INNOVATION FORUM

WHAT CAN SCOTLAND DO?

Shelagh McCall QC

Thanks to Scottish Government and to the Scottish Human Rights Commission for invitation. There are complex questions being discussed today – in terms of politics, public policy and law. I welcome opportunity to participate in the debate.

I'll discuss first of all, why Scotland should incorporate international human rights treaties. Second, I will suggest how Scotland might do that. Third I will look at the benefits of incorporation and why we should not fear it.

WHY INCORPORATE?

There are good reasons of principle, law and policy to do so.

The principle is one of the indivisibility of rights.

The Universal Declaration of Human Rights, in 1948, set out a core set of rights. It covered civil and political rights, as well as economic social and cultural rights. The UDHR was a declaratory instrument and what followed, in the form of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), were international treaties which gave substance to the rights declared in the UDHR and which conferred obligations on states to ensure the implementation of human rights at the domestic level. Together these three treaties comprise the International Bill of Rights. As such the rights are indivisible.

Perhaps partly as a consequence of the need for the UN General Assembly to facilitate different means of implementation of Economic and Social rights in recognition of the varying stages of development among nations, and partly, perhaps, as a result of the political rhetoric of the Cold War, civil and political rights, economic, social and cultural rights, were divided into separate treaties. It was not intended that the separate covenants should suggest a hierarchy of rights in which

preference was given to civil and political. But this appears to have been an unintended consequence at least in Western Europe.

Subsequent treaties (UNCRC, CEDAW, CERD) confirm the principle of indivisibility of rights. There really is no scope to dispute the principle of indivisibility at the level of international law.

Why does the principle of indivisibility matter?
When she was UN High Commissioner for Human Rights, Mary Robinson described the protection of human rights in this way:

"Simply stated, universality of human rights means that human rights must be the same everywhere and for everyone. Human rights are also indivisible. This means that civil and political rights, on the one hand, and economic, social and cultural rights on the other, must be treated equally. Neither set has priority over the other. Although every country must set priorities for the use of its resources at any given time, this is not the same as choosing between specific rights…We must not be selective, for these rights are interrelated and interdependent." [Human Development Report 2000]

Rights are interrelated and interdependent. To take a simple example, full enjoyment of the right to participate in elections is related to the right to education. Freedom from degrading treatment and the right to life are related to the right to adequate healthcare.

So as a matter of principle, there is no justification in continuing to discriminate in the way in which we implement our international human rights obligations.

There are also sound legal reasons why international human rights treaties should be incorporated. In the drafting of the original Covenants, a distinction was drawn between civil and political rights and ESC rights. A2 of the ICCPR requires state parties to ensure an effective remedy and to develop judicial remedies. There was no express equivalent in ICESCR. That is why economic and social rights might be referred to by some as "programmatic" or "promotional".

However, the relevant UN treaty body - the Committee on Economic, Social and Cultural Rights - has now called for justiciable remedies for violations of ESC rights to be made available (General Comment 9 1998). They said, in terms "legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals."

The Committee recognized that states have adopted a number of different approaches to implementation of the Covenant in domestic legal order. And the UK has a dualist approach – meaning that treaties do not automatically become part of domestic law once ratified – and in spite of Lord Kerr's recent efforts in the Supreme Court to persuade his colleagues that because of their nature human rights instruments should not fall under the dualist doctrine, it remains the position that in the UK some further action would be required to allow individuals to seek enforcement of their rights before national courts [Lord Kerr: *R(SG) v SSWP* [2015] I WLR 1449]. This lack of justiciability, lack of access to an effective remedy, is a problem for the UK.

The ICESCR Committee went on to say that "the need to ensure justiciability is relevant when determining the best way to give domestic legal effect to the Covenant rights…While the Covenant does not formally oblige states to incorporate its provisions in domestic law, such an approach is desirable…Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts."

So the UK's international obligations are to provide effective remedies and, in the context of the vast majority of ESC rights, justiciable remedies.

If that is the obligation arising internationally, what does that mean for Scotland, when the UK is not prepared to incorporate?

Under paragraph 7 of schedule 5 of the Scotland Act 1998, observing and implementing international obligations is a devolved matter. The House of Lords in *Friend v Lord Advocate* held that this means that the Scottish Parliament is at liberty

to incorporate treaties if it wishes but it is under no obligation to do so. That is right so far as it goes.

But if what paragraph 7 means is that the Scottish Parliament is obliged to observe the UK's international obligations in so far as they impact on other devolved matters, and if the international obligation is to progressively realize certain rights and to provide remedies, then failure to act, I tentatively suggest, may not legally be an option.

The final reason I say Scotland should incorporate is one of policy. Scotland has, since devolution, established itself as a largely progressive, human rights oriented country. We have a number of examples (imperfect though they may be) of rights focused legislation. For instance, the Mental Health (Care and Treatment)(Scotland) Act 2003 contains a set of statutory principles which are designed to help fulfill the rights – so they expressly recognise the principle of minimum curtailment of freedom and that of maximum benefit to the patient's health.

Section 1 of the Children and Young People (Scotland) Act 2014 is another more express example. Under that provision, Ministers must keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland the UNCRC requirements. Now that is inadequate, in my view, but what these provisions demonstrate is that Scotland has a history post-devolution of taking steps to progressively realize human rights.

If that is Scotland's democratically determined direction of travel (this is not something forced by the judiciary), with the opportunity presented by the commitments made by SG under SNAP to explore the benefits of incorporation, is this not the ideal opportunity to formalize that commitment by incorporation? And as a matter of public policy, is it not particularly important at this time given that it seems the UK is travelling in the opposite direction towards regression even on civil and political rights.

So there are good reasons why I say Scotland should incorporate. The question then is how might it do so?

HOW TO INCORPORATE?

For the purposes of this discussion, I am going to assume that the current UK government is not going to be persuaded that economic, social and cultural rights along with adequate mechanisms for effective remedies should form part of a UK Bill of Rights.

What could Scotland do on its own?

Perhaps best to start by saying what we could not do. And that is, we could not, under the current devolution settlement, fully constitutionalise the rights. By which I mean, we could not create a system of incorporation the same as that which exists for the civil and political rights contained in the ECHR by virtue of the twin pillars of the Scotland Act and the Human Rights Act. The Scotland Act limits the legislative competence of the Scottish Parliament in that any Act it passes which is incompatible with Convention rights is unlawful and has no effect. It can be struck down by the courts. But the Scottish Parliament has no power to limits its own competence in that way – that can only be done by Westminster. So any Scottish statute incorporating other international human rights treaties would not be able to prevent the Scottish Parliament legislating in contravention of those rights; just as in England, the Human Rights Act does not curtail the legislative power of the Westminster Parliament.

But what Scotland could do is introduce a statute similar to the Human Rights Act. That brings with it three components.

1. Public authorities are prohibited from acting incompatibly with the relevant rights. Individuals could raise an action for violation of their rights by public authorities and the Courts can provide the necessary remedy;
2. There is a strong interpretive obligation on the courts and other public authorities to interpret and give effect to legislation in a manner compatible with the relevant rights;
3. Ultimately if the legislation is cannot be read compatibly with the relevant rights, the Courts are empowered to declare a provision of an Act of Parliament incompatible (the court is there, asking the same question as in a fully constitutional model but the difference is one of remedy – there is no remedy of striking down the legislation. The result may be, for example, a

reconsideration by Parliament of whether to amend the provision. There may be other or additional remedies for the individual rights holder affected).

A critical feature of the Human Rights Act is the provision for individuals to claim a breach of their rights and demand a remedy. In the context of economic, social and cultural rights, what this mechanism for justiciability would bring is an ability for the citizen to claim his rights for the rights themselves. He need not attempt to shoe-horn his situation into some other guise, such as a elaborate EU law argument, or trying to hang his hat on an ECHR right perhaps ill-suited to that purpose. As we will see when I come on to discuss the benefits of incorporation, those sorts of attempts can currently fail where they might succeed, were the treaties incorporated.

Some may make an argument that incorporation of ESC rights might lead to floodgates opening and a compensation culture. But that is to misunderstand the regime of the HRA. The judicial remedies in section 8 allow the court to grant such relief of remedy, or make such order, as it considers just and appropriate. There is flexibility in deciding what is an effective remedy. Compensation only follows in limited circumstances – where it is necessary to afford just satisfaction.

Another option may be, rather than incorporation, to introduce provisions such as those already mentioned in the Children and Young People Act, relating to the UNCRC – this is that Ministers must keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland the UNCRC requirements. This is not incorporation and should not be mistaken for it.

The problem with this provision is that while the Ministers must report on how they have fulfilled their obligation, they need not say what steps they considered and rejected, and why. Also the scope for challenge in the courts, other than perhaps where there has been a failure to carry out the duty at all, is hard to envisage and on any view would be very limited. For aught yet seen, it may be a rather toothless provision which does not provide a means for citizens to directly invoke their rights under the CRC. In other words, it may lack the means for an effective remedy.

The Welsh Assembly's equivalent has them pay "due regard" to the CRC in the exercise of their functions. That is perhaps more robust in terms of the scope of judicial scrutiny, as a classic judicial review based on the irrationality standard. The test is very high. The risk though, it seems to me, is of a silo effect, separating children's rights from other economic and social rights. The risk is also, as the Committee on ICESCR points out, that something is lost in translation.

THE BENEFITS OF INCORPORATION

It is sometimes said that the economic and social rights in ICESCR are rather too vague to be incorporated wholesale into domestic law and it may be preferable to legislate for specific sectors. I do not agree. The right to form a trade union is not vague. The right to free primary education is not vague. The right to equal pay for equal work is not vague. We have had legislation for many years in respect of that right, yet still we have a gender pay gap.

Another challenge thrown out by skeptics of incorporation is that the allocation of resources to realize economic and social rights is the province of the democratically elected representatives and is no business of the courts. In fact, the skeptics warn, courts are not well placed to determine such matters. Again I disagree.

Courts are used to addressing such matters and there was in fact a very good example of it just last month. *Hurley & Others v Secy of State for Work and Pensions* [2015] EWHC 3382 Admin concerned the benefit cap regulations in so far as they applied to people in receipt of carer's allowance. The principal argument by the DWP was that both houses of Parliament had scrutinized the regulations, the regulations pursue a legitimate aim of encouraging work and limiting spending on welfare, and that they concerned matters of the allocation of resources which were for the democratically elected government to determine. In a very carefully crafted judgement, Mr Justice Collins recognized the limitations of the court's role in these matters. He said "I have to recognise the caution I must exercise in deciding that a measure which has been approved by both Houses of Parliament is unlawful whether because it is disproportionate or because it is unreasonable. While it may be that every possible detail thrown up by these claims was not directly put to Parliament, it did have

knowledge of the material matters. The review is directed at the defendant and it was his decision, as approved by Parliament which has to be considered. That decision was based on political objectives but had regard to material matters. I cannot properly apply my own views, albeit it must be clear I am not happy with this legislation." He held that at common law the regulations were lawful but under A14 ECHR, they were discriminatory and disproportionate. His judgment illustrates the ability of the judiciary to scrutinise in a nuanced way the choices made by Parliament in the field of economic and social rights.

We will wait and see whether the government appeals that judgement but what was interesting was that it followed on the heels of a Supreme Court case (*R(SG) v SSWP* [2015] 1WLR 1449) in which the majority of justices decided that the benefit cap regulations were not discriminatory against women. In that case, the majority of justices decided that the regulations were incompatible with the UNCRC. But of course that is not directly enforceable and there is no remedy the courts can provide for that. So the case fell to be determined under A14 of ECHR and it failed. Had the CRC been incorporated, the outcome may have been different and we ought to remember that it is children who are impacted by the reduction in income of the parent upon whom they are entirely dependent.

These two cases demonstrate that judges can and do have the skill and the respect for their role in the democratic process to adjudicate on matters of economic and social rights and the fear of some is, I suggest, unfounded.

What incorporation brings, via the courts, is a further layer of accountability. And it is accountability directly in the hands of the citizen who can bring a case seeking to vindicate his or her individual rights. If we are taking a human rights based approach, then these features of empowerment of individual rights holders and accountability of those who are duty bound to deliver human rights can only be a good thing.

But lest you think for a moment I am advocating more work for lawyers, I am not. Litigation is not necessarily the most effective way to bring about change. A consequence of incorporation and justiciability is that government and Parliament will want to ensure that they do not breach rights in their legislation and policy setting.

This opens up the opportunity to greater scrutiny of legislation for its impact on human rights in advance. It opens up the opportunity, and perhaps the necessity, to look at budgeting from a human rights analysis. All of these things would, if done properly, progressively advance the realization of all international human rights in Scotland.

Shelagh M McCall QC
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