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The Devil is in the Details: Entrenching Human Rights Protections in the UK's Devolved Nations

Dr Kasey McCall-Smith*

Abstract

In states with multilevel governance systems, such as the UK, human rights are subject to variable gradations of implementation based on the political will and the legal competence of the subnational governments to implement international law. Entrenching rights through incorporation secures domestic enforcement, which, in turn, paves the way for proactive human rights culture change and guards against human rights regression. This article examines the future of increasing human rights protections in the devolved nations of the UK in the wake of the *Incorporation Reference* decision. First, the article reflects on the opportunity to entrench international human rights protections through incorporation as one form of implementation. Next, Scotland's path to increasing implementation of the UNCRC will be presented, including an examination of the key features of the UNCRC (Incorporation) (Scotland) Bill. These features are then juxtaposed against the challenges raised in the *Incorporation Reference* case. International law is the lens through which the analysis is delivered, aligning with UN human rights treaty body guidance and focussed on delivering human rights in national settings. Finally, the article argues that despite the difficulty posed by the interpretation of devolved legal competence delivered in the *Incorporation Reference* judgment, from the perspective of international law, there remains a great opportunity to entrench human rights in the devolved nations through incorporation legislation and other measures that respect, protect and fulfil human rights.

Keywords: Human Rights; Implementation; Devolution; Incorporation; UNCRC; Judicial Review.

INTRODUCTION

In states with multilevel governance systems, such as the UK, human rights are subject to variable gradations of implementation based on the political will and the legal competence of the subnational governments to implement international human rights. As such, legal recognition and the protection of human rights may be uneven across the different strata of national and subnational governance systems. Entrenching rights through incorporation secures domestic enforcement, which, in turn, paves the way for proactive human rights culture change and guards against human rights regression. Nested within the broader concept of implementation, there are numerous approaches to securing human rights through incorporation. These approaches to incorporation include: maximising the spectrum of implementation options available for delivering distinctive rights in local settings; embedding the respect, protect and fulfil tripartite human rights framework; and exercising a holistic understanding of how distinctive human rights are impacted by different decision makers and service providers. These three approaches not

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only support the legalisation of human rights but also are crucial to bridging legal and non-legal methods of human rights implementation.

In the UK, the European Convention on Human Rights (ECHR) is the single example of direct incorporation of an international human rights treaty into national law through the Human Rights Act 1998 (HRA). The UK is party to a further range of regional and international human rights treaties, but, as of yet, it has not given any explicit legal recognition to these agreements in national law. The three devolution settlements between the UK Parliament and Scotland, Wales and Northern Ireland prohibit the subnational governments from contravening the ECHR and open up spaces to entrench additional international human rights obligations in line with the UK's ratification of international agreements.¹ In short, the devolution arrangements enable the delivery of human rights at a more local level. This article explores what space is available in the devolved governance systems to entrench human rights over and above protections secured through UK legislation.

A main driver of increased human rights implementation through incorporation is to fill existing and impending gaps in human rights protection in order to guard against human rights regression. Incorporation is a key way in which human rights are localised but it is more than a simple move to recognise international law in the national legal system. Along with the legalisation of international human rights, there must be ongoing, discursive consideration of the widely varied non-legal forms of implementation and a constant eye on developing international interpretations of human rights. This approach works in tandem with the idea that international human rights standards serve as a floor, rather than a ceiling. By localising international human rights obligations, local actors, including policy makers, legislators, local authorities, among others, are able to entrench human rights in accord with the national legal system and in line with local contextual requirements.

Until 2021, devolved governments in the UK tended to incorporate international human rights law in addition to the ECHR using indirect and sectoral measures alongside the more common approach of implementing human rights through policy measures. For example, Wales strengthened children's rights by indirectly incorporating the UN Convention on the Rights of the Child² (UNCRC) in 2011. The Welsh Measure placed a duty on the Welsh Assembly (the *Senedd*) to have due regard to the UNCRC.³ While not providing any justiciable rights, the Welsh Measure has driven increased attention to developing law and policy that is more attentive to the wide-ranging issues that affect children.⁴ Similarly, in Northern Ireland, the Children's Services Co-operation Act (Northern Ireland) 2015 places obligations on different duty-bearers to make decisions with regard to the UNCRC, but these measures are non-justiciable.⁵ In

¹ Scotland Act 1998, ss 29(2)(d), sch 5 s 7(2)(a); Government of Wales Act 1998, ss 81, 82; Northern Ireland Act 1998, ss 6(2)(c), 26(2).

² 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990 (UNCRC).

³ Rights of Children and Young Persons (Wales) Measure 2011, s 1 (Welsh Measure).

⁴ Simon Hoffman, 'The UN Convention on the Rights of the Child, Decentralisation and Legislative Integration: a Case Study from Wales' (2019) 23 *IJHR* 374.

⁵ s 1(4). See discussion in Sinéad McMurray, *Children's Rights and Educational Policy in Northern Ireland: Implementation of the UNCRC, Northern Ireland Assembly Briefing Paper*, Paper No. 11/21, NIAR-41-2021 (16 February 2021).

Scotland, the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill (UNCRC Bill) was passed by the Scottish Parliament in March 2021.⁶ To date, the Bill offers the greatest opportunity to entrench the dynamism of the UNCRC into law in a devolved jurisdiction of the UK. The unanimously approved text of the Bill followed a ‘maximalist’ approach to incorporation using a range of legal and non-legal measures to ensure the widely recognised respect, protect and fulfil tripartite approach to securing human rights, including interpretive guidance linking into the international human rights framework, preventative measures and enforcement mechanisms to ensure Scots law and policy would keep pace with the UNCRC.

Shortly after celebrating the historic vote on the UNCRC Bill, the UK Government challenged four elements of the UNCRC Bill as contravening section 28(7) of the Scotland Act 1998, which details that Acts of Scottish Parliament may not modify the power of the UK Parliament to make laws for Scotland. The case centred on the extent to which the Scottish Parliament can legislate in devolved areas of competence without impinging on the sovereignty of Westminster (UK Parliament). In delivering its *Incorporation Reference* decision in October 2021, the Supreme Court acknowledged the relevance of the decision for the other devolved nations and the extent to which they can legislate to strengthen human rights protections in the subnational.⁷

The *Incorporation Reference* decision presents a number of challenges as to how Scotland and the other devolved nations can move forward with plans to incorporate the UNCRC or other international human rights treaties. The Scottish Government has committed to develop a new, comprehensive human rights framework for Scotland through the incorporation of additional international human rights treaties. Wales, too, is following suit with plans to implement additional human rights protections. This article examines the future of increasing human rights protections in the devolved nations of the UK in the wake of the *Incorporation Reference* decision. First, the article reflects on the opportunity to entrench international human rights protections through incorporation as one form of implementation. Notably, the analysis throughout refers to the UNCRC Bill *as passed* in 2021 because, at the time of writing, the revised Bill has not been introduced. Next, Scotland’s path to increasing implementation of the UNCRC will be presented, including an examination of the key features of the UNCRC Bill. These features of the Bill are then juxtaposed against the challenges raised in the *Incorporation Reference* case. . International law is the lens through which the analysis is delivered, aligning with UN human rights treaty body guidance and focused on delivering human rights in national settings to the ‘absolute limits of what is possible within the boundaries of the devolution settlement’.⁸ Finally, the article argues that despite the challenges posed by the interpretation of

⁶ UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill, SP Bill 80B (2021) as passed (UNCRC Bill) <<https://www.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/stage-3/bill-as-passed.pdf>>.

⁷ *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42 [6] (*Incorporation Reference* case).

⁸ UNCRC Bill (n 6), Policy Memorandum, SP Bill 80-PM (Scottish Government, 2020) 17 (UNCRC Bill Policy Memorandum) <<https://www.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/introduced/policy-memorandum-united-nations-convention-on-the-rights-of-the-child-scotland-bill.pdf>>.

devolved legal competence delivered in the *Incorporation Reference* judgment, from the perspective of international law, entrenching human rights through incorporation in the devolved nations can still drive positive change and deliver legislation that respects, protects and fulfils human rights.

ENTRENCHING HUMAN RIGHTS

The UK's ratification of a treaty 'establishes as a matter of international law the United Kingdom's consent to be bound by the treaty.'⁹ As such, it is worth considering what 'consent to be bound' actually means. More precisely, what does this mean for people in the UK? The short answer in the case of human right treaties is 'not much' unless the treaty or the rights contained therein become part of national law. In other words, unless the rights have effect – are respected, protected and fulfilled – in national law, the standards established through treaties serve more as frame of reference for advocacy rather than a legal tool. A growing number of UK judicial opinions reflect this sentiment where the courts disregard the standards set by international human rights treaties and their corresponding monitoring mechanisms.¹⁰ Recent proposals¹¹ put forward in Westminster reinforce a rigid, dualist view of the relationship between international and national law and run contrary to Lord Bingham's observation that 'the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.'¹²

In ratifying seven of the core international human rights treaties in addition to the ECHR, the UK committed to giving effect to these international obligations though it has not taken any steps to make these rights directly accessible to the British public.¹³ The incorporation model set out in the HRA presents a clear example of how to make international human rights standards accessible through the respect, protect and fulfil framework at the local level. In this sense, respect carries a negative obligation on the state to not interfere with incorporated rights while protect entails a positive obligation or proactive duty on government to ensure the rights. To fulfil the rights, there must be some form of enforcement, which requires a determination of whether an act, or failure to act, has violated any enumerated rights. Section 6 of the HRA outlines that the state, through its public authorities, is responsible for ensuring the human rights outlined in the ECHR. This duty is a proactive, preventative dimension of the Act that ensures the state respects and protects ECHR rights through its negative and positive obligations. A person may enforce – fulfil – their rights under section 7 of the HRA by raising a claim that a public authority has acted contrary to the ECHR. Rather than keeping internationally agreed rights at a distance, through the process and effects of incorporation, every member of society is able to identify, engage and defend their rights in their own locality. This, in turn, enables a better opportunity for the state to negotiate rights settlements through local debate, budgeting

⁹ Constitutional Reform and Governance Act 2010, s 25(4).

¹⁰ For example, *R (on the application of AB) v Secretary of State for Justice* [2021] UKSC 28; *Binder*; *Britliff v Birmingham City Council* [2019] UKEAT 0291/18; *R (Davey) v Oxfordshire County Council* [2017] EWHC 354.

¹¹ For example, the Bill of Rights Bill (Bill 117) (*UK Parliament*, 22 June 2022). The Bill was subsequently withdrawn.

¹² Lord Bingham, 'The Rule of Law' (2007) 66:1 *Cambridge Law Journal* 67, 81-82.

¹³ United Kingdom, Ratification Status (OHCHR)

<https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185>. The use of the 'core' term excludes optional protocols to the primary treaties that form the basis of the UN Human Rights Treaty system.

choices and deployment of resources, such as teachers or doctors, that optimise the realisation of individuals' rights in familiar surroundings.

Drawing from the wide field of international human rights, the subnational governments of the UK may use their devolved competencies to respect, protect and fulfil existing rights and to raise the levels of individual protections a means of strengthening human rights for their local populations. There is vast evidence of incremental implementation of international human rights law in both law and policy across the UK, though the various types of rights receive uneven attention across the distinctive subnational systems.¹⁴ Scotland, in particular, with its complex mix of devolved competences and separate legal system is focussing on giving effect to the UK's broader international human rights obligations through incorporation.¹⁵ Wales is more limited in its ability to legislate in favour of directly enforceable human rights in light of its intertwined legal system with England.¹⁶ Nonetheless, beyond the Welsh Measure that indirectly incorporates the UNCRC, the Welsh Assembly (*Senedd*) is planning to pursue incorporation of the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Elimination of Discrimination against Women (CEDAW).¹⁷ While Northern Ireland is not focusing on incorporation, in the aftermath of Brexit and the Covid-19 pandemic there is increasing attention on human rights.¹⁸ In looking across the devolved nations, Scotland is paving the way to shift the human rights landscape significantly by developing a new human rights framework that will entrench multiple human rights treaties into Scots law through incorporation.

Aims of Incorporation

Incorporation is an important form of implementation through which international human rights become tangible for individuals – human rights are made a reality where states respect, protect and fulfil those rights at the local level.¹⁹ The practice of incorporating obligations derived from international law into national legal systems through domestic legislation is acknowledged in a variable range of terms, including domestication, legislative assimilation, quasi-incorporation, sectoral incorporation, to name but a few.²⁰ There are also distinctions between more and less formal uses of incorporation terminology depending on the body of literature and field of law or

¹⁴ For example, Hoffman, 'The UN Convention on the Rights of the Child' (n 4); Bronagh Byrne, et al, 'Disability Policies and Programmes: How does Northern Ireland Measure Up? An Update for ECNI' (2014) 4-5 <https://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/CRPD-Update-Summary-paper-for-Expert-Seminar_14pt_190214.pdf>; McMurray (n 5).

¹⁵ For example, Scottish Government, *A Nation with Ambition: the Government's Programme for Scotland 2017-18* (*Gov.Scot*, 5 September 2017) <<http://www.gov.scot/Resource/0052/00524214.pdf>>; Scottish Government, *UN Convention against Torture: Our Position Statement* (*Gov.Scot*, 28 February 2019) <<https://www.gov.scot/publications/un-convention-against-torture-cruel-inhuman-degrading-treatment-punishment-position-statement/pages/3/>>.

¹⁶ cf Schedule 7A to the Government of Wales Act 2006, amended by Government of Wales Act 2017, sch 1, with Scotland Act 1998, sch 5, amended by Scotland Act 2016 .

¹⁷ Welsh Government, *Programme for Government: Update* (7 December 2021) 14 <<https://gov.wales/programme-for-Government-update>>.

¹⁸ For example, McMurray (n 5) 10 et seq.

¹⁹ CRC, 'General Comment No 5 on General measures of implementation of the Convention on the Rights of the Child (arts 4, 42, and 44, para 6)', UN Doc CRC/GC/2003/5 (27 November 2003) paras 1, 20.

²⁰ Simon Hoffman and Rebecca Thornburn Stern, 'Incorporation of the UN Convention on the Rights of the Child in National Law' (2020) 28 *IJHR* 133, 136.

rights under discussion.²¹ Here, the term ‘incorporation’ is preferred over other options in order to align with the contemporary human rights discourse in the UK when discussing the more formalised method of legalising international human rights, particularly children’s rights, which forms the basis of the analysis contained herein. In the context of human rights in dualist, common law jurisdictions, there are distinctive forms of incorporation that aim to give varying levels of effect to human rights in national legal systems.²²

These different forms of incorporation broadly include direct incorporation, indirect incorporation and sectoral incorporation. As used here, direct incorporation generally refers to the process that gives provisions of international law direct effect in national law and ensures justiciability. Direct incorporation typically entails that the government be subject to both restraints and proactive measures as a means of optimising human rights protections, respectively understood as negative and positive obligations. For example, the prohibition against torture demands that states refrain from engaging in torture – the negative obligation. However, to give full effect to the prohibition, states must also actively investigate allegations of torture – the positive obligation. To fulfil most human rights, the combination of both negative and positive obligations is necessary. Indirect incorporation, alternatively, gives the international legal provisions some measure of effect in national law by means of another legal mechanism such as a due regard duty, often providing a frame of reference for policy development.²³ Sectoral incorporation refers to the method of integrating treaty provisions into national law on an *ad hoc* basis, often without a direct link to a treaty. Most often states use a mixture of these methods in order to achieve the various aims of implementation of different human rights. Arguably, a mixed approach is most effective in delivering negotiated, mutually reinforcing human rights settlements at the local level.

Regardless of the ultimate choice in method, direct, indirect or sectoral, incorporation processes open up collaborative spaces and the opportunity to promote a human rights-based approach to governance. The key is that the method of incorporation is a *choice* made by government as a means of defining its relationship and interactions with its people. Both the constitutional arrangements within the state and the extent to which the government chooses to avail itself of legal duties to deliver human rights shape the method of incorporation elected by the state or its subnational administrations. Direct incorporation demands the most expansive legislative capacity and signals the highest commitment to human rights delivery. Indirect incorporation, by comparison, may be the result of constitutional impediments, such as limitations imposed through the devolution settlements in the UK, or a lack of political will to take on the most expansive commitments under the respect, protect and fulfil approach to delivering human rights. Bearing this in mind, different methods of incorporation sit along a spectrum of what is considered effective implementation, rather than being a binary choice. At any point along this spectrum, the state gives differing levels of effect to the respect, protect and fulfil framework for

²¹ *ibid* 138.

²² Kasey McCall-Smith, ‘To Incorporate the CRC or Not. Is This Really the Question?’ (2019) 23 *IJHR* 425, 430-36.

²³ Simon Hoffman and Sean O’Neill, *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (Equality and Human Rights Commission, 2018), offering an expansive account of how indirect incorporation has driven children’s rights entrenchment in Wales. See also, CRC, ‘General Comment No 5’ (n 19) para 21.

implementation of its international obligations. As a result, the choice of a government to directly incorporate a human rights treaty is not a whimsical decision taken in a moment. Rather, it is the conclusion of a (typically) long, deliberative process. For example, the UNCRC Bill that aims to directly incorporate the UNCRC in Scotland is the product of over a decade of increasing children's rights protection driven by advocacy and education.²⁴ Similarly, other jurisdictions, such as Sweden, travelled a path to UNCRC incorporation that was neither short, nor without many struggles.²⁵ The next section reflects on Scotland's path to UNCRC incorporation as a means of tracing some of the implementation options available to subnational governments.

UNCRC IMPLEMENTATION IN SCOTLAND

The UNCRC is a comprehensive treaty that engages civil, political, economic, social and cultural rights with specific focus on how to ensure these rights for all individuals under age 18. The rights contained in the treaty are indivisible and inter-dependent and, as a result, are optimised when implemented as a holistic framework including both legal and non-legal measures.²⁶ The successful passage of the UNCRC Bill is attributed to the development of a strong platform for UNCRC understanding following years of campaigning, education and support delivered by children's rights organisations in Scotland as well as increased sectoral legislation delivering incremental implementation.²⁷ The following introduces post-devolution examples of incremental UNCRC implementation, the UNCRC incorporation legislation, the challenge by the UK Government and the Supreme Court decision.

Children's Rights Post-Devolution

Scots law has already taken many steps forward to respect, protect and fulfil different aspects of the UNCRC and numerous policies reflect the Convention. For example, GIRFEC (Getting it Right for Every Child) is the umbrella policy addressing children's wellbeing across all organs of the government and service providers, from teachers to healthcare professionals to police officers.²⁸ It is the primary non-legal tool for respecting and protecting children's rights but there is no enforcement dimension and the policy offers vague guidance that is often difficult to link to practice as well-being indicators are not precise comparisons for a child rights-based approach to governance.²⁹ As a result, 'fulfilling' the full complement of children's rights is not possible under this policy.

²⁴ UNCRC Bill Policy Memorandum (n 8) paras 25-30.

²⁵ Rebecca Thornburn Stern, 'Much Ado about Nothing? The Road to the Incorporation of the UN Convention on the Rights of the Child in Sweden' (2019) 27 *International Journal of Children's Rights* 266.

²⁶ Ursula Kilkelly, 'The UN Convention on the Rights of the Child: Incremental and Transformative Approaches to Legal Implementation' (2019) 23:3 *IJHR* 323, 324.

²⁷ For an account of the long-running UNCRC incorporation campaign Scotland, see Kasey McCall-Smith, 'Incorporating the CRC in Scotland' in Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds), *Incorporating the United Nations Convention on the Rights of the Child into National Law* (Intersentia 2021) 307-12.

²⁸ Scottish Government, *Getting it right for every child (GIRFEC)* <<https://www.gov.scot/policies/girfec/>>.

²⁹ Laura Lundy, 'A Lexicon for Research on International Children's Rights in Troubled Times' (2019) 27 *International Journal of Children's Rights* 595; EKM Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' (2015) 23 *IJHR* 769.

Legislation has delivered different aspects of the UNCRC incrementally, typifying the widespread approach to implementing the Convention.³⁰ For example, the Children and Young Peoples Act 2014 (CYP Act) indirectly incorporated the UNCRC by placing a duty on Scottish Ministers to keep the UNCRC under consideration when making decisions.³¹ This prospective, preventative measure of implementation aims to ensure that children's rights are at the forefront of law and policy decision-making processes. The CYP Act is directed toward respecting and protecting children's rights without any enforcement potential. Unfortunately, the Act focusses so heavily on transferring the wellbeing dimensions of GIRFEC into law that the proactive opportunity to entrench children's rights and promote their engagement with rights is overshadowed.³² Among many other goals, the CYP Act aims to give effect to UNCRC article 12 by outlining that children should be included in decision-making processes. This aim resulted in the requirement that a Children's Rights Impact Assessment (CRIA) accompany all legislation that might impact children's rights.³³ This dimension of the CYP Act aligns with the Committee on the Rights of the Child's (CRC) view that CRIA should be 'built into government at all levels and as early as possible'.³⁴ As implemented, however, very few of the CRIs demonstrate effective engagement with children.³⁵ However, without a legal enforcement mechanism attached, fulfilling children's UNCRC rights under the CYP Act was not as successful as envisioned.³⁶

Indirect incorporation through the CYP Act is only one of the legislative measures taken to make the UNCRC a reality in Scotland since devolution. Sectoral laws also play an important role in bringing the UNCRC to life. Sectoral legislation ended the use of corporal punishment of children after almost two decades of slow, but steady progress in understanding its detrimental effects. In 2003, certain forms of physical punishment were restricted through the Criminal Justice (Scotland) Act (s 51). This move to restrict the use of physical punishment followed on from the ECHR case *A v UK*, which held that a private person using a cane to exert physical punishment on a child breached article 3 of the ECHR's prohibition against ill-treatment.³⁷ At that point in time, physical punishment in schools had already been banned.³⁸ The lingering defence of justifiable assault, however, remained available for parents and guardians using other

³⁰ Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang, *The UN Convention on the Rights of the Child: A Comparative Study of Legal Implementation in 12 Countries* (UNICEF-UK, 2012) 4-5; Jean Grugel and Enrique Peruzzotti, 'The Domestic Politics of International Human Rights Law: Implementing the Convention on the Rights of the Child in Ecuador, Chile, and Argentina' (2012) 34 *H Rts Q* 178.

³¹ s 1(1).

³² Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' (n 29) 770-71.

³³ Children and Young People (Scotland) Act 2014, s 1(2). In Scotland, CRIs are referred to as Children's Rights and Wellbeing Impact Assessments (CRWIA) in order to align with the GIRFEC wellbeing indicators. See Scottish Government, *When and How to Best Use the Child Rights and Wellbeing Impact Assessment (CRWIA): Guidance* (19 November 2021) <<https://www.gov.scot/publications/childrens-rights-wellbeing-impact-assessment-guidance/pages/2/>>.

³⁴ CRC, 'General Comment No 5' (n 19) para 45.

³⁵ On the participation dimension of Scottish incorporation and critique of the existing CRWIA system, see Kasey McCall-Smith, 'Entrenching Children's Participation through UNCRC Incorporation in Scotland' (2021) *IJHR* (firstview).

³⁶ Tisdall, 'Children's Wellbeing and Children's Rights in Tension?' (n 29) 783-84.

³⁷ *A v United Kingdom* [1999] 27 *EHRR* 611.

³⁸ Education Act 1986. It took over a decade for the prohibition to extend to private schools in England and Wales (1998) and in Scotland (2000).

forms of physical punishment, a point of contention raised by the CRC.³⁹ Ultimately, the defence was removed by the Children (Equal Protection from Assault) (Scotland) Act 2019. These laws progressively realised the CRC's interpretation of article 19 of the UNCRC that physical assault of a child is a breach of their right to be free from all forms of physical or mental violence.⁴⁰ Another UNCRC focus progressively realised through sectoral legislation is the raising of the age of criminal responsibility. The CRC has long criticised the low age of criminal responsibility in Scotland as running contrary to the protection rights for children in conflict with the law set out in articles 37 and 40 of the UNCRC.⁴¹ Following years of debate, the Age of Criminal Responsibility (Scotland) Act 2019 raised the minimum age of criminal responsibility from 8 to 12. While not fully aligned with the CRC's current position that 14 should be the minimum age for criminal prosecution, it was a step in the right direction.⁴² This process also reflects how children's rights protections can, and should, evolve with the CRC's interpretations of the UNCRC.

Sectoral legislation in Scotland entrenches numerous aspects of the UNCRC and has aided Scots law in keeping pace with CRC interpretations of Convention obligations. While indirect incorporation of the UNCRC through the CYP Act aimed to improve children's rights by placing the whole of the Convention at the forefront of decision-makers minds, the lack enforcement in the Act did not engender significant change. The gap between respecting and fulfilling children's rights under the CYP Act underpinned the continued efforts for direct incorporation of the full UNCRC in Scotland that was realised through the UNCRC Bill.

Key Features of the UNCRC Bill

The UNCRC Bill⁴³ takes a 'maximalist' approach to incorporating the UNCRC by ensuring that 'children's rights are protected, respected and fulfilled in Scotland'.⁴⁴ Modelled on the HRA, the UNCRC Bill incorporates all articles of the UNCRC deemed within devolved competence directly into Scots law through verbatim copy and pasting the relevant articles into Schedule 1. In addition to the core convention, two of the three optional protocols to the UNCRC are also included.⁴⁵ Pre-introduction analysis determined that UNCRC articles relating to nationality and statelessness (article 7), family reunification (article 10), development of international agreements relating to moving children across international borders (article 11) or other matters,⁴⁶ provision of social insurance (article 26), and military recruitment (article 38(3)), as

³⁹ CRC, *Concluding Observations on the Fifth Periodic Report of the United Kingdom*, UN Doc CRC/C/GBR/CO/5 (12 July 2016) para 41 (*Concluding Observations 2016*).

⁴⁰ CRC, 'General Comment No 8 on the right of the child to protection from corporal punishment', UN Doc CRC/C/GC/8 (2 March 2007).

⁴¹ CRC, *Concluding Observations 2016* (n 39).

⁴² For the most recent interpretation, see CRC, 'General Comment No 24 on children's rights in the justice system', UN Doc CRC/C/GC/24 (18 September 2020) para 22.

⁴³ The analysis offered here is based on the UNCRC Bill as passed in March 2021 as at the time of writing the revised Bill has not been reintroduced.

⁴⁴ UNCRC Bill Policy Memorandum (n 8) para 7. The term 'maximalist' is attributed to John Swinney, Deputy First Minister, and is now commonly used Scottish human rights discourse. See Scottish Government, 'Strengthening Children's Rights' (*Gov.Scot*, 20 November 2019) <<https://www.gov.scot/news/strengthening-childrens-rights/>>.

⁴⁵ Optional Protocols on Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography.

⁴⁶ References to such actions were also removed in relation to UNCRC articles 21(e), 27(4), 34, 35

well as several articles located within the optional protocols, fell within those policy areas reserved explicitly to Westminster.⁴⁷ As a result, those sections were removed from Schedule 1. The Bill leaves open the potential to add additional aspects of the Convention in the event of further devolution or if the UK ratifies the Third Optional Protocol on an individual communications procedure (s 5). Notwithstanding the redactions, the Bill has the potential to deliver the most holistic legal advancement for children's rights in UK history.

Not only does the UNCRC Bill aim to directly incorporate all of the articles possible under devolved competence into the legislation, it further offers a variety of implementation and enforcement mechanisms designed to give effect to the incorporated rights. The UNCRC Bill represents a deliberate choice by the Scottish Parliament to offer the most comprehensive path toward respecting, protecting and fulfilling children's rights through multidimensional delivery of UNCRC article 4, which requires States Parties to 'undertake all appropriate legislative, administrative, and other measures for the implementation' of the Convention. This holistic, multifaceted approach aligns with the approach to delivering children's rights as elaborated by the CRC.⁴⁸ Part 3 of the Bill sets out different proactive and responsive implementation measures designed to support duty-bearers to give effect to both the positive and negative obligations required to deliver UNCRC rights, namely: a children's rights scheme (ss 11-13); child rights and wellbeing impact assessments (s 14); and reporting obligations on public authorities and Scottish Parliament (ss 15, 16B). However, the three elements that give the Bill its legal strength and ensure that the UNCRC rights are fulfilled include positive and negative obligations, enforcement and interpretation. These three elements will be the most impacted in light of the *Incorporation Reference* decision. The following briefly introduces each element in turn.

Positive and Negative Obligations

Section 6 of the UNCRC Bill provides that it is unlawful for a public authority to act in a way that is not compatible with the UNCRC, therefore creating a legal duty to ensure UNCRC rights. There is no restriction on whether this equates to a negative or positive obligation and interpretations of both types of obligations should align with those of the CRC, discussed further below.⁴⁹ The inclusion of both negative and positive obligations aligns with UK case law interpreting section 6 of the HRA as well as European Court of Human Rights jurisprudence.

Enforcement

Legalising the justiciability of children's rights is arguably the crux of the UNCRC Bill and essential to fulfilling Convention obligations. While litigation should be viewed as a last resort, it is this potential 'stick' that often gives government the impetus to follow through on its obligations. Justiciability is tied to the establishment of a legal duty pursuant to section 6 and what happens when that duty is breached. The Bill enables all under-18s to raise claims against a public authority that has contravened the incorporated UNCRC articles (s 7) and all legislation raised before the courts requires interpretation in line with the treaty. This significant change in

⁴⁷ As set out in the Scotland Act 1998, sch 5.

⁴⁸ CRC, 'General Comment No 5' (n 19); CRC, 'General Comment No 19 on public budgeting for the realization of children's rights (art. 4)', UN Doc CRC/C/GC/19 (20 July 2016) para 27.

⁴⁹ For example, CRC, 'General Comment No 8' (n 40) para 30; CRC, 'General Comment No 19' (n 48) para 3.

the protection of children’s rights will guard against the inconsistent interpretive references to the UNCRC that currently permeate UK jurisprudence.⁵⁰

Under the Bill as passed, Scottish courts have an obligation to determine whether existing or proposed legislation aligns with the UNCRC. Section 20 allows courts to issue a ‘strike down declarator’ as a means of remedying conflicting laws that predated commencement of the Act. Additionally, section 21 enables courts to deliver a ‘declarator of incompatibility’ for proposed legislation – modelled on the HRA – as a prospective approach to protecting children’s rights before a conflicting law is adopted. These sections aimed ‘to give children’s rights the highest status within Scotland’s constitutional framework’ by delivering a new era in the protection and fulfilment of children’s rights in Scotland with UNCRC enforcement unparalleled in the rest of the UK.⁵¹

Interpreting Human Rights in Line with International Standards

Section 4 of the UNCRC Bill outlines explicitly the interpretive toolbox available to courts when interpreting the UNCRC under the legislation. The interpretive tools include: the preamble and text of the UNCRC and optional protocols as incorporated; concluding observations, general comments, recommendations following days of general discussion and final views of the CRC; and other international and comparative law. The breadth of interpretive tools, in addition to those implicitly available to UK courts, reinforces the evolving nature of human rights interpretation as a multifaceted concept. Maintaining a tether to the international treaty through the CRC interpretive materials is fundamental to keeping pace with children’s rights development across the globe.⁵² It also reinforces the agreed language of children’s rights recognised through the work-product of the CRC. Similarly, child rights schemes under the Bill must be developed in line with the same interpretive toolkit in order to respect and protect children’s rights as well as take into account the UK government’s engagement with the CRC and views of Scottish human rights institutions, such as the Children and Young People’s Commissioner for Scotland and the Scottish Human Rights Commission.⁵³ However, in the context of interpreting the UNCRC Bill as devolved legislation, there are two relevant considerations. The first is which organs of the state are required to interpret and comply with UNCRC rights. The second consideration raises questions about which laws must be interpreted in line with the Convention.

Summary

Altogether, these key features of the Bill, combined with various non-legal measures of implementation, aim to secure a comprehensive, maximalist approach to respecting, protecting and fulfilling children’s rights in a way that links into the international child rights framework. The maximalist approach hinged on Scottish Government’s reliance on a broad interpretation of section 101(2) of the Scotland Act. As flagged prior to the Bill’s adoption, the UNCRC Bill

⁵⁰ Compare how the UNCRC art 4 ‘best interests’ principle is used *Kinlan and Boland v HM Advocate* [2019] HCJAC 47 [18]; *OHara v HM Advocate* [2016] HCJAC 107; *McCormick v HM Advocate* [2016] HCJAC 50; *Hibbard v HM Advocate* [2011] JC 149, with *Natasha Tariro Nyamayaro and Another v Secretary of State for the Home Department* [2019] CSIH 29 [37]; *ME, Re Judicial Review* [2012] CSOH 2 [22]; *AAS and SAAS v Secretary of State for the Home Department* [2010] CSIH 90.

⁵¹ UNCRC Bill Policy Memorandum (n 8) para 109.

⁵² CRC, ‘General Comment No 5’ (n 19) para 7, discussing progressive realization and global implementation.

⁵³ UNCRC Bill, ss 12, 13.

contained a number of provisions that stress tested the boundaries of the devolution settlement and set the stage for the ensuing challenge.

Challenging the UNCRC Bill

Following the unanimous adoption of UNCRC Bill on 16 March 2021, the UK Government challenged four sections of the Bill on the basis that the sections interfered with UK Parliament's ability to make law for Scotland. The UK government also challenged elements of the European Charter of Local Self-Government (Incorporation) (Scotland) Bill, and the joined decision offers interesting insight into the future potential of devolved governments to implement international law in the subnational systems. Both Bills were passed to give effect to two treaties ratified by the UK in the 1990s, the UNCRC and the European Charter of Local Self-Government. The *Incorporation Reference* judgment, delivered on 6 October 2021, presents several hurdles to devolved governments' plans for international human rights incorporation by failing to address the ambiguous lines that exist about the boundaries of devolved competence or how to navigate the areas of law and policy that straddle such boundaries. This section examines the challenges to the UNCRC Bill and the Court's response in order to foreground discussion of what options remain for human rights entrenchment in the devolved nations.

The key questions before the Court concerned the extent to which the devolved legislation *could* modify the power of Westminster to make laws for Scotland. At issue in the first three challenges was whether UNCRC Bill sections 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) 'modified' Parliament's powers contrary to the Scotland Act (s 28(7)). As introduced above, these sections relate to interpretation and enforcement of the Bill. Section 19(2)(a)(ii) provides that in addition to Acts of the Scottish Parliament, Acts of the UK Parliament, too, must be read and given effect in a way which is compatible with the UNCRC – a so-called 'read-down' provision. The Court found this problematic, reasoning that despite emulating section 3 of the HRA, 'A provision which required the courts to modify the meaning and effect of legislation enacted by Parliament would plainly impose a qualification upon its legislative power.'⁵⁴ The challenges to the two key enforcement provisions laid out in sections 20 and 21 were not surprising. The more 'drastic' of the enforcement mechanisms of the Bill, section 20(10)(a)(ii), extends to courts the power to strike down any provision of legislation passed by the UK Parliament prior to the Bill's enactment if deemed incompatible with the UNCRC.⁵⁵ Counsel for Scotland argued that the implicit limitation on this power was whether the relevant legislation regulated an area of policy now fully devolved, such as education.⁵⁶ Again, the Court was unconvinced, noting that 'the fact that the Scottish Parliament has the power to repeal an Act of Parliament does not entail that it has the power to authorise the courts to declare that unrepealed Acts of Parliament have ceased to be law.'⁵⁷ Modelled on section 4 of the HRA, the second enforcement provision (section 21(5)(b)(ii)) sets out that a court may make a declarator of incompatibility in relation to pre-commencement legislation, including an Act of Parliament, where the legislation is deemed incompatible with the UNCRC. The Court's analysis tracked that in its consideration of section 20.

⁵⁴ *Incorporation Reference* case (n 7) [28].

⁵⁵ *ibid* [39].

⁵⁶ *ibid* [30], [44].

⁵⁷ *ibid* [44].

Ultimately, the read-down provision (s 19) and the two enforcement mechanisms (ss 20 and 21) relating to their applicability to Acts of Parliament were found to leave open the *possibility* of interfering with or ‘modifying’ the UK Parliament’s law-making capacity in breach of the section 28(7) of the Scotland Act. The arguments in favour of using section 101(2) of the Scotland Act, which allows potentially conflicting legislation to be read down so as to be within competence, did not persuade the Court.⁵⁸ There are five instances where s 101(2) is potentially deployable, including where language is ambiguous and could be read as exceeding competence or where the challenged language is capable of being read both within and in excess of competence.⁵⁹ The Court explained that there was no ambiguity or confusion in the UNCRC Bill language. As such, the Court followed the reasoning in the *Continuity Bill Reference* case, where the Court explained that

A provision which imposes a condition on the legal effect of laws made by the UK Parliament, in so far as they apply to Scotland, is in conflict with the continuation of its sovereign power to make laws for Scotland, and is therefore equivalent to the amendment of section 28(7) of the Scotland Act.⁶⁰

The Court gave minimal regard to policy areas devolved through the most recent updates to the Scotland Act, which underpin many of the UNCRC rights. Instead, the Court focused on removing itself from serving as a referee in policy areas that now are devolved but where pre-devolution UK legislation remains in effect in full or in part, despite the ability of the Scottish Parliament to repeal and replace such legislation. These aspects of the challenge highlight a difficulty presented by the Court in how to both interpret the Scotland Act ‘in the same way as any other statute’ while simultaneously recognising the Act’s ‘aim to achieve a constitutional settlement and ... giving the [Act] a consistent and predictable interpretation,’ particularly in areas of devolved competence.⁶¹ While the UK Parliament enjoys ‘unqualified legislative power’⁶² over the devolved nations, commentators acknowledge that the Court’s treatment of the Scotland Act in this decision narrows previous understandings of devolution representing a ‘potentially far-reaching constraint on devolved legislative freedom.’⁶³ In imposing this narrow interpretation of section 28(7) of the Scotland Act, the Court insulated UK-level law against the preferred Scottish interpretation even where the UK Parliament has given Scottish Parliament full control over a policy area and the implementation sits squarely on the shoulders of the Scottish Government.

⁵⁸ *ibid* [36], [46], [55].

⁵⁹ For a concise discussion, see HM Attorney General & HM Advocate General for Scotland, Written Submission, UKSC 2021/0079 and 2021/0080, paras 103-09.

⁶⁰ *Reference by the Attorney General and the Advocate General for Scotland - The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022, para 53 (*Continuity Bill Reference* case).

⁶¹ *Incorporation Reference* case (n 12) [7].

⁶² *ibid* [27].

⁶³ Aileen McHarg, ‘Devolution: A View from Scotland’ (*Constitutional Law Matters* blog, 23 May 2022) <<https://constitutionallawmatters.org/2022/05/devolution-a-view-from-scotland/>>; see also Nicholas Kilford, ‘The UNCRC Reference: What Did We Learn?’ (*Constitutional Law Matters* blog, 2 November 2021) <<https://constitutionallawmatters.org/2021/11/the-uncrc-reference-what-did-we-learn/>>.

If the various devolution Acts are meant to be the foundations of constitutional settlement, it could be argued that the resolution of ambiguous limits of devolved legislative competencies should not be left to inter-governmental negotiation.⁶⁴ However, the Court's presentation of section 101(2) of the Scotland Act appears to narrow the benefits of devolution in terms of development of law that raises the bar for human rights protection. This understanding seemingly fails to provide the Scottish Parliament, or any of the devolved law-making bodies, with 'a coherent, stable and workable system within which to exercise its legislative power.'⁶⁵ In the immediate aftermath of the decision, Elliott and Kilford confirmed:

This approach completes the retreat from *Robinson v Secretary of State for Northern Ireland*, in which it was said that devolution legislation should be 'interpreted generously and purposively', moving instead towards a more limited conception of devolution that diminishes it by virtue of an interpretation of the underlying legislation which is far from favourable towards the devolved institutions.⁶⁶

The continuation of Lord Bingham's statement from the *Robinson* decision goes on to say: '...bearing in mind the values which the constitutional provisions are intended to embody' as the Northern Ireland Act 1998 was 'in effect a constitution'.⁶⁷ While Lord Reed notes the constitutional nature of the Scotland Act in the *Incorporation Reference* decision, the narrowed approach to interpreting the Act markedly departs from Lord Bingham's approach and leaves questions as to what this 'constitutional' label actually means. The reasoning offered in relation to the first three challenges demonstrate that current UK constitutional settlements, including the devolution acts and the HRA, are in flux and, as forecasted by Tierney, setting the stage for tension.⁶⁸ If, under the current devolution settlements, devolved governments are not able to strengthen human rights protections in the areas of devolved competence following an extensive deliberative, democratic process then perhaps it is time for Westminster to afford greater clarity about the meaning of devolved competence. Following interpretation of the Scotland Act in the *Incorporation Reference* case, uncertainty permeates discussions about what is possible in terms of 'increasing the effectiveness of incorporation of the UNCRC' across all three dimensions of the respect, protect and fulfil approach to human rights entrenchment.⁶⁹ At this point, this article leaves the dissection of the first three challenges to constitutional lawyers to debate.

⁶⁴ See discussion in Stephen Tierney, 'Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017' in Robert Schütze and Stephen Tierney (eds), *The United Kingdom and the Federal Idea* (Hart 2018). See also, Chris Himsworth, 'Human Rights at the Interface of State and Sub-state: The Case of Scotland' in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights* (OUP 2011) 70.

⁶⁵ *Incorporation Reference* case (n 12) [7].

⁶⁶ Mark Elliott and Nicholas Kilford, 'Devolution in the Supreme Court: Legislative Supremacy, Parliament's "Unqualified" Power, and "Modifying" the Scotland Act' (*UK Constitutional Law Association Blog*, 15 October 2021) <<https://ukconstitutionalaw.org/>>, citing *Robinson v Secretary of State for Northern Ireland* [2005] UKHL 32 [11].

⁶⁷ *Robinson* case (ibid) [11].

⁶⁸ Tierney, 'Drifting Towards Federalism?' (n 64) 102.

⁶⁹ John Swinney, European Charter of Local Self-Government Bill and the UNCRC Bill – Next Steps, Ministerial Statement (*Scot. Gov.*, 24 May 2022) <<https://www.gov.scot/publications/next-steps-european-charter-local-self-government-bill-uncrc-bill-statement-deputy-first-minister-john-swinney-tuesday-24-2022/>>.

We turn now to the fourth challenge to section 6 of the Bill, which yields greater room for examination from a view of incorporation that focuses on the potential of the process to drive culture change on the path to legalisation of rights. This view aligns with the arguments that the process of incorporation can only be effective, and therefore successful, if all relevant duty bearers understand how their actions impact upon the ability of individuals to engage and exercise their rights. The CRC has clarified that decentralization of power through devolution ‘does not in any way reduce the direct responsibility of the State party’s Government to fulfil its obligations to all children within its jurisdiction’.⁷⁰ Section 6 of the UNCRC Bill aimed to give effect to the CRC view by making it ‘unlawful for a public authority to act in a way that is incompatible with the UNCRC.’ The Court noted that on its face this section was outside of Scottish Parliament’s competence as it did not exclude UK Ministers or public authorities applying UK legislation in reserved areas, a point that had been notified to the Scottish Parliament before the Bill was adopted.⁷¹ Lord Reed’s examination of the relationship between Scotland Act s101(2) and public authorities covered by the Act concluded that it should not be for the UK courts to read the section ‘as narrowly as is required for it to be within competence’ despite this possibility under the Act.⁷² As such, section 6 must be redrafted with sufficient detail so as to be within legislative competence.⁷³

This part of the decision appears to take an approach toward identification of public authorities markedly different that found in the Scotland Act, which leaves the determination of what amounts to a ‘cross-border public authority’ flexible. Under sections 88 and 89 of the Scotland Act there are no specific authorities listed and the ordinary meaning of the section’s language suggests that any public authority that may, at any point in time, exercise a specific cross-border function should be determined on a case-by-case basis.⁷⁴ The UNCRC Bill is far more specific and section 16 identifies 22 public authorities understood to owe and required to report on their section 6 duty to act compatibly with the UNCRC. This was not challenged, nor was the list of authorities mentioned in the Court’s reasoning despite being expressly tied to the duty imposed by section 6 (ss 15(1)(a)(i) and (b)(i)). However, if this type of specificity is required so as to bring the legislation within competence, as the Court suggests, then it would make more sense for clarification to come from or with agreement of the UK Parliament rather than ad hoc determinations that have been the primary method of resolution until now.⁷⁵ In the meantime, political jostling over who and how to agree a way forward seems to be perpetuating the lack of resolution.⁷⁶

⁷⁰ CRC, ‘General Comment No 5’ (n 19) para 40.

⁷¹ *Incorporation Reference* case (n 12) [58] – [59].

⁷² *ibid* [77].

⁷³ *ibid* [80].

⁷⁴ The issue of cross-border authorities was a longstanding focus in relation to the Scotland Act, see, for example, Cross-Border Public Authorities: Initial Statues, Hansard Vol 319, Column 649 et seq. 16 Nov 1998. See, also, Himsworth, ‘Human Rights at the Interface of State and Sub-state’ (n 64) 69.

⁷⁵ Himsworth, ‘Human Rights at the Interface of State and Sub-state’ (n 64) 77-79.

⁷⁶ Letter from John Swinney to Alister Jack (1 February 2022) <<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/correspondence/2022/update-regarding-the-uk-supreme-court-judgment-on-the-uncrc-incorporation-scotland-bill>> and the response Letter from Alister Jack to John Swinney (8 February 2022) <<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6->

Ultimately, the Court determined that each of the four challenged sections exceeded the competence of Scottish Parliament in line with the concerns raised by the UK Government prior to the Bill's adoption. The revised Bill will need enough detail to ensure that it does not impinge on the law-making capacity of Parliament in any way. The obvious approach in terms of the first three challenges would be to remove the specific provision. Similarly, with regard to section 6, the addition of a provision clarifying that the public authorities are limited to those identified in the Bill or exercising functions in relation to the implementation of Scots law and policy seems a logical approach. At the time of writing and nearly two years on from the celebration of its passage, the revised Bill has not been reintroduced in Scottish Parliament.⁷⁷ The following section argues that despite the obvious impediments to 'maximalist' incorporation presented by the *Incorporation Reference* decision, there are still many opportunities to entrench human rights through incorporation in the devolved context.

THE FUTURE OF HUMAN RIGHTS INCORPORATION

The UK constitutional settlement dictates that Scotland maintains responsibility for the implementation of international human rights obligations in the policy areas that are devolved.⁷⁸ Following the *Incorporation Reference* decision, McHarg observed that 'the Supreme Court appears to be applying an extended notion of Parliamentary sovereignty which not only preserves the residual power of the UK Parliament to legislate for Scotland, but also limits the way in which the Scottish Parliament is able to legislate in devolved areas.'⁷⁹ In particular, the decision reveals confusion as to where the boundary sits in terms of Scotland's ability to act in areas of overlap where a policy area is governed by laws straddling the 1998 devolution settlement and where public authorities are implementing both Scottish and UK law or operating in a cross-border capacity. The following argues that there remain extensive opportunities to entrench human rights in Scotland through incorporation despite the limitations identified in the *Incorporation Reference* decision. To do so, this section details the diverse international law approaches to human rights implementation and highlights the benefits to be gained from direct incorporation of the UNCRC to the maximum extent possible coupled with other measures sitting along the incorporation spectrum. The benefits to children's rights arising from incorporation, in turn, are projected to cascade to other human rights proposed for incorporation in Scotland.

Moving Forward with UNCRC Incorporation

Recalling that both legal and non-legal measures of implementation are required to give full effect to UNCRC rights, the multidimensional process of incorporation cannot be understated. This international approach reinforces the view that different methods of incorporation sit along a spectrum of implementation that contributes to human rights realisation. Of the 42 articles outlining children's substantive rights, the multitude of those rights are best realised at the local level through the exercise of devolved competence.⁸⁰ Scotland's devolved competences are

equalities-human-rights-and-civil-justice-committee/correspondence/2022/engagement-on-the-uncrc-incorporation-scotland-bill>.

⁷⁷ Swinney, Ministerial Statement (n 69).

⁷⁸ Scotland Act, sch 5, s 7(2)(a).

⁷⁹ McHarg, 'Devolution: A View from Scotland' (n 63).

⁸⁰ Lundy et al (n 30) 102.

many and include health, education, criminal justice, some aspects of social security, to highlight a few of the areas where children's rights are significantly impacted by devolved law and policy. Notably, these competencies are not static and have been expanded since the 1998 devolution settlement. As discussed above, through these variable competencies, Scotland has furthered children's rights through Scottish legislation and policy. Over and above the post-devolution legislation implementing different UNCRC rights interpretations, the UNCRC Bill represents the opportunity to introduce a comprehensive legal framework that will change the face of children's rights in Scotland despite the uncertainty delivered in the *Incorporation Reference* decision. However, legal measures of implementation are not an end-point for securing children's rights. As Kilkelly highlights, '[c]reating an infrastructure to support full implementation of the CRC requires a national, whole-government approach, with the participation of civil society, professional bodies and of course children themselves.'⁸¹

The CRC has identified numerous non-legal measures that provide practical support for the implementation of children's rights, including the use of children's impact assessments, transparent child rights budgeting and widespread training.⁸² In addition to the legal duties deployed in the UNCRC Bill, section 11 of the UNCRC Bill requires the development of children's rights schemes. The use of children's rights schemes is an important non-legal measure that enables different parts of the government to think holistically and prospectively about how they might implement children's rights in within specific remits. This aids duty-bearers in respecting and protecting children's rights. Importantly, the Bill requires Scottish Ministers to have regard to CRC jurisprudence (s 12(2)) as well as other international and comparative law in the development of the schemes, which ensures that evolving interpretations and understandings of UNCRC rights filter into implementation plans. This also opens up the opportunity to cross-fertilise more specific understandings of rights that are shaped by intersectional issues at the local level, such as cross-cutting approaches to education in relation to disability and minorities. This supports the idea that the UNCRC serves as a floor from which more detailed understandings of rights can evolve, rather than a ceiling.

The explicit requirement that CRIA be conducted in relation to all bills introduced in Scottish Parliament, any Scottish statutory instrument and any strategic decision (s 14) improves upon the use of CRIA as read into the CYP Act. Though a non-legal measure, it is arguably the most effective way of preventing decisions from negatively impacting children's rights. Research demonstrates that reviewing the compatibility of legislation with the UNCRC is important for ensuring that children's rights are systematically integrated into formal legislative and governance structures.⁸³ As Hoffman makes clear, 'Proper integration [of CRIA] into policy processes will therefore require commitment by government (at all levels) to develop a culture where CRIA is seen as a key aspect of policy decision-making.'⁸⁴ The benefits of CRIA are limited, however, where there is not significant guidance, education and training of those conducting and using the analysis to inform decision-making. Even the Welsh Government's

⁸¹ Kilkelly, 'Incremental and Transformative Approaches to Legal Implementation' (n 26) 325.

⁸² CRC, 'General Comment No 5' (n 19); CRC, 'General Comment No. 20 on the implementation of the right so the child during adolescence', UN Doc CRC/GC/2016/20 (6 December 2016) para 37.

⁸³ Lundy et al (n 30) 101; Kilkelly, 'Incremental and Transformative Approaches to Legal Implementation' (n 26) 330.

⁸⁴ Simon Hoffman, 'Ex Ante Children's Rights Impact Assessment of Economic Policy' (2020) 24 *IJHR* 1333, 1334.

extensive experience of CRIA since the Welsh Measure has not ensured effectiveness where good practice was not followed or where there was limited knowledge of the UNCRC.⁸⁵ The Scottish CRIA experience, also, reinforces that extensive attention to delivering effective CRIAs should be a priority. As such, an expansive education and training programme across all levels of government must accompany UNCRC Bill implementation. Notably, this does not require that all civil servants understand the full extent of the UNCRC before passing incorporation legislation, but it does support the use of a sunrise clause where new duties exist, such as found in section 40 of the UNCRC Bill. In this way, all duty bearers in Scotland could develop the respect and protect dimensions of their obligations prior to the enforcement mechanisms becoming operational as an essential feature of the fulfilment of rights. In Scotland, where the UNCRC was indirectly incorporated through the CYP Act and where the Scottish Government has operated a policy that reflects the UNCRC obligations for many years (GIRFEC), the distance between how public authorities understand UNCRC rights and the duties imposed through incorporation should not be a long road to travel. In the end, both the children's rights schemes and CRIA requirements in the UNCRC Bill reinforce the value of non-legal measures of implementation working in concert with more focused legal measures to drive forward a children's rights culture throughout government and, if conducted properly, broader society.

The UNCRC Bill compliance duty (s 6) aimed to rectify some of the difficulties in interpreting what amounts to a public authority. The UK Government did not challenge section 6(3-3A), which details that private entities performing public functions are accountable under the Bill. This aligns with the CRC's view that 'privatization of services can have a serious impact on the recognition and realization of children's rights'.⁸⁶ While the Supreme Court rejection of public authorities working cross-border or applying UK law in devolved areas of competence is disappointing, the limitation to Scottish public authorities implementing Scots law and policy is an incredible step forward for establishing a justiciable duty to adhere to the UNCRC in Scotland. In addition to the 22 named public authorities in the Bill, the 32 Local Authorities across Scotland – the most local organs of government – are responsible for extensive services that relate directly to the delivery of children's rights, including: education (UNCRC arts 19, 23, 24); health (UNCRC art 24); many aspects of social care (UNCRC arts 26, 28, 29); and cultural services (UNCRC arts 23, 30, 31). A further 23 organisations are responsible for the physical and mental health of children (UNCRC art 24) throughout Scotland.⁸⁷ In delivering Scottish policy under Scottish laws following the enactment of the revised bill incorporating the UNCRC, these organs will be required to take a children's rights approach and explore how their decisions fit with the UNCRC. This will necessitate a thorough audit of all Scottish law and policy to ascertain which public authorities are responsible for the different dimensions of UNCRC delivery. Such a detailed audit can only be a positive step toward untangling the complexities of delivering not only children's rights but also general human rights in anticipation of the proposed comprehensive Scottish human rights framework. Even where the applicable law does not

⁸⁵ *ibid* 1343.

⁸⁶ CRC, 'General Comment No 5' (n 19) 42.

⁸⁷ A list of organisations responsible for exercising powers or services underpinning the devolved policy areas relating to health is available here: <<https://www.mygov.scot/organisations#health-care>>.

originate in Scotland, the ripple effect of a ‘proactive culture of everyday accountability’ will influence the implementation of other laws.⁸⁸

Lessons for Further Human Rights Implementation

While the Supreme Court acknowledged that incorporating international treaties is a matter for the devolved parliament,⁸⁹ its *Incorporation Reference* decision should only bedevil those focused on constitutional intricacies rather than the implementation of international law. Prior to the *Incorporation Reference* decision, in addition to the UNCRC, the Scottish Government pledged to develop a new human rights framework for Scotland. Incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the CEDAW, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the CRPD will underpin the new framework.⁹⁰ Wales, too, is moving forward with plans to further embed international human rights, including incorporation of the CRPD and CEDAW.⁹¹ With its anticipated human rights legislation, the Scottish Government intends to go a few steps beyond these treaties to offer greater protections to older people, the LGBTQ+ community and enshrine a standalone right to a healthy environment. Every one of these conventions and additional protections has potential overlaps with the UNCRC and should be considered when implementing the UNCRC Bill. Until the constitutional wrangling in the grey areas of devolved competence is settled, if ever, there is more at stake for people’s abilities to engage and exercise their human rights than a narrowing interpretation of the existing devolution settlement.

To progress the understanding and implementation of different international human rights there are a number of steps that will enable the devolved nations to move in the correct direction, three of which are highlighted here as each was also part of the UNCRC Bill. As discussed above, incorporating legal measures that ensure accountability and justiciability for human rights is the only way to deliver the maximum level of protection. However, to fill gaps where legal accountability measures are not possible, non-legal measures can still lay the groundwork for human rights development and also support legal measures. Entrenching human rights education across the whole of society, including all rights holders and duty bearers, with a focus on how human rights support individuals to be fully engaged members of society is a necessary first step. Human rights education is recognised in the UNCRC and other human rights treaties as essential to the development of all individuals.⁹² In the UNCRC Bill, section 10B, in addition to UNCRC article 29, support the promotion and dissemination of information on children’s rights. A second, non-legal step that aids in respecting and protecting rights is the use of human rights

⁸⁸ Scottish Government, *Progressing the Human Rights of Children in Scotland: An Action Plan 2021-2024* (Gov.Scot, 19 November 2021) 5 <<https://www.gov.scot/publications/progressing-human-rights-children-scotland-action-plan-2021-2024/pages/2/>>

⁸⁹ *Incorporation Reference* case (n 7) [4].

⁹⁰ Scottish Government, *A Fairer, Greener Scotland: Programme for Government 2021-2022* (Gov.Scot, 2021) 49 <<https://www.gov.scot/publications/fairer-greener-scotland-programme-government-2021-22/documents/>>.

⁹¹ Welsh Government, *Response to the ‘Strengthening and Advancing Equality and Human Rights in Wales’ Research Report* (Gov.Wales, 2022) 3 <<https://www.gov.wales/sites/default/files/publications/2022-05/response-report.pdf>>.

⁹² UNCRC, art 29(1)(b); CRPD, art 24(1)(a); ICESCR, art 13(1). See Laura Lundy and Patricia O’Lynn, ‘The Education Rights of Children’ in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer 2020).

impact assessment.⁹³ Sections 11(3)(e) and 14 of the UNCRC Bill require CRIAs in the development of children’s rights schemes and all new legislation. Beyond impacts of new law and policy on children, more effective human rights focussed impact assessment that goes beyond the existing equalities approach in the UK could be developed and deployed. Appropriate impact assessment is particularly important in the development of human rights budgeting, which is a third non-legal measure that aids in fulfilling human rights and also features in the UNCRC Bill (s 11(3)(c)). As noted by the UN, ‘almost all government allocations and expenditure are human rights related, if they are intended to ensure a stable, functioning society, as this is a *sine qua non* for the realization of rights.’⁹⁴ A holistic approach to human rights implementation demands that governments use their ‘fiscal envelope’ to realise people’s rights effectively and transparently. Each of these three non-legal measures is recognised in the international human rights system as essential to securing human rights.⁹⁵

Despite the political power struggles that undoubtedly play a central role in the timeline of the Scottish incorporation discourse and the narrowed interpretation of the Scotland Act by the Court, the *Incorporation Reference* decision in no way proscribes further implementation of international human rights treaties through incorporation or any other measure. The Court’s acknowledgement that incorporation of human rights in the devolved nations demands that we look past the constitutional nit-picking to see what remains possible.⁹⁶ As presented above, from the perspective of international law and as explained by the human rights treaty bodies, there is no single method of implementation. Among every potential implementation method, the greatest indicator of success is the state’s commitment as demonstrated by action.⁹⁷ The UNCRC Bill presents a canny mix of legal and non-legal implementation measures to maximise the respect, protect and fulfil approach to realising children’s rights. The Bill tethers its implementation to the international human rights system and signals openness to evolving interpretations of the UNCRC. By all accounts, the Scottish Government remains committed to its programme of human rights entrenchment but only through action will it make good on its years of rhetoric directed toward making Scotland ‘the best place in the world to grow up’.

CONCLUSION

To make children’s rights law stronger and to make policies more effective, Scottish Parliament took the decision to give effect to the UNCRC using the tripartite respect, protect and fulfil framework by including a range of legal and non-legal measures of implementation in its UNCRC Bill. Key aspects of the Bill place prospective and retrospective obligations on public authorities to engage with the UNCRC through children’s rights schemes, CRIA, reporting to Scottish Parliament and budgeting; placing a duty on public authorities to ensure their actions or

⁹³ Simon Walker, ‘Human Rights Impact Assessments: Emerging Practice and Challenges’ in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law* (OUP 2014) 399 et seq.

⁹⁴ UN Office for the High Commissioner for Human Rights, *Realizing Human Rights through Government Budgets* (UN 2017) 14.

⁹⁵ See, for example, CRC, ‘General Comment No. 16 on state obligations regarding the impact of the business sector on children’s rights’, UN Doc CRC/C/GC/16 (17 April 2013) para 29; CRC, ‘General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art 31)’, UN Doc CRC/C/GC/17 (17 April 2013) para 54. CRPD, General Comment No. 7, UN Doc CRPD/C/GC/7 (9 November 2018) paras 19, 22.

⁹⁶ *Incorporation Reference* case (n 7) [6].

⁹⁷ Grugel and Peruzzotti (n 30) 180.

inaction are UNCRC compliant; and by making UNCRC rights justiciable in Scottish courts. The purposeful decision to take such a comprehensive, holistic approach demands detail, but not necessarily the detail suggested by the *Incorporation Reference* decision. The required detail should be focused on the ways in which civil servants in Scotland are trained to approach decision-making and the ways in which Scottish Parliament legislates, budgets and monitors public authorities. The combined impact of education and training about the UNCRC with an unpicking of how UNCRC incorporation will impact Scottish laws relevant to children will generate learning and a policy basis for reinforcing children's rights that will be unprecedented in the UK. The process of incorporation has already opened greater spaces for children's rights discourse and understanding of decision-makers' capacities to improve children's lives.

This article explored the space available for the UK devolved nations to engage more overtly with the international human rights system. It explained the international approach to human rights implementation as one that is widely divergent and driven by local governance choices. The discussion affirms that the one certainty of human rights implementation is that incorporation is merely one approach from a spectrum of possibilities. True children's rights culture change can be celebrated once children's rights permeate every level of governance, but having an enforcement mechanism is necessary, as even with culture change there will be challenges. 'The Scottish Government is committed to a revolution in children's Rights.'⁹⁸ As such, UNCRC Bill implementation processes are moving forward despite the legal haranguing in the aftermath of the *Incorporation Reference* decision. Steps taken so far include the development of a multi-level Theory of Change to assist with implementation and the launch of the Scottish Government's UNCRC Strategic Implementation Board, among other initiatives and working groups.⁹⁹ Despite the limitations presented by the *Incorporation Reference* decision, from the perspective of international law there remains a great opportunity for the Scottish Government, through every organ of government and society, to entrench children's rights and effect real change in their lives.

As Scotland's incorporation project progresses, it must ensure that its incorporation legislation does not get derailed by the existing constitutional settlement. Without clearer guidance from the Court or the UK Government, the task of maximalist incorporation will not be easy. To a certain extent, the constitutional arguments surrounding human rights incorporation are only background noise to the task before the Scottish Government. However difficult the way forward seems, delivering the promise of a human rights based system of governance, the task at hand, must not be diminished. 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. In this way, the UNCRC incorporation process has paved the way toward entrenching human rights into the very fabric of Scottish culture. This is true not only for children in the context of the UNCRC, but all people in Scotland

⁹⁸ UNCRC Bill Policy Memorandum (n 8) para 5.

⁹⁹ Eloise Di Gianni, 'Launch of Ground-breaking Project to Develop a Theory of Change for Making Children's Rights Real in Scotland' (Childhood and Youth Studies blog, 19 November 2021) <<https://blogs.ed.ac.uk/cysrg/2021/11/19/ground-breaking-project-develop-theory-of-change-making-childrens-rights-real-in-scotland/>>; Scottish Government, UNCRC Strategic Implementation Board, Overview <<https://www.gov.scot/groups/uncrc-strategic-implementation-board/>>.

through the ongoing plans to develop a new human rights framework for the benefit of every member of society.