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NORTHERN IRELAND

# LEGAL QUARTERLY

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**Special Issue:** International Human Rights Law and Devolution in the UK

**Guest Editors:** Jane Rooney and Conor McCormick

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# Preface: International human rights law and devolution in the UK

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It is an immense privilege to write this preface for a special issue of the Northern Ireland Legal Quarterly on International Human Rights Law (IHRL) and Devolution in the United Kingdom (UK). The editors, Jane Rooney and Conor McCormick, have brought together an impressive collection of articles speaking to a wide range of issues, from prisoner voting to abortion rights to the right to be free from torture, and from the rights of the child to economic, social and cultural rights, to children's rights, to devolved administrations' engagement with, and monitoring by, United Nations (UN) treaty-monitoring bodies. The authors, leading scholars from institutions across Northern Ireland, Scotland, England and Wales, provide much food for thought in their insightful commentaries.

It is clear that IHRL intersects with a number of devolved areas of law, including health, housing and education, and thus it may fall on devolved administrations to give full effect to the human rights obligations of the state. There is, however, uncertainty over the extent to which devolved nations are duty-bearers in this regard, and the extent of their powers to give effect to international human rights treaties to which the UK is a party. Conversely, where a devolved government is unwilling or unable to give full effect to human rights law obligations, particularly in politically controversial areas, there is a question over how and when the Westminster Government can intervene to do so.

To say that this special issue is timely would be an understatement. At the time of writing, Scotland had just announced its revised plans to incorporate the UN Convention on the Rights of the Child, in response to the UK Supreme Court's 2021 judgment that the previous Bill would exceed Holyrood's legislative competence. Brexit, proposed changes to the UK's Human Rights Act 1998, abortion law reforms in Northern Ireland (pushed through by Westminster in the absence of a functioning devolved administration) and the UK Government's interventions on proposed gender recognition reforms in Scotland, amongst other ongoing issues, all speak to continued tensions between devolved nations and Westminster that will remain central

to debates around decision-making, devolved competences and the implementation of human rights law going forward.

I have no doubt that this special issue represents the start of an important new research agenda into the constitutional and political complexities surrounding devolution in the UK and international human rights law. I commend the editors and contributors for their exceptional contributions to this conversation.

*Swansea, June 2023*

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# International human rights law and devolution in the UK

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## 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.[1] 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.[2] 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.[3] Wales, Scotland and Northern Ireland have reserved models of devolution.[4] For Wales and Scotland, this means that subject matters not listed as reserved fall within the competence of the devolved institutions.[5] 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.[6] 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.[7]

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.[8] 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.[9]

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'.[10] The Welsh Government has proposed more extensive reforms which would enfranchise prisoners sentenced to less than four years.[11] 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)'.[12] 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.[13] 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.[14] 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"'[15] while substantive equality addresses 'systemic and structural inequality beyond the paradigm of equal opportunity'.[16] 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.[17] 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.[18]

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.[19]

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.[20]

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.

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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.[21] 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'.[22] This is merely a 'statement of political intent' and does 'not create legal obligations'.[23] 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.[24] 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'.[25]

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.[26] 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.[27]

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';[28] that the courts should 'strike down any provision of legislation passed by the UK Parliament prior to the Bill's enactment';[29] and that the courts should make a 'declarator of incompatibility in relation to pre-commencement legislation including an Act of Parliament'.[30] 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.[31] 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.[32] 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.[33] 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'.[34] 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.[35]

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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'.[36] 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.[37]

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'.[38] 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.[39]

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.[40] The Supreme Court quashed the decision of the Police Service of Northern

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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'.[41]

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',[42] 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'.[43]

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'.[44] McHarg specifically proposes 'a set of interpretive principles applicable to both devolved legislation and UK legislation affecting devolved matters', which could include:

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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.[45]

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.[46]

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.[47] 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

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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.[48] 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.[49] 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.[50] 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.[51]

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.

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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.[52] 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.[53] 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.[54]

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.[55] 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.[56] 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.[57] 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'.[58] 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'.[59]

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.[60]

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'.[61] Regulators, inspectorates, ombudsmen, tribunals and local complaints mechanisms can bring justice closer to individuals.[62] 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.

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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.[63] 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.[64] 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.[65]

McCall-Smith argues that there needs to be participation from civil society, professional bodies, and children themselves.[66] 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.[67]

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.[68]

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.[69]

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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.[70] 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.[71]

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.[72] Democratic rule 'implies endowing those affected by [a] decision with the most voice, but it also implies listening to them'.[73]

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

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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.[74] 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.[75]

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.[76] 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'[77] 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.[78]

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.[79] 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.[80] 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.[81] 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.[82]

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.[83]

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

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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;[84] that it was 'too abstract and patchy', and that there were some 'significant omissions from its content' either intentionally or by error.[85]

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'.[86] 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.[87] 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.[88] 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.[89]

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.[90]

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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.[91] 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.[92] 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.[93] 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.

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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.

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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.[95]

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.

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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.

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# Prisoner voting in Wales: devolved autonomy and human rights at the jagged edge

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ABSTRACT

In light of recent contestation between the UK Government and devolved institutions over legal human rights protections, this article examines the acute challenges that arise in the Welsh context for 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. The European Court of Human Rights has held repeatedly that a blanket prohibition on convicted prisoner voting is a violation of the ECHR. Following the devolution of competences over devolved and local elections, the fundamental question for Wales is not merely whether prisoners *should* get the vote, but *how* a more progressive policy can be delivered within the current structures of Welsh devolution. We argue that the Welsh Government's proposals for reform – partial enfranchisement based on sentence length – will be conditioned and undermined by criminal law and sentencing policy over which it has no control. Meanwhile, other options are either beyond devolved competence or entirely contingent upon the cooperation of a UK Government which opposes prisoner enfranchisement. In tackling these issues, we aim to demonstrate the profoundly limited nature of 'devolved autonomy' in an area ostensibly within the competence of Welsh institutions. The case study of prisoner voting thus brings into focus the unique and significant limitations on Welsh devolution and the considerable scope for complexity at the intersection of devolved governance and international human rights obligations.

**Keywords:** prisoner voting; Wales; human rights; Welsh devolution; devolved autonomy.

## INTRODUCTION

In recent years, the territorial politics of the United Kingdom (UK) have been marked by significant contestation between Westminster and the devolved institutions.[1] The legal protection of human rights has

1 Roger Masterman, 'Brexit and the United Kingdom's devolutionary constitution' (2022) 13(S2) Global Policy 58.

become a focal point of this conflict, with devolved governments and political parties opposing UK Government plans for a 'Bill of Rights' to replace the Human Rights Act 1998 and developing their own human rights frameworks.[2] In this context, the scope for devolved institutions to implement international human rights standards is under increasing academic scrutiny.[3] In this article, we contribute to these debates using a case study of prisoner voting in the Welsh devolution context.

Over the last two decades, prisoner voting has been one of the most controversial human rights issues in the UK. Between 2004 and 2017, the European Court of Human Rights (ECtHR) held repeatedly that the disenfranchisement of convicted prisoners for the duration of their sentences under UK electoral law was incompatible with the right to free and fair elections under article 3 of the First Protocol (A3P1) of the European Convention on Human Rights (ECHR).[4] Successive UK governments refused to implement the ruling, but the matter was formally resolved in 2018 after the UK Government made several administrative changes which included granting prisoners on temporary release the right to vote while outside of prison.[5] Just as the matter was reaching a resolution, however, prisoner voting became a *devolved* issue, creating 'new dimensions to an old dispute'.[6]

With the enactment of the Scotland Act 2016 and the Wales Act 2017, the Scottish Parliament and the Senedd (Welsh Parliament) acquired control over their respective devolved and local electoral

2 Emma Sheerin, 'British Government must not threaten our rights or our peace' (*Sinn Féin* 22 June 2022); Welsh Government, 'The Welsh Government's response to the UK Government consultation on replacing the Human Rights Act 1998' (Welsh Government 2022); Scottish Government, 'The Human Rights Act and the British Bill of Rights' (Scottish Government 2022); UK Ministry of Justice, 'Consultation outcome. Human Rights Act Reform: A Modern Bill of Rights – consultation' (UK Government 2022).

3 Katie Boyle and Nicole Busby, *Human Rights and Devolution: Devolution as a Vehicle for Human Rights Protection and Progress* (Human Rights Consortium Scotland 2021); Simon Hoffman, Sarah Nason, Rosie Beacock and Ele Hicks (with contribution by Rhian Croke), *Strengthening and Advancing Equality and Human Rights in Wales* (Welsh Government 2021); Kasey McCall-Smith, 'Making rights real through human rights incorporation' (2022) 26(1) Edinburgh Law Review 87.

4 *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41; *Greens and MT v United Kingdom* (2011) 53 EHRR 21; *McLean and Cole v United Kingdom* (2013) 57 EHRR SE8; *Firth and others v United Kingdom* (2016) 63 EHRR 25; *McHugh and others v United Kingdom* [2015] ECHR 155; *Millbank and others v United Kingdom* [2016] ECHR 595.

5 UK Government, 'Secretary of State's oral statement on sentencing' (Ministry of Justice 2017); Committee of Ministers, 'Resolution CM/ResDH(2018)467' (Council of Europe 2018).

6 Colin R G Murray, 'Prisoner voting and devolution: new dimensions to an old dispute' (2021) 25(3) Edinburgh Law Review 291.

arrangements.[7] Public consultations and parliamentary inquiries on prisoner voting swiftly ensued in both countries.[8] In 2020, the Scottish Parliament legislated to enfranchise prisoners serving up to one-year sentences.[9] In Wales, by contrast, matters have proven more complicated.

Following recommendations from the Senedd's Equality, Local Government and Communities Committee, in March 2020 the Welsh Government announced plans to grant Welsh prisoners serving sentences under four years the right to vote in devolved and local elections.[10] Using 'home address' to establish a Welsh 'connection', the plans would extend to all eligible prisoners irrespective of where they are being held across the England and Wales prison estate. By the Welsh Government's estimation, 1,900 prisoners – more than a third of the Welsh prison population – would acquire the right to vote under these proposals.[11] If enacted, this would be the most significant reform of electoral rights within UK prisons in more than five decades.[12]

Bringing Welsh prisoners within the franchise, however, is far more complicated than the decision to enact legislation. Beyond the challenges facing a prison system engulfed in various crises and the hostility of most London-based newspapers,[13] the Welsh devolution dispensation contains significant legal and constitutional barriers to the enfranchisement of Welsh prisoners. Unlike in Scotland and Northern Ireland, Welsh devolved institutions inhabit a single 'England

7 Scotland Act 2016, ss 3–11; Wales Act 2017, ss 5–10. Murray (n 6 above) 300.

8 Welsh Government, 'Electoral Reform in Local Government in Wales' (Welsh Government 2017); Scottish Government, 'Consultation on prisoner voting' (Scottish Government 2018); Equalities and Human Rights Committee, *Prisoner Voting in Scotland* (Scottish Parliament 2018); Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (National Assembly for Wales 2019).

9 Representation of the People Act 1983, s 3, as amended by Scottish Elections (Franchise and Representation) Act 2020, s 5.

10 Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above); Welsh Government, 'Prisoner voting plans unveiled' (Welsh Government 8 March 2020).

11 Ibid.

12 Between 1967–1969, no category of prisoner in the UK was explicitly excluded from the franchise. All convicted prisoners became subject to a statutory ban on voting with the enactment of the Representation of the People Act 1969. Colin R G Murray, 'A perfect storm: Parliament and prisoner disenfranchisement' (2013) 66(3) Parliamentary Affairs 511, 519–520.

13 D McNulty, N Watson and G Philo, 'Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate' (2014) 53(4) Howard Journal of Crime and Justice 360; C R G Murray, 'Monstering Strasbourg over prisoner voting rights' in M Farrell, E Drywood and E Hughes (eds), *Human Rights in the Media: Fear and Fetish* (Routledge 2019).

& Wales' justice system and legal jurisdiction which continues to be the principal responsibility of the UK Government and Westminster Parliament. Absent a justice system and jurisdiction of its own, the Welsh context is highly anomalous. As the Welsh Government has argued, 'every "devolved" legislature in the common law world has an accompanying legal jurisdiction'.[14]

Operating within a system with some but not all of the necessary levers over prisoner voting, Welsh devolved institutions are caught in the grip of legal obligations which they do not have the powers to fulfil. On the one hand, they are required to respect the electoral rights of prisoners under A3P1 ECHR.[15] However, they must do so without control of the criminal law, sentencing, the courts or prisons.[16] For Wales, therefore, the fundamental question is not whether prisoners *should* get the vote, but *how* a more progressive policy can be delivered within these structures.

To date, a considerable body of legal scholarship has addressed the UK's response to the ECtHR's rulings on prisoner voting.[17] Recent work has also examined the implications of devolution, focusing in particular on the prohibitive effects of the 'super-majority' requirement for devolved electoral reforms.[18] In this article, we add to this literature by focusing on the far-reaching implications of the 'jagged edge' for prisoner enfranchisement in the Welsh context, drawing attention to the considerable scope for complexity at the intersection of devolved governance and international obligations.

The article proceeds as follows. First, we situate our discussion of prisoner voting within existing literatures on Welsh devolution and 'devolved autonomy'. Even while there is considerable scope for

14 Welsh Government, 'Commission on Justice in Wales: Supplementary evidence of the Welsh Government to the Commission on Justice in Wales' (Welsh Government 2018).

15 Government of Wales Act 2006, ss 81–82, 108A(2)(e); Human Rights Act 1998, s 6.

16 Government of Wales Act 2006, sch 7A, pt 1, para 8(1) and pt 2, para 175.

17 Eg Sophie Briant, 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg' (2011) 3 European Human Rights Law Review 243; Danny Nicol, 'Legitimacy of the Commons debate on prisoner voting' [2011] Public Law 681; Colin R G Murray, 'Playing for time: prisoner disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22(3) King's Law Journal 309; Murray, 'A perfect storm' (n 12 above); Ed Bates, 'Analysing the prisoner voting saga and the British challenge to Strasbourg' (2014) 14(3) Human Rights Law Review 503; Kanstantsin Dzehtsiarou, 'Prisoner voting saga: reasons for challenges' in Helen Hardman and Brice Dickson (eds), *Electoral Rights in Europe: Advances and Challenges* (Routledge 2017); Elizabeth Adams, 'Prisoners' voting rights: case closed?' (*UK Constitutional Law Blog* 30 January 2019); Ergul Celiksoy, 'Execution of the judgments of the European Court of Human Rights in prisoners' right to vote cases' (2020) 20(3) Human Rights Law Review 555.

18 Murray, 'Prisoner voting and devolution' (n 6 above).

strengthening rights-protection in Wales, we suggest that the concept of 'autonomy' is inappropriate given the significant constraints on Welsh devolved institutions' powers, particularly in matters that straddle the jagged edge of criminal justice. The remainder of the article develops this argument through an examination of legal complexities involved in the implementation of voting rights for Welsh prisoners. Here we argue that current arrangements in Wales are incompatible with A3P1 ECHR and that Welsh devolved institutions are required to take steps to remedy this situation. We then consider different measures which the Welsh Government might consider to ensure that Welsh electoral law is compatible with the ECHR. Here it will be argued that the Welsh Government's preferred option – partial enfranchisement based on sentence length – will be conditioned and undermined by criminal law and sentencing policy for which it has no control. Meanwhile, other reform options are either beyond devolved competence or entirely contingent upon the cooperation of a UK Government which opposes prisoner enfranchisement. Welsh devolution, as presently constituted, provides only limited, contingent scope to observe and enhance the protection of prisoners' rights under A3P1 ECHR. We conclude our discussion by considering the implications for the future of devolution in Wales.

## DEVOLVED 'AUTONOMY': A CRITIQUE

### The scope for home-grown human rights policy

Prisoner voting in Wales is tied to fundamental questions about the nature of devolved power within the UK's constitutional structures. In public law and multilevel governance literature, the concept of 'devolved autonomy' is invoked habitually to describe the devolved institutions' powers and decision-making. The term implies the primacy, control and self-direction of these institutions over devolved policy areas. In an influential account of the concept, Elliott argues:

> the devolution schemes both acknowledge and conjure into life a constitutional principle—that of devolved autonomy—whose fundamentality is increasingly difficult to dispute. This demands, among other things, that the authority of devolved institutions be respected, and implies the general impropriety of UK legislation impinging upon self-government within the devolved nations.[19]

From this perspective, the concept of devolved autonomy has both normative and descriptive dimensions. Normatively, it refers to a

19 Mark Elliott, 'The principle of parliamentary sovereignty in legal, constitutional and political perspective' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* 8th edn (Oxford University Press 2015) 42–43.

principle, counterposed to the legislative supremacy of the Westminster Parliament, which conditions and restrains UK-level interference with decision-making at the devolved level. In this respect, the Sewel Convention, whereby the UK Parliament does not 'normally' legislate with respect to devolved competences or policy areas without the consent of the devolved institution(s) concerned, played an important role, historically.[20]

To the extent that the devolution schemes 'acknowledge' devolved autonomy, however, it appears that the term also purports to describe devolved institutions' powers empirically. Here, researchers generally recognise that the autonomy concerned is not absolute: instead, devolved competences need to be understood within the context of not only the legal but also the political, financial and practical constraints to which they are subject. Trench, for example, observes that 'it is easy to misread the formal division of powers to assume that devolved autonomy is greater than it actually is'.[21]

In both its normative and empirical dimensions, the concept of devolved autonomy is under increasing strain following a range of unilateral, centralising reforms undertaken by the UK Government in the context of the UK's withdrawal from the European Union.[22] Greene argues that 'Brexit … has demonstrated the fragility of this "fundamental" constitutional Principle'.[23] As an empirical description, however, the concept of devolved autonomy has always downplayed and obscured the various ways in which the devolved institutions' powers are contingent and constrained, particularly in the Welsh context.

As a matter of constitutional theory, the term 'devolved autonomy' is paradoxical. The legal doctrine of parliamentary sovereignty provides that the UK Parliament may legislate on any matter, devolved or reserved – a power also guaranteed under the devolution statutes[24]

20 Aileen McHarg, 'Constitutional change and territorial consent: the Miller case and the Sewel Convention' in Mark Elliott, Jack Williams and Alison L Young, *The UK Constitution after Miller: Brexit and Beyond* (Hart 2018).

21 Alan Trench, 'Un-joined-up government: intergovernmental relations and citizenship rights' in Scott L Greer (ed), *Devolution and Social Citizenship in the UK* (Bristol University Press 2009) 119.

22 In particular, the United Kingdom Internal Market Act 2020. Thomas Horsley, 'Constitutional reform by legal transplantation: the United Kingdom Internal Market Act 2020' (2022) 42(4) Oxford Journal of Legal Studies 1143.

23 Alan Greene, 'Parliamentary sovereignty and the locus of constituent power in the United Kingdom' (2020) 18(4) International Journal of Constitutional Law 1166, 1172. Similarly, the Institute for Government concludes that Brexit has 'exposed the limitations of the consent process as a guarantor of devolved autonomy'. Akash Paun and Kelly Shuttleworth, *Legislating by Consent: How to Revive the Sewel Convention* (Institute for Government 2023).

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

– and that Acts of the UK Parliament take precedence over all other laws. The UK Supreme Court has described this as 'the essence of devolution',[25] in contrast to a federal system based on the formal division of powers between the central and sub-state legislatures. From this perspective, devolved powers and decision-making are defined not by their autonomous character, but rather the legal omnipotence of the Westminster Parliament to set them aside at will. Even at a theoretical level, therefore, the 'devolved' prefix is not only a qualification of 'autonomy', but its latent negation.

The governance of legal human rights at the devolved level demonstrates the limitations on devolved power more concretely. Devolved legislatures are required to abide by the ECHR: unlike Acts of the UK Parliament, devolved legislation which violates the Convention rights can be declared 'not law' by the courts.[26] This has already proven to be a significant limitation on devolved powers.[27] However, the devolved institutions do not have a general competence to determine the minimum human rights standards within their respective territories (ie for reserved, as well as devolved, matters), nor do they have any formal influence on the content of those standards.[28] They are entitled to build upon UK-wide human rights obligations within areas of devolved competence, but here they face significant constraints.

For instance, devolved institutions can only subject *themselves* to additional human rights obligations; they cannot place the same obligations on either the UK Parliament or UK ministers, even in respect of devolved matters, nor can they create schemes which could subject UK-level institutions to judicial scrutiny and non-binding declarations on human rights grounds.[29] According to the UK Supreme Court, even non-binding schemes would 'impose pressure'[30] on the UK Parliament

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25 *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64, [2019] AC 1022, [41].

26 Scotland Act 1998, ss 29(1) and 29(2)(d); Northern Ireland Act 1998, ss 6(1) and 6(2)(c); Government of Wales Act 2006, ss 108A(1) and 108A(2)(e).

27 Eg *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] AC 1016.

28 Despite the long-standing opposition of the devolved governments to the repeal of the Human Rights Act 1998, the UK Government seeks to replace the legislation with a 'Bill of Rights' which weakens or removes several of the Act's protections. Both governments also favoured the retention of the EU Charter of Fundamental Rights in UK law, but this was rejected by the UK Government.

29 *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.

30 Ibid [52].

and thereby undermine its freedom to legislate on devolved matters, as guaranteed by the devolution statutes. Since the UK Parliament retains the legal authority to alter devolved competences and intervene in any devolved matter, devolved human rights policy is also contingent upon Westminster's self-restraint. In general, devolved legislation perceived as an impediment to UK Government policy aims can simply be legislated away.[31]

The UK Government also has a power to veto devolved legislation, even when its provisions are within the competence of the devolved legislatures. Overlaps between cross-cutting devolved and non-devolved competences thus provide further scope for the UK Government to frustrate devolved policies which it disagrees with. In the Welsh case, 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. The UK Government recently exercised the equivalent power for the first time under the Scotland Act 1998, section 35, in order to block the Scottish Government's Gender Recognition Reform Bill.[32] The power under section 114 of the 2006 Act, however, is not only broader but subject to more permissive statutory conditions. It is broader to the extent that, unlike Scottish Bills, Senedd legislation can be blocked where the UK Government has reasonable grounds to believe that it would adversely affect the operation of the law as it applies in England.

The statutory threshold is lower because, unlike section 35 of the Scotland Act 1998, there is no requirement that Senedd legislation modifies the law on reserved matters. All that is required is that the UK Government has 'reasonable grounds to believe' the legislation would have the adverse effects specified. The role of the courts here appears to be confined to an assessment of whether the UK Government's judgement is reasonable in the *Wednesbury*[33] sense. If this is the case, judges would be unlikely to intervene to uphold devolved legislation in all but the most extreme cases. While the section 114 order may be annulled by either the House of Commons or the House of Lords,

31 Note, for example, the UK Government's recent plans to repeal provisions of the Trade Union (Wales) Act 2017. 'Rail strike: UK ministers to scrap Senedd ban on agency staff' (*BBC News* 27 June 2022).

32 David Torrance and Doug Pyper, *The Secretary of State's Veto and the Gender Recognition Reform (Scotland) Bill* (House of Commons Library 2022).

33 Namely, 'so unreasonable that no reasonable authority could ever have come to it': *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 223, 230 (Lord Greene MR).

it remains an expansive veto power over Senedd legislation, with significant consequences for the exercise of devolved competences. As Trench notes, 'the practical exercise of devolved autonomy depends on the ability to reach an accommodation with the UK Government – which, given the inequality of bargaining power of each level, means at least ensuring that the UK Government does not obstruct devolved proposals'.[34] Given that successive UK governments have vehemently opposed the enfranchisement of convicted prisoners, this is particularly significant in the present context.

Devolved institutions must also find the resources for additional human rights protections in the absence of any specific funding for such measures in the block grant allocated by the UK Government. With 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. Major spending reductions in England can precipitate the same policy shifts by the devolved governments, irrespective of their own policy agendas.[35] The effects of this arrangement are particularly severe in Wales, where 'UK government fiscal policy remains an overwhelmingly important determinant of the size of the Welsh budget'.[36]

In addition to these general limitations, Welsh devolved institutions have always been subject to a unique set of constraints. The Senedd (then National Assembly for Wales) did not acquire full legislative powers over matters devolved to it until 2011.[37] Further, for almost two decades, the guiding principle of Welsh devolution was that all powers would remain with Westminster unless and until 'conferred'. The Wales Act 2017 introduced a reserved powers 'model' of sorts, whereby all powers would be devolved unless subject to an explicit reservation. Superficially, this reform brought Wales in line with Scotland and Northern Ireland, but is unprecedented in the number and breadth of matters which are reserved to Westminster. To the extent that a reserved powers model emphasises sub-state autonomy 'by specifying *only* those powers to be retained by the central (Westminster) legislature',[38] the Welsh example is a poor fit. Less

34 Trench (n 21 above) 122.

35 For example, the UK Government's decision to discontinue funding for Covid-19 testing in England in early 2022. Ruth Mosalski, 'Welsh Government issues statement on future of free Covid testing in Wales' (*WalesOnline* 22 February 2022).

36 Guto Ifan, Cian Siôn and Daniel Wincott, 'Devolution, independence and Wales' fiscal deficit' (2022) 261(1) National Economic Review 16, 19.

37 Following a referendum on primary law-making powers on 3 March 2011, held in accordance with the Government of Wales Act 2006, pt 4.

38 Masterman (n 1 above) 61.

an exercise in autonomy-enhancement, the latest iteration of Welsh devolution is but 'another constitutional scheme of bits and pieces'.[39]

In the context of the present discussion, by far the most significant constraint is the single England & Wales justice system and legal jurisdiction, which dates back to the Laws in Wales Acts 1536–1542 (sometimes referred to, euphemistically, as the 'Acts of Union'). Five centuries on, despite legislative devolution to Wales and the increasing differentiation of Welsh and English laws, it remains the steadfast view in Westminster and Whitehall that this arrangement should persist.[40] Indeed, the only discernible logic of the most recent iteration of Welsh devolution is the Whitehall imperative that Welsh devolved institutions should not have control over the justice system. The 2017 Act not only reserves justice and jurisdiction to Westminster, it even introduces a requirement on Welsh ministers to conduct 'justice impact assessments' for new Senedd Bills,[41] stipulating how new Welsh policies will affect the workings of the England & Wales legal system. Despite the regular and profound changes, Welsh devolution has been consistently characterised not by notions of self-rule and autonomy but restriction and control.

## The 'jagged edge' of justice in Wales

The area of criminal justice in Wales provides one of the clearest examples of the paradox between autonomy and restriction. While the responsibility for criminal justice remains formally reserved to the UK level, policy decisions taken by successive Westminster governments have, rather inadvertently, provided the Welsh Government with a considerable role to play in delivering justice services.[42] In areas such as health, education, housing, social services, and tackling substance misuse, for example, it has responsibility for developing and implementing its own strategies aimed at reducing crime and supporting those in conflict with the law. Even if there remains a nominally singular England & Wales jurisdiction, the criminal justice system in post-devolution Wales is not the same as that which operates in England.

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39 Richard Rawlings, 'The strange reconstitution of Wales' [2018] Public Law 62, 68.

40 HC Deb 22 January 2020, vol 670, col 156WH; D Wolfson, 'Lord Wolfson speech: Legal Wales Conference' (Ministry of Justice 2021). The UK Government reiterated this standpoint in a Westminster Hall debate on 29 November 2022. The Parliamentary Under-Secretary of State for Justice, Mike Freer MP, said: 'We disagree with Lord Thomas and with the Welsh Government, and do not think that justice should be devolved.' HC Deb 29 November 2022, vol 723, col 274WH.

41 Government of Wales Act 2006, s 110A.

42 Robert Jones and Richard Wyn Jones, *Criminal Justice in Wales: On the Jagged Edge* (University of Wales Press 2022).

Arguably the clearest illustration of the 'different Welsh perspective' to criminal justice in post-devolution Wales is the creation of distinct Welsh-only strategies and initiatives that form part of the Welsh Government's own policy agenda.[43] In the area of youth justice, for example, the devolved government has led on a rights-based approach to the treatment of children in conflict with the law. Its *Children First, Offender Second* strategy has been widely heralded for its inclusive and progressive approach to children's rights.[44] In response to the outbreak of Covid-19 in 2020, the Welsh Government used its powers over healthcare to require Welsh police forces to enforce different public health regulations in Wales to those in England.[45] It has also devised alternative approaches to supporting homeless prison leavers,[46] tackling substance misuse,[47] improving domestic abuse services,[48] and legislating to remove the defence of 'reasonable chastisement'.[49]

Despite the 'considerable autonomy'[50] that the devolved government enjoys over key policy areas in Wales, however, the nature of the Welsh devolution dispensation presents several obstacles and challenges to policy implementation.[51] In post-devolution Wales, absent a separate criminal justice system, those charged with the responsibility for conceiving and operationalising justice policy and wider areas of social policy are working across a *jagged edge* between devolved and reserved responsibilities. The UK Government's criminal justice policies intersect with and indeed are reliant upon the Welsh Government's responsibilities for many areas of social policy. Likewise, devolved policy-making is fundamentally impacted by criminal justice policies being pursued by the UK Government, over which devolved institutions have little or no formal influence. Despite

43 NOMS Cymru, Welsh Government and Youth Justice Board, Joining Together in Wales: An Adult and Young People's Strategy to Reduce Reoffending (National Offender Management Service Cymru 2006) iii.

44 Mark Drakeford, 'Devolution and youth justice in Wales' (2010) 10(2) Criminology and Criminal Justice 137.

45 Robert Jones, Michael Harrison and Trevor Jones, 'Policing and devolution in the UK: the "special" case of Wales' (2022) Policing: A Journal of Policy and Practice 1–13.

46 HM Inspectorate of Prisons, 'Report on a full unannounced inspection of HMP Altcourse' (HMIP 2014).

47 David Brewster and Robert Jones, 'Distinctly divergent or hanging onto English coat tails? Drug policy in post-devolution Wales' (2019) 19(3) Criminology and Criminal Justice 364–381.

48 Jones and Wyn Jones (n 42 above).

49 Welsh Government, 'Ending physical punishment in Wales' (Welsh Government, 2022).

50 NOMS Cymru et al (n 43 above) 8.

51 Brewster and Jones (n 47 above).

having a progressive vision for youth justice, for example, it is the UK Government which is responsible for setting the age of criminal responsibility. Likewise, while the Welsh Government has set out its own vision for a future Welsh criminal justice system, including its intention to 'reduce the size of the prison population',[52] this ambition will ultimately be contingent on the UK Government's control over criminal law and sentencing policy.

Following a two-year investigation into the state of the justice system in Wales, the Commission on Justice in Wales, chaired by the former Lord Chief Justice, Lord Thomas of Cwmgiedd, concluded that the arrangements for criminal justice in Wales are not only highly unorthodox but 'overly complex'.[53] A research report commissioned by the Welsh Government also noted that this setup is 'bound to have an impact on the Welsh Government's capacity to strengthen and advance equality and human rights', and that some rights-enhancing measures 'may require cooperation from UK Government'.[54]

Prisoner voting in devolved elections falls squarely within this complex set of arrangements. The current rule excluding convicted prisoners from voting is found in electoral law, but its effects are determined by criminal law and sentencing policy. While the 2017 Act transferred powers over Welsh electoral arrangements to Wales, thereby providing space for home-grown democratic reform,[55] criminal law, sentencing, prisons and the courts remain reserved to the UK level.[56] It seems that the UK Government simply did not consider the full implications of devolving competences over the electoral franchise. Indeed, when Secretary of State for Justice, David Lidington MP, first announced the changes to prisoner voting rules in 2017, he remarked:

> we will of course work with the three devolved administrations on this issue, in particular to reflect the differences in law and practice in Scotland and Northern Ireland, and we have informed them of our plans to resolve this for the whole of the UK.[57]

The statement underscored, first, the UK Government's preference for a statewide approach to prisoner voting. Second, it showed obliviousness to the fact that the devolution of competences over Scottish devolved elections had already taken place, and that the same changes were also imminent in the Welsh context. Third, the statement suggests that the

52 Welsh Government, Delivering Justice for Wales (Welsh Government 2022) 9.
53 Commission on Justice in Wales, Justice in Wales for the People of Wales (Commission on Justice in Wales 2019) 10.
54 Hoffman et al (n 3 above) 77.
55 Wales Act 2017, ss 5–10.
56 Government of Wales Act 2006, sch 7A, pt 1, para 8(1) and pt 2, para 175.
57 UK Government, 'Secretary of State's oral statement on sentencing' (n 5 above).

single England & Wales legal jurisdiction led to a particular neglect of the Welsh dispensation.

The Senedd has thus inadvertently acquired control over a significant criminal justice policy, but it does not exercise 'autonomy' over this issue. Instead, Welsh devolved institutions find themselves in a legal bind: obliged to uphold the ECHR, yet lacking the powers necessary to protect and enhance prisoners' A3P1 rights independently of Whitehall's supervision; required to act lawfully, even while the routes to legality are either cluttered or shut off entirely by reservations.

## THE CONTINUING DISENFRANCHISEMENT OF WELSH PRISONERS, POST-*HIRST*

### The limitations of the 'Lidington compromise'

So far, we have questioned the merits of the concept of 'devolved autonomy' in light of the various constraints on Welsh devolved institutions. We turn now to examine the interaction between those constraints and the matter of prisoner voting. Our aim here is to demonstrate how, on the one hand, there are powerful legal incentives for the Welsh Government to introduce legislation to enfranchise the Welsh prison population. In the subsequent part of the paper, we will demonstrate how these incentives are stifled by the existing dispensation.

The legal dimensions of the prisoner voting dispute between the UK and the ECtHR are well known. Section 3 of the Representation of the People Act 1983 provides that all convicted prisoners are 'legally incapable' of voting for the duration of their sentences. When this was challenged in Strasbourg in *Hirst v UK*, the ECtHR held that this 'general, automatic and indiscriminate'[58] rule was a disproportionate restriction on the right to vote which violated A3P1 ECHR. While it refrained from specifying how UK electoral law could be brought in line with the Convention, it called repeatedly on the UK to introduce a *legislative* change.[59] In 2018, however, the Council of Europe's Committee of Ministers, responsible for the supervision of the Strasbourg court's judgments, closed the matter after the UK Government introduced a set of minor administrative reforms: the 'Lidington compromise'[60] – named after then Secretary of State for Justice, David Lidington MP.[61] Convicted prisoners would be

58 *Hirst* (n 4 above) para 82.

59 *Greens and MT* (n 4 above) para 115; *Firth* (n 4 above) para 14; *McHugh* (n 4 above) para 10; *Millbank* (n 4 above) para 9. Celiksoy (n 17 above) 573.

60 Murray, 'Prisoner voting and devolution' (n 6 above) 299.

61 UK Government, 'Secretary of State's oral statement on sentencing' (n 5 above).

informed at or close to the time of sentencing that they would lose their right to vote, thereby addressing a minor point in the *Hirst* judgment that disenfranchisement was being imposed upon prisoners without informing them.[62] Second, prisoners on temporary release would be entitled to vote while physically outside of prison. This added to the list of categories who were already able to vote under UK electoral law, including unconvicted, unsentenced and civil prisoners.[63] Third, the administrative guidance would be clarified to make clear that prisoners released on home detention curfew – who were already eligible – were also allowed to vote.

Lidington's compromise has been described as 'minimalist compliance'[64] and the Committee of Minister's decision to accept it 'hard to comprehend'.[65] Despite the ECtHR's insistence on legislative change, section 3 of the 1983 Act is still in force and convicted prisoners remain overwhelmingly disenfranchised. Even those enfranchised by the UK Government's changes face additional restrictions compared with other eligible categories. Temporary release prisoners cannot vote while inside prison.[66] They cannot be released for the purpose of voting, nor can they register to vote using the address of the prison. They can only register and vote if released for other permitted purposes, such as employment, childcare, or compassionate leave.[67] In many cases, these individuals will be on temporary release from a prison outside of their normal constituency, further complicating voter registration. Murray suggests that this particular change 'if anything increases the level of arbitrariness in the process'.[68] All in all, it is difficult to see what has changed since the *Hirst* ruling.

Further to the limitations of the Lidington reforms, prisoners who have a legal right to vote face a risk of *administrative* disenfranchisement – an issue which has not been subject to adequate political and judicial scrutiny. The limited evidence available suggests that very few prisoners are registering to vote. The Electoral Commission's report on the 2021 Scottish Parliament election

62 'it may be noted that, when sentencing, the criminal courts in England and Wales make no reference to disenfranchisement': *Hirst* (n 4 above) para 77.

63 UK Ministry of Justice, 'Restrictions on prisoner voting policy framework' (Ministry of Justice 2020).

64 Andreas von Staden, 'Minimalist compliance in the UK prisoner voting rights cases' (*ECHR Blog* 16 November 2018).

65 Celiksoy (n 17 above) 575.

66 UK Ministry of Justice, 'Restrictions on prisoner voting policy framework' (n 63 above).

67 UK electoral law requires individuals to be 'resident' at an address within a given constituency for the purposes of electoral registration. Representation of the People Act 1983, s 4.

68 Murray, 'Prisoner voting and devolution' (n 6 above) 311.

revealed that just 38 prisoners had registered to vote in that election – despite the Scottish Government's estimation that an additional 1000 prisoners had acquired the vote in 2020.[69] In a recent empirical study of prisoner voting rights in the UK, we found that applications from eligible prisoners are extremely rare: less than a third (28%) of electoral administrators surveyed for our study indicated that they had ever received an application from a prisoner.[70] Almost all of those (96%) had received just one to five applications during the course of their careers.[71]

Even where prisoners seek to vote, there are serious problems in the administration of their voting rights. For instance, although remand prisoners are eligible to vote, a 2012 review by HM Inspectorate of Prisons (HMIP) found that two out of five prisons visited had 'no arrangements to facilitate this entitlement'.[72] Further, prisoners are often unaware of their voting rights and may also lack the necessary information and documentation for the registration process, such as their date of birth, national insurance number, a passport or driver's licence, and a fixed or regular address.[73] These difficulties are compounded by the pressures that electoral administrators have faced in recent years: budget cuts to local authorities, loss of experienced staff, and high workloads, resulting in staff in UK electoral services having 'amongst the highest stress rates in the world'.[74] In these conditions, encouraging eligible prisoners to register to vote is unlikely to be a priority.

We identified further problems in the administration of prisoner voting rights in our empirical study with electoral administrators,

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69 Electoral Commission, *Report on the Scottish Parliament Election on 6 May 2021* (Electoral Commission 2021); Scottish Government, *Consultation on Prisoner Voting* (n 8 above).

70 Robert Jones and Greg Davies, 'Prisoner voting in the United Kingdom: an empirical study of a contested prisoner right' (2022) 86(4) Modern Law Review 900–926.

71 Ibid.

72 HM Inspectorate of Prisons, Remand Prisoners: A Thematic Review (HMIP 2012).

73 Ibid; House of Commons and House of Lords Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill* (HL 103 2013–2014) 75, 77; Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above) 45; Equality, Local Government and Communities Committee, 'Inquiry into Voting Rights for Prisoners: Evidence Session 5' (National Assembly for Wales 2019); Mandeep Dhami and Paula Cruise, 'Prisoner disenfranchisement: prisoner and public view of an invisible punishment' (2013) 13(1) Analysis of Social Issues and Public Policy 211.

74 Toby S James, 'Written evidence submission to the House of Lords Select Committee Inquiry on the Electoral Registration and Administration Act 2013' (House of Lords 2019) 138.

including poor communication between prison and electoral services, the potential for prisoner transfers and dispersal to disrupt electoral correspondence and registration, and a prevalence of incomplete or erroneous registration applications, potentially indicative of a lack of support within prisons.[75] Electoral administrators' responses to the survey also suggested that the electoral guidance on prisoner voting lacks sufficient clarity to be applied consistently, particularly regarding the registration criteria for remand and temporary release prisoners.[76] In light of these problems, we concluded that the scale of prisoner disenfranchisement in the UK is likely to be far more severe than the rules on voting eligibility suggest.[77]

In summary, the Lidington compromise not only deviated from the requirements of A3P1 ECHR, as interpreted in *Hirst* and subsequent cases. By focusing exclusively on the question of legal eligibility, at the expense of the administration of voting rights, neither the UK Government nor the Strasbourg institutions fully appreciated the precarious position of prisoners who already have voting rights. Despite all the litigation and political wrangling, therefore, there is yet to be a full legal evaluation of the A3P1 ECHR rights of UK prisoners based on a comprehensive treatment of the relevant facts.

## The severity of prisoner disenfranchisement in Wales

If current electoral law and administration continues to infringe the A3P1 rights of UK prisoners, the effects of this are arguably felt most acutely in the Welsh context. While England & Wales combined boast one of the highest imprisonment rates in Western Europe, Wales has consistently recorded a higher rate for the best part of a decade.[78] As the Fifth Senedd's Equality, Local Government and Communities Committee observed, 'people in Wales are more likely to be imprisoned than people in England'.[79] What is more, Wales' imprisonment rate eclipses all other countries in Western Europe listed in the most recent *World Prison Population Brief*.[80] At the same time, convicted – as opposed to unconvicted/remand – prisoners make up a much larger proportion of the prison population in England & Wales compared

75 Jones and Davies (n 70 above).
76 Ibid.
77 Ibid.
78 Jones and Wyn Jones (n 42 above).
79 Equality, *Local Government and Communities Committee, Voting Rights for Prisoners* (n 8 above) 37.
80 Helen Fair and Roy Walmsley, *World Prison Population List* 15th edn (Institute for Crime and Justice Policy Research 2021).

to Scotland and Northern Ireland.[81] The result is that Welsh people, particularly those from the most deprived areas[82] and Black, Asian and Minority Ethnic backgrounds,[83] are more likely to be disenfranchised by the Representation of the People Act 1983, section 3. Moreover, given the differences in the number of remand prisoners, a higher proportion of the Welsh prison population is subject to the statutory ban, compared with Scotland and Northern Ireland.

From a Welsh perspective, however, Lidington's reforms were inconsequential. The UK Government estimated that 'up to 100 prisoners on any given day'[84] would benefit from the administrative changes. As a proportion of the UK prison population, this would equate to around six Welsh prisoners on any given day, in an average

81 Remand prisoners comprise a much larger proportion of the prison population in Northern Ireland (37%), while more than a quarter of prisoners in Scotland (28%) are on remand, compared to 16% of the prison population in England and Wales. Northern Ireland Prison Service, Northern Ireland Prison Population 2021–22 (Northern Ireland Prison Service 2022); Scottish Prison Service, Scottish Prison Population: Statistics 2021 to 2022 (Scottish Prison Service 2022); UK Ministry of Justice, Prison Population: 31 March 2022. Offender Management Statistics Quarterly: October to December 2021 (Ministry of Justice 2022).

82 A wide body of research demonstrates the 'clear positive relationship' between income inequality and higher levels of imprisonment. Diane Caddle and Debbie Crisp, 'Imprisoned women and mothers' Research Study 162 (Home Office 1997); Tim Newburn, 'Social disadvantage, crime, and punishment' in Dean Hartley and Lucinda Platt (eds), *Social Advantage and Disadvantage* (Oxford University Press 2016) 329; Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice* 9th edn (Routledge 2010); Social Exclusion Unit, *Reducing Re-offending by Ex-prisoners* (Office of the Deputy Prime Minister 2002); Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009); Kim Williams, Jennifer Poyser and Kathryn Hopkins, *Accommodation, Homelessness and Reoffending of Prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) Survey* (Ministry of Justice 2013). Analysis of Welsh imprisonment data alongside the Welsh Index of Multiple Deprivation shows that the rate of imprisonment is around three times greater in the five most deprived local authorities in Wales than the rate recorded for the five least deprived. Although less than a third (28%) of Wales' population live in the five most deprived areas, almost half (49%) of all Welsh prisoners recorded a 'home address' in these places in 2017: Greg Davies and Robert Jones, 'Deprivation and Imprisonment in Wales by Local Authority Area' (Wales Governance Centre at Cardiff University 2019).

83 In 2020, for every 10,000 White people living in Wales, 14 were in prison. This compared to 79 people from a Black ethnic background, 44 people from a Mixed background, and 21 per 10,000 from an Asian background. These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

84 UK Government, 'Secretary of State's oral statement on sentencing' (n 5 above).

Welsh prison population of 4,682:[85] alternatively, around 0.1 per cent of the Welsh prison population. Developments since the reforms were introduced have also meant that the minor changes made to the franchise in 2018 have largely been undone. In the wake of the Covid-19 pandemic, the temporary release of prisoners in England and Wales was suspended in 2020 for all prisoners except those deemed to be 'key workers' and those released on compassionate grounds. With a 44 per cent decrease in temporary releases between 2019 and 2021,[86] the number of additional prisoners entitled to vote in the Senedd election on 6 May 2021 is likely to have been negligible. On this basis, it could be argued that the election failed to meet the requirements of A3P1 ECHR, as set out in *Hirst* and subsequent cases.

To what extent, then, are Welsh devolved institutions required to act to address this situation? Murray observes that, although the devolved legislatures can 'legislate to rectify human rights breaches resultant from Westminster legislation … within their areas of competence, … questions remain over the extent to which they are *compelled* to do so'.[87] In an analysis of relevant case law,[88] however, he argues that it is 'incumbent'[89] upon them to address breaches falling within the scope of their powers.[90] Although not obliged to legislate, if they do, they must do it in a way which is compatible with the Convention rights.[91] On this basis, Murray concludes that the Welsh Government's recent electoral reforms are problematic: 'In legislating to reform the franchise without addressing the issue of the ongoing breach of prisoners' voting rights, … the Welsh Government risks having its competence to enact these measures challenged on human rights grounds.'[92]

In summary, there remains a compelling case for the Senedd to legislate in order to meet its human rights obligations. The UK Government's reforms have done nothing to address prisoner disenfranchisement in the UK; indeed, the situation is likely to be

85 These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

86 Ibid.

87 Murray, 'Prisoner voting and devolution' (n 6 above) 296 (emphasis added).

88 Ibid 296–297. *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173; *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.

89 Murray, 'Prisoner voting and devolution' (n 6 above) 297.

90 *In re G* (n 88 above) [46] (Lord Hope).

91 Murray, 'Prisoner voting and devolution' (n 6 above) 297.

92 Ibid 308. Murray also notes that the Senedd legislated to enable 16 and 17-year-olds held in the secure estate to register to vote for devolved and local elections (Senedd and Elections (Wales) Act 2020, s 19). However, freedom of information requests to all 22 local authorities in Wales suggest that no one in this category had registered for the 2021 Senedd election.

worse than previously thought. The effects of current UK government policy are most acute in Wales, yet the Lidington reforms had no discernible impact on Welsh prisoners. Despite the formal resolution of the *Hirst* cases, it could therefore be argued that recent electoral reforms in Wales and the 2021 Senedd election fell short of A3P1 ECHR's requirements.

## BARRIERS TO PRISONER ENFRANCHISEMENT IN WALES

Having acquired competences over devolved electoral arrangements, the Welsh Government and Senedd can now initiate a process of prisoner enfranchisement. As the preceding discussion made clear, there are compelling legal reasons for them to do so. If and when that happens, however, they will face a considerable set of constitutional, political and practical obstacles. After setting out these obstacles, we consider their likely impact on four different reform options and the implications for the Senedd's legislative competence in this space.

Constitutionally, the Welsh Government lacks the powers to facilitate prisoner voting by itself. Under the devolution statutes, changes to electoral and institutional arrangements are subject to a 'super-majority' requirement: they require the approval of two-thirds of the Senedd membership, or 40 out 60 members.[93] In practice, this means that the Welsh Government will need the support of other political parties to extend the franchise. The UK Government considered the threshold necessary to prevent electoral changes being implemented for party-political advantage.[94] However, the super-majority requirement has arguably hampered reform in this area. The Welsh Government had initially included provisions in the Local Government and Elections (Wales) Bill to grant prisoners serving up to four-year sentences the right to vote in local elections. However, it chose to abandon these amid the outbreak of the Covid-19 pandemic and criticism from opposition parties over the timing of the changes.[95] Murray therefore argues that the super-majority requirement exerted

93 Under the Government of Wales Act 2006, s 111A the regulation of 'persons entitled to vote as electors at an election for membership of the Senedd' is a protected subject matter to which the super-majority requirement applies.

94 Murray, 'Prisoner voting and devolution' (n 6 above) 301, citing Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (2015) HL 145, para 92.

95 'Coronavirus: prisoner votes in Welsh local elections plan shelved' (*BBC News* 8 April 2020).

'a telling effect': 'the Welsh Government was not confident it could meet the 40 votes that would be required to get these proposals passed'.[96]

A bigger constitutional obstacle, however, is the jagged edge of criminal justice in Wales. Since the UK Government retains control over the prison estate, enfranchisement will require the cooperation of the Ministry of Justice and His Majesty's Prison and Probation Service (HMPPS). As an official for the Electoral Commission told the Senedd Committee inquiry on prisoner voting, 'this can only be done through the co-operation and engagement of the prison service itself'.[97] Further, because the UK Government is still responsible for the criminal law, sentencing and the courts, it will continue to have a profound influence over the number of prisoners which benefit from any Welsh Government changes to the franchise.

This constitutional setup gives rise to a major political obstacle: the long-standing opposition of UK governments to prisoner enfranchisement.[98] With the legal dispute over prisoner voting with the Council of Europe formally resolved, there is little incentive for it to revisit the issue, particularly given the fervent opposition of most of the English media to enfranchising convicted prisoners.[99] Indeed, it seems likely that the more far-reaching the Welsh Government's proposals, the less likely it is that the UK Government will facilitate the desired change. In other words, an attempt to use devolved competences to their full extent will render UK Government obstruction all the more probable. 'Devolved autonomy', however qualified, is not an appropriate description for this arrangement.

The single 'England & Wales' justice system also gives rise to a significant practical complication, namely the dispersal of Welsh and English prisoners across the prison estate. In 2021, more than a quarter (27%) of Welsh prisoners were held in England, in over 100

96 Murray, 'Prisoner voting and devolution' (n 6 above) 307.

97 Equality, Local Government and Communities Committee, 'Inquiry into Voting Rights for Prisoners' (n 73 above) para 154. Similarly, powers given to the Welsh Language Commissioner under the Welsh Language (Wales) Measure 2011 to ensure compliance with standards of conduct on the Welsh language are limited with respect to the criminal justice system in Wales. Under s 43 of the Measure, the Commissioner is only able to impose duties on crown bodies, or ministers of the crown, with the consent of the Secretary of State. In 2018 the Welsh Language Commissioner told Westminster MPs that it is likely that 'most UK Government institutions' will continue to operate schemes set up outside of the Welsh Language Measure 'for some time to come'. Welsh Language Commissioner, 'Written evidence submitted to the House of Commons Welsh Affairs Committee on Prison Provision in Wales' (Welsh Language Commissioner 2018) 3.

98 Former Secretary of State for Justice, David Lidington MP, described the disenfranchisement of convicted prisoners as an expression of 'British values'. UK Government, 'Secretary of State's oral statement on sentencing' (n 5 above).

99 McNulty et al (n 13 above); Murray, 'Monstering Strasbourg' (n 13 above).

English prisons, while English prisoners made up almost a third (32%) of the prison population in Wales.[100] This situation creates a further incentive for the UK Government not to use its powers to facilitate a more progressive Welsh policy. Whether the Welsh Government seeks to enfranchise prisoners on the basis of the location of the prison in which they are held or their home address, it would be asking the UK Government to make significant concessions on its policy of disenfranchisement for convicted prisoners. Given the nature of the prison population, any Welsh policy of prisoner enfranchisement for devolved elections inevitably involves either convicted Welsh prisoners casting votes inside English prisons or convicted English prisoners casting votes inside Welsh prisons – neither of which a UK Government is likely to greet with much enthusiasm.

No matter how the Welsh Government proceeds, these constraints are likely to have decisive implications for the realisation of its chosen policy. One option is to tie disenfranchisement to sentence length. This is the Welsh Government's preferred approach, having proposed to enfranchise prisoners sentenced to less than four years. This, it argued, 'strikes the right balance between sending strong and positive messages to prisoners that they continue to have a stake in society and acknowledging the nature, gravity and circumstances of the offending'.[101]

On the one hand, this step might be enough to discharge its human rights obligations. A number of institutions in recent years have concluded that the enfranchisement of prisoners serving up to one-year sentences would satisfy the ECtHR.[102] However, without the corresponding powers over criminal justice policy, and thus the size of the Welsh prison population, any threshold based on sentence length is likely to be devoid of principle and coherence. In effect, this aspect of Welsh electoral policy will be conditioned by the changing currents of criminal justice policy in Westminster. In this respect, it is worth noting that significant changes have already taken place. Since the Welsh Government first consulted on prisoner voting in 2017, for example, the number of Welsh prisoners serving up to four-year sentences has fallen by almost a third (31%).[103] Following the 2019

100 Welsh prisoners could be found within 104 different prisons in England in 2021. These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

101 Welsh Government, 'Prisoner voting plans unveiled' (n 10 above).

102 Joint Committee on the Draft Voting Eligibility (Prisoners) Bill (n 73 above); Scottish Elections (Franchise and Representation) Act 2020, s 5.

103 The number of Welsh prisoners serving sentences up to four years fell by 31% between 2017 (1,803) and 2022 (1,238). While 38% of the Welsh prison population had been sentenced to less than four years in 2017, this number had fallen to 26% in 2022.

general election, the UK Government also acted upon its commitment to increase the use of longer sentences.[104] As a result, the number of prisoners who would be able to vote in Welsh elections under the Welsh Government's proposals has already shrunk and is likely to reduce further in future.[105]

Another issue with the Welsh Government's preferred approach is that it will require the UK Government, more specifically HMPPS, to permit and facilitate prisoner voting across the prison estate, including potentially in over 100 English prisons. Additionally, it will create differentiated rights inside of prisons, thereby sharpening a division between those prisoners with rights and those without them. This is not without consequence. When the Welsh Government legislated to include unintentionally homeless prison-leavers amongst the list of those given automatic priority need status for accommodation in 2001, the policy was cited as a cause of friction between English and Welsh prisoners in English prisons.[106] Similarly, in this instance, prisoners serving comparable sentences, within the same legal jurisdiction, officially the same criminal justice system, even within the same prisons, would hold different rights of democratic participation. In a prison cell in HMP Berwyn in north Wales, for example, it would be possible to have two prisoners – one from Caernarfon, the other from Coventry – sentenced for the same criminal offence and serving the same sentence length. The former would have the right to vote in a local election, the latter would not. In this way, we see how the jagged edge in constitutional arrangements expresses itself in territorial fault lines and policy differentiation even at the scale of the prison cell.

Alternatively, the Senedd could attempt to enfranchise all prisoners held within Welsh prisons, using the prison as their address and the surrounding area as their voting constituency. It might do so on the grounds that these prisoners receive essential devolved services such as healthcare for which the Welsh Government is responsible and ought to be electorally accountable. This, however, would exclude imprisoned Welsh women from the franchise, since they are currently held

104 Police, Crime, Sentencing and Courts Act 2022.

105 Conversely, if the UK Government were to do the opposite, and increase the use of shorter sentences, the proportion of prisoners with voting rights would accordingly *increase*, yet without needing any sanction from Welsh devolved institutions.

106 Specifically, HMP Altcourse in Liverpool, which then operated as the 'local prison' to north Wales: Robert Jones, 'The Hybrid System: Imprisonment and Devolution in Wales' (PhD Thesis, Cardiff University 2017).

exclusively in English prisons.[107] Concerns over constituency inflation are also likely to make this approach unpalatable to politicians at both the devolved and UK levels. On the one hand, it would enfranchise up to 1,500 English prisoners held inside Welsh prisons.[108] Given that it took 13 years and multiple adverse ECtHR judgments before the UK Government conceded to grant 'up to one hundred prisoners' the vote, such a dramatic change in policy does not appear likely. Welsh politicians are also uneasy with this approach. The Fifth Senedd's Equality, Local Government and Communities Committee expressed concern that the use of the prison as a registration address could have 'a disproportionate effect on a small number of wards and constituencies where prisoners would make up a significant proportion of the electorate'.[109]

A third option would be to grant judges the discretion to disenfranchise individuals sentenced to prison on a case-by-case basis, depending on the nature and seriousness of the offence. Previous case law of the ECtHR indicated that this approach would satisfy the requirements of A3P1:

> there should be a direct link between the facts on which a conviction is based and the sanction of disenfranchisement; and such a measure should preferably be imposed not by operation of law but by the decision of a judge following judicial proceedings.[110]

Subsequent case law has made clear that this is not a requirement under the ECHR.[111] Nonetheless, it highlights one such measure which could help to ensure compatibility with A3P1.[112] Since the Welsh Government and Senedd do not control sentencing policy, however, this policy choice is not available to it. It would therefore need to ask

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107 The UK Ministry of Justice announced in May 2022 that a 12-bed women's residential centre will be built at a site in Swansea. Once operational, the Centre will work with around 50 women a year: Ministry of Justice, 'Location of first-ground breaking residential women's centre revealed' (Ministry of Justice 2022). In addition to women, the plan would also exclude all Category A Welsh prisoners. Due to the fact that there are no Category A places in Wales, all sentenced Category A Welsh prisoners are held in one of five high-security prisons in England. On average, there were 35 Welsh prisoners being held as Category A in 2021.

108 These data were obtained from the UK Ministry of Justice under the Freedom of Information Act 2000.

109 Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above) 41. In 2021, there were, on average, 1,783 prisoners being held at HMP Berwyn in Wrexham and 1,625 prisoners at HMP Parc in Bridgend. Ministry of Justice, 'Prison population figures: 2021' (Ministry of Justice 2022).

110 *Frodl v Austria* (2011) 52 EHRR 5, para 28.

111 *Scoppola v Italy (No 3)* (2013) 56 EHRR 19, para 99.

112 'the intervention of a judge is in principle likely to guarantee the proportionality of restrictions on prisoners' voting rights'. Ibid.

the UK Government to legislate on its behalf or grant the Senedd the competence[113] to give judges the discretion to disenfranchise. Such a request would almost certainly be rejected by a UK government, for three reasons. First, a case-by-case approach would present an inversion of the current position: it would replace automatic legislative disenfranchisement, favoured by the UK Government, with a presumption of continuing enfranchisement. Second, given the UK Government's staunch commitment to retaining a common criminal justice system for England & Wales, it is unlikely it would contemplate such a significant divergence in sentencing policy. Third, English and Welsh prisoners are sentenced at courts across the England and Wales border, meaning that judges in both countries would need to have the discretion to disenfranchise with respect to Welsh devolved elections.[114] Again, it seems highly unlikely that a UK government would facilitate such a significant change in England for the sake of a policy with which it profoundly disagrees.

A fourth, non-legislative, option would be to enhance coordination between electoral and prison services. Given the risk of administrative disenfranchisement facing prisoners with voting rights, discussed above, such an intervention could have a similar practical effect to the formal expansion of the franchise. This has been adopted successfully in other contexts.[115] Once again, however, UK government acquiescence would be needed. This was recognised explicitly by the Equality, Local Government and Communities Committee in 2019, which called for a memorandum of understanding between the Welsh and UK Governments to facilitate better coordination between services.[116]

Having considered the implications of these reform options, it is necessary to return to the question of legislative competence. It cannot be taken for granted that Welsh legislation on prisoner voting rights would survive a referral to the UK Supreme Court. An Act of the Senedd is 'not law' so far as its provisions 'relate to' reserved matters.[117] Whether a provision of devolved legislation relates to a reserved matter is 'determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances'.[118] The UK Supreme Court has stipulated that there

113 Government of Wales Act 2006, s 109.

114 Flora Thompson, 'Courts backlog: MPs raise concerns over government plan' (*The National* 9 March 2022).

115 The Sentencing Project, Voting in Jails (*The Sentencing Project* 2020).

116 Equality, Local Government and Communities Committee, *Voting Rights for Prisoners* (n 8 above) 47.

117 Government of Wales Act 2006, ss 108A(1) and (2)(c).

118 Government of Wales Act 2006, s 108A(6).

needs to be 'more than a loose or consequential connection'.[119] Crucially, this assessment is not confined to a provision's *legal* effects. As the Court's President, Lord Reed, has said: 'a provision does not have to modify the law applicable to a reserved matter in order to relate to that matter'.[120] Rather, a provision also needs to be considered in light of its 'practical effects'[121] and 'political consequences'.[122] The question therefore would be whether Senedd legislation purporting to allow prisoners to vote in devolved and local elections would have more than a loose or consequential connection to criminal proceedings, sentencing, the courts, prisons or offender management, having regard to its legal, practical and political effects. Given the extensive, cross-cutting implications of prisoner enfranchisement in Wales, discussed above, it is conceivable that the UK Supreme Court would find that such legislation fell outside of the Senedd's legislative competence, even if the legislation did not purport to modify the law on the relevant reserved matters.

Of course, this would produce an absurd outcome. In effect, there would be a two-tiered system for Welsh devolved and local elections, in which the Westminster Parliament retained a regulatory role, but only with respect to prisoners. Given the Supreme Court's expansive approach to 'purpose and effect', however, this possibility cannot be discounted. Even if the UK Government refrained from making a referral to the Supreme Court, it would still be free to prevent the legislation from becoming law using the power available to it under the Government of Wales Act 2006, section 114. It would merely need to demonstrate that it had 'reasonable grounds to believe' that the legislation would adversely affect either reserved matters or the law as it applies in England. Again, given the cross-cutting effects of prisoner enfranchisement for Welsh elections, this would not be difficult to justify.

We thus see how the devolved level is 'responsible without power':[123] responsible for fulfilling the human rights obligations which arise from control over electoral arrangements, yet lacking the necessary powers over the justice system to discharge them. This lack of constitutional autonomy, compared to Scotland, has very real implications for the

119 *Martin v Most* [2010] UKSC 10, [49] (Lord Walker).

120 *Reference by the Lord Advocate of devolution issues under paragraph 34 of schedule 6 to the Scotland Act 1998* [2022] UKSC 31, [2022] 1 WLR 5435, [74], citing *Christian Institute v Lord Advocate* [2016] UKSC 51, [33] and [63] (Lady Hale, Lord Reed and Lord Hodge).

121 *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, [2014] 1 WLR 2622, [53] (Lord Reed and Lord Thomas CJ).

122 *Reference by the Lord Advocate* (n 120 above), [81] (Lord Reed).

123 Jones and Wyn Jones (n 42 above).

implementation of prisoners' human rights. The Scottish Government has been able to use the Scottish Parliament's powers over devolved elections to enfranchise around 1,000 Scottish prisoners, and it remains free to go much further. Many Scottish prisoners have therefore seen their rights enhanced, if only very modestly. By contrast, Wales' devolved institutions enjoy the same powers over devolved elections but are unable to use those powers to enhance prisoner rights in the same way, at least not without UK government approval. In practice, and to a greater extent than prisoners elsewhere in the UK, Welsh prisoners' A3P1 ECHR rights are conditioned by conflicting political imperatives.

## CONCLUSION

The issue of prisoner voting highlights basic flaws in the design of Welsh devolution, confronting the devolved institutions with human rights obligations which they cannot fulfil without UK government facilitation. Under these constitutional conditions, the devolved institutions face a stark choice: do nothing, and risk legal challenges to their recent and ongoing electoral reforms, or act, and still face legal challenges (albeit on different grounds), or the potential frustration of their chosen policy by Whitehall.

In these circumstances, what should be done will depend on the priorities of the Welsh Government. If its aim is to engage in box-ticking 'minimalist compliance' purely to shield itself from legal action, it need only legislate to enfranchise some convicted prisoners and request the UK Government to implement the necessary changes. Clearly, it cannot bear legal responsibility for any attempt by the UK Government to frustrate its policy. The incoherence presented by the criminal justice system in Wales, however, cannot be ignored if a durable policy is to be constructed within current arrangements. As we have seen, granting voting rights based on sentence length will effectively outsource this area of devolved electoral policy to the UK Ministry of Justice. The only policy choices which would not are the full enfranchisement of all prisoners with a Welsh address, the enfranchisement of all prisoners held in the Welsh prison estate, or a combination of these options. Whichever approach it adopts, the possibility of the UK Government either referring the legislation to the UK Supreme Court or exercising its section 114 veto power cannot be discounted.

Wyn Jones and Scully argue that the idea of a devolution 'settlement' is 'wholly inappropriate'[124] in the Welsh context, given

124 Richard Wyn Jones and Roger Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press 2012) 170.

the constant changes which have characterised it.[125] Similarly, we contend that 'devolved autonomy' is a flawed empirical description for Welsh devolved competences, particularly where those competences sit at the jagged edge. This is not to downplay the scope which exists for the Welsh Government to strengthen human rights protection within the devolved system.[126] However, the case study of prisoner voting offers a powerful illustration of the difficulties of doing so in the context of an unorthodox and unusually complex Welsh justice system. The problems explored here are not confined to voting rights; other prisoner rights falling at the jagged edge of devolved and reserved competences – whether relating to health, housing or Welsh language provision – are also likely to be adversely affected by current arrangements. The involvement of two different governments within the Welsh criminal justice policy space, each with their own mandate, policy vision and agenda, will therefore continue to raise significant questions over the sustainability of the Welsh dispensation. Unless and until this anomalous situation is resolved, devolved institutions will face considerable challenges to the enhancement of legal human rights protections. Even modest progressive aspirations are likely to be thwarted.

125 Between the two Government of Wales Acts (1998 and 2006) and two Wales Acts (2014 and 2017), the basic structures of Welsh devolution have changed three times since 1999.

126 Boyle and Busby (n 3 above); Hoffman et al (n 3 above).

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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.

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# Subnational incorporation of economic, social and cultural rights – can devolution become a vehicle for progressive human rights reform?

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ABSTRACT

Devolution acts as both a foundation and a potential vehicle for progressive human rights reform. This article examines progress within the current Scottish framework, including the incorporation of international treaties, as recommended by the National Taskforce for Human Rights Leadership. The particular nature of devolution provides the opportunity to close the accountability gap in the protection of economic, social and cultural rights which operate in devolved areas, including the right to health, the right to housing and the right to an adequate standard of living. This reform brings opportunities to embrace normative international standards that facilitate incorporation such as multi-institutional accountability, proportionality-inflected reasonableness review, dignity and collective justice, as well as substantive equality measures. Progress to date is examined against the risks posed to human rights by the erosion of devolution through a number of United Kingdom(UK)-led strategies, particularly in response to Brexit-related policy gaps. Although devolution can act as an important anchor on national reform, mitigating threats to backsliding on rights at the national level, increasing centralisation can make this difficult to realise in practice. The potential opportunities offered by enhanced devolution could provide a fully integrated human rights framework incorporating social and economic policy areas such as employment, social security, immigration and equality. However, given current constitutional arrangements, devolution's promise as a force for human rights progress is limited. The article concludes with a reframing of human rights which reflects the more complex picture painted by diverging trajectories in each of the UK jurisdictions.

**Keywords:** Scotland; human rights; devolution; incorporation; UN treaties.

* Any views and opinions expressed or errors in this article are solely those of the authors.

## INTRODUCTION

There is an accountability gap in the protection of international human rights law in the United Kingdom (UK).[1] This accountability gap, it is argued, emerges as a result of the UK's failure to incorporate its international obligations into domestic law.[2] Successive UK governments argue that the implementation of the state's international obligations is achieved through legislation and administrative measures, which in turn ensures fulfilment of its obligations.[3] In response, United Nations (UN) treaty bodies urge more is required to comply with international law – in particular to ensure that effective remedies are available for a violation of a right. By way of example, the UN Committee on Economic, Social and Cultural Rights (CESCR) has called on the UK

> to ensure that the covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights [and] that … the state party is under a legal obligation to comply with and to give [the treaty] full effect in its domestic legal order.[4]

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1 Paul Hunt, 'How to advance social rights without jeopardising the Human Rights Act 1998' (2019) 90(3) Political Quarterly 393–401; Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) 146–147; Katie Boyle, Diana Camps, Kirstie English and Jo Ferrie, *The Practitioner Perspective on Access to Justice for Violations of Social Rights: Addressing the Accountability Gap* (Nuffield Foundation 2022).

2 Several international treaty bodies have called upon the UK to incorporate its international human rights obligations into domestic law: UN Committee on the Elimination of Discrimination against Women (CEDAW) CEDAW/C/UK/CO/6 (2009); UN Committee against Torture (CAT) CAT/C/GBR/CO/5 (CAT 2013); UN Committee on the Rights of the Child (CRC) CRC/C/GBR/CO/4 (CRC 2008). Treaty bodies recommending justiciable enforcement and effective remedies: UN CRC, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/5 (CRC 2016); UN CESCR, Concluding Observations, United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/5 (CESCR 2009); UN CESCR, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/6 (CESCR 2016); CESCR, Concluding Observations of the UN CESCR's 42nd session, 4–22 May 2009, consideration of reports submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependencies, 12 June 2009, E/C.12/GBR/CO/5, paras 3 and 13; UN CESCR, Concluding observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, E/C.12/GBR/CO/6, para 5.

3 UN CESCR Consideration of reports submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Sixth Periodic Reports of states parties due in 2014 E/C.12/GBR/6 25 September 2014, para 11.

4 CESCR 2016 (n 2 above) para 3.

This article accepts the position, based on international human rights law, that the UK is under an obligation to provide effective remedies for violations of the international human rights treaties it has agreed to be bound by.[5] A failure to do so is a further breach of international law and represents a domestic accountability gap.[6] We are interested in how this gap manifests and to what extent it is possible to address it at the subnational level, looking specifically at the case of Scotland in the context of the incorporation of economic, social and cultural rights (ESCR).[7]

The article addresses the incorporation of international human rights and devolution in four sections. The first sets the scene by articulating the role of human rights within the current devolution frameworks. It provides a brief overview of the progress made thus far in Scotland in relation to the planned incorporation into Scots law of a number of international human rights treaties as recommended by the National Taskforce for Human Rights Leadership (NTF). The second section examines how incorporation may occur, with a particular focus on the opportunity to embrace a range of normative standards that facilitate incorporation such as multi-institutional accountability, proportionality-inflected reasonableness review, dignity and collective justice, as well as substantive equality measures. We do not rehearse arguments about whether incorporation is something that the Scottish Parliament ought to do (subnational enforcement of international human rights law is encouraged by the international legal community[8] and is a long-standing policy objective of the devolved government),[9] but rather examine how subnational incorporation is occurring and what opportunities and challenges it may face. The third section considers the threats posed to human rights by the erosion of devolution through UK-led strategies, particularly in response to

5 Dinah Shelton, *Remedies in International Human Rights Law* 2nd edn (Oxford University Press 2006) 104–174; UN CESCR, *General Comment No 19: The right to social security* (art 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para 77–80; UN General Assembly, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: resolution/Adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN CESCR, General Comment No 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para 4.

6 Shelton (n 5 above).

7 As discussed below, the incorporation agenda extends to environmental rights and access to justice, as well as the rights of specific groups.

8 See, for example, UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 22 December 2014, A/HRC/28/62 on local and subnational implementation of ESCR.

9 Scottish Government, 'New Human Rights Bill' (12 March 2021).

policy gaps resulting from Brexit. It is argued that devolution can act as an important anchor on national reform, mitigating threats to backslide on rights at the national level. In this respect, it is important to note it is beyond the scope of the article to substantively examine the arguments for and against progressive human rights change at the devolved level, such as examining whether the proposals themselves present as a threat to devolution. The article operates on the basis that the UK has already agreed to be bound by a number of international obligations and that progressive reform at the devolved level to observe these obligations is both within devolved competence and aligns with a teleological position on human rights reform – ie that observance of the full international legal framework is, and should already be, taking place. The fourth section considers the potential opportunities that would arise if devolution was further enhanced in policy areas such as employment, equality and immigration. A critical assessment offers insights into the potential reach as well as the limitations of devolution as a force for positive human rights progress. The article concludes with a reframing of human rights in the UK to reflect the more complex picture painted by diverging human rights trajectories in each of the UK jurisdictions.

## HUMAN RIGHTS WITHIN THE CURRENT DEVOLUTION FRAMEWORKS

In contextualising any analysis of human rights progress and the potential opportunities and threats offered by enhanced devolution, it is important to note just how integral human rights are to the devolved frameworks. In Scotland, Northern Ireland and Wales the devolved statutes grant European Convention on Human Rights (ECHR) rights a form of constitutional status by which the courts,[10] the legislature[11] and the executive[12] must each comply with human rights – a failure to do so renders any act or omission *ultra vires* and unlawful (courts can declare such acts, including devolved legislation, as null and void with immediate effect). This foundational constitutional framework is thus more akin to legal constitutionalism than the political constitutional model prevailing at the UK national level.[13]

The UK's devolved legislatures have already taken significant steps to go further than ECHR rights by embedding international human

10 HRA 1998, s 6; SA 1998, ss 29 and 98; Northern Ireland Act (NIA) 1998, ss 6 and 79; Government of Wales Act (GOWA) 2006, ss 94 and 149.

11 SA 1998, s 29; NIA 1998, s 6; GOWA 2006, s 94.

12 SA 1998, s 57; NIA 1998, s 24; GOWA 2006, s 81.

13 Boyle, *Economic and Social Rights Law* (n 1 above) 10–109.

rights obligations into domestic devolved law under the devolved competence to 'observe and implement international obligations'. In Scotland the First Minister's Advisory Group (FMAG)[14] and the NTF[15] have recommended a Human Rights Act for Scotland that incorporates economic, social, cultural and environmental rights via a number of international treaties (discussed further below). The Welsh Senedd has set out plans to follow suit.[16] In 2021, the Scottish Parliament unanimously passed legislation[17] incorporating the UN Convention on the Rights of the Child (UNCRC) into devolved Scottish law. The UK Government challenged the legislation in the Supreme Court and, although the court decided that the Bill requires technical changes relating to devolved competence,[18] there is no 'issue with the Scottish Parliament's decision to incorporate the UNCRC' into devolved law.[19] In Northern Ireland the Ad Hoc Committee on a Bill of Rights[20] recently revisited the peace agreement commitment to design a Bill of Rights for the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission's proposals, following a 10-year participatory process, recommended the incorporation of ESCR as part of this renewed framework, building on ECHR protections.[21] In June 2021 the Ad Hoc Committee with cross-party representation supported a Bill of Rights in principle, however, the Democratic Unionist Party (DUP) later published a position paper disagreeing with this decision.[22] Each of the devolved jurisdictions is directly engaged in processes of incorporation of ESCR, albeit in Northern Ireland this

14 First Minister's Advisory Group on Human Rights Leadership, Recommendations for a New Human Rights Framework to Improve People's Lives (FMAG 2018).

15 National Taskforce for Human Rights Leadership Report (NTF 2021).

16 Senedd Cymru/Welsh Parliament, 'Where next for human rights in Wales?' (10 December 2021); see also Simon Hoffman, Sarah Nason, Rosie Beacock and Ele Hicks (with contribution from Rhian Croke), 'Strengthening and advancing equality and human rights in Wales' Social Research Report No 54/2021 (Welsh Government 2021).

17 The UNCRC Incorporation (Scotland) Bill.

18 Removing provisions relating to obligations placed on the UK Parliament and UK Ministers. The Scottish Government has responded to the court's judgment, see 'Protecting children's rights' (Scottish Government 24 May 2022). On UNCRC incorporation, see Kasey McCall-Smith this volume.

19 See Katie Boyle, 'Constitutional Changes in Scotland – I: Incorporation of International Treaties, Devolution and Effective Accountability' (*Oxford Human Rights Hub* 30 March 2021).

20 Northern Ireland Assembly, Report of the Ad Hoc Committee on a Bill of Rights 156/17-22 (Ad Hoc Committee for a Bill of Rights 4 February 2022).

21 Northern Ireland Human Rights Commission, A Bill of Rights for Northern Ireland: Advice for the Secretary of State (10 December 2008) 170.

22 Ibid para 13.

process has now stalled due to political impasse following elections to the Northern Ireland Assembly.[23]

In the meantime, Scotland and Wales continue to press ahead with incorporation plans. Our particular focus draws attention to the Scottish incorporation experience. By way of brief background, the 2017–2018 Scottish Programme for Government indicated a commitment to consider 'how we can go further to embed human, social, cultural and economic rights including the UN Convention on the Rights of the Child' into domestic law.[24] In December 2018 the FMAG recommended a new Act of the Scottish Parliament to incorporate ESCR into the devolved governance of Scotland as well as specific group rights, including those belonging to children, women, persons with disabilities, on race and rights for older persons and for LGBTQI communities.[25] The recommendations also propose that Scotland undergoes a lengthy participative process to deliberate on how best to contextualise the human rights norms derived from international law into areas of devolved governance.[26] The Scottish Government established the NTF to implement the FMAG's recommendations. The NTF recommended incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of Persons with Disabilities, the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Elimination of Racial Discrimination in a multi-treaty Bill, together with additional rights on the environment, equality, older persons and LGBTQI communities, and access to justice. Its evidence base included a broad participative process with civil society and rights holders in Scotland[27] that has called for better accountability as intrinsic to the 'purposes and opportunities' of the new framework.

This is a step-change in human rights reform in Scotland, and devolution has been the key enabler in taking a distinct and progressive approach.

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23 Following elections to the Northern Ireland Assembly in May 2022, at which Sinn Féin won the most seats for the first time, the DUP has refused to vote for a new Speaker with the effect that the Assembly is unable to operate. The DUP's refusal has been attributed to outstanding issues related to the Northern Irish Protocol which forms part of the UK's Brexit agreement with the EU.

24 'A Nation with Ambition: The Government's Programme for Scotland 2017–2018' (Scottish Government 5 September 2017).

25 FMAG (n 14 above) 7.

26 Ibid 39.

27 All our Rights in Law: Views from the Wider Public, A Report to the National Taskforce on Human Rights Leadership (Human Rights Consortium and Scottish Human Rights Commission 2021).

## SCOTLAND'S PROGRESS

### Multi-institutional incorporation model

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.[28] The test of whether the domestication of the treaties amounts to full incorporation relies on whether an effective remedy is available for a violation.[29] The NTF and the FMAG both recommended that the court must act as a means of last resort. This commitment is further supported by a strong focus on pre-legislative scrutiny,[30] seeking to create a rights-affirmative framework[31] through subsequent legislation.

Importantly, the NTF recommendations propose domestication of a range of international norms and comparative best practice that extends beyond the Scotland Act/Human Rights Act model. This includes embedding progressive realisation of ESCR and the associated obligations to provide a minimum core, deploying the maximum available resources, progression towards substantive equality, expanding the intensity of review in assessing compliance with rights, limiting retrogressive measures and providing effective remedies, including access to collective justice. Participatory approaches to rights elaboration and the facilitation of multi-institutional accountability avenues have been recommended. At the time of writing, it is not yet clear exactly how or whether these commitments will manifest on the face of the Bill.

Here we consider some of the novel ways in which the Scottish proposals seek to advance compliance with rights within the limitations of devolved competence.

### Beyond the fourth branch

The multi-institutional approach is based on the premise that the three branches of state – legislative, executive and judicial – must all act as guarantors of human rights. As well as proposing a more prominent role for pre-legislative scrutiny by the Scottish Parliament, executive

28 FMAG (n 14 above). For a discussion on the comparative and potential Scotland-specific multi-institutional (or inter-institutional) model of incorporation, see Manuel Cepeda, Kate O'Regan and Martin Scheinin, The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership (Bonavero Reports 28 January 2021).

29 Boyle, *Economic and Social Rights Law* (n 1 above) 41.

30 Recommendation 14.

31 Boyle, *Economic and Social Rights Law* (n 1 above) 115.

implementation and monitoring mechanisms and an indispensable accountability role for the court, the recommendations go further and suggest that everyday accountability should occur in the administrative sphere. In this respect the Scottish proposals seek to create a space for everyday implementation 'close to home'.[32] This is where regulators, inspectorates, ombudsmen tribunals and local complaints mechanisms can bring justice closer to individuals. Other democratic accountability mechanisms such as an enhanced role for the national Human Rights Commission are also proposed. This approach is explored in recent scholarship supporting a 'fourth branch' of accountability, otherwise known as the integrity branch, or regulatory branch, which is constituted from the administrative state by 'institutions for protecting democracy'.[33] Referencing the South African Constitution, Tushnet highlights the role of the Human Rights Commission, the public prosecutor, the auditor-general and the Electoral Commission.[34] This multi-institutional approach features significantly in the FMAG and NTF recommendations:

> a multi-institutional approach is about sharing human rights leadership and responsibility among parliament, government at all levels, and the courts, as well as our justice system more broadly. Such an approach also recognises the roles of regulators, the ombudsman, inspectorates and national human rights institutions in providing access to remedy and accountability for rights violations. In this way, the sum is greater than any of the parts, there is no reliance upon a single institution and a broader human rights culture can be developed. Very importantly, this approach also increases the extent to which the public can participate in law, policy and decision-making at all levels. It is public participation which is the best guarantor of human rights.[35]

The multi-institutional approach advocated by the NTF, which goes further than the fourth branch in amplifying the role of civil society and in recognising public participation as 'the best guarantor of rights',[36] is manifested in several different ways in its recommendations. First, there is a recommendation to ensure participation of communities in the making of decisions that affect them.[37] Likewise, as part of the implementation of the new framework, genuine inclusive and

32 Eleanor Roosevelt, 'Speech introducing the UDHR to the General Assembly of the United Nations' (1948) as cited in FMAG (n 14 above).

33 Mark Tushnet, *The Fourth Branch* (Cambridge University Press 2021). See also Bruce Ackerman, 'The new separation of powers' (2000) 113 Harvard Law Review 633; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2019) 194–197.

34 Tushnet (n 33 above) 1.

35 NTF (n 15 above) 19.

36 Ibid.

37 Recommendation 15.

intersectional public participation is seen as a key enabler of success[38] and would include elaborating on the meaning and content of rights in different sectors and contexts.[39] An explicit right to participation, drawn from the principles of international human rights law, is also recommended.[40]

Public and civil society participation are pillars of the multi-institutional framework, key to embedding and cultivating a human rights culture and adopting a human rights-based approach to implementation. International examples show that countries which have improved human rights protections have benefited from a strong, engaged, organised and informed civil society sector.[41] Civil society encourages progress by enabling discourses that make injustices public.[42] In the Scottish context, civil society can position itself at the vanguard of progressive change in deploying and consolidating resources across the spectrum to encourage a positive culture change by 'producing and providing information, educating the public and others, proposing public policies and taking legal action'.[43]

## Progressive realisation and minimum core obligations

The UK's international obligations under the ICESCR require the state to take steps to achieve progressively the rights contained in the treaty.[44] Progressive realisation is an obligation that has been further defined over subsequent years by the CESCR.[45] It constitutes a number of integral components including the obligations to take steps to realise rights through concrete strategies; to respect, protect and fulfil rights; to gather and deploy the maximum available resources to realise rights in a way that is effective, efficient, adequate and equitable; to ensure non-discrimination in realisation of the right; to provide an immediately realisable minimum core of rights; to refrain from retrogressive steps; to ensure that any limitation on the enjoyment of a

38 NTF (n 15 above) 44 implementation requirements; policy objectives 27/28: public participation in the development of the framework and 29: explicit right to participation.

39 Recommendation 13 provides that 'there be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights, and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right'.

40 Recommendation 29.

41 See, for example, the discussion in pt 2 of Oscar Vilhena Viera and A Scott Dupree, 'Reflections on civil society and human rights' (2004) 1 SUR International Journal on Human Rights 47.

42 Ibid 57.

43 Ibid 58.

44 Art 2(1), International Covenant on Economic, Social and Cultural Rights 1966.

45 See, in particular, General Comment No 9 (n 5 above).

right can only be justified according to principles of legality, legitimacy and proportionality; and to provide access to an effective remedy if a violation of a right occurs (using reasonableness as a test to assess compliance – discussed below).

The obligation to progressively realise ICESCR is an obligation directed to the state party, the UK, and so subnational incorporation will require to contend with how to achieve this obligation without full autonomy over each of the integral components listed above. For example, without full fiscal autonomy the commitment to deploy the maximum available resources to fulfil a right will require an interpretation that works in a devolved context. Likewise, as discussed below, when an obligation engages with reserved areas of law (such as the international obligation to ensure non-discrimination and the reserved area of equality law) accountability gaps may continue to arise. As discussed below, we consider how further enhanced devolution may help to support a more comprehensive framework for the full incorporation of ESCR.

Recommendation 13 of the NTF suggests that 'there be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights, and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right'. This approach facilitates a model of incorporation that seeks to address a key critique of ESCR – that the rights can be vague or indeterminate.[46] 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. Ultimately, and because incorporation is occurring at the subnational level, this is a novel approach comparatively, however, it is not entirely unique. ESCR provision is often allocated to local or subnational levels for implementation under the principle of subsidiarity.[47] The UN Special Rapporteur has noted, therefore, the importance of ensuring that progressive realisation obligations apply across multiple-levels of government and has highlighted comparative practice across the globe where accountability has been levelled at the local and subnational level when progressive realisation has not occurred.[48] Ultimately, the obligations under international law rest with the state, and it is the state that remains responsible for their implementation (whether that be at local, subnational or national level).

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46 Boyle, *Economic and Social Rights Law* (n 1 above) 14.
47 Report of UN Special Rapporteur (n 8 above).
48 Ibid.

## From irrationality to proportionality-inflected reasonableness

Enabling effective remedies for violations of ESCR in the UK requires that the intensity of review (the court's ability to investigate and assess the violation) is applied in a more expansive way – ie that standards for reasonableness are enhanced. There are typically three grounds of judicial review in the constituent parts of the UK: illegality, irrationality and procedural impropriety. The courts deploy varying intensity of review depending on circumstances, and there are two possible tests of irrationality deployed by UK courts in the assessment of human rights compliance: the domestic common law test of irrationality and the ECHR test of manifestly without reasonable foundation.[49] Initially, these tests were distinct, however, recent domestic jurisprudence suggests their alignment, which restricts intensity of review when dealing with matters of economic and social policy. This presents as a significant hurdle to adequate scrutiny of human rights by hindering the justiciability of ESCR in a way that might undermine a multi-institutional framework in which the court provides an important accountability mechanism.

The domestic common law test for irrationality (unreasonableness) is based on the well-developed *Wednesbury* reasonableness test where an action (or omission) must be 'so outrageous and in defiance of logic … that no sensible person who had applied his mind to the question … could have arrived at it'.[50] The test developed in ECHR jurisprudence relates to whether an act or omission is 'manifestly without reasonable foundation'. The latter forms part of a proportionality assessment when considering whether or not there has been a difference in treatment under article 14 ECHR (freedom from discrimination). A difference in treatment is considered to have no objective and reasonable justification if it does not pursue a legitimate aim or there is no reasonable relationship of proportionality.[51] There is a margin

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49 In some instances the more intense test of anxious scrutiny is applied in relation to fundamental rights (concerning civil and political rights). Anxious scrutiny relates to a closer form of scrutiny engaging with fundamental rights such as those covered by the ECHR. The courts apply anxious scrutiny when examining whether a government minister acted in a *Wednesbury* unreasonable fashion if the decision impinges on fundamental rights: *R v Home Secretary, ex parte Bugdaycay* [1987] 1 AC 514; *R v SSHD, ex parte Brind* [1991] 1 AC 696. However, for the purposes of this discussion we are focused on the tests typically applied when engaging with economic and social policy.

50 *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374.

51 *Stec and others v the United Kingdom* – 65731/01; 65900/01 [2006] ECHR 393 (12 April 2006) para 51.

of appreciation provided to states in determining whether a difference in treatment is proportionate. Initially, the European Court of Human Rights had encouraged a strong intensity of review where interference with the right(s) would require 'very weighty reasons'.[52] However, a wider margin of appreciation is granted to states in areas of economic and social policy, and the intensity of review is restricted to whether the decision was 'manifestly without reasonable foundation'.[53]

In *SC*,[54] the Supreme Court was tasked with assessing whether the policy to place a benefit cap on families with two or more children was manifestly without reasonable foundation. The court recognised that the two-child limit policy gave rise to a difference in treatment between children living in households with more than two children, compared to those with fewer, and that the policy had a disproportionate impact on women. Nonetheless, it decided the two-child limit had an objective and reasonable justification – it sought to pursue the legitimate aim of 'protecting the economic wellbeing of the country … to achieve savings in public expenditure and thus contribute to reducing the fiscal deficit'.[55] The policy was not considered unlawful, notwithstanding the disproportionate impact on women and children from larger families. In the leading judgment, Lord Reed sought to reconcile ECHR proportionality and domestic jurisprudence on irrationality in relation to matters of economic and social policy. Under both tests he suggests the courts are required to exercise deference to the political process. Indeed, the test applied in *SC* sets a higher threshold than manifestly without reasonable foundation. Drawing on the domestic test of irrationality in areas of economic and social policy, the court suggests that such decisions should 'not be open to challenge short of the extremes of bad faith, improper motive or manifest absurdity'.[56] This test has now been applied as part of common law domestic tests of irrationality[57] in areas of economic and social policy setting a particularly high threshold.

The Scottish model envisages a more prominent role for the court that requires intensity of review to be revisited. This was highlighted by the NTF in calling for,

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52 Ibid para 52.

53 Ibid.

54 *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.

55 Ibid, para 190–193.

56 *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597; *SC* (n 54 above) para 146.

57 *Secretary of State for Work And Pensions v Johnson & others* [2020] EWCA Civ 778 (22 June 2020) and *R (Pantellerisco and others) v SSWP* [2020] EWHC 1944 (Admin); *R (Pantellerisco and others) v SSWP* [2021] EWCA Civ 1454.

> a standard of review which takes into account international human rights law standards and best comparative practices in determining the reasonableness of a particular measure. For such purposes, the administrative and judicial bodies could, for example, take into account if the measures taken by the duty-bearer ensure the minimum levels necessary for a person to live a dignified life, if the measures taken were deliberate, concrete and targeted towards the fulfilment of the rights in the framework and if the measures taken were coordinated, coherent and comprehensive, among other criteria.[58]

This recommendation responds to a concern that domestic tests of irrationality and reasonableness fall short of international standards. Reasonableness would require to be interpreted more widely than irrationality,[59] lowering the bar for findings of incompatibility and aligning with jurisprudence in South Africa,[60] as well as the reasonableness test under the ICESCR Optional Protocol.[61] Liebenberg describes the approach adopted by the CESCR as 'proportionality-inflected reasonableness'.[62] On the continuum of the reasonableness standard,[63] ranging between weak reasonableness (aimed at excluding only manifestly unfair or irrational consequences) to strong reasonableness (incorporating a proportionality analysis), the Committee's analysis is based on the latter.[64] Such an approach would orientate Scottish ESCR jurisprudence towards a more proactive and intense analysis of measures than is currently available, aligning with international normative standards in assessments of human rights compliance.

The proposed Scottish legislation has not yet been published, and so at the time of writing it is not yet known how this will manifest on the

58 NTF (n 15 above) 50.

59 Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission 2018).

60 *Government of the Republic of South Africa and others v Grootboom and others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

61 ICESCR Optional Protocol, art 8(4).

62 Sandra Liebenberg, 'Between sovereignty and accountability: the emerging jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48–84; based on the blended type of proportionality inquiry developed by Katharine G Young, 'Proportionality, reasonableness, and economic and social rights' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 248, 268–271.

63 See Wojciech Sadurski, 'Reasonableness and value pluralism in law and politics' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009) 129, 131–134.

64 See *Rodríguez v Spain*, Communication No 1/2013: views adopted by the Committee at its fifty-seventh session, UN CESCR, UN Doc E/C.12/57/D/1/2013 (2016) 8.4.

face of the Bill. As above, the recommendation of the NTF is to align with proportionality-inflected reasonableness used both comparatively and at the international level. It may be that this is achieved by outlining on the face of the Bill the different types of relevant considerations that a decision-maker should take into account (aligning with domestic administrative law). The broader reasonableness test includes considerations such as whether steps taken to deliver rights are deliberate, concrete and targeted, whether resource allocation is in accordance with international human rights standards, whether the approach adopted is the option that least restricts rights, whether steps taken were within a reasonable timeframe, whether precarious situations experienced by disadvantaged and marginalised groups have been addressed and whether the decision-making was transparent and participatory.[65] For example, in the case of *Ben Djaza and Bellili v Spain* the Committee assessed measures taken by the state in relation to a family who became homeless after an eviction. The reasonableness standard was deployed and required the state to make 'all possible effort, using all available resources, to realise, as a matter of urgency, the right to housing of persons who, like the authors, are in a situation of dire need'.[66] Both individual and structural factors were relevant (ie dealing with the particular circumstances of the family in question as well as the broader policies to realise the right to housing). As a remedy the state was required to engage in genuine consultation with the family to ensure access to adequate accommodation (individual remedy) and to develop a comprehensive plan with necessary resources, indicators, timeframes and evaluation criteria for the progressive realisation of the right to housing for people on a low-income (collective/structural remedy).[67]

65 Bruce Porter, 'Rethinking progressive realisation' (Social Rights Advocacy Centre 2015) 6; and UN CESCR, *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, UN CESCR, thirty-eighth session, UN Doc E/C.12/2007/1 (2007); Malcolm Langford, 'Closing the gap? – An introduction to the optional protocol to the International Covenant on Economic, Social And Cultural Rights' (2009) 27(1) Nordic Journal of Human Rights 2; General comment No 3 (1990) on the nature of states parties' obligations, para 2; UN Special Rapporteur on Housing, Access to justice for the right to housing, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, 15 January 2019, A/HRC/40/61, paras 25–29.

66 E/C.12/61/D/5/2015, para 17.5.

67 Ibid para 21.

## Dignity as a bridge

The NTF recommends that the new framework should place human dignity as the value which underpins all human rights forming a purposive foundation for interpretation[68] and aligning with constitutions and jurisprudence in, *inter alia*, South Africa,[69] Germany[70] and Colombia.[71] A reliance on dignity risks engaging the indeterminacy critique that the concept of dignity and related rights is too vague and therefore difficult to enforce.[72] However, recent qualitative research with Scottish practitioners suggests that dignity's use as a concept and language tool can provide an important bridge or gateway for users to what is often perceived as a very legalistic human rights framework.[73] Although steps are required to address the indeterminacy of 'dignity' as a concept, it is a term that is instinctive and plays a fundamental role in the interpretation of rights. The NTF recommendations envisage dignity as a key value and purposive and interpretative tool for defining the content of rights, for example, by providing a threshold in determining a social minimum, or minimum core entitlement. Whilst tests of reasonableness (discussed above) may provide appropriate thresholds for progressive realisation, dignity can act as a foundational minimum below which no person should fall, thus giving rise to a threshold where substantive enforcement of rights are expected. Dignity is not an unfamiliar legal concept within a regional human rights context,[74] and, as a result, courts in Scotland are already capable of enforcing substantive standards in the context of ECHR and European Union (EU) jurisprudence where the dignity

68 Recommendations Nos 9 and 10.

69 Mahlangu and another v Minister of Labour and Others (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).

70 Ingrid Leitjen, 'The German right to an *Existenzminimum*, human dignity, and the possibility of minimum core socioeconomic rights protection' (2019) 16(1) German Law Journal 23.

71 Colombian Constitutional Court, Decision T-025 of 2004.

72 For a discussion of the indeterminacy critique, see Boyle, *Economic and Social Rights Law* (n 1 above) 14, 19–22.

73 Elaine Webster, 'I Know It When I See It': Can Talking about 'Dignity' Support the Growth of a Human Rights Culture? (Human Rights Consortium 2022) 8.

74 Elaine Webster, 'The Underpinning Concept of "Human Dignity"', Academic Advisory Panel (June 2020) 8.

threshold may feature as a substantive enforceable minimum.[75] The Scottish proposal to use dignity as a purposive and interpretive tool could, thus, expand its use.

## Substantive equality

The reservation of equal opportunities under the Scotland Act (SA) 1998[76] means that England, Wales and Scotland share a common equality framework.[77] The approach required under the Equality Act 2010 is based largely on the achievement of formal equality, which depends on a narrow interpretation of equal treatment so that 'like should be treated alike'.[78] The alternative approach – substantive equality – depends on a broader, more contextual understanding of existing disadvantage with a focus on outcomes and intervention seen as a necessary means to achieving equality in certain circumstances. It is this broader understanding of equality that underpins the international human rights framework.

A helpful example of a more substantive approach is found in the explanatory notes to section 1 of the Equality Act 2010 (which has not been commenced in England but has been commenced under devolved law in Scotland and Wales, discussed below). Section 1 of the Act provided that a public authority must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic

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75 In the context of art 3 and freedom from degrading and inhumane treatment, see *Napier, Re Petition for Judicial Review* [2004] Scot CS 100 (26 April 2004); in relation to art 4 ECHR and art 1, EU Charter of Fundamental Rights, see *Opinion of Lord Armstrong in the Petition JB (AP) for Judicial Review of a Decision of the Secretary of State* [2014] ScotCS CSOH_126 (14 August 2014); in relation to the precedent set down by *Limbuela, R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 (3 November 2005), see *Nyamayaro, (First) Natasha Tariro Nyamayaro and (Second) Olayinka Oluremi Ok against the Advocate General and the Commission for Equality and Human Rights* [2019] ScotCS CSIH_29 (7 May 2019).

76 'Equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions (SA 1998, sch 5 L2, as amended by s 37 of the Scotland Act 2016). The relevant legislation, the Equality Act 2010, is an Act of the Westminster Parliament and a protected enactment. There is some limited Scottish provision, where there is interplay with Scottish devolved legislation, in particular in education and housing, where legislative consent motions have been required.

77 Northern Ireland has its own regime as equality law is devolved under the Northern Ireland Act 1998.

78 This is the Aristotelian or formal equality principle which decrees that two people with equal status in at least one normatively relevant respect must be treated equally in this respect: Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15.

disadvantage. The explanatory notes offer example scenarios in how the application of this provision was envisaged:

> The Department of Health decides to improve the provision of primary care services. They find evidence that people suffering socio-economic disadvantage are less likely to access such services during working hours, due to their conditions of employment. The Department therefore advises that such services should be available at other times of the day.[79]

The purpose of the provision was to reduce inequalities of outcome in education, health, housing, crime rates or other matters associated with socio-economic disadvantage.[80] Under international human rights law, substantive equality is envisaged along a similar outcome-based conceptualisation.[81] MacKinnon, for example, proposes a social hierarchy approach that addresses systemic and structural inequality beyond the paradigm of equal opportunity for substantive equality to be achieved.[82] And Fredman argues that addressing poverty must feature as a component of substantive equality in a multidimensional framework that recognises and addresses the distributional, recognitional, structural and exclusive wrongs experienced by disadvantaged groups.[83]

Despite the common equality framework, regional variations, differences in lived experience and the divergent policy landscape can give rise to gaps in effective rights protection within Scotland,[84] which can be addressed or mitigated by the Scottish Government in certain respects.[85] Improved access to justice for all and the need for a better understanding of the causes and effects of intersectional

79 Explanatory Notes to the Equality Act 2010, para 23.

80 Ibid.

81 The international legal framework requires states to take positive steps to address the substantive inequality between different groups. This requires steps to achieve equality of outcome as opposed to equality of opportunity. For a discussion on substantive equality, see Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) International Journal of Constitutional Law 712–738; and Catharine A MacKinnon, 'Substantive equality revisited: a reply to Sandra Fredman' (2016) 14(3) International Journal of Constitutional Law 739–746.

82 MacKinnon (n 81 above) 740.

83 Fredman (n 81 above) 738.

84 For examples, see Committee on the Elimination of Discrimination, Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom of Great Britain and Northern Ireland CERD/C/GBR/CO/21-23 (CERD 2016); Equality and Human Rights Commission, 'Is Scotland Fairer?' (25 October 2018); Scottish Human Rights Commission, Submission to the United Nation's Committee on the Elimination of All Forms of Discrimination Against Women (2018).

85 See Nicole Busby, *CEDAW*, and Nicole Busby and Kasey McCall-Smith, *UN Treaties* (Academic Advisory Panel to the National Taskforce for Human Rights Leadership 2021).

discrimination are recurring themes in reviews of equality and human rights legislation in Scotland and beyond.[86]

Furthermore, the incorporation process offers scope for improvements in the application and interpretation of existing equality law. The reserved and somewhat restrictive equality framework applies in the devolved policy landscape with some, albeit limited, opportunities to take a more substantive approach in line with its international human rights obligations. Where the Equality Act 2010 does apply directly, the Scottish-specific duties under the public sector equality duty[87] and the socio-economic duty[88] (enacted as the Fairer Scotland Duty)[89] enable public service providers in Scotland to take a more outcomes-focused approach which has perhaps been missing to date.[90] The post-incorporation landscape envisaged by the NTF thus has the potential to catalyse the existing equality duties as well as to provide an opportunity to test the boundaries of some existing provisions of the Equality Act 2010[91] and to fully explore the exceptions to the reservation of equal opportunities under the Scotland Act.[92] In other words, the exceptions to the reservation of equal opportunities open the door to treat the formal equality framework as a floor (as opposed to a ceiling) upon which further enhanced equality measures can be built. If utilised to its full extent to aid the realisation of human rights, incorporation could lead over time to profound and progressive change in equality law by elevating social and economic rights beyond the restrictive formal approach towards a more substantive formulation capable of achieving socially just outcomes.

## Collective justice

Effective access to justice for ESCR requires recognition that violations are often clustered in nature,[93] so that violation of one right can impact

86 Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019).

87 Equality Act 2010, s 149; Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 No 162. The Scottish Government has recently conducted a public consultation exercise with a view to improving the regime surrounding the Scottish-specific duties. See Scottish Government, 'Public Sector Equality Duty Review'.

88 Equality Act 2010, s 1.

89 By the Equality Act 2010 (Scotland) Regulations 2018.

90 See Equality and Human Rights Commission, Effectiveness of the PSED Specific Duties in Scotland (20 September 2018) 51.

91 For example, the positive action provisions (ss 158 and 159, Equality Act 2010) discussed in Busby (n 85 above) 6.

92 See, in particular, the second exception added by the Scotland Act 2016 (amended sch 5, L2).

93 Luke Clements, *Clustered Injustice and the Level Green* (Legal Action Group 2020); Boyle et al (n 1 above).

on the enjoyment of others, and that they are often systemic, affecting multiple people or groups rather than one individual. Traditional 'single issue' lawyering is ill-equipped to deal with such multiple synchronous clustering of legal problems,[94] and the individualised and siloed legal system can be unresponsive to systemic violations.[95] A renewed access to justice framework therefore requires a shift away from such individualisation. The NTF proposes enhanced access to justice mechanisms to overcome traditional barriers relating to costs, standing,[96] legal advice and advocacy, and goes further in aligning with international human rights law by recommending that remedies are accessible, affordable, timely and effective.[97] Regulators, inspectorates, ombudsmen and complaint-handlers should systematically embed human rights standards or approaches into their ways of working as part of everyday accountability.[98] When other mechanisms fail, the judiciary should issue appropriate and effective orders to deal with violations, including guarantees of non-repetition.[99]

The NTF recognises that further work on access to justice is required, suggesting that the framework could provide for the full range of appropriate remedies under international law, including targeted remedies such as structural interdicts.[100] Related language on the use of structural remedies for systemic issues draws on different framings of individual versus collective/[101]systemic/[102]structural relief; specific versus general measures;[103] and simple versus complex remedies.[104] The use of the term structural orders covers the broad field of remedial responses including a complex aggregate of remedies

94 Clements (n 93 above).

95 Ibid 2.

96 Policy Objective 23 suggests standing should be based on sufficient interest, rather than victimhood, and should extend to collective standing and third-party standing in public interest litigation.

97 Recommendation 21.

98 Policy Objective 22.

99 Policy Objective 25.

100 Recommendation 25.

101 Also, in relation to class action, multi-party proceedings and group proceedings.

102 'Systemic' and 'structural' can be used interchangeably in the literature and in practice. See further Kent Roach, *Remedies for Human Rights Violations* (Cambridge University Press 2021); and for national examples of interchangeable use of the term structural remedies, see the South African Constitutional Court and Kenyan Constitutional Court which have issued 'structural remedies' which are framed in similar terms: *Mahlangu and another v Minister of Labour and others* [2020] ZACC 24; *Equal Education and others v Minister of Basic Education and other*s (22588/2020) [2020] ZAGPPHC 306; and *Mitu-Bell Welfare Society v Kenya Airports Authority*, SC Petition 3 of 2018

103 Roach (n 102 above) 77.

104 Ibid.

(interim, delayed, declaratory and mandatory orders), and offers individual and systemic/structural relief involving both individual or collective cases where there may be multiple defendants and the court may perform a supervisory role post-judgment. Structural orders, which may help to ensure effective remedies are available for violations of human rights, are one tool of many and so should be viewed as part of a range of remedies across a spectrum (deferential to interventionist) available to the judiciary. The more flexible the remedial framework is the better-placed the judiciary will be to respond appropriately to ensure the deployment of effective remedies in line with international human rights law.

The existing system within the UK is well placed for development in this respect as available judicial remedies already enable wide-reaching responses to violations of human rights.[105] Existing remedies could be combined in some cases to deploy structural interdicts in response to systemic issues.[106] Such an approach would align with social rights jurisprudence in South Africa,[107] Kenya,[108] Colombia,[109] the United States[110] and Canada[111] among others and has been recommended by the Academic Advisory Panel,[112] the Scottish Human Rights Commission[113] and the Bonavero Institute of Human Rights.[114]

105 Remedies in England and Wales include mandatory orders, quashing orders, prohibitory orders and damages in human rights cases. Remedies in Scotland include reduction, declarator, suspension and interdict, specific performance or specific implement, liberation, interim orders or damages. Remedies in Northern Ireland include quashing orders, mandatory orders, prohibitory orders, declarations, injunctions or damages.

106 Katie Boyle, Access to Remedy – Systemic Issues and Structural Orders (Academic Advisory Panel 30 November 2020).

107 *Equal Education and others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020).

108 Petition No 3 of 2018. For a discussion of this recent case, see Victoria Miyandazi, 'Setting the record straight on socio-economic rights adjudication: Kenya Supreme Court's judgment in the Mitu-Bell case' (*Oxford Human Rights Hub* 1 February 2021).

109 Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press 2017) ch 6 on social rights.

110 Katharine Young, 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) International Journal of Constitutional Law 385.

111 Kent Roach, *Constitutional Remedies in Canada* 2nd edn (Canada Law Book 2013).

112 Boyle, *Access to Remedy* (n 106).

113 Boyle, *Models of Incorporation and Justiciability* (n 59), and Scottish Human Rights Commission, *Adequate and Effective Remedies for Economic, Social and Cultural Rights: Background Briefing Paper for the National Taskforce on Human Rights Leadership* (December 2020).

114 Cepeda et al (n 28 above).

## THREATS TO PROGRESS

Despite the potential opportunities that exist for Scotland to align its human rights framework with international law, the erosion of devolution raises a number of threats. Such erosion is occurring by way of a number of UK-led strategies, particularly in response to policy gaps resulting from Brexit. This section considers these threats concluding that, although devolution provides an important anchor and can mitigate threats to rights at the national level, increasing centralisation is making this more and more difficult in practice.

First, there is a real risk to the operation of devolved 'consent' in the context of the UK Parliament legislating in devolved matters. The 'Sewel Convention', originally a parliamentary convention[115] and subsequently a legislative provision,[116] means that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature. However, the convention has become the subject of controversy in recent years following a number of occasions when the UK Parliament passed legislation despite devolved legislatures withholding consent.[117] This position was exacerbated in the aftermath of the Brexit referendum, when the UK Parliament passed the EU Withdrawal Act 2018 without consent from the Scottish Parliament[118] and the European Union Withdrawal Agreement Act 2020 without consent from all three devolved legislatures. In 2017, the Supreme Court had held that 'policing the scope and manner of [the Sewel Convention's] operation does not lie within the constitutional remit of the judiciary'.[119] Thus, despite being embedded in legislation, there is no recourse to a remedy in court should the UK Parliament proceed without consent in legislating in either reserved or devolved areas in Scotland, making the consent mechanism more procedural than substantive in nature.

Second, in the wake of Brexit there has been a process of recentralising power, including in devolved areas. The recentralisation of certain powers, evidenced by the provisions of the Internal Market Act 2020, poses a threat to current devolution and human rights in

115 Lord Sewel indicated in the House of Lords during the passage of the Scotland Bill (HL Deb 21 July 1998, vol 592, col 791) that 'we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'.

116 See Scotland Act 2016, s 2, and Wales Act 2017, s 2.

117 The Welsh Senedd voted against giving consent to the Police Reform and Social Responsibility Bill in 2011; the Scottish Parliament withheld consent on aspects of the Welfare Reform Bill 2011; the Northern Ireland Assembly withheld consent on the Enterprise Bill 2015.

118 The Welsh Senedd also withheld consent initially but later conceded.

119 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 (24 January 2017) para 151.

two respects. The UK Government's adoption of certain minimum human rights standards with application across the UK could lead to a downward trajectory in the devolved nations' progress – a levelling down of rights. Further, the loss of autonomy on fiscal matters may directly and negatively impact on the resources required to deliver overlapping rights in health, education, housing and so on. It directly impacts on the allocation of funding for the fulfilment of ESCR, a key component of the international human rights framework that requires resources to be deployed for the enjoyment of those rights to the maximum available. 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.[120] Such powers include the provision and operation of infrastructure in Scotland in relation to water, rail services, health care, education, court services and housing, all of which are currently under devolved administration.[121] The centralisation of decision-making regarding the prioritisation of funding in devolved policy areas[122] enables the UK Government to exercise unilateral control over the Shared Prosperity Fund, the UK's replacement for the European Structural Funds.[123] Scotland and Wales's devolved administrations have opposed this shift in decision-making on the grounds that it goes against 'promises repeatedly made that Brexit would not mean any loss of funding and that the devolution settlement would be respected'.[124]

Third, the UK Government's approach has potentially further exacerbated structural inequality, again creating a ripple effect in the enjoyment of ESCR in devolved areas such as health and food. The UK Government did not produce a full equalities impact assessment of Brexit which would have provided a review of its predicted legal and socio-economic effects on different groups of people across the UK. An independent report commissioned by the Scottish Government in 2020[125] identified 137 potential social impacts in Scotland, including

120 Scottish Government, *After Brexit: The UK Internal Market Act and Devolution* (Scottish Government 2021).

121 Internal Market Act 2020, s 50.

122 Equality Act 2010, pt 6. For a detailed analysis of the potential impact of the centralisation of previously devolved funding, see Jess Sargeant and Alex Stojanovic, *The United Kingdom Internal Market Act 2020* (Institute for Government 2021) 23–24.

123 Which, according to reports, were worth approximately £2.1 billion per year split across regional development, agriculture and social funding: see Philip Brien, *The Shared Prosperity Fund* (House of Commons Library 2021) 29.

124 See the Welsh Government's Joint Press Release with the Scottish Government (24 November 2020).

125 Eve Hepburn, *Brexit: Social and Equality Impacts* (Scottish Government 2020).

in respect of the Equality Act 2010's 'protected characteristics'[126] as well as those with other personal characteristics who may face social exclusion or discrimination. Impacts include the loss of legal rights, employment protections, funding opportunities, healthcare rights and impacts on food, fuel and medicines. Although the loss of certain rights and services may have an apparently neutral application, such losses are distinct in terms of how they happen, whom they affect, or both.[127]

Fourth, the UK Government has introduced a proposed 'Bill of Rights' to replace the Human Rights Act 1998 (HRA) a result of which will mean the diminution of rights and remedies at the national and subnational level. The Bill was introduced to Parliament on 22 June 2022 and has, at the time of writing, not yet had its second reading with no date currently scheduled. The Bill of Rights (and the associated agenda on administrative law reform) is regressive human rights reform – where existing rights are diminished rather than progressed. The legislation includes more stringent rules on standing and attempts to undermine the positive obligations that form part of ECHR compliance, leading in some cases to further limitations on economic and social rights protections. As discussed below, there are increasing national trends that overlook the complexities of devolution as the UK Government presses ahead with reform, whether by design or a lack of awareness of the potential seismic changes at the devolved level. For example, the draft legislation[128] contains a clause which will remove the interpretive obligation provided by section 3 of the HRA. Section 3 requires that all primary and secondary legislation should be read, in so far as it is possible to do so, as compatible with the ECHR. It has been deemed an obligation of 'an unusual and far-reaching character'.[129] Devolved legislation is secondary legislation under the HRA. There is no analogous replacement of section 3 within the Bill of Rights, and there has been no consideration of how this change might interact with the devolved interpretative obligations.[130] Section 101 of the SA 1998, by way of example, requires the court to read legislation as narrowly as is required to be within competence of the Scottish Parliament if such a reading is possible. Both section 3 and section 101 are interpretative obligations, and both require devolved legislation (in relevant circumstances and where possible) to be read as compatible with ECHR. Section 3 is a direct ECHR interpretation clause

126 Equality Act 2010, s 4, lists the protected characteristics as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

127 Hepburn (n 125 above) 5.

128 The Bill of Rights Bill was introduced to the House of Commons on 22 June 2022.

129 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, Lord Nicholls at para 30.

130 See SA, s 101; NIA, s 83; GOWA, s 154.

whereas section 101 is an ECHR interpretative clause via section 29 of the Scotland Act, which provides that anything incompatible with the ECHR is beyond devolved competence.

One potential consequence of this change may be that the UK Parliament, uninhibited by section 3 of the HRA 1998, may make legislation in devolved areas of law that directly infringes ECHR rights without interpretative remedies available to the court, something that would be beyond the competence of the Scottish Parliament to do under section 29, and something that the courts could remedy via the devolved interpretative clause should the circumstances arise. Likewise, the Bill proposes extending the scope of declarations of incompatibility to apply to secondary legislation[131] (noting again that devolved statutes are considered secondary legislation under the HRA 1998) without recognising the potential impact of this at the devolved level where strike-down powers are already available for incompatible devolved legislation. At the very least, this creates an anomaly for the judiciary where a declaration of incompatibility remedy would be available for incompatible legislation, which under the SA 1998 would be deemed *ultra vires* and 'not law'. Devolution and the devolved frameworks are an afterthought, rather than an integral part of this national reform.

The erosion of devolution and the devolved settlements has contributed to disquiet around the constitutional settlement. A previous UK government advisor has warned against the onset of 'know your place unionism'[132] and, following the 2021 election of a pro-independence majority in the Scottish Parliament, the Prime Minister called for a summit on the future of the UK.[133] The success of the intervention on intergovernmental relations in the post-Brexit landscape is yet to be determined. There is an underlying tension as to the constitutional future of devolved jurisdictions within the UK with devolved governments often pulling in different directions. This tension can be illustrated in the context of human rights with regressive trajectories at the national level in stark contrast to the more progressive examples of reform in the devolved jurisdictions.

131 Bill of Rights Bill, cl 10(1)(b)(i).

132 Neil Mackay, 'Exclusive interview with former intelligence chief: "Boris and Tory government are gaslighting Scots over indyref2"' *Herald Scotland* (Glasgow 2 May 2021).

133 Christopher Hope, 'Boris Johnson asks Nicola Sturgeon to a "save the Union" summit' *The Telegraph* (London 8 May 2021).

## (RE)IMAGINING ENHANCED DEVOLUTION

The changes imposed on Scotland by Brexit and the UK Government's handling of it have reignited calls for Scottish independence: the Scottish Government has published a draft Referendum Bill.[134] Since taking office First Minister Humza Yousaf has indicated a more cautious approach to the calling of another referendum than his predecessor, preferring to wait until there is a 'consistent majority' in favour of independence and seeking consent from the UK Parliament to do so (implying use of a section 30 order discussed below).[135] Whether a referendum would deliver independence and what the effect on Scotland's human rights framework would be are difficult to gauge. There are currently no proposals to extend Scotland's devolution settlement. Indeed, since taking office, Prime Minister Rishi Sunak has criticised the Scottish Parliament for not using existing powers enough, indicating no further devolution should occur.[136] Nonetheless, given the renewed focus on independence, it is at least possible that the extension of powers in policy areas with a direct link to human rights protections might be considered. In the next section, the potential scope for human rights progression under enhanced devolution arrangements is considered. The process for requesting an amendment to the current settlement is set out in the SA 1998, whereby a section 30 order can be made which grants legislative authority on a temporary or permanent basis to the Scottish Parliament in a specified area. Section 30 orders can be initiated either by the Scottish or UK Governments but require approval by the House of Commons, the House of Lords and the Scottish Parliament before becoming law.[137] In the current context, this seems unlikely but, given the sensitive constitutional issues at stake and the UK Government's desire to protect the Union, it is possible that circumstances may change.[138] If such a request *was* made and approved, the most obvious areas of focus for enhanced rights protections would surely be in respect of those groups and individuals

134 Scottish Government, 'Scottish independence' (22 March 2021).

135 Chris Mason and Nick Eardley, 'SNP plays longer game in bid for Scottish independence' (*BBC News* 29 April 2023)

136 Severin Carrell, 'Conservatives will not devolve more powers to Scotland, Rishi Sunak says' (*The Guardian* 23 April 2023).

137 There are equivalent provisions in the GOWA 2006 and NIA 1998.

138 Following the previous Scottish Independence Referendum, the Smith Commission recommended the further devolution of equal opportunities to Scotland, specifically that: 'The powers of the Scottish Parliament will include but not be limited to the introduction of gender quotas in respect of public bodies in Scotland. The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas.' See Smith Commission, Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament (2014) para 60.

who fall between the current structural gaps resulting from the uneven matching of reserved and devolved powers. Examples include asylum seekers; the victims of trafficking; those workers who, because of a lack of employment status and/or their engagement in precarious forms of work, are not able to enjoy the full protection available to those with employment security; and, cutting across all of these groups, individuals and groups experiencing extreme poverty.[139]

Employment law has long been the subject of calls for greater devolved powers.[140] In the post-Brexit environment, such a move would facilitate the Scottish Parliament's objectives of non-regression and keeping pace with the EU's social policy agenda as the minimum standards guaranteed by EU law become vulnerable to change.[141] Despite the UK Government's announcement in 2019 that protection for EU workers' rights would be included in an Employment Bill,[142] no such Bill has yet been published. Scotland's ability to act independently is limited to the promotion of support for employment with attention focused in recent years on the promotion of fair working practices through the Fair Work Action Plan,[143] aimed at the achievement of a range of policy initiatives including employer accreditation schemes on the living wage,[144] carer support,[145] and facilitating the return of women workers to the labour market.[146] In the context of incorporation, the devolution of employment law to Scotland would certainly open up a myriad of legislative interventions capable of bringing improvements for those experiencing disadvantage. However, given the direct relationship between economic policy and employment law, further powers in this respect would seem to be very unlikely. Equality law and immigration and asylum law are two areas which have also been the subject of calls for greater powers for Scotland.[147] Both have the

139 See Professor Philip Alston (United Nations Special Rapporteur on extreme poverty and human rights), Statement on Visit to the United Kingdom (UN 2018).

140 Most recently, in June 2021, the Social Justice Secretary Shona Robison called on the opposition parties in Holyrood to support her bid for the full devolution of employment law as a means of tackling child poverty and building a fairer and more equal country. See Devolution of Employment Powers to Tackle Poverty: Letter to Party Leader (Fairer Scotland 6 June 2021).

141 Michael Ford QC, Workers' Rights from Europe: The Impact of Brexit (TUC 2016).

142 See the Queen's Speech (Prime Minister's Office 2019) 43.

143 Scottish Government, Fair Work: Action Plan (Scottish Government 2021).

144 Poverty Alliance, 'The real Living Wage for the real cost of living' (Living Wage Scotland).

145 Carer Positive, 'Carer Positive Employer in Scotland'.

146 Employability in Scotland, 'Women in the Economy'.

147 See, for example, the First Minister's National Advisory Council on Women and Girls, Report and Recommendations (2020) Recommendation 1, 11.

potential to make a significant contribution to the better realisation of human rights in Scotland.

## Equality law

The UK Government has already devolved aspects of equality law, including devolving the competence to implement the socio-economic equality duty under section 1 of the Equality Act 2010, to the Scottish Parliament and Welsh Senedd (equality law is already largely devolved in Northern Ireland). Further devolution of equality law would enable the Scottish Parliament to implement fully the changes necessary for Scotland to fulfil its international obligations.[148] The necessary shift from a formal to substantive approach to equality required if the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (UNCRPD) and the Convention of the Elimination of all forms of Racial Discrimination (UNCERD) are to be fully implemented would bring about alignment of domestic law with the international human rights framework, enabling substantial progress in the realisation of the rights of women, disabled people and in relation to race and ethnicity. In addition, the NTF's recommendations[149] include a right for older people to lead a life of dignity and independence and to take part in social and cultural life, as provided for by the EU Charter of Fundamental Rights,[150] and an equality clause that would provide for the protection and promotion of the full and equal enjoyment of rights of LGBTQI people.[151] The devolution of equality law would enable these rights to be given meaningful effect, so as to ensure, as far as possible, equality of outcome for all protected groups.

The full devolution of equality law would make it possible to extend the relatively narrow range of categories deemed as protected characteristics under the Equality Act 2010.[152] An obvious choice for inclusion would be socio-economic status. The Equality Act 2010 does provide for a socio-economic duty which requires public bodies to adopt transparent and effective measures to address the inequalities that result from differences in occupation, education, place of residence

148 See Nicole Busby, 'The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW', and Nicole Busby and Kasey McCall-Smith, 'Incorporation of the CERD and CRPD and Equivalent Rights Provision for LGBTI Communities and Older Persons' (Academic Advisory Panel Papers for the National Taskforce for Human Rights Leadership).

149 NTF Report (n 15 above).

150 Ibid Recommendation 6.

151 Ibid Recommendation 7.

152 See Busby (n 148 above).

or social class.[153] The competence to enact this duty was transferred under the Scotland Act 2016. This duty was thereafter enacted by the Scottish Parliament as the Fairer Scotland Duty in 2018[154] and came into effect in Wales on 31 March 2021.[155] The UK Government has no plans to introduce the duty in England. The Equality and Human Rights Commission has conducted an evaluation of the socio-economic duty in Scotland and Wales[156] which found that, although some early positive signs could be deduced in relation to its influence over decision-making, its full impact in relation to setting or tackling specific priorities had not yet been felt.[157] Providing real and measurable improvements to people's lives was considered a longer-term aspiration for the duty in both Scotland and Wales.[158] The duty falls far short of a legal right not to be discriminated against on the grounds of socio-economic status or social class, a right that is recognised by the constitutional provisions of some jurisdictions[159] and has been the subject of proposals for reform in others.[160] Importantly, the extension of the framework to explicitly include socio-economic status would bring domestic law into line with the provision of the ICESCR.[161]

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153 Equality Act 2010, s 1, which provides: 'An authority ... must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.'

154 The Equality Act 2010 (Commencement No 13) (Scotland) Order 2017. For the associated guidance, see 'Fairer Scotland Duty: interim guidance for public bodies'.

155 Equality Act 2010 (Authorities subject to a duty regarding Socio-economic Inequalities) (Wales) Regulations 2021. For an overview of the duty, see 'Socio-economic duty: an overview'.

156 Equality and Human Rights Commission, Evaluating the Socio-Economic Duty in Scotland and Wales (2 March 2021).

157 Ibid 8.

158 Ibid.

159 Examples include South Africa and India.

160 Irish Equality (Miscellaneous Provisions) Bill 2021, currently before Dáil Éireann, second stage, contains a definition of a disadvantaged socio-economic status ground.

161 The UN CESCR has noted: 'While welcoming the adoption of the Equality Act 2010, the Committee is concerned that some of its provisions, particularly those relevant for enhancing the protection of economic, social and cultural rights without discrimination, are not yet in force, such as the duty of public authorities to consider socioeconomic disadvantage in decision-making processes and the prohibition of intersectional discrimination. The Committee also regrets that, despite its previous recommendation, the Equality Act 2010 is not applicable in Northern Ireland and does not explicitly include all prohibited grounds of discrimination, such as national or social origin (art. 2(2)).' See CESCR 2016 (n 2 above).

## Immigration and asylum law

Nationality, immigration and asylum are reserved matters,[162] although the devolved administrations are responsible for related policies which assist and support migrant integration in the host nation including ensuring access to essential services such as healthcare, housing and education. Approaches to migrant integration in England and the devolved nations have increasingly diverged. Since the early 2000s the UK Government's Department for Communities and Local Government, which has responsibility for migrant integration in England, has adopted 'community cohesion'[163] in place of a multicultural understanding of integration.[164] This shift followed an independent review which concluded that tensions between different communities could be overcome through an emphasis on British citizenship and core British values.[165] Community cohesion has been articulated as representing a 'clear sense of shared aspirations and values, which focuses on what we have in common rather than our differences'.[166]

In contrast, the multicultural approach which celebrates difference and diversity has underpinned the Scottish Government's migrant integration policy since the early days of devolution when demographic concerns relating to Scotland's population led to the adoption of a broadly consensual position among Scotland's political parties that migration provides 'an important economic and cultural resource for Scotland'.[167] The 'One Scotland, Many Cultures' campaign, launched by the Scottish Executive in 2002 and renamed 'One Scotland' in 2005,[168] places multiculturalism at its centre. The Scottish Government has called for further devolution of immigration and asylum law,[169] albeit with much of the discussion to date focusing on an economic rationale,

162 Scotland Act 1998, sch 5, pt II, s B6.

163 See Department for Communities and Local Government, 'Creating the conditions for integration' (21 February 2012).

164 Derek McGhee, *The End of Multiculturalism? Terrorism, Integration and Human Rights* (Open University Press 2005).

165 Ted Cantle, *Community Cohesion: Report of the Independent Review Team* (Home Office 2001).

166 David Cameron, 'Prime Minister's speech to Conservative party members on the government's immigration policy' *The Guardian* (London 14 April 2011).

167 Eve Hepburn, Migrant Integration in Scotland: Challenges and Opportunities (Iriss 2020); see further Eve Hepburn and Michael Rosie, 'Immigration, nationalism and political parties in Scotland' in E Hepburn and R Zapata-Barrero (eds), *The Politics of Immigration in Multilevel States: Governance and Political Parties* (Palgrave Macmillan 2014).

168 Scottish Government, One Scotland.

169 Scottish Government, Scotland's Population Needs and Migration Policy: Discussion Paper on Evidence, Policy and Powers for the Scottish Parliament (2018).

rather than on the specific needs of new migrant populations.[170] Although Scotland does not have an integration policy relevant to all migrant groups, it does have separate policy strands which are intended to promote a welcoming and inclusive environment including the 'Stay in Scotland Toolkit' aimed at EU migrants, launched in 2019 in response to Brexit,[171] and the New Scots Refugee Integration Strategy,[172] which offers support including access to public services to asylum seekers from the first day of entry into Scotland. Some of the UK Government's provisions which restrict access to social rights have not been applied in Scotland, so that, for example, access to free English for Speakers of Other Languages classes for those in the asylum system and to further education, although restricted, remain in place.[173] The Scottish Government has also made clear its intention to change the law so that asylum seekers can obtain a work permit.[174] This is currently prohibited under UK law and any such change would be difficult to achieve under current devolution arrangements by which decisions about levels of migration, nationality status and resulting rights are managed by the UK Government's Home Office.

In July 2021 the UK Government introduced the Nationality and Borders Bill to the House of Commons, heralded as 'the cornerstone of the government's New Plan for Immigration, delivering the most comprehensive reform in decades to fix the broken asylum system'.[175] Both the Scottish and Welsh legislatures withheld consent in the passing of the Bill. Despite ongoing concerns that a number of the measures were likely to interfere with areas of devolved policy[176] and that some of the provisions are incompatible with international law and likely to damage access to justice,[177] the Nationality and Borders Act 2022 received royal assent and became law on 28 April 2022. Examples of where the new legislation impinges on areas of devolved policy include the arrangements regarding the identification,

170 Silvia Galandini, Gareth Mulvey and Laurence Lessard-Phillips, 'Stuck between mainstreaming and localism: views on the practice of migrant integration in a devolved policy framework' (2019) 20 Journal of International Migration and Integration 685, 689.

171 Scottish Government, 'EU citizens staying in Scotland: support and toolkit for EU citizens, their employers and landlords' (17 August 2019).

172 Scottish Government, 'New Scots: refugee integration strategy 2018 to 2022' (10 January 2018).

173 Ibid.

174 Ibid.

175 Home Office, 'Nationality and Borders Bill' (6 July 2021).

176 Jen Ang, 'Legal opinion: what does the Nationality and Borders Bill mean for devolution in Scotland?' (*Justright Scotland* 30 November 2021).

177 See commentary by the Law Society, 'Nationality and Borders Act' (24 February 2023).

support and safeguarding of vulnerable groups, including survivors of gender-based violence and of trafficking and exploitation,[178] families who are destitute and homeless and unaccompanied children arriving in Scotland. UK strategy designed to 'take back control' of Britain's borders looks increasingly at odds with Scotland's vision of itself as an inclusive and welcoming place – a vision that could only be fully realised with enhanced devolved powers in relation to migration and asylum policy.

Although it is tempting to speculate about the difference that further devolved powers in specific policy areas would make to the full realisation of human rights in Scotland, the piecemeal and isolated development of domestic rights cannot be fully effective as the demarcations that characterise law and policymaking are rarely, if ever, reflected in the complex reality of lived experience. A fully operational human rights framework will require the devolution of a range of social and economic policy areas, including integration of employment, equality and immigration and asylum law and policy, alongside a fully devolved social security system.

## CONCLUSIONS

The devolved trajectory sheds light on the inconsistencies between national and subnational framings of rights and in particular ESCR. Once enacted, the Scottish framework will (in so far as it is possible to do so) enable ESCR justiciability in line with international and comparative best practice supported by a multi-institutional framework that seeks to ensure accountability across the institutions of government through everyday accountability mechanisms. Despite the increasing resistance at national level, devolution has created a constitutional framework for the ECHR as a minimum level of human rights protection that anchors the rest of the UK to normative standards. In the context of human rights progression, devolution has also provided clear opportunities to build on this foundation and close the UK's accountability gap in ESCR protection at the subnational level. There are now several examples of progress in the protection of such rights at the devolved level, including direct incorporation of international treaties.

Scotland's incorporation agenda provides an opportunity to embed international normative standards across a range of ESCR. However, it is not without its limitations. Devolution is complex. It does not apply universally across each devolved jurisdiction, meaning that in practice three very different forms of devolution operate simultaneously

178 An area in which Scotland has its own legislation in place in the form of the Human Trafficking and Exploitation (Scotland) Act 2015.

across the UK's devolved nations. Furthermore, in each jurisdiction there is further complexity in relation to what constitutes a devolved, transferred, excepted or reserved matter (the latter of which takes on a different meaning in Northern Ireland). This creates a complex web for the individual or organisation trying to navigate intertwined and yet separate devolved legal jurisdictions. However, despite the divergence that devolution brings, it can also inspire and lead unified action across the devolved nations, particularly in relation to any perceived or actual threat to, or destabilisation of, the current guarantees in relation to the protection of international human rights standards by the UK Government or Westminster Parliament. This is because the legislatures in each of the devolved jurisdictions have legislative competence to observe and implement international human rights obligations. Devolved ambitions to align with international normative standards can be seen to have had an ongoing stabilising effect on ensuring that the guarantees relating to international human rights standards, with which the UK has after all agreed to comply, are maintained. This is an outcome with positive discernible benefits for all those protected by human rights within the UK.

As well as providing an important human rights anchor on national reform, devolution also plays a key role in enabling deeper conversations on the UK's human rights landscape. The diverging trajectories, whilst on the one hand problematic, as people living in different parts of the UK enjoy different levels of protection, also offer the opportunity for devolved jurisdictions to demonstrate the various ways in which human rights progress can be achieved in a teleological framing of rights protection. However, the sub-divisions and silos that characterise law and policy-making frameworks rarely reflect the realities of people's lived experience. If it is to be fully integrated and truly effective, Scotland's future human rights framework will require a restructuring of the existing law and policy frameworks relevant to ESCR, something that will be difficult under the existing allocation of competences. For the implementation and observance of international human rights standards, including ESCR, further devolution of a range of social and economic policy areas may indeed be required to close the accountability gap at the subnational level where such observance is not forthcoming at the national level.

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# The devil is in the details: entrenching human rights protections in the UK's devolved nations

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ABSTRACT

In states with multilevel governance systems, such as the United Kingdom (UK), human rights are subject to variable gradations of implementation based on the political will and the legal competence of the subnational governments to implement international law. Entrenching rights through incorporation secures domestic enforcement, which, in turn, paves the way for proactive human rights culture change and guards against human rights regression. This article examines the future of increasing human rights protections in the devolved nations of the UK in the wake of the *Incorporation Reference* decision. First, the article reflects on the opportunity to entrench international human rights protections through incorporation as one form of implementation. Next, Scotland's path to increasing implementation of the United Nations Convention on the Rights of the Child (UNCRC) will be presented, including an examination of the key features of the UNCRC (Incorporation) (Scotland) Bill. These features are then juxtaposed against the challenges raised in the *Incorporation Reference* case. International law is the lens through which the analysis is delivered, aligning with UN human rights treaty body guidance and focused on delivering human rights in national settings. Finally, the article argues that, despite the difficulty posed by the interpretation of devolved legal competence delivered in the *Incorporation Reference* judgment, from the perspective of international law, there remains a great opportunity to entrench human rights in the devolved nations through incorporation legislation and other measures that respect, protect and fulfil human rights.

**Keywords:** human rights; implementation; devolution; incorporation; UNCRC; judicial review.

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## INTRODUCTION

In states with multilevel governance systems, such as the UK, human rights are subject to variable gradations of implementation based on the political will and the legal competence of the subnational governments to implement international human rights. As such, legal recognition and the protection of human rights may be uneven across the different strata of national and subnational governance systems. Entrenching rights through incorporation secures domestic enforcement, which, in turn, paves the way for proactive human rights culture change and guards against human rights regression. Nested within the broader concept of implementation, there are numerous approaches to securing human rights through incorporation. These approaches to incorporation include: maximising the spectrum of implementation options available for delivering distinctive rights in local settings; embedding the respect, protect and fulfil tripartite human rights framework; and exercising a holistic understanding of how distinctive human rights are impacted by different decision-makers and service-providers. These three approaches not only support the legalisation of human rights but also are crucial to bridging legal and non-legal methods of human rights implementation.

In the United Kingdom (UK), the European Convention on Human Rights (ECHR) is the single example of direct incorporation of an international human rights treaty into national law through the Human Rights Act 1998 (HRA). The UK is party to a further range of regional and international human rights treaties, but, as of yet, it has not given any explicit legal recognition to these agreements in national law. The three devolution settlements between the UK Parliament and Scotland, Wales and Northern Ireland prohibit the subnational governments from contravening the ECHR and open up spaces to entrench additional international human rights obligations in line with the UK's ratification of international agreements.[1] In short, the devolution arrangements enable the delivery of human rights at a more local level. This article explores what space is available in the devolved governance systems to entrench human rights over and above protections secured through UK legislation.

A main driver of increased human rights implementation through incorporation is to fill existing and impending gaps in human rights protection in order to guard against human rights regression. Incorporation is a key way in which human rights are localised, but it is more than a simple move to recognise international law in the national legal system. Along with the legalisation of international human rights,

1 Scotland Act 1998, ss 29(2)(d), sch 5, para 7(2)(a); Government of Wales Act 2006, s 94(6)(c); Northern Ireland Act 1998, ss 6(2)(c), 26(2).

there must be ongoing, discursive consideration of the widely varied non-legal forms of implementation and a constant eye on developing international interpretations of human rights. This approach works in tandem with the idea that international human rights standards serve as a floor, rather than a ceiling. By localising international human rights obligations, local actors, including policy-makers, legislators and local authorities, among others, are able to entrench human rights in accord with the national legal system and in line with local contextual requirements.

Until 2021, devolved governments in the UK tended to incorporate international human rights law in addition to the ECHR using indirect and sectoral measures alongside the more common approach of implementing human rights through policy measures. For example, Wales strengthened children's rights by indirectly incorporating the United Nations Convention on the Rights of the Child[2] (UNCRC) in 2011. The Welsh Measure placed a duty on the Welsh Parliament (the Senedd) to have due regard to the UNCRC.[3] While not providing any justiciable rights, the Welsh Measure has driven increased attention to developing law and policy that is more attentive to the wide-ranging issues that affect children.[4] Similarly, in Northern Ireland, the Children's Services Co-operation Act (Northern Ireland) 2015 places obligations on different duty-bearers to make decisions with regard to the UNCRC, but these measures are non-justiciable.[5] In Scotland, the UNCRC (Incorporation) (Scotland) Bill (UNCRC Bill) was passed by the Scottish Parliament in March 2021.[6] To date, the Bill offers the greatest opportunity to entrench the dynamism of the UNCRC into law in a devolved jurisdiction of the UK. The unanimously approved text of the Bill followed a 'maximalist' approach to incorporation using a range of legal and non-legal measures to ensure the widely recognised respect, protect and fulfil tripartite approach to securing human rights, including interpretive guidance linking into the international human rights framework, preventative measures and enforcement mechanisms to ensure Scots law and policy would keep pace with the UNCRC.

Shortly after Scotland celebrated the historic vote on the UNCRC Bill, the UK Government challenged four elements of the UNCRC Bill

2 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990 (UNCRC).

3 Rights of Children and Young Persons (Wales) Measure 2011, s 1 (Welsh Measure).

4 Simon Hoffman, 'The UN Convention on the Rights of the Child, decentralisation and legislative integration: a case study from Wales' (2019) 23 International Journey of Human Rights 374.

5 S 1(4). See discussion in Sinéad McMurray, *Children's Rights and Educational Policy in Northern Ireland: Implementation of the UNCRC* (Northern Ireland Assembly Briefing Paper No 11/21, NIAR-41-2021 16 February 2021).

6 UNCRC (Incorporation) (Scotland) Bill, SP Bill 80B (2021) as passed (UNCRC Bill).

as contravening section 28(7) of the Scotland Act 1998, which details that Acts of the Scottish Parliament may not modify the power of the UK Parliament to make laws for Scotland. The case centred on the extent to which the Scottish Parliament can legislate in devolved areas of competence without impinging on the sovereignty of Westminster (UK Parliament). In delivering its *Incorporation Reference* decision in October 2021, the Supreme Court acknowledged the relevance of the decision for the other devolved nations and the extent to which they can legislate to strengthen human rights protections in the subnational sphere.[7]

The *Incorporation Reference* decision presents a number of challenges as to how Scotland and the other devolved nations can move forward with plans to incorporate the UNCRC or other international human rights treaties. The Scottish Government has committed to develop a new, comprehensive human rights framework for Scotland through the incorporation of additional international human rights treaties. Wales, too, is following suit with plans to implement additional human rights protections. This article examines the future of increasing human rights protections in the devolved nations of the UK in the wake of the *Incorporation Reference* decision. First, the article reflects on the opportunity to entrench international human rights protections through incorporation as one form of implementation. Notably, the analysis throughout refers to the UNCRC Bill *as passed* in 2021 because, at the time of writing, the revised Bill has not been introduced. Next, Scotland's path to increasing implementation of the UNCRC will be presented, including an examination of the key features of the UNCRC Bill. These features of the Bill are then juxtaposed against the challenges raised in the *Incorporation Reference* case. International law is the lens through which the analysis is delivered, aligning with UN human rights treaty body guidance and focused on delivering human rights in national settings to the 'absolute limits of what is possible within the boundaries of the devolution settlement'.[8] Finally, the article argues that, despite the challenges posed by the interpretation of devolved legal competence delivered in the *Incorporation Reference* judgment, from the perspective of international law, entrenching human rights through incorporation in the devolved nations can still drive positive change and deliver legislation that respects, protects and fulfils human rights.

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7 *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 at [6] (*Incorporation Reference* case).

8 UNCRC Bill (n 6 above), Policy Memorandum, SP Bill 80-PM (Scottish Government 2020) 17 (UNCRC Bill Policy Memorandum).

## ENTRENCHING HUMAN RIGHTS

The UK's ratification of a treaty 'establishes as a matter of international law the United Kingdom's consent to be bound by the treaty.'[9] As such, it is worth considering what 'consent to be bound' actually means. More precisely, what does this mean for people in the UK? The short answer in the case of human rights treaties is 'not much' unless the treaty or the rights contained therein become part of national law. In other words, unless the rights have effect – are respected, protected and fulfilled – in national law, the standards established through treaties serve more as a frame of reference for advocacy rather than a legal tool. A growing number of UK judicial opinions reflect this sentiment where the courts disregard the standards set by international human rights treaties and their corresponding monitoring mechanisms.[10] Recent proposals[11] put forward in Westminster reinforce a rigid, dualist view of the relationship between international and national law and run contrary to Lord Bingham's observation that 'the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.'[12]

In ratifying seven of the core international human rights treaties in addition to the ECHR, the UK committed to giving effect to these international obligations though it has not taken any steps to make these rights directly accessible to the British public.[13] The incorporation model set out in the HRA presents a clear example of how to make international human rights standards accessible through the respect, protect and fulfil framework at the local level. In this sense, respect carries a negative obligation on the state to not interfere with incorporated rights while protect entails a positive obligation or proactive duty on government to ensure the rights. To fulfil the rights, there must be some form of enforcement, which requires a determination of whether an act, or failure to act, has violated any enumerated rights. Section 6 of the HRA outlines that the state, through its public authorities, is responsible for ensuring the human rights outlined in the ECHR. This duty is a proactive, preventative

9 Constitutional Reform and Governance Act 2010, s 25(4).

10 For example, *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 487; *Binder; Britliff v Birmingham City Council* [2019] UKEAT 0291/18; *R (Davey) v Oxfordshire County Council* [2017] EWHC 354.

11 For example, the Bill of Rights Bill (Bill 117) (UK Parliament 22 June 2022).

12 Lord Bingham, 'The rule of law' (2007) 66(1) Cambridge Law Journal 67, 81–82.

13 UK, Ratification Status (OHCHR). The use of the 'core' term excludes optional protocols to the primary treaties that form the basis of the UN Human Rights Treaty system.

dimension of the Act that ensures the state respects and protects ECHR rights through its negative and positive obligations. A person may enforce – fulfil – their rights under section 7 of the HRA by raising a claim that a public authority has acted contrary to the ECHR. Rather than keeping internationally agreed rights at a distance, through the process and effects of incorporation, every member of society is able to identify, engage and defend their rights in their own locality. This, in turn, enables a better opportunity for the state to negotiate rights settlements through local debate, budgeting choices and deployment of resources, such as teachers or doctors, that optimise the realisation of individuals' rights in familiar surroundings.

Drawing from the wide field of international human rights, 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. There is vast evidence of incremental implementation of international human rights law in both law and policy across the UK, though the various types of rights receive uneven attention across the distinctive subnational systems.[14] Scotland, in particular, with its complex mix of devolved competences and separate legal system is focusing on giving effect to the UK's broader international human rights obligations through incorporation.[15] Wales is more limited in its ability to legislate in favour of directly enforceable human rights in light of its intertwined legal system with England.[16] Nonetheless, beyond the Welsh Measure that indirectly incorporates the UNCRC, the Welsh Assembly is planning to pursue incorporation of the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[17] While Northern Ireland is not focusing on incorporation, in the aftermath of Brexit and the Covid-19 pandemic there is increasing attention on human rights.[18] In looking across the devolved nations, Scotland is paving the way to shift the human rights landscape significantly by developing a new human rights framework

14 For example, Hoffman (n 4 above); Bronagh Byrne, et al, 'Disability policies and programmes: how does Northern Ireland measure up? An update for ECNI' (2014) 4–5; McMurray (n 5 above).

15 For example, Scottish Government, *A Nation with Ambition: The Government's Programme for Scotland 2017–18* (*Gov.Scot* 5 September 2017); Scottish Government, *UN Convention Against Torture: Our Position Statement* (*Gov.Scot* 28 February 2019).

16 Cf sch 7A to the Government of Wales Act 2006, amended by Government of Wales Act 2017, sch 1, with Scotland Act 1998, sch 5, amended by Scotland Act 2016.

17 Welsh Government, Programme for Government: Update (7 December 2021) 14.

18 For example, McMurray (n 5 above) 10ff.

that will entrench multiple human rights treaties into Scots law through incorporation.

## Aims of incorporation

Incorporation is an important form of implementation through which international human rights become tangible for individuals – human rights are made a reality where states respect, protect and fulfil those rights at the local level.[19] The practice of incorporating obligations derived from international law into national legal systems through domestic legislation is acknowledged in a variable range of terms, including domestication, legislative assimilation, quasi-incorporation, sectoral incorporation, to name but a few.[20] There are also distinctions between more and less formal uses of incorporation terminology depending on the body of literature and field of law or rights under discussion.[21] Here, the term 'incorporation' is preferred over other options in order to align with the contemporary human rights discourse in the UK when discussing the more formalised method of legalising international human rights, particularly children's rights, which forms the basis of the analysis contained herein. In the context of human rights in dualist, common law jurisdictions, there are distinctive forms of incorporation that aim to give varying levels of effect to human rights in national legal systems.[22]

These different forms of incorporation broadly include direct incorporation, indirect incorporation and sectoral incorporation. As used here, direct incorporation generally refers to the process that gives provisions of international law direct effect in national law and ensures justiciability. Direct incorporation typically entails that the government will be subject to both restraints and proactive measures as a means of optimising human rights protections, respectively understood as negative and positive obligations. For example, the prohibition against torture demands that states refrain from engaging in torture – the negative obligation. However, to give full effect to the prohibition, states must also actively investigate allegations of torture – the positive obligation. To fulfil most human rights, the combination of both negative and positive obligations is necessary. Indirect incorporation, alternatively, gives the international legal

19 CRC, General Comment No 5 on General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42, and 44, para 6) UN Doc CRC/GC/2003/5 (27 November 2003) paras 1, 20.

20 Simon Hoffman and Rebecca Thornburn Stern, 'Incorporation of the UN Convention on the Rights of the Child in national law' (2020) 28 International Journal of Human Rights 133, 136.

21 Ibid 138.

22 Kasey McCall-Smith, 'To incorporate the CRC or not: is this really the question?' (2019) 23 International Journal of Human Rights 425, 430–436.

provisions some measure of effect in national law by means of another legal mechanism such as a due regard duty, often providing a frame of reference for policy development.[23] Sectoral incorporation refers to the method of integrating treaty provisions into national law on an *ad hoc* basis, often without a direct link to a treaty. Most often states use a mixture of these methods in order to achieve the various aims of implementation of different human rights. Arguably, a mixed approach is most effective in delivering negotiated, mutually reinforcing human rights settlements at the local level.

Regardless of the ultimate choice in method – direct, indirect or sectoral – incorporation processes open up collaborative spaces and the opportunity to promote a human rights-based approach to governance. The key is that the method of incorporation is a *choice* made by government as a means of defining its relationship and interactions with its people. Both the constitutional arrangements within the state and the extent to which the government chooses to avail itself of legal duties to deliver human rights shape the method of incorporation elected by the state or its subnational administrations. Direct incorporation demands the most expansive legislative capacity and signals the highest commitment to human rights delivery. Indirect incorporation, by comparison, may be the result of constitutional impediments, such as limitations imposed through the devolution settlements in the UK, or a lack of political will to take on the most expansive commitments under the respect, protect and fulfil approach to delivering human rights. Bearing this in mind, different methods of incorporation sit along a spectrum of what is considered effective implementation, rather than being a binary choice. At any point along this spectrum, the state gives differing levels of effect to the respect, protect and fulfil framework for implementation of its international obligations. As a result, the choice of a government to directly incorporate a human rights treaty is not a whimsical decision taken in a moment. Rather, it is the conclusion of a (typically) long, deliberative process. For example, the UNCRC Bill that aims to directly incorporate the UNCRC in Scotland is the product of over a decade of increasing children's rights protection driven by advocacy and education.[24] Similarly, other jurisdictions, such as Sweden, travelled a path to UNCRC incorporation that was neither short, nor without many

23 Simon Hoffman and Sean O'Neill, *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (Equality and Human Rights Commission 2018), offering an expansive account of how indirect incorporation has driven children's rights entrenchment in Wales. See also, CRC, General Comment No 5 (n 19 above) para 21.

24 UNCRC Bill Policy Memorandum (n 8 above) paras 25–30.

struggles.[25] The next section reflects on Scotland's path to UNCRC incorporation as a means of tracing some of the implementation options available to subnational governments.

## UNCRC IMPLEMENTATION IN SCOTLAND

The UNCRC is a comprehensive treaty that engages civil, political, economic, social and cultural rights with specific focus on how to ensure these rights for all individuals under age 18. The rights contained in the treaty are indivisible and inter-dependent and, as a result, are optimised when implemented as a holistic framework including both legal and non-legal measures.[26] 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.[27] The following introduces post-devolution examples of incremental UNCRC implementation, the UNCRC incorporation legislation, the challenge by the UK Government and the Supreme Court decision.

### Children's rights post-devolution

Scots law has already taken many steps forward to respect, protect and fulfil different aspects of the UNCRC, and numerous policies reflect the Convention. For example, GIRFEC (Getting it Right for Every Child) is the umbrella policy addressing children's wellbeing across all organs of the government and service-providers, from teachers to healthcare professionals to police officers.[28] It is the primary non-legal tool for respecting and protecting children's rights, but there is no enforcement dimension and the policy offers vague guidance that is often difficult to link to practice as well-being indicators are not precise comparisons for

25 Rebecca Thornburn Stern, 'Much ado about nothing? The road to the incorporation of the UN Convention on the Rights of the Child in Sweden' (2019) 27 International Journal of Children's Rights 266.

26 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, 324.

27 For an account of the long-running UNCRC incorporation campaign in Scotland, see Kasey McCall-Smith, 'Incorporating the CRC in Scotland' in Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds), *Incorporating the United Nations Convention on the Rights of the Child into National Law* (Intersentia 2021) 307–312.

28 Scottish Government, *Getting it Right for Every Child* (GIRFEC).

a child rights-based approach to governance.[29] As a result, 'fulfilling' the full complement of children's rights is not possible under this policy.

Legislation has delivered different aspects of the UNCRC incrementally, typifying the widespread approach to implementing the Convention.[30] For example, the Children and Young Peoples Act 2014 (CYP Act) indirectly incorporated the UNCRC by placing a duty on Scottish Ministers to keep the UNCRC under consideration when making decisions.[31] This prospective, preventative measure of implementation aims to ensure that children's rights are at the forefront of law and policy decision-making processes. The CYP Act is directed toward respecting and protecting children's rights without any enforcement potential. Unfortunately, the Act focuses so heavily on transferring the wellbeing dimensions of GIRFEC into law that the proactive opportunity to entrench children's rights and promote their engagement with rights is overshadowed.[32] Among many other goals, the CYP Act aims to give effect to UNCRC article 12 by outlining that children should be included in decision-making processes. This aim resulted in the requirement that a Children's Rights Impact Assessment (CRIA) accompany all legislation that might impact children's rights.[33] This dimension of the CYP Act aligns with the view of the Committee on the Rights of the Child (CRC) that CRIA should be 'built into government at all levels and as early as possible'.[34] As implemented, very few of the CRIAs demonstrate effective engagement with children.[35] However, without a legal enforcement mechanism

29 Laura Lundy, 'A lexicon for research on international children's rights in troubled times' (2019) 27 International Journal of Children's Rights 595; E K M Tisdall, 'Children's wellbeing and children's rights in tension?' (2015) 23 International Journal of Human Rights 769.

30 Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, *The UN Convention on the Rights of the Child: A Comparative Study of Legal Implementation in 12 Countries* (UNICEF-UK 2012) 4–5; Jean Grugel and Enrique Peruzzotti, 'The domestic politics of international human rights law: implementing the Convention on the Rights of the Child in Ecuador, Chile, and Argentina' (2012) 34 Human Rights Quarterly 178.

31 S 1(1).

32 Tisdall (n 29 above) 770–771.

33 Children and Young People (Scotland) Act 2014, s 1(2). In Scotland, CRIAs are referred to as Children's Rights and Wellbeing Impact Assessments (CRWIA) in order to align with the GIRFEC wellbeing indicators. See Scottish Government, *When and How to Best Use the Child Rights and Wellbeing Impact Assessment (CRWIA): Guidance* (19 November 2021).

34 CRC, General Comment No 5 (n 19 above) para 45.

35 On the participation dimension of Scottish incorporation and critique of the existing CRWIA system, see Kasey McCall-Smith, 'Entrenching children's participation through UNCRC incorporation in Scotland' (2021) International Journal of Human Rights (firstview).

attached, fulfilling children's UNCRC rights under the CYP Act was not as successful as envisioned.[36]

Indirect incorporation through the CYP Act is only one of the legislative measures taken to make the UNCRC a reality in Scotland since devolution. Sectoral laws also play an important role in bringing the UNCRC to life. Sectoral legislation ended the use of corporal punishment of children after almost two decades of slow, but steady progress in understanding its detrimental effects. In 2003, certain forms of physical punishment were restricted through the Criminal Justice (Scotland) Act (section 51). This move to restrict the use of physical punishment followed on from the ECHR case *A v UK*, which held that a private person using a cane to exert physical punishment on a child breached article 3 of the ECHR's prohibition against ill-treatment.[37] At that point in time, physical punishment in schools had already been banned.[38] The lingering defence of justifiable assault, however, remained available for parents and guardians using other forms of physical punishment, a point of contention raised by the CRC.[39] Ultimately, the defence was removed by the Children (Equal Protection from Assault) (Scotland) Act 2019. These laws progressively realised the CRC's interpretation of article 19 of the UNCRC that physical assault of a child is a breach of their right to be free from all forms of physical or mental violence.[40] Another UNCRC focus progressively realised through sectoral legislation is the raising of the age of criminal responsibility. The CRC has long criticised the low age of criminal responsibility in Scotland as running contrary to the protection rights for children in conflict with the law set out in articles 37 and 40 of the UNCRC.[41] Following years of debate, the Age of Criminal Responsibility (Scotland) Act 2019 raised the minimum age of criminal responsibility from 8 to 12. While not fully aligned with the CRC's current position that 14 should be the minimum age for criminal prosecution, it was a step in the right direction.[42] This

36 Tisdall (n 29 above) 783–784.

37 *A v United Kingdom* [1999] 27 EHRR 611.

38 Education Act 1986. It took over a decade for the prohibition to extend to private schools in England and Wales (1998) and in Scotland (2000).

39 CRC, *Concluding Observations on the Fifth Periodic Report of the United Kingdom*, UN Doc CRC/C/GBR/CO/5 (12 July 2016) para 41 (*Concluding Observations 2016*).

40 CRC, General Comment No 8 on the right of the child to protection from corporal punishment UN Doc CRC/C/GC/8 (2 March 2007).

41 CRC, *Concluding Observations 2016* (n 39 above).

42 For the most recent interpretation, see CRC, General Comment No 24 on children's rights in the justice system UN Doc CRC/C/GC/24 (18 September 2020) para 22.

process also reflects how children's rights protections can, and should, evolve with the CRC's interpretations of the UNCRC.

Sectoral legislation in Scotland entrenches numerous aspects of the UNCRC and has aided Scots law in keeping pace with CRC interpretations of Convention obligations. While indirect incorporation of the UNCRC through the CYP Act aimed to improve children's rights by placing the whole of the Convention at the forefront of decision-makers' minds, the lack of enforcement in the Act did not engender significant change. The gap between respecting and fulfilling children's rights under the CYP Act underpinned the continued efforts for direct incorporation of the full UNCRC in Scotland that was realised through the UNCRC Bill.

## Key features of the UNCRC Bill

The UNCRC Bill[43] takes a 'maximalist' approach to incorporating the UNCRC by ensuring that 'children's rights are protected, respected and fulfilled in Scotland'.[44] Modelled on the HRA, the UNCRC Bill incorporates all articles of the UNCRC deemed within devolved competence directly into Scots law through verbatim copying and pasting the relevant articles into schedule 1. In addition to the core Convention, two of the three optional protocols to the UNCRC are also included.[45] Pre-introduction analysis determined that UNCRC articles relating to nationality and statelessness (article 7), family reunification (article 10), development of international agreements relating to moving children across international borders (article 11) or other matters,[46] provision of social insurance (article 26), and military recruitment (article 38(3)), as well as several articles located within the optional protocols, fell within those policy areas reserved explicitly to Westminster.[47] As a result, those sections were removed from schedule 1. The Bill leaves open the potential to add additional aspects of the Convention in the event of further devolution or if the UK ratifies the Third Optional Protocol on an individual communications procedure (section 5). Notwithstanding the redactions, the Bill has the

43 The analysis offered here is based on the UNCRC Bill as passed in March 2021 as at the time of writing the revised Bill has not been reintroduced.

44 UNCRC Bill Policy Memorandum (n 8 above) para 7. The term 'maximalist' is attributed to John Swinney, Deputy First Minister, and is now commonly used Scottish human rights discourse. See Scottish Government, 'Strengthening children's rights' (*Gov.Scot* 20 November 2019).

45 Optional Protocols on Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography.

46 References to such actions were also removed in relation to UNCRC arts 21(e), 27(4), 34, 35.

47 As set out in the Scotland Act 1998, sch 5.

potential to deliver the most holistic legal advancement for children's rights in UK history.

Not only does the UNCRC Bill aim to directly incorporate all of the articles possible under devolved competence into the legislation, it further offers a variety of implementation and enforcement mechanisms designed to give effect to the incorporated rights. The UNCRC Bill represents a deliberate choice by the Scottish Parliament to offer the most comprehensive path toward respecting, protecting and fulfilling children's rights through multidimensional delivery of UNCRC article 4, which requires states parties to 'undertake all appropriate legislative, administrative, and other measures for the implementation' of the Convention. This holistic, multifaceted approach aligns with the approach to delivering children's rights as elaborated by the CRC.[48] Part 3 of the Bill sets out different proactive and responsive implementation measures designed to support duty-bearers to give effect to both the positive and negative obligations required to deliver UNCRC rights, namely: a children's rights scheme (sections 11–13); child rights and wellbeing impact assessments (section 14); and reporting obligations on public authorities and Scottish Parliament (sections 15, 16B). However, the three elements that give the Bill its legal strength and ensure that the UNCRC rights are fulfilled include positive and negative obligations, enforcement and interpretation. These three elements will be the most impacted in light of the *Incorporation Reference* decision. The following briefly introduces each element in turn.

### *Positive and negative obligations*

Section 6 of the UNCRC Bill provides that it is unlawful for a public authority to act in a way that is not compatible with the UNCRC, therefore creating a legal duty to ensure UNCRC rights. There is no restriction on whether this equates to a negative or positive obligation and interpretations of both types of obligations should align with those of the CRC, discussed further below.[49] The inclusion of both negative and positive obligations aligns with UK case law interpreting section 6 of the HRA as well as European Court of Human Rights jurisprudence.

### *Enforcement*

Legalising the justiciability of children's rights is arguably the crux of the UNCRC Bill and essential to fulfilling Convention obligations.

48 CRC, General Comment No 5 (n 19 above); CRC, General Comment No 19 on public budgeting for the realization of children's rights (art 4) UN Doc CRC/C/GC/19 (20 July 2016) para 27.

49 For example, CRC, General Comment No 8 (n 40 above) para 30; CRC, General Comment No 19 (n 48 above) para 3.

While litigation should be viewed as a last resort, it is this potential 'stick' that often gives government the impetus to follow through on its obligations. Justiciability is tied to the establishment of a legal duty pursuant to section 6 and what happens when that duty is breached. The Bill enables all under-18s to raise claims against a public authority that has contravened the incorporated UNCRC articles (section 7) and all legislation raised before the courts requires interpretation in line with the treaty. This significant change in the protection of children's rights will guard against the inconsistent interpretive references to the UNCRC that currently permeate UK jurisprudence.[50]

Under the Bill as passed, Scottish courts have an obligation to determine whether existing or proposed legislation aligns with the UNCRC. Section 20 allows courts to issue a 'strike down declarator' as a means of remedying conflicting laws that pre-dated commencement of the Act. Additionally, section 21 enables courts to deliver a 'declarator of incompatibility' for proposed legislation – modelled on the HRA – as a prospective approach to protecting children's rights before a conflicting law is adopted. These sections aimed 'to give children's rights the highest status within Scotland's constitutional framework' by delivering a new era in the protection and fulfilment of children's rights in Scotland with UNCRC enforcement unparalleled in the rest of the UK.[51]

*Interpreting human rights in line with international standards*

Section 4 of the UNCRC Bill outlines explicitly the interpretive toolbox available to courts when interpreting the UNCRC under the legislation. The interpretive tools include: the preamble and text of the UNCRC and optional protocols as incorporated; concluding observations, general comments, recommendations following days of general discussion and final views of the CRC; and other international and comparative law. The breadth of interpretive tools, in addition to those implicitly available to UK courts, reinforces the evolving nature of human rights interpretation as a multifaceted concept. Maintaining a tether to the international treaty through the CRC interpretive materials is fundamental to keeping pace with children's rights development

50 Compare how the UNCRC art 4 'best interests' principle is used: *Kinlan and Boland v HM Advocate* [2019] HCJAC 47 [18]; *OHara v HM Advocate* [2016] HCJAC 107; *McCormick v HM Advocate* [2016] HCJAC 50; *Hibbard v HM Advocate* [2011] JC 149, with *Natasha Tariro Nyamayaro and Another v Secretary of State for the Home Department* [2019] CSIH 29 [37]; *ME, Re Judicial Review* [2012] CSOH 2 [22]; *AAS and SAAS v Secretary of State for the Home Department* [2010] CSIH 90.

51 UNCRC Bill Policy Memorandum (n 8 above) para 109.

across the globe.[52] It also reinforces the agreed language of children's rights recognised through the work-product of the CRC. Similarly, child rights schemes under the Bill must be developed in line with the same interpretive toolkit in order to respect and protect children's rights as well as take into account the UK Government's engagement with the CRC and views of Scottish human rights institutions, such as the Children and Young People's Commissioner for Scotland and the Scottish Human Rights Commission.[53] However, in the context of interpreting the UNCRC Bill as devolved legislation, there are two relevant considerations. The first is which organs of the state are required to interpret and comply with UNCRC rights. The second consideration raises questions about which laws much be interpreted in line with the Convention.

*Summary*

Altogether, these key features of the Bill, combined with various non-legal measures of implementation, aim to secure a comprehensive, maximalist approach to respecting, protecting and fulfilling children's rights in a way that links into the international child rights framework. The maximalist approach hinged on Scottish Government's reliance on a broad interpretation of section 101(2) of the Scotland Act. As flagged prior to the Bill's adoption, the UNCRC Bill contained a number of provisions that stress-tested the boundaries of the devolution settlement and set the stage for the ensuing challenge.

## Challenging the UNCRC Bill

Following the unanimous adoption of the UNCRC Bill on 16 March 2021, the UK Government challenged four sections of the Bill on the basis that the sections interfered with the UK Parliament's ability to make law for Scotland. The UK Government also challenged elements of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill, and the joined decision offers interesting insight into the future potential of devolved governments to implement international law in the subnational systems. Both Bills were passed to give effect to two treaties ratified by the UK in the 1990s, the UNCRC and the European Charter of Local Self-Government. The *Incorporation Reference* judgment, delivered on 6 October 2021, presents several hurdles to devolved governments' plans for international human rights incorporation by failing to address the ambiguous lines that exist about the boundaries of devolved competence or how to navigate the areas of law and policy that straddle such boundaries. This section examines

52 CRC, General Comment No 5 (n 19 above) para 7, discussing progressive realisation and global implementation.

53 UNCRC Bill, ss 12, 13.

the challenges to the UNCRC Bill and the court's response in order to foreground discussion of what options remain for human rights entrenchment in the devolved nations.

The key questions before the court concerned the extent to which the devolved legislation *could* modify the power of Westminster to make laws for Scotland. At issue in the first three challenges was whether UNCRC Bill sections 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) 'modified' Parliament's powers contrary to the Scotland Act (section 28(7)). As introduced above, these sections relate to interpretation and enforcement of the Bill. Section 19(2)(a)(ii) provides that, in addition to Acts of the Scottish Parliament, Acts of the UK Parliament, too must be read and given effect in a way which is compatible with the UNCRC – a so-called 'read-down' provision. The court found this problematic, reasoning that despite emulating section 3 of the HRA: 'A provision which required the courts to modify the meaning and effect of legislation enacted by Parliament would plainly impose a qualification upon its legislative power.'[54] The challenges to the two key enforcement provisions laid out in sections 20 and 21 were not surprising. The more 'drastic' of the enforcement mechanisms of the Bill, section 20(10)(a)(ii), extends to courts the power to strike down any provision of legislation passed by the UK Parliament prior to the Bill's enactment if deemed incompatible with the UNCRC.[55] Counsel for Scotland argued that the implicit limitation on this power was whether the relevant legislation regulated an area of policy now fully devolved, such as education.[56] Again, the court was unconvinced, noting that 'the fact that the Scottish Parliament has the power to repeal an Act of Parliament does not entail that it has the power to authorise the courts to declare that unrepealed Acts of Parliament have ceased to be law'.[57] Modelled on section 4 of the HRA, the second enforcement provision (section 21(5)(b)(ii)) sets out that a court may make a declarator of incompatibility in relation to pre-commencement legislation, including an Act of Parliament, where the legislation is deemed incompatible with the UNCRC. The court's analysis tracked that in its consideration of section 20.

Ultimately, the read-down provision (section 19) and the two enforcement mechanisms (sections 20 and 21) relating to their applicability to Acts of Parliament were found to leave open the *possibility* of interfering with or 'modifying' the UK Parliament's law-making capacity in breach of the section 28(7) of the Scotland Act. The arguments in favour of using section 101(2) of the Scotland

54 *Incorporation Reference* case (n 7 above) [28].
55 Ibid [39].
56 Ibid [30], [44].
57 Ibid [44].

Act, which allows potentially conflicting legislation to be read down so as to be within competence, did not persuade the court.[58] There are five instances where section 101(2) is potentially deployable, including where language is ambiguous and could be read as exceeding competence or where the challenged language is capable of being read both within and in excess of competence.[59] The court explained that there was no ambiguity or confusion in the UNCRC Bill language. As such, the court followed the reasoning in the *Continuity Bill Reference* case, where the court explained that:

> A provision which imposes a condition on the legal effect of laws made by the UK Parliament, in so far as they apply to Scotland, is in conflict with the continuation of its sovereign power to make laws for Scotland, and is therefore equivalent to the amendment of section 28(7) of the Scotland Act.[60]

The court gave minimal regard to policy areas devolved through the most recent updates to the Scotland Act, which underpin many of the UNCRC rights. Instead, the court focused on removing itself from serving as a referee in policy areas that now are devolved but where pre-devolution UK legislation remains in effect in full or in part, despite the ability of the Scottish Parliament to repeal and replace such legislation. These aspects of the challenge highlight a difficulty presented by the court in how to both interpret the Scotland Act 'in the same way as any other statute' while simultaneously recognising the Act's 'aim to achieve a constitutional settlement and … giving the [Act] a consistent and predictable interpretation', particularly in areas of devolved competence.[61] While the UK Parliament enjoys 'unqualified legislative power'[62] over the devolved nations, commentators acknowledge that the court's treatment of the Scotland Act in this decision narrows previous understandings of devolution representing a 'potentially far-reaching constraint on devolved legislative freedom'.[63] In imposing this narrow interpretation of section 28(7) of the Scotland Act, the court insulated UK-level law against the preferred Scottish interpretation even where the UK Parliament

58 Ibid [36], [46], [55].

59 For a concise discussion, see HM Attorney General & HM Advocate General for Scotland, Written Submission, UKSC 2021/0079 and 2021/0080, paras 103–109.

60 *Reference by the Attorney General and the Advocate General for Scotland – The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [2019] AC 1022 at [53] (*Continuity Bill Reference* case).

61 *Incorporation Reference* case (n 7 above) [7].

62 Ibid [27].

63 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).

has given the Scottish Parliament full control over a policy area and the implementation sits squarely on the shoulders of the Scottish Government.

If the various devolution Acts are meant to be the foundations of constitutional settlement, it could be argued that the resolution of ambiguous limits of devolved legislative competencies should not be left to intergovernmental negotiation.[64] However, the court's presentation of section 101(2) of the Scotland Act appears to narrow the benefits of devolution in terms of the development of law that raises the bar for human rights protection. This understanding seemingly fails to provide the Scottish Parliament, or any of the devolved law-making bodies, with 'a coherent, stable and workable system within which to exercise its legislative power'.[65] In the immediate aftermath of the decision, Elliott and Kilford confirmed:

> This approach completes the retreat from *Robinson v Secretary of State for Northern Ireland*, in which it was said that devolution legislation should be 'interpreted generously and purposively', moving instead towards a more limited conception of devolution that diminishes it by virtue of an interpretation of the underlying legislation which is far from favourable towards the devolved institutions.[66]

The continuation of Lord Bingham's statement from the *Robinson* decision goes on to say: 'bearing in mind the values which the constitutional provisions are intended to embody' as the Northern Ireland Act 1998 was 'in effect a constitution'.[67] While Lord Reed notes the constitutional nature of the Scotland Act in the *Incorporation Reference* decision, the narrowed approach to interpreting the Act markedly departs from Lord Bingham's approach and leaves questions as to what this 'constitutional' label actually means. The reasoning offered in relation to the first three challenges demonstrates that current UK constitutional settlements, including the devolution Acts and the HRA, are in flux and, as forecasted by Tierney, setting the stage

64 See discussion in Stephen Tierney, 'Drifting towards federalism? Appraising the Constitution in light of the Scotland Act 2016 and Wales Act 2017' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart 2018). See also, Chris Himsworth, 'Human rights at the interface of state and sub-state: the case of Scotland' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights* (Oxford University Press 2011) 70.

65 *Incorporation Reference* case (n 7 above) [7].

66 Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: legislative supremacy, Parliament's "unqualified" power, and "modifying" the Scotland Act' (*UK Constitutional Law Association* 15 October 2021), citing *Robinson v Secretary of State for Northern Ireland* [2005] UKHL 32 [11].

67 *Robinson* (n 66 above) [11].

for tension.[68] If, under the current devolution settlements, devolved governments are not able to strengthen human rights protections in the areas of devolved competence after an extensive deliberative, democratic process then perhaps it is time for Westminster to afford greater clarity about the meaning of devolved competence. Following interpretation of the Scotland Act in the *Incorporation Reference* case, uncertainty permeates discussions about what is possible in terms of 'increasing the effectiveness of incorporation of the UNCRC' across all three dimensions of the respect, protect and fulfil approach to human rights entrenchment.[69] At this point, this article leaves the dissection of the first three challenges to constitutional lawyers to debate.

We turn now to the fourth challenge to section 6 of the Bill, which yields greater room for examination from a view of incorporation that focuses on the potential of the process to drive culture change on the path to legalisation of rights. This view aligns with the arguments that the process of incorporation can only be effective, and therefore successful, if all relevant duty-bearers understand how their actions impact upon the ability of individuals to engage and exercise their rights. The CRC has clarified that decentralisation of power through devolution 'does not in any way reduce the direct responsibility of the state party's government to fulfil its obligations to all children within its jurisdiction'.[70] Section 6 of the UNCRC Bill aimed to give effect to the CRC view by making it 'unlawful for a public authority to act in a way that is incompatible with the UNCRC'. The court noted that on its face this section was outside of the Scottish Parliament's competence as it did not exclude UK ministers or public authorities applying UK legislation in reserved areas, a point that had been notified to the Scottish Parliament before the Bill was adopted.[71] Lord Reed's examination of the relationship between the Scotland Act's section 101(2) and public authorities covered by the Act concluded that it should not be for the UK courts to read the section 'as narrowly as is required for it to be within competence' despite this possibility under the Act.[72] As such, section 6 must be redrafted with sufficient detail so as to be within legislative competence.[73]

This part of the decision appears to take an approach toward identification of public authorities markedly different from that found in the Scotland Act, which leaves the determination of what amounts

68 Tierney (n 64 above) 102.
69 John Swinney, 'European Charter of Local Self-Government Bill and the UNCRC Bill – Next Steps, Ministerial Statement' (*Gov.Scot* 24 May 2022).
70 CRC, General Comment No 5 (n 19 above) para 40.
71 *Incorporation Reference* case (n 7 above) [58]–[59].
72 Ibid [77].
73 Ibid [80].

to a 'cross-border public authority' flexible. Under sections 88 and 89 of the Scotland Act there are no specific authorities listed and the ordinary meaning of the section's language suggests that any public authority that may, at any point in time, exercise a specific cross-border function should be determined on a case-by-case basis.[74] The UNCRC Bill is far more specific, and section 16 identifies 22 public authorities understood to owe and required to report on their section 6 duty to act compatibly with the UNCRC. This was not challenged, nor was the list of authorities mentioned in the court's reasoning despite being expressly tied to the duty imposed by section 6 (sections 15(1)(a)(i) and (b)(i)). However, if this type of specificity is required so as to bring the legislation within competence, as the court suggests, then it would make more sense for clarification to come from or with agreement of the UK Parliament rather than *ad hoc* determinations that have been the primary method of resolution until now.[75] In the meantime, political jostling over who and how to agree a way forward seems to be perpetuating the lack of resolution.[76]

Ultimately, the court determined that each of the four challenged sections exceeded the competence of the Scottish Parliament in line with the concerns raised by the UK Government prior to the Bill's adoption. The revised Bill will need enough detail to ensure that it does not impinge on the law-making capacity of Parliament in any way. The obvious approach in terms of the first three challenges would be to remove the specific provision. Similarly, with regard to section 6, the addition of a provision clarifying that the public authorities are limited to those identified in the Bill or exercising functions in relation to the implementation of Scots law and policy seems a logical approach. At the time of writing and over two years on from the celebration of its passage, the revised Bill has not been reintroduced in Scottish Parliament.[77] The following section argues that, despite the obvious impediments to 'maximalist' incorporation presented by the *Incorporation Reference* decision, there are still many opportunities to entrench human rights through incorporation in the devolved context.

74 The issue of cross-border authorities was a longstanding focus in relation to the Scotland Act. See, for example, Cross-Border Public Authorities: Initial Status, HC Deb 16 November 1998, vol 319, col 649ff. See, also, Himsworth (n 64 above) 69.

75 Himsworth (n 64 above) 77–79.

76 Letter from John Swinney to Alister Jack (1 February 2022) and the response Letter from Alister Jack to John Swinney (8 February 2022).

77 Swinney (n 69 above).

## THE FUTURE OF HUMAN RIGHTS INCORPORATION

The UK constitutional settlement dictates that Scotland maintains responsibility for the implementation of international human rights obligations in the policy areas that are devolved.[78] Following the *Incorporation Reference* decision, McHarg observed that:

> the Supreme Court appears to be applying an extended notion of Parliamentary sovereignty which not only preserves the residual power of the UK Parliament to legislate for Scotland, but also limits the way in which the Scottish Parliament is able to legislate in devolved areas.[79]

In particular, the decision reveals confusion as to where the boundary sits in terms of Scotland's ability to act in areas of overlap where a policy area is governed by laws straddling the 1998 devolution settlement and where public authorities are implementing both Scottish and UK law or operating in a cross-border capacity. The following argues that there remain extensive opportunities to entrench human rights in Scotland through incorporation despite the limitations identified in the *Incorporation Reference* decision. To do so, this section details the diverse international law approaches to human rights implementation and highlights the benefits to be gained from direct incorporation of the UNCRC to the maximum extent possible coupled with other measures sitting along the incorporation spectrum. The benefits to children's rights arising from incorporation, in turn, are projected to cascade to other human rights proposed for incorporation in Scotland.

### Moving forward with UNCRC incorporation

Recalling that both legal and non-legal measures of implementation are required to give full effect to UNCRC rights, the multidimensional process of incorporation cannot be understated. This international approach reinforces the view that different methods of incorporation sit along a spectrum of implementation that contributes to human rights realisation. Of the 42 articles outlining children's substantive rights, the multitude of those rights are best realised at the local level through the exercise of devolved competence.[80] Scotland's devolved competences are many and include health, education, criminal justice and some aspects of social security, to highlight a few of the areas where children's rights are significantly impacted by devolved law and policy. Notably, these competencies are not static and have been expanded since the 1998 devolution settlement. As discussed above, through these variable competencies, Scotland has furthered children's rights through Scottish legislation and policy. Over and

78 Scotland Act, sch 5, para 7(2)(a).

79 McHarg (n 63 above).

80 Lundy et al (n 30 above) 102.

above the post-devolution legislation implementing different UNCRC rights interpretations, the UNCRC Bill represents the opportunity to introduce a comprehensive legal framework that will change the face of children's rights in Scotland despite the uncertainty delivered in the *Incorporation Reference* decision. However, legal measures of implementation are not an end-point for securing children's rights. As Kilkelly highlights, '[c]reating an infrastructure to support full implementation of the CRC requires a national, whole-government approach, with the participation of civil society, professional bodies and of course children themselves'.[81]

The CRC has identified numerous non-legal measures that provide practical support for the implementation of children's rights, including the use of children's impact assessments, transparent child rights budgeting and widespread training.[82] In addition to the legal duties deployed in the UNCRC Bill, section 11 of the UNCRC Bill requires the development of children's rights schemes. The use of children's rights schemes is an important non-legal measure that enables different parts of the government to think holistically and prospectively about how they might implement children's rights within specific remits. This aids duty-bearers in respecting and protecting children's rights. Importantly, the Bill requires Scottish Ministers to have regard to CRC jurisprudence (section 12(2)) as well as other international and comparative law in the development of the schemes, which ensures that evolving interpretations and understandings of UNCRC rights filter into implementation plans. This also opens up the opportunity to cross-fertilise more specific understandings of rights that are shaped by intersectional issues at the local level, such as cross-cutting approaches to education in relation to disability and minorities. This supports the idea that the UNCRC serves as a floor from which more detailed understandings of rights can evolve, rather than a ceiling.

The explicit requirement that CRIAs be conducted in relation to all Bills introduced in Scottish Parliament, any Scottish statutory instrument and any strategic decision (section 14) improves upon the use of CRIAs as read into the CYP Act. Though a non-legal measure, it is arguably the most effective way of preventing decisions from negatively impacting children's rights. Research demonstrates that reviewing the compatibility of legislation with the UNCRC is important for ensuring that children's rights are systematically integrated into formal legislative and governance structures.[83] As Hoffman makes

81 Kilkelly (n 26 above) 325.

82 CRC, General Comment No 5 (n 19 above); CRC, General Comment No 20 on the implementation of the right so the child during adolescence UN Doc CRC/GC/2016/20 (6 December 2016) para 37.

83 Lundy et al (n 30 above) 101; Kilkelly (n 26 above) 330.

clear: 'Proper integration [of CRIAs] into policy processes will therefore require commitment by government (at all levels) to develop a culture where CRIA is seen as a key aspect of policy decision-making.'[84] The benefits of CRIAs are limited, however, where there is not significant guidance, education and training of those conducting and using the analysis to inform decision-making. Even the Welsh Government's extensive experience of CRIAs since the Welsh Measure has not ensured effectiveness where good practice was not followed or where there was limited knowledge of the UNCRC.[85] The Scottish CRIA experience, also, reinforces that extensive attention to delivering effective CRIAs should be a priority. As such, an expansive education and training programme across all levels of government must accompany UNCRC Bill implementation. Notably, this does not require that all civil servants understand the full extent of the UNCRC before passing incorporation legislation, but it does support the use of a sunrise clause where new duties exist, such as found in section 40 of the UNCRC Bill. In this way, all duty-bearers in Scotland could develop the respect and protect dimensions of their obligations prior to the enforcement mechanisms becoming operational as an essential feature of the fulfilment of rights. In Scotland, where the UNCRC was indirectly incorporated through the CYP Act and where the Scottish Government has operated a policy that reflects the UNCRC obligations for many years (GIRFEC), the distance between how public authorities understand UNCRC rights and the duties imposed though incorporation should not be a long road to travel. In the end, both the children's rights schemes and CRIA requirements in the UNCRC Bill reinforce the value of non-legal measures of implementation working in concert with more focused legal measures to drive forward a children's rights culture throughout government and, if conducted properly, broader society.

The UNCRC Bill compliance duty (section 6) aimed to rectify some of the difficulties in interpreting what amounts to a public authority. The UK Government did not challenge section 6(3)–(3A), which details that private entities performing public functions are accountable under the Bill. This aligns with the CRC's view that 'privatization of services can have a serious impact on the recognition and realization of children's rights'.[86] While the Supreme Court's rejection of public authorities working cross-border or applying UK law in devolved areas of competence is disappointing, the limitation to Scottish public authorities implementing Scots law and policy is an incredible step forward for establishing a justiciable duty to adhere to the UNCRC in

84 Simon Hoffman, '*Ex Ante* children's rights impact assessment of economic policy' (2020) 24 International Journal of Human Rights 1333, 1334.

85 Ibid 1343.

86 CRC, General Comment No 5 (n 19 above) 42.

Scotland. In addition to the 22 named public authorities in the Bill, the 32 local authorities across Scotland – the most local organs of government – are responsible for extensive services that relate directly to the delivery of children's rights, including: education (UNCRC articles 19, 23, 24); health (UNCRC article 24); many aspects of social care (UNCRC articles 26, 28, 29); and cultural services (UNCRC articles 23, 30, 31). A further 23 organisations are responsible for the physical and mental health of children (UNCRC article 24) throughout Scotland.[87] In delivering Scottish policy under Scottish laws following the enactment of the revised Bill incorporating the UNCRC, these organs will be required to take a children's rights approach and explore how their decisions fit with the UNCRC. This will necessitate a thorough audit of all Scottish law and policy to ascertain which public authorities are responsible for the different dimensions of UNCRC delivery. Such a detailed audit can only be a positive step toward untangling the complexities of delivering not only children's rights but also general human rights in anticipation of the proposed comprehensive Scottish human rights framework. Even where the applicable law does not originate in Scotland, the ripple effect of a 'proactive culture of everyday accountability' will influence the implementation of other laws.[88]

## Lessons for further human rights implementation

While the Supreme Court acknowledged that incorporating international treaties is a matter for the devolved Parliament,[89] its *Incorporation Reference* decision should only bedevil those focused on constitutional intricacies rather than the implementation of international law. Prior to the *Incorporation Reference* decision, in addition to the UNCRC, the Scottish Government pledged to develop a new human rights framework for Scotland. Incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the CEDAW, the Convention on the Elimination of All Forms of Racial Discrimination and the CRPD will underpin the new framework.[90] Wales, too, is moving forward with plans to further embed international human rights, including incorporation of the CRPD and CEDAW.[91] With its anticipated human rights legislation,

87 See mygov.scot for a list of organisations responsible for exercising powers or services underpinning the devolved policy areas relating to health.

88 Scottish Government, *Progressing the Human Rights of Children in Scotland: An Action Plan 2021–2024* (*Gov.Scot* 19 November 2021) 5.

89 *Incorporation Reference* case (n 7 above) [4].

90 Scottish Government, *A Fairer, Greener Scotland: Programme for Government 2021–2022* (*Gov.Scot* 2021) 49.

91 Welsh Government, *Response to the 'Strengthening and Advancing Equality and Human Rights in Wales' Research Report* (*Gov.Wales* 2022) 3.

the Scottish Government intends to go a few steps beyond these treaties to offer greater protections to older people, the LGBTQ+ community and enshrine a standalone right to a healthy environment. Every one of these conventions and additional protections has potential overlaps with the UNCRC and should be considered when implementing the UNCRC Bill. Until the constitutional wrangling in the grey areas of devolved competence is settled, if ever, there is more at stake for people's abilities to engage and exercise their human rights than a narrowing interpretation of the existing devolution settlement.

To progress the understanding and implementation of different international human rights there are a number of steps that will enable the devolved nations to move in the correct direction, three of which are highlighted here as each was also part of the UNCRC Bill. As discussed above, incorporating legal measures that ensure accountability and justiciability for human rights is the only way to deliver the maximum level of protection. However, to fill gaps where legal accountability measures are not possible, non-legal measures can still lay the groundwork for human rights development and also support legal measures. Entrenching human rights education across the whole of society, including all rights-holders and duty-bearers, with a focus on how human rights support individuals to be fully engaged members of society is a necessary first step. Human rights education is recognised in the UNCRC and other human rights treaties as essential to the development of all individuals.[92] In the UNCRC Bill, section 10B, in addition to UNCRC article 29, supports the promotion and dissemination of information on children's rights. A second, non-legal step that aids in respecting and protecting rights is the use of human rights impact assessment.[93] Sections 11(3)(e) and 14 of the UNCRC Bill require CRIAs in the development of children's rights schemes and all new legislation. Beyond impacts of new law and policy on children, more effective human rights-focused impact assessment that goes beyond the existing equalities approach in the UK could be developed and deployed. Appropriate impact assessment is particularly important in the development of human rights budgeting, which is a third non-legal measure that aids in fulfilling human rights and also features in the UNCRC Bill (section 11(3)(c)). As noted by the UN, 'almost all government allocations and expenditure are human rights related, if they are intended to ensure a stable, functioning society,

92 UNCRC, art 29(1)(b); CRPD, art 24(1)(a); ICESCR, art 13(1). See Laura Lundy and Patricia O'Lynn, 'The education rights of children' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer 2020).

93 Simon Walker, 'Human rights impact assessments: emerging practice and challenges' in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014) 399ff.

as this is a *sine qua non* for the realization of rights'.[94] A holistic approach to human rights implementation demands that governments use their 'fiscal envelope' to realise people's rights effectively and transparently. Each of these three non-legal measures is recognised in the international human rights system as essential to securing human rights.[95]

Despite the political power struggles that undoubtedly play a central role in the timeline of the Scottish incorporation discourse and the narrowed interpretation of the Scotland Act by the Supreme Court, the *Incorporation Reference* decision in no way proscribes further implementation of international human rights treaties through incorporation or any other measure. The Court acknowledged that incorporation of human rights in the devolved nations demands that we look past the constitutional nit-picking to see what remains possible.[96] As presented above, from the perspective of international law and as explained by the human rights treaty bodies, there is no single method of implementation. Among every potential implementation method, the greatest indicator of success is the state's commitment as demonstrated by action.[97] The UNCRC Bill presents a canny mix of legal and non-legal implementation measures to maximise the respect, protect and fulfil approach to realising children's rights. The Bill tethers its implementation to the international human rights system and signals openness to evolving interpretations of the UNCRC. By all accounts, the Scottish Government remains committed to its programme of human rights entrenchment, but only through action will it make good on its years of rhetoric directed toward making Scotland 'the best place in the world to grow up'.

## CONCLUSION

To make children's rights law stronger and to make policies more effective, the Scottish Parliament took the decision to give effect to the UNCRC using the tripartite respect, protect and fulfil framework by including a range of legal and non-legal measures of implementation

94 UN Office for the High Commissioner for Human Rights, *Realizing Human Rights through Government Budgets* (UN 2017) 14.

95 See, for example, CRC, General Comment No 16 on state obligations regarding the impact of the business sector on children's rights UN Doc CRC/C/GC/16 (17 April 2013) para 29; CRC, General Comment No 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art 31) UN Doc CRC/C/GC/17 (17 April 2013) para 54; CRPD, General Comment No 7, UN Doc CRPD/C/GC/7 (9 November 2018) paras 19, 22.

96 *Incorporation Reference* case (n 7 above) [6].

97 Grugel and Peruzzotti (n 30 above) 180.

in its UNCRC Bill. Key aspects of the Bill place prospective and retrospective obligations on public authorities to engage with the UNCRC through children's rights schemes, CRIAs, reporting to the Scottish Parliament and budgeting; placing a duty on public authorities to ensure their actions or inaction are UNCRC-compliant; and by making UNCRC rights justiciable in Scottish courts. The purposeful decision to take such a comprehensive, holistic approach demands detail, but not necessarily the detail suggested by the *Incorporation Reference* decision. The required detail should be focused on the ways in which civil servants in Scotland are trained to approach decision-making and the ways in which Scottish Parliament legislates, budgets and monitors public authorities. The combined impact of education and training about the UNCRC with an unpicking of how UNCRC incorporation will impact Scottish laws relevant to children will generate learning and a policy basis for reinforcing children's rights that will be unprecedented in the UK. The process of incorporation has already opened greater spaces for children's rights discourse and understanding of decision-makers' capacities to improve children's lives.

This article has explored the space available for the UK devolved nations to engage more overtly with the international human rights system. It has explained the international approach to human rights implementation as one that is widely divergent and driven by local governance choices. The discussion affirms that the one certainty of human rights implementation is that incorporation is merely one approach from a spectrum of possibilities. True children's rights culture change can be celebrated once children's rights permeate every level of governance, but having an enforcement mechanism is necessary, as even with culture change there will be challenges. 'The Scottish Government is committed to a revolution in children's Rights.'[98] As such, UNCRC Bill implementation processes are moving forward despite the legal haranguing in the aftermath of the *Incorporation Reference* decision. Steps taken so far include the development of a multilevel 'Theory of Change' to assist with implementation and the launch of the Scottish Government's UNCRC Strategic Implementation Board, among other initiatives and working groups.[99] Despite the limitations presented by the *Incorporation Reference* decision, from the perspective of international law there remains a great opportunity for the Scottish Government, through every organ of government

98 UNCRC Bill Policy Memorandum (n 8 above) para 5.

99 Eloise Di Gianni, 'Launch of ground-breaking project to develop a theory of change for making children's rights real in Scotland' (*Childhood and Youth Studies* 19 November 2021); Scottish Government, UNCRC Strategic Implementation Board, Overview.

and society, to entrench children's rights and effect real change in their lives.

As Scotland's incorporation project progresses, it must ensure that its incorporation legislation does not get derailed by the existing constitutional settlement. Without clearer guidance from the Supreme Court or the UK Government, the task of maximalist incorporation will not be easy. To a certain extent, the constitutional arguments surrounding human rights incorporation are only background noise to the task before the Scottish Government. However difficult the way forward seems, delivering the promise of a human rights-based system of governance, the task at hand, must not be diminished. Diffusing human rights understanding across public authorities and requiring them to take a human rights-based approach in the context of Scots law and policy will no doubt influence devolved delivery of UK law for the better. In this way, the UNCRC incorporation process has paved the way toward entrenching human rights into the very fabric of Scottish culture. This is true not only for children in the context of the UNCRC, but all people in Scotland through the ongoing plans to develop a new human rights framework for the benefit of every member of society.

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# Challenges for human rights treaty monitoring in a devolved UK: a case study

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ABSTRACT

This article is one of the first of its kind to undertake empirical research into the engagement of a devolved government in a United Nations (UN) human rights treaty-monitoring process. There is a lack of studies on this topic, even though the devolved nations of the United Kingdom (UK) have legislative competence and responsibilities to implement many obligations arising from several international human rights treaties, such as the UN Convention on the Rights of the Child. The article provides a case study to evaluate and compare how regional governments are accommodated in the treaty body system so that future monitoring processes accurately reflect the differences in implementation of UN treaties, or lack thereof, across different regions within the state. The potential impact of 'under-representative' state reporting is also examined. The article highlights that State Reports and the monitoring process should ensure accurate and reliable information on implementation in each nation of the UK and, more specifically, should ensure that the state delegation is composed of a balanced number of representatives from each nation, that delegation responses to questions from the Committee on the Rights of the Child clearly indicate whether the reply relates to law, policy and practice in the UK as a whole or solely to a specific nation, and that delegation representatives have a full understanding of the division of responsibilities between the UK Government and the devolved governments.

**Keywords:** devolution; international law; human rights; treaty monitoring.

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## INTRODUCTION

The United Nations (UN) human rights treaty-monitoring system has been subject to considerable scrutiny virtually since its inception.[1] Concerns have long been raised about a 'substantial gap' between the human rights treaty bodies' capacity for holding states to account and enhancing human rights implementation at the national level,[2] leading to general agreement that the treaty body system does not work as well as it could.[3] The literature identifies several issues such as the under-resourcing of treaty bodies, considerable duplication of work for states, increasing workloads for both treaty bodies and states, and non-submission of State Reports,[4] all of which have led to radical proposals for reforming the monitoring system.[5] These challenges are likely to be magnified for multilevel governance states as the implementation of treaty obligations will diverge across their jurisdictions, and inconsistencies in implementation can lead to a lack of accountability and the 'dilution' of central government responsibilities

1 See eg Felice Morgenstern, 'International legislation at the crossroads' (1978) 49 British Yearbook of International Law 101; Theodor Meron, 'Norm-making and supervision in international human rights: reflections on institutional order' (1982) 76 American Journal of International Law 754; Philip Alston, 'Conjuring up new human rights: a proposal for quality control' (1984) 78 American Journal of International Law 607; UN GAOR, 44th Session, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, UN Doc A/44/668 (8 November 1989).

2 Michael O'Flaherty and Claire O'Brien, 'Reform of UN human rights treaty monitoring bodies: a critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body' (2007) 7(1) Human Rights Law Review 141, 142.

3 See eg Michael O'Flaherty, 'Reform of the UN human rights treaty body system: locating the Dublin statement' (2010) 10(2) Human Rights Law Review 319; Jasper Krommendijk, 'Less is more: proposals for how UN human rights treaty bodies can be more selective' (2020) 38(1) Netherlands Quarterly of Human Rights 5; UN Office of the High Commissioner for Human Rights, 'Strengthening the United Nations human rights treaty body system: a report by the United Nations High Commissioner for Human Rights' (June 2012).

4 Morten Kjærum, 'State Reports' in Gudmundur Alfredsson et al (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Möller* 2nd edn (Martinus Nijoff 2009) 17–25; see also Lutz Oette, 'The UN human rights treaty bodies: impact and future' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018).

5 Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, Eighteenth meeting of chairpersons of the human rights treaty bodies 22–23 June 2006 (HRI/MC/2006/2 22 March 2006).

in monitoring and compiling State Reports.[6] This creates additional pressure for these states around the need for consolidated, concise and accurate reporting and ascribing sufficient resources to facilitate authentic participation in treaty-monitoring processes.

Despite this, there has been little scrutiny of the extent to which these issues impact multi-governance states, the robustness of state party reporting in light of these challenges, and the effect this may have on the eventual implementation of rights in the state. In the United Kingdom (UK), 'little attention' has been paid in the literature to regional government beneath the level of the state party.[7] The UK's system of devolution means that the competence and responsibility to implement many human rights obligations lie with the devolved nations – Northern Ireland, Scotland and Wales – so accurate and complete reporting on implementation should include sufficient information on the devolved nations. However, evidence suggests that UK state reporting has tended towards England-centricity.[8]

While the already established systemic issues at the international level could be the root cause of this, or at least a significant contributing factor, they could also be obfuscating problems at the domestic level that impact the extent to which state party reporting takes account of information on implementation in the devolved nations. Understanding how and why devolved nations have been under-represented in reporting could not only facilitate improvement of the UK's participation in treaty-monitoring processes, but could also contribute to the ongoing debate on reforming the treaty body system by considering how multilevel governance states can be better accommodated. This article aims to fill this lacuna.

In this special issue, Professor Brice Dickson analyses 17 different monitoring mechanisms to give broad oversight of the role of devolved governments in treaty-monitoring processes for the first time. This

6 Particularly in federal case studies, see Laura Lundy et al, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF & Queen's University Belfast November 2012) 5; Christof Heyns and Frans Viljoen, 'The impact of the UN human rights treaties at domestic level' (2001) 23(3) Human Rights Quarterly 483, 508. Heyns and Viljoen say that 'federal states find it more difficult to report (Canada) and at times also to take decisions to ratify treaties (Australia)' 520.

7 Jane Williams, 'Multi-level governance and CRC implementation' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Routledge 2016) 240; also see Simon Hoffman, 'The UN Convention on the Rights of the Child, decentralisation and legislative integration: a case study from Wales' (2019) 23(3) International Journal of Human Rights 374, 374–275. Heyns and Viljoen (n 6 above) say this is also true in federal states, where 'awareness and impact are the least at the lower levels of government, such as in the local government sphere (eg in South Africa)': 520.

8 See case study in this article.

article complements Dickson's comprehensive research by conducting a detailed exploration of UK state party reporting in a single treaty-monitoring 'cycle' to examine the representation of the devolved nations and identify challenges or barriers to effectual reporting. A 'case study' approach has been taken as it enables an 'in-depth, multi-faceted understanding of a complex issue in its real-life context',[9] which can develop a broader understanding of a particular issue and facilitate an explanation of how or why the issue exists.[10] After setting out the relevant context in the second and third sections of the article, the monitoring-cycle case study interrogates the extent of non-representative reporting in UK state party reporting and the underlying reasons for it. The article goes on to identify the wider implications that such reporting may have and sets out recommendations to improve the reporting process at the domestic level in the UK. The article also reflects on how these findings could supplement discussions for reform at the international level.

The UK's Fifth Periodic Reporting Cycle (2016) for the UN Convention on the Rights of the Child (UNCRC)[11] was selected as the case study due to a significant number of Convention rights that cut across devolved competences, such as education, health and social care. This means that there is substantial divergence across the UK in respect of how these obligations are implemented, and one might expect that state party reports would comprehensively take account of these differences. The case study also has a specific focus on Wales, given that it was the only country in the UK to have incorporated the UNCRC into law at the time of the reporting cycle.[12] It should be noted that the article does not aim to scrutinise implementation or incorporation of the UNCRC across the UK, for which there is already

9 Sarah Crowe et al, 'The case study approach' (2011) 11 BMC Medical Research Methodology 100.

10 See generally Robert Yin, *Case Study Research and Applications: Design and Methods* 6th edn (Sage 2018).

11 UN Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC). The UK's Fifth Periodic Report was examined in 2014–2016 and is the most recently completed monitoring and reporting cycle at the time of writing. In this article, the Convention is referred to as the UNCRC, while the treaty body, the Committee on the Rights of the Child, is referred to as the CRC or the Committee.

12 The Rights of Children and Young People (Wales) Measure 2011 gives further effect to the rights and obligations set out in the UNCRC in Wales by requiring that Welsh Ministers have 'due regard' to UNCRC when exercising any of their functions.

a robust body of literature,[13] rather the focus is on how the devolved nations were represented in State Party Reports to the treaty body. A new, simplified reporting procedure has since been introduced for the UNCRC, and the UK is currently participating in its first cycle under this new system. This means that the findings of this study will also provide a valuable basis of comparison for future research, enabling a more comprehensive evaluation of the 2022/2023 UNCRC reporting cycle.

## UN HUMAN RIGHTS TREATY MONITORING: SYSTEMIC CHALLENGES FOR MULTILEVEL GOVERNANCE STATES

State party compliance with the core international human rights treaties is monitored by treaty bodies. These are committees of independent experts, elected by state parties, that scrutinise how state parties are implementing their obligations under the treaties and assess whether there is full enjoyment of the Conventions' rights in the states' jurisdictions. These assessments happen periodically with a reporting cycle usually taking place over a five-year period, and, although each treaty body's monitoring process varies, they tend to follow a similar structure. 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 non-governmental organisations (NGOs), civil society and other stakeholders, and can decide to hold country visits. Most treaty bodies, including the Committee on the Rights of the Child (CRC), now also offer simplified reporting procedures, where the treaty body prepares a List of Issues Prior to Reporting (LoIPR), which allows states to prepare a more focused report in response.[14] Treaty bodies issue recommendations to improve compliance following the review, but as the bodies have a non-judicial character, these 'Concluding Observations' are non-binding.

Treaty bodies have undoubtedly added value to the interpretation and implementation of human rights treaties. They can issue general comments or recommendations that seek to comprehensively interpret

13 See eg Invernizzi and Williams (eds) (n 7 above); Jane Williams, 'General legislative measures of implementation: individual claims, "public officer's law" and a case study on the UNCRC in Wales' (2012) 20(2) International Journal of Children's Rights 224; Simon Hoffman and Rebecca Thorburn Stern, 'Incorporation of the UN Convention on the Rights of the Child in national law' (2020) 28(1) International Journal of Children's Rights 133; Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds), *Incorporating the UN Convention on the Rights of the Child into National Law* (Intersentia 2021).

14 The LoIPR is informed by a document review, including reports from UN agencies, NGOs, children and other stakeholders.

substantive provisions or address cross-cutting and thematic issues. Most treaty bodies can also receive individual complaints from persons who claim to be the victim of a rights violation. However, practitioners and academics have identified significant challenges with the treaty-monitoring system which has long been under-resourced with inadequate administrative and financial support.[15] This has become a greater problem in recent years due to the exponential growth of the treaty body system, in respect of the number of treaties, increased ratification, and the number of individual petitions and inquiries. This has led to an increased workload and considerable backlog, or a 'system overload', for the treaty bodies,[16] particularly considering that members work part-time and are unremunerated.

This also affects state parties, which have substantial reporting requirements and spend considerable human and financial resources to participate in complex and diverse monitoring procedures. This often leads to duplication, given the overlap in treaty provisions and the lack of integration and information exchange between treaty bodies, and may lead to late and non-reporting.[17] It may also lead to recommendations being ignored or inadequately complied with by states,[18] particularly if treaty bodies have recommended different approaches to identical human rights challenges.[19] Statistics have shown that treaty bodies typically adopt between 200 and 400 recommendations for each state party per reporting cycle.[20] There have been several calls for reform of the treaty-monitoring system,[21] including unification of the treaty bodies,[22] and it is clear to see why.

These are high-level issues that exist at the international level and the national level for every state party. However, these issues create

15 Concept Paper (n 5 above) [18]; James Crawford, 'The UN human rights treaty system: a system in crisis?' in Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 4–5; Jaap Doek, 'The CRC: dynamic and directions of monitoring its implementation' in Invernizzi and Williams (eds) (n 7 above) 107.

16 O'Flaherty and O'Brien (n 2 above) 146.

17 Geneva Academy, 'Fundamental challenges of the UN human rights treaty body system: background paper for expert meeting on 14–15 December 2015' (15 October 2015) [1].

18 O'Flaherty and O'Brien (n 2 above) 143.

19 Geneva Academy (n 17 above) [2].

20 Ibid.

21 See nn 3 and 5 above. See also UN High Commissioner for Human Rights, 'Strengthening the United Nations Human rights treaty body system' UN Doc A/66/860 (2012); UN GAOR, 68th Session, Resolution Adopted by the General Assembly on 9 April 2014, Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System (UN Doc A/RES/68/268 21 April 2014).

22 Concept Paper (n 5 above).

distinct challenges for federal and decentralised states, such as the UK, which the monitoring system does not take into consideration. The treaty-monitoring system tends towards state-centricity, and the response to decentralisation has simply been to emphasise state responsibility. For example, under article 4 UNCRC it is the state party who should 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized' in the Convention. While the state certainly has the ultimate responsibility for compliance, this approach does not reflect the day-to-day reality of how human rights are implemented, as discussed further below. The CRC has a set of non-binding, treaty-specific guidelines that states are expected to consider when reporting.[23] These reporting guidelines for the UNCRC suggest that states will have a 'comprehensive national strategy' to protect children's rights,[24] which contradicts the autonomy of the devolved governments. There is some acceptance of this reality in the Concluding Observations of the UK's Fifth Periodic Reporting Cycle, though it is emphasised that it is the state party who is responsible for the coordination of the implementation of the Convention throughout the state and for putting in place a high-level body or mechanism to coordinate activities related to implementation.[25]

It should also be noted that there are tensions as a result of the reporting requirements imposed by the treaty bodies.[26] Resource pressures on the treaty-monitoring system mean that all state parties have the same strict word limits on reports and are allocated the same short time for the dialogue sessions, adhering to the principle of equality rather than equity. This lacks consideration for states where implementation of obligations is decentralised and divergent across jurisdictions. The CRC's reporting guidelines say that treaty-specific reports should examine implementation of the Convention in the

23 UN Committee on the Rights of the Child, Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States Parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child, CRC/C/58/Rev3 (3 March 2015) (CRC Reporting Guidelines). See also Compilation of Rules of Procedure Adopted by Human Rights Treaty Bodies (28 April 2003, HRI/GEN/3/Rev 1).

24 CRC Reporting Guidelines (n 23 above) [19(b)].

25 UN Committee on the Rights of the Child, *Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland* (CRC/C/GBR/CO/5 12 July 2016) [11]; UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland* (CRC/C/GBR/CO/4 20 October 2008) [12]; See also Roberta Ruggiero, 'Article 4: states parties' obligations' in Ziba Vaghri et al (eds), *Monitoring State Compliance with the UN Convention on the Rights of the Child* (Springer 2022).

26 Milka Sormunen, 'A focus on domestic structures: best interests of the child in the Concluding Observations of the UN Committee on the Rights of the Child' (2020) 38(2) Nordic Journal of Human Rights 100, 104.

reporting state and should not exceed 21,200 words.[27] States should also reflect on which government authority has overall responsibility for coordinating the implementation of the UNCRC and with what level of authority.[28] This means that the UK has to report on the implementation of a wide breadth of rights across four countries with divergent law and policies in a relatively short word limit, the same word limit afforded to monocentric governance states. There is little room to both clarify nuance in devolved law and cover all issues. A common core document was introduced to provide general information about the state to all monitoring bodies, with a limit of 42,400 words.[29] The CRC's new simplified reporting procedure, explained further below, may facilitate more focused reporting, given that states that choose this option are provided with up to 30 questions in a LoIPR, although states should write no more than 10,000 words.

The treaty reporting guidelines do not expand on the extent of the state's obligation to report what constitutes 'sufficient' information and enables a 'comprehensive' understanding, as required by the UNCRC.[30] Presumably, this is subjective, and it is up to the CRC to decide if it has been furnished with sufficient information by the state party. The CRC itself can indicate the form and content of reports or information to be supplied by the state parties,[31] and can also request the state to provide an additional report or information where the CRC does not consider a report to contain sufficient information.[32] However, there have been incidences where it is clear from the Concluding Observations that sufficient information has not been provided.[33] Even so, if the guidelines were to include such detail, they are non-binding, and the treaty bodies have little power to enforce states to comply with the procedures.[34]

Sormunen suggests that, due to the restriction imposed by the word count, states 'may create an illusion of progress' that can emphasise legislative reform over practice.[35] Likewise, Lundy identifies an

27 CRC Reporting Guidelines (n 23 above) [10].
28 Ibid [19(c)].
29 In accordance with UNGA Res 68/268 (9 April 2014) UN Doc A/RES/G8/268 [16].
30 UNCRC, art 44(2).
31 Human Rights Treaty Bodies Rules of Procedure (n 23 above); Rules of Procedure of the Committee on the Rights of the Child (CRC/C/4/Rev5 1 March 2019) r 70(3).
32 CRC Rules of Procedure (n 31 above) r 73.
33 See note on the Committee for Economic, Social and Cultural Rights (CESCR) in the discussion of findings (n 141 below).
34 Concept Paper (n 5 above) [16]. During 2004 and 2005, committees noted that only 39% of reports were compliant with reporting guidelines and in 18% of cases, non-compliance was specifically noted in Concluding Observations [24].
35 Sormunen (n 26 above) 104.

inherent lack of reliability in state-party reporting as the states will be conscious of how they 'present themselves as making meaningful progress in the implementation' of the UNCRC.[36] Despite these limitations, Lundy argues that analysing UN reports can still yield 'valuable insight'.[37] We believe that the same can be true when looking at the representation of sub-state governments in the reporting process.

## CONTEXTUALISING HUMAN RIGHTS TREATY MONITORING IN A DEVOLVED UK

Before starting to interrogate these issues from a UK perspective, it is necessary to understand and appreciate the constitutional landscape in which treaty monitoring operates. Devolution is a key feature of the UK's Constitution, which means that power and competence is transferred from the central government to nations and regions, primarily the legislatures and executives in Northern Ireland, Scotland and Wales. This system of devolution is asymmetric, meaning that the transfer of power is not equal for all nations and regions, and different matters are reserved or excepted for the UK Parliament and Government in relation to each devolved institution. Important areas for the implementation of the UNCRC, such as health, social care and education are non-reserved matters where devolved governments and parliaments have control. On the other hand, important levers for full implementation of the Convention, such as most aspects of state welfare and immigration, are reserved to the UK Government and Parliament. Devolution is complicated further by the fact that England does not have a devolved parliament at all. This means that UK Government and Parliament also make decisions on all matters relating to England. This highly asymmetric approach to devolution requires careful attention to understand what is within the scope of each devolved government for the purposes of state reporting. For example, criminal justice is devolved to Northern Ireland and Scotland, but reserved in Wales.[38] This can be challenging as the responsibilities of Welsh institutions over several social policy areas means that the criminal justice system in Wales operates across a 'jagged edge' of devolved and reserved powers and responsibilities.[39]

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36 Laura Lundy, 'Children's rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child' (2012) 38(4) Oxford Review of Education 393, 398.

37 Ibid.

38 Government of Wales Act 2006, schs 7A and 7B (para 4).

39 See eg Robert Jones and Richard Wyn Jones, *The Welsh Criminal Justice System: On the Jagged Edge* (University of Wales Press 2022).

International relations, including relations with international organisations, are a reserved competence for UK Government[40] and extend to treaty-making and the transformation of treaties into domestic law.[41] Arrangements regarding this competence are captured in a Concordat on International Relations (Concordat), part of the 2012 Memorandum of Understanding agreed between the UK Government and the devolved governments.[42] However, the Concordat also recognises that devolved governments have an active interest in implementing and observing international obligations. This reflects that the day-to-day responsibility for meeting treaty standards often lies with the devolved governments.[43] Devolved parliaments can and have legislated to give further effect and incorporate international treaties that the UK has ratified, and which is within their legislative competence. Likewise, devolved governments can use international treaties to underpin policy and decision-making.[44] The devolved nations have also demonstrated a firm commitment to progress human rights in a way that differs from the approach of UK Government,[45] meaning that they also have an active interest in receiving specific meaningful recommendations on how to progress rights.

Even so, as the state party, the UK bears the ultimate responsibility for compliance with its treaty obligations, a fact explicitly recognised by treaty-monitoring bodies.[46] A state also has a general duty in international law to ensure that its domestic law is in conformity

40 Under the Government of Wales Act 2006, as amended by the Wales Act 2017; 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) [18], Supplementary Agreement D: Concordat on International Relations, D1.3, D2.3, D3.3.

41 Nicola McEwen et al, 'Intergovernmental relations in the UK: time for a radical overhaul?' 91(3) Political Quarterly 632, 633.

42 Memorandum of Understanding (n 40 above).

43 Ibid [21].

44 The development of the Rights of Children and Young Persons (Wales) Measure 2011, which gives further effect to the UNCRC in Wales, is a prime example of this.

45 Welsh Government, Action to Strengthen Human Rights in Wales: 2018 to 2022 (17 October 2022).

46 UN Committee on the Rights of the Child, *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6)* (CRC/GC/2003/5 27 November 2003) [40]–[41]. The Committee on the Elimination of Discrimination Against Women noted in its *Concluding Observations on the UK's Eighth Periodic Report* in 2019 that 'the devolution of government powers does not negate the direct responsibility of the State Party to fulfil its obligations to all women and girls within its jurisdiction' (CEDAW/C/GBR/CO/8 14 March 2019) [10].

with its international obligations,[47] and it is a generally accepted principle of international law that a state cannot use its domestic law or constitutional arrangements to justify breaching its international obligations.[48] This has been quite controversial in recent years, with the UK criticised for breaching international law on several occasions, including the Withdrawal Agreement[49] and the Trade and Cooperation Agreement between the European Union (EU) and the UK.[50] The UK's responsibility over internal compliance also extends to devolved law. For example, in February 2022, Northern Ireland's Agriculture Minister was accused of breaching the Withdrawal Agreement by attempting to stop checks on goods travelling from England, Wales and Scotland.[51]

The Concordat also stipulates the UK Government's duties in respect of treaty-monitoring and reporting, namely that it 'will invite' devolved ministers to contribute to reports to international organisations and 'will consider' the representation of devolved nations when such organisations discuss the reports.[52] As the state party, the UK assumes responsibility for providing adequate information in the assessment of its compliance with treaty obligations. However, while the Concordat states that the devolved nations should be invited to contribute to reports, and that their representation will be considered when international organisations discuss such reports, it lacks detail on how this should be done and what the level of contribution should be. Further, the Concordat is part of a 'non-statutory machinery

47 Failing to bring domestic law into conformity is not usually a breach of international law *per se*; the breach occurs when the state breaches its international obligations on a specific occasion.

48 UN Human Rights Committee, General Comment No 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (CCPR/C/21/Rev1/Add13 26 May 2004) [14]; CRC, *General Comment No 5* (n 46 above) [40]–[41]; 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'. See also, *Greco-Bulgarian Communities Case* (1930) PCIJ Ser B, No 17 [32].

49 The Withdrawal Agreement sets out the terms of the UK's exit from the EU. See eg Welsh Parliament, Legislation, Justice and Constitution Committee, *The Welsh Government's Legislative Consent Memorandum on the United Kingdom Internal Market Bill* (November 2020) [55]–[61]; Jonathan Jones, 'The Northern Ireland Protocol Bill is one of the most extraordinary pieces of legislation I have ever seen' (*The House* 15 June 2022).

50 The EU–UK Trade and Cooperation Agreement makes provision for free trade, market access and other cooperation mechanisms. See eg European Parliament's UK Contact Group, 'Press release: serious breach of international law: MEPs call on UK not to adopt new Bill' (14 June 2022).

51 Lisa O'Carroll, 'Northern Ireland minister orders halt to Brexit agri-food checks' (*The Guardian* 2 February 2022).

52 Memorandum of Understanding (n 40 above), Concordat D1.4, D2.4, D3.4.

of cooperation' with no legislative footing,[53] meaning that the UK Government is not legally bound by these undertakings. Ultimately, the extent of this engagement relies on good intergovernmental relations, and it has long been established that without good communication systems between the governments, devolution would be less effective.[54] The tension in the intergovernmental arrangements became ever more apparent with the end of Labour government at UK level, continued Labour dominance in Wales and, more recently, with the challenges of Brexit and Covid-19.[55]

## STATE REPORTING IN THE UK'S FIFTH PERIODIC CYCLE FOR THE UNCRC: SUMMARY OF FINDINGS

It is clear in setting out the context above that the UK's participation in treat-monitoring processes takes place in a complicated setting given the international systemic challenges and domestic constitutional complexities. The intricacies of such a multifaceted environment mean that any deficiencies in UK state reporting could go unchecked. It also creates a lack of certainty as to the cause(s) of any problems, making their resolution more difficult. One such issue, as noted in the introduction, is that UK state reporting may be under-representative of the devolved nations. A case study facilitates a narrow, yet in-depth approach to exploring this issue, enabling key questions to be addressed:

a. to what extent are there problems with the representation of devolved nations in UK state party reporting;
b. why do these problems exist; and
c. what is the potential impact on the implementation of obligations in the UK.

This also sets out important groundwork to consider to what extent these issues could be mitigated at the domestic level to ensure accurate and robust reporting, and how a greater understanding of the challenges faced by multi-governance states could factor into discussions about reform of the treaty-monitoring system.

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53 HL Deb 17 June 1998, vol 590, col 1573.

54 Ibid.

55 See eg Select Committee on the Constitution, *Inter-Governmental Relations in the United Kingdom* (HL 2014–2015 146) [1]–[6]; Select Committee on the Constitution, *Parliamentary Scrutiny of Treaties* (HL 2017–2019 345) 'Summary' [9]; see also European Union Committee, *Scrutiny of International Agreements: Lessons Learned* (HL 2017–2019 387); European Union Committee, *Treaty Scrutiny: Working Practices* (HL 2019–2021 97); Nicola McEwen, 'Intergovernmental relations review: worth the wait?' (*UK in a Changing Europe* 17 January 2022).

## The UNCRC 1989 and its reporting procedure

The UNCRC was chosen as a case study to examine UK state party reporting due to the substantial number of provisions that cut across devolved competences. Further, although the UK has ratified the UNCRC, it is yet to fully become part of the UK's domestic law. The case study primarily focuses on scrutinising the UK's Periodic Report, the UK delegation's oral evidence, and the CRC's Concluding Observations in the Fifth Periodic Reporting Cycle in order to answer the questions set out above. Although other stakeholders, such as NGOs, civil society and National Human Rights Institutions (NHRIs), can and do make important contributions to the process, this study aims to interrogate issues in state party reporting. There is also particular focus on Wales when considering issues relating to the devolved nations, given that it was the only country in the UK to have incorporated the UNCRC into law at the time of the reporting cycle[56] and that the UNCRC had been established as 'a foundation of principle' for the National Assembly for Wales, now Welsh Government, since November 2000.[57] The UNCRC sets out the economic, social, cultural, political and civil rights of children, and its 54 articles determine that, *inter alia*, children have a right to life, to education, freedom of expression, health, social security and play. Under article 44 UNCRC, state parties are required to periodically report to the CRC on how they have implemented the Convention and the progress on the enjoyment of children's rights in their territories.[58]

Historically, a new reporting cycle has been initiated by the submission of a state party report.[59] The state report contains both a common core document and a treaty-specific report, which 'shall contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned'.[60] There is also an expectation that the state will indicate

56 Rights of Children and Young Persons (Wales) Measure 2011; a duty to have 'due regard' to the UNCRC is also contained in the Social Services and Well-being (Wales) Act 2014 (s 7) and the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (s 7).

57 See further Ian Butler and Mark Drakeford, 'Children's rights as a policy framework in Wales' in Jane Williams (ed), *The United Nations Convention on the Rights of the Child in Wales* (University of Wales Press 2013) 11–12; Jane Williams, 'Seven threads in policy on children and young people: rights and well-being' in Jane Williams and Aled Eirug (eds), *The Impact of Devolution in Wales: Social Democracy with a Welsh Stripe?* (University of Wales Press 2022) 179–203; Simon Hoffman, 'Incorporating the CRC in Wales' in Kilkelly et al (n 13 above) 101–103.

58 UNCRC, art 44(1).

59 As happened during the 2016 cycle examined in this case study.

60 UNCRC, art 44(2).

factors and difficulties affecting the degree of fulfilment of the UNCRC obligations in the reports.[61] A pre-sessional working group is scheduled following the report's submission, enabling advance identification and notification of the most important issues to be discussed with the state party.[62] The Committee presents a list of issues to the state party to which the state responds in writing, allowing the state party to prepare answers to some of the key questions in advance.[63] A simplified procedure has been available to parties since September 2019.[64]

The Committee invites input from other stakeholders, may conduct visits to states and can request further information from state parties that is relevant to the implementation of the Convention.[65] The state party is also invited to send a delegation to a dialogue session, after which the Committee issues recommendations, or Concluding Observations, for identified concerns. The Concluding Observations are based on information received from the state party, however, the Committee can refer to information received from other sources, such as specialised agencies or other competent bodies. The Committee also sent rapporteurs to the UK, and devolved nations, in advance of the oral hearing which gave an opportunity for NGOs in devolved nations and devolved government a chance to engage further. The non-binding nature of Concluding Observations is reflected in article 45(d) UNCRC, which states that 'the Committee may make *suggestions* and *general recommendations* based on information received'.[66] Even so, the treaty obligations themselves are legally binding, and if the treaty body finds there to be a violation, there may be a legal duty to remedy the breach.[67]

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61 Ibid.

62 The Committee appoints either Country Rapporteurs or a Task Force comprising three to four members in advance of a country pre-session, which is a confidential meeting between Committee members, UN agencies and invited children's rights defenders where concerns can be shared in advance of the dialogue session. This Task Force has the mandate to lead the dialogue with the state party. For the sake of brevity, this article hereinafter refers to the 'Committee'.

63 Implementation Handbook for the Convention on the Rights of the Child [648].

64 See n 14 above. The UK accepted the simplified procedure on 19 August 2020 and submitted its response to the LoIPR on 16 June 2022 as part of a new reporting cycle. UK State Party report under LoIPR (CRC/C/GBR/6–7 16 June 2022); UK List of issues prior to reporting (LoIPR) 9CRC/C/GBR/QPR/6–7 15 February 2021).

65 UNCRC, art 44(4).

66 Emphasis added.

67 Martin Scheinin, 'International mechanisms and procedures for implementation' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (Åbo Akademi University 1997) 369.

## UK state reporting on UNCRC: Fifth Periodic Report (2016)

### *State Party Report*

General criticisms about the UK's Fifth Periodic Report[68] included that it stayed at policy level and did not say whether or how that policy has been implemented in practice,[69] and that it 'paint[ed] a picture of things all generally moving in a glorious direction towards a rosy sunset',[70] including the situation in the devolved nations. For example, the Welsh Government funding of Funky Dragon, the Children and Young People's Assembly for Wales, is used twice as a positive example, despite the charity being told prior to the submission of the report that it would have to apply for grant funding to secure its future,[71] thus casting uncertainty over the potential for youth participation in Welsh politics.[72] It was later announced in July 2014 that the charity had been unsuccessful in its grant bid, leading to its closure.[73]

In respect of adequately reflecting devolved law and policy in the report, the initial draft focused heavily on matters relating to England, often misrepresenting matters specific to England or England & Wales as being UK-wide. This was also noted by Together, the Scottish Alliance for Children's Rights, when providing evidence to the Joint Committee on Human Rights (JCHR) in its inquiry on the UK's compliance with

68 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Fifth Periodic Reports of States Parties due in 2014: United Kingdom* (CRC/C/GBR/5 25 May 2014) (UK State Report).

69 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.

70 Joint Committee on Human Rights, The UK's Compliance with the UN Convention on the Rights of the Child, Evidence from Dr Maggie Atkinson and Anne Longfield OBE, 4 February 2015, 6.

71 Welsh Government, Written Statement – Children and Families Delivery Grant (16 July 2014). Beneficiaries of the Children and Families Organisation Grant were informed on 4 October 2013 that the programmes would end in September 2014. The application period for the new grant scheme ran between 3 March 2014 and 23 May 2014. The UK's State Report was received on 27 May 2014.

72 The Welsh Government had also not reinstated its support for Wales' Participation Unit and the National Children and Young People's Participation Consortium in Wales since its dissolution in 2013. See further Williams, 'Seven threads in policy' (n 57 above) 188.

73 See further, Rhian Croke and Jane Williams, 'Our Rights, Our Parliament: The Story of the Campaign for the Children and Young People's Assembly for Wales, 2014–2018' (2018) 10–11. Notably, the closure of Funky Dragon became the vehicle for a campaign led by young people for a formal youth parliament in Wales and their efforts were reflected in a specific recommendation in the Concluding Observations.

the UNCRC.[74] The JCHR described the report as too abstract and patchy and noted that there were some significant omissions from its content, 'whether because of the process by which it was put together, or whether by intention'.[75] In giving evidence to the JCHR, a UN Children's Fund (UNICEF) UK representative agreed that the report was weakened by the contributions from the four countries of the UK not being synthesised comprehensively,[76] meaning that it lacked a coherent overall view,[77] and the Northern Ireland Commissioner for Children and Young People also noted her disappointment at the limited information on the implementation of the UNCRC in Northern Ireland.[78] Although the final version of the State Report was somewhat more robust than earlier drafts and contained evidence that Wales had contributed to it, it continued to be dominated by UK Government policy as it applied to England, and habitually did not clarify that such policies did not apply or had limited effect in the devolved countries.[79]

To provide selected examples, the information provided on children with disabilities in the report does not specify whether the policies mentioned apply to the UK as a whole or just one of the four nations. The report outlines a new statutory framework introduced by the 2014 Children and Families Act for disabled children and those with special educational needs (SEN),[80] however, most of the provisions only apply in England.[81] While the report later briefly refers to actions taken in Scotland and Northern Ireland,[82] one might take the view that these jurisdiction-specific policies *supplement* the Children and Families Act, given the omission of any reference to England specifically when introducing the 2014 Act. Wales is not expressly mentioned. Concerns were also raised that the State Report did not reflect the devolved governments' 'clear' position on the negative impact of welfare reforms

74 Submission from Together (Scottish Alliance for Children's Rights) to the UK Parliamentary Joint Committee on Human Rights Inquiry into the UK's compliance with the UNCRC; see also 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 ) [61].

75 JCHR, Eighth Report [11].

76 JCHR, Evidence taken on 11 February 2015 (n 69 above) [6]; see also JCHR, Eighth Report (n 74 above) [58].

77 JCHR, Eighth Report (n 74 above) [169].

78 Northern Ireland Children's Commissioner Response to Rt Hon Harriet Harman, Chair of JCHR (5 September 2016).

79 See also Doek (n 15 above) 103.

80 UK State Report (n 68 above) [154]–[158].

81 Pt 3 of the Act (ss 19 to 83) makes provision that reforms the special educational needs system. 'These provisions extend to England and Wales, but the majority only apply in England': Children and Families Act 2014, Explanatory Notes, Wales, pt 3 [45].

82 UK State Report (n 68 above) [159].

on children.[83] The report's exclusion of the devolved governments' perspectives on this issue became more apparent in the dialogue session, when representatives of the devolved governments sought to clarify their position on the policies, noting the welfare reforms' 'disproportionate and unfair effects' on children in their jurisdictions.[84]

Disproportionate reporting continues in other areas of the report. Appendix 5 provides over 40 examples of consultations or activities with children undertaken by different UK government departments in England, including the Cabinet Office, Department for Communities and Local Government, Department for Education, Department for Health, Ministry of Justice, Department for Transport, Home Office, Department for Work and Pensions and the Ministry of Defence.[85] However, just 10 examples are given for Northern Ireland, Scotland and Wales combined.[86] While this was an improvement from the draft report which initially referred to the initiatives in England as 'national' developments,[87] it remains extremely unbalanced considering that many of the activities listed would clearly not involve the participation of children and young people from the other three nations.

There are other incidences throughout the 2014 report where little to no information on Wales is provided on key issues. In its 2008 Concluding Observations, the Committee recommended that the UK 'take all appropriate measures to ensure that the principle of the best interests of the child ... is adequately integrated in *all legislation and policies* which have an impact on children',[88] yet the 2014 report only refers to developments in England on this issue.[89] Similarly, in reporting on violence, abuse and neglect, about which the Committee had been 'alarmed' at its high prevalence in 2008,[90] there was very little information in the 2014 State Report pertaining to what had been done to improve the situation in Wales.[91] No information was given

83 See, for example, 'Welfare reforms "impacting on children"' *Glasgow Evening Times* (3 June 2014).

84 Committee on the Rights of the Child, 72nd Session, 2115th meeting (24 May 2016) (Session 2). Sessions were fully transcribed as part of this study; summary records are publicly available (CRC/C/SR.2115).

85 UK State Report (n 68 above) app 5, [69]–[73].

86 Ibid [74]–[75].

87 Together Submission to JCHR (n 74 above) 3.

88 CRC, Concluding Observations 2008 (n 25 above) [27] emphasis added.

89 UK State Report (n 68 above) [51]–[52].

90 CRC, Concluding Observations 2008 (n 25 above) [51].

91 It was simply noted that Domestic Homicide Reviews had been established on a statutory basis in England and Wales, and that, following reviews, Wales had established the Welsh Safeguarding Children Forum; UK State Report (n 68 above) [108], [113].

on the placing of children in care in Wales[92] or on strengthening the voice of children in care in Wales,[93] despite an increase of 23 per cent in looked-after children in Wales between 2009 and 2014, and the finding that looked-after children in Wales are not always afforded the right to be heard in decisions that impact their futures.[94]

The Committee had also noted in 2008 concerns about increased numbers of disabled children in alternative care, inadequate monitoring, and the scarce possibility of contact between them and their parents.[95] Yet in the 2014 report, no Welsh policies were subsequently identified on children with disabilities in long-term care, contact for children separated from parents and siblings, and the monitoring of children in care.[96] Another 2008 recommendation from the Committee had been to develop early identification programmes to improve the situation of children with disabilities,[97] though the 2014 report does not comment on any developments in Wales.[98] The Committee had also identified breastfeeding as an area of concern, recommending that the UK further promote baby-friendly hospitals and encourage breastfeeding to be included in nursery training.[99] Again, no information on Welsh policies was included in the 2014 report.[100] It could be argued that the 2014 State Report does not 'contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention' in Wales.[101]

### *Dialogue session*

The 2016 dialogue session took place in Geneva and was attended by a UK delegation consisting of 19 delegates from the UK Government, two from Northern Ireland, one from Scotland and one from Wales.[102] Thirty per cent of delegates came from the UK Government's Department for Education alone, which perhaps reflects where

92 Ibid [114]–[118]; CRC, Concluding Observations 2008 (n 25 above) [44]–[45].
93 UK State Report (n 68 above) [124]–[128]; CRC, Concluding Observations 2008 (n 25 above) [44]–[45].
94 Report of the UK Children's Commissioners, UN Committee on the Rights of the Child Examination of the Fifth Periodic Report of the United Kingdom (14 August 2015) [7.5].
95 CRC, Concluding Observations 2008 (n 25) [44]–[45].
96 UK State Report (n 68 above) [129]–[131].
97 CRC, Concluding Observations 2008 (n 25) [53(b)].
98 UK State Report (n 68 above) [145]–[151].
99 CRC, Concluding Observations 2008 (n 25) [58]–[59].
100 UK State Report (n 68) [152]–[153].
101 As required by UNCRC, art 44(2).
102 UK Mission to the United Nations in Geneva, Note Verbale 099/16 (13 May 2016).

children's rights fall within the UK Government's portfolio. Even so, Sally Holland, then Children's Commissioner for Wales, noted disappointment that there was only one representative for the Welsh Government and commented that the UN Committee's 'careful treatment of the devolved constitutional arrangement of the UK State Party was not matched with a proportionate delegation against this arrangement'.[103] Further, when a House of Lords Select Committee reported on parliamentary scrutiny of treaties, it noted the importance of representatives from the devolved governments forming part of the UK Government's delegation in relevant treaty negotiations, which acknowledges the important role devolved nations play in the implementation of international obligations.[104] Presumably, the same logic should also apply to UK reporting on compliance with treaty obligations.

At the start of the dialogue session, the UK delegation gave the Committee a brief breakdown of legislative responsibilities in the UK, noting that powers for legislative changes in education, health services and social care are devolved.[105] In respect of many issues, the study's findings suggest that the Committee was conversant with the UK constitutional arrangements and understood the breakdown of responsibilities between the UK and the devolved nations and so was able to direct specific questions to the delegation where relevant.[106] However, in answering the Committee's general questions, the nature of some of the delegation's responses raised two issues of concern. First, answers to the Committee's questions tended to focus on matters that related to England only, often misrepresenting these as being UK-wide, and second, some delegation responses appeared to be ill-informed as to the breakdown of responsibilities between the UK Government and the devolved governments. Essentially, the problems that beset the State Report became significantly more apparent in the dialogue session.[107]

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103 Children's Commissioner for Wales Response to Rt Hon Harriet Harman, Chair of JCHR (6 September 2016).

104 Select Committee on the Constitution (HL 345) (n 55) 'Summary of conclusions and recommendations' [25].

105 Committee on the Rights of the Child, 72nd Session, 2114th meeting (23 May 2016) (Session 1). Sessions were fully transcribed as part of this study; summary records are publicly available: CRC/C/SR.2114.

106 This was undoubtedly supported by contributions from other stakeholders. For example, the Committee was aware of the dissolution of Funky Dragon in Wales, in addition to funding issues relating to S4C, the Welsh language channel. The Committee asked questions on both of these issues: Session 1 (n 105 above).

107 Children and Young People's Commissioner Scotland's Response to Rt Hon Harriet Harman, Chair of JCHR (30 August 2016).

As noted above, the written State Report revealed ambiguities in reporting on education, particularly for children with disabilities or additional learning needs. This continued in the dialogue session. At the end of the first session, the Committee asked several questions on this issue without specifying that they were directed at a particular jurisdiction.[108] These included questions on how the UK ensures that children with disabilities systematically and actively participate in children's services they receive, how accessible schools are for children with disabilities, and what measures are being taken to treat children with disabilities in schools. In response, the delegation gave an overview of the 'important reform to the system on children with special educational needs and disabilities that were introduced by the Children and Families Act 2014'.[109] It was noted that the new system is 'set out in a statutory code of practice which is jointly issued by the Department for Education and Health'.[110] Again, just as the State Report, there was a failure to call the Committee's attention to the fact that part 3 of the 2014 Act, which applies to SEN, mostly applies to England, as education is a devolved matter. The delegation also mentioned the strong framework in place for mainstream schools, set out in the statutory code, to support children with SEN in mainstream schools, which again, would be applicable to England. Very little evidence was given about SEN in Wales generally.

The Committee also asked whether the UK has statutory obligations for schools to have policies on the prevention of bullying of particular groups, and whether there are any sanctions for schools which do not take action when bullying is known to them.[111] It was noted that schools are held to account by Ofsted (the Office for Standards in Education, Children's Services and Skills), which is responsible for the inspection of education institutions in England. To support this, it was stated that 'the government' had recently changed the law to strengthen teachers' powers to discipline children and that it had given schools guidance on sanctions that should be used proportionately, which include the use of seclusion and isolation rooms. Presumably, the response is referring to the 2011 Education Act, but sections 2 to 6 that set out powers in relation to discipline are only applicable to England.[112] The Committee also had to seek clarity as a result of unclear

108 Session 1 (n 105 above).

109 Session 2 (n 84 above).

110 Ibid.

111 Session 1 (n 105 above).

112 The Welsh Ministers have some powers in relation to fees, and some issues fall within a Legislative Consent Motion passed by the Senedd on 14 June 2011. It is noted, however, that seclusion and isolation rooms are used throughout the UK.

evidence on at least one occasion,[113] as to whether information given about a new waiting period target of two weeks for early intervention in mental health was for England only.[114] While further information was provided on waiting-time standards in Wales and Scotland, the delegation was unable to make comment on the waiting time for mental health provision in Northern Ireland during the session.[115]

Although it appears that the UK and devolved officials worked jointly to decide when a devolved matter – or difference in approach between the UK Government and a devolved government – should be highlighted in the dialogue session,[116] like the State Report, the responses to the Committee's questions also tended to focus on English matters at times. This concern was expressed by the then Children's Commissioner for Scotland,[117] with the Northern Ireland Commissioner for Children and Young People also noting her disappointment at the limited information on the implementation of the UNCRC in Northern Ireland during the examination.[118] As one example, Ofsted was mentioned on several occasions during the dialogue session when giving examples of good practice on monitoring policies and holding schools to account, but Estyn in Wales went unmentioned.[119] In fact, the former Children's Commissioner for Wales expressed disappointment during the first session that the UK delegation had not referred to Wales at all when discussing education and social care, two major devolved policy areas.[120] It was reported that the Children's Commissioners had taken steps to remind the Committee of the devolved nature of government in the UK in between the oral evidence sessions,[121] given that NGOs and NHRIs can usefully meet with Committee members informally during the plenary session.[122] This disproportionality in reporting was also recognised by other observers at the dialogue session. Campaign 4 CYPAW, a Welsh civil society movement campaigning for the establishment of a Welsh Youth Parliament, shared that it had heard 'lots of responses from UK Gov ... including on alt care and family

113 Session 2 (n 84 above).
114 Ibid.
115 Ibid.
116 Children and Young People's Commissioner Scotland Response (n 107 above).
117 Ibid.
118 Northern Ireland Children's Commissioner Response (n 78 above).
119 As did the Education and Training Inspectorate in Northern Ireland and Her Majesty's Inspectorate of Education in Scotland.
120 Children's Commissioner Wales, 'Disappointing that Wales not mentioned at all by UK Govt on two major devolved policy areas – education & social care #UNCRC' (24 May 2016)
121 Children and Young People's Commissioner Scotland Response (n 107 above).
122 Child Rights Connect, 'The Reporting Cycle of the Committee on the Rights of the Child: A Guide for NGOs and NHRIs' 31.

support which referred only to England'[123] and that the discussion on transgender and intersex children was limited to NHS England.[124]

On occasion, the delegation also seemed to be ill-informed about the breakdown of devolved competences. In the first session, the Committee posed a question on budgetary cuts of more than 25 per cent to S4C,[125] a Welsh language channel, and expressed concern at the negative impact this may have on the rights of children in Wales to enjoy access to information and express themselves in their own language.[126] The Committee specifically asked how the UK planned to ensure the continuity and quality of programmes on S4C with these cuts. Given that broadcasting is a non-devolved matter, the proposals for broadcasting cuts came from the Department for Culture, Media and Sport (DCMS), situated in the UK Government. Therefore, in responding to the Committee, an official with knowledge of DCMS policy should have addressed the question. However, the chair of the UK delegation directed the question to the sole representative for the Welsh Government, who noted that funding for S4C was the responsibility of UK Government and gave a general response about the Welsh Government's support for S4C and the Welsh language. The response thus failed to address the question and allowed the delegation to avoid offering an explanation for how UK Government intends to ensure protection for the rights of children in Wales in this key area. In a similar vein, the Committee posed a question about progress on a Bill of Rights for Northern Ireland, given the commitment in the 1998 Belfast Agreement to introduce one. While this was answered by one of the two Northern Ireland representatives, who noted that a Bill of Rights has been identified as an outstanding commitment in the 2014 Stormont House Agreement between the UK Government and Northern Ireland Executive,[127] it could be argued that a UK Government representative may have been better placed to advise on

123 Campaign 4 CYPAW, 'Hearing lots of responses from UK Gov this morn including on alt care and family support which referred only to England. #UNCRC #UNCRCWales' (24 May 2016).

124 Campaign 4 CYPAW, 'Still lots of talk just about @NHSEngland rather than all areas based on transgender, intersex children #UNCRC #UNCRCWales' (24 May 2016).

125 Session 1 (n 105 above).

126 'S4C cuts could breach child rights, academics warn' (*BBC News* 24 May 2016); Alison Mawhinney and Carys Aaron, 'Cyllido S4C -Hawliau Plant yn y Fantol' (*Barn* March 2017).

127 Session 1 (n 105 above); The Stormont House Agreement (23 December 2014) [69].

progress given the expectation under the Belfast Agreement to draft a Bill of Rights in Westminster legislation.[128]

## DISCUSSION OF FINDINGS

The above summary of findings provides a case study to begin to view the extent to which the devolved nations are represented in state party reporting. The case study found that reporting tends to be rather general, largely focusing on Westminster policy (which is mainly applicable to England) but with some select examples of positive variance in devolved approaches where those exist. Given that decision-making on how the UK drafted its reports and gave evidence was not well publicised or transparent, it is important to explore the experience of the UK's Fifth Periodic Reporting Cycle; thus looking in more detail at why problems exist and what is the potential impact on the implementation of obligations in the UK.

It appears that information is prepared at the devolved level and then collated at the UK level, where the report is then drafted.[129] The Former UK Parliamentary Under Secretary of State for Children and Families notes that, 'when we pulled together the response to the UNCRC last year, clearly that meant that we had to have quite detailed discussions about what each [counterparts in other nations] were doing and had achieved during our period in office'.[130] The UK Government clearly makes the final decision on what it will include in its report, though the process of preparing the State Party Report should be broad and participatory.[131]

However, the process that was in place did not seem to facilitate full and robust reporting of the progress made to meet international human rights obligations across the UK, and the method of compiling the information also left little time for meaningful engagement with civil society in practice.[132] The four Children's Commissioners encouraged the Committee to hear from the devolved governments during the examination 'since it can be difficult for them to feed into the reporting process'.[133] The findings indicate that the written State

128 Belfast Agreement 1998, 'Rights, Safeguards and Equality of Opportunity' [4]– upon which the Northern Ireland Human Rights Commission would be invited to consult and to advise on the scope for defining rights.

129 Northern Ireland Children's Commissioner Response (n 78 above).

130 Joint Committee on Human Rights, 'The UK's Compliance with the UN Convention on the Rights of the Child, Edward Timpson MP' (25 February 2015) 21.

131 Child Rights Connect (n 122 above) [7].

132 Northern Ireland Children's Commissioner Response (n 78 above).

133 Report of the UK Children's Commissioners (n 94 above) [1.3].

Party Report had somewhat improved from the draft to the final version, which suggests that there is some scope for issues such as under-representation of devolved governments to be addressed at state level, and this could be done by reviewing how State Reports are compiled.

The importance of political will has been emphasised in the literature on incorporation of the UNCRC.[134] Key stakeholders in the monitoring process also suggest that political will heavily influences how devolved nations are represented in state reporting, which could explain the England-centric approach taken in the report and oral evidence session and the lack of devolved representation in the delegation. In giving evidence to the JCHR, Together (Scottish Alliance for Children's Rights) noted that the 'extent to which Scotland is involved in reporting – and held to scrutiny at a UN level – can be patchy and is very dependent on the will to involve the devolved nations at a UK level'.[135] Koulla Yiasouma, Northern Ireland Commissioner for Children and Young People, also commented that 'while there appeared to have been meaningful engagement in some areas in relation to this process, this was not uniform across all jurisdictions'.[136]

This seemed to extend beyond the reporting cycle to Parliament's 2015 scrutiny of the UK's compliance with the UNCRC. A letter written jointly by the Northern Irish, Scottish and Welsh Children's Commissioners expressed disappointment that none of them had been given the opportunity to provide either written or oral evidence into the JCHR's short inquiry.[137] Both the outgoing and incoming Children's Commissioners for England were invited to give oral evidence.[138] Similarly, in the JCHR's 2016/2017 inquiry into the UK's record on children's rights, oral evidence was given by the Children's Commissioner for England and the Equality and Human Rights Commission, with the Children's Commissioners for the devolved nations and the Equality Commission for Northern Ireland being invited to give written evidence. There also seemed to be a lack of clarity surrounding applicability of UK Government policies in the devolved nations, with the Northern Ireland Children's Commissioner noting that she had been asked by the JCHR to raise any implications for children in Northern Ireland of the Children and Social Work Bill,

134 Lundy et al (n 6 above) 19; Heyns and Viljoen (n 6 above) 483; 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.

135 Together Submission to JCHR (n 74 above) 5.

136 Northern Ireland Children's Commissioner Response (n 78 above).

137 Letter from Scottish, Northern Irish and Welsh Children's Commissioners, Correspondence to the JCHR, 13 February 2015.

138 JCHR, Evidence from Dr Maggie Atkinson and Anne Longfield OBE (n 70 above).

responding that 'as this extends only to England and Wales, I have no comments in relation to this'.[139]

While it is right to be circumspect given the limited scope of this study, there is also evidence to suggest that these concerns are not unique to UNCRC reporting. In monitoring the UK's compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR)[140] in 2016, the Committee for that Covenant noted that it regretted the lack of involvement and participation of Northern Ireland in the review process and that 'the absence of representatives of the government of Northern Ireland did not enable it to make a full assessment of the enjoyment of Covenant rights in Northern Ireland'.[141] The UK Government was reminded 'of its ultimate responsibility for implementing the Covenant in all its jurisdictions' and to take 'all necessary measures to ensure the full enjoyment of [rights] by all persons under its jurisdiction'.[142] In the reporting procedure on the Convention on the Elimination of All Forms of Discrimination Against Women,[143] the 2019 Concluding Observations remarked that 'the Committee once again notes that the State Party's delegation did not include representatives of the overseas territories or Crown dependencies'.[144] For the most recent Universal Periodic Review in 2017, a process which involves the review of the human rights records of all states, the Cabinet Secretary for Communities, Social Security and Equalities in the Scottish Government had advised that ministerial representation from Scotland would be useful given the different policy approaches but reported that the UK Government did not accept the proposal.[145] Dickson's paper in this special issue provides a more comprehensive overview of these other mechanisms.

The accuracy and reliability of the Committee's evaluation and observation depend on the quality of the information supplied. While it is true that other stakeholders can and do submit information to the

139 Northern Ireland Children's Commissioner Response (n 78 above).

140 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR).

141 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of the United Kingdom* (E/C.12/GBR/CO/6 14 July 2016) [2], [7]–[8].

142 Ibid.

143 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

144 CEDAW Committee, Concluding Observations (n 46 above) [3].

145 Scottish Parliament Equalities and Human Rights Committee, Getting Rights Right: Human Rights and the Scottish Parliament (SP Paper 431 26 November 2018) (Session 5) [111].

Committee, including from children themselves,[146] it is the state that has the obligation to provide the Committee with sufficient information to enable a comprehensive understanding of the implementation of the Convention in its territory, as stipulated by article 44 UNCRC. An accurate and reliable response is necessary to make a full assessment on the enjoyment of rights in the state, including in the devolved nations. If factors and difficulties affecting the degree of fulfilment of obligations are not drawn to the attention of the Committee, particularly in areas of concern, this could impact the opportunity for progressive improvements in compliance with those rights. In other words, the quality of reporting could ultimately affect the recommendations and their implementation.

Although the Committee addresses its recommendations towards the Government of the United Kingdom of Great Britain and Northern Ireland, it does qualify this, in paragraph 3 of the Concluding Observations, by noting that recommendations are also addressed to the 'devolved administrations in Wales, Scotland and Northern Ireland' 'where relevant mandates fall under their jurisdiction'.[147] Despite this, Hoffman suggests that the Committee 'may have overlooked … an opportunity to connect its recommendations to the context of Welsh devolution'.[148]

The Committee did make specific recommendations for devolved governments and to deal with regional issues in some contexts.[149] In the 2016 Concluding Observations, the Committee referred directly to relevant policy in Wales on six occasions,[150] with a further two where Wales was identified separately on issues shared with other devolved governments.[151] There were only two recommendations that were made explicitly regarding Wales. Firstly, to fully implement the Programme for Children and Young People (2015) and, secondly, to 'strictly implement the legal prohibition of prolonged placement of children in temporary accommodation by public authorities'.[152] However, both recommendations are directed at the state party alone with no reference to the devolved Welsh Government. On six further occasions which could relate to Wales, recommendations do

146 Croke and Williams (n 73 above) 15.

147 CRC, Concluding Observations 2016 (n 25 above) [3].

148 Hoffman (n 7 above) 380.

149 CRC, Concluding Observations 2016 (n 25 above) [3]

150 Ibid, powers of the Children's Commissioner in Wales [15], Youth Parliament [30], collective worship in public schools [36], measures to address child sex exploitation [44], rate of child poverty [70], and the adoption of a right to play by the Welsh Government [74].

151 Ibid, concern regarding increase of children in care [52], improvements to mental health services [60].

152 Ibid [71(e)].

refer explicitly to devolved governments.[153] Although the State Party Report did highlight the introduction of the 2011 Measure in Wales to incorporate the UNCRC, no mention of this was made in the Concluding Observations.

On some occasions, the Committee seems to place the recommendation with the state party to take the initiative to introduce reforms 'in each of the devolved administrations'.[154] On other occasions it suggests that the state party and devolved governments work together,[155] or that devolved governments should take action 'in relation to devolved matters'.[156] On the whole, recommendations are directed towards the state party even where the matters concerned are clearly non-reserved matters, such as education,[157] childcare and social work,[158] and child poverty and adequate housing.[159] While the general nature of the recommendations in terms of decentralisation confirmed by General Comment No 5,[160] as well as the asymmetric and complex delineation of responsibilities within the UK, makes distinguishing who should be responsible for implementing the recommendations difficult, it is not clear why general phrasings on devolved governments are used inconsistently. Appendix 3 of the State Party Report provides a brief overview of devolved and reserved areas but could be argued to be incomplete as it does not show that housing and social care are devolved matters. This, and weaknesses on devolution related to the oral hearing discussed above, may have had an effect on how recommendations were ultimately framed.

Leading on to the issue of wider accountability, it is possible to develop a thicker analysis of the role of reporting on law and policy at the devolved level and to remember that reporting should 'not become an end in itself'.[161] Commentary from the literature shows that the

153 Ibid. There is some inconsistency in the phrasing used to refer to devolved governments. It appears that the following are used interchangeably: 'devolved governments' (sex exploitation [45], children rights impact assessment on reduction in child funding and support [51]); 'devolved administrations' (voting age [33], air pollution levels [69]); 'governments of the devolved administrations' (health and health services [59], rights of children to rest and leisure [75]).

154 Ibid, corporal punishment [41], mental health [61], juvenile justice [79], Optional Protocol to the Convention on the sale of children, child prostitution and child pornography [82]–[83].

155 Ibid, sex exploitation [45], child rights impact assessment of the recent reduction of funding for childcare and family support [51], health and health services [59], rest, leisure and recreation [75].

156 Ibid, environmental health [69].

157 Ibid, collective worship in schools [36], ensuring inclusive education [73].

158 Ibid [53].

159 Ibid [71].

160 General Comment No 5 (n 46 above) [41].

161 Geneva Academy (n 17 above) 5.

monitoring process can provide an important basis and catalyst for sub-state innovation, as was the case in Wales. The National Assembly for Wales, as it then was, could initiate a commitment on policy on children and young people from its inception despite a weak form of executive devolution at the time.[162] The establishment in Wales of the first Children's Commissioner in the UK was indicative of this commitment and the cross-party support for this policy area.[163] The National Assembly later adopted the UNCRC as a 'foundation of principle for dealing with children' and a basis for policy-making.[164] This evolved into *Rights to Action* (2004) which set out the UNCRC principles in seven core aims for policy-making and was followed with *Rights in Action* (2007) which provided a form for implementation.[165] Butler and Drakeford highlight that *Rights in Action*, was notable as it became the separate 'country report' for Wales to provide a contribution to the periodic reporting of the state party.[166] This was complimented by a separate report submitted to the UN Committee from the UNCRC Wales Monitoring Group, an alliance of non-governmental agencies and academics established in 2002.[167] Further, it has been argued that the Concluding Observations and General Comments from the Committee from 2002 and 2008 were used to underpin the justification for the Rights of Children and Young Persons (Wales) Measure 2011.[168] The Welsh Government was able to build on article 4 of the Convention, and the general recommendations from the Committee, to assist towards the 2011 Measure.[169] The Measure itself is also influenced by the UN monitoring procedure, as it includes a duty to prepare a report on the Welsh Ministers' compliance with the 'due regard' obligation in the Measure, which initially corresponded with the cycles of the UN reporting period but are now set at every two-and-a-half years.[170]

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162 Butler and Drakeford (n 57 above) 9.

163 Ibid 9–10.

164 As quoted in ibid 12.

165 Ibid 13–14.

166 Ibid.

167 Trudy Aspinall and Rhian Croke, 'Policy advocacy communities: the collective voice of children's NGOs in Wales' in Williams (ed) (n 57 above).

168 Jane Williams, 'The Rights of Children and Young Persons (Wales) Measure 2011 in the context of the international obligations of the UK' in Williams (ed) (n 57 above) 49.

169 Hoffman, 'UNCRC and decentralisation' (n 7 above) 380; Williams (n 39 above) 50.

170 Hoffman (n 57 above) 116.

Concluding Observations can also be used as a tool for parliamentary accountability and scrutiny on a devolved level.[171] Although the duty on Welsh Government to have 'due regard' to the UNCRC has not always been utilised fully in scrutiny at the Senedd,[172] this has been seen most clearly in the Children, Young People and Education (CYPE) Committee of the Senedd which published a review of Children's Rights in Wales and used the UNCRC and Concluding Observations from 2016 as a framework to analyse the success of the 2011 Measure.[173] Specifically, it recommended that the Welsh Government 'publish a detailed strategic response' to the UNCRC 2016 Concluding Observations and subsequently, an annual update of process made against the Concluding Observations to be scrutinised by the CYPE Committee.[174] Both recommendations were accepted by the Welsh Government[175] and led to the publication of an update on progress on the Concluding Observations in March 2021,[176] the Children's Rights Scheme in December 2021,[177] and the Children and Young People's Plan in March 2022.[178] The Concluding Observations are not the only evidence that the Senedd uses to scrutinise the Welsh Government's progress on children's rights, but, given their prominence in governmental scrutiny, future research should consider how the framing of the Concluding Observations in the next reporting cycle subsequently impacts scrutiny at the devolved level.[179]

171 Jane Williams and Simon Hoffman, 'Accountability' in Williams (ed) (n 57 above) 117; Children, Young People and Education Committee (Senedd Cymru), Inquiry into Children's Rights in Wales, Evidence from Dr Simon Hoffman (16 October 2019) 140.

172 Simon Hoffman and Sean O'Neill, *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (EHRC August 2018, published March 2019) 38–40; Hoffman (n 57 above) 16, 116–117.

173 Children, Young People and Education Committee, Children's Rights in Wales (August 2020).

174 Ibid, ch 8 and [344].

175 Letter from Julie Morgan MS, Deputy Minister for Health and Social Services, to the Chair of the Children, Young People and Education Committee (23 September 2020).

176 Welsh Government, Welsh Government Update on Progress following the Publication of the United Nations Committee on the Rights of the Child Concluding Observations Report into the United Kingdom of Great Britain and Northern Ireland 2016 (WG42282 March 2021).

177 Welsh Government, Children's Rights Scheme 2021 (WG44156 December 2021).

178 Welsh Government, Children and Young People's Plan (1 March 2022).

179 Hoffman (n 57 above) 116.

## CONCLUSION

The aim of this article has been to fill a critical gap in understanding the role and engagement of devolved governments in the monitoring of UN human rights treaty compliance, using the UNCRC and Wales as a case study. This is important because so far there has been little empirical research into examining the extent to which devolved governments are involved in state reporting. While recognising the treaty-monitoring system's important role in the promotion and protection of human rights, much of this existing literature has focused on highlighting weaknesses in treaty-monitoring bodies that are not conducive to effective reporting[180] and proposals for the system's reform.[181] Even so, beyond the introduction of a moderately simplified reporting procedure, the UN monitoring system remains under-resourced and oversubscribed. For the UK, this means that the systematic challenges to reporting in a devolved jurisdiction are likely to remain for some time.

From the experience of the UK's Fifth Periodic Reporting Cycle of the UNCRC, this study confirms that the UK Government could do more to engage the devolved governments in treaty monitoring and to sufficiently incorporate devolved policy when reporting. In doing so, this article identifies an opportunity to improve reporting efficacy at the domestic level in future monitoring cycles. As a result of efforts from a range of actors and stakeholders, treaty bodies are provided with quality information that does highlight issues specific to each of the four countries in the UK, meaning they are conversant of several factors and difficulties affecting the degree of fulfilment of the obligations of the treaties across the UK. Even so, this does not negate the UK's responsibility for ensuring that a treaty body receives sufficient information to enable a comprehensive understanding of the implementation of obligations in the UK. Meaningful engagement with the devolved governments is needed to ensure accuracy and reliability when evaluating the implementation of UN human rights treaties, and it is the responsibility of UK Government to ensure that it has a process that allows this to happen. The study's findings clearly indicate that this is not always the case.

To ensure effective reporting, UK Government should establish a robust and comprehensive procedure that ensures that each country in the UK, and its overseas territories and Crown dependencies, are fully engaged and represented in international human rights reporting mechanisms. As a minimum, such a procedure should aim to ensure closer and obligatory cooperation between Whitehall and the devolved

180 Crawford (n 15 above). See also O'Flaherty and O'Brien (n 2 above).

181 See nn 3 and 5 above.

governments to produce a State Report that appropriately and distinctly reflects law, policy and practice in each nation with respect to the concerns of the treaty under consideration.[182] It should also ensure that the UK delegation is composed of a balanced number of representatives from each country, that delegation responses to Committee questions clearly indicate whether the reply relates to law, policy and practice in the UK as a whole or solely to a specific nation, and that delegation representatives have a full understanding of the division of responsibilities between the UK Government and the devolved governments.

Ultimately, these findings raise key questions and issues that will support the future evaluation of UK state reporting and the role of the devolved nations in treaty-monitoring processes. While this article has focused on the role of the UK Government as the state party, the systemic issues in the reporting process should not be overlooked. In discussing reform to the treaty body system, there must be consideration of how the system can effectively manage multi-governance states. As noted above, the reporting requirements and the general nature of the Concluding Observations should be part of the context of future analysis too.

At the time of writing, the UK is participating in the Sixth Periodic UNCRC Reporting Cycle. The fulfilment of commitments such as establishing a Youth Parliament for Wales and changes resulting from new devolution arrangements in Wales, such as allowing votes at age 16 in Senedd elections, abolishing the defence of reasonable chastisement against children, and bringing the socio-economic duty under the Equality Act 2010 into force in Wales, will further show a differing approach to children's rights in Wales. Different approaches to managing Covid-19 and its impact on children, especially in terms of education, will also be an important context for the sixth cycle.[183] It is also likely that further divergence will emerge generally regarding human rights between the UK Government and the devolved governments.[184] The Welsh Government has recently established a legislative options group that includes looking at the potential for a

182 These recommendations were previously submitted as written evidence to the JHRC; Hayley Roberts and Alison Mawhinney, Written Evidence to the Inquiry on the UK's Record on Children's Rights (19 October 2016) CHR0022.

183 Senedd and Elections (Wales) Act 2020; Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020; Williams, 'Seven threads in policy' (n 57 above) 179–203; Hoffman (n 57 above) 101–103.

184 'England, Scotland, Wales and Northern Ireland, NGO briefing to the UN Committee on the Rights of the Child to inform its List of Issues Prior to Reporting United Kingdom of Great Britain and Northern Ireland' (December 2020).

Welsh Human Rights Bill.[185] More advanced work in this regard has taken place in Scotland with a commitment for a new statutory human rights framework.[186]

This article will provide a valuable basis of comparison for evaluating the effectiveness of the next reporting cycle, particularly in relation to the role of the devolved nations and portraying a full and accurate picture of children's rights in the UK, in addition to facilitating research on other UN treaty-monitoring processes in the future.

185 Welsh Government, 'Welsh Government Response to the "Strengthening and Advancing Equality and Human Rights in Wales" research report' (2022) 3.

186 Scottish Government, 'New Human Rights Bill' (12 March 2021); National Taskforce for Human Rights, Leadership Report (Scottish Government March 2021).

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# Devolution and international human rights monitoring mechanisms

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ABSTRACT

This article analyses how the protection of human rights in the three devolved regions of the United Kingdom (UK) has been periodically monitored at the international level since devolution took effect in 1999. It looks at the work of the 10 United Nations monitoring mechanisms to which the UK has subscribed and at seven Council of Europe mechanisms. A summary is provided of the degree to which the UK's national reports, responses to lists of issues and replies to questionnaires have referred to human rights issues in Scotland, Wales and Northern Ireland, and there is then a summary of references made to those jurisdictions in the monitoring body's concluding observations or reports, especially when the references express concerns about whether the rights in question are being fully protected in accordance with treaty requirements. The analysis reveals that UK national reports do now include a lot of information about how rights are protected in the devolved regions, even if the devolved administrations themselves, especially in Northern Ireland, are not always as cooperative as they should be in compiling the national reports. The monitoring bodies also now pay close attention to regional variations in the protection of rights and at times issue recommendations directed at the devolved administrations, while emphasising that the UK Government has ultimate responsibility for compliance with treaty obligations. The case study illustrates various well-known defects in the international monitoring system, such as delays, duplication of effort and lack of enforcement powers.

**Keywords:** human rights monitoring; devolution and human rights; UN and European monitoring bodies.

## INTRODUCTION

There are essentially three different ways in which international human rights standards can be 'enforced' at the national level by external states or institutions. The first is through 'direct action', which can take the form of travel restrictions, economic sanctions or even military intervention. The second is through litigation, perhaps by lodging a complaint with a regional Court of Human Rights or sending a 'communication' to a treaty-monitoring body. The third enforcement

mechanism is the evaluative one, whereby an independent body – eg the United Nations (UN) Human Rights Council, a Working Group, a Special Rapporteur, a Commissioner or a treaty-based monitoring committee – evaluates the extent to which a state is complying with its international human rights obligations and issues a report listing its conclusions and recommendations.[1] It is with this last type of enforcement mechanism that this article is solely concerned, and in particular those which operate on an agreed periodic basis.

Typically, the evaluative mechanisms operate in review cycles and require the state to initiate the monitoring round by submitting a national report on how it has met its obligations under a particular treaty during the immediately preceding years. But some mechanisms operate on a more *ad hoc* basis: they do not demand a national report but they do seek answers to written questions and may pay visits to the state to inspect facilities (such as prisons or refugee centres) and to speak with government representatives, activists and other experts with knowledge of the human rights situation on the ground.

Under international law the duty to comply with ratified treaties rests squarely on national governments, even when day-to-day responsibility for meeting the standards in question has been devolved to sub-state entities such as, in the United Kingdom (UK), the Scottish Government, the Welsh Government and the Northern Ireland Executive. This orthodox position was clearly stated by, for example, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) in its Concluding Observations on the UK's Eighth Periodic Report in 2019:

> The Committee is cognizant of the State party's structure of government, with devolved administrations in Northern Ireland, Scotland and Wales, and with separate governance structures in the State party's overseas territories and Crown dependencies. It recalls, however, that the devolution of government powers does not negate the direct responsibility of the State party to fulfil its obligations to all women and girls within its jurisdiction … It also recalls that article 27 of the Vienna Convention on the Law of Treaties provides that a party to a treaty may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.[2]

The monitoring mechanisms which were the focus of a study backgrounding the current article are the periodic evaluations conducted by UN, Council of Europe and (in one case) European Union

1 Sometimes these evaluative bodies can also hold 'inquiries' into particular human rights issues. Two examples of such inquiries involving the UK are mentioned at nn 11 to 13 and 56 below.

2 CEDAW/C/GBR/CO/8, para 10. There was no space in this article to examine how the UK's Crown Dependencies and Overseas Territories are now dealt with by the evaluative mechanisms.

(EU) bodies.[3] As indicated in Table 1, the UK is currently involved in 10 UN mechanisms and eight Council of Europe mechanisms. There are two UN mechanisms which have not made assessments of the UK because the UK has not yet ratified the treaties under which

*Table 1: Human rights monitoring mechanisms applying to the UK (with starting dates)*

| | **United Nations mechanisms** | | **Council of Europe mechanisms** | |
|---|---|---|---|---|
| 1 | Committee of Experts on the Application of Conventions and Recommendations (CEACR)[4] | 1926 | European Committee on Social Rights (ECSR) | 1968 |
| 2 | Committee on the Elimination of Racial Discrimination (CERD) | 1969 | European Committee on the Prevention of Torture (ECPT) | 1989 |
| 3 | Human Rights Committee[5] | 1977 | European Commission Against Racism and Intolerance (ECRI)[6] | 1993 |
| 4 | Committee on the Elimination of Discrimination Against Women (CEDAW) | 1981 | Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) | 1998 |
| 5 | Committee Against Torture (CAT) | 1984 | Group of States Against Corruption (GRECO) | 1999 |
| 6 | Committee on Economic, Social and Cultural Rights (CESCR) | 1985 | Committee of Experts of the Charter for Regional or Minority Languages (CECRML) | 2001 |
| 7 | Committee on the Rights of the Child (CRC) | 1991 | Group of Experts on Action against Trafficking in Human Beings (GRETA) | 2009 |
| 8 | Sub-Committee on the Prevention of Torture (SPT) | 2007 | Group of Experts on Action Against Violence Against Women and Domestic Violence (GREVIO) | 2022 |
| 9 | Human Rights Council[7] | 2007 | | |
| 10 | Committee on the Rights of Persons with Disabilities (CRPD) | 2008 | | |

3 Brice Dickson, *International Human Rights Monitoring Mechanisms: A Study of their Impact in the UK* (Edward Elgar 2022). The study was undertaken with the help of an Emeritus Fellowship from the Leverhulme Trust, whose assistance is here gratefully acknowledged. The EU mechanism is – or was, now that the UK has left the EU – the monitoring conducted by the Fundamental Rights Agency, whose offices are in Vienna. Its monitoring is not reviewed within this article.

4 This Committee evaluates state adherence to (*inter alia*) the eight 'fundamental rights' Conventions drawn up by the International Labour Organization, now a UN institution.

5 This Committee evaluates state adherence to the International Covenant on Civil and Political Rights.

6 This is the only Council of Europe mechanism which is not linked to a specific human rights treaty.

7 This is the UN body which conducts Universal Periodic Reviews of each member state every four or five years. It is the only mechanism not conducted by human rights experts but by political representatives.

they operate, and in the case of one Council of Europe mechanism monitoring became possible only in November 2022.[8]

As many as seven of the 18 mechanisms listed in Table 1 began operating only *after* considerable powers were devolved to Scotland, Wales and Northern Ireland in 1999. Since then it might have been expected that the devolved administrations would play a significant role in providing information for, and responding to, evaluations conducted by the various mechanisms, especially the new ones. Regrettably, that has not consistently been the case, although in recent years the situation has improved.

The evaluations conducted after 1999 are listed in Table 2.[9] It will surprise many readers to learn that there are no fewer than 145 of them, roughly two-thirds being UN evaluations and one-third European.[10] The 73 evaluations conducted by the International Labour Organization (ILO) were of a much less intensive nature than those conducted by the traditional treaty-monitoring bodies but were still rigorous. A further 21 evaluations were conducted by the European Committee on Social Rights (ECSR), since under its system states which have ratified the European Social Charter are assessed each year on one of four groups of rights. Of the remaining 51 evaluations, two were not periodic reports but *ad hoc* inquiries set up by the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of Discrimination Against Women (CEDAW), the latter of which became a key driver of the process which ultimately led to the decriminalisation of abortion in Northern Ireland.[11]

Each of the evaluations relied greatly on information submitted to the monitoring body concerned. Some of this was specifically requested, some was volunteered. It emanated not just from government sources but also from quangos and civil society organisations. The accuracy of evaluations clearly depends on the quality of information supplied. When monitoring mechanisms make visits to states – as do the Council of Europe mechanisms (except for the ECSR) and UN bodies when conducting inquiries or inspections – there are clear opportunities to gain further insights. The bodies can do their own research too.

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8 These are the UN Committee on the Rights of Migrant Workers, the UN Committee on Enforced Disappearances and the Council of Europe GREVIO. The UK eventually ratified the (Istanbul) Convention on Preventing and Combating Violence against Women and Domestic Violence on 22 July 2022, and it came into effect for the UK on 1 November 2022.

9 There was a Northern Ireland Parliament and Government between 1921 and 1972, but there appears to be no record of the involvement of either institution in the ECSR's evaluations of the UK in 1968, 1970 and 1972, nor in CERD's evaluations in 1970 and 1972.

10 This was the position as of 31 December 2022.

11 By the Northern Ireland (Executive Formation etc) Act 2019, s 9.

*Table 2: Evaluations of the UK by UN and Council of Europe mechanisms, 1999–2022*

| UN Evaluative Mechanisms | Council of Europe and Evaluative Mechanisms |
|---|---|
| CEACR (ILO): 73 reports since 2000 | ECSR: 21 reports since 2000 |
| CERD: 2001, 2003, 2011, 2016 | ECPT: 2001, 2009, 2018 |
| Human Rights Committee: 2001, 2008, 2015 | ECRI: 2001, 2005, 2010, 2016, 2019 |
| CRC: 2002, 2008, 2016 | GRECO: 2001, 2004, 2008, 2012, 2018 |
| CESCR: 2002, 2009, 2016 | ACFC: 2002, 2007, 2011, 2016 |
| CAT: 2004, 2013, 2019 | CECRML: 2003, 2006, 2010, 2013, 2018 |
| Human Rights Council: 2008, 2012, 2017 | GRETA: 2012, 2016, 2021 |
| CEDAW: 2008, 2013, 2018,[12] 2019 | |
| CRPD: 2016,[13] 2017 | |
| SPT: 2020 | |
| **Total number of evaluations: 99** | **Total number of evaluations: 46** |

For the purposes of this article an analysis was made of the information supplied about the devolved regions by the UK Government during the most recent round of each of the 17 varieties of periodic evaluation.[14] It appears that there is little uniformity in the way that central government departments liaise with devolved governments in this regard. Regrettably, it was not possible in this short piece to also analyse the information supplied by regional non-governmental organisations or the three 'national human rights institutions'.[15] In addition, an analysis was made of the attention given to the UK's devolved regions in the monitoring bodies' Concluding Observations or reports. A summary of the results of these analyses is set out below, working forward from the least recent evaluation (published in July 2015) to the most recent (published in December 2021). In the case of the ECSR and the Committee of Experts on the Application of Conventions and Recommendations (CEACR), each of which spread their periodic evaluations over a number of years, the last complete cycle of evaluations has been analysed (2018–2021 for the ECSR; 2019–

12 This was a report of an inquiry conducted by CEDAW on the criminalisation of abortion in Northern Ireland.

13 This was a report of an inquiry into the impact of austerity measures on persons with disabilities in the UK.

14 In May 2014, the Office of the UN High Commissioner for Human Rights set a limit of 21,200 words for state reports and 10,700 words for treaty bodies' Concluding Observations: A/RES/68/268. While doubtless necessary for bureaucratic reasons, these word limits do restrict the breadth and depth of analysis in those documents.

15 These are the Equality and Human Rights Commission (which covers Wales as well as England, but only equality issues in Scotland), the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission.

2022 for CEACR). The article therefore looks at the comments made on *all* the human rights standards monitored by the 17 mechanisms. The focus is not so much on the substance of the information supplied and evaluated as on the degree of attention paid by the state and the monitoring body to the human rights situation in each devolved region. An ascending chronological approach to the evaluations has been adopted in order to make it clearer whether the devolved regions are being given more attention as time moves on.

## THE HUMAN RIGHTS COMMITTEE (JULY 2015)

The UK's Seventh Periodic Report was submitted in 2012.[16] Its 'Foreword' claims that the increased devolution of powers to Scotland, Wales and Northern Ireland greatly impacted upon the character of the report and in the section where responses are given to the Committee's previous recommendations from 2008 it is stressed that entries referring to the devolved nations are direct submissions from those nations' governments unless otherwise indicated. But in fact this applies only to entries relating to Scotland and Wales because earlier the report admits that:

> [d]espite requests from the UK Government, the devolved administration in Northern Ireland has been unable to agree a contribution to this report reflecting the views and actions of the Northern Ireland Executive relating to those Articles for which they have policy responsibility under the devolution settlement.[17]

This is a sad reflection of the disharmonious nature of the relationship between the Democratic Unionist Party and Sinn Féin within the Office of the First Minister and Deputy First Minister in Northern Ireland's Executive between 2007 and 2012.[18]

In explaining the UK's position regarding article 1 of the International Covenant on Civil and Political Rights (ICCPR) (which guarantees the right of all peoples to self-determination), 23 paragraphs are devoted to explaining the devolution arrangements in the UK. In the remainder of the report there are separate paragraphs on developments

16 CCPR/C/GBR/7 (29 December 2012). The Committee now operates on the basis that it will review each country every eight years. The UK's next report was due by 24 July 2020, but it was not received until 28 June 2021 (CCPR/C/GBR/8). It is based on the list of issues adopted by the Committee in March 2020 (CCPR/ C/ GBR/QPR/8) and should be considered by the Committee during 2023.

17 Ibid para 12.

18 The Assembly and Executive were suspended from 2002 to 2007, due largely to the failure of Republican paramilitary groups to decommission their weapons. It was only in 2010 that responsibility for policing and criminal justice was transferred to Northern Ireland from Westminster.

in Scotland on more than 20 different issues relating to, for example, equality and discrimination, judicial appointments, police and judicial training, human rights education in schools, domestic violence against women, deaths in police custody and in prisons, human trafficking, the treatment of asylum seekers, aspects of criminal procedure, religious education, freedom of information, hate crime, civil partnerships, and the rights of children and young people.

There are fewer separate references to Wales, partly because the devolution of powers in Wales was (and still is) not as extensive as in Scotland and Northern Ireland. There are separate paragraphs on public sector equality duties, reducing violence against women, the appointment of an Anti-Trafficking Co-ordinator, the Rights of Children and Young Persons (Wales) Measure 2011, the Welsh language and education.

With regards to Northern Ireland, mention is made of the continuing derogation notice relating to the right to liberty guaranteed by article 9 of the Covenant, deemed necessary because of the continuing risk of terrorism in that part of the UK. For the same reason non-jury trials are mentioned. Further information is supplied as to how the right to a thorough investigation of killings is protected.

In the Human Rights Committee's Concluding Observations on the UK's report,[19] five concerns were raised vis-à-vis Scotland: the way stop and search powers were being used; the high number of suicides; the availability of a 'justifiable assault' defence when children are corporally punished (particularly at home); the cuts to legal aid; and the fact that the minimum age for criminal responsibility was set at eight years and for criminal prosecutions at 12 years. Wales did not attract the Committee's concern on any matter specific to that jurisdiction, but Northern Ireland was criticised for: the slow progress in introducing a Bill of Rights; the reduction in the budget of the Northern Ireland Human Rights Commission (NIHRC); the poor quality and pace of the process for promoting accountability in relation to 'the Troubles'; the way stop and search powers were exercised without data being gathered on the community background of those stopped; the low number of women in the civil service and the judiciary; the highly restricted circumstances in which abortion was permitted; delays across the criminal justice system; and the absence of suitable bail packages for child defendants.

19 CCPR/C/GBR/CO/7 (adopted 21 July 2015).

## THE ADVISORY COMMITTEE ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES (MAY 2016)

The Advisory Committee on the Framework Convention (ACFC) issued its fourth Opinion on the UK on 25 May 2016.[20] Here we look not only at the UK's Fourth Report on which that Opinion was based, but also at its Fifth Report which was received on 4 November 2021 and on which the ACFC's Opinion should be published in mid-2023.[21]

The fourth Opinion is quite generous in the attention it gives to the devolved regions. It notes the moves that were then in place to increase the devolution of powers to Scotland and Wales. It describes the situation in Northern Ireland as:

> characterised by political tensions in governing bodies, tensions that often prevent smooth governance, by lack of dialogue with stakeholders and by the continuing lack of an updated legal framework for equality implementing section 75 of the 1998 Northern Ireland Act.[22]

It devotes separate paragraphs to the three devolved regions when commenting on sites for Gypsies and Travellers and it looks closely at what has been done to protect the Gaelic and Scots languages in Scotland, the Welsh language in Wales and the Irish and Ulster Scots languages in Northern Ireland.

There are seven paragraphs on community relations in Northern Ireland and two recommendations targeted directly at the Northern Ireland Executive rather than the UK Government: it should 'adopt legislation directing the Department for Education to enhance shared education' (between children from Protestant and Catholic backgrounds) and it should 'monitor the Traveller Education Support Service to ensure that access and attendance of Traveller children to education is effective and that funds provided to schools in relation to children belonging to ethnic minorities are used to improve their attainment'.[23] The report also says the Northern Ireland Assembly should adopt robust and comprehensive single equality legislation. Neither the Scottish nor the Welsh Government and legislature are targeted in this direct manner.

The UK's Fifth Report consists mainly of information on what progress has been made in implementing the ACFC's 2016 recommendations. Where pertinent, reference is made to developments in Scotland and Wales. Startlingly, at three points the report admits that further information is still awaited from the Northern Ireland

20 ACFC/OP/IV(2016)005.
21 ACFC/SR/V(2021)009.
22 See n 20 above para 7.
23 Ibid paras 119–120.

Executive on comprehensive equality legislation, using disaggregated data to help implement effective minority protection policies and supplying legislative definitions of 'good relations' and 'sectarianism'. But responses are provided on other issues in Northern Ireland, such as housing, the protection of Irish and Ulster Scots, and shared education. This suggests that it was the Executive Office itself (which is responsible for equality issues) and not other departments in the Northern Ireland Government, which was resisting cooperation with the ACFC when the fifth state report was being compiled.

## THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (JUNE 2016)

The UK's Sixth Periodic Report was submitted in June 2014.[24] The bulk of it (paras 5 to 107) is devoted to responding to the Committee's previous recommendations in 2009,[25] one of which called for the adoption of a national action plan on human rights. The UK Government's response was that '[t]he development and management of such a plan would have implications in the context of devolution',[26] and it added that human rights promotion is further strengthened at the devolved level, citing Scotland's National Action Plan for Human Rights developed by the Scottish Human Rights Commission in 2013 and the Welsh Government's UN Stakeholder Group, which provides expert advice to the government on UN human rights reporting. In preparing its periodic report, the UK Government held stakeholder events not just in London but in Edinburgh, Cardiff and Belfast. For some unexplained reason the Executive in Northern Ireland seems to have been willing to cooperate in the preparation of this national report (and also with that for the Committee on the Rights of the Child (CRC), below) but not with that for the Human Rights Committee (above).

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24 Sixth Periodic Report E/C.12/GBR/6. It is much longer than 21,200 words (see n 14 above) because it was already in an advanced draft when that limit was imposed. At several points it incorporates by reference information contained in the UK's latest 'Core Document', issued in 2014 (a new version was issued in 2022: HRI/CORE/GBR/2022). It also follows the UN Office of the United Nations High Commissioner for Human Rights' guidance by cross-referring extensively to UK state reports already submitted to other UN and Council of Europe treaty-monitoring bodies – CERD, the Human Rights Committee, CEDAW, CAT, the CRC, the CRPD, the ECSR, the ACFC and the CECRML. This practice saves on words, reduces the workload of treaty bodies and enhances their consistency of approach. The UK's Seventh Periodic Report was received by CESCR on 20 May 2022: E/C.12/GBR/7. It makes copious references to developments in each of the three devolved regions, but it may not be considered by CESCR until 2024.

25 E/C.12/GBR/CO/5.

26 See Sixth Periodic Report (n 24 above) para 8.

The report goes on to provide more information about how Scotland, Wales and Northern Ireland are complying with the previous recommendations of the Committee on Economic, Social and Cultural Rights (CESCR) regarding the provision of employment opportunities, the protection of women and girls from violence, the right to adequate housing (including for Roma, Gypsies and Irish Travellers), the right to the highest attainable standard of health, the prevention of suicide, the reform of the welfare benefits system, the reduction of inequalities in the primary and secondary education systems and the introduction of higher tuition fees at the tertiary level.

The report mentions what both Scotland and Wales have done vis-à-vis gender equality, the poor health of people with mental disabilities, and greater awareness-raising for health care professionals and the general public concerning dementia and Alzheimer's disease. Scotland's commitment to a minimum Living Wage is also referred to.

On Northern Ireland the report corrects CESCR's assumption that there is already a draft Bill of Rights for Northern Ireland about to be presented to Parliament, and it reminds the Committee about Northern Ireland's public sector equality duties,[27] the details of Northern Ireland's law on abortion and what is being done to develop the Irish language. On the last of these issues the report cross-refers the Committee to information in reports already submitted by the UK Government to the Council of Europe's ACFC and Committee of Experts of the Charter for Regional or Minority Languages (CECRML).

Subsequent paragraphs in the report outline additional developments within the UK beyond those covered in the responses to CESCR's 2009 recommendations. Three of these relate to Scottish developments, on protection of the family, the right to an adequate standard of living and the right to education. Wales and Northern Ireland do not feature.

The Committee's Concluding Observations were adopted in June 2016.[28] CESCR welcomed the constructive dialogue held with the UK's ministerial delegation, which included representatives from Scotland and Wales but not from Northern Ireland. It could not therefore make 'a full assessment of the enjoyment of Covenant rights in Northern Ireland', and it asked future UK governments 'to ensure effective coordination with all devolved administrations, particularly Northern Ireland'.[29] Nevertheless, the Observations include multiple comments on human rights in Northern Ireland, only two on Scotland (on enhancing childcare services and reducing the gender pay gap) and none specifically on Wales.

27 These were provided for by the Northern Ireland Act 1998, s 75.

28 E/C.12/GBR/CO/6.

29 Ibid paras 2, 7 and 72.

Regarding Northern Ireland, CESCR repeated its 2009 recommendation that the UK should 'take all necessary measures to expedite the adoption of a bill of rights',[30] regretted that there was no equivalent to Great Britain's Equality Act 2010, called for an anti-poverty strategy and for the repeal of the Unauthorised Encampments (NI) Order 2005, urged that immediate measures be taken to reduce the exceptionally high rate of homelessness, proposed that the law on termination of pregnancy should be made compatible with women's rights to health, life and dignity, and recommended that an Irish Language Act be enacted.

## THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (JUNE 2016)

The European Commission against Racism and Intolerance (ECRI) conducted its fifth assessment of the UK's performance in tackling racism and intolerance in 2016. Its experts prepare their reports by analysing documents, visiting the country concerned and conducting a confidential dialogue with the country's authorities. As with the Council of Europe's Group of States against Corruption (GRECO) and Group of Experts on Action against Trafficking in Human Beings (GRETA), different topics are chosen as the focus for each round of assessments. For ECRI's fifth round, the four topics were legislative issues, hate speech, violence and integration policies. In addition, each assessment looks at how the state has implemented ECRI's recommendations from the previous round. A novel feature of the process is that the Commission is asked to specify two priority implementations above all others, and the state must then submit a follow-up report on how it is implementing those two recommendations.

ECRI's 2016 report makes 23 recommendations. None of them relates specifically to Scotland or Wales, but Northern Ireland features three times.[31] First, and this was one of the round's two priority recommendations,[32] ECRI strongly recommended 'that the authorities of Northern Ireland consolidate equality legislation into a single, comprehensive equality act, taking inspiration from the Equality Act 2010 [applicable in Great Britain]'. Second, it recommended that Northern Ireland develop a refugee integration strategy to assist newly arrived refugees with matters such as housing and access to welfare.

30 Ibid para 10.

31 CRI(2016)38 (adopted 29 June 2016). An appendix contains the UK Government's comments on the report.

32 The second priority recommendation was that in Great Britain data should be collected on the application of the Equality Act 2010, from the filing of a complaint to the final outcome.

Third, it wanted legislation to be enacted protecting people in Northern Ireland from discrimination on grounds of gender identity: currently the law protects people only on the ground of gender reassignment.

In 2019 ECRI issued its conclusions on how the UK was implementing its two priority recommendations, including the one on equality in Northern Ireland.[33] It had been informed that, in the absence of a functioning Northern Ireland Executive since January 2017, there had been no ministerial agreement on a new Equality Act, but a team had been set up to review the Race Relations (NI) Order 1997. There was not enough progress to allow ECRI to find that its recommendation had been implemented. The Review was eventually published in March 2023, for consultation; legislation may therefore finally appear in 2024.

## THE COMMITTEE ON THE RIGHTS OF THE CHILD (JULY 2016)

The UK's Fifth Periodic Report was submitted in May 2014.[34] In its depiction of the current state of play in the UK it focused on issues raised by the CRC in its 2008 Concluding Observations,[35] and in relation to nearly all of them information is supplied on the position in each of the devolved regions. Even developments in Northern Ireland are extensively recorded, indicating that, as with the report to CESCR, government departments in Northern Ireland must have been involved in its compilation. Appendix 3 to the report provides further information on devolution, including new legislative measures, while Appendix 4 contains fascinating fine-grained detail on how much money is allocated to children's issues throughout the UK. For instance, the per head spending on primary and secondary education in each region of the UK in 2012–2013 was £6504 in England, £6396 in Scotland, £6262 in Wales but only £4961 in Northern Ireland.

After reviewing the state report, in November 2015 the CRC sent the UK Government a 'List of Issues' (28 of them in all) on which it required more information.[36] The UK replied to that list in March 2016,[37] and in July the CRC adopted its Concluding Observations.[38] In the latter document the CRC seemed to recognise the realities of devolution in the UK when it said that, while the recommendations were addressed to the UK Government, they were also addressed 'where relevant mandates

33 CRI(2019)28 (adopted 3 April 2019).
34 CRC/C/GBR/5.
35 CRC/C/GBR/CO/4.
36 CRC/C/GBR/Q/5.
37 CRC/C/GBR/Q/5/Add.1
38 CRC/C/GBR/CO/5.

fall under their jurisdiction, to the governments of the devolved administrations in Wales, Scotland and Northern Ireland'.[39] Amongst the concerns expressed about the regions were: for Scotland, the high rate of children in care, the lack of a statutory duty on local authorities to provide safe and adequate sites for Travellers and the retention of eight years as the minimum age for criminal responsibility; for Wales there were no issues raised that were not also an issue for England or one of the other regions; for Northern Ireland, the issues were the need for a Bill of Rights 'agreed under the Good Friday Agreement' (GFA),[40] the lack of 'a child rights indicator framework' with relevant data, the exclusion of children under 16 years from the protection of age discrimination legislation, violence against children carried out by non-state actors involved in paramilitary-style attacks, the use of secure accommodation for some children in care, the criminalisation of abortion and the segregation of schools by religion. The CRC noted as well that in Scotland and Northern Ireland children have no right to withdraw from collective worship without parental permission.

To start the sixth cycle of reporting, and in line with the UN's preferred 'simplified reporting procedure', the CRC issued the UK with a 'List of Issues Prior to Reporting' (LoIPR) in March 2021,[41] and the UK submitted a 5000-word update on developments in its devolved regions in June 2022.[42] It is on the LoIPR that the UK will focus when submitting its joint Sixth and Seventh Periodic Reports.[43] Unless otherwise stated, the CRC wants responses to each issue to include separate information in respect of England, Scotland, Wales and Northern Ireland.[44]

## THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (AUGUST 2016)

The UK's joint Twenty-First, Twenty-Second and Twenty-Third Periodic Report was submitted to the Committee on the Elimination of Racial Discrimination (CERD) in 2015. It too reminds the Committee about the devolution arrangements in the UK:

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39 Ibid para 3.

40 Ibid para 7(b). This is a factual inaccuracy, since the GFA does *not* promise a Bill of Rights.

41 CRC/C/GBR/QPR/6–7.

42 See 'Annex B: Developments since 2016' on the UN's Human Rights Treaty Bodies Database (section on the CRC). See too Annex E: III. Statistical information and data, which includes a lot of data relating to the three devolved regions.

43 The full joint report was apparently submitted on 15 June 2022, but at the time of writing (February 2023) it was still not available on the Treaty Body Database.

44 See n 41 above para 2.

> Under the UK's devolved system of government, legislation and policy in Scotland, Wales and Northern Ireland on many subjects relevant to the Convention are the responsibility of the devolved administrations. The commitment of the governments of Scotland, Wales and Northern Ireland to the Convention is exemplified by their participation in drafting the State Report and attending the periodic examinations.[45]

To an extent the report is a model of how the UK should be reporting to a treaty body because on many issues it sets out what is different about the position in Scotland, Wales and Northern Ireland compared with that in England. However, this is done in a rather haphazard fashion. There are separate sections for the three devolved regions in relation to five themes: race equality and integration policies; measures to improve equality of socio-economic outcomes; tackling hate crime; Traveller accommodation; and education. But nothing specific is said about Scotland on police stop and search powers, on the representativeness of the police, on health or on mental health. There is nothing about Wales in relation to police stop and search powers or on housing. There is nothing about Northern Ireland concerning anti-Muslim hatred or mental health. In relation to health there are four paragraphs on the situation in England, none on Scotland, three on Wales and, bizarrely, 22 on Northern Ireland. Clearly the devolved administrations were not working to the same template when compiling their contributions to the State Report or else their contributions were not adequately edited at a central UK level. Moreover, as is common, a lot is said in this report about what *is being* or *will be* done, rather than about what *has been* done during the period under review. Even when the past *is* reviewed, indications are rarely given as to whether the initiatives taken were effective in reducing racial discrimination.

CERD adopted its Concluding Observations in August 2016. It appreciated 'the open and constructive dialogue that it had with the delegation of the State party, which included representatives of Northern Ireland, Scotland and Wales'.[46] Like the Human Rights Committee a year earlier, CERD referred to 'the complex structure of the State party, with devolved governments in Northern Ireland, Scotland and Wales', but it reiterated that 'as the duty bearer at the international level, the State party has the duty to ensure that the provisions of the Convention are implemented effectively in all territories it is responsible for'.[47] The Committee expressed concerns in relation to the failure by all three devolved governments to collect data on the enjoyment of rights by members of ethnic minorities in all fields of life

45 CERD/C/GBR/21–23 para 12.

46 CERD/C/GBR/CO/21–23 para 2. The UK's next report was due by April 2020 but by February 2023 it had still not been received.

47 Ibid para 4.

and to review the impact of stop and search powers on such persons. One concern specific to Scotland was the inability of its Human Rights Commission to support individuals with their legal claims. Nothing specific was observed about Wales. Four points were made about Northern Ireland: the absence of comprehensive anti-discrimination legislation; the slowness of the process for adopting a Bill of Rights; the reduced resources of the NIHRC; and the lack of information on concrete measures adopted to address racial discrimination.

## THE HUMAN RIGHTS COUNCIL (MAY 2017)

The UK's national report for its third Universal Periodic Review (UPR) in 2017 expressly states that it includes contributions from devolved administrations.[48] During its preparation there were 'stakeholder' events in Glasgow and Cardiff and the Northern Ireland Executive 'held a series of bilateral meetings with various organisations in the course of October 2016'.[49] Separate attention is given to the three devolved regions on human trafficking, discrimination and hate crime, the treatment of detainees, combating poverty, the gender pay gap, the rights of older persons, the rights of persons with disabilities, Gypsies and Travellers, protecting children's rights, and promoting health.

On the legal framework for protecting human rights, mention is made of the Scottish Government's commitment to integrate human rights and the Sustainable Development Goals within its 'National Performance Framework' and also of its National Equality Improvement Project, which assists public authorities to better comply with the public sector equality duty, including in the socio-economic area. A paragraph on Northern Ireland refers to the UK Government's promise to seek a resolution to legacy issues that will allow the bodies envisaged by the Stormont House Agreement of 2014 to be established. In addition, it is 'willing to consider proposals for a Northern Ireland specific Bill of Rights if sufficient consensus can be reached'.[50]

The relevant Working Group of the Human Rights Council adopted its report on the UK in May 2017. As was the custom, it summarised

48 A/HRC/WG.6/27/GBR/1 para 4. The UK's fourth UPR took place in November 2022, with Scotland and Wales being represented on the UK delegation by someone from each of those regions' governments and Northern Ireland being represented by someone from the UK Government (through its Northern Ireland Office). The report of the Human Rights Council's Working Group was published on 9 January 2023 (A//HRC/52/10). It contains no fewer than 302 recommendations, to which responses from the UK Government were still awaited at the time of writing. Scotland is mentioned once in the recommendations, Wales not at all and Northern Ireland 10 times.

49 Ibid para 5.

50 Ibid para 13.

the interactive dialogue held with the national delegation to the UPR, during which 94 other delegations gave statements. As many as 227 recommendations were made by the Working Group. It is in the nature of the UPR process, which is inevitably rather superficial given that the time available is limited and the dialogue is with political representatives rather than human rights experts, that the issues affecting particular regions of the state rarely get much attention unless the human rights situation there is egregious. In the Working Group's report, therefore, there were very few references to Scotland, Wales or Northern Ireland, and in its recommendations there were none at all aimed at Scotland or Wales. There were six specifically concerning Northern Ireland. Five related to the position on same-sex relationships, the role of coroners, abortion law, inclusive education and domestic violence. The sixth, made by Ireland, asked that the UK Government's proposed British Bill of Rights should not adversely affect the protection of rights in Northern Ireland and that 'a Bill of Rights for Northern Ireland ... should be pursued to provide continuity, clarity and consensus on the legal framework for human rights there'.[51]

## THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (AUGUST 2017)

The CRPD's first, and so far only, review of the UK's adherence to the 2006 Convention on the Rights of Persons with Disabilities took almost six years to complete: the UK's report was received in November 2011, but the CRPD did not produce its 'list of issues prior to review' until March 2017, to which the UK replied promptly in July 2017,[52] and the CRPD's Concluding Observations emerged in August 2017.[53]

At the start of the UK's report, in the 'Overview' section, there are multiple paragraphs summing up the situation in Scotland, Wales and Northern Ireland, and in almost all of the subsequent sections of the report separate attention is paid to developments in each of the regions.[54] Unlike with the report to the Human Rights Committee just a year later, there does not appear to have been any lack of cooperation in compiling the report on the part of the Northern Ireland Executive.

The CRPD's report commended the UK delegation, which included persons 'from authorities in Northern Ireland, and the governments of Scotland and Wales'.[55] Otherwise Scotland was mentioned only twice,

51 Ibid para 134.67.
52 CRPD/C/GBR/Q/1 and CRPD/C/GBR/Q/1/Add.1, respectively. The UK's next national report (its joint second, third and fourth) is due by July 2023.
53 CRPD/C/GBR/CO/1.
54 CRPD /C/GBR/1.
55 See n 53 above para 3.

for two positive developments in 2016: its national plan of action to implement the UN Convention on the Rights of Person with Disabilities and its Accessible Travel Framework. The only specific reference to Wales (rather than to England and Wales) was to its Social Services and Well-being (Wales) Act 2014, which provides a framework for social services and health. Northern Ireland, on the other hand, was the subject of several concerns: the CRPD notes the absence of initiatives aimed at addressing living conditions for persons with disabilities, the lack of adequate protection against disability-based discrimination and discrimination by association, the use of non-consensual electroconvulsive therapy (which was also occurring in Scotland and Wales, but less frequently), the high suicide rate among persons with disabilities, and the need for support packages to mitigate the negative impacts of social security reform.[56]

## THE GROUP OF STATES AGAINST CORRUPTION (MAY 2018)

The Council of Europe Committee which evaluates states' compliance with anti-corruption standards (GRECO) published its latest report on the UK in May 2018.[57] It compiles such evaluations on the basis of information collected from a questionnaire sent to the national government and from on-site visits during which meetings are held with various stakeholders. The focus of the fifth round of evaluations was corruption amongst persons with top executive functions in government (whether ministers or senior officials) and amongst members of law enforcement agencies (specifically, in the UK's case, the London Metropolitan Police Service and the National Crime Agency). The three devolved regions are mentioned in passing several times in GRECO's report, but none of its 12 recommendations refers to one of the regions.

In May 2021 GRECO published its comments on how the UK had implemented the recommendations made three years earlier.[58] It concluded that five of the 12 recommendations had been implemented, or otherwise dealt with, satisfactorily. Four had been partly implemented and three had not been implemented. Again, none of the regions featured in GRECO's reckoning. Scotland and Northern Ireland were not mentioned, and Wales was referred to only in the

56 In 2013 the CRPD agreed to launch its first ever 'inquiry' under the UN Convention. It was into the effects of the UK Government's austerity measures on persons with disabilities. For the inquiry's report, see CRPD/C/15/4 (24 October 2017).

57 GrecoEval5Rep(2017)1. The next evaluation will take place in 2023.

58 GrecoRC5(2020)4.

phrase 'England and Wales'. It is remarkable, for example, that the controversy over a Renewable Heating Incentive scheme in Northern Ireland, which was one of the reasons why the Northern Ireland Executive was suspended between 2017 and 2020, does not seem to have been considered by GRECO, despite the widespread allegations of corruption relating to the scheme that were made at the time.[59]

## THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (FEBRUARY 2019)

The UK's Eighth Periodic Report to CEDAW was received in November 2017.[60] The 'Foreword' explains that the report uses statistics and information provided by UK government departments as well as by the devolved administrations in Scotland, Wales and Northern Ireland, and it refers to a targeted engagement exercise with a cross-section of women's organisations organised by the UK, Scottish and Welsh governments, there being stakeholder roundtables held in each of those jurisdictions. It adds that power-sharing negotiations were continuing between the main political parties in Northern Ireland and so 'in the absence of a functioning devolved government, references to Northern Ireland contained in this report remain subject to review and agreement by future ministers with responsibility for the issues concerned'.[61]

The State Report reviews the UK's implementation of the UN Convention on the Elimination of Discrimination Against Women on an article-by-article basis, cross-referring where appropriate to the recommendations issued by CEDAW in 2013 after the previous periodic review. References to developments within the three devolved regions occur under almost every heading within the report, and in truth it is difficult to identify any significant gaps in the information relating to the prevailing situation in Northern Ireland.

CEDAW sent the UK a list of issues prior to review, and the UK duly issued its responses to that list.[62] Amongst the issues was a call for more information from each of the three devolved regions on actions being taken to improve the representation of women in parliament and in local government. Further information was called for from both Scotland and Northern Ireland on the activities undertaken by the UK's Government Equalities Office in those jurisdictions and on

59 The Report of the Independent Public Inquiry into the Non-domestic Renewable Heat Incentive (RHI) Scheme (12 March 2020). See too Sam McBride, *Burned* (Merrion Press 2019).

60 CEDAW/C/GBR/8.

61 Ibid 'Foreword'.

62 CEDAW/C/GBR/Q/8 and CEDAW/C/GBR/Q/8/Add.1 respectively.

the measures taken to ensure the availability of affordable childcare facilities.

CEDAW's Concluding Observations were adopted in February 2019.[63] The UK's delegation at the review meeting with the Committee included representatives of the governments of Scotland, Wales and Northern Ireland but, as already noted,[64] CEDAW sternly stressed that it is the UK Government which must take ultimate responsibility for implementing its international human rights obligations, even if there is no functioning government in a devolved region.[65] The only specific reference to devolved regions in CEDAW's recommendations related to the need for more research to be conducted into the prevalence and nature of prostitution in Scotland and Northern Ireland, so that changes required to legislation and policy could be identified. The UK's Ninth Periodic Report to CEDAW was due in March 2023.

## THE COMMITTEE AGAINST TORTURE (MAY 2019)

The UK's most recent periodic report to the Committee Against Torture (CAT) was submitted in 2017.[66] It comprised the Government's responses to the list of issues prior to reporting, which CAT had published the previous year.[67] The report contains separate sub-sections on Scotland, Wales and Northern Ireland in the sections on violence against women, human trafficking, and minors and women in detention. Scotland and Wales have sub-sections on hate crimes. There are also separate sub-sections on Scotland and Northern Ireland relating to prison regulations, prison overcrowding and the minimum age for criminal responsibility. On several other issues there is separate attention given only to Scotland: training for law enforcement officials, deaths in custody, persons deprived of their liberty in mental health settings, and inadmissibility of evidence obtained through torture. Likewise, only Northern Ireland is referred to on a number of matters: non-jury trials, transitional justice, historical institutional abuse, abortion law and the recruitment of children into illegal paramilitary groups. On a Bill of Rights for Northern Ireland the UK Government said that it was 'willing to consider proposals for Northern Ireland specific rights if sufficient consensus can be reached', the same phrase that it used in its report to the Human Rights Council in 2017.[68]

63 CEDAW/C/GBR/CO/8.
64 See the text at n 2 above.
65 See n 63 above para 10.
66 CAT/C/GBR/6.
67 CAT/C/GBR/QPR/6.
68 See n 66 above para 8. See too nn 40 and 51 above.

CAT's Concluding Observations were adopted in May 2019.[69] They are critical of all three devolved regions (and also England) for their very low minimum ages for criminal responsibility, but otherwise no negative criticism relates specifically to Scotland or Wales. In contrast, a whole page is devoted to accountability for conflict-related violations in Northern Ireland, with CAT calling for the implementation of the Stormont House Agreement of 2014. In particular it does not approve of limitations being placed on the investigations of past crimes, nor of any amnesties being accorded for torture or ill-treatment (a step which CAT says would be inconsistent with the UK's obligations under the UN Convention against Torture). The Committee also called for stronger efforts to be made to promptly and effectively investigate cases of paramilitary violence in Northern Ireland, including against children. As a matter of urgency, measures should be adopted to provide redress to victims of ill-treatment identified by the Historical Institutional Abuse Inquiry, and an impartial and effective investigation into the practices of the Magdalene laundries and mother-and-baby homes should be expedited. Finally, CAT recommended that the UK should ensure that all women and girls in Northern Ireland have effective access to a termination of pregnancy when not doing so would be likely to result in severe pain and suffering or in cases of fatal foetal impairment.

The UK's Seventh Periodic Report to CAT was due by May 2023. In anticipation of that, the Committee issued its list of issues prior to reporting in May 2022.[70]

## THE COMMITTEE OF EXPERTS OF THE CHARTER FOR REGIONAL OR MINORITY LANGUAGES (JULY 2020)

The UK submitted its latest report to the CECRML (also sometimes abbreviated to COMEX) in 2018. It contained long sections on the status of regional languages in Scotland and Wales (and also in Cornwall and the Isle of Man), but it contained nothing whatsoever on Northern Ireland.[71] In its evaluation of the report the Committee regretted this lacuna and added:

> Given that the Northern Ireland Assembly has been suspended since January 2017, it was, as in the fourth monitoring cycle, not possible to agree within the Northern Ireland power-sharing Executive on a contribution to the report. However, it is unclear to the Committee of Experts why the United Kingdom central authorities have not reported on their own competences. The Committee of Experts reminds the UK

69 CAT/C/GBR/CO/6.
70 CAT/C/GBR/QPR/7.
71 MIN-LANG (2017) PR 8, 15–33 (Scotland) and 34–89 (Wales).

> Government that it has the final responsibility under international law for the implementation of the Charter and that it is its treaty obligation to submit a complete report in full compliance with Article 15 of the Charter.[72]

The blockage within the Northern Ireland Executive was doubtless due to Unionist opposition to further protection of the Irish language. Nevertheless, basing itself on information gleaned from elsewhere, not least during its visit to the UK, the Committee's evaluative report still comments quite extensively on the position of both Irish and Ulster Scots in Northern Ireland.[73]

The report helpfully sets out in the form of charts the degree to which the UK's undertakings relating to each of the regional languages have been fulfilled. It calls for more complete implementation where required and then makes specific recommendations. In relation to Scots there are five recommendations, one of which calls for immediate action to provide forums and means for the teaching and study of Scots at all appropriate stages. On Scottish Gaelic there are 11 recommendations, two of which call for immediate action on making school education available in the language and on providing teacher training and learning materials. Welsh attracts three recommendations, all comparatively minor in nature. On Irish there are as many as 18, two of which call for immediate action on adopting a comprehensive law and strategy for its promotion in Northern Ireland and on providing training for a sufficient number of teachers. The only recommendations concerning Ulster Scots are to adopt a strategy promoting its use in education and other areas of public life and to establish cultural relations with other linguistic groups. After examining the Committee's report, the Council of Ministers of the Council of Europe emphasised just two of all these recommendations: those on further measures to strengthen Scottish Gaelic education and on a comprehensive law and strategy for the promotion of Irish.[74]

In January 2021 the UK submitted information on how it was implementing the Committee's latest recommendations for immediate action,[75] and two months later the Committee responded to that document.[76] While it was reasonably satisfied with what had been done in relation to Scots, it was less so in relation to Scottish Gaelic, and

72 CM(2019)84-final (1 July 2020) ch 1, para 7.

73 Ibid ch 1, paras 13 and 17, and chs 2.2 and 2.6.

74 CM/RecChL(2020)1. It also stressed the recommendation to empower Cornwall County Council to promote Cornish.

75 MIN-LANG (2021) IRIA 1.

76 MIN-LANG (2021) 3. It should be noted that on 6 December 2022 the Identity and Language (NI) Act 2022 received Royal Assent. But under s 10 its main provisions will not commence until the necessary regulations are in place.

much less so as regards Irish and Ulster Scots. The UK's next national report is due by July 2023.

## THE EUROPEAN COMMITTEE ON THE PREVENTION OF TORTURE (APRIL 2002 [WALES], DECEMBER 2018 [NORTHERN IRELAND], OCTOBER 2020 [SCOTLAND])

The European Committee on the Prevention of Torture (ECPT) now makes a 'periodic' visit to the UK once every four or five years, but it also makes *ad hoc* visits. Between its periodic visits in 2016 and 2021 it made two *ad hoc* visits in 2017, one in 2018 and two in 2019. Both types of visit may or may not include detention facilities in the devolved regions, but none of them is preceded by the submission of a state report. The Committee's report on its periodic visit in 2021, which included detention facilities only in England, was generally complimentary, but it did draw attention to the problems of overcrowding and prolonged periods of seclusion in psychiatric establishments.[77]

The latest ECPT visit to detention facilities in Scotland occurred in 2019, and the resulting report referred back to another visit made the previous year.[78] It concluded that urgent measures were required to counter the rise in the prison population, with the number of women prisoners being 85 per cent above the envisaged maximum capacity of 230, meaning that many women were being held in primarily male prison facilities. The Committee also criticised the use of long-term segregation measures, which were sometimes imposed on prisoners for years on end. It invited the Scottish authorities to consider providing body-worn video cameras for front-line prison staff and making their use mandatory when staff may have to apply control and restraint measures. It added that the lack of secure psychiatric beds for women prisoners remained a concern.

It would appear that the only visits to detention facilities in Wales since devolution occurred took place in 2001, when Cardiff Central Police Station, Parc Prison in Bridgend and Hillside Secure Centre for children in Neath were included.[79] The ECPT recommended that conditions in police stations be reviewed. Some of the young persons the Committee spoke to at Parc Prison and Hillside Secure Centre alleged that they had been ill-treated by police officers in different parts of Wales, but not in the detention facilities themselves.

The ECPT's last visit to Northern Ireland, in 2017, examined developments on policing and prison matters since its previous visit

77 CPT/Inf (2022) 13. The UK Government's response is at CPT/Inf (2022) 14.

78 CPT/Inf (2020) 28 (published 8 October 2020), a follow-up to CPT/Inf (2019) 29 (published 11 October 2019).

79 CPT/Inf (2002) 6 (18 April 2002).

in 2008. It focused particularly on Maghaberry Prison, Ash House (for female prisoners) and Shannon Clinic (a forensic psychiatric unit). The report noted that '[t]he co-operation received from the Northern Ireland authorities and from the staff at the establishments visited was excellent'.[80] It highlighted 'the enormous culture change that has taken place within the police of Northern Ireland since the late 1990s',[81] but it recommended that better training be provided to police officers to avoid the use of unnecessary force when conducting arrests (eg not applying very tight handcuffs). It pointed out that the confidentiality of a detainee's medical details was not always respected. Amongst many other concerns were the incidence of inter-prisoner violence, the number of prisoners locked in their cells for more than 22 hours a day and deficiencies in the health care provided. The 54-page report is probably the most comprehensive evaluation ever conducted by an international human rights monitoring mechanism of a particular set of human rights issues in Northern Ireland or in either of the other two devolved regions.

## THE SUB-COMMITTEE ON PREVENTION OF TORTURE (MAY 2021)

The UN's Sub-Committee on the Prevention of Torture (SPT), created by the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, made its first visit to the UK in September 2019 and its report was published in May 2021.[82] The SPT tries to coordinate its activities with that of the ECPT (see above), so during its visit it focused on places of deprivation of liberty which the ECPT had not recently visited (it went to 12 places in England and four in Scotland) and also on the functioning of the National Preventive Mechanism (NPM), the body which the Optional Protocol requires to be established in each ratifying state. The UK's NPM actually comprises 21 bodies, six of which operate in Scotland, two in Wales and four in Northern Ireland. They include, for example, the Scottish Human Rights Commission, the Care Inspectorate Wales and Criminal Justice Inspection Northern Ireland. During its visit in 2019 the SPT had 14 meetings with individuals or organisations in Scotland (including eight from within the Scottish Government), one in Wales and two in Northern Ireland. No one from the Welsh or Northern Ireland governments appears to have been involved in the meetings, unless they did so indirectly as members of the NPM.

80 CPT/Inf (2018) 47 (6 December 2018) 4.
81 Ibid 9.
82 CAT/OP/GBR/ROSP/1.

The SPT's report, as several other UN treaty-monitoring reports have done, calls for the minimum age for criminal responsibility to be raised in all four UK jurisdictions. It was concerned about the quality of health care provided at Dungavel House Removal Centre in Scotland, but no observations were made specifically about Wales or Northern Ireland. This is surprising, certainly as far as Northern Ireland is concerned. As pointed out in this article, several other monitoring mechanisms – notably the ECPT and CAT – have recently expressed concerns about police behaviour, prison regimes and institutional care in Northern Ireland. The omission may be because the SPT is a relatively young treaty-body mechanism, it has a difficult role to play in trying to avoid any significant duplication of the work of the ECPT, and it effectively delegates a lot of its monitoring to the NPM in the country being assessed.

The UK Government's comments on the SPT report were published at the same time as the report itself.[83] From its content we can reasonably infer that both the Scottish Government and the Northern Ireland Executive (especially the Department of Justice) were consulted during its compilation. They are replete with additional information about how Scotland, in particular, is complying with its obligations in this domain. Wales is dealt with as part of England and Wales, since justice is not an issue that has been devolved to the Welsh Senedd. One of the points made in relation to Northern Ireland is that research has been commissioned into why the proportion of Catholics within the Youth Justice System is higher than the current census breakdown for the 10 to 17-year-old age group. More details are supplied about health care in prisons and the training given to prison staff on mental health issues, and it was disclosed that, as of February 2021, no prisoners in Northern Ireland were sharing a cell, which is remarkable. There were also legislative plans to change the law on bail and remand for children since at present the number of children admitted to custody on remand is significantly higher than the number who subsequently receive a custodial sentence.

## THE GROUP OF EXPERTS ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS (OCTOBER 2021)

GRETA monitors state compliance with the Council of Europe's Convention on Action against Trafficking in Human Beings of 2005. Like GRECO and ECRI (see above) it focuses on different issues in each round of evaluations. It conducts these by sending states a questionnaire, considering the responses, making a visit to the state

83 CAT/OP/GBR/CSPRO/1 (1 June 2021).

and then publishing an evaluative report, usually alongside the state's comments on the report. The thematic focus of the third evaluative round was access to justice and effective remedies for victims of trafficking and the UK submitted its responses to the questionnaire in June 2020.[84]

The UK's 100-page document is exemplary in containing, within each section, separate sub-sections explaining the position in Scotland and Northern Ireland (Wales is again treated in conjunction with England). It is again obvious that the Scottish Government and Northern Ireland Executive contributed significantly to the document. GRETA's report on the UK's answers to the questionnaire was published in October 2021, with the UK Government's comments inserted at the end.[85] To help prepare its report, GRETA held online meetings with eight governmental and non-governmental organisations in Scotland, three in Wales and nine in Northern Ireland. Of the 32 paragraphs which contain GRETA's recommendations, 20 of which focus on the topics under consideration in the third evaluation round and 12 on other issues already raised by the Committee, only one relates specifically to a devolved region: the amount of compensation awarded by the Northern Ireland Criminal Injuries Compensation Authority should not be dependent on the victim's co-operation with the authorities or prior convictions. GRETA's next evaluation of the UK is likely to be in 2025.

## THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS (2018–2021)

The ECSR monitors implementation of the European Social Charter and also its Revised version. In the case of the UK, which has ratified only the original Charter, reviews take place annually over a cycle of four years, with one of the four groups of Charter rights being examined each year. Group 1 rights relate to employment, training and equal opportunities; Group 2 rights relate to health, social security and social protection; Group 3 rights are labour rights; and Group 4 rights relate to children, families and migrants. National reports are submitted to, and assessed in, Strasbourg: the ECSR does not visit states nor engage in face-to-face dialogues with state representatives. After conducting its assessment the Committee declares clearly whether the state is or is not in conformity with the requirements of each Charter provision in question. If it needs more information in order to make up its mind, it defers taking a firm position until the next review.

84 GRETA(2018)26_GBR_rep.
85 GRETA(2021)12.

The UK's national reports do now refer very frequently to the relevant position on particular rights in each of the devolved regions, and to date the Committee has not highlighted any lack of cooperation by a devolved government in the compilation of a national report. The Forty-First National Report (on Group 3 rights) was submitted in February 2022, but at the time of submitting this article the ECSR has not yet published its assessment of it. The four most recent assessments relevant to this article are therefore those published in 2021 on Group 1 rights (2015 to 2018) and Group 2 rights (2016 to 2019), in 2020 on Group 4 rights (2014 to 2017) and in 2019 on Group 3 rights (2013 to 2016).[86] It is immediately evident that ECSR reports sometimes relate to the position obtaining in the state up to six years earlier.

On Group 1 rights, the ECSR's 2021 report gives special attention to Scotland in relation to disability issues, leaving Wales and Northern Ireland to be dealt with alongside England. The Committee deferred its conclusion on whether the UK was in conformity with article 15 of the Charter (the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement) until further information was forthcoming on the remedies available in Scotland in cases of disability discrimination with respect to education. On Wales it said that it was not clear that workers' organisations participated in the supervision of vocational training for young workers. In relation to Northern Ireland the ECSR asked for updated information on whether equality law was to be brought into line with that in Great Britain and on what progress was being made with a new racial equality strategy and new racial equality legislation.

On Group 2 rights, the ECSR's 2021 report refers at length to information provided in the UK's report about the devolved regions and often mentions information provided separately by the Scottish Human Rights Commission and the Scottish Children and Young People's Commissioner. As regards tackling the causes of ill-health the Committee noted that very limited information had been provided about Wales and asked that the next report should provide details concerning all constituent parts of the UK, 'rather than a list of links to various websites'. People living in Scotland and Northern Ireland had lower life expectancy rates than people living in England, though they also displayed smaller gaps between the rates in the most deprived and the least deprived areas. The ECSR wanted more information on the measures taken to provide abortion services in Northern Ireland.

As regards the right to protection of health, the Committee noted concerns over mental health services for young people in Scotland

86 For convenient links to all the relevant reports, see Council of Europe, 'Country Profiles: United Kingdom'. They are also available through the database at HUDOC.

and asked for the data existing in other parts of the UK. It noted that the drug-related death rate was higher in Scotland than anywhere else in the EU and 3.5 times as high as in the UK as a whole. Minimal reference is made to comparable issues in Wales and Northern Ireland. As social security is largely not a devolved matter in the UK, the ECSR found that in the whole of the country the levels of statutory sick pay, employment support allowance, long-term incapacity benefits and unemployment benefits were all inadequate. Also, non-nationals had to be in permanent residence in the UK for an excessively long period (five years) before becoming eligible for social security benefits.

The ECSR's latest report on Group 3 rights says little about regional situations because labour rights are a reserved matter in Scotland and Wales, while in Northern Ireland the tradition is usually to follow the English lead (except that in Northern Ireland employees are protected against unfair dismissal after just one year of working for an employer, while in England, Scotland and Wales they must have served for two years). The report on Group 4 rights refers to the situation in devolved regions when relevant, but expresses few concerns. It upbraids Wales and Northern Ireland (as well as England) for maintaining the age of criminal responsibility at 10 years and notes that Scotland intends to increase the age to 12. The ECSR's own position is that the age should be at least 14. It also notes that in Scotland and Northern Ireland (as well as in England), but not Wales, it remains possible for a child to be taken into care merely because the parents have inadequate resources to look after the child. It impliedly praises Scotland for introducing its own Child Poverty Act in 2017 but is concerned that Northern Ireland's laws on protecting women are inadequate. It observes that Wales is intending to remove the 'reasonable chastisement' defence in cases of assault against children, but it criticises that region (as well as England) for continuing to allow the prosecution of child victims of prostitution.

## THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS (2019–2022)

Of the 190 Conventions which the ILO has developed (many have lapsed or been replaced), eight are referred to as fundamental human rights Conventions, and state compliance with these is monitored every two or three years by CEACR. In the case of the UK, the most recent monitoring of each such Convention occurred as follows: in 2022, the Conventions on Freedom of Association and the Right to Organise; in 2021, the Conventions on Equal Remuneration and Discrimination; in

2019, the Conventions on Forced Labour, Abolition of Forced Labour, Minimum Age of Employment and Child Labour.

If we look at the available comments from CEACR on each of the latest evaluations we see that the UK's devolved regions receive barely a mention.[87] This is partly because the comments are rarely longer than one or two pages per Convention (hundreds of evaluations are conducted each year, and not just of the fundamental Conventions), but also because only in Northern Ireland is employment a devolved issue.[88]

In 2020, in its comments on the Forced Labour Convention, CEACR noted the publication of annual progress reports on the implementation of the Human Trafficking and Exploitation Strategy in Scotland and that a revised strategy was being prepared. It also remarked that the Department of Justice in Northern Ireland had developed its third Modern Slavery Strategy for 2019–2020 and that the Organized Crime Task Force was regularly monitoring progress made with that strategy in its annual reports. CEACR requested the UK Government to provide information on any revised strategies in Scotland and Northern Ireland and asked for more detail on their effectiveness.[89]

In 2021, in its comments on the Convention on Discrimination, CEACR repeated its usual call for the abolition of the exclusion of teachers in Northern Ireland from protection against discrimination on the ground of religious belief, as provided for by section 71(1) of the Fair Employment and Treatment (NI) Order, 1998.[90] In 2022 CEACR commented on implementation of the Convention on Freedom of Association, but it referred only to legislation applying throughout Great Britain, making no specific mention of Scotland, or Wales, and ignoring the legislation applying in Northern Ireland altogether.

## CONCLUSIONS

A number of tentative conclusions can be drawn from the foregoing analysis and from other research conducted for the background study to this piece.[91]

87 The comments are contained in CEACR's own Annual Reports (Part A) and also in its annual reports on the Application of International Labour Standards.

88 In Scotland responsibility for employment tribunals was devolved in 2016, but not responsibility for employment law.

89 CEACR, 2020 Observations.

90 In 2022 the Northern Ireland Assembly enacted the Fair Employment (School Teachers) Act (NI), which requires the legislative exclusion to be removed within two years.

91 See n 3 above.

1 While the international monitoring mechanisms have a great deal to be said for them, they are not designed to deal well with states which are non-unitary. In other words, if a state has regional governments as well as a central government, the monitoring bodies find it difficult to make a full assessment of the situation in each region, even if the powers devolved to that region are very wide-ranging and its population quite large. In the UN's system, the word limits applying to documents associated with an assessment inevitably mean that little can be said about each and every region. The largest UK region is Scotland, with a population of about 5.4 million. Within Europe alone there are 21 independent states with a smaller population, but because of their independence most of them receive a lot more attention from the monitoring bodies than does Scotland.
2 By and large the UK Government does now include appropriate information in its national reports, and in its replies to questions, to explain how, if at all, devolved regions are protecting rights differently. In general, it emphasises positive differences rather than deficiencies. The fact that so many rights have to be covered, especially in the reports submitted to the Human Rights Council, the Human Rights Committee, CESCR and the ECSR, impacts negatively on the comprehensiveness of information available to the monitoring bodies, which often have to supplement what they are told by the state through gathering information from other sources. The principle of equality (whereby in each monitoring round the same time is devoted to each state, regardless of its size) also militates against devolved regions being considered in close-up.
3 There continue to be inconsistencies and inefficiencies in the way that information is supplied by devolved regions in the UK. In recent years the Scottish Government has been much more proactive than those in Wales and Northern Ireland in this regard, as is evident from the responses to recommendations emerging from the UPR in 2017.[92] The absence of devolved government ministers in Northern Ireland from 2002 to 2007 and from 2017 to 2020 led to a significant deficit in the information supplied to the ACFC and CECRML during those periods. Northern Ireland departments and the Northern Ireland Office (a branch of the UK Government) were unable or unwilling to remedy the deficit. The quality of government consultation with civil society organisations and national human rights institutions remains variable across the regions.

92 See A/HRC/36/9/Add.1/UK-Annex: Annex to the UK response to the recommendations received on 4 May 2017 (29 August 2017).

4 Monitoring bodies, especially at the UN, tend to insist upon a state devising one overall national strategy to protect a set of rights, even though this runs counter to the principles of devolution and subsidiarity. The monitoring bodies appear unwilling to engage directly with representatives from subnational governments, although those representatives do sometimes form part of the national delegation when it is meeting with a UN body in Geneva, and Council of Europe bodies making visits to the UK do often try to travel to one or more of the devolved regions.

5 The monitoring bodies do not always operate efficiently. The UN bodies, in particular, are overworked and under-resourced, except for the ILO's CEACR.[93] Long delays build up, meaning that Concluding Observations and recommendations are sometimes issued in respect of deficiencies in human rights protection that arose many years earlier. The remits of the bodies also significantly overlap. Both the UN and the Council of Europe have monitoring bodies focusing on socio-economic rights and on torture and ill-treatment. Within the UN the remits of the Convention-based bodies (CERD, CAT, the SPT, CEDAW, the CRC and the CRPD) overlap with the remits of the two Covenant-based bodies (the Human Rights Committee and CESCR), and the work of all of these bodies is duplicated again by the UN Charter-based Human Rights Council. All of this results in the same issue being highlighted time and time again by several monitoring bodies: the minimum age for criminal responsibility in the devolved regions is referred to by five of the 17 monitoring bodies examined above, while a Bill of Rights for Northern Ireland is mentioned by six. There is a distinct lack of cross-referencing between the various monitoring bodies, and the UK's national reports exhibit the same defect, with the notable exception of its 2014 report to CESCR.[94]

6 Northern Ireland receives a disproportionate amount of attention relative to its population (1.9 million). Apart from the rather formulaic mentions of a Bill of Rights, the issues given particular salience are the decriminalisation of abortion, accountability for conflict-related violations, the mistreatment of children in residential institutions and by paramilitary groups, and the

93 In 2022 the UN's planned expenditure on the ILO's monitoring mechanisms was US$25,107,827. Its planned expenditure on *all* its other human rights monitoring mechanisms was US$8,978,700. See ILO, *The Director-General's Programme and Budget Proposals for 2022–23* (2021) 87 and 89–90; UN General Assembly, *Proposed Programme Budget for 2022* (Human Rights) A/76/6 (Sect.24) 94.

94 See n 24 above.

absence of legislation comparable to the Equality Act 2010 which applies in England, Scotland and Wales.

7 Wales and Northern Ireland could learn a lot from Scotland as regards devolved legislative engagement with international monitoring mechanisms. Since 2000 various Committees of the Scottish Parliament have considered human rights issues, and in 2016 an Equalities and Human Rights Committee was created, the remit of which extends to 'human rights contained in any international convention, treaty or other international instrument ratified by the UK'. In 2018 the Committee published *Getting Rights Right: Human Rights and the Scottish Parliament*, which makes several recommendations aimed at increasing Scottish parliamentary engagement with monitoring.[95] The Committee undertook to send its relevant reports directly to monitoring bodies and to meet with members of those bodies and other monitors when they are visiting the UK.

8 The NIHRC has been the most active of the three UK National Human Rights Institutions (NHRIs) in this field of international monitoring. Between 2001 and 2020 it made 61 submissions to international bodies, including to two UN Special Rapporteurs.[96] The Scottish Human Rights Commission has also engaged well with the UN's UPR mechanism, with seven UN treaty bodies and, recently, the ECSR.[97] But no NHRI has interacted meaningfully with the ILO, and the Equality and Human Rights Commission, as well as the NIHRC, pay little attention to the ECSR: socio-economic rights are to that extent still the poor relation in the field. However, the three NHRIs (and the Equality Commission for Northern Ireland) form the UK Independent Mechanism for the purposes of the UN Convention on the Rights of Persons with Disabilities, and the Scottish Human Rights Commission is part of the National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture.

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95 Sixth Report, 2018 (Session 5), SP Paper 431, 26 November 2018. It is worth recording that in 2021 a member of CEDAW submitted written and oral evidence to the Northern Ireland Assembly's Committee for Health when it was considering the Severe Fetal Impairment Abortion (Amendment) Bill, a Private Members' Bill aimed at protecting some disabled fetuses from being aborted. See the Committee for Health's Report NIA 88/17-22 (11 November 2021). At the time of writing the Bill had not been passed by the Assembly. (I am indebted to Rhyannon Blythe of the NIHRC for this information.)

96 The Special Rapporteurs on Extreme Poverty (in 2019) and on Adequate Housing (2016).

97 Details are available on the Scottish Human Rights Commission, 'Treaty and International Work'.

9 Devolved administrations do little to assist in the dissemination of Concluding Observations of monitoring bodies or to consult with civil society organisations and national human rights institutions on how to implement recommendations emerging from those observations. The Scottish Government has developed a plan to incorporate five human rights treaties into Scottish law, but the Supreme Court has recently pointed out that there are constitutional limits to what regional legislatures can enact in that regard: they cannot mandate UK-wide institutions to act in a certain way in Scotland, since no devolved legislature has the competence to bind such institutions.[98] Wales leans more towards a 'due regard' approach in its legislation.[99] The Northern Ireland Executive has no clear strategy on the issue and activists' concentration on devising a Bill of Rights for Northern Ireland may be distracting the Northern Ireland Assembly's attention from the potential impact of international monitoring as well as from its own legislative capacity. It is vital for elected representatives in the devolved legislatures to recognise that 'observing and implementing international obligations' is a transferred matter in all three of the regions.[100]

10 The fundamental question is what impact the numerous monitoring bodies are having on the protection of human rights in the UK's three devolved regions. Is this a situation where, in Horace's famous phrase, '*parturient montes, nascetur ridiculus mus*' ('the mountains will go into labour, and a ridiculous mouse will be born')? The answer must be an emphatic 'no', but it is important to specify that the impact of the monitoring is not easily measurable in terms of policies and laws that have been reformed as a direct consequence of something recommended by a monitoring body. Instead, the impact lies in the constant pressure which states are put under by the monitoring mechanisms to live up to the obligations they promised to adhere to when they ratified or acceded to a human rights treaty. The pressure means that policy- and law-makers need to be continuously aware that if they do not comply with those obligations this will be noticed and publicised on the international plane. It can safely be said that, collectively, the monitoring systems do shine a bright light and ring a resounding bell, even if governments, whether central or devolved, are not always watching or listening.

98 *In Re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106.

99 See eg Social Services and Well-being (Wales) Act 2014, s 7(1) and (2).

100 Scotland Act 1998, sch 5, para 7; Government of Wales Act 2006, sch 7A, paras 10(1) and (3); Northern Ireland Act 1998, sch 2, para 3(c).

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# The law and practice of the Ireland–Northern Ireland Protocol

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*The Law and Practice of the Ireland–Northern Ireland Protocol*, Christopher McCrudden (ed) (Cambridge University Press 2022) 240p; paperback £29.99/hardback £89.99/pdf open access

The decision of the United Kingdom (UK) to leave the European Union (EU) in June 2016 gave birth to a considerable headache for those wishing to secure the UK's departure from the EU in a timely and 'orderly fashion'.[1] Prior to reaching any agreement regarding the UK's withdrawal from the EU, much less any future trade agreement, the EU made clear that a solution to the 'Irish border conundrum'[2] was first and foremost its primary concern. Fast-forward three years, to 2019, and the Ireland–Northern Ireland Protocol to the EU Withdrawal Agreement (the Protocol), to which both the UK and EU were co-signatories, was the agreed-upon solution 'to address the difficult and complex impact of Brexit on the island of Ireland'.[3]

As the UK Government (UKG) in June 2022 proposed legislation (at the time of writing awaiting its second reading in the House of Lords) in the form of the Northern Ireland Protocol Bill (NIPB), which would see a 'root and branch overhaul of the principal commitments in the protocol',[4] the relevance of Christopher McCrudden's edited collection of 25 essays once again proves its dependability as a legal resource, having previously been cited heavily in the *Allister* judgment in the Northern Ireland Court of Appeal.[5] With many facets of the Protocol's legality having been challenged, the importance of a concise explanatory analysis and interpretation of its substantive legal aspects remains an unequivocally helpful reference point. Whilst the book can be said to have addressed a moving target, prospective readers should

1 Prime Minister Theresa May's Statement to the House of Commons (12 March 2019).

2 Michael Keating, 'The Irish Border Conundrum' (Centre on Constitutional Change 8 December 2017).

3 Christopher McCrudden, *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) i.

4 Catherine Barnard 'Why is there so much fuss over the Northern Ireland Protocol Bill?' (*UK in a Changing Europe* 20 June 2022).

5 *Allister & Ors v Secretary of State for Northern Ireland* [2022] NICA 15.

bear in mind the book's objective, which is to examine the fundamental legal aspects to the Protocol, and that it was written in consideration of those purposes for which it was initially envisaged. Given certain contentions now ever-more prevalent surrounding interpretation of the Protocol's legalities, a documented academic examination of the Agreement's 'legal dimensions' (as envisioned when signed between the EU and UKG) proves invaluable in combating any subsequent distortions of its perceived purpose, as well as its purported legal authority and any such contention to the contrary.

The book brings together wide-ranging expertise from academic scholars and legal practitioners. With this broad church of expertise, the book does not confine its audience simply to the lawyer or the scholar, instead, proving a valuable 'go-to' for all those wishing to grapple with the Protocol in its wider legal context. As does the Protocol, the book covers a vast canvas of issues including governance, rights, citizenship and judicial matters, to form an 'important and informative Brexit resource'[6] for readers wishing to understand any of the niche and highly (Northern Ireland) specific legal crevasses the Protocol addresses.

Whilst there are 25 chapters, the book is subdivided into nine parts. McCrudden introduces discussion by characterising the Protocol in terms of how it ought best be understood, which, as he explains, is within the context of aspirations to safeguard the Belfast–Good Friday Agreement (GFA), and in reflection of the dynamics of a volatile UK political landscape, as well as in consideration of the subsequently agreed Trade and Cooperation Agreement. This introduction acts as a caveat to the book's thematic approach in its analysis of the Protocol's legal scope. McCrudden outlines extensively how joint Irish and British EU membership helped not only in the peace negotiations in terms of trust leading up to the 1998 GFA, but also how it continued to facilitate the peace process more generally through the creation of an all-island economy and continued common identity as joint EU member states. The extent to which the EU's initial approach to the 'Northern Ireland difficulty' was primarily influenced by Ireland's early concerns regarding Brexit is highlighted, however, it is shown the EU's unapologetic approach to such negotiations goes well beyond any perceived 'one-sidedness',[7] given its rightful outlook on the GFA and overall peace process as a 'success story to which it had contributed'

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6 Sir Declan Morgan, Lord Chief Justice of Northern Ireland (2009–2021), 'The law and practice of the Ireland–Northern Ireland Protocol' in McCrudden (n 3 above) 'Foreword' xii.

7 Secretary of State for Northern Ireland Brandon Lewis, Oral Answers to Questions: 'Northern Ireland Protocol: EU negotiations' HC Deb 27 October 2021, vol 702, col 253.

and given the potential jeopardy posed to this by the UK's decision to exit the EU.

The forementioned introduction bodes well for Part I in which Harvey subsequently contextualises the 1998 Agreement's 'foundational constitutional quality as a peace, as well as political, agreement' and its legality as a 'bilateral treaty'. Harvey emphasises the EU's focus in safeguarding the primacy of the GFA at the heart of its negotiating mandate to ensure the effects of Brexit would not be permitted to destabilise the peace process. He also observes the fact that most 'anchor their argumentative strategy around its defence',[8] and that interpretation of such approximations will no doubt be at the heart of any future legal contestation.

Parts II and IV of the book address EU governance and governance of the Protocol in Ireland and the UK, respectively, with chapters dedicated to legal structures, the Protocol's committees and dispute settlement, as well as how the Protocol interacts with UK, Irish, and Northern Irish law. Part III addresses interpretation of the agreements, with contributions from Weatherill and Ratner outlining 'what the Protocol does and why it does it' as well as how the agreements may engage with the 'idiosyncratic' nature of the Vienna Convention on the Law of Treaties. McCrudden also addresses 'good faith' in this section, in a chapter in which those charged with the ratification and application of the Protocol in UK law may wish to consider reading more than once, perhaps while also revising their understanding of the words 'spirit' and 'sincere'.

Parts V and VI analyse fundamental rights as well as citizenship and free movement, each outlining the importance of replicating in the Protocol the emphasis placed on such provisions as fundamental in the GFA. In Part V, McCrudden discusses the application of article 2 of the Protocol in relation to human rights and equality, emphasising the need to prevent derogations caused by Brexit to those same rights secured under the GFA. McCloskey LJ analyses the UK's 'retreat' from the Charter of Fundamental Rights whilst examining its role in Northern Ireland in tandem with the intricacies of the Protocol's legal arrangements alongside the nuances of Northern Ireland citizenship, in what he describes as 'murky waters'.

Maher begins Part VI by outlining the importance of the continuation of the Common Travel Area (CTA) post-Brexit. Maher describes the CTA as an arrangement 'defined more by pragmatism

8 One notes the UKG's legal reasoning of 'necessity' under art 25 of the International Law Commission's articles of Responsibility of States for Internationally Wrongful Acts for their justification of the NIPB stating 'maintenance of stable social and political conditions in Northern Ireland and protecting the Belfast (Good Friday) Agreement are essential UK interests'. See Barnard (n 4 above).

than by law', and one that she expects to comfortably overcome any of the political or legal challenges regarding borders which Brexit may pose. As alluded to by McCloskey LJ, Brexit raised considerable issues surrounding identity and citizenship in Northern Ireland as secured under the GFA. Murray furthers this discussion by outlining the divisive nature of Brexit in its reassertion of 'core identities' in Northern Ireland. Murray also points out that it was in fact the Democratic Unionist Party which championed Brexit in the belief this would solidify its British identity by 'intensifying Northern Ireland's distinctiveness from Ireland', theoretically hampering the case for a united Ireland. The irony that Brexit produced the Protocol to ensure the maintenance of the GFA (the guarantor to identity and citizenship in Northern Ireland), and is thus now the source of unionist identity concerns, will not be lost on most.

The largest section of the book, Part VII, elaborates on the economic law within the Protocol, with notable contributions on the Irish Sea border, competition law, state aid and the free movement of services. Jerzewska outlines the functioning of the Irish Sea customs border and how it impacts on businesses trading between Great Britain and Northern Ireland. She also notes the UK's proposal of a 'radical renegotiation' of the Protocol in the form of the UK Government's July 2021 Command Paper having been immediately dismissed by the Commission. Said paper, when placed in comparison with the NIPB, almost exactly a year later, serves only to illustrate the fundamental hardening of attitudes within the Conservative Party regarding the Protocol's implementation (or lack thereof) at the time of writing. Power and Peretz discuss the legal framework for competition law and state aid in Northern Ireland respectively, whilst Barrett shines light on the 'shaky legal foundations'[9] of the all-Ireland services market. Barrett notes that unlike in goods there is now a border on the island of Ireland with regards to services trade, albeit something of a 'soft' border due to a number of merciful factors. Interestingly, Barrett points out that services are of much greater economic significance, although political debate remains 'squarely on the free market for goods'.

Part VIII discusses judicial co-operation, whilst in Part IX Melo Araujo and Brittain inform the reader of the Protocol's safeguarding provisions, the now infamous article 16. The two authors explain these provisions in contrast to those typically used within World Trade Organization trade agreements and the almost paradoxical nature of article 16 as in direct contradiction with the Protocol's primary objective, namely preventing the erection of trade barriers on the island of Ireland.

9 A phrase coined in a thread tweeted by D Henig @DavidHenigUK, 26 February 2020; Gavin Barrett, 'Free movement of services' in McCrudden (n 3 above).

Overall, the book paints a much more insightful picture of the Protocol in its legal context than might be commonly construed in public discourse.[10] It also highlights the considerably deeper relationship of its text with the objective of protecting the GFA than may often be understood.[11] The book does not gloss over Unionist concerns regarding the implementation of the Protocol, but in fact deals in political reality and legal certainty in conveying to the reader an understanding of the complexities of Northern Ireland and the overall peace process's relationship with EU membership, and the impossibility of the circle that had to be squared regarding Brexit and the Irish border.

10 'Cross-party commission to visit Northern Ireland as Prime Minister continues protocol misinformation campaign' (*UK Trade and Business Commission* 28 February 2022); David Young, 'Negative portrayal of NI Protocol is "fake news", Assembly told' *Belfast Telegraph* (27 September 2021).

11 A worrying example of this misunderstanding regarding the Protocol's relationship with the Good Friday Agreement can be seen within Suella Braverman's legal justification for scrapping parts of the Protocol in her capacity as Attorney General to Boris Johnson, describing the GFA as having 'more importance and "primordial significance"' see 'Pastor in legal challenge to Northern Ireland Protocol' *Irish News* (Belfast 19 July 2022).

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# Human rights and the righting of 'historical' wrongs: the Supreme Court's judgment in *Re McQuillan, McGuigan, and McKenna*

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ABSTRACT

This comment examines particular aspects of the Supreme Court's judgment in *McQuillan, McGuigan and McKenna*, notably its reasoning and findings in respect of the investigative obligation emanating from the right not to be subjected to torture or inhuman or degrading treatment or punishment as it related to the case of the 'Hooded Men'. Although the Supreme Court acknowledged that the subjection of the Hooded Men to the so-called 'five techniques' of interrogation in 1971 would, today, be characterised as 'torture', and in spite of new evidence linking named members of the United Kingdom (UK) Government to the authorisation of the 'five techniques', the court found that there was no basis for recognising the applicability or revival of UK authorities' obligation to investigate under article 3 of the European Convention on Human Rights. In this case commentary, I consider the court's analysis and conclusions and reflect briefly on their significance in the context of an uninterrupted 'history' of British involvement in torture.

**Keywords:** right not to be subjected to torture or to inhuman or degrading treatment; investigative obligations; dealing with the past.

## BACKGROUND

The case – which I will refer to as *McQuillan, McGuigan and McKenna*[1] – relates to appeals from the Court of Appeal in Northern Ireland regarding what the Supreme Court referred to as 'distressing events' which took place in 1971 and 1972, during the

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1 *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)* [2022] UKSC 55, [2022] AC 1063 (*McQuillan, McGuigan and McKenna*).

height of 'the Troubles' in Northern Ireland. The key question at issue in the case was whether the United Kingdom (UK) Government was under a duty to conduct human rights-compliant investigations in relation to these events. This investigative duty would derive from the right to life and the right not to be subjected to torture or inhuman or degrading treatment or punishment, found in article 2 and article 3 of the European Convention on Human Rights (ECHR) respectively.

The appeal in *McQuillan* concerned the fatal shooting of Jean Smyth while she was a passenger in a car in Belfast on 8 June 1972. Military logs discovered later suggested that she had been shot by a member of the British Army's Military Reaction Force, and on the basis of this information the Chief Constable of the Police Service of Northern Ireland (PSNI) proposed to conduct a further investigation into her death. Ms Smyth's sister, Margaret McQuillan, sought a declaration that the Legacy Investigation Branch (LIB) of the PSNI was insufficiently independent to conduct an investigation in line with the independence requirement under the investigative duty of article 2 of the ECHR.

The appeal in *McGuigan and McKenna* concerned the duty to investigate the subjection to the 'five techniques' of interrogation – consisting of hooding as a means of creating disorientation, subjection to noise, deprivation of food and sleep, and stress positions – of 14 detained persons who came to be known as the 'Hooded Men'. This abuse was inflicted on the Hooded Men, including Francis McGuigan and Séan McKenna, by members of the Royal Ulster Constabulary (RUC) during the detention of the Hooded Men by security forces in August 1971. The 'techniques' had been taught to members of the RUC by officers of the British Military Intelligence Centre in the same year. Mr McGuigan and the daughter of the late Séan McKenna were seeking judicial review of the PSNI's decision that there was not sufficient evidence to warrant an investigation compliant with the right to life and the right not to be subjected to torture or ill-treatment (under articles 2 and 3 of the ECHR) into the allegation that the Hooded Men had been subjected to torture authorised by ministerial members of the UK Government. This comment chiefly examines the *McGuigan and McKenna* appeal, though I will be touching on broader issues pertaining also to the appeal in *McQuillan*.

The abuse suffered by the Hooded Men had been the subject of an inter-state case addressed by the European Court of Human Rights (ECtHR) in 1978. In what is by now a deeply contested finding, in *Ireland v UK* the ECtHR departed from an earlier finding of torture by the European Commission of Human Rights,[2] and held that the

2 *Ireland v United Kingdom* App no 5310/71 (Report of the Commission, 25 January 1976).

'five techniques' of interrogation to which the Hooded Men had been subjected amounted to inhuman and degrading treatment but not torture.[3] The ECtHR's finding hinged primarily on its assessment of the intensity of suffering experienced by the Hooded Men – it said:

> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.[4]

In 2014, a documentary broadcast by RTÉ made reference to documents discovered through the National Archives, which had not been before the ECtHR prior to the 1978 judgment. These documents included medical reports that had been seen by relevant officials and that contradicted the evidence given in the course of the inter-state case on behalf of the UK that the psychological effects of the five techniques were not likely to be long-lasting or severe. They also contained information about those responsible for the authorisation and use of the five techniques, including evidence of the involvement of Cabinet Ministers.[5] Following the documentary, the PSNI concluded that there was not sufficient evidence to warrant a further investigation into the allegation. Mr McGuigan and Ms McKenna applied for judicial review of the PSNI's decision. Separately, the Government of Ireland also applied to the ECtHR seeking a revision of the ECtHR's 1978 judgment, requesting in particular that the finding of inhuman and degrading treatment be substituted by a finding of torture. The ECtHR issued a decision in 2018 refusing this request, on the basis that the alleged new facts would not have had a 'decisive influence' on the findings made in the original (1978) judgment.[6]

## KEY FINDINGS

Before the Supreme Court were three broad questions:

a. whether the UK authorities' domestic investigative obligations under articles 2 and 3 ECHR could be engaged in relation to

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3 *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167.

4 *Ireland v UK* [1978 ECtHR Judgment] (n 3) para 167.

5 See RTÉ Investigates: *The Torture Files*. See further 'British Government authorised use of torture methods in NI in early 1970s' (*BBC News* 5 June 2014).

6 *Ireland v United Kingdom* (2018) 67 EHRR SE1. Note the Dissenting Opinion of Judge Síofra O'Leary. The criterion of 'decisive influence' is found in r 80(1) of the Rules of Court. See the critical analysis of the revision judgment in Michelle Farrell, 'The marks of civilisation: the special stigma of torture' (2022) 22(1) Human Rights Law Review 1.

events occurring before the coming into effect of the Human Rights Act 1998 (HRA) in 2000;

b. whether new evidence had 'revived' the investigative obligations; and
c. whether the requirement of independence within the investigative obligations at issue had been, or was capable of being, fulfilled through the investigations provided.

The Supreme Court, in brief, considered:

a. that the investigative obligations under articles 2 and 3 were not engaged on the basis of the events which had occurred in 1971 and 1972;
b. that the new evidence available was enough to revive the UK authorities' investigative obligation under article 2 in respect of Ms Smyth's killing (as was common ground in the appeal), but was not enough to revive the UK authorities' investigative obligation under article 3 ECHR in respect of the Hooded Men's subjection to the five techniques;[7] and
c. that the requirement of independence would not have been fulfilled on the facts in relation to Ms Smyth's killing, but that there were no particular grounds on which to consider that the LIB would lack independence in investigating the *Hooded Men*'s case.

The Supreme Court also dismissed arguments that there was an equivalent obligation to the article 2 and 3 ECHR investigative duty at common law,[8] and arguments concerning the creation of a legitimate expectation that there would be an investigation into the treatment of Mr McGuigan and Mr McKenna.[9]

Nonetheless, the Supreme Court ultimately turned to consider the rationality of the PSNI's decision not to investigate further the allegations emerging from the RTÉ documentary on collusion in the torture of the Hooded Men. Finding that the PSNI's decision had been based on a seriously flawed report and was therefore irrational, it quashed the decision.[10]

Although other elements of the Supreme Court's judgment, notably its finding that 'it has not been established that the LIB is not capable of carrying out an effective investigation on the basis either of institutional or hierarchical connection or that it is not capable of conducting

7 *McQuillan, McGuigan and McKenna* (n 1 above) [119].
8 Ibid [215]–[217].
9 Ibid [218]–[222].
10 Ibid [223]–[252].

an investigation with practical independence',[11] are significant in relation to redress processes within Northern Ireland, the comment below focuses on the Supreme Court's consideration of the question of the existence of an investigative obligation in respect of the subjection of Mr McGuigan and Mr McKenna to the 'five techniques'. I will take each element of the Supreme Court's assessment of this question in the order in which the court addressed it.

## THE REVIVAL QUESTION

Had there been a possibility of the relevant obligations applying in respect of events which had occurred in the early 1970s,[12] the question for the Supreme Court would have been whether the investigative obligation could be said to be 'revived' in light of the new evidence. Even though the temporal applicability of these obligations is a prerequisite to their potential 'revival', the Supreme Court nonetheless chose to consider the 'revival' question first, before analysing the temporal 'boundaries' of the investigative obligation. The basis for such a 'revival' is found in the *Brecknell* case, which was an article 2 case before the Strasbourg Court, where the ECtHR indicated that 'events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued'.[13] The ECtHR outlined the revival 'test' as follows:

> where there is a plausible, or credible, allegation, piece of evidence or item of information *relevant to the identification, and eventual prosecution or punishment* of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution …[14]

11 Ibid [214]. See the thorough analysis of this and other aspects of the case in this recently published comment: Anurag Deb and Colin Murray, 'Sealing the past: McQuillan and the future of legacy litigation' (2022) 4 European Human Rights Law Review 395–411.

12 The principle that this is a condition for 'revival' of the investigative obligation was underlined by the Supreme Court in *McQuillan, McGuigan and McKenna* (n 1 above) [178].

13 *Brecknell v United Kingdom* (2008) 46 EHRR 42, para 68.

14 Ibid para 71 (citations omitted, emphasis added).

The *Brecknell* test, as it has come to be known, is considered applicable also in relation to investigations into alleged or suspected article 3 ill-treatment.[15] As the above excerpt demonstrates, at the heart of the test is a focus on pursuing individual criminal accountability: the question is whether the new or newly revealed allegation, evidence or information is relevant to the identification, prosecution and punishment of the perpetrator(s) of the human rights violation at issue, and the prospects of success of any prosecution are relevant to determining whether (and what) renewed investigative efforts would be reasonable.

The Supreme Court found that the new material pertaining to the treatment of the Hooded Men did not satisfy the *Brecknell* test because, although it provided 'a considerable amount of detail in relation to the authorisation of the five techniques which was not previously publicly available', including identifying the part played by individual ministers and shedding light on the policy decision of the UK Government not to pursue proceedings against the individuals involved, it did not – in the view of the Supreme Court – add significantly to the state of knowledge in 1978 or alter its substance.[16] The Supreme Court borrowed from the judgment of the Court of Appeal in Northern Ireland in enumerating the various (many of them deeply troubling) facts that had been 'known' in 1978:

> By 1978, as a result of the Compton Enquiry, the Parker Committee Report, the debates in Parliament, the investigations by the European Commission and the hearings before the [Strasbourg Court] the following matters were established:
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> (i) the precise nature of the techniques used and the purposes for which they were used;
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> (ii) the persons in respect of whom they were used;
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> (iii) the extent of the training and preparation for their use;
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> (iv) the fact that a secret base was identified for their application;
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> (v) the use of the techniques had been authorised at a high/senior level;
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> (vi) the authorisation included ministerial authorisation (referred to by Lord Gardiner);
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> (vii) the use of the techniques was unlawful;
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> (viii) the use of the techniques was in breach of article 3 of the Convention ;
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> (ix) the use of the techniques was an administrative practice of the United Kingdom;

15 *McQuillan, McGuigan and McKenna* (n 1 above) [115].
16 Ibid [128].

> (x) the UK Government had chosen not to co-operate fully with the investigation carried out by the European Commission;
>
> (xi) that attitude persisted during the hearing before the Court;
>
> (xii) the UK Government made clear that it did not intend to carry out any investigation into the criminal or disciplinary liability of those who authorised and applied the techniques. ...
>
> It is clear, therefore, that by 1978 there was a compelling case for the investigation of those who authorised and implemented the unlawful use of the five techniques with a view to prosecution for any criminal offences disclosed. That investigation did not take place because of a policy decision made within the UK Government. All of that was known.[17]

In particular, the Supreme Court sought to underline that 'the question of authorisation at Ministerial level was a live issue in the investigations which took place up to 1978' but 'was not pursued at that time as a matter of policy'.[18] This appears to have been central in the Supreme Court's determination that 'the applicants should have been aware of the lack of any effective criminal investigation as early as the 1970s'[19] and, presumably, that it was therefore not the case that the 2014 revelations amounted to 'events or circumstances ... which cast doubt on the effectiveness of the original investigation'[20] more than the events or circumstances of the 1970s already had. Lastly, the Supreme Court considered that the ECtHR's finding in the 2018 *Ireland v UK* revision decision that the new material did not demonstrate facts relating to the *level* of authorisation which were unknown to the court when it delivered its original judgment[21] – the UK had at the time conceded that the 'five techniques' had been authorised at 'high level'[22] – was key to establishing that the *Brecknell* test was not satisfied.[23] The Supreme Court also dismissed the further evidence concerning withheld medical reports indicating the likely severe and long-lasting effects of the 'five techniques' on the basis that 'this material cannot be relevant to the identification and eventual prosecution or punishment of a perpetrator of conduct in breach of Article 3'.[24] Accordingly, the

17 *Re McGuigan's Application for Judicial Review; Re McKenna's Application for Judicial Review* [2019] NICA 46, [103]–[104], cited by the Supreme Court in *McQuillan, McGuigan and McKenna* (n 1 above) [125]

18 *McQuillan, McGuigan and McKenna* (n 1 above) [127].

19 Ibid [131].

20 *Brecknell* (n 13 above) para 68.

21 *Ireland v UK* [Revision Decision] (n 6 above) para 136.

22 *Ireland v UK* [1978 Judgment] (n 3 above) para 97; *Ireland v UK* [Revision Decision] (n 6 above) paras 117–118.

23 *McQuillan, McGuigan and McKenna* (n 1 above) [129].

24 Ibid [130] (citations omitted).

Supreme Court held that the Court of Appeal in Northern Ireland had been right to depart from the first instance judge's finding that the *Brecknell* test was satisfied, following the ECtHR's revision decision.[25]

## THE SUPREME COURT'S APPLICATION OF THE 'GENUINE CONNECTION' AND 'CONVENTION VALUES' TESTS

The determination of whether UK authorities were under an investigative obligation under articles 2 and 3 ECHR required the court to assess whether a duty to investigate could be said to be engaged in relation to events in the early 1970s. The Supreme Court turned to this question next, and sought to answer it by applying the 'genuine connection' and 'Convention values' tests as developed in the jurisprudence of the ECtHR, notably the judgments in *Brecknell*,[26] *Šilih v Slovenia*[27] and *Janowiec v Russia*.[28] The Supreme Court interpreted the Strasbourg Court's case law as establishing that in order for investigative obligations to be applicable in relation to an incident which had taken place before the ECHR came into effect in respect of the state concerned, there must be either:

> (1) a 'genuine connection' with the triggering event, meaning
>
> (a) a reasonably short period of time between the triggering event and the entry into force of the Convention, which should not exceed 10 years, and
>
> (b) that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that State; or
>
> (2) where the 'genuine connection' test is not met, an extraordinary situation where there is a need to ensure that the guarantees and the underlying values of the Convention are protected.[29]

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25 Ibid [119]–[129].

26 *Brecknell* (n 13 above).

27 *Šilih v Slovenia* (2009) 49 EHRR 37. For a critical analysis of *Šilih*, see Eirik Bjorge, 'Right for the wrong reasons: *Šilih v Slovenia* and jurisdiction *ratione temporis* in the European Court of Human Rights' (2013) 83(1) British Yearbook of International Law 115.

28 *Janowiec v Russia* (2014) 58 EHRR 30. For a critical analysis of *Janowiec*, see Corina Heri, 'Enforced disappearance and the European Court of Human Rights' *ratione temporis* jurisdiction: a discussion of temporal elements in *Janowiec and others v Russia*' (2014) 12(4) Journal of International Criminal Justice 751.

29 See the analysis in *McQuillan, McGuigan and McKenna* (n 1 above) [135]. See *Šilih* (n 27 above) paras 161–167; *Janowiec* (n 28 above) paras 141–161.

For the Supreme Court, however, the 'critical date' was not that of the entry into force of Convention obligations in respect of the UK *as a matter of international law*. Drawing a distinction between the obligations of the UK at international law and the obligations borne by UK authorities under domestic law, the Supreme Court deemed the 'critical date' for the purposes of the 'genuine connection' test in the case before it to be the date of the commencement of the HRA, which was 2 October 2000, rather than the date on which the UK accepted the right of individual petition under the Convention, which was 14 January 1966.[30]

The Supreme Court highlighted three 'features' of the HRA in making this determination. First, it underlined that 'although the Convention rights created in domestic law by the HRA are defined by reference to the Convention, they are distinct from the rights in the Convention itself'.[31] This notion stems from the idea, traced back to the House of Lords' judgment in *Re McKerr*, that the HRA created 'new' rights whose scope depends on the domestic courts' interpretation of the HRA, rather than simply 'mirroring' the rights found in the ECHR and interpreted by the ECtHR.[32] Second, the Supreme Court set out that the HRA 'does not have retrospective effect', a principle based on a 'general presumption' against the retrospective effect of statutes which establish rights and obligations – something that, according to the court, 'reflects values of fairness, legal certainty and the rule of law'.[33] Nonetheless, the Supreme Court clarified that this principle is qualified in respect of the HRA insofar as 'there could be a limited application of the article 2/3 investigative obligation in respect of a triggering event which occurred before 2 October 2000'.[34] The extent of this qualification would be crucial to determining the applicability of the investigative obligation to the case of the *Hooded Men*. Finally, the Supreme Court sought to both assert and complicate the so-called 'mirror principle' according to which 'Parliament intended that the domestic rights created by the HRA in relation to public authorities should mirror the rights in the Convention, applicable in international law to the United Kingdom as a contracting state.'[35] In particular, the Supreme Court underlined that (Parliament intended or anticipated that) there might be violations of Convention rights committed by UK public authorities prior to 2000 for which a remedy could be sought

30 *McQuillan, McGuigan and McKenna* (n 1 above) [147]–[168].
31 Ibid [149].
32 *In Re McKerr* [2004] UKHL 12, [25] (Lord Nicholls).
33 *McQuillan, McGuigan and McKenna* (n 1 above) [151].
34 Ibid [154].
35 Ibid [155].

in Strasbourg but not in UK courts under the HRA.[36] Moreover, the Supreme Court acknowledged that the applicability or decisive force of the 'mirror principle' had been questioned or qualified in a range of domestic judgments.[37] Finally, emphasising that the HRA is meant in principle not to have retrospective effect, it reasoned that the 'critical date' against which the 'genuine connection' to the 'triggering events' (the events triggering the investigative duties at issue, ie the killing of Ms Smyth and the subjection of the Hooded Men to the 'five techniques') was to be assessed should be the date on which the HRA came into force.[38]

Referring to the 10-year criterion emerging from *Šilih* and *Janowiec*,[39] the Supreme Court distinguished the facts of the cases before it from those in *Finucane*, a case in which the Supreme Court had accepted that the investigative obligation was at play, in circumstances where the 'triggering event' – the brutal murder of lawyer Pat Finucane – had taken place just over 11 years prior to the coming into force of the HRA.[40] The Supreme Court in *McQuillan, McGuigan and McKenna* stressed that it 'would significantly undermine the legal certainty which the Grand Chamber had sought to achieve in *Janowiec* if longer extensions than this were to be contemplated or permitted'[41] and indicated that

> an extension beyond the normal ten year limit of *up to two years* is permissible where there are compelling reasons to allow such an adjustment constituted by circumstances that (a) any original investigation into the triggering death can be seen to have been seriously deficient and (b) the bulk of such investigative effort which has taken place post-dates the relevant critical date.[42]

Given that the cases before the court were well outside these temporal limits, the Supreme Court considered the 'genuine connection' test not to be met.[43]

Turning to the 'Convention values' test, the Supreme Court underlined that 'the Convention values test must be applied on the basis of the law as it stood in 1971 and in the years immediately following'.[44] This allowed it simultaneously to acknowledge and at the same time not treat as decisive the fact that '[it] is likely that the

36 Ibid [156].
37 Ibid [157].
38 Ibid [158]–[168].
39 See text to n 29 above.
40 *Re Finucane* [2019] UKSC 7.
41 *McQuillan, McGuigan and McKenna* (n 1 above) [144] with reference to *Janowiec* (n 28 above) para 146.
42 Ibid [144] (emphasis added).
43 Ibid [176].
44 Ibid [189].

deplorable treatment to which the Hooded Men were subjected at the hands of the security forces would be characterised today, applying the standards of 2021, as torture'.[45] It focused on the fact that the 'five techniques' had not been considered by the ECtHR to amount to torture in 1978, and implicitly side-lined the alternative view of the European Commission two years earlier,[46] as well as the acknowledgment that the 'five techniques' had amounted to 'torture' in communications of UK Government ministers.[47] The Supreme Court therefore concluded that, as they were understood in the 1970s by the ECtHR, the 'five techniques' could not be seen to negate the very foundations of the Convention. It rejected the notion that an administrative practice of 'inhuman and degrading treatment' in contravention of the absolute right enshrined in article 3 ECHR, which was what the ECtHR had found in *Ireland v UK* in 1978,[48] could be said to negate the foundations of the Convention. In doing this, it focused on the Grand Chamber's indication in *Janowiec* that the 'Convention values' requirement would be satisfied where the events at issue involved 'serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments'.[49] The Supreme Court's comments suggest that it did not consider inhuman and degrading treatment to reach that level of severity, although it ultimately argued that given its conclusion on the *Brecknell* test, it was 'not necessary to express a concluded view in relation to the application of the Convention values test to the particular circumstances of the case of the Hooded Men'.[50]

## A NARROW BASIS FOR QUASHING THE DECISION NOT TO INVESTIGATE

Ultimately, the Supreme Court quashed the PSNI's decision on narrow grounds and on the understanding that, if it based its decision on the 'right' grounds, the PSNI could opt not to investigate and remain well within the bounds of rationality. The Supreme Court said:

> In the present case it could not be said that the decision of the PSNI made on 17 October 2014 not to take the matter further was, in itself, irrational. Given the passage of time since the ill-treatment of the Hooded Men in 1971, the fact that those who authorised the use of the

45 Ibid [186].
46 *Ireland v UK* [Commission Decision] (n 2 above).
47 On the Rees Memo, see *McQuillan, McGuigan and McKenna* (n 1 above) [226]–[227].
48 *Ireland v UK* [1978 Judgment] (n 3 above) para 167.
49 *Janowiec* (n 28 above) para 150.
50 *McQuillan, McGuigan and McKenna* (n 1 above) [191]–[192].

> five techniques were either dead or very elderly, our conclusion in this judgment that the new material publicised by the RTÉ documentary 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, a decision could rationally have been made not to undertake a further investigation. The decision to take no further action was not based, however, on any of the matters just mentioned. Its basis was stated to be that the investigation … had not identified any evidence to support the allegation that the British Government authorised the use of torture in Northern Ireland.[51]

The significance of this finding should not be dismissed: what the Supreme Court is saying here is that there *is* evidence to support the view that the British Government explicitly authorised the use of torture in Northern Ireland. However, the quashing of the PSNI's decision not to investigate is couched in such terms as to be, in effect, an invitation for the PSNI to re-take the decision not to investigate on what the Supreme Court deems more rational grounds,[52] including the death or old age of those who had authorised the use of the 'five techniques' and the consequently reduced prospects of successful prosecution, combined with the competing demands on police resources.

## HUMAN RIGHTS-BASED INVESTIGATIONS AND THE RIGHTING OF ('HISTORICAL') WRONGS

The Supreme Court took a number of interesting steps in its reasoning towards the conclusion that the investigative obligation under article 3 ECHR did not operate in respect of the new revelations concerning the subjection of the Hooded Men to the 'five techniques'. First, building on prior case law, it chose to treat the 'critical date' as being the date at which the obligations that the UK had assumed under the ECHR were given domestic effect. Second, it applied the *Brecknell* test with a focus on whether the new information revealed by RTÉ's 'The Torture Files' altered what had been known in 1978 regarding what was already an ineffective investigation, and was relevant to identifying, prosecuting and punishing any perpetrator(s) of conduct in breach of article 3. Third, it opted for the numerical approach to the 'genuine connection' test (largely following in the footsteps of the Strasbourg Court), based on the number of years between the triggering event and the 'critical date'. And fourth, it adopted a narrow understanding of 'Convention values', with emphasis on the idea that the 'Convention values' requirement

51 Ibid [245].

52 See 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).

would be satisfied where the events at issue involved 'serious crimes under international law, such as war crimes, genocide or crimes against humanity' and applying this with reference to (a selection of) 1970s perceptions of what had happened to the Hooded Men.

There is much to dissect in the Supreme Court's reasoning in the months and years to come. For the purposes of this comment, I want to consider the wider significance of how the Court viewed the wrong(s) committed against the Hooded Men in its application of the 'Convention values' test, even if this element of the judgment was not – according to the court – key to the outcome, and briefly to contextualise the rest of the court's line-drawing by looking somewhat beyond the technical dimensions of its reasoning.

The Supreme Court applied the 'Convention values' test with particular emphasis on the examples of the sort of wrong-doing that would 'satisfy' the test given by the ECtHR's Grand Chamber in *Janowiec*, namely 'serious crimes under international law, such as war crimes, genocide or crimes against humanity'.[53] In this way, the Supreme Court reduced the statement of principle within the same paragraph in *Janowiec*, which indicated that 'the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention',[54] to the illustrative example offered by the ECtHR. Yet if we are to take the idea of an event negating the Convention's foundations seriously, it is relevant to refer to the ECtHR's frequent association of violations of article 3 with the Convention's fundamental values. The ECtHR has repeatedly underlined that 'respect for human dignity forms part of the very essence of the Convention',[55] or that 'the very essence of [the Convention system] … is respect for human dignity',[56] that 'Article 3 of the Convention enshrines one of the most fundamental values of democratic societies', and that 'the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity'.[57] Accordingly, there was ample scope for finding, as Maguire J had done at first instance, that the systematic authorisation and infliction of purposeful ill-treatment (which many at the time considered to be torture and most, today,

53 *Janowiec* (n 28 above) para 150. See *McQuillan, McGuigan and McKenna* (n 1 above) [191].

54 *Janowiec* (n 28 above) para 150.

55 *Bouyid v Belgium* (2016) 62 EHRR 32, para 89.

56 *Vinter and Others v United Kingdom* (2016) 63 EHRR 1, para 113.

57 *Bouyid* (n 55 above) para 81 (citations omitted).

including the Strasbourg Court and the Supreme Court, would consider to be torture) negates the very foundations of the Convention.[58]

Lastly, it is striking that the Supreme Court opted to interpret and apply the 'Convention values' test in such a retrogressive way. The idea that a departure from the 'genuine connection' test is called for in circumstances where the wrong at issue negates the foundations of the Convention suggests an emphasis on the object, purpose and spirit of the Convention, and thereby a rich, purposive approach[59] to interpreting and applying what is now referred to as the 'Convention values' test. Deciding, therefore, that the 'Convention values' test and its application to the issue at hand is to be understood in terms of (a selection of) perceptions in the 1970s hollows out the value-driven assessment which the 'Convention values' safeguard is meant to represent. It cloaks in thin formalism what is meant to be a thicker, value-laden standard that serves 'to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner'[60] in the here and now.

More broadly, and in the context of what is fundamentally a technical judicial treatment of grave human rights abuses the full extent and gravity of which has never been formally and authoritatively established,[61] it is important to look beneath the layers of technicality under which the heart of the case lies. At the heart of the case brought by Mr McGuigan and Ms McKenna is not only an instantiation but a virtually uninterrupted history of the British Government's involvement in torture.[62] Northern Ireland constitutes a prominent but by no means isolated site of such abuse.[63] Indeed, as a Cypriot in Northern Ireland, conscious of documented practices of torture by British forces in Cyprus in the 1950s,[64] and getting to hear about the 'five techniques' from many of the Hooded Men themselves, I was confronted with the historical thread of British torture.

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58 *Re McGuigan's Application for Judicial Review; Re McKenna's Application for Judicial Review* [2017] NIQB 96, [251]–[254].

59 See, in this respect, the Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller in *Janowiec* (n 28 above) at paras 30–35.

60 *Šilih* (n 27 above) para 163.

61 But see the detailed accounts in Kathleen Cavanaugh, 'On torture: the case of the "Hooded Men"' (2020) 42 Human Rights Quarterly 519; Aoife Duffy, *Torture and Human Rights in Northern Ireland: Interrogation in Depth* (Routledge 2019).

62 For an analysis of the historical continuum of British torture and judicial responses thereto, see Conor Gearty, 'British torture, then and now: the role of the judges' (2021) 84(1) Modern Law Review 118.

63 See, in this regard, Ian Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books 2012).

64 Ibid 90–99.

Torture is about dehumanisation. Jean Améry, who was a survivor of torture, located in it the utter and complete 'negation' of the mutual humanity between the torturer and the person tortured.[65] Torture, as Michelle Farrell has put it, is 'the reduction of the human … to the status of less than human'.[66] And torture operates on a continuum of othering – victims of torture often find themselves in the hands of torturers having already been vilified, marginalised, abandoned. Michael Rosen has underlined that atrocities like torture are often facilitated by the expressive denial of the humanity of their victims.[67] These dynamics are not new. In ancient Greece, as Page DuBois highlights, torture served as a physical 'marker' of lesser status, which delineated the boundary 'between the untouchable bodies of free citizens and the torturable bodies of slaves'.[68] Darius Rejali traces, in more recent practices, the operation of torture as a 'civic marker' demarcating those deemed worthy of being treated as fully human from those deemed less worthy, reminding those deemed 'lesser' of 'who they are and where they belong'.[69] In the case of the *Hooded Men*, their detention and subjection to the 'five techniques' was closely tied to their association with what Paddy Hillyard has described as a 'suspect community'.[70]

There are two reasons why it is important to acknowledge the 'five techniques' inflicted on the Hooded Men as part of a continuum of torture, inhumanity and profound and pervasive dehumanisation. The first is that it better illuminates the way in which the wrong done to the Hooded Men in 1971, and the inadequacy of the official response to it, has reverberated over time. Indeed, the ECtHR's reasoning on the distinction between torture and inhuman and degrading treatment in its 1978 *Ireland v UK* judgment was used in the infamous Torture Memos to play down the severity of, and justify, the United States' Central Intelligence Agency's euphemistically labelled 'enhanced interrogation techniques' after 9/11.[71] The second reason why we

65 Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities* (Indiana University Press 1980) 35.

66 Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge University Press 2013) 246.

67 Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 158.

68 Page DuBois, *Torture and Truth* (Routledge 1991) 63.

69 Darius Rejali, *Torture and Democracy* (Princeton University Press 2007) 56–58.

70 Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993). Although the book focuses on experiences of the Irish community in Britain, it is relevant to the experiences of persons of similar background to the Hooded Men in Northern Ireland during the Troubles: see Cavanaugh (n 63 above) 534–535.

71 See David Cole (ed), *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009).

ought to acknowledge these continuities is that it reminds us that it is important to contextualise such events and view them as part of a bigger picture encompassing the factors that enabled them and that have continued to enable similar abuses thereafter. Structural, systemic and, at times, systematic patterns and continuums of dehumanisation and torture are obscured and, arguably, perpetuated by a continued tendency to decontextualise, individualise and/or treat as aberrant incidents of abuse and dehumanisation. Recently, in reporting on UK complicity in torture after 9/11, the Intelligence and Security Committee specifically highlighted and criticised a tendency by UK agents to view occurrences of torture and rendition as isolated incidents. The Committee found that it should have been clear that the problem went beyond isolated aberrations and called for a coordinated response rather than the piecemeal and inadequate responses which materialised.[72] A tendency to disaggregate and decontextualise may itself be part of a pattern of denial, of refusal to confront a past and present practice of inflicting, instigating, enabling, tolerating, and/or knowingly benefiting from torture and ill-treatment – and, indeed, of 'future-proofing' British torture.[73] It is worth reflecting, in this context, on whether the reasoning and outcome in the *McGuigan and McKenna* appeal – with its formalistic appraisal of the significance of the new revelations, its drawing of rigid temporal lines, and its narrow focus on (the prospects of) individual criminal accountability – represents at best a failure to counter this phenomenon, and at worst a contribution to sustaining it.

Yet while the Supreme Court's judgment in this case may be seen as part of the problem, it is important that we do not ourselves individualise and decontextualise it in identifying it as such. Rather, 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

72 Intelligence and Security Committee of Parliament, Detainee Mistreatment and Rendition: 2001–2010 (House of Commons 2018) 87.

73 Ruth Blakeley and Sam Raphael, 'Accountability, denial and the future-proofing of British torture' (2020) 96(3) International Affairs 691. See also Ruth Blakeley and Sam Raphael, 'The prohibition against torture: why the UK Government is falling short and the risks that remain' (2019) 90(3) Political Quarterly 408.

*as well as* effective guarantees of non-recurrence. Adopting the latter approach to the investigative obligation would require accountability to be understood in richer, less individualised, terms than criminal redress, and necessitate a more reparative and transformative – or transformatively reparative[74] – approach to 'dealing with the past'.[75] Such a revision of the investigative obligation would arguably better serve the aim of 'practical and effective protection' of rights,[76] which is the primary purpose (meant to be) served by positive obligations under the Convention, particularly in the context of abuses that form part of a pattern or continuum, such as British involvement in torture. It would also, arguably, allow us to see a continued failure to acknowledge and address the full scale of the wrong-doing committed and harm inflicted as a continuing violation;[77] for the Hooded Men, this enduring experience of victimisation and injustice has been all too painfully felt for more than half a century.[78] Finally, seeing accountability as both reparative and transformative might help us more clearly see 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.

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74 On transformative reparations, see Rashida Manjoo, 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21(9) International Journal of Human Rights 1193.

75 I encountered these succinct and evocative terms while working at Queen's University Belfast several years ago – for some examples of layered scholarship and policy work grappling with 'dealing with the past' in Northern Ireland, see: Christine Bell, 'Dealing with the past in Northern Ireland' (2002) 26(4) Fordham International Law Journal 1095; Louise Mallinder, 'Metaconflict and international human rights law in dealing with Northern Ireland's past' (2019) 8(1) Cambridge International Law Journal 5; Northern Ireland Human Rights Commission, *Dealing with Northern Ireland's Past: Towards a Transitional Justice Approach* (2013); Kieran McEvoy et al, 'Dealing with the past in Northern Ireland' project: see website.

76 *Valiulienė v Lithuania* App no 33234/07 (ECtHR, 26 March 2013), para 75; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 284.

77 On continuing violations and continuing situations, see Antoine Buyse, 'A lifeline in time – non-retroactivity and continuing violations under the ECHR' (2006) 75 Nordic Journal of International Law 63. On the continuation of suffering in the absence of redress, see Maeve O'Rourke, 'Prolonged impunity as a continuing situation of torture or ill-treatment? Applying a dignity lens to so-called "historical" cases' (2019) 66 Netherlands International Law Review 101.

78 Freya McClements, '"Hooded Men": UK court finds PSNI decision not to investigate case unlawful' *Irish Times* (Dublin 15 December 2021).

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**Articles**



**Commentaries and Notes**