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What are the responsibilities of the UK Government under its international obligations for taking action to reform abortion law in Northern Ireland? How should these be reconciled to the UK’s devolution settlement

1. The Prohibition of Abortion as a Human Rights Violation Under International Law

There is growing acceptance in international law that prohibitions on abortion, or indeed, overly restricted access to abortion is a human rights violation. This has evolved from an initial position of ensuring access to family planning services, as well ensuring medical treatment for women who have undergone illegal abortion. The Convention on the Elimination of Discrimination Against Women 1979 (CEDAW) states that ‘states parties are required to ensure access to family planning services’,¹ while the 1995 Beijing Platform for Action calls on Governments to review ‘laws containing punitive measures against women who have undergone illegal abortions’.²

2. United Nations treaty bodies have since gone further and called on states to decriminalise and ensure access to safe abortion. The Committee on Economic Social and Cultural Rights (CESCR) requires states party to the International Convention on Economic Social and Cultural Rights ‘to liberalize restrictive abortion laws; to guarantee women and girls access to safe abortion services and quality post-abortion care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health’.³ It further clarifies that states are obligated to ‘repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health…for example criminalization of abortion or restrictive abortion laws. States parties should also ensure that all individuals and groups have equal access to the full range of sexual and reproductive health information, goods and services, including by removing all barriers that particular groups may face.’⁴ Similarly, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), in

¹ Convention on the Elimination of all Forms of Discrimination Against Women, 1979, Articles 10, 12 and 14.
⁴ Ibid, para 34.
its Concluding Observations on Paraguay, called on the state to ‘act without delay and implement effective measures to deal with the high maternal mortality rate, prevent women from having to resort to unsafe abortions and remove punitive provisions imposed on women who undergo abortion.’ In its Concluding Observations on Zambia, The Human Rights Committee recommended similar, stating that ‘The State party should amend its abortion laws to help women avoid unwanted pregnancies and not have to resort to illegal abortions that could put their lives at risk.’

3. UN Human Rights Bodies and Northern Ireland

The UK is a signatory to all major human rights treaties and several treaty bodies have expressed concern with the restrictive access to abortion in Northern Ireland and the criminal sanctions for women who procure them illegally. CESCR highlighted in 2016 that ‘termination of pregnancy in Northern Ireland is still criminalised in all circumstances except when the life of the woman is in danger’. It recommended that the UK should ‘amend the legislation on termination of pregnancy in Northern Ireland to make it compatible with other fundamental rights, such as women’s rights to health, life and dignity.’ The Committee on the Rights of the Child has also advocated that abortion be decriminalised, and called on the UK to ‘review its legislation with a view to ensuring girls’ access to safe abortion and post-abortion care services.’ The CEDAW Committee has repeatedly challenged the UK’s policy on abortion in Northern Ireland in its assessment of the UK’s country reports.

- The overly restrictive prohibition on abortion in Northern Ireland is at odds with the international legal trend towards liberalisation.

4. The Right to Access Abortion Where it is Legal in Certain Circumstances

In order to ensure access to abortion, states have been encouraged to adopt clear guidelines stating the circumstances in which abortion is legal, as well as providing financial support

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8 Ibid, para. 62.
for women who might otherwise struggle to afford the service. 12 Where women have procured illegal abortions, they are not to be refused medical care, nor is the medical care to be conditioned upon prosecution. 13 The Committee Against Torture has held that doing so may constitute cruel, inhuman and degrading treatment. 14

5. There is growing acceptance by human rights bodies that access to abortion ought to be provided at a minimum in situations of rape and incest, but that states should ultimately work towards decriminalisation, and where there is the legal right to access abortion, this needs to be realised in reality. This was affirmed by the European Court of Human Rights, which held in P v Poland that where a state permits abortion on the grounds that the pregnancy endangered the mother’s life or health, then domestic law must have system in place to allow effective access. 15

- Previous legal challenges arising from the criminalisation and prohibition of abortion in Northern Ireland have arisen out of a need to clarify the circumstances in which an abortion may legally be carried out in Northern Ireland. This lack of clarity contributes to the relatively negligible number of legal abortions carried out in Northern Ireland.
- The CEDAW Committee found that ‘de facto limitations render access to abortion [in Northern Ireland] virtually impossible’. 16
- The UK is therefore likely in violation of both the European Convention of Human Rights, and international law by not offering clear and unfettered access to abortion for women who meet the requirement for a legal abortion in Northern Ireland.

6. Criminal Sanctions Against Women Who Undergo Illegal Abortions

14 Committee Against Torture, Concluding Observations on Chile, UN Doc. CAT/C/CR/32/5 (2004), para. 7(m).
15 P v Poland [2013] 1 FCR 476 at [127].
International human rights bodies have consistently suggested that criminalisation and punishment of women who undergo abortion is a violation of human rights. The recent media attention on women who have been prosecuted in Northern Ireland for procuring illegal abortions has helped demonstrate that criminal sanctions against women who terminate pregnancies are not simply anachronistic penalties that exist only on paper. The prosecution of women in Northern Ireland who have procured an abortion, as well as the arrests and prosecutions of women who have assisted Northern Irish women in procuring pills, have demonstrated that such penalties can and will be implemented. In response to the criminal prosecutions of women in Northern Ireland, The UN Human Rights Council stated that ‘The UK should, as a matter of priority, amend its legislation on abortion in NI with a view to providing for additional exceptions to the legal ban on abortion.’

- It is difficult to see how the prosecution of some UK women for procuring abortion, when such activity is legally available on the NHS in other parts of the UK cannot amount to discrimination under articles 14 and article 8 of the European Convention on Human Rights given how the various international human rights committees have interpreted women’s rights to reproductive healthcare.

7. Northern Irish Human Rights Challenges Against the Prohibition of Abortion in Cases of Sexual Crime, Fatal Fetal abnormality or Serious Fetal Malformity

The 2017 Supreme Court case focused on the failure of the current settlement to allow or provide for legal abortion to women in cases of sexual Crime, fatal fetal abnormality or serious fetal malformity. While the court was not able to give a judgment due to a finding that the Northern Irish Human Rights Commission lacked standing, it did, rather unusually, state that, had the case been brought by a victim with standing then it would have likely issued a declaration of incompatibility under S.4 of the Human Rights Act 1998, on the basis that the current legal prohibitions were a clear violation of human rights. There is also an ongoing judicial review brought by an individual that aims to obtain such a declaration.

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18 The prosecution of a Northern Irish student who was reported to the PSNI by her housemates after she obtained medication and self-induced an abortion made national and international headlines. The woman was convicted and received a suspended sentence. https://www.theguardian.com/uk-news/2016/apr/04/northern-irish-woman-suspended-sentence-self-induced-abortion.


20 In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review [2018]
While the Supreme Court case was concerned only with the lack of access to abortion for women in cases of sexual crimes, fatal fetal abnormality and serious fetal malformity, the Women and Equalities Committee ought to consider the fact that the Court saw fit to deliver a highly unusual judgement, effectively finding that the current situation is a clear violation of article 8 of the European Convention on Human Rights in offering no access to abortion for women in the first two categories. The Court was clear that the issue was ‘a matter of fundamental human rights on which, difficult though it is, the courts are as well qualified to judge as is the legislature.’ This suggests that failure of the legislature to redress this issue will result in the courts doing so.

While UN human rights treaty bodies have called on the UK to provide access to abortion in situations of rape, incest, and fatal fetal abnormality in Northern Ireland as a minimum, the Women and Equalities Committee should go further, and seek to equalize the rights of Northern Irish women with those in the rest of the UK as a priority.

8. Responding to CEDAW’s Recommendations

The CEDAW Committee recommended that the UK Government ‘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.’ This response is in line with its previous position, which has been consistently to call for liberalisation of criminal sanctions against women who procure abortions.

- Failure to respond adequately to CEDAW’s findings would leave the UK in the position of being found to systematically violate women’s rights.

- As a first priority it is recommended that repealing Sections 59 and 59 of the Offences Against the Persons Act would potentially remove the criminal sanctions against women who procure illegal abortions. The criminal sanctions set out in the Criminal Justice Act (Northern Ireland) 1945 still remain and would necessitate repeal.

UKSC 27.
21 Ewart’s (Sarah Jane) Application [2018] NIQB 85.
22 In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review [2018] UKSC 27, Para, 38.
9. Devolution
CEDAW has been clear in its comments to the UK’s country reports, and in the inquiry, that devolution does not absolve the state party of liability. Compliance with international human rights norms is the responsibility of the state party. Even in states where there may be devolved or autonomous regions, or situations where minority peoples have chosen to be governed and live by cultural or religious practices, UN human rights bodies have held that such practices cannot over-ride the state’s obligation to women’s rights.

10. Repeal of S.58 and S.59 of the Offences against the Persons Act 1861 (OAPA)
In the absence of a willingness or ability of the devolved assembly in Northern Ireland to legislate to provide for access to abortion in Northern Ireland, the UK Government has an obligation to ensure that the rights of Northern Irish women are not violated. A sensible suggestion is for the repeal of S.59 and S.59 of OAPA. However, this approach is not without problems:

- The Offences Against the Persons Act 1861 is a Westminster statute that applies in England, Wales and Northern Ireland, but not Scotland. Repealing the relevant sections of OAPA would effectively decriminalise abortion in England, Wales and Northern Ireland, but not Scotland, where abortion is a common law crime.
- Mirror reform would be required in Scotland in order to harmonise the UK’s approach to abortion and prevent Scotland from having a more illiberal regime than the rest of the UK, as this would similarly create a two-tier system in the UK.
- The Committee should work with the Scottish Parliament’s Equalities and Human Rights Committee in order to achieve a coherent system of decriminalised abortion throughout the UK.

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24 Ibid, para. 53.
25 Lovelace v Canada Communication No. 24/197 (1986), UN Doc. CCPR/C/OP/1.
27 Complete decriminalisation would involve overturning the common law position in Scotland, since repealing the 1967 Act would merely return Scotland to its pre-1967 position. Therefore, ‘whereas decriminalisation in England and Wales would involve a process of repeal, complete decriminalisation in Scotland would mean enacting new law to clarify that abortion was not a crime’. Mary Neal, ‘Devolving Abortion Law’ 2016 20 (3) Edinburgh Law Review 399.
11. The UK Government’s Position on Abortion and Women’s Rights: Ensuring Consistency

Despite the UK Government’s official position that abortion is an issue for the devolved Northern Irish Assembly, and not a UK wide human rights issue, the UK promotes access to abortion and reproductive rights as part of its development program. The Department for International Development (DFID) considers abortion a right.\(^{28}\) It highlights that unsafe abortion in states where it is illegal is a significant contributor to mortality.\(^{29}\) The report concludes that: ‘The need for increased access to an expanded range of reproductive health services is clear.’\(^{30}\) The All-Part Parliamentary Group on Population, Development and Reproductive Health recommended that ‘DFID should do even more to support willing countries to expand access to safe and legal abortion where abortion is restricted through policy and legal reform.’\(^{31}\)

12. In addition to this, the UK Government also reviewed its humanitarian aid policy in light of a series of UN Security Council resolutions that called for safe abortion services to women raped in war.\(^{32}\) It now acknowledges that safe abortion services for such victims are protected under international humanitarian law.\(^{33}\)

- It is clear that the UK Government’s endorsement of abortion rights for women overseas is at odds with its refusal to legislate to ensure such rights for all women in the UK.
- This is problematic, not least in light of the UK’s self-proclaimed position as a human rights leader of the international community, but also because it appears to suggest that the UK government is willing to acknowledge that some women (namely those in Northern Ireland) do not merit those same rights that it is promoting.

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\(^{29}\) DFID, ‘Developing a Human Rights-Based Approach to Addressing Maternal Mortality’
\(^{30}\) Ibid.
\(^{31}\) APPG, ‘WHO DECIDES? We trust women Abortion in the developing world and the UK A report by the UK All-Party Parliamentary Group (APPG) on Population, Development and Reproductive Health (March 2018), at 35.