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CEDAW and the Istanbul Convention: A comparative view on transposition and implementation in domestic law and practice

A research paper on the implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women, and the Istanbul Convention, in domestic law and practice.

Key Points

- This paper is provided following a request from the Assembly Ad Hoc Committee on a Bill of Rights. It details research on the implementation of the United Nations ('UN') Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), and provisions relating to violence against women, in domestic law. As the most relevant international treaty relating to violence against women, the Istanbul Convention is considered in particular.

CEDAW

- The UN adopted CEDAW in 1979. The Convention was developed within the context of several broader human rights treaties of the mid-twentieth century, each of which included commitments to ending gender discrimination. The United Kingdom (UK) signed CEDAW in 1981 and ratified it in 1986. Currently, 189 UN member states have ratified the Convention.
- Amongst other measures, CEDAW commits signatories to embody the Convention's gender equality provisions in national constitutions, and other appropriate domestic legislation. The 'CEDAW Committee' – a body of experts elected by the Convention signatories – oversees the Convention's implementation.
- In the 1998 Belfast/Good Friday Agreement, signatories affirmed their commitment to specific rights, including equal opportunity regardless of gender, and the right of women to full and equal political participation. In their 2008 report, however, the Northern Ireland Bill of Rights Forum was divided on whether women's rights should be included amongst the 'particular circumstances' of Northern Ireland.
- Since CEDAW entered into force in 1981, it has influenced the creation and amendment of multiple national constitutions, to reflect gender equality and non-discrimination. However, signatories have also relied upon their constitutions when lodging reservations to the Convention – for example, to retain gendered royal succession laws or to ensure the primacy of sharia law.
- The incorporation of CEDAW principles and provision in national constitutions is only one element of signatories implementing CEDAW in full. For the purposes of compiling this paper, literature identified by RaISe highlights how full transposition and implementation of CEDAW provisions occurs in a signatory country. Methods used include a country's constitution, other domestic equality and anti-discrimination legislation, relevant case law and public administration.

Istanbul Convention

- The Council of Europe adopted the Convention on Preventing and Combating Violence Against Women and Domestic Violence (the 'Istanbul Convention') in April 2011. To date, 44 countries have signed the Convention, and 33 have ratified it. A group of experts in the area, commonly referred to as 'GREVIO', monitor the Convention's implementation.
- The Istanbul Convention is based on four pillars – prevention, protection, prosecution and coordinated policies – intended to work together, to address violence against women and domestic violence. In some ways, the Istanbul Convention should be understood as subordinate to the broader principles of CEDAW, as it is concerned with one specific topic.
- The UK signed the Convention in June 2012, but has not yet ratified it. Under international law, the UK is not yet bound by the Convention's provisions.
- The Committee should note that the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act was passed by the UK Parliament in 2017. This Act requires the UK Government to take steps to enable the UK to ratify the Convention, and to report annually on those steps. Legislation enacting several provisions of the Istanbul Convention is currently progressing through the UK Parliament. If enacted, the UK may then be in a position to ratify the Convention.
- In 2009, the Northern Ireland Human Rights Commission (NIHRC) provided formal advice to the Secretary of State for Northern Ireland on a potential Bill of Rights. That advice recommended that any Bill of Rights should include supplementary rights relating to freedom from violence and harassment on multiple grounds. Those grounds included domestic violence, sexual violence and gender-related harassment.
- In general, the Convention has not resulted in amendments or additions to signatories' national constitutions. As required by the Convention, a large number of signatories have taken steps to transpose Convention provisions into their domestic law. To date, the Republic of Kosovo is the only country identified which has amended its constitution to explicitly reflect the Istanbul Convention.
- In countries that have amended their domestic law to satisfy the Istanbul Convention, many have not done this fully, leaving implementation incomplete. For example, in case studies including Italy, Serbia and Spain, legislative compliance has been incomplete, and/or insufficiently reinforced in public administration. In addition to this, a number of countries have recently withdrawn from the Convention, including one country – Bulgaria – which found the Convention would contravene its national constitution.
- Relevant literature identified by RaISe for purposes of this paper considers the factors contributing to effective implementation of the Convention. This literature indicates that the inclusion of specific and explicit constitutional provision on violence against women, and/or domestic violence, is not a significant element of signatories implementing the Istanbul Convention. Rather, this literature indicates that the thoroughness of other domestic legislation, and the rigour of public administration, are instrumental to implementing the Istanbul Convention in law and in practice.

Human rights & equality protections in Ireland/Northern Ireland Protocol

- In Article 2 of the Ireland/Northern Ireland Protocol, the UK Government committed to upholding six European Union (EU) human rights and equality directives. Those directives prohibit discrimination in specific areas and on grounds of gender, race, belief, age, sexual orientation and disability. These directives' provisions – despite the UK's exit from the EU – continue to have application in Northern Ireland *via* the Protocol, which protects the chapter of the 1998 Belfast/Good Friday Agreement entitled 'Rights, Safeguards and Equality of Opportunity'. As a result, the UK Government, the Northern Ireland Executive and all public authorities are obliged to comply with these directives in Northern Ireland.

Concluding observations

- Literature reviewed by RaISe indicates that many factors are necessary to meaningfully transpose and implement CEDAW and the Istanbul Convention in national contexts. CEDAW has commonly been transposed into signatories' constitutions and/or bills of rights. The Istanbul Convention, meanwhile, has typically been transposed into domestic law covering prevention of violence against women, criminal acts, and procedures for investigation and prosecution. The literature reviewed indicates that for both CEDAW and the Istanbul Convention, meaningful domestic implementation requires effective domestic legislation, case law and public administration.

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Introduction

This briefing paper is delivered in response to a request received by the Research and Information Service (RaISe) from the Assembly's Ad Hoc Committee on a Bill of Rights. The Committee's request sought comparative perspectives regarding the following two areas:

1. An overview of how signatory countries have sought to incorporate into their domestic law both the United Nations Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW') and measures relating to violence against women: specifically, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the 'Istanbul Convention').
2. An overview of government use of gender budgeting, including approaches taken in a selection of countries, such as the Republic of Ireland, Northern Ireland and elsewhere, in order to identify good practice.

The second area is addressed in a separate RaISe briefing paper, entitled 'Government use of gender budgeting: a comparative perspective to highlight good practice' (NIAR-86-2021), dated 23rd April 2021.

This paper is structured as follows:

- Section 1 briefly details CEDAW, the UN Convention which sought to eliminate all forms of discrimination against women.
- Section 2 then details and considers signatories' transposition and implementation of CEDAW provisions into their domestic law and practice.
- Section 3 details the 2011 Istanbul Convention, which sought to prevent and combat violence against women and domestic violence.
- Section 4 then details and considers the incorporation of Istanbul Convention provisions into signatories' domestic law and practice.
- Section 5 details the human rights and equality protections included in the Ireland/Northern Ireland Protocol to the EU-UK Withdrawal Agreement. Key potential implications of these protections for any Bill of Rights for Northern Ireland are then considered.
- Finally, section 6 offers concluding observations on factors informing the incorporation of CEDAW and the Istanbul Convention into domestic law and practice.

This paper is not offered as legal advice or opinion. Rather, it aims to assist the Committee in further expanding its general knowledge and understanding of these topics, and to therefore facilitate the Committee when exercising its advisory and scrutiny roles.

1 CEDAW

For background, this section briefly details CEDAW. The background and content of the Convention is first detailed. Further developments since this point are then outlined, including the creation of an Optional Protocol to the Convention and the current role of the CEDAW Committee.

1.1 CEDAW: Background and content

The UN General Assembly adopted CEDAW on 18th December 1979. The Convention entered into force as an international treaty in 1981.

CEDAW was the result of work delivered by the UN Commission on the Status of Women, first established in 1946.¹ It should also be understood in the context of several mid-20th century human rights treaties, which included commitments to eliminating gender discrimination. These include the Universal Declaration of Human Rights in 1948, the International Covenant on Civil and Political Rights in 1966, and the International Covenant on Economic, Social and Cultural Rights also in 1966.² CEDAW is often characterised as an 'international Bill of Rights' for women.³

The UK signed CEDAW in 1981 and ratified it in 1986. In total, 189 UN member states have ratified the Convention.⁴

Substantively, CEDAW:

[. . .] defines discrimination against women and sets up an agenda for national action to end such discrimination [. . .] [and] provides the basis for realizing equality between women and men through ensuring women's equal access to, and equal opportunities in, political and public life – including the right to vote and to stand for election – as well as education, health and employment. States parties agree to take all appropriate measures, including legislation and temporary special measures, so that women can enjoy all their human rights and fundamental freedoms.⁵

Article 1 of the Convention defines 'discrimination against women', stating:

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

¹ See <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>, retrieved 23rd March 2021

² Neil Englehart & Melissa Miller, *Women's Rights, International Law and Domestic Politics: Explaining CEDAW's Effectiveness* (2011) p3

³ See <https://www.boell.de/en/cedaw>, retrieved 15th April 2021

⁴ See web.archive.org/web/20150906035454/https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-8&chapter=4&lang=en, retrieved 23rd March 2021

⁵ See <https://www.un.org/womenwatch/daw/cedaw/>, retrieved 15th April 2021

⁶ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) Art. 1

Further to this, CEDAW contains several commitments relating to transposing the Convention's principles into signatories' domestic law. In particular:

a) Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

*(a) **To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein [emphasis added] and to ensure, through law and other appropriate means, the practical realization of this principle**⁷ [. . .]*

b) Article 15

*States Parties shall **accord to women equality with men before the law** [emphasis added].⁸*

1.2 The CEDAW Committee

The Committee on the Elimination of Discrimination against Women (the 'CEDAW Committee') oversees the implementation of the Convention.⁹

CEDAW Committee members are elected by the states that have ratified the Convention, and serve four-year terms.¹⁰ Signatories must send reports for the Committee's consideration at least every four years, detailing measures adopted to meet the Convention, progress made, and any difficulties that the signatories have encountered.

1.3 The Optional Protocol to CEDAW

In 2000, the UN General Assembly adopted an Optional Protocol to CEDAW. The Optional Protocol was informed by other international gender-based discrimination declarations, including the 1993 Vienna Declaration¹¹ and the 1995 Beijing Declaration.¹² At the time of writing, 189 states have ratified CEDAW as detailed above; 114 of these, including the UK, have also ratified the Optional Protocol.¹³

The Optional Protocol strengthens the CEDAW Committee's ability to investigate violations of Convention rights by establishing two new mechanisms: a complaints procedure, and an inquiry procedure.¹⁴

In states that have ratified the Optional Protocol, the complaints procedure permits individuals or groups to submit written communications to the CEDAW Committee. The

⁷ United Nations, *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) Art. 2

⁸ As cited immediately above, Art. 15

⁹ As cited in footnote 7, Arts 17-22

¹⁰ As cited in footnote 7, Art. 17

¹¹ See <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>, retrieved 23rd March 2021

¹² See <https://www.un.org/womenwatch/daw/beijing/platform/declar.htm>, retrieved 23rd March 2021

¹³ See <https://indicators.ohchr.org/>, retrieved 23rd March 2021. In effect, this means that 75 other countries have committed to the original CEDAW Convention, but are not subject to the Optional Protocol.

¹⁴ See <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx>, retrieved 23rd March 2021; see also <https://blogs.lse.ac.uk/vaw/int/cedaw/>, retrieved 23rd March 2021

Committee may consider these communications, if the individual or group claims to be victim of violation of CEDAW rights, and if all domestic remedies to these violations have been exhausted.¹⁵

The inquiry procedure permits the CEDAW Committee to conduct inquiries, where it receives 'reliable information indicating grave or systematic violations' of CEDAW rights by a state.¹⁶ The Committee communicates its findings to the state in question, and the state concerned must then respond with its own observations.¹⁷

¹⁵ United Nations, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (2000), Arts 2-4

¹⁶ As cited immediately above, Art. 8

¹⁷ In Northern Ireland, several organisations used the inquiry procedure in 2010. These organisations contended that restrictive access to abortion in Northern Ireland constituted 'grave and systematic violations of rights under the Convention' by the UK. This eventually resulted in a CEDAW Committee report in 2018, which found multiple violations of Convention rights and made recommendations on expanding lawful access to abortion in Northern Ireland, and improving sexual and reproductive health rights and services. The UK Government subsequently committed to implementing the CEDAW Committee's recommendations in the Northern Ireland (Executive Formation etc.) Act 2019 and subsequent Regulations.

2 CEDAW in domestic law and practice

This section considers the transposition and implementation of CEDAW principles in domestic law and practice.

First, relevant background on proposals for a Bill of Rights in Northern Ireland is provided. Then, the interaction of CEDAW and national constitutions is considered – specifically, where CEDAW has been incorporated into signatories’ constitutions; the practical limits of such steps; and instances where existing national constitutions have been used to lodge reservations against CEDAW. Finally, current proposals to explicitly codify CEDAW in Scots law are detailed.

2.1 Background in Northern Ireland

In the 1998 Belfast/Good Friday Agreement, signatories agreed to create the Northern Ireland Human Rights Commission (‘NIHRC’). Among its responsibilities was to consult and advise on the development of a potential Bill of Rights¹⁸ for Northern Ireland, which would ‘reflect the particular circumstances of Northern Ireland’, and build on the European Convention on Human Rights and other international instruments.¹⁹

Elsewhere in the agreement, parties affirmed their commitment to mutual respect, civil rights and the religious liberties of everyone in the community. Against ‘the background of the recent history of communal conflict’, the parties specifically affirmed their commitment to eight rights, including the following:

*[. . .] the right to equal opportunity in all social and economic activity in all social and economic activity, regardless of class, creed, disability, **gender** [emphasis added] or ethnicity; [. . .] the right of women to full and equal political participation.*²⁰

The Committee should note, however, that these rights were not conclusively intended to constitute the ‘particular circumstances’ of Northern Ireland.²¹ Consideration of the particular circumstances was to be subject to future consideration.²²

In its 2008 report, the Northern Ireland Bill of Rights Forum was divided over what constituted the ‘particular circumstances’ of Northern Ireland. The report noted contrasts between a broad-range definition of the legacy of conflict, and a narrower definition which focused on issues arising ‘directly from the conflict between the two main communities and reflecting the principles of mutual respect and . . . parity of esteem’.²³

The broader definition of Northern Ireland’s particular circumstances in the Forum report included the following:

¹⁸ A Bill of Rights can be defined as ‘A declaration of individual rights and freedoms, usually issued by a national government.’ See <https://legal-dictionary.thefreedictionary.com/Bill+of+Rights>, retrieved 15th April 2021

¹⁹ Northern Ireland Office, *Belfast Agreement* (1998) pp20-21

²⁰ As cited immediately above, p20

²¹ Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (2008) p11

²² As cited immediately above; see also M Potter, *Definitions of the ‘Particular Circumstances’ of Northern Ireland* (2020)

²³ As cited in footnote 21, p12

[. . .] women's rights, evident, for example, in the low level of women's participation in public life and the higher than expected incidence of mental health issues among women in Northern Ireland.²⁴

Following the Forum's 2008 report, in 2009 the Northern Ireland Office (NIO) published a consultation on next steps for a Bill of Rights for Northern Ireland. This detailed the NIHRC recommendations, and the Government's view on those.

The NIHRC's recommendation 5 proposed a large number of specific characteristics, on which discrimination would be prohibited:

The right to equality and prohibition of discrimination

Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law, including the full and equal enjoyment of all rights and freedoms.

*No one shall be unfairly discriminated against by any public authority on any ground such as: race, membership of the Irish Traveller community, colour, ethnicity, descent, **sex, pregnancy, maternity, civil, family or carer status**, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, **gender**, identity, age, disability, health status, generic or other predisposition toward illness, irrelevant criminal record, property or a **combination of any of these grounds, on the basis of characteristics associated with any of these grounds, or any other status** [emphasis added] [. . .]²⁵*

In considering this NIHRC proposal, the NIO noted existing equality provisions in Sections 75 and 76 of the Northern Ireland Act 1998.²⁶ It further expressed concern that expanding characteristics on which discrimination is prohibited could weaken existing protections:

The Government would strongly support in principle a general statement to the effect that everyone in Northern Ireland is equal before the law and has the right to the equal protection and benefit of the law. However, it would be important to ensure that any such provision did not lead to uncertainty about the extent to which differences in treatment were justified, or weaken the effect of existing protections by diluting the focus on particular disadvantaged groups. The Government also recognises the potential scope for streamlining and updating the current equality system, which will have a bearing on the formulation of any new right.²⁷

Since 1999, shortly after the signing of the Belfast/Good Friday Agreement, the CEDAW Committee has recommended that the UK incorporate the provisions of

²⁴ Bill of Rights Forum, *Final Report: Recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland* (2008) p12

²⁵ Northern Ireland Office, *A Bill of Rights for Northern Ireland: Next Steps* (2009) pp109-110

²⁶ As cited immediately above, pp26-29

²⁷ As cited in footnote 25, p31

CEDAW into domestic legislation.²⁸ In their 2019 ‘shadow report’ to the CEDAW Committee, women’s sector groups from across the UK supported continued to such a step, arguing that ‘progressive realisation of rights across the UK could be hastened’ through CEDAW’s incorporation to UK, Scots and devolved law.²⁹

Such support continues to be expressed by some. When responding to the Assembly Bill of Rights Committee consultation, both the Northern Ireland Women’s European Platform and the Women’s Policy Group NI emphasised the relevance of CEDAW to any Bill of Rights for Northern Ireland, and called for incorporation of CEDAW provisions in domestic law and policy.³⁰

2.2 Reservations to CEDAW on constitutional grounds

As detailed above, Article 2 of CEDAW requires signatory states to ‘embody the principle of the equality of men and women in their national constitutions’.³¹

Despite this, a number of countries have lodged reservations with CEDAW, at least partially based on incompatibility with their national constitutions. These are:

- Australia
- Brunei
- Lesotho
- Liechtenstein
- Malaysia
- Mauritania
- Micronesia
- Monaco
- Morocco
- Pakistan
- Qatar
- Spain
- Tunisia³²

The primary reasons for these reservations are:

- Retaining gendered laws of royal succession;
- Asserting the primary of Islamic sharia law, contained within national constitutions, over CEDAW; and
- Retaining traditional titles and marital customs.

²⁸ Engender, Northern Ireland Women’s European Platform, Women’s Equality Network Wales & Women’s Resource Centre, *Shadow Report from the Four Nations of the United Kingdom* (2019) p3

²⁹ As cited immediately above

³⁰ See Northern Ireland Women’s European Platform, *Submission to the Ad Hoc Committee on a Bill of Rights for Northern Ireland* (2021) p3, and Women’s Policy Group NI, *Response to Ad Hoc Committee on a Bill of Rights Consultation* (2021) p3

³¹ See p6 of this paper above

³² See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec, retrieved on 29th March 2021

2.3 CEDAW in national constitutions

Since CEDAW entered into force in 1981, it has influenced the creation and/or amendment of multiple national constitutions, and has been incorporated into national case law by constitutional courts on several occasions. Below is an indicative list of CEDAW being utilised in these ways:

- Article 18 of Albania's constitution bars 'unjust discrimination' for reasons including gender.³³ The 2008 domestic law 'Gender Equality in Society' introduced mandatory 'gender mainstreaming' across policymaking, implementing and monitoring processes in education, media, employment and public life.³⁴
- Andorra's constitution establishes equality between men and women, and bars discrimination on multiple grounds, including sex.³⁵
- Colombia's constitutional court, in 2006, extended the grounds for legal abortion on the basis of CEDAW. The court found that the existing criminal prohibition of abortion in all circumstances violated women's fundamental rights, as established in Colombia's 1991 constitution and international human rights law.³⁶

Notably, the court made this ruling by interpreting the constitution in line with the state's obligations under international human rights treaties – primarily CEDAW. The court found discrimination against women was evident in high rates of maternal mortality because of negligent healthcare provision, and that existing law stereotyped women into childbearing service roles, inhibiting free and informed decisions on whether and when to found a family.³⁷

- Malaysia amended its constitution in 2011, to include gender as a prohibited ground for discrimination. The Malaysian Parliament has also amended domestic legislation to eliminate discrimination in multiple instances.³⁸
- Malta's constitution prohibits discrimination on a range of grounds, including gender. Subordinate to this, Malta has extensive domestic equality legislation, and has established an independent National Commission for Promotion of Equality to hear discrimination cases, issue non-binding opinions and promote equal treatment more generally.³⁹
- Morocco's constitution establishes equal access for men and women to all 'civil, political, economic, social, cultural and environmental' rights and freedoms –

³³ *Constitution of the Republic of Albania* (1998) p4

³⁴ *Law No. 9970: Gender Equality in Society* (2008)

³⁵ *Constitution of the Principality of Andorra* (1993) p13

³⁶ Rebecca Cook, 'Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia' in *Reproductive Health Matters* (2007) p160

³⁷ As cited immediately above, p161

³⁸ See <https://constitutions.unwomen.org/en/countries/asia/malaysia?provisioncategory=b21e8a4f9df246429cf4e8746437e5ac>, retrieved on 31st March 2021. See also Asia Pacific Transgender Network, *Legal Gender Recognition in Malaysia: A legal & policy review in the context of human rights* (2017)

³⁹ *Constitution of Malta* (1991) p8 – specifically Art. 14 as amended. See also Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report: Malta* (2020) p14

both domestic rights and freedoms, and those located within international treaties which Morocco joins. In addition, it commits the state to working to realise parity between men and women, and creates a public authority to this end.⁴⁰

- Nepal, in 2002, passed the 11th amendment to the country code. This ended gender discrimination in multiple areas including inheritance law, adoption, divorce, and elements of criminal law.⁴¹
- Serbia establishes constitutional equality in Article 15 of its constitution, and further defines this in domestic law with its 'Act on Gender Equality'.⁴²
- Spain's constitution prohibits discrimination on the basis of sex. The 'Act for Effective Equality between Women and Men' further develops substantive equality by setting gender policy goals and measures for public bodies in education, health, employment and the media.⁴³
- Thailand's constitutional court found that laws forcing women to change their name when marrying were unconstitutional, as they violated the principle of equality between men and women.⁴⁴

In Colombia, the constitutional court relied directly on CEDAW to find domestic law unconstitutional, on the basis of discrimination against women. However, the Committee should note that this is not an option for the UK Supreme Court in the same manner.

In terms of international law and treaties, Colombia is a 'monist' state. This means that international treaties which Colombia signs are then considered part of its internal legal system.⁴⁵ The UK, however, follows a 'dualist' legal system where international law stands apart from national law.⁴⁶ To have effect on rights and obligations at the national level in the UK, CEDAW would have to be explicitly brought into domestic legislation.⁴⁷ This means currently, the UK judicial system cannot rely directly upon CEDAW (or other international treaties) in the way that monist states like Colombia can.

⁴⁰ *Constitution of Morocco* (2011) p9

⁴¹ *Country Code Eleventh Amendment Act* (2002); see also http://www.fao.org/gender-landrights-database/country-profiles/countries-list/national-legal-framework/en/?country_iso3=NPL, retrieved on 31st March 2021

⁴² *Constitution of the Republic of Serbia* (2006) p3, and *Act on Gender Equality* (2009)

⁴³ *The Spanish Constitution* (1978) p11, and *Constitutional Act 3/2007 for effective equality between women and men* (2007)

⁴⁴ The Constitutional Court of the Kingdom of Thailand, *Summary of the Constitutional Court Ruling 21/2546* (2003)

⁴⁵ See <https://international-review.icrc.org/articles/international-humanitarian-law-colombia-going-step-beyond-ir912>, retrieved 20th April 2021

⁴⁶ See <https://legalresearch.blogs.bris.ac.uk/2017/04/the-dualist-system-of-the-english-constitution-and-the-victorian-acquis/>, retrieved 21st April 2021

⁴⁷ See http://www.judicialmonitor.org/archive_winter2014/generalprinciples.html, retrieved on 29th March 2021

2.4 Limits of incorporating CEDAW into domestic law

As detailed above, there are a large number of instances of countries creating or amending constitutional law in light of CEDAW. However, this constitutional equality is only one element of enacting CEDAW in full. Below, four case studies detail the limits of ensuring CEDAW is reflected in constitutional law:

a) South Africa

In 2009, the CEDAW Committee received a report from several women's and human rights organisations in South Africa, on CEDAW's implementation there.

This report argued that whilst South Africa has embedded the right to gender equality in its constitution,⁴⁸ this right has not been fully transposed and implemented through legislation and public administration. The report cited the continuing existence of discriminatory domestic law in customary, cultural and religious spheres; the absence of any overall domestic 'gender law' in South Africa; and the absence of laws addressing women with multiple vulnerabilities.⁴⁹

The report further stated that beyond the absence of full equality in domestic law, there was a consistent state failure to progress practical equality. Women continued to experience discrimination from public bodies; inadequate financial, infrastructural and human resources; poor service provision in rural areas; and a lack of sensitivity from government to gender rights and equality.⁵⁰ In addition, the absence of national gender data collection or monitoring meant that any efforts towards greater practical equality were difficult to measure and establish.

In its subsequent observations on South Africa, the CEDAW Committee acknowledged and welcomed the incorporation of gender equality into constitutional and other elements of domestic law.⁵¹ However, the Committee called for strengthening of equality provisions in the constitution,⁵² and for expedited passage of domestic legislation to reinforce those constitutional principles.

b) Afghanistan

After the passage of CEDAW, Afghanistan added provisions to its constitution embodying gender equality and a prohibition of discrimination.⁵³ However, Article 54 of the constitution of Afghanistan also upheld a specifically Islamic view of 'family [as] the fundamental pillar of society, and requires the state to protect this institution and eliminated any traditions contrary to the principles of Islam.'⁵⁴

⁴⁸ Centre for the Study of Violence and Reconciliation, People Opposing Women Abuse & Western Cape Network on Violence Against Women, *South African Shadow Report on the Implementation of CEDAW* (2011) p6

⁴⁹ As cited immediately above

⁵⁰ As cited in footnote 48, p7

⁵¹ UN Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: South Africa (48th session)* (2011) p2

⁵² As cited immediately above, pp3-4

⁵³ Megan Smith, 'Redefining Substantive Equality: An Examination of Afghanistan's National Action Plan through a Constitutional Lens' in *Mapping the Impact of Gender Equality Provisions and Constitutionmaking* (2016) pp30-31

⁵⁴ As cited immediately above, p31

A 2016 academic paper on this matter argued that the Afghan constitution remains 'weak in its protection and promotion of women's equality'.⁵⁵ The author argued that the constitution should be amended with stronger provisions that explicitly bind the state and private institutions. The author also acknowledged the concept of intersectionality: that is, the interaction of gender discrimination with discrimination on other grounds, including age, disability or tribal background.⁵⁶

c) Egypt

Egypt's 2014 Constitution incorporates numerous articles towards gender equality,⁵⁷ which CEDAW directly helped to inform and shape.⁵⁸ However, Egypt also retains a reservation to CEDAW, whereby the country will only comply with CEDAW to the extent that it does not contradict sharia law. This potentially limits the enforceability of the constitutional provisions to which CEDAW has contributed.

The cases of South Africa, Afghanistan and Egypt above are instructive. Constitutional provision is a useful and valuable starting point, but much more is required – in terms of subsequent domestic legislation, and reform of public administration – to ensure fuller enactment of CEDAW principles, both in law and in practice. In this light, the example of Sweden may be a useful contrast.

d) Sweden

Sweden has constitutional equality, as embodied in its constitution and 'Instrument of Government'.⁵⁹ In addition to this, it also has substantive domestic legislative equality as embodied in the Swedish Discrimination Act 2008,⁶⁰ and strong administrative equality in practice. All Swedish ministries have gender equality policies incorporated into their Departmental remits, and public servants are trained to enact these in practice. These equality policies include routine provision of gender impact assessments and equality analyses in public administration.⁶¹

⁵⁵ Megan Smith, 'Redefining Substantive Equality: An Examination of Afghanistan's National Action Plan through a Constitutional Lens' in *Mapping the Impact of Gender Equality Provisions and Constitutionmaking* (2016) p32

⁵⁶ As cited immediately above

⁵⁷ *Constitution of Egypt* (2014) p10, 13, 21, 29, 45 & 54

⁵⁸ Nancy Zambrana, 'Women's Power and Decision-Making in the Arab Republic of Egypt' in *Mapping the Impact of Gender Equality Provisions and Constitutionmaking* (2016) pp71-72

⁵⁹ *The Constitution of Sweden* (2016) p65 & p70

⁶⁰ See https://www.government.se/4a788f/contentassets/6732121a2cb54ee3b21da9c628b6bdc7/oversattning-diskrimineringslagen_eng.pdf, retrieved on 31st March 2021

⁶¹ Group of Experts on Action against Violence against Women & Domestic Violence, *Baseline Report: Sweden* (2019) p12

2.5 Plans to incorporate CEDAW into Scots law

In light of the above discussion of the limits of incorporating CEDAW to constitutional law, and the benefits of further domestic legislation and public administration reform, recent steps in Scotland are of note. The Scottish Government is currently working towards the incorporation of CEDAW into Scottish domestic law (commonly known as ‘Scots law’).

In 2021, the Scottish Government’s Human Rights Advisory Group reported to the First Minister. The Group made seven recommendations, the first being an Act of Scottish Parliament providing human rights leadership.⁶² This was to include rights drawn from UN treaties ratified by the UK, but not codified in Scots law (including CEDAW).⁶³

Women’s sector groups in Scotland have argued that taking such a step would have several positive impacts, specifically:

- *The significantly improved visibility of CEDAW and the rights it protects;*
- *Enhanced accountability for women’s rights including the possibility that any woman can access a remedy for a breach of her rights in her local court;*
- *Rights could be better delivered without litigation because of requirements for public sector bodies to better embed substantive equality . . .*
- *As the overarching aim of incorporation would be to avoid litigation, effective incorporation would require the legislature’s enhanced vigilance [. . .]⁶⁴*

In addition to the Human Rights Advisory Group’s recommendation of a Scottish Human Rights Act, six other recommendations are made. These include steps intended to practically realise the human rights included in any Act, by making subsequent changes to domestic law and public administration. Such recommendations include the following:

Capacity-building to enable effective implementation of the Act so as to improve people’s lives.

[. . .]

A Scottish Government National Mechanism for Monitoring, Reporting and Implementation of Human Rights

[. . .]

Development of human rights-based indicators for Scotland’s National Performance Framework (NPF).⁶⁵

In light of the example of Sweden, the proposals in Scotland may also be instructive. The starting point is Scottish constitutional provision of CEDAW principles, and women’s equality more generally. In addition to this, however, there are explicit recommendations to enact these principles through domestic legislation and government prioritisation and decision-making structures, and therefore to deliver everyday practical equality.

⁶² First Minister’s Advisory Group on Human Rights Leadership, *Report to the First Minister* (2018) p6

⁶³ As cited immediately above, p7 & p32

⁶⁴ Engender et. al., *Incorporating CEDAW into Scots Law* (2020) p8

⁶⁵ First Minister’s Advisory Group on Human Rights Leadership, *Report to the First Minister* (2018)

2.6 Potential issues for consideration

In considering the implementation of CEDAW in domestic law and practice discussed above, the Committee may wish to consider the following with relevant governmental and non-governmental experts:

- Whether, and in what form, CEDAW principles of gender equality and elimination of gender discrimination should be considered a necessary response to the 'particular circumstances' of Northern Ireland?
- Drawing on experience in other signatory countries, whether gender equality within a Bill of Rights is sufficient, or would be more effective if accompanied by consequent changes in domestic law and public administration?
- What learning can be taken from ongoing work of the Scottish Government in Scotland to codify CEDAW, along with a broader range of UN treaties, into Scots law?

3 The Istanbul Convention

This section details the Istanbul Convention, and the UK's current position in relation to ratifying this Convention.

3.1 What is the Istanbul Convention?

In April 2011, the Council of Europe⁶⁶ adopted the Convention on Preventing and Combating Violence Against Women and Domestic Violence. It is commonly referred to as the 'Istanbul Convention', after the city in which the Convention was opened for signature. The Convention came into force in August 2014. At the time of writing, it has been signed by 44 countries and ratified by 33.⁶⁷ This means that eleven countries, including the UK, have signed but not ratified the Convention.

The Council of Europe intends the Convention to be a regional instrument that complements and expands standards set by other regional human rights organisations: for example, the Organisation of American States' 1994 'Convention on violence against women', and the 2003 African Union 'Protocol on the rights of women in Africa'.⁶⁸ The Council of Europe states that the Istanbul Convention 'complements and expands' upon these standards and is 'more comprehensive in nature', and is also open to states which are not members of the Council.⁶⁹

The opening articles of the Istanbul Convention state its purposes and structure:

1 The purposes of the Convention are to:

- a) protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence;*
- b) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women;*
- c) design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence;*
- d) promote international co-operation with a view to eliminating violence against women and domestic violence;*
- e) provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.*

2 In order to ensure effective implementation of its provisions by the Parties, this Convention establishes a specific monitoring mechanism.⁷⁰

⁶⁶ The Council of Europe was founded in 1949 in the wake of World War Two and works to uphold human rights, democracy and the rule of law in Europe. See <https://www.coe.int/en/web/about-us/values>, retrieved on 31st March 2021

⁶⁷ See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>, retrieved on 30th March 2021

⁶⁸ Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (2011) p2

⁶⁹ As cited immediately above

⁷⁰ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (2011) p7

The five clauses of Article 1(1) are often abbreviated and referred to as the ‘four pillars of Istanbul’ – these are prevention, protection, prosecution and co-ordinated policies.⁷¹

The Convention has twelve chapters. Most of these – in particular, Chapters 2 to 8 – concern sub-constitutional domestic law, and international cooperation with regard to this. Chapter titles include:

- Prevention
- Protection and support
- Substantive law
- Investigation, prosecution, procedural law and protective measures, and
- International cooperation

The Istanbul Convention therefore does not address foundational or constitutional principles in the same way that CEDAW does. In some ways, Istanbul’s content can be viewed as subordinate to the broader principles of CEDAW, as it is concerned specifically with the matter of ending violence against women and domestic violence.⁷²

Chapter 5 of the Convention addresses domestic law regarding violence against women and domestic violence. It establishes a number of criminal offences for Convention signatories to adopt – for example, ‘psychological violence’, ‘forced marriage’ and ‘female genital mutilation’ (FGM).⁷³ In addition to this, it establishes civil law remedies for victims to seek justice and compensation, whether from perpetrators, or state authorities where they fail in their duties.⁷⁴

Chapter 6 of the Convention concerns investigation, prosecution, procedural law and protective measures. It details specific requirements relating to (for instance) immediate response, prevention and protection; risk management; evidence and investigative practices; court proceedings; legal aid; and statutes of limitations.⁷⁵

Chapter 9 establishes the monitoring mechanism referred to in Article 1(2) of the Convention, as detailed above. The Chapter creates a ‘group of experts on action against violence against women and domestic violence’ (commonly abbreviated to ‘GREVIO’). This group is composed of experts in human rights, gender equality, violence against women and domestic violence, criminal law and assistance and protection of victims.⁷⁶ At the time of writing, of the 33 countries which have signed and ratified the Convention:

- 17 countries have adopted initial GREVIO reports on their performance;
- 7 countries are currently under evaluation by GREVIO; and
- 9 countries are due for future evaluation.⁷⁷

⁷¹ Council of Europe, *The Four Pillars of the Istanbul Convention* (2011)

⁷² Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (2011) p5

⁷³ As cited immediately above, pp17-18

⁷⁴ As cited in footnote 72, p16; see also Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (2011) pp27-28

⁷⁵ As cited in footnote 72, pp21-24; see also Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (2011) pp43-50

⁷⁶ As cited in footnote 72, pp28-29

⁷⁷ See <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work>, retrieved on 21st April 2021

3.2 The UK's signature & ratification of the Istanbul Convention

The UK signed the Convention in June 2012, but has not yet ratified it.⁷⁸ This means that the treaty, in terms of international law, does not yet bind the UK.⁷⁹

In April 2017, the UK Parliament passed the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act. This was a private member's Bill, brought by Dr. Eilidh Whiteford MP of the Scottish National Party.

This Act requires the UK Government to take 'all reasonable steps as soon as reasonably practicable to enable the United Kingdom to come compliant' with the Istanbul Convention.⁸⁰ Further to this, it requires annual reports from the UK Government to this end. These reports must detail:

- When the UK Government expects to be able to ratify the Convention;
- Administrative measures taken by the UK Government to this end, and any future measures envisioned; and
- Legislative proposals across the four UK legislatures to this end, and any future measures envisioned.⁸¹

The UK Government published its most recent progress report in 2020. In this, the UK Government details one major remaining requirement to ratify the Convention: namely, legislation allowing other ratifying states to prosecute offences under the Convention, when committed by UK nationals or residents overseas.⁸² This is commonly referred to as 'extraterritorial jurisdiction' in relation to violence against women and domestic violence offences. Instituting this measure requires primary legislation.⁸³

In March 2020, the UK Government reintroduced the Domestic Abuse Bill to Parliament, which sought to institute those 'extraterritorial jurisdiction' powers across the UK. At the time of the UK Government's 2020 progress report, Royal Assent on the Bill was expected by 'spring 2021'.⁸⁴ At the time of writing, the Bill is in its final stages of consideration.⁸⁵ Subsequent commencement Regulations for this legislation will then be required in Northern Ireland and Scotland.

The Government's report also notes that before the restoration of devolution, the UK Parliament's Domestic Abuse Bill contained provision for the creation of a new domestic abuse offence in Northern Ireland. After the restoration of a fully functioning Assembly in January 2020, that Bill was included in what is now the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021.

⁷⁸ Pat Strickland & Grahame Allen, *UK policy on ratifying the Istanbul Convention on preventing violence against women* (2017) p3

⁷⁹ See <https://ask.un.org/faq/14594>, retrieved 19th April 2021

⁸⁰ As cited in footnote 78

⁸¹ *Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017*, Arts. 1 & 2

⁸² See Article 44; Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (2011) pp19-20

⁸³ Home Office, *Ratification of the Council of Europe Convention on Combating Violence Against Women and Girls and Domestic Violence (Istanbul Convention) – 2020 Report on Progress* (2020) p7

⁸⁴ As cited immediately above

⁸⁵ See <https://bills.parliament.uk/bills/2709>, retrieved on 22nd April 2021

The creation of the domestic abuse offence in this Act⁸⁶ allowed Northern Ireland to satisfy Article 33 of the Convention, which requires the criminalisation of psychological violence.⁸⁷ The Act also allowed for extraterritorial jurisdiction in relation to this offence, and thus satisfies Article 44 of the Convention.⁸⁸

Finally, the Government's 2020 progress report also highlights the 2016 UK Government 'Violence Against Women and Girls Strategy' as one of the administrative measures taken by the UK Government with respect to the Convention. This Strategy includes actions addressing domestic abuse, 'honour-based' abuse, stalking and sexual violence, and the attitudes and behaviours that discriminate against women and girls.⁸⁹ The Government published a refreshed Strategy for England and Wales in 2019.⁹⁰

In this context, it is notable that Northern Ireland currently has no such strategy. In March 2021, the Assembly debated a private motion calling for the Justice and First and deputy First Ministers to bring such a strategy.⁹¹

⁸⁶ *Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021*, Art. 1

⁸⁷ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (2011) p17

⁸⁸ As cited immediately above, pp19-20

⁸⁹ Home Office, *Ratification of the Council of Europe Convention on Combating Violence Against Women and Girls and Domestic Violence (Istanbul Convention) – Report on Progress* (2020); see also <https://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020>, retrieved on 31st March 2021

⁹⁰ See <https://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020/ending-violence-against-women-and-girls-strategy-refresh-2016-to-2020-march-2019-accessible-version>, retrieved on 31st March 2021

⁹¹ NIA OR 23rd March (2021) pp47-66

4 The Istanbul Convention in domestic law and practice

This section details and considers signatories' transposition and implementation of the Istanbul Convention, in their domestic law and practice.

First, NIHRC proposals on including gender-based violence in a Bill of Rights are detailed. Following this, the transposition and implementation of the Istanbul Convention in signatories' domestic law and practice is considered. Finally, the section considers the factors informing signatories' implementation of the Convention.

4.1 Background in Northern Ireland

In 2009, the NIHRC provided formal advice to the Secretary of State for Northern Ireland on a Bill of Rights for Northern Ireland, as required in the Belfast/Good Friday Agreement.⁹² In that advice, it recommended that a Bill of Rights should include supplementary rights relating to freedom from violence and harassment on numerous grounds:

Freedom from violence, exploitation and harassment

The ECHR does not specifically protect the right to freedom from violence, harassment or sexual exploitation, nor does it recognise the particular threat of violence and abuse in the private sphere. The Commission recommends that a Bill of Rights for Northern Ireland includes the following supplementary rights.

Provisions should be drafted to ensure that –

- 1. Everyone has the right to be free from all forms of violence and harassment, from either public or private sources, including but not limited to:*
 - a) domestic violence or harassment;***
 - b) sexual violence or harassment;***
 - c) gender-related violence or harassment [emphasis added];***
 - d) sectarian violence or harassment; and*
 - e) violence or harassment motivated by hate on any prohibited ground of discrimination.*
- 2. Everyone has the right to be protected from sexual exploitation and sexual and other forms of trafficking.*
- 3. Public authorities must take all appropriate measures to ensure protection of the rights in Recommendations 1 and 2.⁹³*

In their 2019 report to the CEDAW Committee, the Northern Ireland Women's European Platform highlight what they characterise as the unique experience of gender-based violence for women in Northern Ireland.⁹⁴ Whilst sharing similarities with

⁹² Northern Ireland Office, *Belfast Agreement* (1998) pp20-21

⁹³ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (2009) p16

⁹⁴ Northern Ireland Women's European Platform, *Shadow report for the examination of the UK by the Committee on the Convention to Eliminate Discrimination against Women* (2019) p4

Great Britain, this report argues the legacy of the Troubles has contributed to environments where such violence could not, and sometimes still cannot, be reported to authorities, 'leaving women without recourse to justice or support.'⁹⁵

4.2 Istanbul Convention domestic law

This sub-section proceeds in two stages. First, the Republic of Kosovo is identified as the only place actively transposing the Istanbul Convention into its constitution. Second, the domestic law and implementation of other Istanbul signatories is considered.

a) Republic of Kosovo

In the Republic of Kosovo, Article 22 of the Constitution guarantees multiple international human rights treaties and makes them 'directly applicable in the Republic of Kosovo.' This includes CEDAW.⁹⁶ On 25th September 2020, the National Assembly of Kosovo adopted an amendment to this Article, to also include the Istanbul Convention among those treaties.⁹⁷

The Republic of Kosovo is not a member state of the UN, EU or Council of Europe: in international terms, it is a 'partially-recognised state.'⁹⁸ Consequently, the Republic of Kosovo does not currently have the standing to directly sign or ratify the Istanbul Convention.

In this context, the Kosovo Assembly has directly adopted and transposed many human rights treaties into the national constitution. Reasons for this include avoiding violation of human rights in domestic legislation; seeking international support for the state; and attempting to speed integration of the Republic of Kosovo into international networks.⁹⁹ In the absence of any comprehensively recognised ability to sign or ratify international treaties, this direct transposition is the only option for the Republic of Kosovo. The country is an outlier in this regard.

b) Istanbul Convention – signatories with no constitutional provision

As mentioned above, the Istanbul Convention creates a monitoring body commonly known as GREVIO, to ensure effective implementation of the Convention's provisions.¹⁰⁰ At the time of writing, GREVIO has produced and agreed 17 initial reports on the 33 countries that have signed and ratified the Convention.¹⁰¹

A consistent theme emerges across these reports. Where GREVIO reports refer to national constitutions, they indicate that many countries have constitutional provision for gender equality and non-discrimination in the general sense. However, none of the

⁹⁵ Northern Ireland Women's European Platform, *Shadow report for the examination of the UK by the Committee on the Convention to Eliminate Discrimination against Women* (2019) p4

⁹⁶ *Constitution of the Republic of Kosovo* (2008) Art. 22

⁹⁷ Assembly of the Republic of Kosovo, *Amendment of the Constitution of the Republic of Kosovo* (2020) p1

⁹⁸ Natalie Zufle, 'Is Kosovo a state in international legal terms?' (2008)

⁹⁹ Rreze Hoxha, *Snapshot analysis on the recent developments related to the Human Rights sector in Kosovo* (2019) p7

¹⁰⁰ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (2011) p5 & pp28-29

¹⁰¹ See <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work>, retrieved on 21st April 2021

reports indicates additional, specific constitutional provision relating to violence against women, or domestic violence.

This is the case for the following countries: Albania, Andorra, Belgium, Malta, Monaco, Montenegro, the Netherlands, Spain and Sweden.¹⁰² In each of these countries, constitutional law establishes general gender equality, which is reinforced further by domestic equality and anti-discrimination law. However, there is no specific constitutional provision relating to the specific topic or provisions of the Istanbul Convention. This is due to the fact that the Istanbul Convention is focused on domestic criminal and procedural law – rather than constitutions – and appears to treat the eradication of violence against women as one specific objective, within the broader fundamental principle of gender equality.

4.3 Limits of the Istanbul Convention's domestic application

This sub-section proceeds in two stages. First, the application of Istanbul Convention provisions are considered in three countries where this has been incomplete in legislative terms, and not achieved in practical terms. Second, two countries which eventually rejected the Convention are also considered.

a) Italy, Serbia and Spain

- Italy is a useful and representative case study of incomplete transposition of Istanbul Convention provisions into domestic law. The Italian Parliament passed Law 119/2013 to satisfy Convention requirements, by adding or expanding definitions of criminal offences relating to sexual harassment; FGM; physical and psychological violence; stalking; and forced abortion and sterilisations.¹⁰³

However, it has not criminalised forced marriages, and its criminalisation of FGM is partial – covering the acts themselves, but not acts that provide means or support to those who carry out FGM.¹⁰⁴ One author has suggested that this is due to these specific matters being less of a historical issue in Italy, and thus the state having less knowledge and prioritisation of these issues.¹⁰⁵

- Serbia has a constitutional guarantee for gender equality, reinforced by domestic law.¹⁰⁶ The Constitution also establishes an ombudsperson on public bodies, titled the Protector of Citizens of the Republic of Serbia. This ombudsperson has drafted a number of reports with recommendations on legislation and policy relating to domestic violence. However, information on the Protector's powers, and any government action taken in response to reports and recommendations, was not made available to GREVIO in their reporting on the matter.¹⁰⁷

¹⁰² See <https://www.coe.int/en/web/istanbul-convention/country-monitoring-work>, retrieved on 30th March 2020

¹⁰³ Francesca Rosso, *Tackling Gender-Based Discrimination and Gender-Based Violence: A comparative perspective between Europe and Africa* (2017) pp32-34

¹⁰⁴ As cited immediately above, p34

¹⁰⁵ As cited immediately above

¹⁰⁶ See p11 of this paper above, and Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report: Serbia* (2020) p12

¹⁰⁷ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report: Serbia* (2020) p39

- Spain has a constitutional Court system, reinforced by domestic law, which legislatively satisfies Istanbul Convention provisions¹⁰⁸ permitting victims to seek justice from perpetrators, and from public bodies that fail to meet their obligations.¹⁰⁹ However, GREVIO found that these constitutional mechanisms are rarely actually applied in cases of violence against women. GREVIO goes on to emphasise that states must not only take legislative measures, but also any administrative measure necessary to ‘diligently carry out their duties related to prevention, prosecution and protection’.¹¹⁰

In Italy, Serbia and Spain, legislative compliance with the provisions of the Istanbul Convention has been incomplete, and/or has not been sufficiently reinforced with administrative measures ensuring that the Convention provisions are fully realised in practice.

b) Turkey & Bulgaria

- Turkey signed the Istanbul Convention in May 2011, and ratified it in March 2012.¹¹¹ Outside of the Convention, Article 10 of the Turkish Constitution, as amended, establishes gender equality as follows: ‘Men and women have equal rights [. . .] The State has the obligation to ensure that this equality exists in practice.’¹¹² There is no specific constitutional provision on violence against women or domestic violence.

Turkey is a monist state,¹¹³ and Article 90 of the Constitution places ratified international treaties on the same footing as national law. However, in its initial report, GREVIO found court data practices to be poor – meaning the extent of judicial enforcement of Istanbul provisions was difficult to ascertain – and there was a broader issue of lack of awareness of Istanbul provisions amongst women in Turkey.¹¹⁴

At the time of its report, GREVIO noted that state efforts to promote gender equality were closely tied to policies protecting the family (as required by Article 41 of the Constitution). GREVIO noted ‘tensions between these two goals’ – citing, for example, the Ministry of Women and Family Affairs being renamed to the Ministry of Family and Social Affairs in 2011.¹¹⁵ Shortly after the report’s publication, Turkey’s President Erdogan withdrew Turkey from the Istanbul Convention.¹¹⁶ At this time, the President’s spokesperson said that the Convention was ‘attempting to normalise homosexuality’ and was incompatible with Turkey’s social and family values.¹¹⁷

¹⁰⁸ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence* (2011) p16

¹⁰⁹ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report: Spain* (2020) p50

¹¹⁰ As cited immediately above

¹¹¹ See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures>, retrieved on 30th March 2021

¹¹² *Constitution of Turkey* (2004) p12

¹¹³ See p13 of this paper above, for detail on the distinction between ‘monist’ and ‘dualist’ states, in relation to international law.

¹¹⁴ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report: Turkey* (2018) p15

¹¹⁵ As cited immediately above, p24; see also <https://www.hrw.org/news/2011/06/09/turkey-backward-step-womens-rights>, retrieved on 31st March 2021

¹¹⁶ See <https://www.bbc.co.uk/news/world-europe-56516462>, retrieved 30th March 2021; see also footnote 99

¹¹⁷ See <https://www.bbc.co.uk/news/world-europe-56516462>, retrieved 30th March 2021

- Bulgaria signed the Istanbul Convention in April 2016. However, in July 2018, Bulgaria's Constitutional Court ruled that ratifying the Convention would contravene the country's constitution. This followed strong opposition from multiple political parties, the country's President and the Orthodox Church, to a Bill ratifying the Convention in Bulgaria.¹¹⁸

The Court found in an 8-4 judgment that the Convention would breach the Bulgarian Constitution's definitions of women's social roles as mothering, giving birth and midwifery. In addition, the judgment took issue with what the Court saw as Convention measures that went beyond violence against women, and into matters of gender identity and gender roles.¹¹⁹

4.4 Consideration of the Istanbul Convention in domestic law

This section considers the application of the Istanbul Convention and violence against women more generally, in constitutional law, in light of the above detail.

The NIHRC made recommendations to the Secretary of State on a Bill of Rights in 2009. At that stage, these recommendations included specific rights for women (and men) to be free from domestic, sexual or gender-related violence and harassment.¹²⁰

Since this point, the Istanbul Convention has been the major regional international development concerning violence against women. The Convention locates violence against women, as an issue, primarily within domestic legislation and administration.

Some key findings arise from relevant literature identified by RaISe for the purposes of this paper. Whether or not explicit provision for the Istanbul Convention is made in national constitutions, domestic legislation and public administration are the more important factors in successfully implementing the Convention in practice. Signatory countries have not added to or amended their constitutions to give effect to the Convention, with the sole identified exception of the Republic of Kosovo. In fact, national constitutions have occasionally been relied on (as in Bulgaria) to reject the Convention altogether.

One author's conclusion is that the extent of the Convention's substantive transposition into domestic law and practice indicates the unreliability of international law:¹²¹ international law has the potential to bind states, but 'only insofar as states themselves accept to be bound by it.'¹²² This author further argues that for international models to be effective, momentum must also be delivered from 'the bottom'. That is, national and sub-national politics, culture and law should build consensus on the problem and the solution.¹²³

¹¹⁸ Ruzha Smilova, *Promoting 'Gender Ideology': Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional* (2018)

¹¹⁹ As cited immediately above

¹²⁰ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* (2009) p16; see also p19 above

¹²¹ Francesca Rosso, *Tackling Gender-Based Discrimination and Gender-Based Violence: A comparative perspective between Europe and Africa* (2017) p35

¹²² Francesca Rosso, *Tackling Gender-Based Discrimination and Gender-Based Violence: A comparative perspective between Europe and Africa* (2017) p35

¹²³ As cited immediately above

4.5 Potential issues for consideration

In considering the transposition and implementation of the Istanbul Convention in signatory countries' domestic law and practice, as discussed above, the Committee may wish to consider the following with relevant governmental and non-governmental experts:

- Whether, and in what form, the eradication of violence against women is a necessary response to the 'particular circumstances' of Northern Ireland?
- Whether inclusion in a Bill of Rights is sufficient to achieve the goal of eradicating violence against women?
- If not, how could such a Bill of Rights enable and direct changes in domestic law and public administration to achieve that goal?

5 Human rights & equality protections in Ireland/Northern Ireland Protocol

This section briefly details the international human rights and equality protections included in the Ireland/Northern Ireland Protocol of the EU-UK Withdrawal Agreement. The potential relevance of these protections to any Bill of Rights for Northern Ireland is then considered.

Article 2 of the Protocol addresses the treatment of human rights and equality in the context of the Belfast/Good Friday Agreement, and relevant EU directives remaining applicable in the context of Northern Ireland:

Article 2 Rights of individuals

1. *The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.*
2. *The United Kingdom shall continue to facilitate the related work of the institutions and bodies set up pursuant to the 1998 Agreement, including the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Joint Committee of representatives of the Human Rights Commissions of Northern Ireland and Ireland, in upholding human rights and equality standards.¹²⁴*

Annex 1 to the Protocol, as referred to in Article 2 above, includes six EU directives prohibiting discrimination. They concern a range of specific areas including employment, social security and goods of services, and ban discrimination on protected grounds of gender, race, religious belief, age, sexual orientation and disability.¹²⁵

These Protocol provisions may be relevant to considerations of a future Bill of Rights for Northern Ireland, as they provide for specific human rights and equality protections in the above areas. This includes the below issues that the Committee may wish to consider, with assistance from relevant governmental and non-governmental experts:

Potential issues for consideration

- How the directives specified in Annex 1 of the Protocol, and associated UK obligations, would interact with any obligations created by a Bill of Rights for Northern Ireland?
- How any 'dedicated mechanisms' mentioned in Article 2 of the Protocol would interact with the creation and delivery of a Bill of Rights for Northern Ireland?

¹²⁴ European Union & United Kingdom, *Protocol on Ireland/Northern Ireland* (2019) p3

¹²⁵ As cited immediately above, p16

6 Concluding observations

This final section offers some concluding observations on the transposition and implementation of CEDAW and the Istanbul Convention into domestic law and practice.

CEDAW, amongst other measures, commits signatories to embody gender equality provisions in their national constitutions and relevant domestic legislation. Many signatories have included explicit gender equality provisions in their constitutions and Bills of Rights since CEDAW was agreed.

The provision of such constitutional guarantees, however, is only one element of fully implementing the principles of CEDAW. Relevant literature studied to compile this paper indicates that further domestic law, case law and public administration are also necessary significant contributors to achieving gender equality in practice. The Committee may wish to consider further:

- Whether CEDAW principles of gender equality should be considered a necessary response to the 'particular circumstances' of Northern Ireland?
- Whether inclusion of gender equality in a Bill of Rights is sufficient, or whether this should be accompanied by consequent changes in domestic law and public administration? and
- What learning can be taken from ongoing work to codify CEDAW into Scots law?

The Istanbul Convention locates violence against women primarily as an issue for domestic law and administration – not constitutional law. For this reason, Istanbul Convention provisions have only rarely been transposed into national constitutions. However, similarly to CEDAW, the relevant literature studied in compiling this paper indicates that successful implementation of the Convention requires a combination of domestic law, case law and public administration. The committee may wish to consider further:

- Whether the eradication of violence against women is a necessary response to the 'particular circumstances' of Northern Ireland?
- Whether including violence against women in a Bill of Rights is sufficient, or whether this should be accompanied by consequent changes in domestic law and public administration?

Finally, the Committee may wish to consider the interaction of any Bill of Rights with the international human rights and equality protections specified in Article 2 and Annex 1 of the Ireland/Northern Ireland Protocol.