

Dr Katie Boyleⁱ and Professor Nicole Busbyⁱⁱ

Devolution as a Vehicle for Human Rights Protection and Progressⁱⁱⁱ

Introduction

This article addresses the interrelationship between human rights and devolution in four parts. Part 1 provides a detailed overview of human rights and devolution in practice, including an examination of how the European Convention of Human Rights performs a fundamental foundation for human rights in the devolved jurisdictions and acts as a base from which human rights protections can be further progressed, including economic, social, cultural and environmental rights (ESCER). In this sense devolution provides both a foundation and a vehicle for progressive change. The particular nature of devolution provides the opportunity to close the accountability gap in the protection of ESCER, many of which are devolved areas of law, such as the right to health, the right to housing and the right to a healthy environment. Part 2 examines progress within the current framework, including the incorporation of international treaties, as recommended by the National Taskforce for human rights leadership in Scotland. Scotland's planned incorporation of international human rights law provides an opportunity to embrace a number of normative standards, including progressive realisation, minimum core obligations as well as substantive equality measures. At the same time, the process thus far has demonstrated that there is no transformative change without effective accountability and the processes of incorporation will need to address this gap in order to function effectively. Part 3 examines the risk posed to human rights by the erosion of devolution through a number of UK-led strategies, particularly in response to policy gaps as a result of Brexit. It is argued that devolution can act as an important anchor on national reform, mitigating threats to backslide on rights at the national level in this respect. Finally part 4 sets out the potential opportunities if devolution was further enhanced, including a fully integrated operational human rights framework across a range of social and economic policy areas such as employment, social security, immigration and equality. The paper critically assesses each of these areas offering insights into the potential reach as well as limitations of devolution as a force for positive human rights progress. It concludes with a reframing of human rights in the UK to reflect the more complex picture painted by diverging human rights trajectories in each of the UK jurisdictions and the roles played by different actors in relation to human rights reform. Importantly, the cultivation of a rich discourse on human rights and the potential for progressive change relies on a strong, engaged, organised and informed civil society leveraging change across the legislative, policy, executive and accountability spheres. The development of any new human rights framework must include genuinely participative and inclusive processes at the local level and new legal frameworks must include both effective accountability as well as acknowledging that law alone does not result in transformative change but can enable a fundamental culture change in the way people are treated in their daily lives.

ⁱ Associate Professor in International Human Rights Law, School of Law, University of Stirling.

ⁱⁱ Professor of Human Rights, Equality and Justice, School of Law, University of Glasgow.

ⁱⁱⁱ Any views and opinions expressed or errors in this article are solely those of the authors

Part 1: DEVOLUTION: Understanding the current framework

Overarching statutory framework

Devolution is governed through three overarching statutory frameworks for Scotland (the Scotland Act 1998), Northern Ireland (the Northern Ireland Act 1998) and Wales (the Government of Wales Act 2006¹). Subsequent devolved statutes engage with and can amend the devolved frameworks but the 1998 and 2006 statutes provide the constitutional backdrop to devolution.² Section 29 of the Scotland Act provides that the Scottish Parliament cannot legislate in a way that is incompatible with the European Convention of Human Rights (ECHR) or retained EU Law.³ In a similar vein, legislation must be read in so far as is possible to ensure compliance with the ECHR.⁴ Likewise, the Scottish Government must act compatibly with the ECHR⁵ and public bodies, including courts, are also under an obligation to comply.⁶ The Human Rights Act 1998 and the Equality Act 2010 are ‘protected enactments’ meaning that under the terms of devolution they are beyond the power of the Scottish Parliament to amend.⁷ This is a multi-institutional constitutional framework for human rights protection where the parliament, the executive and the judiciary must each act as a guarantor of human rights.⁸ Similar provisions constitute the devolved frameworks in Northern Ireland⁹ and Wales.¹⁰

This overarching statutory framework is important in framing our understanding of human rights under devolution. This is because the devolved statutes take on a form of constitutional status.¹¹ In the case of *Thoburn*, the Court of Appeal referred to such legislation as ‘constitutional statutes’,¹² a term that while by no means abandoned by the UK courts, is being gradually recrafted into a more general focus on ‘constitutional principle(s)’¹³ or the ‘constitutional character’ of a particular provision.¹⁴ This can often be overlooked in

¹ the Government of Wales Act 1998 was superseded by the Government of Wales Act 2006

² For example, the Scotland Act 2016 introduced new powers for the Scottish Parliament including devolved competence of the socio-economic equality duty in section 1 of the Equality Act and placing the Sewel Convention on a statutory footing. The 2016 Act achieved this by amending the 1998 Act meaning the 1998 remains the primary statute where Scottish devolution is set out in full.

³ including some but not all EU derived rights s30A.

⁴ Scotland Act 1998 s 101

⁵ Scotland Act 1998 s 57

⁶ Human Rights Act 1998 s 6

⁷ Scotland Act 1998 Schedule 4

⁸ A multi-institutional framework is the strongest form of incorporation as responsibility for guaranteeing rights is shared across institutions with multiple accountability mechanisms if one of the institutions fails to uphold rights (the court acts as a means of last resort and is also subject to the same human rights compatibility standards). See Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights*, (Scottish Human Rights Commission 2018). For a discussion on the theoretical underpinning of multi-institutionalism see also Jeff King *Judging Social Rights* (CUP 2012) and Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020). Cepeda et al refer to this model as a ‘pluralistic institutional model’ Cepeda et al, *The Development and Application of the Concept of the Progressive Realisation of Human Rights, Report to the Scottish National Taskforce for Human Rights Leadership*, (Bonavero Institute, December 2020)

⁹ Section 83 of the Northern Ireland Act compels the reading of Acts of the Northern Ireland Assembly to be read as narrowly as is required to be within devolved competence and any act, or subordinate legislation, introduced by Ministers of the Assembly is deemed ultra vires if it is in breach of the ECHR (section 24(1)(c)) or, in the case of subordinate legislation, encroaches on entrenched Acts (section 24(1)(e)).

¹⁰ See Government of Wales Act s 81(1) (Ministerial competence); s 94(6)(c) (legislative competence); s 154 (interpretation of Acts of the Assembly)

¹¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] Q.B. 151

¹² *ibid*

¹³ *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, [2014] UKSC 3, at 79, [2014] 1 W.L.R. 324 (appeal taken from Eng. & Wales).

¹⁴ *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017) *Union* at 67. See also, Lord Neuberger’s reluctance to comment on whether the Government of Wales Act 2006 should be approached as a constitutional enactment in the reference *Local Government Byelaws (Wales) Bill 2012 - Reference* [2012] UKSC 53 at 69, [2013] 1 A.C. 792 (AG reference under section 112 of the Government of Wales Act 2006).

discussions on human rights at a national level where, by way of example, there has been a long-standing threat to repeal the Human Rights Act 1998 by successive UK Conservative led governments implying a degree of negotiation on what constitutes constitutional rights in the UK. Indeed, there is a current review of the HRA underway with potential amendments to follow.¹⁵ This has often meant campaigning on retaining the status quo for human rights protections, potentially causing a chilling effect on campaigning for human rights progress beyond ECHR protection at the UK national level.¹⁶ Meanwhile at the devolved level the ECHR plays a non-negotiable foundation – in other words a foundation on which to build and progress.¹⁷

Devolution also goes further than the protection provided under the Human Rights Act 1998. Whilst the HRA protects human rights in reserved areas in each jurisdiction, the devolved statutes provide a greater degree of ECHR protection in devolved areas. This affords human rights a foundational status in devolved jurisdictions that does not exist at the national level – notably absent in England and unfamiliar to the UK constitution. By way of example, under the HRA if the UK Parliament enacts legislation that explicitly breaches the ECHR then courts can issue a ‘declaration of incompatibility’¹⁸ – this remedy has no effect on the incompatible legislation – the legislation remains valid, in force and continues to breach human rights until such time as the UK Parliament amends it.¹⁹ The European Court of Human Rights (the body responsible for oversight of the ECHR) has deemed the declaration of incompatibly as insufficient to meet the threshold of an effective remedy under Article 13 of the treaty.²⁰

On the other hand, under the devolved statutes if the devolved legislatures enact legislation that is incompatible with the ECHR, the court can declare it *ultra vires*, outwith legislative competence and therefore null and void.²¹ The incompatible provision is no longer law and the court can strike down the incompatible provision in the legislation. This strike down power is much stronger than a declaration of incompatibly and much more in keeping with other rights-based constitutional frameworks around the world.

Devolution creates a constitutional framework for the ECHR as a minimum level of human rights protection that the devolved legislatures, governments and courts must uphold.

Human rights as a foundation and a vehicle for progressive change

Human rights therefore form a substantive pillar of the devolution settlement. It is both a foundation for devolution as well as a vehicle for progressive change. It is perhaps easier to break this down into two complementary categories. The first is the design of devolution itself.

¹⁵<https://www.gov.uk/guidance/independent-human-rights-act-review>

¹⁶ Boyle, *Economic and Social Rights Law*, (n 8) 103

¹⁷ The devolved statutes were approved by direct democracy, and in Northern Ireland, the ECHR also features as part of the 1998 peace agreement taking on what is termed a ‘non-negotiable foundational status’. Feldman cites the example of *Grundgesetz* or Basic Norm of the 1949 Constitution for the Federal Republic of Germany and the Constitution of Bosnia and Herzegovina, Article X.2 of which provides ‘Human Rights and Fundamental Freedoms. No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph’ creating a framework in which fundamental human rights norms are foundational, non-derogable and beyond the reach of retrogressive legislative measures. In other words they hold constitutional status. David Feldman, ‘Constitutionalism, Deliberative Democracy and Human Rights’, in John Morison et al (eds), *Judges, Transitions and Human Rights* (OUP 2007) 447-453

¹⁸ Human Rights Act 1998 s 4

¹⁹ See for example the long-standing dispute on prisoner voting and the UK Parliament’s refusal to amend the offending legislation for over a decade. *Hirst v UK* (No. 2), 2005-IX Eur. Ct. H.R. 187; COUNCIL OF EUROPE, COMMITTEE OF MINISTERS DOCUMENT, DH-DD (2016)1201 (November 4, 2016).

²⁰ *Burden v UK* App no 13378/05 (ECHR, 12 December 2006)

²¹ Scotland Act 1998, s 29 (legislative competence); s 57 (Ministerial competence); s 101 (interpretation of Acts of the Scottish Parliament).

The second is the devolved matter of human rights where each devolved jurisdiction has the competence to advance human rights protections in devolved areas.

Under the terms of devolution human rights is an area of devolved competence. Furthermore, each devolved legislature can enact legislation that implements and observes international human rights obligations.²² This provides a broad canvas for devolved legislatures to progress on human rights protections (remembering that the ECHR is a non-negotiable minimum under the devolved statutes).

Devolved matters cover areas such as health, education, transport, the environment, land distribution and housing. These areas engage with economic, social, cultural and environmental rights (ESCER). ESCER have been largely ignored or overlooked in UK constitutional and human rights law meaning there is a significant accountability gap in the protection of ESCER.²³

Devolution has therefore opened up an opportunity to close the accountability gap in the protection of ESCER. There are now several examples of progress in the protection of ESCER at the devolved level, including direct incorporation of international treaties.

| Pillar One: Devolution as a Foundation | Pillar Two: Devolution as a Vehicle for Progressive Change |
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| <p>Each devolved statute entrenches the European Convention of Human Rights as a minimum standard. The ECHR forms a non-negotiable foundation that devolved governments, parliaments, courts and public bodies much abide by.</p> <p>Examples include:</p> <p><i>ABC, Petition of ABC Against (First) Principal Reporter; (Third) The Lord Advocate (2018)</i>²⁴ In this case a brother petitioned for judicial review when his younger brother was subject to a compulsory supervision order and there was no right for the sibling to participate in the proceedings. The case had some success in the Outer House, was dismissed on appeal in the Inner House, and was unsuccessful in the Supreme Court. However, the judgment noted the importance of the child's right to</p> | <p>Human rights is a devolved area²⁸ meaning devolved legislatures can progress on implementing and observing international obligations beyond the ECHR.</p> <p>This can include incorporation of international human rights treaties as well as progress in specific devolved areas.</p> <p>Devolution serves as a vehicle for progressive change for civil, political, economic, social, cultural and environmental rights. For example, the Scottish Elections (Franchise and Representation) Act 2020 enhanced civil and political rights by extending the right to vote to refugees as well as prisoners.</p> <p>Notably, devolved areas also engage with areas such as health, education, housing and the environment meaning there is an</p> |

²² Scotland Act 1998 Schedule 5 para.7(2)(a) excludes observing and implementing international obligations from the international relations reservation in para 7(1). Northern Ireland Act 1998 Schedule 2 para.3(c): implementation of international obligations is an exception to the excepted 'international relations' matter and not listed as a reserved matter under Schedule 3, meaning it constitutes a transferred matter under section 4(1). Government of Wales Act 2006 Schedule 7A para.10(3)(a): observing and implementing international obligations does not fall within reserved area of "international relations".

²³ Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (n 8)

²⁴ [2018] ScotCS CSIH 72

²⁸ See above (exempt from reserved issue of international relations)

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| <p>participate in proceedings under Article 8 ECHR and the finding of non-compatibility was only due to changes to the system made by the Scottish Government during the case duration.</p> <p><i>Christian Institute and others (Appellants) v. The Lord Advocate (Respondent) (Scotland) (2016)</i>²⁵</p> <p>The UK Supreme Court found that the information sharing provisions in relation to the Named Person Service in Part 4 of the Children and Young People (Scotland) Act 2014 were beyond the legislative competence of the Scottish Parliament as they breached Article 8 ECHR, the right to private life. The petitioner claimed the compulsory appointment of a named person without parental consent breached the parents' Article 8 rights and the information-sharing provisions under Part 4 violated the rights both of parents and children. The Scottish Ministers agreed to amend the incompatible provisions before passage of the legislation.</p> <p><i>Cadder v Her Majesty's Advocate (Scotland) (2010)</i>²⁶</p> <p>In this case the Supreme Court held that the practice of detaining and questioning an accused without guaranteeing his or her right to access a solicitor was contrary to the right to a fair trial (Art 6 ECHR). As a result the Scottish Parliament passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 to rectify the gap in the law.</p> <p><i>Napier v The Scottish Ministers (2004)</i>²⁷</p> <p>In this case Lord Bonomy held that the long-established practice of slopping out in Scottish prisons was contrary to Article 3 of the ECHR. As a result the Scottish Ministers and the Scottish Prison Service took steps to end the practice. The Scottish</p> | <p>opportunity to progress in the protection of economic, social, cultural and environmental rights (ESCER). Despite the UK signing and ratifying international treaties protecting ESCER, the rights are not currently incorporated into domestic law in the UK and so devolved competence means devolved legislation can address this gap.</p> <p>Examples include:</p> <ul style="list-style-type: none"> - The UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2020 directly incorporates the UNCRC into domestic law in Scotland meaning children can rely on the treaty to claim their rights. - The Land Reform (Scotland) Act 2016 calls for the observance of international human rights, including the International Covenant on Economic, Social and Cultural Rights.²⁹ - The Social Security (Scotland) Act 2018 draws on ICESCR as a relevant international legal framework and declares the right to social security as a human right "essential to the realisation of other human rights."³⁰ - The Rights of Children and Young Persons (Wales) Measure 2011 imposes a duty on Welsh Ministers to have due regard to the UN Convention on the Rights of the Child. - The Commissioner for Older People (Northern Ireland) Act 2011 requires the NI Commissioner for Older People to have regard to the United |
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²⁵ [2016] UKSC 51

²⁶ [2010] UKSC 43

²⁷ *Napier (Ap) v. The Scottish Ministers* ScotCS CSOH P739/01 (26 April 2004)

²⁹ Land Reform (Scotland) Act 2016 s 1 (6)(b)

³⁰ Social Security (Scotland) Act 2018 ss 1(b) and 22(5)(d)

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| <p>courts advanced on ending this practice long before other parts of the UK and Europe, relying on the ECHR as the minimum standard below which no-one should fall in relation to inhumane and degrading treatment.</p> | <p>Nations Principles for Older Persons when performing his/her functions.³¹</p> <p>In Scotland the work of the First Minister’s Advisory Group and the National Taskforce on Human Rights Leadership has commenced a process of incorporation for ESCER. The Taskforce’s report in March 2021 recommended incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the UN Convention on Equality and Non-Discrimination Against Women (CEDAW) and the UN Convention on the Elimination of Racial Discrimination (UNCERD) in a multi-treaty Bill, together with additional rights on the environment, equality, older persons and access to justice.</p> |
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Cultivating a human rights culture in the devolved nations

As outlined above, the current devolution settlements create a constitutional framework for the civil and political rights contained in the ECHR. These rights provide a minimum level of human rights protection that must be upheld by the devolved legislatures, governments and courts. The fact that the standards provided by the ECHR serve as a floor and not a ceiling means that it is at least possible that human rights protections in the devolved nations could go further than the ECHR and also that devolution itself might provide opportunities to enhance protection for human rights in other respects, for example in relation to the social, economic, cultural and environmental contexts which serve as the basis for specific treaties within the international human rights framework. Under the current provisions of the devolution Acts, the UK’s devolved legislatures and executives can take measures to give further effect to the UK’s international human rights obligations when acting within the scope of their powers, including but not confined to those that arise under the ECHR.

The role of civil society is key to embedding and cultivating a human rights culture. This is evident in a comparative sense where countries that have sought to improve the protection of human rights have benefitted from a strong, engaged, organised and informed civil society sector.³² Indeed, civil society organisations are key to human rights progress as one of the key actors in a multi-institutional approach to human rights. Civil society encourages human rights progress by enabling a discourse that makes injustice public.³³ In the context of Scotland’s human rights incorporation journey the First Minister’s Advisory Group on Human Rights Leadership recommended a model of incorporation across parliament, government (and the broad administrative decision-making sphere), the judiciary and other accountability mechanisms including ombudsmen, complaints mechanisms and tribunals. Within this vision

³¹ Section 2(3).

³² See for example the discussion in Part 2 of Oscar Vilhena Viera and A. Scott Dupree, ‘Reflections on Civil Society and Human Rights’ (2004) 1 SUR International Journal on Human Rights 47

³³ Viera and Dupree *ibid* 57

of a multi-institutional framework civil society should engage across the different arms of the state (the legislature, the executive, the broad decision-making/ policy sphere and the through accountability mechanisms, including the courts) to encourage accountability and human rights progress. In this sense, civil society can position itself at the vanguard of progressive change in deploying and consolidating resources across the spectrum to encourage a positive culture change by “producing and providing information, educating the public and others, proposing public policies and taking legal action”.³⁴ There are limits on relying on focussing on one aspect of the spectrum. For example, relying solely on decision makers to voluntarily adopt cultural change may result in no substantive change without appropriate accountability mechanisms. Likewise, engaging with the legislature alone may mean those who are under-represented or marginalised cannot find a voice within the majoritarian political sphere. Turning solely to the judiciary can mean barriers to progress without a commitment from the legislature itself to improve human rights laws.³⁵ Civil society should therefore coalesce across the spectrum to exert pressure for change across each of these avenues.³⁶ Engaging across these different spaces can also help build alliances and strengthen resources of civil society thus increasing the visibility of civil society groups and their leverage over the state.³⁷

By way of example, the process which produced the Scottish National Action Plan for Human Rights (SNAP),³⁸ described as a roadmap for the realisation of all internationally recognised human rights, operated through a partnership between the Scottish Government, the Scottish Human Rights Commission and Scottish civil society. In recognition of international best practice,³⁹ SNAP was developed through broad participation involving public bodies, voluntary organisations and people across Scotland. The intention was to provide a long-term vehicle for joint working to agree outcomes and priorities, to identify and address practical challenges and to test actions. SNAP originally ran for four years (2013-2017) during which time an annual review process enabled its evolution from ‘being a traditional action plan, into a plan for acting together. SNAP became a process, built on a recognition that sustainable culture change is achieved through collaboration between those with responsibilities and those whose rights are affected.’⁴⁰ The SNAP process is currently under review. The open nature of SNAP and its shared ownership provides scope, in any future iteration, for civil society to lead,

³⁴ Viera and Dupree *ibid* 58

³⁵ See for example the Supreme Court’s reluctance to engage in a proportionality assessment of the benefit cap and the best interests of the child and a firm indication that unincorporated international human rights treaties cannot be treated as forming part of domestic law (para.77). Lord Reed draws a constitutional line in declaring “[t]here are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies... . There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament’s judgment that the measure was an appropriate means of achieving its aims.”, *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26, at para.208-209

³⁶ Viera and Dupree, n 32 p.58

³⁷ David Landau, ‘Courts and Support Structures: Beyond the Classic Narrative’, in Erin F.Delaney and Rosalind Dixon (eds), *Comparative Judicial Review*, (Eldgar 2018), p. 226. See also Gaurav Mukherjee, ‘The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights’, *World Comparative Law* (2020) 411, 428.

³⁸ See Scottish Human Rights Commission, *Scotland’s National Action Plan for Human Rights* (SHRC, 2013), available at: <https://www.scottishhumanrights.com/projects-and-programmes/scotlands-national-action-plan/>

³⁹ UN guidance on National Action Plans for human rights advises that broad participation “will ensure that the plan’s goals are widely shared and that the process is transparent” – see the United Nations Office of the High Commissioner for Human Rights *Handbook on National Human Rights Plans of Action* (UN, 2002), available at: <https://www.ohchr.org/Documents/Publications/training10en.pdf>, p. 42.

⁴⁰ Scottish Human Rights Commission, *How SNAP was Developed* (SHRC website), available at: <http://www.snaprights.info/how-snap-was-developed/participation>

influence and shape the future of human rights in Scotland in ways that go beyond the legislative process.

Further opportunities exist for civil society to lead and influence the ways in which the UK and devolved governments carry out their obligations to comply with international human rights. In its role as a National Human Rights Institution (NHRI), the Equality and Human Rights Commission monitors the UK's compliance with the treaties by submitting shadow reports on the progress made by the UK to the relevant UN Committees, which decide whether the UK is complying with the treaties. The Scottish Human Rights Commission and the Northern Ireland Human Rights Commission are also NHRIs and, as such, will submit reports covering the devolved human rights issues in Scotland and Northern Ireland to which the UN Committees will respond specifically. In addition, civil society organisations can submit shadow reports to the UN Committees as a means of raising awareness within the UN and beyond of breaches of human rights by the UK or devolved governments. This process provides an important means of ensuring and improving government accountability and of making sure that the needs of the communities that civil society organisations represent are clearly articulated, whether in relation to the implementation of reserved or devolved policy. The separation of powers and participation of different NHRIs underlines the need for civil society organisations advocating for change to ensure that submissions are made to the relevant UN committees in line with UK-wide and devolved priorities and that the ways that resulting recommendations are interpreted and acted upon correspond with differences in reserved and devolved law and policy.

Scotland's progress and its ambitious plans in respect of the full realisation of all international human rights are detailed below. Given that the future trajectory of human rights protection in Scotland in particular looks so different from that countenanced by the current UK government based on its reviews of the Human Rights Act and the use of judicial review, it is worth asking whether devolution in and of itself enhances protection for human rights. This is a difficult question to answer emphatically as the relatively progressive stances taken in the devolved nations towards human rights protections result from a complex and diverse combination of historical and geopolitical factors which are unique to each. However, it is apparent that, for some time, those in the devolved nations have fostered a receptive approach to human rights development with any obstruction in this respect being more likely to be confined to England. A 2012 report by the Commission on a Bill of Rights found that, 'There was little, if any, criticism of the Strasbourg Court, of the European label of the Convention, or of human rights generally in Scotland, Wales or Northern Ireland' and that, 'Calls for a UK Bill of Rights were generally perceived to be emanating from England only.'

There is a more complex interplay between an indigenous Bill of Rights and the ECHR in the Northern Ireland context. This relates to promises in the 1998 peace agreement to go beyond the ECHR and further enshrine rights for the particular circumstances of Northern Ireland in a Northern Ireland Bill of Rights. The Northern Ireland Bill of Rights process stalled due to political impasse as far back as 2009. Nonetheless, the work of the Northern Ireland Human Rights Commission and the Bill of Rights process acted as an important catalyst for devolved reform in both Scotland and Wales, demonstrating the possibility of advancing the protection of rights beyond the ECHR to include economic, social and cultural rights.

As this paper demonstrates, the UK human rights framework already diverges in quite significant ways and so Northern Ireland could keep pace with developments in Scotland and Wales by enhancing economic, social, cultural and environmental rights. The Bill of Rights process has recommenced under an Ad Hoc Committee on a Bill of Rights in the Northern Ireland Assembly. Either way, the enhanced nature of the devolution settlement itself affords the ECHR a stronger form of protection than exists at UK level, meaning devolution performs

a rights-enhancing role and whilst there is not yet a Northern Ireland Bill of Rights as envisaged in the peace agreement, there are examples of enhanced human rights protection, such as the Commissioner for Older People (Northern Ireland) Act 2011, that requires the NI Commissioner for Older People to have regard to the United Nations Principles for Older Persons when performing his/her functions.⁴¹

Although it may be difficult to determine whether devolution in itself has led the different attitudes and approaches towards human rights in the devolved nations, what can be discerned is that the promotion of a human rights culture is generally supported and facilitated by the devolved administrations and a strong civil society culture engaged in promoting progressive reform, particularly in Scotland and Wales, resulting in a more favourable environment for human rights progression. The Northern Ireland picture is slightly more complex due to the contested nature of rights in the post-peace agreement context, however, much of the early work of the Northern Ireland Bill of Rights process informed devolved reform elsewhere.

Scotland's policy framework

Devolution has also provided the vehicle for policy shifts, which when viewed together, offer a paradigm shift in terms of human rights priorities at the devolved level. At times this occurs as part of deliberate attempt to advance on human rights protections (both explicitly and implicitly) and at times, it is a reaction to regressive measures at the national level through mitigation measures. For example, whilst those who have had their claim for asylum refused in England are no longer eligible for support (no recourse to public funds), in Scotland additional mitigation measures are taken to ensure that every one, including those whose immigration status is precarious, can access health care on the same basis.⁴² In a similar vein, refugees and all those born elsewhere (foreign nationals with leave to remain) for whom Scotland is home can vote in Scottish elections.⁴³ The Scottish Government has stepped in to ensure that the bedroom tax is not applicable in Scotland through the deployment of discretionary housing payments⁴⁴ and that the benefit cap is mitigated through measures such as the Scottish Child Payment.⁴⁵ Likewise, in Northern Ireland, additional mitigation social security packages, which is a devolved area, have been introduced to mitigate the severity of UK austerity policies such as the bedroom tax and benefit cap.⁴⁶ Similar calls for devolved social security in Wales are now taking place.⁴⁷

Mitigation measures are insufficient to countenance the long-term impact of austerity. Since 2016 poverty and destitution have increased in Scotland, Wales and England (Northern Ireland has seen a slight decrease overall).⁴⁸ However, both devolved law and devolved policy help demonstrate the very different trajectory often seen at the devolved level where the devolved administrations are trying to plug the gaps of UK-led austerity measures, and it may help explain why at times it feels like the devolved jurisdictions are diverging from the national

⁴¹ Section 2(3).

⁴² [New Scots: refugee integration strategy 2018 to 2022 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/new-scots-refugee-integration-strategy-2018-to-2022/pages/12.aspx)

⁴³ Scottish Elections (Franchise and Representation) Act 2020

⁴⁴ Child Poverty Action Group, *Discretionary Housing Payments in Scotland*, (CPAG 2020) available at <https://cpag.org.uk/scotland/welfare-rights/scottish-benefits/discretionary-housing-payments-scotland>

⁴⁵ Citizens Advice Scotland advice on Scottish Child Payment available at

<https://www.citizensadvice.org.uk/scotland/benefits/help-if-on-a-low-income/scottish-child-payment-s/>

⁴⁶ Ciara Fitzpatrick, Kate McCauley and Kevin Higgins, *Mitigation of welfare reform in Northern Ireland: on a cliff edge* (CPAG 2020)

⁴⁷ Emma Taylor-Collins and Dan Bristow, *Administering social security in Wales Evidence on potential reforms* (Wales Centre for Public Policy 2020)

⁴⁸ Joseph Rowntree Foundation, *Poverty levels and trends in England, Wales, Scotland and Northern Ireland*, data available at <https://www.jrf.org.uk/data/poverty-levels-and-trends-england-wales-scotland-and-northern-ireland>

trajectory – ultimately leading to a more positive discourse on human rights and their transformative potential as a public good. Indeed, research demonstrates the very different public perceptions of human rights at the devolved level (a force for public good)⁴⁹, compared to the national level (where human rights are deemed as negative, or belonging to someone else, often times associated with othering, such as the (“undeserved”) rights of criminals, social security recipients or immigrants)⁵⁰. These discourses are important to note, as devolution as a progressive vehicle for change is more attune with the first, and the threats to repeal and regress on rights more attune with the second.

In the case of Scotland, the requirement for ECHR compliance imposed by the Scotland Act has had a positive impact on human rights awareness within the Scottish Parliament. In 2016 the Equal Opportunities Committee became the Equalities and Human Rights Committee and was charged, as part of its remit, with a particular responsibility for human rights.⁵¹ The Parliament’s human rights road map has focused on the need to ‘be bolder and to strengthen our existing procedures and processes, to make human rights more central to our work and how we undertake our scrutiny function and to be an exemplar of international best practice to other parliaments.’⁵² The resulting human rights-based approach to policymaking has informed and influenced legislative developments in Scotland, particularly in relation to the delivery of public services. For example, the Social Security (Scotland) Act 2018 establishes a new devolved social security system in Scotland and attempts to ground it in a framework which acknowledges that access to social security is a human right.

The interplay between Scottish civil society and law and policymakers has produced some impactful outcomes grounded in lived experience demonstrating the role of participation, one of the PANEL principles⁵³ which underpin the human rights-based approach. The feminist organisations that comprise Scotland’s women’s sector have had a strong and positive influence over the recognition of women’s human rights as evidenced in such cornerstone legislation as the Domestic Abuse (Scotland) Act 2018 which criminalises psychological domestic abuse and coercive and controlling behaviour.⁵⁴ More recently the Period Products (Scotland) Act 2020 places a legal duty on local authorities to make period products available free of charge for all those who need them.⁵⁵

In the context of children’s rights, the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2020,⁵⁶ which aims to directly incorporate the UNCRC into domestic law in Scotland, is the result of a long process of campaigning by children, young people and civil society which culminated in recognition of the importance of children’s rights within the Scottish Parliament, Scottish Government, and public service providers.⁵⁷ If

⁴⁹ Scottish Human Rights Commission, Building a human rights culture in Scotland: insights from audience research (SHRC 2018)

⁵⁰ Michelle Farrell et al (eds), *Human Rights in the Media* (Routledge, 2019)

⁵¹ <https://archive2021.parliament.scot/Equalities-Committee.aspx>

⁵² [Equalities and Human Rights Committee, Getting Rights Right: Human Rights and the Scottish parliament, SP Paper 431, 6th Report, 2018 \(Session 5\) available at https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3](https://www.parliament.scot/Committees/Report/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3)

⁵³ Scottish Human Rights Commission, *A Human Rights Based Approach: An Introduction* (SHRC website) available at: https://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf

⁵⁴ Domestic Abuse Scotland Act 2018, sections 1 and 2.

⁵⁵ Period Products (Free Provision) (Scotland) Act 2021, sections 1-3.

⁵⁶ For further information, including the explanatory notes that accompany the Bill, see <https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>

⁵⁷ For an overview of the process, see Together Scotland, *Scotland incorporates the UN Convention on the Rights of the Child into law – let’s celebrate the past, present and future!* [Together Scotland Blog](https://www.togethertoscotland.org.uk/blog/2021/03/16/Scotland-incorporates-the-UN-convention-on-the-rights-of-the-child-into-law-lets-celebrate-the-past-present-and-future/), 16th March 2021.

enacted⁵⁸ the UNCRC (Incorporation) (Scotland) Act will make it unlawful for public authorities to act incompatibly with the Convention's requirements, giving children, young people and their representatives the power to go to court to enforce their rights. The UK Government has referred the Bill to the Supreme Court for adjudication on the legislative competence of the Scottish Parliament.⁵⁹ This referral highlights the complex nature of the separation of reserved and devolved powers in the context of human rights legislation and the potential vulnerability of Scotland's ability to act in this area.

The UNCRC Bill is challenged on two grounds.⁶⁰ Firstly, that the bill would place obligations on public authorities (including UK authorities) to act compatibly with UNCRC requirements.⁶¹ The second ground relates to the obligations that it would place on the courts to interpret legislation, including Acts of the UK Parliament, so as to be compatible with UNCRC requirements. If a compatible reading were not possible, the bill gives powers to the courts to strike down legislation prior to its enactment or to declare existing legislation incompatible.⁶² This, the UK Government claims, would amount to unlawful modification of the Scotland Act 1998⁶³ in relation to the obligations imposed on UK public authorities. The powers that the UK Government has exercised in making its referral - although rarely and only very recently used⁶⁴ - relate in this instance to legal competence rather than the substantive policy issue at stake. However, the decision to refer has been linked with its timing which coincided with the Scottish Parliament elections⁶⁵ illustrating how ongoing political tensions between the UK government and devolved administrations can impact directly on the realisation of rights.

Equality outcomes in Scotland

Assuming that the UNCRC Bill (in its unamended form) and the planned Act incorporating a suite of international human rights conventions⁶⁶ do make it onto the statute books in Scotland, it is difficult to say with any certainty what their immediate impact will be on the operation in Scotland of the economic and social rights flowing from the Conventions. This relies on the domestication of a number of international norms such as progressive realisation, minimum core obligations as well as substantive equality, the latter of which engages with a reserved matter. The reservation of equal opportunities under the Scotland Act 1998⁶⁷ means that England, Wales and Scotland share a common equality framework.⁶⁸ The legislative approach

⁵⁸ Although the Act was passed unanimously by the Scottish Parliament on 16th March 2021, the UK Government has challenged the Scottish Parliament's legal competence and has referred the Act to the Supreme Court. The Act cannot be given Royal Assent until the case has been heard and any resulting changes made to its contents.

⁵⁹ Scotland Act 1998 s 33.

⁶⁰ <https://www.gov.uk/government/publications/alister-jack-letter-to-scottish-government-on-uncrc-bill-24-march-2021>

⁶¹ Section 6.

⁶² Sections 19-21.

⁶³ Specifically, s 28(7) which preserves the power of the UK Parliament to make laws for Scotland.

⁶⁴ The only previous occasion when the procedure was used being in respect of the UK Withdrawal from the European Union (Legal Continuity) Scotland Bill in 2018, see: <https://www.supremecourt.uk/cases/uksc-2018-0080.html>

⁶⁵ Chris McCorkindale 'The UNCRC and European Charter of Local Self-Government Bill References: Once (and twice) more unto the breach?' Centre for Constitutional Change Blog, 26 April 2021, available:

<https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/uncrc-and-european-charter-local-self-government-bill-references-once-and-twice>

⁶⁶ <https://www.gov.scot/news/new-human-rights-bill/>

⁶⁷ 'Equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions (SA 1998, Schedule 5 L2, as amended by section 37 of the Scotland Act 2016). The relevant legislation, the Equality Act 2010 (EA), is an Act of the Westminster Parliament. There is some limited Scottish provision, where there is interplay with Scottish devolved legislation, in particular in education and housing, where legislative consent motions have been required.

⁶⁸ The Equality Act 2010. Northern Ireland has its own regime as equality law is devolved under the Northern Ireland Act 1998 so that the Northern Ireland Assembly is responsible for passing or amending anti-discrimination legislation. Many of the provisions of the Equality Act 2010 are reflected in the legal framework in Northern Ireland via secondary legislation. The fact that Northern Ireland lacks harmonising legislation has been cited by the Equality Commission for Northern Ireland

required under the Equality Act 2010 is based largely on the achievement of formal equality which depends on a narrow interpretation of equal treatment so that ‘like should be treated alike’.⁶⁹ The alternative approach - substantive equality - depends on a broader, more contextual understanding of existing disadvantage with a focus on the outcomes achieved by intervention, which is seen as necessary in certain circumstances, to achieve equality. It is this broader understanding of equality that underpins the international human rights framework.

Although the common equality framework can make it difficult to identify differences in the experiences of accessing and utilising existing rights protections of protected characteristic groups in Scotland compared to elsewhere in the UK, it does not mean that they do not exist or that they cannot be addressed or mitigated by actions taken by the Scottish Government. Mapped onto the relatively restrictive legal framework is the devolved policy landscape which provides Scotland with the opportunity to engage, at least in some respects, with a more substantive approach to fulfilling its commitments in line with the international human rights framework. In addition, even where the Equality Act does apply directly, the Scottish-specific duties under the Public Sector Equality Duty⁷⁰ and Socioeconomic Duty⁷¹ (enacted as the Fairer Scotland Duty⁷²) provide some scope for public service providers in Scotland to take a more outcomes-focused approach.

Successive reviews of the lived experiences of rights holders in Scotland have highlighted a range of significant gaps, some resulting from the uneven matching of British equality law and international human rights law,⁷³ and others from lacunae in the devolved policy framework itself. Examples can be found in a number of recommendations for further action made by the UN Committee on the Elimination of Racial Discrimination.⁷⁴ Although based on data drawn from across the UK, some of the action required to close these gaps relates to areas of devolved policy. For example, in relation to criminal justice, where the need to tackle racist hate crime, the disproportionate detention and restraint of Black and ethnic minority populations, and problems of racial bias within the criminal justice system itself were highlighted,⁷⁵ the lack of racial and ethnic diversity in Scotland’s police force was a subject of specific focus by the Committee.⁷⁶ Furthermore the Committee recommended that the devolved nations ‘systematically collect and publish disaggregated data on the enjoyment of rights by members of ethnic minorities in all fields of life.’⁷⁷ The lack of reliable equalities data in Scotland was also highlighted by the EHRC in its review of the state of equality and human rights in Scotland which reported in 2018.⁷⁸ The review found an array of unequal outcomes including: an ethnicity pay gap; lower levels of attainment in higher education and graduate employment

as the cause of significant gaps between equality law in Great Britain and Northern Ireland which leave individuals in Northern Ireland with less protection against discrimination and harassment than people in other parts of the United Kingdom – see <https://www.equalityni.org/Delivering-Equality/Addressing-inequality/Law-reform/Tabs/Gaps-in-equality-law>

⁶⁹ This is the Aristotelian or formal equality principle which decrees that two people with equal status in at least one normatively relevant respect must be treated equally in this respect: Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15.

⁷⁰ Equality Act 2010 s 149.

⁷¹ Equality Act 2010 s1.

⁷² By the Equality Act 2010 (Scotland) Regulations 2018.

⁷³ See Nicole Busby, *CEDAW* and Nicole Busby and Kasey McCall-Smith, *UN Treaties*, (Academic Advisory Panel to the National Taskforce for Human Rights Leadership, 2021) available at: <https://www.gov.scot/publications/national-taskforce-for-human-rights-leadership-academic-advisory-panel-papers/>

⁷⁴ CERD, (2016). Concluding Observations on the Twenty-First to Twenty-Third Periodic Reports of United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/21-23, available: https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/GBR/CERD_C_GBR_CO_21-23_24985_E.pdf

⁷⁵ Ibid.

⁷⁶ Ibid, para 28.

⁷⁷ Ibid, paras 13 and 14.

⁷⁸ Equality and Human Rights Commission (2018) ‘Is Scotland Fairer?’, available: <https://www.equalityhumanrights.com/en/publication-download/scotland-fairer-2018>

rates for those in ethnic minority groups who were more likely to live in poverty than other racial groups and were underrepresented in all areas of public life.⁷⁹

The EHRC's review also found that disabled people in Scotland are twice as likely to be without work than those without disabilities and more likely to live in poverty and that disabled pupils are almost twice as likely to be excluded from school. A lack of full access to services, including transport, continued to negatively impact the lives of those with disabilities.⁸⁰

The Scottish Human Rights Commission highlighted a number of necessary improvements in its 2018 report to the UN Committee on the Elimination of all forms of Discrimination against Women.⁸¹ These included the need for urgent action relating to recourse to public funds for women with insecure immigration status experiencing domestic abuse and action to eliminate the dissemination of stereotypical imaging and objectification of women, especially in advertising. The Commission called for a review of the Scottish Government's anti-bullying strategy to ensure it expressly recognises gender-based bullying and misogynistic behaviour in schools.

Improved access to justice for all and the need for a better understanding of the causes and effects of intersectional discrimination are recurring themes in reviews of equality and human rights legislation in Scotland and beyond. In the specific Scottish context both of these aspects could be enhanced through greater investment in civil society aimed at building capacity and equipping organisations in how best to scrutinise the devolved framework and the performance of the relevant actors enabling them, where necessary, to hold the Scottish Government and other relevant institutions to account.⁸² As the examples highlighted above relating to Scotland's women's and children's sectors illustrate, the empowerment of civil society actors to represent their service users in inclusive participative processes aimed at setting agendas and developing policy can lead to profound and progressive change in the realisation of human rights. Ensuring the existence of formal structures by which such participation can occur, such as that exemplified by SNAP (see above), is an important piece of the human rights jigsaw. However, effective participation will also depend on available resources and as well as the necessary connections. The authors of a 2019 report for the First Minister's National Advisory Council on Women and Girls⁸³ found that, despite the creation of the 'velvet triangle' - a policy network comprising Scottish Government policy-makers, academics and interest groups...committed to use evidence to pursue gender equality in areas such as childcare and long-term care... access to government amongst women's groups (as with any interest groups) can be uneven and that "only some participants have the resources to invest in engagement."⁸⁴

⁷⁹ Ibid, Chapter 6.

⁸⁰ Ibid, 114.

⁸¹ The Scottish Human Rights Commission (2018) Submission to the United Nation's Committee on the Elimination of All Forms of Discrimination Against Women, available:

<https://www.scottishhumanrights.com/news/commission-calls-for-action-to-protect-womens-rights-in-scotland/>

⁸² For example, through strategic litigation using the judicial review process which is utilised much less in Scotland than elsewhere in the UK. See Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Oxford: Hart Publishing, 2001) 82-84. A report on the use of judicial review and other forms of public interest litigation (PIL) in Scotland identified five barriers: poor access to information about court cases; limitations to who can take a case to court ('standing' issues); short time-limits for taking cases; inhibitive costs and financial risk; a limited culture of using PIL. See Human Rights Consortium Scotland (2018) Discussion Paper: Overcoming Barriers to Public Interest Litigation in Scotland, available: <https://hrcscotland.org/wp-content/uploads/2018/11/final-overcoming-barriers-to-pil-in-scotland-web-version.pdf>

⁸³ Robert Rae, Eve Hepburn, and Lewis Bloss, *Gender Equality in Scotland: Policy Coherence and Systems Mapping*, Report for the First Minister's National Advisory Council on Women and Girls, (3rd Horizons, 2019) available at: <https://onescotland.org/wp-content/uploads/2020/01/NAGWG-Policy-Systems-Mapping-3rd-Horizons.pdf>

⁸⁴ Paul Cairney and Kirstein Rummery *Feminising Politics to Close the Evidence-Policy Gap: The Case of Social Policy in Scotland*, (2018) 77 Australian Journal of Public Administration, 4, 542.

Although the significant barriers to enhanced protection for human rights that exist under the current arrangements cannot be overstated, devolution certainly appears to have catalysed progress towards the realisation of such rights through a human rights-based approach to policymaking. The interaction between the ECHR and the Scotland Act has helped in the development of a fledgling human rights culture within the Executive and Parliament. Although there is undoubtedly room for improvement, the visibility given to human rights alongside a relatively open system of government and a rich and active civil society has propelled the agenda for rights realisation in Scotland forward, resulting in some tangible gains.

Scotland's planned incorporation of a range of international human rights Conventions into domestic law provides an opportunity to align the reserved equality law framework with an integrated and comprehensive system capable of elevating social and economic rights beyond the restrictive formal approach resulting in a more substantive understanding capable of achieving social justice outcomes.

Problems and Grey Areas within the Current Framework

Of course, devolution does not provide a panacea for rights. For example, in Scotland, there have been a number of cases where courts have addressed the failure to comply with human rights in devolved areas, including for example bringing an end to the long established practice of an accused not having access to a solicitor in a police station⁸⁵, the years of slopping out in Scottish prisons that led to wholesale structural reform of the prison system⁸⁶, and more recently abandoning the named-person legislation⁸⁷, and changing the way in which children in care can participate in decisions impacting their siblings.⁸⁸

Whilst the examples above provide important evidence of human rights accountability, there are also underlying gaps that prevent access to justice for violations of human rights in Scotland. For example, there have been concerns over the years that judicial review, an important route to remedy for violations of human rights, has been historically under-utilised in Scotland.⁸⁹ Whilst there are examples of the efficacy of JR (such as the cases mentioned above) studies have also shown that, although it is not possible to establish with any certainty the exact reasons for this, there are a number of factors that may have contributed to the pace of JR being slower in Scotland than south of the border. Historically the subject matter was overlooked in law school curriculums;⁹⁰ judicial attitudes have arguably been 'slower to change, or more resistant to change, than judicial attitudes south of the border'⁹¹; and there may be less awareness of JR as a route to remedy amongst citizens as well as a lack of appropriate advice and representation.⁹² The barriers to JR as a route to remedy require to be addressed to close the accountability gap in access to justice. In particular in relation to the historically narrow definition of standing⁹³, the prohibitive costs in bringing a case⁹⁴, inadequate legal aid

⁸⁵ *Cadder v Her Majesty's Advocate* (Scotland) [2010] UKSC 43 (26 October 2010)

⁸⁶ Robert Napier: Opinion of Lord Bonomy, *Napier (Ap) v. The Scottish Ministers* ScotCS CSOH P739/01 (26 April 2004)

⁸⁷ *Christian Institute and others (Appellants) v. The Lord Advocate (Respondent)* (Scotland) [2016] UKSC 51

⁸⁸ *ABC, Petition of ABC Against (First) Principal Reporter; (Third) The Lord Advocate* (2018) [2018] ScotCS CSIH 72

⁸⁹ See for example the work of Genn and Paterson, *Paths to Justice Scotland* (n 82)82-84 and Alan Page, 'The judicial review caseload: an Anglo-Scottish comparison' (2015) 4 *Juridical Review* 337, 343

⁹⁰ McCorkindale et al identify a dearth of academic research and teaching materials, McCorkindale et al, 'Judicial Review at 30', (2015) 4 *Juridical Review* 317, 318.

⁹¹ Page, (n 89) 343.

⁹² *Administrative Justice in Scotland – the Way Forward* (June 2009) paras 8.74-75, available at:

<http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-WayForward-Full-Report.pdf>

⁹³ Douglas Jack and Chris McCorkindale, *Standing in Scots Public Law Litigation*, (Human Rights Consortium Scotland, 2020)

⁹⁴ Prohibitive costs continue to threaten the right to access justice as outlined in *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 and *FB (Afghanistan) & Anor, R (On the Application Of) v The Secretary of State for the Home*

support, inadequate advocacy support⁹⁵, the lack of group proceedings or collective advocacy to challenge systemic issues⁹⁶ and the lack of awareness as to what constitutes an ‘effective remedy’ in international human rights law.⁹⁷ Rather than close the existing gaps by improving JR as a route to remedy there is a UK government commitment to reform the area by pairing back on JR as an accountability mechanism.⁹⁸

Legislative Competence and Grey Areas in Reserved Matters

Another significant difficulty at the devolved level relates to the complexity of the devolved settlement itself meaning enhancing rights under devolution will inevitably engage in what can be deemed as contested ‘grey areas’ in the determination of what constitutes a ‘reserved matter’.⁹⁹ The Scottish Parliament cannot enact legislation that ‘relates to reserved matters’ (section 29(2)(b)). Reserved matters are determined ‘having regard ... to its effect in all the circumstances.’¹⁰⁰ Based on recent case law the definition of what constitutes ‘relating’ to a reserved matter depends on whether there is a ‘loose or consequential connection’.¹⁰¹ Whilst each of the devolved legislatures has the legislative competence to observe and implement international human rights obligations¹⁰², the legislatures cannot typically traverse into reserved matters, meaning legislative restrictions in relation to areas such as ‘equal opportunities’¹⁰³, ‘employment and industrial relations’¹⁰⁴, ‘social security’¹⁰⁵ and ‘immigration and nationality’.¹⁰⁶ This is further complicated as reserved matters can at times include exceptions. For example, the reservation of ‘equal opportunities’ discussed above includes an exception whereby the Scottish Parliament has the legislative competence to encourage the ‘observance of the equal opportunity requirements’. The incorporation of CEDAW, for example, will rely on an interpretation that the reserved matter of ‘equal

Department [2020] EWCA Civ 1338 (21 October 2020). Further, even when cost orders are available, such as in environmental cases, the courts have rendered it far from easy to obtain a cost order, Faculty of Advocates, *Response from the Faculty of Advocates to the Independent Review of Administrative Law* (Faculty of Advocates, 2020) – (see also *Gibson v Scottish Ministers* [2016] CSIH 31, 2016 SLT 675). As McCorkindale and Jack explain ‘important barriers to judicial review remain – most significantly, cost’ Jack and McCorkindale (n 93) 1.

⁹⁵ For example, see the work of the Health and Social Care Alliance on the right to advocacy, <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2013/09/independent-advocacy-public-consultation-guide-commissioners/documents/0042-health-social-care-alliance-scotland-alliance/0042-health-social-care-alliance-scotland-alliance/govscot%3Adocument/00433440.pdf>. The Human Rights Consortium has argued for a right to independent advocacy to be recognised on the face of the UNCRC (Incorporation) (Scotland) Bill, <https://hrcscotland.org/2020/10/28/consortium-submits-response-to-un-crc-bill-consultation/>

⁹⁶ Boyle, *Economic and Social Rights Law*, (n 8) 36-39

⁹⁷ *Ibid*, 39-41 and 71-75

⁹⁸ The Judicial Review and Courts Bill (available here: <https://www.gov.uk/government/publications/judicial-review-and-courts-bill>) follows on from the Independent Review of Administrative Law <https://www.gov.uk/government/groups/independent-review-of-administrative-law>

⁹⁹ For a recent discussion on this see the contested position on whether it is within legislative competence to enact legislation for a second independence referendum without a section 30 Order. Stephen Tierney, *The Scottish Parliamentary Elections and the “Second Referendum” Debate*, U.K. Const. L. Blog (10th May 2021) <https://ukconstitutionallaw.org/2021/05/10/stephen-tierney-the-scottish-parliamentary-elections-and-the-second-referendum-debate/>

¹⁰⁰ Section 29(3)

¹⁰¹ *Martin v Her Majesty’s Advocate* [2010] UKSC 10 (03 March 2010) para.49, *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61 (12 December 2012) para.16, *The UK Withdrawal From The European Union (Legal Continuity) (Scotland) (rev 2)* [2018] UKSC 64 (13 December 2018) para.27

¹⁰² Scotland Act 1998 Schedule 5 para.7(2)(a); Northern Ireland Act 1998 Schedule 2 para.3(c); Government of Wales Act 2006 Schedule 7A para.10(3)(a)

¹⁰³ Scotland Act 1998 Reservation L2 Schedule 5

¹⁰⁴ Scotland Act 1998 Reservation H Schedule 5

¹⁰⁵ Scotland Act 1998 Reservation F Schedule 5

¹⁰⁶ Scotland Act 1998 Reservation B6 Schedule 5

opportunities' should be treated as a floor rather than a ceiling, meaning that advancing substantive intersectional equality is within devolved competence.¹⁰⁷

Furthermore, what is within devolved competence in one jurisdiction may be reserved in another meaning devolution as an area of law is highly complex in nature, nor can lessons be directly applied across devolved systems. For example, employment law is largely devolved in Northern Ireland, and reserved in Scotland and Wales. In Scotland and Northern Ireland, the justice system is largely devolved, and in Wales, it is wholly reserved.¹⁰⁸ Equality law is largely reserved in Scotland but devolved in Northern Ireland. Devolution is therefore a complex web of reserved and devolved matters. An additional category of 'excepted matters' exists in the Northern Ireland framework constituting areas which are beyond the competence of the Northern Ireland Assembly.¹⁰⁹ Reserved matters in Northern Ireland, on the other hand, are deemed beyond competence unless transferred.¹¹⁰

Each devolved statutory framework also lists enactments that are 'protected' from devolved amendment. Schedule 4 of the Scotland Act 1998 lists those enactments that are protected from modification by the Scottish Parliament including the Human Rights Act 1998, the Equality Act 2010 and the Scotland Act 1998 itself.¹¹¹ In Northern Ireland protected enactments are called 'entrenched enactments'¹¹² and in Wales enactments are listed as protected from modification under general restrictions to devolved matters.¹¹³

Devolution is complex. It does not apply universally across each devolved jurisdiction, meaning three very different forms of devolution and in each jurisdiction there is further complexity as to what constitutes a devolved, transferred, excepted or reserved matter (the latter of which takes on a different meaning in Northern Ireland). This creates a complex web for the person or organisation trying to navigate intertwined and yet separate devolved legal jurisdictions.

Constitutional Change and Eroding Devolution

A number of recent changes in constitutional arrangements has potentially eroded the devolution settlements. Following Brexit the UK Government undertook to establish principles in connection with a UK internal market. Under the provisions of the Internal Market Act 2020 the UK Parliament has granted UK Ministers the power to take budgetary decisions on devolved matters bypassing the Scottish Parliament.¹¹⁴ For example, there is a power for UK Ministers to provide and operate infrastructure in Scotland in relation to water, rail services, health care, education, court services and housing. Each of which are currently under devolved administration.¹¹⁵ Whilst the Internal Market Act has a consent mechanism, the devolved legislatures can withhold consent and the UK Government Ministers can still proceed – meaning the mechanism is more procedural than substantive.

¹⁰⁷ Nicole Busby and Muriel Robison, *CEDAW: How can women's rights be better realised in Scotland?* (2018, Engender). available at <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>; Busby (n 194).

¹⁰⁸ Boyle (n 8), 199 – in relation to Wales only

¹⁰⁹ Northern Ireland Act 1998 Schedule 2

¹¹⁰ Reserved areas can become transferred matters under a section 4 Order

¹¹¹ Scotland Act 1998 Schedule 4 and s 29(2)(c)

¹¹² Northern Ireland Act s 7

¹¹³ Government of Wales Act 2006 General Restrictions para.(3)(1) Schedule 5 Assembly Measures Part 2

¹¹⁴ Scottish Government *After Brexit: The UK Internal Market Act and devolution*, (Scottish Government, 2021), available at:

<https://www.gov.scot/publications/brexit-uk-internal-market-act-devolution/pages/5/>

¹¹⁵ Internal Market Act 2020 s 50

The ‘Sewel Convention’, originally a parliamentary convention¹¹⁶ and subsequently a legislative provision¹¹⁷, means that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature. However, the convention has become the subject of controversy in more recent years following a number of occasions when the UK Parliament passed legislation despite devolved legislatures withholding consent.¹¹⁸ This position was exacerbated in the context of Brexit, where the UK Parliament passed the EU Withdrawal Act 2018 without consent from the Scottish Parliament¹¹⁹ and passed the European Union Withdrawal Agreement Act 2020 without consent from all three devolved legislatures. In 2017, the Supreme Court held that ‘policing the scope and manner of [the Sewel Convention’s] operation does not lie within the constitutional remit of the judiciary.’¹²⁰ This means that, despite being embedded in legislation, there is no recourse to a remedy in court should the UK Parliament proceed without consent in legislating in either reserved or devolved areas in Scotland. In other words, the consent mechanism is once again more procedural in nature than substantive.

This erosion of devolution has perhaps contributed to disquiet around the constitutional settlement. A previous UK Government advisor has warned against the onset of ‘know your place unionism’¹²¹ and following the 2021 election of a pro-independence majority in the Scottish Parliament the Prime Minister has called for a summit on the future of the UK.¹²² The success of any forthcoming intervention on intergovernmental relations in the post-Brexit landscape is yet to be determined. Whilst Covid has provided an important anchor of cooperation there is an underlying tension as to the constitutional future of devolved jurisdictions with the UK Government and devolved governments often pulling in different directions. Human rights is a manifestation of this where regressive trajectories at the national level pull in a different direction to the more progressive examples of human rights reform in the devolved jurisdictions, in particular in Wales and Scotland.

Despite the threats to both devolution and human rights, it is difficult to see how an erosion of either would operate successfully in practice in the longer term. Undermining devolution risks encouraging separatism and undermines the union itself. Undermining or backsliding on rights further exacerbates this position. Likewise, regardless of whether there is a diminution on rights protections under the Human Rights Act 1998 it is unlikely the UK Parliament would legislate to remove the rights enshrined under devolution, although not impossible given the recent example of doing so under the EU Withdrawal Act 2018.¹²³ Nonetheless, the ECHR has formed a pillar of devolution from the outset that is perhaps so entrenched as to be near impossible to

¹¹⁶ Lord Sewel indicated in the House of Lords during the passage of the Scotland Bill (H.L. Deb vol. 592 col. 791) that ‘we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’

¹¹⁷ See Scotland Act 2016 s 2 and Wales Act 2017 s 2

¹¹⁸ In Wales, the Welsh Senedd voted against giving consent to the Police Reform and Social Responsibility Bill in 2011. In Scotland, the Scottish Parliament withheld consent on aspects of the Welfare Reform Bill 2011. In Northern Ireland, the NI Assembly withheld consent on the Enterprise Bill 2015.

¹¹⁹ The Welsh Senedd also withheld consent initially but later conceded.

¹²⁰ *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017) para.151

¹²¹ Neil Mackay, ‘Exclusive interview with former intelligence chief: ‘Boris and Tory government are gaslighting Scots over indyref2’’, *Herald Scotland*, (Glasgow, 2 May 2021) available at <https://www.heraldsotland.com/news/19273942.big-read-exclusive-interview-former-intelligence-chief-boris-tory-government-gaslighting-scots-indyref2/>

¹²² Christopher Hope, ‘Boris Johnson asks Nicola Sturgeon to a ‘save the Union’ summit’, *The Telegraph*, (London, 8 May 2021) available at <https://www.telegraph.co.uk/politics/2021/05/08/boris-johnson-asks-nicola-sturgeon-save-union-summit/>

¹²³ Rights derived from EU law were weakened both nationally and under the devolved frameworks. The Scottish Parliament legislated to protect the EU Charter of Fundamental Rights and to retain its incorporation under the EU Continuity Bill, however, the subsequent EU Withdrawal Act made rendered this legislation unlawful as determined by the UK Supreme Court, *THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL – A Reference by the Attorney General and the Advocate General for Scotland (Scotland)* [2018] UKSC 64

remove. The commitment to human rights and entrenchment of the ECHR via the Northern Ireland peace agreement means it takes on a special constitutional status in that regard. In each of the devolved jurisdictions the legislatures have legislative competence to observe and implement international human rights obligations, meaning a UK attempt to undermine the ECHR could be mitigated by devolved legislation to re-entrench it. Although legally the UK Parliament can remove or repeal the devolved provisions protecting the ECHR it is perhaps more *realpolitik*, i.e. political reality, that renders the rights as ‘non-negotiable’ norms at the sub-national level.

In this sense devolution can act as an important human rights anchor on national reform, mitigating threats to backslide on rights at the national level.

Part 2: Opportunities for progress within the current framework

- Incorporation of international treaties

The devolved constitutional arrangement has meant that the Scottish Parliament has progressed on human rights protection beyond the ECHR in devolved areas. For example, the Scottish Parliament has passed the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill.¹²⁴ As discussed above, this Bill incorporates the UNCRC in devolved areas meaning the protection and enforcement of children’s rights in areas of devolved competence. The Bill places an obligation on public authorities to comply with the treaty, encourages implementation through advanced monitoring and reporting mechanisms, and finally provides routes to remedy for violations of the treaty for non-compliance. It draws on a mixture of incorporation from both the Scotland Act 1998 model and the Human Rights Act 1998 model meaning, for example, scenarios where a declaration of incompatibility can be issued, and scenarios where courts have the ability to strike down incompatible legislation.¹²⁵

Incorporation of further international treaties has also featured as part of the recommendations of the National Taskforce on Human Rights Leadership.¹²⁶ The Taskforce has recommended incorporation of the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of Persons with Disabilities, the UN Convention on Equality and Non-Discrimination Against Women and the UN Convention on the Elimination of Racial Discrimination in a multi-treaty Bill, together with additional rights on the environment, equality, older persons and access to justice. Its evidence base includes a broad participative process with civil society and rights holders in Scotland¹²⁷ that has called for better accountability as one of the key ‘purposes and opportunities’ of the new framework.

This is a step-change in human rights reform in Scotland, and devolution has been the key enabler in taking a distinct and progressive approach. If delivered the recommendations would

¹²⁴ The UK Government has referred the Bill to the Supreme Court challenging some of the provisions as beyond the legislative competence of the Scottish Parliament (see here: <https://www.gov.uk/government/publications/alister-jack-letter-to-scottish-government-on-uncrc-bill-24-march-2021>). Although, importantly, not challenging the competence to incorporate or progress on human rights beyond the ECHR reaffirming human rights as a devolved matter.

¹²⁵ For a discussion see here: Katie Boyle, ‘Constitutional Changes in Scotland – I: Incorporation of International Treaties, Devolution and Effective Accountability’, (*Oxford Human Rights Hub*, 30 March 2021) available at <https://ohrh.law.ox.ac.uk/constitutional-changes-in-scotland-i-incorporation-of-international-treaties-devolution-and-effective-accountability/>

¹²⁶ National Taskforce for Human Rights Leadership Report (Edinburgh, 2020) available at <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>

¹²⁷ All Our Rights In Law: views from the wider public, A report to the National Taskforce on Human Rights Leadership (Human Rights Consortium and Scottish Human Rights Commission, 2021) available at https://hrscotland.org/wp-content/uploads/2021/03/HRCS_all-our-rights_report_48pp_web_single-pages.pdf

mean the rights under this framework become a substantive component of the rule of law, taking on a form of constitutional status, similar to that of the foundational status of the ECHR under devolution as discussed above. This is a key enabler of progressive human rights reform. As discussed above, in a recent Supreme Court case, Lord Reed has reiterated that it is “a fundamental principle of our constitutional law that an unincorporated treaty does not form part of the law of the United Kingdom”.¹²⁸ Incorporating the treaties into domestic law therefore enables a change in legal accountability meaning the treaties crystallise into forming an enforceable part of domestic law.

A change in law alone does not complete the incorporation journey, it creates the opportunity for a culture change in decision making and a means of holding decision makers to account when things go wrong. This is a key component of cultivating a human rights environment for progressive change that is not merely tokenistic in nature – incorporation offers an opportunity to embed and respect rights across society.¹²⁹ A participant in the 2020 All Our Rights process envisaged this as follows

“We need a movement to change the law and to embed rights in everything. The legislation gives a structural framework to hang the culture change on. The new law will speed up the shaping of a culture where everyone has to think about rights in everyday situations.”¹³⁰

The model of incorporation proposed in Scotland¹³¹ is one in which the parliament, the government, the entire administrative decision making sphere, non-judicial complaints mechanisms and the judiciary must all act as guarantors of human rights in a multi-institutional approach.¹³² The test of whether the domestication of the treaties amounts to full incorporation relies on whether an effective remedy is available for a violation.¹³³ The National Taskforce, and its predecessor the First Minister’s Advisory Group, have both recommended the court must act as a means of last resort. This is not dissimilar to the concept of social constitutionalism¹³⁴ or transformative constitutionalism¹³⁵ seen in the Global South. This commitment is further supported by a strong focus on pre-legislative scrutiny¹³⁶, seeking to create a rights affirmative framework¹³⁷ through subsequent legislation.

The National Taskforce recommends going further than incorporation under the UNCRC Bill. The report recommends domestication of a number of international norms and comparative best practice. For example, reasonableness as a means of review is to be interpreted more widely than the domestic form of *Wednesbury* reasonableness (irrationality)¹³⁸, lowering the

¹²⁸ *R (on the application of SC, CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26 para.77

¹²⁹ All Our Rights In Law (n 127) 19

¹³⁰ Ibid, 19

¹³¹ See First Minister’s Advisory Group on Human Rights Leadership (Edinburgh, 2018) available here: <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> and the National Taskforce Report (n 126)

¹³² First Minister’s Advisory Group, *ibid*

¹³³ Boyle, *Economic and Social Rights Law*, (n 8) 41

¹³⁴ Social constitutionalism is adapted from liberal constitutionalism as the model developing in the Global South, in particular Latin America, Natalia Angel-Cabo and Domingo Lovera Parmo, ‘Latin American Social Constitutionalism: courts and popular participation’ in Helena Alviar García, Karl Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge 2015) 85-105

¹³⁵ Karl Klare, ‘Legal Culture and Transformative Constitutionalism’, (1998) 14(1) South African Journal on Human Rights 146

¹³⁶ Recommendation 14

¹³⁷ Boyle, *Economic and Social Rights Law*, (n 8) 115

¹³⁸ Boyle, *Models of Incorporation* (n 8)

bar for findings of incompatibility and aligning with jurisprudence in South Africa¹³⁹, as well as the reasonableness test under OP-ICESCR.¹⁴⁰ It recommends that the new statutory framework place human dignity as the value which underpins all human rights forming a purposive foundation for interpretation, in this case aligning with constitutions and jurisprudence in South Africa¹⁴¹, Germany¹⁴² and Colombia¹⁴³ among others.

The report recommends an explicit duty to progressively realise rights and to give meaning to their content.¹⁴⁴ For example, the report sets out a process to “define what the minimum core obligations are in Scotland, [that] international human rights law standards should be taken into account, while also ensuring a participatory process that takes into account the views and concerns of right-holders in Scotland”. Participation permeates at the core of the process of implementation and as an ongoing requirement moving forward, including consideration of a right to participation in and of itself.¹⁴⁵

There are also proposals for enhanced access to justice mechanisms that address barriers relating to costs, standing, legal advice and advocacy. The report recommends that remedies are accessible, affordable, timely, and effective.¹⁴⁶ Regulators, inspectorates, ombudsmen and complaint-handlers should systematically embed human rights standards or approaches into their ways of working as part of everyday accountability.¹⁴⁷ And when other mechanisms fail, the judiciary should issue appropriate and effective orders to deal with violations, including guarantees of non-repetition.¹⁴⁸

The report recognises that further work on access to justice is required, suggesting that the framework could provide for the full range of appropriate remedies under international law, including targeted remedies such as structural interdicts.¹⁴⁹ The potential development of structural interdicts to respond to systemic issues¹⁵⁰ aligns with social rights jurisprudence in South Africa¹⁵¹, Kenya¹⁵², Colombia¹⁵³, the US¹⁵⁴ and Canada¹⁵⁵ among others. It forms part

¹³⁹ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) <http://www.saflii.org/za/cases/ZACC/2000/19.html>

¹⁴⁰ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx>

¹⁴¹ *Mahlangu and Another v Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020) <http://www.saflii.org/za/cases/ZACC/2020/24.html>

¹⁴² Ingrid Leitjen, ‘The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection’, (2019) (16)(1) German Law Journal 23

¹⁴³ Colombian Constitutional Court, Decision T-025 of 2004 https://www.brookings.edu/wp-content/uploads/2016/07/colombia_t-025_2004.pdf

¹⁴⁴ National taskforce report (n 126) Recommendation 13

¹⁴⁵ *ibid* Recommendation 29

¹⁴⁶ *Ibid* Recommendation 21

¹⁴⁷ *Ibid* Policy Objective 22

¹⁴⁸ *Ibid* Policy Objective 25

¹⁴⁹ *Ibid* Recommendation 25

¹⁵⁰ Katie Boyle, Academic Advisory Panel ArticlePaper Access to Remedy – Systemic Issues and Structural Orders 30 November 2020, available at <https://storre.stir.ac.uk/retrieve/83ce5341-cc71-43dd-98ad-72be806d9a10/BOYLE%20Systemic%20Issues%20and%20Structural%20Orders%20Briefing%20Paper.pdf>

¹⁵¹ *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020) <http://www.saflii.org/za/cases/ZAGPPHC/2020/306.html>

¹⁵² Available at <https://katibainstitute.org/wp-content/uploads/2021/01/Petition-3.2018-MituBell.pdf> For a discussion on this recent case see Victoria Miyandazi, ‘Setting the Record Straight on Socio-Economic Rights Adjudication: Kenya Supreme Court’s Judgment in the Mitu-Bell Case’, (*Oxford Human Rights Hub*, 1 February 2021) available at <http://ohrh.law.ox.ac.uk/setting-the-record-straight-on-socio-economic-rights-adjudication-kenya-supreme-courts-judgment-in-the-mitu-bell-case/>

¹⁵³ Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017) see chapter 6 on social rights

¹⁵⁴ Katharine Young, ‘A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review’, (2010) 8(3) *International Journal of Constitutional Law* 385

¹⁵⁵ Kent Roach, *Constitutional Remedies in Canada*, (2nd ed. Canada Law Book, 2013)

of the recommendations of the Academic Advisory Panel¹⁵⁶, the Scottish Human Rights Commission¹⁵⁷ and the Bonavero Institute of Human Rights report.¹⁵⁸

Looking ahead, lessons from the process of incorporating the UNCRC (Incorporation) (Scotland) Bill demonstrate that gaps in current access to justice mechanisms continue to emerge. For example, how to ensure accountability in the privatisation of public services¹⁵⁹, impediments relating to prohibitive costs¹⁶⁰, legal aid¹⁶¹, advice¹⁶², advocacy¹⁶³, child-friendly complaints mechanisms¹⁶⁴, participation¹⁶⁵, the grounds and intensity of review¹⁶⁶, group proceedings¹⁶⁷ as well as what constitutes an effective remedy in practice.¹⁶⁸

There is no transformative change without effective accountability and the processes of incorporation will need to address this gap in order to function effectively.

Part 3: The risk of reform/ regression / diminution to the current framework

Notwithstanding the significant gaps that will require to be addressed in order to provide Scotland with a fully functioning and effective framework for the realisation of social, economic, culture and economic rights, it is clear that devolution has provided Scotland with the opportunity for progress in regard to its aspirations concerning human rights. However, given the nature and fragility of the devolution settlement as outlined above, it is important to consider the sustainability of that progress and in particular its ability to withstand any threat of diminution that might result from changes to the current constitutional arrangements.

The most recent and profound constitutional change arises from the UK's withdrawal from membership of the European Union. The referendum result itself is of some significance here as, despite an overall vote across the UK of 52% in favour of leave, Scotland voted by 62% to remain. Brexit is an ongoing process and it is still quite difficult to say with certainty what its

¹⁵⁶ Boyle, Academic Advisory Panel Briefing Paper Access to Remedy (n 150)

¹⁵⁷ Boyle, Models of Incorporation and Justiciability (n 8) and Scottish Human Rights Commission, Adequate and Effective Remedies for

Economic, Social and Cultural Rights Background Briefing paper for the National Taskforce on Human Rights Leadership (SHRC, December 2020) available at <https://www.scottishhumanrights.com/media/2163/remedies-for-economic-social-and-cultural-rights.pdf>

¹⁵⁸ Cepeda et al, *Report to the Scottish National Taskforce for Human Rights Leadership*, (n 8)

¹⁵⁹ Katie Boyle, 'The Right to an Effective Remedy and Accountability in the Privatisation of Public Services' (2020) (6) European Human Rights Law Review 610

¹⁶⁰ Together (Scottish Alliance for Children's Rights) *Scottish Government Consultation on the Incorporation of the United Nations Convention on the Rights of the Child into Scots law* (Together, August 2019), available at https://www.togetherscotland.org.uk/media/1342/uncrc_incorporation_response_final.pdf

¹⁶¹ Equalities and Human Rights Committee Stage 1 Report on the UN Convention of the Rights of the Child (Incorporation) (Scotland) Bill, Scottish Parliament, available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2020/12/20/b8645859-4fa2-4a02-ab99-1300cc14f686/EHRiCS052020R4.pdf>

¹⁶² *ibid*

¹⁶³ All Our Rights In Law (n 127)

¹⁶⁴ Fiona Morrison et al, *Embedding Systems of Child-Friendly: Complaints, Remedy and Redress in Scotland, CHILDHOOD AND YOUTH STUDIES RESEARCH GROUP* (University of Edinburgh, 2021), available at <https://blogs.ed.ac.uk/cysrg/2021/03/03/embedding-systems-childfriendly-complaints-systems-remedy-redress-scotland/>

¹⁶⁵ Equalities and Human Rights Committee Stage 1 UNCRC (I)(S) Bill Report <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2020/12/20/b8645859-4fa2-4a02-ab99-1300cc14f686/EHRiCS052020R4.pdf>

¹⁶⁶ Katie Boyle, Equalities and Human Rights Committee: UNCRC (Incorporation) (Scotland) Bill Written Evidence, 16 October 2020, available at <https://dspace.stir.ac.uk/retrieve/4594fadc-c4a7-4b3e-ab45-d7fb9a4b9248/Dr%20Katie%20Boyle%20UNCRC%20EHRiC%20Evidence.pdf>

¹⁶⁷ *ibid*

¹⁶⁸ Equalities and Human Rights Committee, 23rd Meeting 2020, Session 5, 12 November 2020 <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12941&mode=pdf>

effect will be with regard to devolution and related human rights protections, although the removal of the guarantees provided by the presence and influence of EU law does risk destabilising the UK's framework in this respect.¹⁶⁹

The UK government did not produce a full equalities impact assessment of Brexit which would have provided a review of its predicted legal and socioeconomic effects on different groups of people in the UK. An independent report commissioned by the Scottish Government in January 2020¹⁷⁰ identified 137 potential social impacts across different groups in Scotland. These include the 'protected characteristic' groups covered by the Equality Act as well as those with other personal characteristics who may face social exclusion or discrimination. The impacts identified include the loss of legal rights, employment protections, funding opportunities, healthcare rights, and impacts on food, fuel and medicines. Although some of these impacts such as the loss of certain rights and services have an apparently neutral application, they are distinct in terms of how they happen, who they affect, or both.¹⁷¹

Post-Brexit the UK Government's recentralisation of certain powers, evidenced by the provisions of the Internal Market Act discussed above, poses a substantial threat to the current devolution arrangements. The possibility that the UK Government's adoption of certain minimum human rights standards with application across the UK might lead to a downward trajectory in the devolved nations' progress is very real and the centralisation of decision-making regarding the prioritisation of funding in devolved policy areas¹⁷² enables the UK Government to exercise unilateral control over the Shared Prosperity Fund, the UK's replacement to the European Structural Funds.¹⁷³ The devolved administrations have opposed this on the grounds that the shift in decision-making towards Westminster goes against "promises repeatedly made that Brexit would not mean any loss of funding and that the devolution settlement would be respected".¹⁷⁴ The Northern Ireland Assembly's Minister of Finance has suggested that the Fund has been designed with the UK Government's political benefit rather than Northern Ireland's priorities in mind.¹⁷⁵

In an attempt to mitigate at least some of the effects of the UK's withdrawal from the EU on social and environmental protections, the Scottish Parliament passed the UK Withdrawal from the European Union (Continuity) (Scotland) Act in December 2020.¹⁷⁶ The Act contains a provision to maintain alignment in devolved areas with EU law as far as possible through a

¹⁶⁹ See Equality and Human Rights Commission *Brexit and the EU Charter of Fundamental Rights: our concerns* (EHRC website) available at: <https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union-0>

¹⁷⁰ Eve Hepburn, *Social and Equality Impacts of Brexit*, (Scottish Government, 2020), available at: <https://www.gov.scot/publications/social-equality-impacts-brexit/pages/3/>

¹⁷¹ Ibid, 5.

¹⁷² Equality Act 2010, Part 6. For a detailed analysis of the potential impact of the centralisation of previously devolved funding, see Jess Sargeant and Alex Stojanovic. *The United Kingdom Internal Market Act 2020* (Institute for Government, 2021), available at: <https://www.instituteforgovernment.org.uk/sites/default/files/publications/internal-market-act.pdf> 23-24.

¹⁷³ Which, according to reports, were worth approximately £2.1bn per year split across regional development, agriculture and social funding – see Philip Brien *The Shared Prosperity Fund* House of Commons Library Article Paper 08527, 29 (House of Commons Library, 20210, available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-8527/>

¹⁷⁴ See the Welsh Government's Joint Press Release with the Scottish Government, 24 November 2020, <https://gov.wales/uk-government-must-respect-devolution-wales-and-scotland>

¹⁷⁵ Northern Ireland Assembly, 18 January 2021, 68, available at: <http://data.niassembly.gov.uk/HansardXml/plenary-18-01-2021.pdf>

¹⁷⁶ This is the Parliament's second attempt to pass a Continuity Bill. The first, intended as an alternative to the European Union (Withdrawal) Act 2018, was the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. The Bill was held by the Supreme Court to be outwith devolved competence in certain respects. The Scottish Government withdrew the Bill and committed to bring back legislation containing the remaining provisions.

“keeping pace” power¹⁷⁷ and, in relation to the maintenance of environmental standards in Scotland, it makes provision for environmental governance.¹⁷⁸ Constitutional experts have noted that the Act is ‘is as much a piece of political rather than technical law-making’.¹⁷⁹ Giving evidence to the Scottish Parliament at Stage 1 of the Bill, Professor Aileen McHarg warned that uncertainty about the level of divergence that there would be between the UK’s future trade agreements and EU standards made it difficult to predict how effective the “keeping pace” provision would be in practice.¹⁸⁰ Elaborating further on the relationship between the Scottish Continuity Act and the UK’s Internal Market Act, Professor McHarg stated, “What is clear is that if trade agreements require a divergence from EU standards, those trade agreements can be made binding on the Scottish Parliament even if they affect devolved areas”. In relation to the effect of this on devolution, she noted that the concern was that “...the area of discretion is being whittled away very, very significantly. The idea in principle that there might be convergence in some areas and divergence in other areas, that’s devolution. We’re talking about where the balance between those things lies.”

The changes that Brexit will bring to the UK’s current constitutional arrangements are still unclear, but what is apparent is that there has been a shift in the existing devolution of powers as a result of the UK Government’s attempts to control the arrangements on which its future trading relationships are based. The ability of the Scottish Government and the Scottish Parliament to mitigate any resulting impacts seems limited. If the UK Government chooses to depart from EU regulatory standards – either current or future – in key areas such as equality or employment this could have a negative effect on rights protections in Scotland and could also threaten the intended impact of the incorporation agenda. Of course, this does not represent any change to the current devolution arrangements as both areas have always been reserved matters.

The removal of the guaranteed minimum standards and obligation to comply with social progress imposed by EU membership means that the UK has lost this important anchor. Furthermore, the centralisation of funding which, is at least partially intended to provide support for the most disadvantaged regions and communities, poses a further threat to the devolved administrations’ ability to protect the most vulnerable members of society.

Part 4: The potential opportunities if devolution was enhanced?

The changes imposed on Scotland by Brexit and the UK government’s handling of it have led to calls for a second Scottish independence referendum. In the May 2021 elections to the Scottish Parliament elections, the pro-independence parties the SNP and the Greens won 72 out of 129 seats – a result which the Scottish Government claim represents a valid mandate for a second referendum. The first minister pledged in her victory speech that she would press

¹⁷⁷ UK Withdrawal from the European Union (Continuity) (Scotland) Act s 1(1)(a).

¹⁷⁸ UK Withdrawal from the European Union (Continuity) (Scotland) Act Part 2.

¹⁷⁹ Christopher McCorkindale, Aileen McHarg and Tom Mullen *The Continuity Bill is Dead; Long Live the Continuity Bill – Regulatory Alignment and Divergence in Scotland Post-Brexit* Constitutional Law Association Blog, 30 July 2020, available at: <https://ukconstitutionallaw.org/2020/07/30/christopher-mccorkindale-aileen-mcharg-and-tom-mullen-the-continuity-bill-is-dead-long-live-the-continuity-bill-regulatory-alignment-and-divergence-in-scotland-post-brexit/>

¹⁸⁰ See Finance and Constitution Committee of the Scottish Parliament, *UK Withdrawal from the European Union (Continuity) (Scotland) Bill: Stage 1*, 26 August 2020, evidence from Prof Aileen McHarg, available at: <https://www.parliament.scot/chamber-and-committees/debates-and-questions/s5/finance-and-constitution/26-august-2020-12767>

ahead with the necessary preparations once the Covid crisis was over.¹⁸¹ Whether a referendum would deliver independence and, if so, what the effect on Scotland's human rights framework would be are questions for the future. There are currently no proposals to extend Scotland's devolution settlement, although recent events have led to recommendations from a variety of sources for the extension of powers across a range of different policy areas, many with a direct link to human rights protections. It is therefore worth considering whether any further extension to the current devolution arrangements is possible, be it in place of a referendum or in the event that a referendum did not result in a vote for independence and, if so, what the impact of further devolved powers might be.

The process for requesting such amendment is set out in the Scotland Act 1998, whereby a section 30 order can be made which grants legislative authority on a temporary or permanent basis to the Scottish Parliament in a specified area.¹⁸² Such an order can be used to increase or restrict the Scottish Parliament's legislative authority by altering the list of 'reserved powers' set out in Schedule 5, and/or the protections against modification set out in Schedule 4 of the Scotland Act. Section 30 Orders can be initiated either by the Scottish or UK Governments but require approval by the House of Commons, the House of Lords, and the Scottish Parliament before becoming law.¹⁸³ In the current context, this seems unlikely but, given the sensitive constitutional issues at stake and the UK Government's desire to protect the Union, it is possible that circumstances may change.¹⁸⁴

If such a request was forthcoming and, assuming that approval was likely, what areas of social and economic policy should be the focus of enhanced rights protections? The most obvious need in this respect would surely be in respect of those groups and individual who fall between the current structural gaps that result from the uneven matching of reserved and devolved power. Examples include asylum seekers; the victims of trafficking; those workers who, because of a lack of employment status and/or their engagement in precarious forms of work, are not able to enjoy the full protection available to those with employment security and, cutting across all of these groups, individuals and groups experiencing extreme poverty.¹⁸⁵

Employment law has long been the subject of calls for the full devolution of power.¹⁸⁶ In the post-Brexit environment, enhanced powers in this respect would facilitate the Scottish Parliament's objectives of non-regression and keeping pace with the EU's social policy agenda as the minimum standards guaranteed by EU law become vulnerable to change.¹⁸⁷ Despite the

¹⁸¹ <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-57038039>

¹⁸² This is the same legislative procedure that would be used by the Scottish Government to initiate the process of legislating for an independence referendum.

¹⁸³ There are equivalent provisions in the Government of Wales Act 2006 and Northern Ireland Act 1998.

¹⁸⁴ Following the previous Scottish Independence Referendum, the Smith Commission recommended the further devolution of equal opportunities to Scotland, specifically that, 'The powers of the Scottish Parliament will include but not be limited to the introduction of gender quotas in respect of public bodies in Scotland. The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas.' See Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament', para 60, clause 24.

¹⁸⁵ See Professor Philip Alston (United Nations Special Rapporteur on extreme poverty and human rights), *Statement on Visit to the United Kingdom* 2018, available at:

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881>

¹⁸⁶ Most recently, in June 2021, the Social Justice Secretary Shona Robison called on the opposition parties in Holyrood to support her bid for the full devolution of employment law as a means of tackling child poverty and building a fairer and more equal country. See *Devolution of employment powers to tackle poverty: Letter to Party Leaders*, available at:

<https://blogs.gov.scot/fairer-scotland/2021/06/06/devolution-of-employment-powers-to-tackle-poverty/>

¹⁸⁷ Michael Ford QC *Workers' Rights from Europe: The Impact of Brexit* (TUC, 2016), available at:

<https://www.tuc.org.uk/sites/default/files/Workers%E2%80%99Rights%20from%20Europe%20the%20impact%20of%20Brexit%20-%20Michael%20Ford%20QC.pdf>

UK Government's announcement in 2019 that protection for EU workers' rights would be included in an Employment Bill,¹⁸⁸ no such bill has yet been published. Scotland's ability to act independently is limited to the promotion of support for employment with attention focused in recent years on the promotion of fair working practices through the Fair Work Action Plan¹⁸⁹ which has been aimed at the achievement of a range of policy initiatives such as employer accreditation schemes on the living wage,¹⁹⁰ and carer support¹⁹¹ and facilitating the return of women workers to the labour market.¹⁹² If placed alongside the incorporation agenda, the devolution of employment law to Scotland would certainly open up a whole range of possible direct legislative interventions capable of bringing improvements to the lives of protected characteristic groups and others who face disadvantage and discrimination. However, given the direct relationship between economic policy and employment law, further powers in this respect would seem to be very unlikely. Equality law and immigration and asylum law are two areas which have also been the subject of calls for greater powers for Scotland and, if that were achieved, both have the potential to make a significant contribution to the realisation of human rights in Scotland.

Equality Law

The devolution of equality law would enable the Scottish Parliament to implement fully the changes that are necessary for Scotland to fulfil its obligations in line with the international law framework.¹⁹³ The necessary shift from a formal to a substantive approach to equality would catalyse the whole process by enabling alignment of domestic equality law with the international human rights framework. However, while equality law remains reserved with its provisions largely contained within the Equality Act 2010, this looks unlikely to happen. In its 2020 report, the First Minister's National Advisory Council on Women and Girls called for Scottish Government to advocate for the full devolution of equality legislation and policymaking to the Scottish Parliament, stating, 'We believe that if Scotland is serious about radically progressing gender equality, the Scottish Government must dedicate considerable effort to the devolution of equality through existing inter-governmental mechanisms.'¹⁹⁴ The incorporation of CEDAW, the UNCRPD and UNCERD into domestic law alongside the full devolution of equality law would provide Scotland with an opportunity to make radical and substantial progress in the realisation of the rights of women, disabled people and in relation to race and ethnicity. Furthermore, the vision for Scotland's equality and human rights framework as expressed by the National Taskforce for Human Rights Leadership in its Report¹⁹⁵ includes a right for older people to lead a life of dignity and independence and to take

¹⁸⁸ See the Queen's Speech (Prime Minister's Office, 2019) p. 43, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853886/Queen_s_Speech_December_2019_-_background_briefing_notes.pdf

¹⁸⁹ Scottish Government, *Fair Work: Action Plan* (Scottish Government, 2021) available at: <https://www.gov.scot/publications/fair-work-action-plan/>

¹⁹⁰ The Poverty Alliance *Living Wage Scotland*, see <https://scottishlivingwage.org/>

¹⁹¹ Carer Positive, *Carer Positive Employer in Scotland*, see: <https://www.carerpositive.org/>

¹⁹² Employability in Scotland, *Women in the Economy*, see: <http://www.employabilityinscotland.com/participants-and-barriers/women-and-work/women-returns/>

¹⁹³ See Nicole Busby 'The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW' and Nicole Busby and Kasey McCall-Smith 'Incorporation of the CERD and CRPD and Equivalent Rights Provision for LGBTI Communities and Older Persons', Academic Advisory Panel papers for the National Taskforce for Human Rights Leadership.

¹⁹⁴ First Minister's National Advisory Council on Women and Girls (2020) Report and Recommendations, Recommendation 1, 11, available: https://onescotland.org/wp-content/uploads/2021/01/562006_SCT1120576152-002_NACWG.pdf

¹⁹⁵ National Taskforce for Human Rights Leadership (2021) Report (n 126)

part in social and cultural life, as previously provided by the EU Charter of Fundamental Rights,¹⁹⁶ and an equality clause that protects and promotes the full and equal enjoyment of rights of LGBTI people¹⁹⁷ to be included in the framework Act. The devolution of equality law would enable these rights to be given meaningful effect, so as to ensure as far as possible, equality of outcome for all protected groups.

Looking beyond the relatively narrow categories deemed as protected characteristics under the Equality Act 2010,¹⁹⁸ the devolution of equality could enable the extension of the framework to include a wider range of characteristics. In line with the planned incorporation agenda, one obvious choice for inclusion would be socio-economic status. The Equality Act does provide for a socio-economic duty which requires public bodies to adopt transparent and effective measures to address the inequalities that result from differences in occupation, education, place of residence or social class.¹⁹⁹ This duty was enacted by the Scottish Parliament as the Fairer Scotland Duty in 2018²⁰⁰ and came into effect in Wales on 31st March 2021.²⁰¹ The UK Government has no plans to introduce the duty in England. The EHRC has conducted an evaluation of the socio-economic duty in Scotland and Wales²⁰² which found that, although some early positive signs could be deduced in relation to its influence over decision making, its full impact in relation to setting or tackling specific priorities had not yet been felt.²⁰³ Providing real and measurable improvements to people's lives was considered a longer-term aspiration for the duty in both Scotland and Wales.²⁰⁴ The duty falls far short of a legal right not to be discriminated against on the grounds of socio-economic status or social class, a right that is recognised by the constitutional provisions of some jurisdictions²⁰⁵ and has been the subject of proposals for reform in others.²⁰⁶ Importantly, given Scotland's incorporation agenda, the extension of the framework to explicitly include socio-economic status would bring domestic law into line with international human rights law obligations under the International Covenant on Economic, Social and Cultural Rights.²⁰⁷

¹⁹⁶ Taskforce report *ibid*, Recommendation 6

¹⁹⁷ Taskforce report, *ibid* Recommendation 7.

¹⁹⁸ Section 4 of the Equality Act 2010 lists the protected characteristics as: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

¹⁹⁹ Section 1, Equality Act 2010 which provides, "An authority [...] must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage."

²⁰⁰ The Equality Act 2010 (Commencement No. 13) (Scotland) Order 2017. For the associated guidance, see

<https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/>

²⁰¹ The Equality Act 2010 (Authorities subject to a duty regarding Socio-economic Inequalities) (Wales) Regulations 2021.

For an overview of the duty, see <https://gov.wales/socio-economic-duty-overview>

²⁰² Equality and Human Rights Commission, *Evaluating the socio-economic duty in Scotland and Wales* (EHRC, 2021) available at:

<https://www.equalityhumanrights.com/en/publication-download/evaluating-socio-economic-duty-scotland-and-wales>

²⁰³ *Ibid*, 8.

²⁰⁴ *Ibid*.

²⁰⁵ Examples include South Africa and India.

²⁰⁶ [The Irish Equality \(Miscellaneous Provisions\) Bill 2021, currently before Dáil Éireann, second stage, contains a definition of a disadvantaged socioeconomic status ground, see: https://www.oireachtas.ie/en/bills/bill/2021/6/](https://www.oireachtas.ie/en/bills/bill/2021/6/)

²⁰⁷ The UN on Committee on Economic, Social and Cultural Rights noted in its concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland in 2016, 'While welcoming the adoption of the Equality Act 2010, the Committee is concerned that some of its provisions, particularly those relevant for enhancing the protection of economic, social and cultural rights without discrimination, are not yet in force, such as the duty of public authorities to consider socioeconomic disadvantage in decision-making processes and the prohibition of intersectional discrimination. The Committee also regrets that, despite its previous recommendation, the Equality Act 2010 is not applicable in Northern Ireland and does not explicitly include all prohibited grounds of discrimination, such as national or social origin (art. 2 (2)).' See Committee on Economic, Social and Cultural Rights, *Concluding Observations* (UN, 2016), available at:

Immigration and Asylum Law

Nationality, immigration and asylum are reserved matters²⁰⁸ although the devolved administrations are responsible for related devolved policy which supports refugees and asylum seekers. This includes ensuring access to essential services like healthcare, housing and education which assist and support migrant integration in the host nation. Following devolution, the approaches to migrant integration in England and the devolved nations have increasingly diverged. The UK Government's Department for Communities and Local Government, which has responsibility for migrant integration in England, has adopted 'community cohesion' as its approach.²⁰⁹ This replaced the multicultural understanding of integration in the early 2000s²¹⁰ following a government-commissioned independent review which concluded that tensions between different communities could be overcome through an emphasis on British citizenship and core British values.²¹¹ In the political arena, community cohesion has been articulated as representing a 'clear sense of shared aspirations and values, which focuses on what we have in common rather than our differences'.²¹²

In contrast the multicultural approach which celebrates difference and diversity has underpinned the Scottish Government's migrant integration policy since the early days of devolution 'when concerns about Scotland's demographic decline led Scottish parties to develop a broadly consensual position that migration and migrants were an important economic and cultural resource for Scotland'.²¹³ The 'One Scotland, Many Cultures' campaign, launched by the Scottish Executive in 2002 – renamed 'One Scotland'²¹⁴ in 2005 – placed multiculturalism at its centre and this approach which sees Scotland as a 'place of many cultures' continues to underpin relevant policy in Scotland. Although Scotland does not have an integration policy relevant to all migrant groups, it does have separate policy strands which are intended to promote a welcoming and inclusive environment. The 'Stay in Scotland Toolkit' aimed at EU migrants was launched in 2019 in response to the Brexit Referendum result²¹⁵ and the New Scots Refugee Integration Strategy²¹⁶ offers support to asylum seekers from the first day of entry into Scotland rather than, as is the case under Home Office in England, once refugee status is established. Such support includes crucial access to public services. Furthermore, some of the UK Government's provisions which restrict access to social rights instituted by the UK Government have not been applied in Scotland, so, for example, access to free ESOL (English for Speakers of Other Languages) for those in the asylum system and access to further education, although restricted, remain.²¹⁷ The Scottish Government has

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW3XRinAE8KCBFogOHnz%2FvuCC%2BTxEKAI18bzE0UtfQhJkxxOSGuoMUxHGypYLjNFkwxnMR6GmqogLJF8BzscMe9zpGfTXBkZ4pEaigi44xqiL>

²⁰⁸ Scotland Act 1998, Schedule 5, Pt II, section B6.

²⁰⁹ See Department for Communities and Local Government (2012) Creating the conditions for integration, available: <https://www.gov.uk/government/publications/creating-the-conditions-for-a-more-integrated-society>

²¹⁰ Derek McGhee *The end of multiculturalism? Terrorism, integration and human rights*, (Open University Press, 2005).

²¹¹ Ted Cante Community cohesion: a report of the Independent Review Team, (Home Office, 2001).

²¹² David Cameron (2011) 'Prime Minister's speech to Conservative Party Members on the government's immigration policy' *The Guardian*, (London, 14 April 2011).

²¹³ Eve Hepburn *Migrant integration in Scotland: challenges and opportunities*, (Iriss, 2020) available at: <https://www.iriss.org.uk/resources/insights/migrant-integration-scotland-challenges-and-opportunities>; see further Eve Hepburn and Michael Rosie, 'Immigration, nationalism and political parties in Scotland' In E. Hepburn R. Zapata-Barrero (eds) *The politics of immigration in multilevel states: governance and political parties*. (Palgrave Macmillan, 2014).

²¹⁴ Scottish Government, *One Scotland*, see: <https://onescotland.org/>

²¹⁵ Scottish Government (2019) Stay in Scotland Toolkit: <https://www.gov.scot/publications/eu-citizens-staying-in-scotland-package-of-support/>.

²¹⁶ <https://www.gov.scot/publications/new-scots-refugee-integration-strategy-2018-2022/>

²¹⁷ Ibid.

also made clear its intention to change the law so that asylum seekers can obtain a work permit.²¹⁸ This is currently prohibited under UK law and any such change would be difficult to achieve under current devolution arrangements by which decisions about levels of migration, nationality status and resulting rights are managed by the UK Government's Home Office.

The Scottish Government has called for further devolution of immigration and asylum law,²¹⁹ albeit with much of the discussion to date focussing on an economic rationale,²²⁰ rather than on the specific needs of new migrant populations. Nonetheless, the differing approaches to migrant integration which underpin the relevant policy in Scotland and in England sit in stark contrast to each other. On 24 March 2021, the UK Government published its 'New Plan for Immigration'²²¹ which sets out various proposals for changes to nationality, immigration and asylum law. Scottish experts on immigration and asylum law have highlighted a key concern that,

whilst some of the proposals relate to issues that are reserved to the UK Government (for example, proposals around the legal standard for assessing asylum claims, or reforms to British nationality law), some of the proposals are not matters to be decided by the UK Home Office alone, because they are issues devolved to the competence of the Scottish Parliament and/or their impact will fall into areas of devolved competence.

²²²

Examples of where the proposals impinge on areas of devolved policy include arrangements regarding the identification, support and safeguarding of vulnerable groups, including survivors of gender-based violence, survivors of trafficking and exploitation, families who are destitute and homeless and separated children arriving in Scotland alone. UK strategy designed to 'take back control' of Britain's borders looks increasingly at odds with Scotland's vision of itself as an inclusive and welcoming place – a vision that could only be fully realised with enhanced devolved powers in relation to migration and asylum policy.

Although it is tempting to speculate about the difference that further devolved powers in specific policy areas would make to the achievement of Scotland's human rights obligations, associated legal rights cannot be fully effective in isolation as the demarcations that characterise law and policy-making are rarely, if ever, reflected in the complex reality of lived experience. For example, the interplay between employment, equality and immigration and asylum law and policy alongside a fully devolved social security system would be necessary to improve the lives of many intended rights holders.

A fully integrated operational human rights framework will depend on the devolution of a range of social and economic policy areas.

²¹⁸ Ibid.

²¹⁹ Scottish Government (2018) Scotland's population needs and migration policy: Discussion paper on evidence, policy and powers for the Scottish Parliament, available:

<https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2018/02/scotlands-population-needs-migration-policy/documents/00531087-pdf/00531087-pdf/govscot%3Adocument/00531087.pdf>

²²⁰ Silvia Galandini, Gareth Mulvey and Laurence Lessard-Phillips 'Stuck Between Mainstreaming and Localism: Views on the Practice of Migrant Integration in a Devolved Policy Framework' (2019) 20 Journal of International Migration and Integration 685, 689.

²²¹ <https://www.gov.uk/government/consultations/new-plan-for-immigration>

²²² See JustRight Scotland 'New Plan for Immigration Consultation: Our Response' available:

<https://www.justrightscotland.org.uk/2021/05/new-plan-for-immigration-consultation-our-response/>

CONCLUSIONS: risks/ opportunities/ recommendations

Devolution has created a constitutional framework for the ECHR as a minimum level of human rights protection that the devolved legislatures, governments and courts must uphold. In relation to the progression of human rights, devolution has provided clear opportunities to close the accountability gap in the protection of economic, social, cultural and environmental rights (ESCER). There are now several examples of progress in the protection of such rights at the devolved level, including direct incorporation of international treaties. Civil society organisations can play a transformative role in encouraging and cultivating the environment for human rights progress. For example, the SNAP process in Scotland helped to build CSO alliances and created the space to coalesce in exerting pressure for change by producing and providing information, educating the public and others and proposing solutions to address human rights accountability gaps.

Scotland's planned incorporation of a range of international human rights Conventions into domestic law provides an opportunity to align the reserved equality law framework with an integrated and comprehensive system capable of elevating social and economic rights beyond the restrictive formal approach resulting in a more substantive understanding capable of achieving social justice. This process, if fully realised, has the potential to transform the operation of equality law aiding its effectiveness and impact. However, the reservation of equal opportunities is likely to substantially curb progress in this respect.

As the equality example illustrates, devolution is complex. It does not apply universally across each devolved jurisdiction, meaning that in practice three very different forms of devolution operate simultaneously across the UK's devolved nations. Furthermore, In each jurisdiction there is further complexity in relation to what constitutes a devolved, transferred, excepted or reserved matter (the latter of which takes on a different meaning in Northern Ireland). This creates a complex web for the person or organisation trying to navigate intertwined and yet separate devolved legal jurisdictions. This diversity in law, policy and practice will inevitably impact on the strategies and actions of civil society organisations, particularly those that operate across the UK, when attempting to engage with or to influence human rights agendas and related policy outcomes. A clear example of this exists in the United Nations monitoring process in relation to compliance with the seven human rights treaties ratified by the UK.²²³ Despite the divergence that devolution brings, it can also inspire and lead unified action across the devolved nations, particularly in relation to any perceived or actual threat to, or destabilisation of, the current guarantees in relation to the protection of international human rights standards by the UK Government or Westminster Parliament. This is because the legislatures in each of the devolved jurisdictions have legislative competence to observe and implement international human rights obligations. This would mean, for example, that any attempt by the UK Government to undermine the ECHR could be mitigated by devolved legislation to re-entrench it. Although legally the UK Parliament can remove or repeal the devolved provisions protecting the ECHR, perhaps it can be said that political reality in fact renders the rights as 'non-negotiable' norms at the sub-national level. In this way, the influence of devolution can be seen to have had an ongoing stabilising effect on ensuring that the guarantees relating to international human rights standards, with which the UK has after all

²²³ Namely, the [International Covenant on Civil and Political Rights](#) (ICCPR); the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR); the [International Convention on the Elimination of All Forms of Racial Discrimination](#) (CERD); the [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW); the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment](#) (CAT); the [Convention on the Rights of the Child](#) (CRC); the [Convention on the Rights of Persons with Disabilities](#) (CRPD).

agreed to comply, are maintained. This is an outcome with positive discernible benefits for all those protected by human rights within the UK.

As well as providing an important human rights anchor on national reform, mitigating threats to backslide on rights at the national level, devolution also plays an important role in enabling deeper conversations on the UK human rights landscape. The diverging trajectories, whilst on the one hand problematic as people living in the UK enjoy different levels of protection depending on where they live, also offer the opportunity to demonstrate the potential and different ways through which the devolved jurisdictions seek to improve human rights progress. One of the notable lessons to be learned by a clearer understanding of the diverging experiences is how important it is that UK-wide CSO, the UK Government and international treaty body reporting mechanisms address each of the devolved jurisdictions respectively as to their international human rights obligations and what their respective responsibilities are.

Scotland's progressive approach to incorporation has already highlighted gaps in current access to justice mechanisms which it must now seek to address, providing further opportunities for Scottish civil society advocacy and future learning across the UK. As the early example of the process of incorporating the UNCRC (Incorporation) (Scotland) Bill demonstrates substantial gaps exist in relation to, for example, ensuring accountability in the privatisation of public services, prohibitive costs, legal aid, and a shortage of advice and advocacy services. Without effective accountability there can be no transformative change. The processes of incorporation will need to address such gaps if the intended rights are to be fully realised for everyone.

Brexit has brought further complexity to this already muddled landscape through the removal of the guaranteed minimum standards and obligation to comply with social progress which were imposed by the UK's EU membership. Furthermore, the centralisation of funding which, is at least partially intended to provide support for the most disadvantaged regions and communities, poses a further threat to the devolved administrations' ability to protect the most vulnerable members of society. The time to change the outcome of the Brexit referendum has well and truly passed but Brexit is a process, not an event, and there is still much to play for in terms of the influence that civil society can wield over the future protection of rights and the allocation of funding intended to support national and regional social and economic growth. Post-Brexit activity should be focused on these important areas so as to ensure that its effects are, at the very least, not felt unevenly across the UK's four nations.

As this article has outlined, effective human rights implementation depends on participative and inclusive processes which are, in turn, best conducted at the most local level. In addition the sub-divisions and silos that characterise law and policy-making frameworks, be they the result of devolution arrangements or pre-existing conventions and processes, rarely reflect the realities of people's lived experience. If it is to be fully integrated and effective, Scotland's future human rights framework will depend on a restructuring of the existing law and policy frameworks relevant to economic, social, cultural and environmental rights and the devolution of a range of social and economic policy areas.