributions note that these publications are sometimes issued in respect of deficiencies in human rights protection that arose many years earlier.<sup>83</sup>

Dickson agrees with Roberts and Pritchard in finding that the international monitoring mechanisms struggle to deal with states which are non-unitary. The mechanisms find it difficult to assess regional governments as well as the central government. The word limits in documents related to the assessment, for example, restrict scrutiny of the variations in human rights protection across regional states. Bearing in mind the larger data set of Dickson, as compared with the detailed scrutiny provided in respect of a periodic review of one treaty

---

81 The Rights of Children and Young People (Wales) Measure 2011.

82 Roberts and Pritchard (n 3 above) 127.

83 Ibid 128; Dickson (n 79 above) 184.

body by Roberts and Pritchard, there are some significant divergences in their findings. Dickson finds that the treaty-monitoring bodies now pay close attention to regional variations in the protection of rights, noting recommendations directed at the devolved administrations, whereas Roberts and Pritchard find that there is a deficiency in so far as recognising devolved variations is concerned.

It is important to note that Roberts and Pritchard are primarily concerned with the representation of devolved nations in the UK's state reporting which will ultimately then inform the focus of the treaty-monitoring body. General criticisms of the UK's Fifth Periodic Report include that it stayed at policy level and did not say whether or how that policy has been implemented in practice;<sup>84</sup> that it was 'too abstract and patchy', and that there were some 'significant omissions from its content' either intentionally or by error.<sup>85</sup>

With regard to representation of devolved nations, the report was England-centric. The state report was dominated by UK Government policy as it applied to England, and 'regularly did not clarify that such policies did not apply or had limited effect in the devolved countries'.<sup>86</sup> The dialogue session exposed exclusion of devolved governments' perspectives. England had greater representation in the dialogue session: there were 19 delegates from the UK Government, two from Northern Ireland, one from Scotland, and one from Wales.<sup>87</sup> At times, the delegation seemed to be ill-informed about the breakdown of devolved competences. Concerns were raised that the state report did not reflect the devolved governments' 'clear' position on the negative impact of welfare reforms on children.<sup>88</sup> Information is prepared at the devolved level and collated at the UK level, where the report is then drafted. Timings make it difficult for devolved governments to effectively feed into the reporting process.<sup>89</sup>

Dickson agrees with Roberts and Pritchard in noting that the UK Government includes information on regional differences in its reports, but that it tends to emphasise positive differences rather than deficiencies.<sup>90</sup>

---

84 Roberts and Pritchard (n 3 above) 137 citing the Joint Committee on Human Rights, *The UK's Compliance with the UN Convention on the Rights of the Child*, Evidence taken on 11 February 2015, 6.

85 Roberts and Pritchard (n 3 above) 138 citing Joint Committee on Human Rights, *The UK's Compliance with the UN Convention on the Rights of the Child*, Eighth Report of Session 2014–15 (HL 144, HC 1016 24 March 2015) 11.

86 Roberts and Pritchard (n 3 above) 138.

87 *Ibid* 140.

88 *Ibid* 139.

89 *Ibid* 145.

90 Dickson (n 79 above) 183.

Dickson further suggests that the devolved governments themselves could more proactively engage and cooperate with the UK state reporting process, especially in Northern Ireland, which has not been proactive because of its recurring governance problems. He acknowledges that Scotland is more proactive in supplying information. He also finds that the Northern Ireland Human Rights Commission has been the most active of the three NHRIs in feeding into the state reporting processes. Dickson also suggests that the devolved administrations could further assist in the dissemination of concluding observations of monitoring bodies and that they could consult with civil society organisations and NHRIs on how to implement monitoring-body recommendations.

While the concluding observations are not binding, Dickson notes that they do effectively put pressure on states to adhere to the standards they have signed up to in international law.<sup>91</sup> From the editors' perspective, it is important to highlight when and where committee recommendations have been successfully incorporated into UK domestic law. A prime example of this phenomenon is explored in this special issue by way of Rooney's paper on the CEDAW special inquiry report relating to the decriminalisation and provision of abortion in Northern Ireland.<sup>92</sup> In the context of an issue which spotlights a great many challenges and obstacles to effective implementation, we underscore this episode as one which positively illustrates the potential impact of the IHRL system.

What is more, it should be remembered that IHRL treaty-body monitoring recommendations are taken into account by the ECtHR and can thereby inform the content of ECHR rights.<sup>93</sup> Given that the ECHR is incorporated into UK domestic law with a requirement placed on UK courts to 'take into account' ECtHR decisions under section 2 of the Human Rights Act 1998, we believe this jurisprudential arrangement further demonstrates the potential of their reach.

In the discursive process of deciding the content of IHRL obligations, IHRL committee recommendations on state reports have the potential to be extremely influential. They come from the reports produced by devolved nations relating to the specific issues arising from violations taking place in those nations. While there are issues with capacity and resources in connection with the committees themselves, the UK state reports should consistently reflect issues arising in the devolved nations so that committee responses can make targeted recommendations for those devolved nations.

---

91 Ibid 86.

92 Rooney (n 48 above).

93 See eg Ebru Demir, 'The European Court of Human Rights' engagement with international human rights instruments: looking at the cases of domestic violence' (2021) 17 *The Age of Human Rights Journal* 79.

## CONCLUSIONS

We have identified no fewer than 10 recommendations arising from our introductory survey of the contributions to this special issue. Given the significance and potential of these recommendations, we think that they are worth collating and repeating at this final stage of our essay. Our intention in reiterating them is twofold: first, to motivate our readers to thoroughly engage with each and every paper that follows and, second, to underscore the practical implications of the ideas that are explored more extensively throughout this volume. The 10 recommendations we wish to highlight are as follows.

First, where there is an overlap between devolved and reserved competences which gives rise to practical obstacles, it ought to be a constitutional principle that the UK should take reasonable steps to accommodate human rights implementation in the devolved nations. An alternative to this ‘reasonable steps to accommodate’ test could be that the UK institutions should aim to level up human rights protection in order to avoid obstacles arising from different regimes across internal borders.

Second, devolved nations should engage in processes of discursive and deliberative public consultation before they formally propose to incorporate an IHRL treaty that overlaps with reserved competences. This would ensure that the degree to which such legislation would require the UK to adjust its own legal framework is clearly identified in advance, which could help to facilitate a potential obligation on the UK to take ‘reasonable steps to accommodate’ a devolved nation’s preferred mode of IHRL implementation.

Third, the UK Government maintains different degrees of financial control across Wales, Scotland and Northern Ireland, which can prevent the devolved nations from implementing the state’s IHRL obligations in practical terms. Our suggestion is that the UK Government should agree to a measure of financial flexibility for the devolved nations when it comes to plans for fulfilling the implementation of human rights norms. It could be required that enhanced financial support from the exchequer will be predicated on implementation plans which are set out with a level of clarity that would ensure implementation measures are targeted, cost-effective, feasible and executable rather than open-ended and vague.

Fourth, the UK can and does invoke parliamentary sovereignty to stop legislative change for progressive human rights implementation in the devolved nations. The statutory framework for devolution recognises this power, but the invocation of parliamentary sovereignty to deny human rights implementation is of great concern. It arguably undercuts the autonomy that was envisaged for the devolved nations by the devolution legislation. To remedy this challenge with regard to the

case studies in this special issue, we propose that the Sewel Convention should be better respected by the centrally based UK institutions. We also suggest that the parameters of section 28(7) and section 35 of the Scotland Act 1998 (and their equivalents as regards Wales and Northern Ireland) should be more clearly defined and delimited so as to create transparency as regards the invocation of this power and to ensure that the UK courts and Government cannot be accused of an unaccountable abuse of power. The points and reasoning made by Mavronicola specifically in relation to allegations of torture by the British Government in devolved nations should also be recognised and addressed in suitable litigation or legislation.

Fifth, the suggestions made above regarding invocation of parliamentary sovereignty are narrow in their application. They do not address an underlying cultural problem regarding the relationship between UK institutions and devolved nation institutions where there remains the remnants of an imperialist exercise of control. In order to elucidate, highlight and address this cultural problem, legal academics need to engage with historical, sociological and cultural methodologies. The challenges involved in implementing IHRL in the devolved nations require an inquiry into the bedrock of the devolution arrangement and, in particular, the legitimacy of parliamentary sovereignty as a concept that can be deployed to block the devolved nations from enacting democratically constructed laws. This inquiry involves moving beyond a purely legal form of constitutional analysis and towards a more interdisciplinary perspective.

Sixth, within the devolution framework, there is a lack of clarity in respect of IHRL duty-bearers. The devolution framework should therefore be revisited to ensure that reasonable steps are taken by central institutions when they are necessary to accommodate the implementation of IHRL. Further, where a devolved nation is unwilling or unable to implement IHRL obligations, there should be clear obligations placed on Westminster bodies, working with local institutions and non-state actors, to progress the implementation of IHRL in devolved nations, when they are at odds with the rest of the UK as regards human rights protection.

Seventh, determining the substantive content of IHRL provisions requires multiple, multi-level (international, national, subnational, local), multi-actor (state and non-state, those most directly affected by lack of human rights provision) processes of discursive and deliberative public consultation. This takes time and often requires decentralised conversations in the first instance. Different actors can then come together to discuss both the formal content and the practical realisation of IHRL protections, with a view to agreeing on the detail required for proposing devolved legislation.

Eighth, implementation of IHRL is not synonymous with the incorporation of IHRL, although incorporation is a significant hallmark of implementation. There is a spectrum of implementation noted in this special issue which ranges from non-legal, community-oriented measures to hard law measures that do not merely require a remedy but an 'effective remedy'. State and non-state actors can and should engage in non-legal measures of implementation for the further protection of human rights, such as by way of education; by information dissemination; by the facilitation of wider conversations that include those most implicated by violations or the non-fulfilment of IHRL treaty norms; by learning from those most affected; and by maintaining statistics on the extent of violations or the non-fulfilment of IHRL treaty norms.

Ninth, the intuitive concept of dignity should be regarded as a guiding principle when delineating the content of indeterminate IHRL obligations, including the remedies that are available to victims when the state's obligations are breached.

Tenth, in the discursive process of deciding the content of IHRL obligations, IHRL committee recommendations on state reports have the potential to be extremely influential. They come from the reports produced by devolved nations relating to the specific issues arising from violations taking place in those nations. While there are issues with capacity and resources in connection with the committees themselves, UK state reports should consistently reflect issues arising in the devolved nations so that committee responses can make targeted recommendations for those devolved nations. This could be achieved by ensuring that there is a continuous process for sharing information between the devolved nations and the UK Government, rather than an episodic process for exchanging information only when the state reporting cycle begins.

These 10 recommendations encapsulate just some of the most practical insights derived from our survey of the articles in this volume. We hope that our introduction as a whole has provided a useful starting point for navigating and understanding each of those articles on their own terms.

## ACKNOWLEDGMENTS

This special issue follows from workshops entitled ‘Devolution in the UK and International Law’ which took place online across three two-hour sessions from 13–15 September 2021. The event was kindly funded by the Society of Legal Scholars (SLS) Small Projects and Events Fund and that award was initially intended to fund travel and accommodation for presenters, but, as a result of the Covid-19 pandemic, was redirected to the provision of a research assistant. Adam Rowe, a PhD student at Durham Law School provided great assistance to us as regards the online delivery of the workshop, as well as in connection with the recording and editing of the panel presentations for Durham University’s YouTube channel.<sup>94</sup> We are really grateful to the SLS and to Adam. We would also like to thank Professor Roger Masterman and Dr Irene Wieczorek for chairing parts of the workshop, as well as Stan Neal, former Senior Research Administrator at Durham Law School, for all of his assistance with the event.

We are particularly grateful to each of the contributors to this special issue. We acknowledge the conditions under which those contributors were writing and participating. The workshop was meant to take place in person in 2020 but was postponed to 2021 and took place online. In 2022 there were periods of industrial action and we are conscious that proofs were read and edited during a marking and assessment boycott during which many colleagues were subjected to 50 per cent pay deductions. Against this background, we do not take for granted the continued support and engagement of the contributors. We are delighted that they agreed to publish their high-quality research in this volume.

We are eager to record some special words of thanks to Professor Colin Murray, Professor Jo Hunt, Hedydd Phylip and Dr Christopher McCorkindale, who contributed to a panel on EU Law, Brexit and Devolution at our SLS workshops. In post-workshop discussions we found that questions regarding the retention of EU law and the division of competences and responsibilities in that area raised very complex and diverse issues which departed from some of the core principles and themes which we identified as regards the implementation of IHRL. As a result, we decided to narrow the focus of the special issue to a consideration of IHRL implementation in the devolved nations. The contributions that each of those scholars have made in the field of devolution and EU law are extensive and significant. They continue

---

94 [Devolution in the UK and International Law: Human Rights and Devolution Panel 1 \(YouTube 3 November 2021\)](#); [Devolution in the UK and International Law: Human Rights and Devolution Panel 2 \(YouTube 3 November 2021\)](#).

to deepen our understanding of the dynamics between international, devolved and UK institutions.<sup>95</sup>

Many thanks also go to the PhD students who provided commentary on the papers at our workshop, and who provided interesting insights into their own PhD research projects relating to the themes of the workshop: Liam Edwards, Leah Rea and Gary Simpson.

Finally, we owe our sincere thanks to Professor Mark Flear, Marie Selwood and the anonymous peer reviewers. We are delighted to publish this work in the flagship law journal of Northern Ireland and one of the most prestigious generalist law journals in the UK. The *Northern Ireland Legal Quarterly* has provided an important forum for matters relating to international law and devolution in recent years, especially post-Brexit. Mark and Marie have embraced and supported this project from the beginning. They have always been available to answer any queries and to offer support when needed. We thank the anonymous peer reviewers for offering careful and constructive insights which have undoubtedly enhanced the originality, significance and rigour of all the contents overleaf.

---

95 See eg Jo Hunt, 'Subsidiarity, competence, and the UK territorial constitution' in Oran Doyle, Aileen McHarg and Joe Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (Cambridge University Press 2021) 21; Chris McCorkindale and Aileen McHarg, 'Litigating Brexit' in Oran Doyle, Aileen McHarg and Joe Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure* (Cambridge University Press 2021) 260; Colin Murray and Clare Rice, 'Into the unknown: implementing the Protocol on Ireland/Northern Ireland' (2020) 15 *Journal of Cross Border Studies in Ireland* 17.