

**INCORPORATING HUMAN RIGHTS TREATIES:
WHAT CAN BE DONE? WHAT SHOULD BE DONE?**

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Introduction

1. Although I hold the appointment of First Standing Junior to the Scottish Government, I am not representing them on this occasion. I am speaking in a purely personal capacity.

Indirect effect

2. In order to set the debate over incorporation in context, it may be helpful to begin by saying a few words about the *status quo*. The UK has signed and ratified numerous human rights treaties. Most of them have not been incorporated into Scots law. What effect, if any, do these treaties have in domestic law?
3. We live in a dualist state. While that means that unincorporated treaties are not law, putting matters as starkly as that presents an incomplete picture. It is more accurate to say that unincorporated treaties do not have direct effect as law. They can and do have a good deal of indirect effect.

Via the European Convention on Human Rights

4. The main indirect route into domestic law for unincorporated treaties lies through via the Human Rights Act. Our courts are enjoined to take account of judgments of the European Court of Human Rights.¹ The Strasbourg Court frequently has regard to other international human rights instruments. Where Strasbourg will do so, then so too will our courts.

¹ Human Rights Act, section 2(1)

Rules of interpretation

5. Unincorporated treaties can also have an impact via rules of interpretation. When the courts are concerned with the interpretation of a statute in a field where the UK is bound by international treaty obligations, there is a presumption that Parliament intended to legislate in a manner which does not involve breach of those obligations.
6. Unincorporated treaties may also have bearing upon the process of development of the common law. Where development of the common law is called for, it should ordinarily be in harmony with the UK's international obligations rather than antithetical to them.
7. A glance at the law reports for the last couple of years shows unincorporated treaties featuring quite prominently in a number of leading cases. Purely by way of example, the challenge to the exclusion of prisoners from voting in the Scottish referendum was based to a substantial extent on Article 25 of the UN Covenant on Civil and Political Rights.² The UN Convention on the Rights of the Child was the subject of spirited disagreement among the Justices of the Supreme Court earlier this year.³

Direct effect

8. Some judges would like to go further and to give human rights treaties direct effect. A decade ago, Lord Steyn referred to "growing support for the view that human rights treaties enjoy a special status".⁴ Similar sentiments were expressed by Lord Kerr earlier this year. If these views were to prevail, they would render today's discussion about the merits and drawbacks of incorporation redundant. But they have yet to carry

² *Moohan v Lord Advocate* [2015] SC (UKSC) 1

³ *R (SG & Others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449

⁴ [2004] 1 WLR 807 at §§49-50

the day. The orthodox view remains that unincorporated treaties have no direct effect.

9. That is not, as some would have it, a backward looking approach. On the contrary, it is grounded in important constitutional principles. Treaties are concluded by the executive. But it is for those representing the people in Parliament, not the executive or the unelected judiciary, to make the law.
10. I might add that the rationale for the orthodox approach is, if anything, stronger post-devolution. Within its increasingly broad areas of competence it is the Scottish Parliament which has democratic legitimacy and legislative power. That power should not be limited by actions of the executive government in London in relation to the international obligations of the UK.

To incorporate or not?

11. Having set the scene by describing the current status of unincorporated treaties, I turn to the main question for discussion: whether it would be beneficial to incorporate the currently unincorporated human rights treaties.
12. There is no general duty as a matter of international law that a treaty must be incorporated into domestic law. We have, of course, incorporated one leading international human rights treaty in the shape of the European Convention. There is no doubt that that has had a profound impact on litigation in the Scottish courts. To an extent unimaginable twenty years ago, human rights are argued over in our courts day in day out. I am less qualified to say what has been the wider impact of incorporation. But it is my impression that public authorities are increasingly conscious of human rights considerations when formulating policy and taking decisions.

13. The rights protected by the European Convention are predominantly civil and political rights. What of economic and social rights, such as those covered by the United Nations Covenant on Economic, Social and Cultural Rights. Are they not equally important? And what of other human rights treaties dealing with particular groups or subject areas? Well-known examples include the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. Ought they not to be incorporated too?
14. To some human rights activists, the answer to that question is obvious. A resounding “yes”, and the sooner the better. I beg to differ, or at least to strike a cautionary note. Time is relatively short. Let me deal in turn with the Economic and Social Covenant and subject-specific treaties.

UN Covenant on Economic, Social and Cultural Rights

15. Most of you will be familiar, I am sure, with the contents of the Covenant. The main economic and social rights are set out in Part III. They include rights
- to work (Article 6)
 - to social security (Article 9)
 - to an adequate standard of living (Article 11)
 - to the enjoyment of the highest attainable standard of physical and mental health (Article 12); and
 - to education (Article 13)
16. The point is often made that for many people – particularly for the poor and disadvantaged – these rights are as important as the rights protected by the ECHR or by the Covenant’s sister instrument, the Covenant on Civil and Political Rights. I agree. Indeed they may be more important. But the proposition that we ought to care about economic and social rights does not necessarily lead to the conclusion that the best way to care about them is to incorporate the Covenant

into domestic law. Doing so would seem to me to give rise to a number of difficulties. Let me mention four.⁵

(1) The Nature of the rights

17. Some provisions of the Covenant are relatively specific. But many of the rights are set out in the broadest of terms. That is so of the rights to education, health, standard of living and so on. Bear in mind too that, unlike the position with the ECHR, we do not have the benefit of a substantial body of case law putting flesh on the bones.

18. It is all very well to say that these rights are universal. That may be so at the level of abstraction. But it is almost impossible to say what in practical terms they mean. They are, to a large extent, programmatic and promotional. More of a mission statement than a set of justiciable rights. The Covenant itself seems to recognise this. Article 2(1) provides that each party

... undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

19. Compare and contrast the corresponding provision in the Civil and Political Covenant. No mission statement here but a direct injunction

to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant

(2) These realisation of economic and social rights is a matter for the democratically elected legislature

⁵ There is a substantial amount of literature on the issues bearing upon incorporation. I mention in particular, and acknowledge having drawn from, Gearty and Mantouvalou, *Debating Social Rights* (2010) Hart Publishing.

20. The realisation of economic and social rights contained in the Covenant is a more complex matter than the realisation of many of the core rights in the ECHR such as the prohibition of torture. Take, for example, the right to the highest attainable standard of physical and mental health. How this can best be achieved is, by way of understatement, a complex question. It is one on which well-motivated and reasonable men and women differ. And one must add into the equation that this right is to be advanced at the same time as seeking to secure other economic and social rights. Such as the right to work, the right to an adequate standard of living and the right to education. Not to mention the many other responsibilities which governments must discharge and for which they may be held to account.
21. This inevitably raises difficult and controversial questions about prioritisation and allocation of resources. These are quintessentially political questions. It follows that the primary way of realising economic and social rights is via the political, rather than the judicial, process. Making decisions about these questions is the function of the democratically accountable institutions of the state.

(3) The courts are not well-suited to the task

22. The other side of that coin takes me to my third point which is that the courts are the wrong places to decide questions of economic and social policy. They are set up to apply existing law to disputes between the parties appearing before them. They are not equipped to engage in wide-ranging factual and political inquiries into how public revenues should be distributed, prioritised and spent.
23. I might add that another drawback of progress through judicialisation of economic and social rights is that it tends to involve a rather patchy process of development based on waiting for individual cases to arise.

(4) The judges are not well-suited to the task

24. My fourth point follows from the third. Judges' experience and expertise lies in the law. Questions of prioritisation and allocation of resources in relation to economic and social policy are matters in which legal learning is of little assistance. In a functioning democracy, these are properly matters for the political process. One should at least pause for thought before concluding that allowing unelected judges to override the assessment of the democratically elected legislature on such matters would represent an improvement on current arrangements.
25. Doing so risks double disadvantage. First, the judges being ill-equipped to decide on such matters are unlikely to make better decisions than elected representatives. At the same time, drawing the judges into this essentially political area risks undermining public confidence in the judiciary.

Not a defeatist approach

26. Pointing out such drawbacks to incorporation need not be a recipe for complacency or inaction. There are other means of holding government to account which do not involve full incorporation of human rights treaties. The Scottish National Action Plan model - of auditing and monitoring the implementation of fundamental rights is – I would suggest, a preferable approach.

Subject-specific treaties

27. In the time that remains, I will say a few words about what I described earlier as subject specific treaties. These include the UNCRC and the UNCRDP. Depending upon how broadly one defines the expression "human rights", there are many others. Surely UN Conventions are admirable instruments. What reason could there be for not wishing to incorporate them? Let me suggest a few.

28. As James mentioned, I served with the United Nations for almost a decade. I support the UN and its work. You can feel a “but” coming. Here it is. But, UN treaties are the product of a process of diplomatic negotiation, often reflecting in their broadly framed provisions competing and even contradictory points of view. They do not necessarily represent unique or eternal wisdom on the subjects they cover. They should not, I venture to suggest, be elevated to the status of holy writ.
29. Being the product of negotiation among many countries with different legal systems, they are not always well-suited to direct transplantation into domestic systems. I mentioned earlier that there is no general obligation in international law that a treaty must be incorporated into domestic law. Still less is there any rule specifying exactly how incorporation is to be achieved.
30. The aims of a progressive and enlightened legal system should, I venture to suggest, include clarity, simplicity and accessibility. The aim of a legal system respectful of human rights should be that such rights infuse all aspects of the law. It is not obvious to me that those aims are served by putting in place additional layers of legislation by wholesale incorporating of human rights treaties.
31. This potentially raises a number of technical issues relating to means of incorporation which are to be addressed in other sessions.
32. An alternative to wholesale incorporation is to ensure that domestic law adequately reflects human rights treaties. Child law is not an area in which I specialise, so I choose the UNCRC as an example with some hesitation. If it is felt that child law in Scotland in some respects fails to protect the rights set out in the UNCRC, one response is to say that we need to incorporate the Convention. Another – and some might think more straightforward - response is to say that we need to consider amending the existing law to bring it into line with the Convention.

33. That is, largely, the current approach. The Children and Young People (Scotland) Act 2014 places duties on the Scottish Ministers in relation to the rights of children as set out in the UNCRC. These include keeping under consideration whether there are any steps which they could take which would secure better or further effect in Scotland of the UNCRC requirements. Ministers are also obliged to report periodically to the Scottish Parliament on steps they have taken or plan to take.
34. That seems to me a practical and sensible approach, worth considering extending to other subject areas as an alternative to direct incorporation of treaties.

Conclusion

35. A theme running through these brief remarks is that primary responsibility for the delivery of economic and social rights is – and should remain – the responsibility of the democratically elected legislature. Of course, it is in the nature of the political process that it is prone to disappoint. Frustration with the political process - a feeling that progress is too slow – may lie behind many of the calls for incorporation of human rights treaties.
36. Incorporation of treaties followed by judicial enforcement may indeed present as a tempting short cut through the political process. However, for the reasons I have briefly set out, it is a temptation which I would respectfully suggest should be resisted.

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