Are Women's Rights Really Human Rights? The Limitations of Human Rights Law in Securing Abortion Rights

by Lynsey Mitchell - posted on 30 June 2022

On Friday, the US Supreme Court released its decision in the *Dobbs v Jackson* case. A draft decision had already been leaked to the media weeks earlier showing that the Court looked likely to overturn the landmark case of *Roe v Wade*, and so bringing an end to constitutional protection against state interference with access to abortion in the USA. As expected, the judges (six in favour, three against; with one judge concurring in relation to the ban at issue but not agreeing with the reasoning in relation to the overturning of *Roe v Wade*) found in favour of Dobbs, ending almost fifty years of abortion protection in the USA. Several states had already enacted legislation that would trigger a complete ban on abortion if the Court found in favour of the plaintiffs.

This decision has triggered a wave of outrage and fear for abortion rights around the globe. Protesters took to the streets in cities across America and around the world. While the decision of the US Supreme Court has no legal effect on abortion access in the UK, it does provide a chilling portent of the reach of the anti-choice movement and shines a light on the liminality of reproductive rights.

Many politicians and commentators in the UK were quick to highlight that abortion access in the UK is secured via the Abortion Act 1967. However, when talking about abortion access in the UK, there is often a tendency to occlude the fact that the Abortion Act never extended to Northern Ireland and so women in the UK have continually been hampered from receiving abortion care due to the fact that the only option for the majority of women in Northern Ireland was to travel to Britain. This option is expensive, intrusive and an interference with the right to private life.

I have previously written about the limited success of human rights litigation in securing access to abortion in Northern Ireland. I argued that despite great strides and acceptance publicly and politically of the message that women's rights are human rights, it is difficult to litigate women's rights concerns using the human rights framework. This is because the law remains welded to the liberal notion that core human rights protections should protect traditional public sphere activity that has generally been coded as male. This means that it is easier to conceptualise certain acts as human rights violations, while those that tend to affect women are not considered to fit within this historical and romanticised understanding of human rights. Despite an acceptance that wider issues can fall within the human rights framework, utilising the Human Rights Act 1998 in court has done little to secure workable access to abortion in Northern Ireland.

Many Northern Irish activists had been optimistic that the UK's human rights framework would help advance abortion access in Northern Ireland. However, that has not been the case as was seen in two UK Supreme Court judgments on access to abortion in Northern Ireland.

The first of these was *R (on the application of A and B) v Secretary of State for Health*. This case challenged the UK Government's decision not to fund NHS abortions for Northern Irish women and pregnant people who travelled to mainland Britain to have an abortion. The majority of the judges were sympathetic to the women involved, but appeared to conceptualise abortion as an elective procedure rather than routine reproductive healthcare. There was also a failure to consider that abortion was a particularly gendered procedure and therefore was not easily compared with other medical procedures. A majority of the judges found that the Secretary of State for Health was correct to refuse funding. They stated that this was to preserve the devolution settlement and show respect to the will of the Northern Irish Assembly and Northern Irish law, which criminalised abortion except in very limited circumstances. In reaching their decision, the judges appeared swayed by stereotypes and assumptions about abortion that meant there was an acceptance that abortion should not be easy or accessible, especially for Northern Irish women and pregnant people. There was a flawed logic utilised by the majority of the judges, particularly in deciding that affording respect to devolution was more important than securing access to healthcare. The easy dismissal of human rights arguments and their inability to situate the pain, trauma and suffering endured as a human rights violation is problematic.

The second UK Supreme Court case was *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)*. This was a much anticipated case brought by the Northern Irish Human Rights Commission. The Commission challenged the lack of abortion access in Northern Ireland and argued that the legislation criminalising abortion was not compliant with the European Convention on Human Rights (ECHR) as it made no provision for rape, incest, fatal foetal abnormality or severe malformation of the foetus; the relevant legislative provisions being s.58 and s.59 of the Offences Against the Persons Act and the Criminal Justice (Northern Ireland) Act 1945, and the relevant ECHR provisions being Articles 3, 8 and 14. It was hoped by many that the Supreme Court would issue a declaration of incompatibility and pressure both the UK Government and Stormont administration to act. Instead, the Supreme Court found that the Northern Irish Human Rights Commission did not have standing to bring the case and so the challenge failed. Unusually, the Court gave an obiter judgement on the merits, stating that the lack of provision of abortion for victims of sexual crime (rape and incest) or where there was a fatal foetal abnormality, was a breach of Article 8 of the ECHR. While this judgement was celebrated for acknowledging that lack of access to abortion could be a human rights violation, the decision on standing meant that there was no declaration of incompatibility and so no actual remedy.

These cases were a missed opportunity for the Supreme Court to protect reproductive rights in the UK. Since the wider ECHR jurisprudence is quite clear that lack of abortion access can be a human rights violation, the Court took an unusually conservative approach to the issue of standing. While the judges were deeply sympathetic to the plight of the women who gave evidence, the majority did not fully situate access to abortion as a core human right, particularly as there was a real reluctance to even consider whether the suffering and trauma that was experienced could engage Article 3.

I have argued that this is due to the continued framing of abortion in the UK as a paternalistic privilege permitted to women only in limited scenarios and locations. The Supreme Court implicitly endorsed this framing and consequently excluded women's victimhood from the human rights framework.

In the wake of both judgements, public opinion and media pressure meant that MPs were minded to act. Despite the Supreme Court finding, the Government quickly reversed its decision and agreed to fund NHS abortions for Northern Irish women. Similarly, despite the fact that the Court did not grant a declaration of incompatibility, a group of cross-party MPs were willing to work together to amend the Offences Against the Persons Act, effectively decriminalising abortion in Northern Ireland and supposedly ushering in an era of effective access to abortion for Northern Irish women and pregnant people. While these changes in the law are welcome and have brought about tangible benefits, I question why victims were not able to secure these victories in the courts given the existing jurisprudence that acknowledged that lack of access to abortion can engage both Article 8 and Article 3 of the ECHR and does meet the threshold to be considered a violation.

International and European human rights law has long been promoted as a vehicle for reforming the restrictive abortion regime in Northern Ireland, but this rights-based approach has been slow to penetrate the traditional liberal construction of human rights that consequently excludes women's trauma from being understood as a core rights issue. At the same time, the lack of political will to commission abortion services for the NHS in Northern Ireland has meant that recent decriminalisation is a somewhat pyric victory. Women and pregnant people are still having to travel to Britain. At the same time, increasingly vocal anti-choice protests have created a gauntlet of harassment and intimidation of those seeking abortion at clinics throughout Britain. Legislation to prevent this harassment has been the subject of legal challenge and we await a UK Supreme Court judgment on this. Clearly we have a long a way to go to embed abortion care as a priority in our health system.

Accordingly, while the *Dobbs* judgement has no direct legal baring on abortion access in the UK, we should be mindful that restrictions on abortion are closer to home than we often think.

Dr Lynsey Mitchell is a lecturer researching women's rights and reproductive rights in international human rights law. She is on the Executive Committee of Abortion Rights Scotland. She attended the First Minister's summit on abortion care in Edinburgh on 27 June 2022 to discuss how to better protect abortion rights in Scotland and whether current legislation is ineffective.

The picture on the blog's main page of people (including Dr Mitchell) at a rally was taken by Craig Maclean.