



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

## Making rights real through human rights incorporation

**Citation for published version:**

McCall-Smith, K 2022, 'Making rights real through human rights incorporation', *Edinburgh Law Review*, vol. 26, no. 1, pp. 87-93. <https://doi.org/10.3366/elr.2022.0740>

**Digital Object Identifier (DOI):**

[10.3366/elr.2022.0740](https://doi.org/10.3366/elr.2022.0740)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

Edinburgh Law Review

**Publisher Rights Statement:**

This article has been accepted for publication by Edinburgh University Press in the *Edinburgh Law Review*, and can be accessed at <https://doi.org/10.3366/elr.2022.0740>.

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



# MAKING RIGHTS REAL THROUGH HUMAN RIGHTS INCORPORATION

*Kasey McCall-Smith\**

## A. INTRODUCTION

The UK is party to all but two of the treaties that form the legal basis of the international human rights system.<sup>1</sup> Each treaty individually requires states to take action to implement their international obligations by adopting legislation, administrative procedures or any number of other appropriate measures to respect, protect and fulfil the human rights outlined therein. Incorporation of a human rights treaty into national law is one of the most effective means of embedding international human rights law (IHRL) into a national legal system but it is only a first step. This step is one that the UK government has thus far been unwilling to take aside from the incorporation of the European Convention on Human Rights (ECHR) through the Human Rights Act 1998 (HRA 1998). The Scotland Act 1998 (s29(2)(d)) details that Scots law cannot be incompatible with the ECHR and that Scotland should observe and implement the UK's international obligations (schedule 5, para 7(2)(a)). Further revisions of the Scotland Act have opened up the opportunity for Scotland to legislate across numerous policy areas, including education and training, health and social services, housing, law and order, some aspects of equality, social security and taxation, among many others that are integral to securing a broad range of human rights. It is the culmination of the UK government's antipathy for human rights incorporation coupled with the expanding governance opportunities in the devolved Scottish administration that provide a jumping off point for considering the value of incorporating human rights treaties into Scots law.

The UK government argues that civil and political rights protections delivered through the HRA are sufficient and maintains that sectoral laws and policies are the appropriate implementation mechanism for economic, social and cultural rights.<sup>2</sup> Following the support for incorporation of the UN Convention on the Rights of the Child<sup>3</sup> (UNCRC) and extensive attention to human rights inequity in Scotland, the Scottish government committed to developing a new, comprehensive human rights framework, which includes incorporation of the following treaties into Scots law: the International Covenant on Economic, Social and Cultural Rights<sup>4</sup> (ICESCR), the Convention on the Elimination of Discrimination against Women<sup>5</sup>

---

\* Senior Lecturer in Public International Law (and eternal optimist), University of Edinburgh.

<sup>1</sup> OHCHR, *Ratification Status by Country, United Kingdom*, available at [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185).

<sup>2</sup> See, for example, Committee on Economic, Social and Cultural Rights (CESCR), Sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/6 (2014) at para 11.

<sup>3</sup> Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (UNCRC).

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (ICESCR).

<sup>5</sup> Convention on the Elimination of all forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13.

(CEDAW), the Convention on the Rights of Persons with Disabilities<sup>6</sup> (CRPD) and the International Convention on the Elimination of all forms of Racial Discrimination<sup>7</sup> (ICERD).<sup>8</sup>

International practice demonstrates that one of the most important aspects of incorporation is the process.<sup>9</sup> The process itself is multidimensional and should involve all parts of government and society. This note considers the ways in which incorporating IHRL can strengthen the Scottish population's claims to human rights in terms of both embedding a human rights-based approach to governance and securing a legal avenue for enforcing human rights. The next section offers a brief snapshot of human rights inequality in Scotland. Section C explains why and how full and direct human rights incorporation is an exemplary option for addressing human rights inequality. The fourth section provides an overview of the Scottish incorporation project, including how the recent *UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill Reference* case may inform future human rights incorporation in Scotland. Finally, the note concludes with a brief reflection on Scotland's human rights implementation journey.

## B. A SNAPSHOT OF HUMAN RIGHT INEQUALITY IN SCOTLAND

A key driver of incorporation in Scotland is to cure existing human rights inequality that persists under existing gaps in the law. A great deal of work has been carried out in Scotland in an effort to identify how different rights-holders often fall through the cracks in the complex system of laws and policies that govern human rights either directly or indirectly.<sup>10</sup> Women are frequently unable to engage or enjoy their rights to an adequate standard of living or personal security due to intersectional discrimination.<sup>11</sup> As a group, children are moving further into poverty, which has an impact on their rights to life, health, survival, adequate standard of living, education, among many others.<sup>12</sup> Disabled people consistently struggle to engage basic civil and political rights or to secure and adequate standard of living which impedes their right to

---

<sup>6</sup> Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (CRPD).

<sup>7</sup> International Convention on the Elimination of all forms of Racial Discrimination, 7 March 1966, 660 UNTS 195 (ICERD).

<sup>8</sup> Only ICESCR is identified by title and the other three treaties by general reference. See, Scottish Government, *A Fairer, Greener Scotland: Programme for Government 2021-2022*, at 49, available at <https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/>.

<sup>9</sup> e.g., L Lundy et al. for UNICEF, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (2012) at 4.

<sup>10</sup> e.g., Scotland Act 2016 s22; Social Security (Scotland) Act 2018.

<sup>11</sup> N Busby and M Robison, "CEDAW: How can women's rights be better realized in Scotland?", available at <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>; Engender, *A Woman's Place: Gender, Housing and Homelessness in Scotland*, February 2020, available at <https://www.engender.org.uk/content/publications/A-WOMANS-PLACE---GENDER-HOUSING-AND-HOMELESSNESS-IN-SCOTLAND.pdf>.

<sup>12</sup> P Alston, Report of the UN Special Rapporteur on extreme poverty and human rights in the UK, A/HRC/41/39/Add.1 (2019) at 16-17.

health.<sup>13</sup> Decision-making processes addressing the delivery of health, education and other public services often fail to include minorities or consider disaggregated data that impacts how minorities access and use public services.<sup>14</sup> These examples reflect the shortcomings of the current legal framework, which tends to focus more on equalities law than human rights. Improving the basic level of human rights protections for all people is complicated further by the devolved and reserved responsibilities divided, not always clearly, between the Scottish and broader UK governments.<sup>15</sup>

The lack of access to justice in the UK has been a particular concern during IHRL monitoring processes.<sup>16</sup> Human rights treaty bodies consistently reinforce that human rights rarely are realized without some means of enforcement. In Scotland, barriers to enforcement often result from the lack of a clear path to justice in law, such as the absence of the right in law, or from lack of resources to claim the right.<sup>17</sup> Even where legal paths are available, the decreasing availability of legal aid means that rights-holders' access to justice and remedy is contingent on their ability to secure legal representation.

The UK tends to harness issues relating to non-discrimination under its more limited equalities framework.<sup>18</sup> In Scotland, this is delivered through the Fairer Scotland Duty, as the public sector equality duty (Equality Act 2010 ss1, 149) is known. Unfortunately, the equality duty fails to get to the source of substantive, prolonged human rights inequality as envisioned by the IHRL system.<sup>19</sup> The failure to address substantive equality exacerbates gaps in the lived experiences of different rights-holders. The frameworks presented by human rights treaties aid in guarding against discrimination by relying on a holistic, substantive approach to the promotion and protection of internationally recognized rights.

---

<sup>13</sup> K McCall-Smith, "Incorporating the United Nations Convention on the Rights of Disabled People into Scots Law", October 2020, available at <https://www.alliance-scotland.org.uk/blog/resources/incorporating-the-united-nations-convention-on-the-rights-of-disabled-people-into-scots-law/>; CRPD Committee, Inquiry concerning the UK, UN Doc CRPD/C/15/4 (2017).

<sup>14</sup> E Sullivan, "The added Benefit of Incorporating ICERD in Scotland", Briefing for HRCS, 24 August 2020, available at <https://hrcscotland.org/?s=Emma+Sullivan>.

<sup>15</sup> e.g., K Boyle and N Busby, "Human Rights and Devolution: Devolution as a Vehicle for Human Rights Protection and Progress", 12 October 2021, available at <https://hrcscotland.org/2021/10/12/new-briefing-addresses-relationship-between-human-rights-and-devolution/>.

<sup>16</sup> e.g., CESCR, Concluding Observations on the 6<sup>th</sup> periodic report of the United Kingdom, E/C.12/GBR/CO/6 (2016) at paras 5-6; ICERD Committee, Concluding observations on the combined 21<sup>st</sup> to 23<sup>rd</sup> periodic reports of the United Kingdom, CERD/C/GBR/CO/21-23 (2016) at paras 8(a), 20-1, 39; CRPD Committee, Concluding observations on the 2<sup>nd</sup> periodic report of the United Kingdom, CRPD/C/GBR/CO/1, at paras 7(a), 19, 32, 38(a), etc.

<sup>17</sup> See, e.g., Scottish Human Rights Commission, *Submission to the United Nations Human Rights Committee*, January 2020, available at <https://www.scottishhumanrights.com/news/rights-concerns-about-policing-prisons-and-access-to-justice-raised-in-commissions-latest-report-to-un/>; HRCS and others, *Overcoming Barriers to Public Interest Litigation*, October 2018, available at <https://hrcscotland.org/?s=Barriers+to+Public+Interest+Litigation>.

<sup>18</sup> Equality Act 2010.

<sup>19</sup> V Blaker Strand, "Non-Discrimination and Equality as the Foundations of Peace", in C Bailliet and K Mujezinovic Larsen (eds), *Promoting Peace Through International Law* (2015) at 231.

### C. FULL AND DIRECT INCORPORATION

The legal dimension of incorporation is extremely important for numerous reasons, not the least that it foregrounds decision-making in human rights, clarifies which actors hold accountability for delivering human rights and opens paths to justice for human rights violations. Full and direct incorporation refers to the process where new legislation transposes an international treaty into national law. While other forms of incorporation are more common, namely indirect and sectoral incorporation, this note is limited to a discussion of full and direct incorporation for the reasons outlined herein.<sup>20</sup> Verbatim incorporation of the treaty, which is key to full and direct incorporation, supports the interdependent, interrelated and indivisible nature of human rights by using the internationally agreed language of IHRL. It also facilitates delivery of human rights through the widely recognized respect, protect and fulfil framework. The legislative process of incorporating IHRL aids in clarifying the substantive and procedural aspects of each human right. The substance explains what the content of the right is. The procedural component speaks to how individuals access those rights, such as accessing information, participation in government and enforcing rights through administrative or judicial mechanisms.

If incorporation legislation is drafted in the spirit of 'full and direct', public bodies must respect rights – the negative obligation of non-interference with incorporated rights – by not acting incompatibly with the incorporated rights. The complementary positive obligation on the state requires that public bodies take steps to protect human rights by progressing the implementation of incorporated rights. Finally, to fulfil human rights, full and direct incorporation requires that national courts are able to directly apply and enforce the rights, known as direct effect. For this dimension to be successful, the incorporating legislation must be clear that courts should treat the international human rights as part of national law and ensure that judicial and administrative paths to remedy are available. The Human Rights Act 1998 is the quintessential UK example of incorporation.

### D. THE SCOTTISH INCORPORATION PROJECT

The first comprehensive move to incorporate IHRL was the introduction of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (UNCRC Bill) in September 2020. Throughout the legislative process, Scottish Parliament, civil society and public bodies debated perceived difficulties in navigating the devolution settlement as developed through interpretation of the Scotland Act 1998 and its subsequent expansions in 2012 and 2016. The UNCRC Bill, unanimously passed on 16 March 2021, took a full and direct approach to incorporating the UNCRC into Scots law to the greatest extent possible under the current

---

<sup>20</sup> These forms of incorporation are examined elsewhere, see K McCall-Smith, "To Incorporate the CRC or Not. Is This Really the Question?" (2019) 23 *IJHR* 425.

devolution arrangement. This approach, coined ‘maximalist’ during the UNCRC Bill campaign,<sup>21</sup> resulted in the direct transposition of all articles of the UNCRC and its two additional protocols into the Bill except for the articles relating to clearly reserved matters, such as nationality conferral (UNCRC articles 7 and 8) and recruitment of 16 and 17 year-olds to the military (UNCRC article 38(3)). Section 6 of the Bill imposes a duty of UNCRC compliance on public authorities and section 11 requires Scottish Ministers to publish a ‘Children’s Rights Scheme’ to detail how they are fulfilling the duty, reinforcing the accountability dimension of the Bill. To fulfil UNCRC rights, sections 20 and 21 authorise, respectively, a ‘strike down declarator’ and a ‘declarator of incompatibility’ as part of the suite of remedies available to address Scots law passed prior or subsequent to the Bill taking effect. In short, the UNCRC Bill is a strong model for full and direct incorporation.

The opportunity to strengthen human rights in Scotland through incorporation has gained steady traction in the wake of the UNCRC incorporation efforts, a process that has been underway in Scotland for many years.<sup>22</sup> Building on the 2018 Final Report of the First Minister’s Advisory Group on Human Rights Leadership<sup>23</sup> and the 2020 Report of the Human Rights Taskforce,<sup>24</sup> the Scottish government plans to incorporate rights set out in ICESCR, ICERD, CEDAW and CRPD into Scots law.<sup>25</sup> Furthermore, the government has boldly committed to securing additional rights that are not recognized explicitly in any IHRL treaty, including the right to a healthy environment and the rights of older people.<sup>26</sup> As envisioned by the Taskforce and confirmed by the government, Scotland will see the introduction of a comprehensive statutory framework for human rights. The legislation is intended to reshape the way in which government actors and courts use IHRL as a tool to respect, protect and fulfil human rights in Scotland. Incorporation supports this aim in several ways. First, by placing a duty on public bodies to not contravene the treaty rights there is an *ex ante*, preventative obligation ensuring that decision-makers keep human rights at the forefront of their deliberations. Second, locating accountability across public authorities opens greater pathways to promote and deliver more holistic approaches to engaging human rights through different policies. Finally, justiciability

---

<sup>21</sup> John Swinney is credited with this now commonly used term in Scottish discourse. See Scottish Government, “Strengthening Children’s Rights”, 20 November 2019, available at <https://www.gov.scot/news/strengthening-childrens-rights/>.

<sup>22</sup> For a brief history of the UNCRC incorporation journey in Scotland, see K McCall-Smith, “Incorporating the CRC in Scotland”, in U Kilkelly, L Lundy and B Byrne (eds), *Incorporating the United Nations Convention on the Rights of the Child into National Law* (2021) at 307-12.

<sup>23</sup> First Minister’s Advisory Group on Human Rights Leadership, Recommendations for a new human rights framework to improve people’s lives, Final Report, 10 December 2018, available at <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>.

<sup>24</sup> National Taskforce for Human Rights Leadership, Leadership Report, 12 March 2021, available at <https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/>.

<sup>25</sup> *A Fairer, Greener Scotland* at 49.

<sup>26</sup> *ibid.*

provides a necessary safeguard when questions arise regarding whether public authorities are upholding their duties to respect, protect and fulfil incorporated rights.

(1.) *UNCRC (Incorporation) (Scotland) Bill Reference case*

Shortly after the UNCRC Bill vote, the UK government challenged sections of the Bill as being outside the legislative competence of the Scottish Parliament. The Supreme Court's *UNCRC Reference* judgment, delivered on 6 October 2021, reinforces how IHRL incorporation will need to navigate carefully the ambiguous lines that exist between reserved and devolved competences.<sup>27</sup> There were two principal questions before the Court. The first concerned whether the UNCRC Bill sections 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) could be interpreted as modifying the UK Parliament's power to make laws for Scotland contrary to Scotland Act section 28(7), therefore exceeding the Scottish Parliament's competence under section 29(2)(c). The second queried whether UNCRC Bill section 6, which on its face exceeded Scottish Parliament's legislative competence, *could* 'be read as narrowly as is required for it to be within competence' in line with Scotland Act s101(2).<sup>28</sup> Despite arguments that the Bill was designed to be narrowly construed and only applicable to devolved areas of competence, the Court determined that each of the four challenged sections exceeded the competence of Scottish Parliament and would require adjustment.

While the judgment was met with mixed responses from constitutional lawyers, from a human rights perspective, a key message remains intact. The Court's dicta confirmed that Scottish Parliament may incorporate international treaties as it sees fit. The focus of the reference was one of constitutional wrangling and the extent to which any incorporation legislation could be interpreted to 'impinge on matters which lie outside the legislative competence of the Scottish Parliament'.<sup>29</sup> Moving forward with its incorporation project, Scotland must ensure that the impacts of incorporation do not exceed the Court's interpretation of the existing constitutional settlement. This will not be simple nor will it cure gaps in the implementation of human rights in purely reserved areas, but diffusing human rights understanding across public authorities and requiring them to take a human rights-based approach in the context of Scots law and policy will no doubt influence devolved delivery of UK law for the better.

#### E. IT'S ONLY JUST BEGUN

Incorporation is the first step toward closing existing accountability gaps in Scots law and policy in relation to human rights. While the *UNCRC Reference* decision delays the legal entrenchment of children's rights, it also informs the future crafting of the accountability mechanisms in the planned Scottish human rights framework. Adjusting the UNCRC Bill in response to the decision

---

<sup>27</sup> *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42.

<sup>28</sup> *ibid* at para 5.

<sup>29</sup> *ibid* at para 4.

will not cure all of the gaps in Scottish human rights implementation but can deliver the maximal level of protection across the broad range human rights within the devolved competence. This exercise should prevent such delays in future human rights incorporation – a future that has only just begun. Scottish Government has committed to continuing incorporation of the UNCRC to the maximum extent possible and has not voiced any hesitance in its further incorporation plans.<sup>30</sup> Incorporating human rights treaties is not a simple matter but neither is navigating the existing multitude of overlapping laws and policies that engage human rights. Full and direct incorporation of human rights treaties offers a reference point for decision-making and implementation that cuts across all levels of government, is holistic and designed to make human rights real for every member of society.

---

<sup>30</sup> Scottish Government, 'Pledge on Children's Rights', Press Statement, 6 October 2021, <https://www.gov.scot/news/pledge-on-childrens-rights/>.