European Human Rights Law Review

European Human Rights

Law Review

Issue 1 2024

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Meghan Campbell

Economic and Social Rights in the UK: Between Pessimism of the Intellect and Optimism of the Will
Koldo Casla

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Simon Hoffman

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SPECIAL ISSUES

The Editors welcome expressions of interest into special issues of the European Human Rights Law Review. Previous special issues have concentrated on the terms of reference for the Fourth Summit of Heads of State and Government of the Council of Europe as well as a special issue dedicated to the work and enduring contribution to the sphere of human rights by the late Editor, Jonathan Cooper KC.

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Editorial

The Universal Declaration of Human Rights' 75th Anniversary (10 Dec 2023)—Making (UDHR) Human Rights Real in the UK

Human rights; Universal Declaration of Human Rights

The articles published in this special edition of *European Human Rights Law Review* are the product of a conference held at Leicester Law School, University of Leicester on 28 April 2023, organised by Dr Ed Bates and Dr Stephen Riley. The event would not have been possible without the generous financial support of the *Modern Law Review*, and the *Centre for European Law and Internationalisation* (Leicester Law School), and we would like to thank them.

Aside from commemorating the 75th anniversary of the Universal Declaration on Human Rights (UDHR) on 10 December 2023, the Conference had several aims. One was to examine the extent to which the human rights found in the UDHR receive positive protection in the United Kingdom (UK), beyond those protected in the form of 'Convention [ECHR] rights', via the Human Rights Act 1998. After all, the UK has ratified the two Covenants completing the 'International Bill of Rights', yet these remain unincorporated, as do many other United Nation (UN) human rights treaties accepted by the UK. The premise for the Conference was that the UK's international obligations demand that all human rights, including those found within the UDHR and unincorporated treaties, need to be taken seriously *as human rights*. The (at the time) forthcoming 75th anniversary of the UDHR was seen as an important opportunity to pursue that objective, highlight the progress still to be made, and the possibilities for the future. The aim was to draw attention to how aspects of the UK's legal regime may be wanting with respect to the protection of certain UDHR rights, and explore how they may be made more *real* in the UK context.

Back in April 2023 the political climate for the type of thinking just noted was challenging to say the least, but also underlined the very points we were seeking to make. At that stage, the Ministry of Justice, under Dominic Raab, had completed a consultation for a 'Modern Bill of Rights'.[1] Instead of providing a progressive, forward-looking vision for human rights for the UK in the 2020s, the Bill of Rights Bill that followed was regressive with respect to existing human rights protection, so much so that it was labelled by some as the 'rights removal bill'. The Bill did not advance to second reading, and in June 2023 it was announced that the government would not proceed with it. However, the environment for celebrating the UDHR in the UK has remained far from propitious since then. Certain senior politicians have continued to talk up the prospect of the UK leaving the ECHR,[2] whilst the matter of the UK's so-called Rwanda plan became headline news in November and December 2023, in the light of a landmark ruling from the United Kingdom Supreme Court.[3] Refreshingly, that unanimous judgment highlighted how the key international law principle at stake, that of non-refoulement, was derived not just from art.3 ECHR, but several other treaties that the United Kingdom is bound by.[4] Depressingly, the government's response to the ruling, at the time of writing at least, has been to table a Bill that purports to ensure that Parliament's determination

[1] Ministry of Justice, *The Human Rights Act Reform: A Modern Bill of Rights* (CP 588, December 2021).
[2] See E. Bates, "UK Withdrawal From the ECHR ('BrECHRit'): From Taboo to Tenable?", forthcoming *European Convention on Human Rights Law Review*.
[3] *R. (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42; [2023] 1 W.L.R. 4433 (15 November 2023).
[4] *R. (AAA (Syria))* [2023] 1 W.L.R. 4433 at [19]–[26].

that Rwanda is a 'safe country' for the purposes of the Bill cannot be upset by 'international law'.[5] Remarkably, the latter is defined to include various treaties the UK has ratified, plus, 'customary international law' and 'any other international law, or convention or rule of international law, whatsoever…'.[6] The second reading of the Bill took place on 12 December 2023. The irony of the timing was noted by one MP, who regarded it as a 'shameful indictment' of the government that the Bill was 'wav[ing] aside our human rights obligations' just two days after the 75th anniversary of the UDHR.[7] The contents of this Special Issue thus provide a timely opportunity to highlight the significance of not just the UDHR but human rights protection in the UK more generally.

We would like to thank all those who were involved with the Leicester Conference. The articles that follow are a selection from those who presented papers at it. Some take the UDHR as their starting point, and reflect on it in relation to a specific field, whilst others look more to unincorporated human rights treaties, taking a more general look at the receptivity of the UK legal system to international human rights obligations. The articles were submitted in October 2023, and so have not taken into account developments since, such as the UKSC judgment referred to above.

In her article Dr Meghan Campbell casts a critical eye over the UDHR from the perspective of Women's Rights, asking whether it matters today, and if so why. Like other authors represented here, Campbell traces the legacy—for good, and for ill—of the Declaration in modern human rights law and thinking. Her analysis demonstrates that the gendered assumptions of the UDHR cannot simply be dismissed as 'of their time' given their partial replication in the UN Convention on the Elimination of Discrimination Against Women. Her work allows us both to critique the Declaration and to locate that critique within unfolding, and perhaps more salutary, currents of international human rights law.

Two articles within the collection focus on economic and social rights in the UK context. Dr Koldo Casla highlights how successive UK Governments have regarded such rights as non-justiciable, but how there is room for some optimism that this perspective may be starting to change, even if only slightly. Dr Luke Graham highlights the importance of the issues at stake, focusing on what he terms the 'cost-of-living-perma-crisis' in the UK (terminology he uses to highlight how human rights and poverty need to be seen from a long-term perspective). It is clear from the evidence marshalled by both authors that defenders of human rights should better connect—in their practice and in their rhetoric—failures of social justice and failure to make social and economic rights justiciable. For all of the shortcomings of the UDHR, it is a permanent reminder of the indivisibility of human rights.

Three articles in this edition focus on the UK constitutional landscape. Professor Merris Amos looks to the impact and influence of the UDHR on national human rights law to date, and considers what realistic prospects there are to advance it in the UK. Dr Lewis Graham examines the approach adopted by the United Kingdom Supreme Court to the UK's unincorporated human rights treaties. Professor Dominic McGoldrick considers to what extent, and how, an instrument such as the International Covenant on Civil and Political Rights may be given legal effect in the national context, in accordance with the Human Rights Act model. In a certain sense these analyses reveal that international human rights instruments, including the UDHR, are no less 'alien' to the UK constitutional landscape than they were 75 years ago. At the same time, they reveal the real force that the Declaration continues to exert on the scholarly imagination.

The final pieces in the collection look to the situation in two devolved nations, Scotland and Wales, where there is, apparently, a better political climate for a more progressive approach to human rights protection. Professor Nicole Busby takes stock of the recent efforts to advance human rights law in Scotland, and the challenges arising. Professor Simon Hoffman looks to how Wales has embraced the ambition of the UDHR, and the progress made in that regard. Devolution has allowed a more complex

[5] Safety of Rwanda (Asylum and Immigration) Bill, UK House of Commons, Session 2023–24.
[6] Clause 1(6)(f) and (g).
[7] *Hansard* HC Debates Vol.742, col.801 (12 December 2023), Caroline Lucas MP.

and variegated human rights story to arise in the United Kingdom. And this allows us to think more carefully about the distinctive *political* status of instruments like the UDHR. Deep political differences have made it possible for different parts of the UK to claim greater or lesser commitment to international human rights law. But it is precisely the UDHR's ability to stand outside political difference—as a rare instance of unchallenged *universality*—that will ensure its durability far beyond this first 75 years.

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Bulletin: Strasbourg

Committees; Council of Europe; European Court of Human Rights; Human rights; Torture; Treaties

European Court of Human Rights

The Court issued, inter alia, judgments and decisions in the following cases in September-October 2023:

Article 2 of the Convention

- *Ainis v Italy*, finding that police had failed to take sufficient steps to prevent a drug overdose in custody.

Articles 2 and 13 of the Convention

- *Dimakysan v Armenia*, and *Hovhannisyan and Karapetyan v Armenia*, finding, variously, violations of the right to life and lack of proper investigation or effective remedy, arising out of the deaths of young men while doing their military service.

Article 3 of the Convention

- *Paul François Compaoré v France*, finding that the extradition of the applicant, brother of a former President toppled from power, to Burkina Faso would breach this provision, failing assessment of the validity and reliability of diplomatic assurances given to the French Government;
- *El-Asmar v Denmark*, finding a lack of safeguards and lack of an effective investigation where the applicant prisoner was pepper-sprayed in his cell;
- *AMA v the Netherlands*, finding that the authorities had not carried out a rigorous enough examination as to the risks facing the applicant on expulsion to Bahrain.

Articles 3, 5 § 1 and 13 of the Convention

- *AD v Malta*, finding violations arising out of the conditions of detention and detention of a minor, a migrant from the Ivory Coast.

Articles 3, 5 § 1 and 14 of the Convention

- *Lapunov v Russia*, finding breaches where the applicant was taken into custody and subjected to torture as part of an apparent purge in Grozny aimed at homosexual persons.

Articles 3, 5, 11 and 14 of the Convention

- *Romanov v Russia*, finding that the authorities had failed to protect members of the LGBTI community from homophobic attacks and failed to conduct effective investigations into the incidents.

Articles 3, 8 and 9 of the Convention

- *Karsai v Hungary*, notifying to the Hungarian Government the complaints of the applicant, in the advanced stages of ALS, a motor neurone disease, that he is unable to bring his state of increasing suffering to an end due to a lack of framework of assisted suicide or the equivalent.

Article 3 of the Convention and Article 4 of Protocol No.4

- *SS v Hungary*, finding a violation arising out of the inhuman treatment and collective expulsion of seven Yemenis and three Afghans to Serbia after their arrival by plane in Budapest where they had claimed asylum.

Articles 5 and 18 of the Convention

- *Melia v Georgia*, finding that the detention of the applicant, an opposition politician, in relation to the storming of Parliament in 2019 had been lawful and not based on ulterior motives.

Article 6 § 1 of the Convention

- *Van der Kerkhof v Belgium*, finding an unreasonable length of proceedings in a civil case arising from a structural problem that needed to be addressed.

Article 6 § 1, Article 7 and Article 11 of the Convention

- *Yüksel Yaltinkaya v Turkiye*, finding a violation where the applicant was convicted of membership of a proscribed terrorist organisation (FETÖ/PDY) on the basis that he had used Bylock, an encrypted messaging service.

Article 6 § 2 and Article 7 of the Convention

- *Bavčar v Slovenia*, finding that, where the applicant, a former minister, had been tried for money laundering, there had been a breach of presumption of innocence due to comments by the Justice Minister but that the conviction had been on a reasonably foreseeable interpretation of domestic law.

Article 6 and Article 14 of the Convention

- *Pajak v Poland*, finding violations where legislation lowered the retirement age for women judges to 60, whereas the age was lowered to 65 for men.

Article 7 of the Convention

- *Total SA and Vitol SA v France*, finding that no violation arose where the applicants were convicted of bribing Iraqi officials in contravention of the UN "oil for food" programme.

Articles 6 and 8 of the Convention

- *Pengezov v Bulgaria*, finding insufficient procedural safeguards in proceedings by which the applicant, a judge, was suspended.

Article 8 of the Convention

- *Gauvin-Fournis and Silliau v France*, finding no breach where the applicants had been unable to obtain information about the donors involved in their medically-assisted procreation, the procedure which had developed requiring the consent of the donors for the provision of such information;
- *Baret and Caballero v France*, finding no breach arising from a prohibition on the export of gametes and embryos to a country which permitted posthumous insemination;

- *IV v Estonia*, finding the Estonian courts failed to take into account, when deciding on the adoption of a child by a man in Estonia that there were parallel proceedings brought by the applicant claiming paternity in Latvia;
- *CP and MN v France*, finding no violation where the courts rejected as inadmissible the application for the applicants, a mother of a child and her new partner, to contest the paternity of a child legally recognised by a former partner;
- *Luca v the Republic of Moldova*, finding a failure of the courts to take into account the domestic abuse suffered by the applicant mother in child care proceedings and to assist her in maintaining contact with the child now living with the father, and also finding failures to protect her from domestic abuse contrary to arts 3 and 14 of the Convention; and in *Bîzdîga v the Republic of Moldova*, finding a failure of the courts in proceedings for access and custody of a child to properly afford the applicant father, who had been accused of domestic abuse, a hearing where he brought forward new circumstances in his favour;
- *Loscascia v Italy*, finding various violations arising out of the collection, disposal and storage of waste in the Campania region and the impact of the pollution on applicant's homes and private life;
- *Plechio v Slovakia*, finding a lack of safeguards where the applicant, a National Property Fund official was randomly affected by telephone interception measures.

Article 10 of the Convention

- *Radio Broadcasting Company BD 92AD v Serbia*, finding a breach where the applicant media company was fined for its reporting allegations of abuse of office by a minister in connection with the swine flu vaccine;
- *Dirukan and Birol v Turkiye*, finding that the conviction of the applicants, with "judgment suspended" for various statements made variously, concerning Abdullah Ocalan and President Erdogan infringed their freedom of expression;
- *Bild Gmbh & Co Kg v Germany*, finding a violation arising where the courts issued an injunction against the applicant newspaper preventing the showing of footage of a police arrest outside a nightclub.

Article 14 of the Convention in conjunction with Articles 8 and 12

- *Boilova and Babulkova v Bulgaria*, finding a breach where the applicants, a same-sex couple, were unable to obtain recognition of their marriage abroad.

Article 14 of the Convention in conjunction with Article 1 of Protocol No.2

- *Laviullina v Latvia*, finding no violation where the applicants, members of the Russian-speaking minority, complained of the change in the school curriculum which meant more subjects would be taught in Latvian and less subjects would be taught in Russian.

Article 1 of Protocol No.1 to the Convention

- *Yordanov v Bulgaria*, finding a violation where the applicants' assets were forfeited following conviction for criminal and administrative offences despite a lack of any judicial findings of connection between the assets and the offences;
- *Midyat Saint Gabriel's Syriac Monastery Foundation v Turkiye*, finding a violation where the authorities refused to register the ownership of land used as a cemetery as the property by the oldest Christian monastery, founded in the fourth century BCE.

Rules of Court

The court adopted new rules for a regime to handle highly sensitive documents which states consider raise issues of national security—a new r.44F and an amended r.33 §1.

Hearings

The court held the following hearing in September-October 2023:

- *Duarte Agostinho v Portugal and 32 other States*, concerning the complaints of the applicants, aged between 11 and 24, that the respondent states had not been complying with their positive obligations to curtail greenhouse emissions which were causing devastating forest fires and other phenomena impacting on their lives and health, invoking arts 2, 3, 8 and 14 of the Convention.

Relinquishment

- A Chamber has relinquished jurisdiction to the Grand Chamber in *Pindo Mulla v Spain*, concerning the complaints of the applicant, a Jehovah's Witness, that she had been subjected to blood transfusions against her will.

Referrals to the Grand Chamber

- The panel of the Grand Chamber has accepted the referral in the case of *Semenya v Switzerland*, concerning complaints under arts 8, 13 and 14 of the Convention, where the Chamber had found discrimination and lack of effective remedy where the applicant, an international level athlete, had been required to take medication to lower her testosterone levels in order to compete and there had been insufficient procedural safeguards in the procedures to challenge this requirement.

Advisory opinions

- The court issued its advisory opinion to questions posed by the Finland Supreme Court concerning the procedure and rights of a biological mother in the context of an application to adopt an adult offspring.

Committee for the Prevention of Torture (CPT)

The Committee carried out the following inspections: it monitored the Frontex-supported return flight of foreign nationals from Germany to Pakistan; it carried out a 10-day visit to Armenia to verify improvements to prisons and police and military detention following previous visits; a nine day visit to Malta; a 10-day visit to Northern Macedonia; and an 11-day visit to Ukraine, its first since the invasion by Russia.

The Committee issued its report on its 2023 visit to Luxembourg, in particular calling for an end to the detention of children in Luxembourg Prison; on its 2022 visit to Romania, calling in particular for urgent improvements to the conditions of detention in psychiatric institutions; and on its 2022 ad hoc visit to the Republic of Moldova, highlighting in particular problems of inter-prisoner violence and the informal prisoner hierarchy which labelled some detainees as "untouchables".

Council of Europe

- Members of the Congress of Local and Regional Authorities of Council of Europe have elected Marc Cools (Belgium, GILD) as the new President of the Congress, for a mandate of two-and-a-half years;
- Armenia became the 45th Member State to abolish the death penalty in all circumstances;
- The 11th Václav Havel Human Rights Prize—which honours outstanding civil society action in defence of human rights—has been awarded to imprisoned Turkish human rights defender, philanthropist and civil society activist Osman Kavala;
- The Council of Europe's Committee on Anti-Discrimination, Diversity, and Inclusion (CDADI) has issued a report concluding with 12 recommendations to Member States to combat hate crimes against LGBTI people;
- On 1 October the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS 210), commonly known as the Istanbul Convention, entered into force in respect of the European Union, which became the 38th Party to the Convention.

Bulletin: EU Charter of Fundamental Rights

EU law; Fundamental rights

General Court of the European Union

The Court issued, inter alia, judgments and decisions in the following during October 2023-November 2023 (all articles refer to the EU Charter, unless otherwise specified):

Article 41

- *Zippo Manufacturing v Commission* (T-402/20), 18 October 2023, concerned an action under art.263 TFEU by the applicant, Zippo Manufacturing Co, seeking the annulment of Regulation 2020/502 on commercial policy measures regarding selected products originating in the United States. The background to the dispute was that on 24 January 2020, the United States adopted measures in the form of an increase in customs duties on imports of certain derivative aluminium products and derivative steel products. The EU responded to what it deemed a protectionist measure by adopting the contested regulation which provides for additional customs duties on equivalent products as long as the United States applies or re-applies its measures in a manner that would affect products from the EU. Amongst other arguments, Zippo sought annulment on the basis that the Commission had not provided it an opportunity to be heard prior to the rebalancing regulation being passed as required under the WTO Agreement and art.41 of the Charter. For context, art.41(2)(a) of the Charter provides that the right to good administration includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken. The Commission disputed that Zippo had a right to be heard and that the entire procedure for adopting the contested regulation was subject to the time limits and information gathering laid down in art.8(2) of the WTO Agreement on Safeguards. The court held that, as a matter of principle, it cannot be ruled out that undertakings exporting the products concerned by the rebalancing measures may rely on the right to be heard in the context of the procedure for adopting those measures. The court went on to note that the exercise of the right to be heard may be subject to limitations under art.52(1) of the Charter. However, since the Commission had not advanced an argument as to limitation but rather non-existence, the court found that the Commission had failed to prove that this was the case and had also failed to show that it was impossible for it to hear the applicants effectively during the procedure. Accordingly, the court ruled that the Commission disregarded the applicants' right to be heard and, therefore, the principle of good administration under art.41 of the Charter.

Court of Justice of the European Union

The Court issued, inter alia, judgments and decisions in the following during October 2023-November 2023 (all articles refer to the EU Charter, unless otherwise specified):

Articles 1, 4 and 19

- *Staatssecretaris van Justitie en Veiligheid (Notion d'atteintes graves)* (C-125/22), 9 November 2023, concerned a request for a preliminary ruling on the interpretation of art.15 of Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as

beneficiaries of international protection. The request had been submitted in the proceedings involving X, Y, and their six minor children, all of whom were Libyan nationals. The case concerned the rejection of their applications for international protection by the Dutch State Secretary for Justice and Security. One of the questions raised was whether, in the interpretation of art.15(c) of Directive 2011/95, in conjunction with arts 1 and 4 and art.19(2) of the Charter, a humanitarian situation arising directly or indirectly from the acts and/or omissions of a serious harm-inflicting actor in the context of an international or internal armed conflict should be considered in evaluating an application for international protection under art.15(c). Although the court ultimately deemed this question inadmissible, its rationale remains instructive. The court initiated its examination by observing that while questions referred by national courts were presumed to be relevant, the primary objective was not to solicit advisory opinions on general or hypothetical matters. Rather, it was imperative that the question was essential for the effective resolution of a specific case. As mandated by art.94(a) of the Rules of Procedure, the order for reference was required to include a summary of relevant factual findings determined by the referring court or, at a minimum, an account of the facts underlying the questions. In the present case, the grounds supporting the applications for international protection, emphasised by the applicants and acknowledged by the competent national authority and the referring court, pertained to the overall level of violence and insecurity in Libya, challenging living conditions in Tripoli, and the resultant "humanitarian situation". However, the information presented did not establish a clear connection between the humanitarian situation and the acts and/or omissions of an actor causing serious harm in the context of an international or internal armed conflict, as defined in art.15(c) of Directive 2011/95. Furthermore, the referring court did not identify the actor responsible for the acts and/or omissions and did not specify the nature of these actions. Consequently, the referring court did not adequately demonstrate how an answer to the question was indispensable to resolving the main dispute and, as a result, it was dismissed.

Articles 4, 19 and 47

- *Ministero dell'Interno (Brochure commune — Refoulement indirect)* (C-228/21) (Joined Cases C-228/21, C-254/21, C-297/21, C-315/21, C-328/21), 30 November 2023. These requests for a preliminary ruling concerned, amongst other things, the interpretation of Regulation 604/2013 (the Dublin III Regulation) and art.47 of the Charter. The requests were made in five proceedings. The first (Case C-228/21) concerned the Italian Ministry of the Interior and CZA, regarding the decision of the Ministry of the Interior to transfer CA to Slovenia following a failed application for international protection. The other four (Cases C-254/21, C-297/21, C-315/21 and C-328/21) involved DG, XXX.XX, PP and GE and the Ministry of the Interior, and concerned the latter's decision to transfer DG, to Sweden, XXX.XX and PP to Germany and GE to Finland. One of the main questions referred was whether art.3(1) and art.3(2) of the Dublin III Regulation, read in conjunction with art.27 of that regulation and with arts 4, 19 and 47 of the Charter, allow the national court to examine whether there is a risk of indirect refoulement following the applicant's transfer to a Member State who has already rejected an application for international protection but has no "systemic flaws in the asylum procedure and in the reception conditions for applicants" within the meaning of art.3(2) of the Dublin III Regulation. In particular, the referring courts asked what is to happen where a national court interprets the concept of "internal protection" differently from the authorities of the requested Member State or takes the view, contrary to those authorities, that there is an armed conflict in the country of origin. The court held

that under EU law, the examining court in a transfer decision cannot conduct a detailed assessment of the risk of refoulement upon return. It must assume that the responsible asylum authority will appropriately evaluate the risk, adhering to art.19 of the Charter. The court also emphasised that the individual in question should have effective remedies, per art.47 of the Charter, to challenge the authority's decision. Consequently, a court in the requesting Member State, when reviewing a transfer decision, cannot assess the risk of non-refoulement unless there are systemic flaws in the asylum procedure and reception conditions in the requested Member State. Disagreements between authorities of the requesting and requested Member States on the interpretation of conditions for international protection do not indicate systemic deficiencies.

Articles 8(3) and 47

- *Ligue des droits humains (Vérification du traitement des données par l'autorité de contrôle)* (C-333/22), 16 November 2023, concerned a request for a preliminary ruling on, amongst other things, the interpretation of art.8(3) and art.47 of the Charter and the validity of art.17 of Directive in the light of the Charter. The request was made in proceedings between Ligue des droits humains BA and the Belgian Supervisory Body for Police Information who had passed certain of BA's data to the Belgian National Security Agency, who subsequently refused to issue BA a security clearance. One of the questions posed by the referring court was whether art.17 of the Directive, read in the light of art.8(3) and art.47 of the Charter, must be interpreted as meaning that, where the rights of a data subject have been exercised, that data subject must also be guaranteed an effective judicial remedy against the authority in question. The court held that art.17 of Directive 2016/680, read in conjunction with art.46(1)(g), art.47(1) and (2) and art.53(1) of that Directive, and with art.8(3) and art.47 of the Charter, must be interpreted as meaning that where the rights of a data subject have been exercised, that data subject must have an effective judicial remedy against the decision of that authority to close the verification process.

Articles 21, 48 and 51

- *Sistem ecologica v Commission Case* (C-787/22 P) (Appeal Case before the General Court T-81/21), 30 November 2023, concerned an appeal by "Sistem Ecologica", which sought to annul the General Court's dismissal of its action against the final investigation report by the European Anti-Fraud Office (OLAF) dated 8 December 2020, and OLAF's decisions in a communication sent on 9 June 2020. The appeal also included contesting several letters exchanged between November and December 2020 and seeking compensation for alleged damages. The case related to suspected fraudulent biodiesel imports into the European Union from the United States starting in 2015. OLAF had initiated an investigation in August 2019, prompted by random inspections revealing discrepancies in biodiesel content. In June 2020, OLAF communicated its preliminary findings, asserting that "Sistem Ecologica" had no biodiesel production and that the imported biodiesel actually originated in the United States. In October 2020, OLAF invited the appellant to provide comments on the investigation's facts. The appellant contested OLAF's claims, citing procedural concerns. By December 2020, OLAF finalised its report, determining that the exported "used cooking oils" were, in fact, biodiesel from the United States and offered recommendations. On 14 December, 2020, the appellant raised procedural complaints, which OLAF dismissed, asserting its inability to investigate post-closure complaints and highlighting the appellant's earlier opportunity to present views. Consequently, the appellant initiated legal action before the General Court,

seeking to annul OLAF's decision, declaring OLAF's non-compliance with relevant rules as unlawful, and contesting various OLAF decisions, including the denial of access to the investigation file. The appellant relied on several grounds of appeal and, in relevant parts, claimed infringement of art.7(2) and (4) of Protocol 5 as well as art.21 of the Charter read in conjunction with art.5. The appellant argued that the General Court had, by implying that fundamental rights and procedural guarantees under EU law were set aside when OLAF conducted investigations outside the EU territory, violated the principle of non-discrimination and infringed art.124 of the EU-BH Agreement as well as art.21 of the Charter read in conjunction with art.51. The court, however, rejected this argument, maintaining that the General Court correctly determined the inspection's responsibility and the governing law, dismissing any violation of Charter provisions. The appellant further argued that the General Court's interpretation of art.7(2) and (4) of Protocol 5 had infringed the right to avoid self-incrimination, as protected under art.9(2) of Regulation 883/2013, art.48(1) of the Charter, and art.6 of the ECHR. The appellant contended that the General Court's reasoning wrongfully restricted this right to investigations within the EU territory or involving persons residing or established on that territory. On this point, the court ruled that the appellant had misinterpreted the judgment. The court observed that the appellants had misunderstood the General Court on this point, since it did not assert that the right to avoid self-incrimination is limited to investigations within the EU territory. Instead, it found that any alleged unlawful conduct during the 4 December 2019 inspection, including a potential infringement of the right to avoid self-incrimination, could not trigger the non-contractual liability of the European Union. This was because the appellant did not identify any specific conduct by OLAF officials participating in the inspection that could constitute a violation of its right to avoid self-incrimination.

Article 31

- *Keolis Agen* (C-271/22) (Joined Cases C-271/22, C-272/22, C-273/22, C-274/22, C-275/22), 9 November 2023, concerned a request for a preliminary ruling on the interpretation of art.7 of Directive 2003/88 and of art.31(2) of the Charter. The requests were made in proceedings between XT, KH, BX, FH and NW and Keolis Agen SARL, regarding the latter's refusal to allow the applicants to take accrued days of leave insofar as they were not able to take these up at the relevant time due to illness. One of the questions referred was whether art.7 of Directive 2003/88 concerning annual leave may be relied on by a worker against his or her employer, even if the employer is a private undertaking holding a public service delegation. The court began by stating that as a matter of principle the directive is not meant to be invoked in a dispute between private persons. However, it went on to state that the provision in question regarding annual leave gives concrete expression to the fundamental right to an annual period of paid leave, as set out in art.31(2) of the Charter. Therefore, a worker may rely directly on this Charter right in any dispute with their employer and, to the extent that national legislation unduly infringes on art.31(2), it must be disapplied by the national court.

Does the UDHR Matter for Women's Equality?

Meghan Campbell*

Equal treatment; Human rights; Legal history; Sex discrimination; Universal Declaration of Human Rights; Women

Abstract

The history of legal efforts to secure women's equality rarely mention the Universal Declaration of Human Rights (UDHR). There is an obvious explanation for this silence. The UDHR has been eclipsed by the United Nations (UN) Convention on the Elimination of Discrimination Against Women (CEDAW) and other regional treaties. This article asks, does the UDHR matter for women's equal human rights? A simple "no" would be an inaccurate and misleading answer. This article argues UDHR does matter and there are valuable lessons to be learned from the drafting process and the text. While the text of the UDHR is outdated, the larger context of drafting the UDHR reveals radical cracks. Notwithstanding the textual limitations, the article argues that the UDHR should command respect, humility and inspiration. Grappling with the obscurity of the UDHR in relation to women's equal human rights provides glimmers of hope for the future.

Introduction

In the history of human rights, the Universal Declaration of Human Rights (UDHR) stands out as a landmark.[1] Yet in the history of legal efforts to secure women's equality the UDHR is rarely mentioned. There is limited scholarship on the UDHR and women, mostly focusing on the drafting history.[2] In domestic, regional, and international jurisprudence on women's rights, the UDHR is almost never cited or referenced. There is an obvious explanation for this silence. The UDHR has been eclipsed by the United Nations (UN) Convention on the Elimination of Discrimination Against Women (CEDAW).[3] CEDAW, which has been described as the Magna Carta for women's rights, has become a focal point for legal activism on women's equality.[4] It is the world's leading legal instrument on equal rights for women, and the CEDAW Committee, which monitors the implementation of the treaty, has developed a sophisticated and dynamic jurisprudence, touching upon a wide range of issues including gender-based violence against women, sexual and reproductive health, conflict and post-conflict scenarios, Indigenous rights and the climate crisis.[5] The work of the CEDAW Committee has influenced sexual harassment laws, abortion regulation and has even been enforced in domestic courts.[6] This work is also complemented by a range of regional legal instruments

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[1] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[2] J. Morsink, "Women's Rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 229; R. Adami, *Women and the Universal Declaration of Human Rights* (Routledge, 2019).

[3] UN Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13.

[4] M. Nussbaum, "Women's Progress and Women's Human Rights" (2016) 38(3) *Human Rights Quarterly* 589.

[5] P. Schulz et al (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary*, 2nd edn (Oxford University Press, 2022).

[6] *Vishaka v State of Rajasthan* AIR 1997 SC 3011 (Indian Supreme Court); Northern Ireland (Executive Formation etc) Act 2019 (UK); Tribunal Supremo Sala de lo Contencioso-Administrativo Sección Cuarta Sentencia núm 1263/2018 (Spain); R.A. Stoffels, "The 'Effectiveness' of CEDAW Committee Decisions: Angela Gonzalez Carreño v Spain" (2015) 19 *Spanish International Yearbook* 365.

such as the Maputo Protocol on the Right of Women in Africa and the Istanbul Convention on Violence Against Women. Against the dynamism of CEDAW and these other treaties, the UDHR has faded into the background. So, this article asks, does the UDHR matter for women's equal human rights?

A simple answer would be "no", the UDHR does not matter, and it should only be a footnote in the larger feminist movement. While the UDHR is unlikely to emerge from the shadows and play a significant role in future struggles for women's equal human rights, understanding the UDHR does matter and there are valuable lessons to be learned from the drafting process and the text. Furthermore, reflecting on the secondary status of the UDHR in relation to women's equality also reveals foundational guiding principles to using domestic law and international treaties to secure human rights. This stock-taking exercise is coming at a pertinent time as around the world women's equal rights are being rolled back and hollowed out,[7] including in the United Kingdom (UK).[8] Paradoxically, grappling with the obscurity of the UDHR provides glimmers of hope for the future.

Part I of this article explores how the UDHR addresses discrimination against women. It argues that equality in the UDHR is an impoverished concept and would be a shaky foundation upon which to argue for a transformation of gendered norms, structures, and institutions. Part II argues that notwithstanding the role of women in the drafting of the UDHR, the universal subject of the Declaration is a man. The unspoken assumption guiding the text is that men are active participants in defending public life from tyranny. Women, on the other hand, are essentialised, infantilised and outright ignored. Part III concludes by arguing that even with these limitations, the UDHR should command respect, humility, and hope for the future. Women were instrumental in ensuring the UDHR did engage with facets of women's equality. While it is easy to identify where their efforts fell short, their accomplishments still demand respect. Ensuring the UDHR referenced sex discrimination, caring roles and equal pay was no easy feat and laid foundational building blocks for subsequent developments. Taking the UDHR seriously should also underscore the need for humility when drafting texts that aspire to universality and that all drafters are inherently bound and blinded by their times. And lastly, the UDHR should inspire hope and highlight the central importance of interpreting and re-interpreting commitments to equality.

I. The bare minimum

The UDHR is not a comprehensive legal instrument on women's equality. There is an omnibus provision prohibiting sex discrimination and there are provisions on marriage equality, motherhood, and equal pay. But that is it. These provisions are crucial, and their absence would be startling, but it cannot be said that the UDHR addresses all facets of women's equality. The UDHR marks the international community's awareness that women are treated unequally, and that marriage, parenting and employment are sites of that inequality. A careful excavation of the UDHR, however, demonstrates a minimal commitment to engendering international human rights law.[9]

[7] UN Working Group on discrimination against women and girls, "Reasserting equality, countering rollbacks" (2018) A/HRC/38/46.

[8] *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] A.C. 223; M. Campbell, "Might Makes Right: The 'Two-Child Limit' and Justifiable Discrimination Against Women and Children" (2021) 43(4) *Journal of Social Welfare and Family Law* 467; C. O'Brien, "Inevitability as the New Discrimination Defence: UK Supreme Court Mangles Indirect Discrimination Analysis While Finding the Two-Child Limit" (26 July 2021), *OxHRH Blog*, available at: *https://ohrh.law.ox.ac.uk/inevitability-as-the-new-discrimination-defence-uk-supreme-court-mangles-indirect-discrimination-analysis-while-finding-the-two-child-limit-lawful/* [Accessed 9 February 2024].

[9] S. Fredman, "Engendering Socio-Economic Rights" in A. Hellum and H.S. Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge: Cambridge University Press, 2013), p.217.

(i) What equality?

Using the tools of intellectual history, this subsection argues that the UDHR is premised on formal equality. Intellectual history is "the history of what people have thought about and believed".[10] There are different methodologies in intellectual history and this article employs structuralism, which studies the continuities and discontinuities in the history of a particular idea.[11] By tracing how women's equality is framed in the UDHR and subsequent UN human right treaties it becomes evident that the equality in the UDHR is formal.

Before examining the text of these treaties, it is helpful to compare and contrast competing models of equality. Formal or *de jure* equality aims for consistent treatment between like groups and permits differential treatment for groups who are different. Formal equality is insufficient to achieve women's equality. Formal equality offers no moral framework for identifying when individuals and groups are similar and when they are different.[12] Historically, women have been perceived as different from men. This supposed difference has been used to justify disadvantaged treatment towards women including prohibiting women from voting and even denying women rights over their own bodies. Moreover, seeking identical treatment between men and women does not challenge the supposed neutrality of the male norms and in practice, formal equality requires women to conform to male living patterns.[13] Substantive equality seeks to transcend the problems of formal equality and infuses equality with a normative underpinning. It recognises that men and women for historical, biological, social, and cultural reasons are not the same and different treatment may be required to achieve equality. There are overlapping theoretical models of substantive equality,[14] but at its heart it seeks to transform gendered norms, prejudice, stereotypes, institutions, systems, power relations, choices, and structures by fully accounting for the context of women's lives.

Turning back to the UDHR, the preamble makes a simple reference to "the equal rights of women and men". Article 2 prohibits sex discrimination. It holds that:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status." (Emphasis added).

Similar to many constitutional guarantees of equality, the text does not elaborate on the meaning of discrimination. Moreover, sex is only one of many grounds of prohibited discrimination and is not singled out in any manner.

Moving forward on the timeline, women's equality is treated differently in the International Covenant on Civil and Political Rights (ICCPR)[15] and International Covenant on Economic, Social and Cultural Rights (ICESCR).[16] Much like the UDHR, the ICCPR and ICESCR prohibit discrimination and include sex discrimination in the list of prohibited grounds.[17] These two covenants also include specific provisions on equality between men and women. Article 3 of ICCPR requires:

> "The States Parties to the present Covenant undertake to ensure *the equal right of men and women* to the enjoyment of all civil and political rights set forth in the present Covenant". (Emphasis added).

[10] W. Fisher, "Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History" (1996–97) 49 *Stanford Law Review* 1065, 1065.
[11] P. Petit, *The Concept of Structuralism: A Critical Analysis* (Berkeley: University of California Press, 1975).
[12] P. Weston, "The Empty Idea of Equality" (1982) 95(3) *Harvard Law Review* 537.
[13] C. MacKinnon, *Feminism Unmodified* (Cambridge, Mass: Harvard University Press, 1987).
[14] S. Fredman, *Discrimination Law*, 3rd edn (Oxford: Clarendon, 2022); C. Albertyn, "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *South African Journal of Human Rights* 441; C. Sheppard, *Inclusive Equality* (Montreal, Quebec: McGill-Queen's University Press, 2010).
[15] International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.
[16] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 999 UNTS 3.
[17] Article 2 of ICCPR and ICESCR.

Specific and targeted obligations were included beside an omnibus discrimination provision to emphasise the critical importance of women's equality.[18] There is no equivalent provision in the UDHR and merely referencing equality in the preamble and including sex discrimination in a list means that women's equality in the Declaration becomes lost in the proverbial mix.

The minimal quality of the equality guarantees in the UDHR is even more apparent in comparison with equality rights in CEDAW. CEDAW entered into force 33 years after the UDHR and the passage of time resulted in a more expansive conception of equality. Article 1 of CEDAW defines discrimination against women as:

> *"any distinction, exclusion or restriction* made on the basis of sex which has the *effect or purpose* of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." (Emphasis added).

This is a substantive understanding of women's equality. By including "effect or purpose" it recognises that discrimination is not only apparent distinction on a plain reading of the text (direct) but can be tightly woven into the status quo (indirect) and CEDAW calls on states to redress seemingly neutral laws, policies or practices that disproportionately and negatively impact on women. Equality in CEDAW is more than a formalistic guarantee of similar treatment and recognises that differential treatment is required.[19]

The expansion of women's equality across later UN human rights treaties implies that it was clarifying or correcting previous definitional misunderstandings.[20] Taking all these provisions together, it is arguable that the prohibition on discrimination on the basis of sex in the UDHR merely allows women equal access to a world built by, around and for men. This conclusion is bolstered when examining the equal pay provisions in the UDHR, which only extends to women the right to similar treatment and fails to grapple with gender differences in pay and job segregation. While the text of the UDHR or any human rights instrument is not frozen in time, as argued in Part III, the paucity of women's substantive equality in UDHR helps explain the limited explicit provisions on gender in the text and why the Declaration has been eclipsed by these later treaties.

(ii) Marriage and motherhood

There are two provisions on women's equality in family life in the UDHR. Article 16 provides that:

> "men and women of full age…have the right to marry. Parties must enter into marriage with free and full consent and both men and women are entitled to equal rights as to marriage, during marriage and its dissolution."[21]

There are also provisions for social security for widows.[22] This is an important recognition of women's vulnerability in marriage, particularly at the point of relationship breakdown.

However, art.16(3) recognises that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Charlesworth argues the primacy the text of the UDHR gives to the family "reinforce[s] the restricted image of women".[23]

[18] UN Report of the Third Committee, "Draft International Covenants on Human Rights" (1962) A/5365 at [84]–[85].
[19] P. Kapai and A. Byres, "Article 1" in Schulz et al (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol: A Commentary* (2022).
[20] H. Charlesworth, "The Mid-Life Crisis of the Universal Declaration of Human Rights" (1998) 55(3) *Washington and Lee Law Review* 781, 785.
[21] Article 16(1) and (2) of UDHR.
[22] Article 25(1) of UDHR.
[23] Charlesworth, "The Mid-Life Crisis of the Universal Declaration of Human Rights" (1998) 55(3) *Washington and Lee Law Review* 781, 783.

The "family" in this context refers to traditional heteronormative families and did not refer to non-traditional family formations such as lone mothers or same-sex unions.[24] Furthermore, there is little acknowledgement in the text that the family can be a site of economic dependence and exploitation for women, as gender expectations within the family burden women with the drudgery of care work. There is also no indication that family can also be a place of control, coercion, and gender-based violence against women. The need to protect the family reinforces the public-private boundary lines and implies that the family is exempt from human rights scrutiny and accountability.[25]

The provisions on motherhood also read as outdated to modern eyes. Article 25 explains that:

> "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

By lumping together caring for children and being a child, women are infantilised, and the effort, skill, responsibility, and work of parenting is diminished. Motherhood is also singled out as "special". While this is a step towards recognising that differential treatment is needed with respect to pregnancy, it also lays a foundation for conceptualising pregnancy as peculiar or deviating from the norm. It was this negative understanding of pregnancy that reverberated throughout the jurisprudence of the 1970s and 1980s.[26] Article 25 can also be read as reinforcing that women are the primary caregivers of children and men remain secondary as there is no mention of men's caring roles.

Contrasting the UDHR with CEDAW is illuminating. In the space between 1948 and 1981, human rights instruments established a different relationship between gender and care. The preamble of CEDAW holds:

> "Bearing in mind *the great contribution of women* to the welfare of the family and to the development of society, so far *not fully recognized*, the social significance of maternity and *the role of both parents in the family* and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole….aware *that a change in the traditional role of men as well as the role of women* in society and *in the family is needed* to achieve full equality between men and women." (Emphasis added).

This is a much richer understanding as it emphasises the work of caring, that women's role in care is undervalued, that caring roles should not be the basis for inequality and that men have an equal role in care. The obligations in CEDAW do not frame pregnancy and care as special, rather, the Convention places obligations on the state to eliminate pregnancy discrimination, to introduce maternity leave and encourages states to provide caring services so parents—both men and women—can combine participation in public life and caring.[27] The provisions recognise, reduce and redistribute caring responsibilities and most crucially hold that caring roles are not a basis for discriminating against women. Contrasting CEDAW and the UDHR highlights the limited vision of care in the Declaration.

(iii) Equal pay

And lastly, the concept of equal pay strongly correlates to a formalistic understanding of women's equality. Article 23 holds that:

> "Everyone, without any discrimination, has the right to equal pay for equal work".

[24] Morsink, "Women's Rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 229, 237.
[25] Charlesworth, "The Mid-Life Crisis of the Universal Declaration of Human Rights" (1998) 55(3) *Washington and Lee Law Review* 781, 783.
[26] *Geduldig v Aiello* 417 US 484 (1974) (US Supreme Court); *Bliss v Attorney General of Canada* [1979] 1 SCR 183 (Canadian Supreme Court).
[27] Article 4(2) and art.11 of CEDAW.

This is an important landmark as it guarantees that women cannot be paid less than men when men and women are performing the same work. Yet the UDHR fails to grasp the complexity of unequal pay. The text does not question how economic power and privilege is structured. It fails to recognise men and women are segregated into different jobs and how gender segregation negatively impacts on women's pay. Due to gender stereotypes and gender assumptions on the provision of care, women concentrate in low-wage labour. Culturally perceptions on the value of that work negatively impact on women's pay. It is not enough to guarantee a formal guarantee of equal pay for women when they perform the same work as men; a more radical transformation is needed. Women's substantive equal pay requires challenging the perceptions on the skills, effort and responsibility required for a wide range of jobs.

Again, contrasting with CEDAW highlights the limits of the UDHR. Article 11 of CEDAW holds that women have:

> "The right to equal remuneration, including benefits, and to equal treatment in respect of *work of equal value*, as well as equality of treatment in the evaluation of the quality of work". (Emphasis added).

Work of equal value is a transformative obligation. Daycare workers should be able to demand equal pay to construction workers, and grocery store clerks should be able to claim equal pay against warehouse staff.[28] While daycare workers and grocery store clerks in the UK have argued for equal pay, Fredman has argued the ghost of a formalistic model of equal pay continues to these haunt efforts.[29] In part, because a substantive right to equal pay is challenging. Equal pay for work of equal value requires looking beyond job titles or job roles and developing mechanisms for accounting the value of work across jobs and industries to ensure that gender does not result in women being paid unequally. The UDHR pay guarantees accept a world that is still defined by men.

II. The universal is male

Besides the ambiguous anti-discrimination guarantee, the woman of the UDHR is defined by her relationship with men. She is married, divorced, widowed, caring for his children and working in his job. Women's lives outside of men are beyond the parameters of the Declaration. The universal was still equated with men's lives and experiences. This is reflected in the language of the text. The pronouns "she" and "her" are nowhere in the UDHR and the word "women" is used only twice, in the preamble and the right to marry. "Him" and "his" is used approximately 25 times. This is not just linguistic semantics but reflects a prevailing view that men encompassed the entirety of human experience.

Examining the text reenforces the activity of men and the passivity of women. It is man who "exercise[s] his rights and freedoms" and it is men's exercise of rights that needs to be justifiably limited.[30] The preamble affirms that human rights are in place to prevent men from being compelled to rebel "against tyranny and oppression". Men are the active participants in ensuring freedom. It is men who are tasked with rebuilding a world destroyed by war as art.1 states that humans "should act towards one another in a spirit of brotherhood". It is men who are moving around and between countries, men who are working, who own property, who participate in their government, who form trade unions, men who have families and men who produce scientific, literary, or artistic work.[31] It is men's risks that are protected in the UDHR as it is man's right to a fair trial, his nationality, his privacy, his adequate standard of living and it is "circumstances beyond his control" that should guide the availability of social security.[32] While feminists

[28] *North v Dumfries and Galloway Council* [2013] UKSC 45; 2013 S.L.T. 769; *Asda Stores Ltd v Brierley* [2021] UKSC 10; [2021] I.C.R. 786.
[29] S. Fredman, "Inching Forward: Preliminary Victory for Equal Value at Tesco and Asda" (2022) 51(1) *Industrial Law Journal* 166.
[30] Article 29 of UDHR.
[31] Articles 13, 17, 21, 27 of UDHR.
[32] Articles 8, 10, 11, 1222, 23, 25 of UDHR.

at the drafting table and earlier in the history of the UDHR argued for an inclusive understanding of the text,[33] it is noticeable that a plain reading of the text centres men's lives and experiences. In contrast, women are passive subjects in the UDHR that are married, pregnant and widowed.

The UDHR not only pushes women into the shadows but can be read as cementing inequality. Article 23 says:

> "Everyone who works has the right to just and *favourable remuneration ensuring for himself and his family* an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection". (Emphasis added).

Men are entitled to a living wage for him and his family. The wage is meant to support multiple persons. Behind this guarantee is an assumption on family structures which excludes women from active labour force participation and casts them into relationships of dependency. The family wage reflects a traditional gender-geographic divide where men perform labour in the public space and women provide care (which was often unrecognised as labour) in the private home. Efforts to secure women's equal pay were rejected as both unnecessary and threatening to the family wage.[34] Women were presumed not to have family members who needed support and thus there was no need to pay them same as men who had dependants at home.[35] This failed to recognise women can be the head of the household and that men do not inherently have relationships of financial dependency. Nor does it acknowledge the material and expressive harm of paying women less for their labour. By protecting the family wage, the UDHR could be accused of implicitly legitimatising unequal pay structures.

III. The UDHR matters

It is tempting to dismiss the UDHR as a product of its time. Despite the clear gender bias in the text, the UDHR still matters. The drafting process of the UDHR and the tireless work of women to put equality on the agenda should be respected. At the same time, feminists of the late 1940s, and all delegates at the drafting table were bound by time. The ideas, the concerns, the debates, even the language issues were expressed in are all a product of time and space. They are connected to the contemporary political debates and ideologies. Reflecting on the UDHR's relationship to women's equality is a reminder that the drafting of human rights instruments is an exercise in humility. The minimalist and outdated language of the UDHR is also a call to action. There is no fixed end point in conceptualising women's equality in the UDHR or any instrument. These are not dead documents and as time marches on women's right to equality must be reinterpreted and reinvigorated.

(i) Respect for the accomplishments of the past

It was not a foregone conclusion that the UDHR would include facets of women's equality. In fact, an earlier draft of the preamble did not contain any reference to the "equal rights of men and women".[36] It was a woman delegate from the Dominican Republic who flagged this omission and successfully lobbied for it to be included. This is but one example. Women from around the world working within the UN system and participating in the drafting process championed equal rights and advocated for the inclusion of women in the UDHR. They challenged the sexist language and advocated for the recognition of civil

[33] R. Burke, "Universal Human Rights for Women: UN Engagement with Traditional Abuses 1948-1965" in R. Adami and D. Plesch (eds), *Women and the UN: A New History of Women's International Human Rights* (Abingdon: Routledge, 2022).
[34] R. Adami, "International Welfare Feminism: CSW Navigating Cold War Tensions 1949" in Adami and Plesch (eds), *Women and the UN: A New History of Women's International Human Rights* (2022), p.58.
[35] S. Fredman, *Women and the Law* (Clarendon, 1998).
[36] Morsink, "Women's Rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 229, 232.

marriages and divorce and paid pregnancy leave.[37] The women participating in the drafting of the UDHR were championing for a future that was built upon women's substantive equality. To build consensus, feminist positions were watered down and compromised and, as argued above, the ethos of the UDHR still skews towards men. But even these defeats matter. Understanding the compromises is of value as it illuminates sticking points. Later human rights instruments, drafted not long after the UDHR, clearly built upon these fractures and did so in a way that strengthens and reenforces women's equality. Adami concludes that

> "the women of the Declaration influenced the wording; they vouched for inclusion. They are not silent names; they created a new narrative—of human rights as inclusive of women."[38]

This is a major achievement when one remembers that "in many countries women had only recently been eligible to participate in public politics".[39] Women were not silent bystanders merely watching men draft a universal declaration but were actively fighting to further women's equality.

There was a diversity of women's voices speaking during the drafting process. Adami in her careful study on the role of non-Western women in the making of the UDHR observes that:

> "The female delegates' proposals and arguments were colored by their experiences: of claiming women's rights beyond religious divides; a Muslim female delegate's battle against the political and economic oppression of women; and a Hindu female delegate's non-violent struggle against colonialism for independence and recognition of rights; a Dominican female delegate's advocacy for women's place in politics; and a Polish female delegate's insistence that no one forget the displaced, the refugees, or the stateless people."[40]

Born out of specific national contexts, women brought their understanding of equality and human rights to the universal project.[41] It is also an important reminder that women's equality is inherently intersectional and cannot be essentialised. The women involved in the UDHR brought their diversity to the table and in doing so, they took the crucial steps in decentring the male as universal. That victory should be celebrated. The delegates at the drafting process began a process, that is still continuing, of imagining an international legal order that would transform traditional gender paradigms and be inclusive of the totality of human experiences.

(ii) Humility in imaging the future

Examining the drafting history of the UDHR should also prompt reflection on the process of drafting any human rights instrument or document that aspires to universalism. Delegates were limited to expressing themselves in words and concepts that existed at the time of drafting. Pocock further explains "men [or women] cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that it is".[42] This explains some of the glaring absences in the text such as gender-based violence against women and sexual and reproductive health. Violence was still not conceptualised as a matter of human rights law and thus the drafters would not have thought to include it in the Declaration.[43] The blind spot to gender inequality which is at the heart of violence against women was so pronounced that CEDAW, which entered into force 33 years later, still contained no obligations on gender-based violence against women.

[37] Morsink, "Women's Rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 229, 323.
[38] Adami, *Women and the Universal Declaration of Human Rights* (2019), p.6.
[39] Adami, *Women and the Universal Declaration of Human Rights* (2019), p.3.
[40] Adami, *Women and the Universal Declaration of Human Rights* (2019), p.3.
[41] Adami, *Women and the Universal Declaration of Human Rights* (2019), p.3.
[42] Quoted in J. Appleby, "Ideology and the History of Political Thought" (1980) 2 *Intellectual History Newsletter* 10, 15.
[43] M. Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart, 2018), Ch.4.

The drafting history also reveals preoccupations that seem misguided to modern eyes. There were debates on whether equality in marriage would also include equality in dissolution of marriage. Women representing the International Union of Catholic Women Leagues did not want to see any reference to divorce in the UDHR with one representative saying that millions of women would be "offended by the 'principle of the dissolution of marriage."[44] There were long debates during the drafting process on how to respect the institution of marriage but also acknowledge the reality of divorce. The need for equality at relationship breakdown is not questioned anymore and equality within a range of familial relationships has been achieved through feminist legal activism.[45] Preoccupations of the moment, debates that seem important, can rapidly change, and become antiquated.

While drafters might be able to look over the horizon and peek into the future, their ability to see into the distance is limited. A modern universal declaration would include stronger protections on gender-based violence, economic inequality, the climate crisis and the natural world, migration, refugees and asylum-seeking, equality for disabled persons and persons with diverse sexual orientations and gender identities. 75 years into the future, this list of human rights issues may also be outdated, as it is impossible to predict the human rights challenges that will concern the people living in 2098. The drafting of any human rights instrument must respect that the concerns of the moment may appear old-fashioned and even ludicrous in the future. This in turn requires drafting techniques that are porous and open-textured so each generation can see its challenges reflected back in the text.

(iii) Living rights and hopeful equality

The rights in the UDHR should not be locked in understandings from the 1940s. In fact, even at the drafting table and shortly after the adoption of the UDHR, women were advocating that "everyone" and "him" and "his" be inclusive of women.[46] The history of reinterpreting the UDHR is almost as old as the Declaration itself. In examining the history of the UDHR, Charlesworth chronicles how women immediately built upon the success and failures of the UDHR to advance women's equal rights.[47] The contemporaries of the UDHR did not see the text as an endpoint but as a starting place.

It is well established that human rights legal instruments are not dead or frozen in time. Looking back at the UDHR, it is possible to measure that dynamism and witness the living character of women's equality and human rights; to mark the changes towards not only caring and pay but the expansion of women's equal rights, through gender mainstreaming and engendering, to all aspects of life. The limited nature of the UDHR is a timely reminder that human rights are constantly in need of interpreting and reinterpreting.[48] Current challenges are not insurmountable, and defeats are not final. Working to secure women's equality is a hopeful exercise even when accounting for setbacks. The women delegates and participants did not give up on substantive equality but found new avenues within the UN system in which to advocate for women's full equal rights. New problems can be brought to old texts. Rather than foreclosing the usefulness of that text, it is imperative to adopt a transformative vision that can use an older and outdated text to reimagine a new world.

Conclusion

Asking whether the UDHR matters to women's equality cannot be answered with a simple "yes" or "no". Answering questions on the UDHR's relationship to women reveals a complex picture on the struggle for

[44] Morsink, "Women's Rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 229, 244–245.
[45] *Women's Legal Trust Centre v President of the Republic of South Africa* [2022] ZACC 23 (South African Constitutional Court); *Shayara Bano v Union of India* (2017) 9 SCC 1 (Indian Supreme Court).
[46] Morsink, "Women's Rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 229, 252.
[47] Charlesworth, "The Mid-Life Crisis of the Universal Declaration of Human Rights" (1998) 55(3) *Washington and Lee Law Review* 781.
[48] G. de Burca, "Human Rights Experimentalism" (2017) *The American Society of International Law* 277.

women's equality. The text of the UDHR is outdated but the larger context of the UDHR reveals radical cracks. While the provisions in the UDHR reflect a formalistic conception of equality and are built around men and men's experiences, the drafting history and the continued evolution of women's rights shows a deeply engrained commitment to transforming gender power relations. The UDHR is part of the larger project of creating a domestic and legal order that takes women seriously. The successes and failures of the UDHR with respect to women's equality are also a reminder that defeats and dead ends are not permanent and that new ways of understanding of equality are always on the horizon.

Economic and Social Rights in the UK: Between Pessimism of the Intellect and Optimism of the Will

Koldo Casla*

Human rights; Social justice; Universal Declaration of Human Rights

Abstract

Economic and social rights are recognised in a number of treaties voluntarily signed and ratified by the United Kingdom (UK). International human rights bodies have repeatedly issued recommendations urging the UK to incorporate international law on economic and social rights into the domestic legal framework. So far, the UK Government has maintained the position that economic and social rights are not directly justiciable. This has been the Government's position, with little public questioning of it, except in specialised circles. However, the politics and context of the debate appear to be shifting in recent years. This paper explores the reasons why this may be happening and reflects on why one might be hopeful, but cautious, about the prospects of seeing socio-economic rights enhanced in the UK.

Introduction

Since this special issue commemorates the 75th anniversary of the adoption of the 1948 Universal Declaration of Human Rights (UDHR), it makes sense to start from there. Article 22 UDHR proclaims:

> "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[1]

Article 25 mentions specifically the rights to an adequate standard of living, the right to health and the right to social security.[2]

Economic and social rights are the material conditions of freedom recognised as human rights in key international treaties, particularly the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by the United Kingdom (UK) and 170 other countries to this day.[3] ICESCR proclaims, amongst others, the right to work and rights at work, the right to form and join a trade union, the right to social security, the right to protection and assistance to the family, the right to an adequate standard of living (including food and housing, inter alia), the right to health, the right to education, and the right to take part in cultural life and to benefit from science.

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[1] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[2] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

[3] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol.993, p.3; OHCHR status of ratification dashboard: available at: *https://indicators.ohchr.org/*.

As a matter of international law, states must perform their international treaty obligations in good faith, and they may not invoke their internal law as a justification or an excuse for their failure to abide by their international obligations.[4] The United Nations (UN) Committee on Economic, Social and Cultural Rights requires States to recognise the rights contained in ICESCR appropriately in the domestic legal order, including means or redress, accountability and judicial remedy.[5]

In recent decades, the world has experienced a trend towards greater recognition of socio-economic rights domestically, in national constitutions or legislation. In 2013, at least 160 constitutions contained at least two socio-economic rights, 26 of them as aspirational rights, 75 justiciable, and 59 with a mixture of both. In 2016, environmental rights were present in 68 per cent of constitutions and were justiciable in 42 per cent, up from 53 per cent and 29 per cent respectively in 2000. In 2016, the right to health was judicially enforceable in 74 countries, 20 more than in 2000. The right to housing is present in 42 per cent of the constitutions. Child protection, education, health and social security appear in more than two thirds of the world's constitutions, and are justiciable in at least 40 per cent of them. The right to education is present in 81 per cent of constitutions and is justiciable in 59 per cent.[6] This is why Rosevear, Hirschl and Jung conclude that economic and social rights "are not only more present in constitutions but they are also more likely to be justiciable than ever before".[7] Furthermore, international and comparative practice shows that, even when economic and social rights are not constitutionalised as directly enforceable rights in court, constitutional economic and social rights can provide an interpretive guidance for the application of domestic legislation.[8]

The UK is a State Party to ICESCR and other relevant treaties. However, as opposed to the civil and political rights recognised in the Human Rights Act 1998, there is no holistic domestic legal framework to give effect to socio-economic rights as human rights. In its latest Concluding Observations, from 2016, the UN Committee on Economic, Social and Cultural Rights recalled previous recommendations and urged the UK "to fully incorporate the Covenant rights into its domestic legal order and ensure that victims of violations of economic, social and cultural rights have full access to effective legal remedies".[9] Six years later, in 2022, the UK Government maintained the position they have taken for a very long time, namely, that there is no need to incorporate ICESCR into the domestic legal framework, adding that they are "confident that [the UK] is fully compliant with its UN treaty obligations including ensuring that there are effective remedies for any breaches".[10]

That has been the standing position of the UK Government for a long time, with little public questioning of it, except in specialised circles. Yet, the context of the debate appears to be shifting significantly enough in recent years. In this paper I will explore why this may be happening, reflecting on reasons to be cautious and reasons to be hopeful about the prospects of seeing the legal status of socio-economic rights enhanced in the UK. I do not claim to present a comprehensive list of factors. Instead, I focus on four supportive arguments for the pessimist, and four for the optimist.

This brief analysis is based on my observations as a scholar working on socio-economic rights in the UK since 2016, as well as my past experience as a campaigner and researcher, and my current role as the project lead of Human Rights Local, a project of the Human Rights Centre of the University of Essex to make human rights locally relevant in England. Over the years, I have discussed law and policy issues

[4] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, Vol.1155, p.331, arts 26–27.

[5] UN Committee on Economic, Social and Cultural Rights, *General Comment No.9: The domestic application of the Covenant*, UN Doc. E/C.12/1998/24 (1998), paras 2–3.

[6] Facts and figures: E. Rosevear, R. Hirschl and C. Jung, "Justiciable and Aspirational Economic and Social Rights in National Constitutions" in K.G. Young, *The Future of Economic and Social Rights* (Cambridge: Cambridge University Press, 2019).

[7] Rosevear, Hirschl and Jung, "Justiciable and Aspirational Economic and Social Rights in National Constitutions" in Young, *The Future of Economic and Social Rights* (2019), p.40.

[8] J. King, "Social rights in comparative constitutional theory" in G. Jacobsohn and M. Schor (ed.), *Comparative Constitutional Theory* (Cheltenham: Edward Elgar, 2018), p.166.

[9] UN Committee on Economic, Social and Cultural Rights, Concluding Observations: UK E/C.12/GBR/CO/6 (2016), para.6.

[10] UK Government, Seventh periodic report to UN Committee on Economic, Social and Cultural Rights, E/C.12/GBR/7 (2022), para.2.

pertaining to socio-economic rights with local government officials, law practitioners, members of Parliament, party officials, campaigners, community activists and people with lived experience of poverty. What should we expect to happen to socio-economic rights in the years ahead? Will the UK finally bring art.22 of the UDHR home? The following words by Antonio Gramsci written in prison some 95 years ago capture *to some extent* how I feel about these questions: "My own state of mind synthesizes these two feelings and transcends them: my mind is pessimistic, but my will is optimistic. Since I never build up illusions, I am seldom disappointed."[11] The quote partly reflects my state of mind, but not entirely. I admit from the outset that I lean to one of the sides, and my inclination is given away by the structure of the paper: I start with pessimism, and I end with optimism, letting it have the last word. That is how I tend to tackle difficult questions: Use the intellect to understand challenges as well as possible, and use the will to seize opportunities as much as possible.

Incorporation of socio-economic rights and pessimism of the intellect

The first obstacle facing those advocating for the legal recognition of socio-economic rights as human rights is one of strategic communications: human rights have been under heavy attack by right-wing commentators, media and politicians at least since the Conservative Party returned to power in 2010. Opinion polls suggest that most people support socio-economic rights.[12] However, over the years, substantial segments of the British public have been exposed to a narrative that portrays human rights as an antidemocratic tool that only protects terrorists, migrants and prisoners. Sometimes openly, sometimes covertly, influential voices close to power or from within power have urged to "overhaul" the Human Rights Act, to borrow ministers' language,[13] or to withdraw from the European Convention on Human Rights entirely.[14] This may very well be part of the Conservative manifesto for the 2024 general election. Against this background of hostility, considering the negative publicity given to the frame "human rights" over the years, even if a politician in opposition was genuinely willing to protect and fulfil housing, health or social security, they would understandably think twice about using human rights law and discourse to make their case.

The second hurdle is structural. In the UK, the parliamentary power represented in Westminster is supreme. This does not apply to the devolved administrations, to which I shall return shortly. But in principle Westminster can legislate about any topic, no parliament is meant to tie the hands of a future parliament, and the validity of an Act of Parliament cannot be questioned in court. Certain Acts are considered to have quasi-constitutional weight, and the Human Rights Act 1998 is one of them. However, the power of judges under the Human Rights Act is limited, as is well known, since they cannot strike down and invalidate legislation that they may deem contrary to the Human Rights Act. They can only declare it incompatible with the Human Rights Act,[15] and it shall be up to Parliament to consider the question and make the necessary amendments or not. Parliamentary sovereignty does not feature in neighbouring countries. The majority of states have a written constitution and an independent judicial body—and/or a constitutional court—that can determine the compatibility between the national constitution and a piece of legislation passed in parliament. However, the UK is different in that regard, and any sort

[11] A. Gramsci, *Letters from Prison*, selected and translated by Lynn Lawner (Harper and Row, 1973), p.159.

[12] Daily Mail, "Half of Britons are worried about being able to pay for FOOD in cost-of-living crisis and 44% are anxious about rent and mortgage payments, shock new poll finds" (16 November 2022), available at: *https://www.dailymail.co.uk/news/article-11430533/Half-Britons-worried-able-pay-FOOD-cost-living-crisis-new-poll.html*.

[13] Liberty, "Explainer: Liberty's guide to the government's plan to 'overhaul' the human rights act" (March 2022), available at: *https://www.libertyhumanrights.org.uk/issue/explainer-libertys-guide-to-the-governments-plan-to-overhaul-the-human-rights-act-2/*.

[14] Rowena Mason, "UK would be outlier with Russia if it left ECHR, Law Society says" (9 August 2023), *The Guardian*, available at: *https://www.theguardian.com/world/2023/aug/09/uk-could-leave-european-convention-on-human-rights-to-stop-channel-migrant-boats* [Accessed 9 February 2024].

[15] Human Rights Act 1998 s.4.

of UK-wide legal recognition of socio-economic rights would need to live with parliamentary sovereignty in the way the Human Rights Act does.[16]

The third challenge is political, like the first one, only that this one comes from the left. Socio-economic rights concern fair taxation, distributive policies, public healthcare, social security entitlements, the private rental sector, etc. They are at the core of the traditional right-left divide, more conspicuously than civil and political rights, which are widely seen as foundational in a liberal society. The Conservative Party has been in Downing Street uninterruptedly since 2010 (until 2015 in coalition with Liberal Democrats, and under a confidence and supply agreement with the Democratic Unionist Party of Northern Ireland between 2017 and 2019). Conservatives have been in power for 50 of the last 80 years. Rather than changing laws, many on the left crave winning a general election for a change. "We don't need legal rights; we just need to vote for Clement Attlee again," as one Labour campaigner put it to me once. Furthermore, a not insignificant group are sceptical of human rights as an ideal; some because of the supposedly Marxist critique of the individualism of human rights,[17] others because they see the establishment of the European human rights regime after World War Two primarily as a conservative project.[18] In this context, persuading the left that human rights have something meaningful to offer to egalitarianism and social justice is not an easy task.

The fourth difficulty is more contingent than the other three. Much of the movement around socio-economic rights comes from Scotland and Wales. As we will see in the next section, policy and legal debates taking place there are sources of inspiration for advocates and researchers living in England. At the same time, since the resignation of Nicola Sturgeon as First Minister in February 2023, Scotland appears to be going through a period of political turmoil. In the current parliament, all Scottish parties except the Conservatives are formally committed to incorporating international human rights standards into Scots Law. That includes the Greens, currently in government, but also Labour and Liberal Democrats, in opposition. However, the UK Government's referral of the Scottish Bill to incorporate the UN Convention on the Rights of the Child (CRC) to the UK Supreme Court muddled the waters about what a future Scottish Bill including socio-economic rights could actually deliver. The haziness only got thicker when the Supreme Court ruled that some of the provisions of the CRC Bill exceeded the powers of the Scottish Parliament.[19] In the second half of 2023, the Scottish Government consulted publicly on what a future Scottish Bill of Rights should look like, and the text is expected for mid-2024.[20] However, at this point, the remit and ambition of such a future Bill, and the priority it will be given in the political agenda, remain uncertain.

Incorporation of socio-economic rights and optimism of the will

The other side of the coin of the last paragraph of the previous section is that Scotland and Wales are showing remarkable leadership in relation to socio-economic rights. Both devolved executives made use of their powers to bring to life the socio-economic duty, a legal provision of the Equality Act 2010 that requires public authorities to have due regard to the desirability of reducing inequalities of outcome.[21] The then First Minister of Scotland, Nicola Sturgeon, set up the advisory group on human rights leadership,

[16] On the challenges to the judicial enforceability in the UK legal context, see generally: K. Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge, 2020), particularly Chs 3–5.

[17] For an excellent interrogation into whether Marx was truly against human rights, or simply insufficiently interested, see: P. O'Connell, "On the Human Rights Question" (2018) 40(4) *Human Rights Quarterly* 962.

[18] M. Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (New York: Oxford University Press, 2017).

[19] *Re Attorney General's Reference and the Advocate General for Scotland, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] W.L.R. 5106.

[20] A Human Rights Bill for Scotland: Consultation (June 2023), available at: *https://www.gov.scot/publications/human-rights-bill-scotland-consultation/*.

[21] Equality Act 2010 s.1. In the case of Scotland, it was implemented in 2017 and the duty acquired the name "Fairer Scotland Duty". It Wales, the duty was commenced in 2021.

which presented its conclusions on 10 December 2018.[22] Following on their recommendations, the Scottish Government announced a process to incorporate all international human rights instruments into Scots Law. While such a commitment has progressed much more slowly than advocates and campaigners would have desired, as indicated earlier, a consultation was made public in June 2023, and it is expected that the Bill will be submitted to Parliament in mid-2024, assuming the timeline is respected. In addition, in 2018, the Scottish Parliament passed the Social Security (Scotland) Act, which declares as one of its foundational principles that "social security is itself a human right and essential to the realisation of other human rights".[23]

Like their Scottish counterparts, the Welsh Government has been very critical of the UK Government's threats to repeal or replace the Human Rights Act. They have also declared they are "committed to a detailed plan of action which will explore incorporating UN Conventions into Welsh law which could potentially lead to a Welsh Bill of Rights".[24] At the same time, in 2023 the Local Government and Housing Committee of the Welsh Parliament (Senedd) debated the added value of the right to adequate housing for Wales,[25] and the Welsh Government issued a consultation on future legislation on fair rents and affordability of housing, inspired partly by international human rights law standards.[26] These initiatives are providing an opportunity for civil society and academics to engage with concrete law and policy proposals, setting up an example of what could be possible in England and in the UK as a whole for non-devolved matters.

While the Conservative Party toys with the idea of scrapping the Human Rights Act and denouncing the European Convention on Human Rights, other parties are formally endorsing and considering how to recognise socio-economic rights. These moves give reason for moderate optimism. We covered in the previous paragraphs the initiatives set in motion by the SNP-Greens Scottish executive and the Labour-led Welsh executive. Part of the Green Party's set of policies are the recognition of the "universal human right to shelter" (meaning housing, since that is the chapter under which this commitment is contained), the right to food and water, workers' rights in line with the International Labour Organisation and ICESCR, and incorporation of the UN Convention on the Rights of the Child.[27] At a party conference level, the Liberal Democrats also supported the incorporation of the right to food.[28] So did Labour in 2021 in relation to the right to food and the right to housing,[29] while in 2023 former Prime Minister Gordon Brown's Commission on the UK's Future recommended the Labour Party to advocate for "constitutionally protected social rights".[30] Whether all or any of these commitments will be included in the manifestoes of these parties ahead of the next general election remains to be seen, but the mere fact that these policy positions are being considered speaks to the shift in public and political discourse.

This brings us to the third reason for optimism. After 13 years in power, polls currently suggest that Conservatives may be evicted from Downing Street at the next general election, expected at some point in 2024. Time will tell if Labour wins outright or if it will need to form a coalition or seek support from

[22] Read about the advisory group's work and recommendations on their website, available at: *https://humanrightsleadership.scot/*.

[23] Social Security (Scotland) Act 2018 s.1(b); C. O'Cinneide, "The Social Security (Scotland) Act 2018—A Rights-Based Approach to Social Security?" (2019) 23(1) *Edinburgh Law Review* 117.

[24] Minister for Social Justice of the Welsh Government, "The United Nations is right, what the UK Government is doing will lead to serious human rights violations" (3 May 2022), available at: *https://www.gov.wales/united-nations-right-what-uk-government-doing-will-lead-serious-human-rights-violations*.

[25] Welsh Parliament—Local Government and Housing Committee, *The Right to Adequate Housing* (July 2023), available at: *https://business.senedd.wales/mgIssueHistoryHome.aspx?IId=40832*.

[26] Welsh Government, "Securing a path towards adequate housing including fair rents and affordability: consultation" (June 2023), available at: *https://www.gov.wales/securing-path-towards-adequate-housing-including-fair-rents-and-affordability*.

[27] Green Party Policies HO300, SW101, WR432 and RR405, available at: *https://policy.greenparty.org.uk/our-policies/*.

[28] Sustain, "Liberal Democrats support incorporation of the Right to Food in UK law" (14 September 2019), available at: *https://www.sustainweb.org/news/sep19_lib_dem_right_to_food/*.

[29] Labour Campaign for Human Rights, "Labour Party Conference 2021—the Right to Food and Housing", available at: *https://www.lchr.org.uk/labour_party_conference_2021_the_right_to_food_and_housing*.

[30] Commission on the UK's Future, *A New Britain: Renewing our Democracy and Rebuilding our Economy* (2023), p.12, available at: *https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf*.

other parties in Parliament. One should not take for granted that a future Labour government would incorporate international standards on socio-economic rights, either with a single overarching legal instrument like the Human Rights Act, or right by right (say, Right to Housing Act, Right to Social Security Act, etc).[31] At this moment, there is little indication that Labour would walk towards that goal if they get to power. However, one can be certain it would not happen while Conservatives remain in control. In fact, the Conservative Party might well run on a so-called culture war to withdraw from the European Convention on Human Rights and to repeal the Human Rights Act.[32] Therefore, the potential change of government in 2024 is another reason to be less than pessimistic about the prospects for socio-economic rights, and human rights in general.

If this or any future government implements laws and policies in line with internationally recognised human rights, it will be because they are moved to do so by the public and organised civil society. And there is an observable change in the extent to which civil society groups are speaking about social rights openly, this being the fourth cause for vigilant enthusiasm. Scottish and Welsh organisations have been following closely the processes in their respective nations, advocating decisively for the recognition of socio-economic rights. A growing number of NGOs in all four nations are shadowing the 7th review in front of the UN Committee on Economic, Social and Cultural Rights in 2022–25, including community groups of people with live experience of poverty. The number and quality of submissions had already increased notably in the 6th review of 2014–16.[33] Larger NGOs are also steering in that direction. The international human rights NGO Human Rights Watch has produced reports on the situation in Britain, focusing on council housing, food and universal credit.[34] Amnesty International published a report on homelessness,[35] and the UK Section has become gradually more open to highlighting socio-economic rights in their public communications. Even Liberty, which since the 1930s has focused on civil liberties and civil and political rights, is debating what contribution they can make to socio-economic rights. In hindsight, I have no doubt that the mission to the UK by the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, in November 2018, made a real difference in helping to connect the realities of disadvantage, hardship and social injustice with internationally recognised human rights.[36] The social rights NGO Just Fair launched the Social Rights Alliance of the North East soon after Alston's visit to Newcastle, a project that later became the Social Rights Alliance of England. Following these steps, in 2020, Just Fair, Amnesty International, the Human Rights Centre of the University of Essex, ATD Fourth World and various community groups joined forces to form GRIPP (Growing Rights Instead of Poverty Partnership), an initiative that brings together people with lived and learnt experiences of poverty.[37] The tide is changing towards greater engagement with socio-economic rights by community groups, mainstream human rights organisations and British civil society in general.

[31] About the virtues of each option, see P. Hunt, "How to advance Social Rights without Jeopardising the Human Rights Act 1998" (2019) 90(3) *The Political Quarterly* 393.

[32] The Observer, "We risk being seen as the 'nasty party' again, warn senior Conservatives" (13 August 2023), available at: *https://www.theguardian.com/politics/2023/aug/13/we-risk-being-seen-as-the-nasty-party-again-warn-senior-conservatives*.

[33] OHCHR Reporting status for the UK, available at: *https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=GBR&Lang=EN*.

[34] Human Rights Watch, "United Kingdom", available at: *https://www.hrw.org/europe/central-asia/united-kingdom*.

[35] Amnesty International, "An Obstacle Course: Homelessness Assistance and the Right to Housing in England" (2022), available at: *https://www.amnesty.org/en/documents/eur03/5343/2022/en/*.

[36] K. Casla and D. Willis, "Philip Alston's austerity report must be a turning point for social justice in Britain" (22 May 2019), *Huffington Post*, available at: *https://www.huffingtonpost.co.uk/entry/philip-alston-austerity_uk_5ce4f0c5e4b0d513447c7276*; K. Casla and W. Wyporska, "Poverty in the UK: The world is listening, but is the government?" (5 July 2019), *Open Democracy*, available at: *https://www.opendemocracy.net/en/opendemocracyuk/poverty-uk-world-listening-government/*; UN Special Rapporteur on Extreme Poverty and Human Rights, Report after visit to UK, A/HRC/41/39/Add.1 (2019).

[37] Research Project Human Rights Local, available at: *https://www.essex.ac.uk/research-projects/human-rights-local*; GRIPP, available at: *http://staging.gripp.org.uk/*.

Conclusion

There are reasons to be optimistic, albeit cautiously so, about the potential for socio-economic rights in the UK. It is important to choose the right frame for this cause, connecting human rights with local realities and grievances as much as possible. Advocates in England (not in Wales or Scotland) should be mindful that the category "international" is not persuasive in and by itself and that in fact many are put off by it. Socio-economic rights can satisfy the material conditions of freedom so individuals can become citizens and make meaningful contributions to the community they are part of. Following Marshall, we can see socio-economic rights as essential ingredients of social citizenship, the foundation of a more egalitarian society that cares for the wellbeing and freedom of all its members, irrespective of migration status or any other condition, focusing particularly on the situation of those at greater risk of disadvantage.[38] It is also essential to choose the right moment, the window of opportunity, and to choose between a constitution-type grand agenda or a more granular approach sector by sector, policy by policy, right by right. One way or another, legislators would need to adjust international human rights standards to the UK's constitutional setting and legal traditions, including parliamentary sovereignty. At the same time, campaigners and scholars working on socio-economic rights should be clear and realistic about what human rights can offer to social justice, managing expectations without pretending that the legal recognition of rights is a panacea that will change Britain overnight. Policy makers and officials would need clarity about what specifically would need to change to adapt the domestic legal framework to international standards on socio-economic rights. They would also crave arguments that speak to their language and concerns in relation to cost-effectiveness and evidence-based policy making.

While parliamentary sovereignty is a particular feature of the UK's legal tradition, the so-called democratic critique of socio-economic rights is not at all unique to the UK. Champions of this critique contend that giving judges too much power to adjudicate on socio-economic rights presents a fundamental conflict with the separation of powers in a democratic society. In their opinion, judicial review of social rights is "democratically illegitimate" as the substance of rights should be determined by elected and accountable bodies; the legislature—and potentially the executive with a mandate derived from the people directly or indirectly through parliament—would be best placed to resolve substantive disputes and conflicts of interest in society.[39] However, contrary to the so-called democratic critique, constitutionalising social rights does not take the authority away from the people or from democratically elected bodies. Quite the reverse, the fulfilment of social rights requires the involvement of all powers of the state, not only the judiciary. Countries exploring new forms of legal or constitutional enhancement of socio-economic rights should be encouraged to apply an incrementalist approach to judicial adjudication, so as all powers have the chance to enter into a form of dialogue over the merits and limits of judicial review of social rights. Such an incrementalist approach requires caution and restraint from legal operators, particularly at the beginning, and sincere collaboration between judiciary, executive and legislature.[40]

Finally, fairness ought to be at the centre of the process. Policy-makers, but also campaigners, researchers and scholars must strive to bring people along. In particular, they should seek to involve people with lived experience of poverty as co-participants. The UN Committee on Economic, Social and Cultural Rights defined poverty "as a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living" and other human rights.[41] Poverty is about lack of resources and public services, but it is also about lack of choices. People in poverty regularly report experiences of stigma and blame, the feeling of being ignored, the entrapment of over-indebtedness, isolation, and lack of recognition of unpaid labour, particularly for

[38] T.H. Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press, 1950).
[39] J. Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1346.
[40] J. King, "The Future of Social Rights: Social Rights as Capstone" in K.G. Young, *The Future of Economic and Social Rights* (Cambridge University Press, 2019), p.317.
[41] UN Committee on Economic, Social and Cultural Rights, Statement on Poverty and ICESCR, UN Doc. E/C.12/2001/10 (2001), para.8.

women.[42] One should pay attention not only to what is being said in policy development, but who says it as well. As a matter of human rights, the voices of people with lived experience of poverty must be heard in the development of policies that affect their lives.[43] Merging lived and learnt experiences adequately requires a sort of practice that respects the "epistemic agency" of people with lived experience of poverty, meaning, their capacity "to think and to act in this world."[44] Human rights should aim higher than simply giving voice to people in poverty. Public policy should aim at ending poverty. However, the path to that end must include actively listening to the grievances and the recommendations made by people who live or have lived the consequences of poverty and inequality. People with the relevant lived experience should be invited to engage in the production of knowledge in a participatory process. From this perspective, research and practice on poverty and socio-economic rights is not something done *to* people with lived experience of poverty, it is not even something done *for* them; inasmuch as possible, it must be done *with* them and *by* them. Both lived and learnt experience bring unique knowledge to the table. In the dilemma between pessimism of the intellect and optimism of the will, this is a critically important challenge for academics, researchers and campaigners for human rights and socio-economic rights in particular.

[42] R. Bray et al, *The Hidden Dimensions of Poverty* (International Movement ATD Fourth World, 2019).
[43] UN Committee on Economic, Social and Cultural Rights, Statement on Poverty and ICESCR, UN Doc. E/C.12/2001/10 (2001), para.12.
[44] W. Mignolo, "On subalterns and other agencies" (2005) 8(4) *Postcolonial Studies* 381, 396.

Poverty: The Cost-Of-Living Perma-Crisis and the UDHR

Luke D. Graham*

Human rights; Poverty; Social justice; Universal Declaration of Human Rights

Abstract

This article takes the opportunity of the 75th anniversary of the Universal Declaration of Human Rights (UDHR) to reflect on the relationship between the UDHR and the recently labelled cost-of-living crisis. It argues that it is inaccurate to suggest that the cost-of-living crisis is a new *crisis. Rather, the cost-of-living crisis is merely the label given to the intensification in depth and scale of a longstanding and neglected perma-crisis: poverty. It is contested that poverty represents a lack of resilience (vulnerability) to broader crises; that there is a need to recognise and respond to economic, social and cultural rights (ESCRs) to address poverty; and that through doing so human rights can be harnessed to facilitate societal and individual resilience to prevent future intensifications of poverty (cost-of-living crises). At the same time as facilitating resilience, increased recognition of, and responsiveness to, ESCRs would also serve to fulfil the promise of the UDHR.*

Introduction

Milestone anniversaries in international human rights law have generated a great body of literature. Three key themes have stemmed from this body of work: celebration, reflection, and new understanding.[1] This article takes the opportunity of the 75th anniversary of the Universal Declaration of Human Rights (UDHR) to reflect on the relationship between the UDHR and the recently labelled cost-of-living crisis. This cost-of-living crisis has dramatically impacted human rights, especially economic, social and cultural rights (ESCRs), and engages a range of state obligations pertaining to ESCRs including non-retrogression, progressive realisation, and minimum core obligations.[2] Whilst this crisis "both follows and intersects with a series of crises" it is also likely to reoccur in the future making it "vital that we take up the challenges it poses to human rights".[3]

To take up this challenge, based on a reflection on the relationship between the cost-of-living crisis and the UDHR, this article offers a new understanding: there is no *new* cost-of-living crisis. Rather, even before the labelling of a cost-of-living crisis those experiencing poverty, which was and remains prevalent and is rising, were unable to meet the cost-of-living. It is argued that the poverty which pre-existed the recognition of a cost-of-living crisis constitutes not only a perma-crisis but also represents a failure to fulfil the promise of the UDHR. More specifically, this poverty—and the failure to recognise it as an ongoing cost-of-living crisis—illustrates a long-standing failure to appropriately recognise and appropriately respond to ESCRs. Given that poverty exacerbates the consequences of other crises,[4] poverty that is this

* The views expressed in the material contained in the European Human Rights Law Review are not necessarily those of the Editors, the Editorial Board, the publisher, or other contributors.

[1] K. McNeilly, "Milestone Anniversaries: Marking Time in International Human Rights Law" (2023) 45 *Human Rights Quarterly* 109, 130.

[2] A. Nolan, "Human Rights and the Cost-of-Living Crisis" (2023) 41 *Netherlands Quarterly of Human Rights* 3, 3.

[3] Nolan, "Human Rights and the Cost-of-Living Crisis" (2023) 41 *Netherlands Quarterly of Human Rights* 3, 12.

[4] P. Alston, "The Parlous State of Poverty Eradication: Report of the Special Rapporteur on Extreme Poverty and Human Rights (Advance Unedited Version)" (United Nations 2020) A/HRC/44/40 at [1].

longstanding and ongoing has increased societal vulnerability to broader crises. However, poverty is not inevitable. It follows that, whilst global crises may be inevitable (and beyond the control of domestic policymakers) it is not inevitable that global crises will result in cost-of-living crises. So understood, the solution to cost-of-living crises—and the negative impact of this current crisis on human rights—is to address the poverty which inhibits societal resilience to the impact of broader crises. To do so it is argued that there is a need to live up to the promise of the UDHR and give equal place to the promotion and realisation of ESCRs. This is required to reduce the capability of global challenges to cause cost-of-living crises.

As to structure, this article first argues that poverty constitutes a perma-crisis that precedes, contributes to, and exacerbates the impact of other crises. It suggests that the current cost-of-living crisis has been recognised as such only because it has caused more widespread poverty which impacts those who were previously just about managing. This spread of poverty has also come to impact the "undeserving" poor and it is argued that this too has contributed to the recognition of a cost-of-living crisis. Thus, the cost-of-living crisis may be understood merely as the intensification of poverty. The cause of this intensification of poverty has been a lack of resilience to "market shocks". The following section illustrates the links between poverty and human rights and argues that this lack of resilience, or rather vulnerability, is attributed to a failure to recognise the promise of the UDHR towards ESCRs. The final section, before the conclusion, argues that to build the resilience required to avoid future cost-of-living crises there is a need to address the underlying poverty which set the conditions for the cost-of-living crisis: that is to fulfil the promise of the UDHR and ensure the realisation of the ESCRs required to avoid poverty. Towards this end, this article does not criticise systems of civil and political rights protection—which are largely incapable of addressing these issues—but rather criticises the lack of parity with which systems of ESCR protection are treated.

Poverty: A cost-of-living perma-crisis

When essential goods and services are generally accessed through the operation of the market, a "cost-of-living" crisis describes the situation through which increasing numbers of people have been "priced out" of these ordinary market processes due to rising costs and/or reduced incomes. This results in them being unable to afford the cost-of-living and represents the economic non-accessibility, that is unaffordability, of essential goods and services. This unaffordability represents, rather than is caused by, the cost-of-living crisis. The cause of this unaffordability is, in the context of the current cost-of-living crisis, partly the increase in the costs of essential goods and services (inflation) as a result of shocks to the global market. These shocks have occurred in the form of other crises and the cost-of-living crisis forms part of a polycrisis or rather a "simultaneous occurrence of multiple, overlapping crises, which interact so that the whole of their impact is greater than the sum of their parts".[5] These various crises have coalesced to negatively "affect … all human rights, inducing wider and deeper poverty within UK society".[6] It is this widening and deepening of poverty in United Kingdom (UK) society, rather than the emergence of a new previously unencountered issue, which has been labelled the cost-of-living crisis. To address the cost-of-living crisis and its associated implications for human rights there is therefore a need to address poverty.

It is only in the context of this polycrisis that poverty has been labelled the cost-of-living crisis.[7] Yet even before the recognition of this cost-of-living crisis, poverty, extreme poverty, and destitution were

[5] Nolan, "Human Rights and the Cost-of-Living Crisis" (2023) 41 *Netherlands Quarterly of Human Rights* 3, 5.

[6] A. Cahill-Ripley and L.D. Graham, "Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice" [2022] *Journal of Human Rights Practice* 225, 229.

[7] For an overview of the rising cost-of-living in the UK see D. Harari et al, *Rising Cost of Living in the UK* (House of Commons Library 2023), 9428, available at: *https://researchbriefings.files.parliament.uk/documents/CBP-9428/CBP-9428.pdf*.

rising in the UK.[8] Increasingly, individuals were unable to afford the cost-of-living and yet this was not recognised as a crisis to the same degree that the cost-of-living crisis has been recognised. This is indicative that some poverty—that is some inability to meet the cost-of-living for some people—was regarded as acceptable in the public consciousness. Indeed, not only was poverty a growing issue, but it was also longstanding. Writing in 1914, Robert Tressell contemplated that "a very great number—in fact, the majority of the people—*lived on the verge of want*; and that a smaller but still a very large number lived lives of semi-starvation from the cradle to the grave; while a yet smaller but still very great number actually died of hunger".[9] This notion of being on the verge of want is another part cause of the cost-of-living crisis. The rising costs—stemming from the polycrisis—have combined with this underlying poverty to cause the cost-of-living crisis. Not only through pushing the already impoverished into deeper poverty but also through pushing many of those who were previously just getting by, those on the verge of want, into poverty.

This notion of being on the verge of want evokes the theme of vulnerability and, relatedly, resilience. This engages Professor Martha Fineman's "concept of vulnerability and the idea of a vulnerable subject".[10] From its beginnings as "a stealthily disguised human rights discourse",[11] this theory tasks the state "with a responsibility to establish and monitor social institutions and relationships that facilitate the acquisition of individual and social resilience".[12] In the context of the cost-of-living crisis, it is evident that there was a lack of resilience to the impact of other crises, which has led to those who were on the verge of want, entering into it. In the context of access to justice, but equally applicable here, viewed through the lens of vulnerability theory "it is possible to appreciate that large sections of society are now experiencing a lack of resilience in the sense of finding themselves suddenly in need".[13] This lack of resilience can be attributed not only to inherent vulnerability but also to the extent to which individuals are denied or enabled access to "the resources required for resilience".[14] As such, the cost-of-living crisis cannot be considered in isolation but rather is intimately woven with a long-standing failure to build societal resilience towards poverty.

Not only has there been a failure to build resilience to market shocks—such as those which coalesced to cause the recently labelled cost-of-living crisis—but such resilience has also been undermined by government policies and the United Kingdom has been made especially vulnerable to the effects of a cost-of-living crisis following a decade of austerity.[15] This is because austerity has caused a broader cross-section of society to face barriers to affording the cost-of-living as it impoverished not only those dependent on welfare but also working families,[16] and "broadened the scope of those at risk of" poverty.[17] Previously, austerity in the UK had been in part based upon the narrative that the impoverished can, "if they so wish, improve their own condition through their own choices".[18] This narrative was used to justify a whole range of social policies which have weakened the social safety net in the United Kingdom.[19] This

[8] S. Fitzpatrick et al, "*Destitution in the UK 2020*" (Joseph Rowntree Foundation, 2021), p.2; see also M. Brewer et al, *The Living Standards Outlook 2021* (Resolution Foundation, 2021), p.6.

[9] R. Tressell, *The Ragged Trousered Philanthropists* (Ware: Wordsworth Editions Limited, 2012), p.38. Emphasis added.

[10] M. Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition Essay" (2008) 20 *Yale Journal of Law and Feminism* 1; M. Fineman, "The Vulnerable Subject and the Responsive State" (2010) 60 *Emory Law Journal* 251.

[11] Fineman, "The Vulnerable Subject and the Responsive State" (2010) 60 *Emory Law Journal* 251, 255.

[12] M. Fineman, "Vulnerability and Inevitable Inequality" (2017) 4 *Oslo Law Review* 133, 134.

[13] D. Newman, J. Mant and F. Gordon, "Vulnerability, Legal Need and Technology in England and Wales" (2021) 21 *International Journal of Discrimination and the Law* 230, 239.

[14] M. O'Rourke, "The Manipulation of 'Vulnerability': State Responses to So-Called 'Historical' Abuses in Ireland" (2021) 43 *Human Rights Quarterly* 435, 436.

[15] Elsewhere it has been argued that austerity during this period was designed in such a way as to induce destitution. See Ch.4 of L.D. Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (Abingdon: Routledge 2022), pp.76–95.

[16] W. Rose and C. McAuley, "Poverty and Its Impact on Parenting in the UK: Re-Defining the Critical Nature of the Relationship through Examining Lived Experiences in Times of Austerity" [2019] *Children and Youth Services Review* 134, 140.

[17] Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (2022), p.89.

[18] Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (2022), p.86.

[19] For an overview of changes to social security policy during the period of austerity see L.D. Graham and S. MacLennan, "Tax in Reverse: Financial Support and Social Security during COVID-19" in B. Stanford et al (eds), *Global Crisis and COVID-19: Rights, Security and Law* (Abingdon: Routledge,

austerity has reduced the UK's welfare state to "a much more minimalist system of social protection"[20] and resulted in a "relatively weaker social security system than it entered" the 2008 global financial crisis.[21] This relative weakness was representative of increased vulnerability to the impact of broader crises and "has exposed the fiction of invulnerability" to poverty.[22] It has done so through highlighting that a lack of resilience (resulting in this crisis in poverty) can occur not as a result of individual failing but rather as a result of "unequal access to certain societal structures or the result of unequal allocations of privilege and power within those structures".[23] To reiterate all that has occurred is that a longstanding and neglected issue—poverty—has risen in depth and scale. This has, however, brought into sharp focus the systemic and structural causes of poverty and rebutted the narrative of poverty being an individual failing. It is the rebuttal—or rather the shattering—of this narrative of the deserving poor which has triggered the labelling of a cost-of-living crisis.

Poverty and human rights

From the perspective of human rights, however, there can be no deserving poor. Human rights belong to all human beings, regardless of conceptions of deservedness and it therefore follows that the idea of the deserving poor is at odds with the universal realisation of human rights. Speaking on the 60th anniversary of the UDHR, Mary Robinson sought to persuade her audience of the UDHR's relevance to several contexts which "by and large, were not those envisioned by the authors of the Universal Declaration", and one such context was poverty.[24] Although the UDHR and ensuing human rights instruments do not include an explicit right to be free from poverty,[25] because the living conditions faced by those experiencing poverty "demonstrate violations of a large variety of human rights", if the guarantees contained within the normative framework of international human rights law were fulfilled, poor people would be lifted out of poverty.[26] Elsewhere it has been argued that the right to an adequate standard of living, the rights which derive from this provision, and the right to social security are required to avoid destitution.[27] Poverty, which is less severe than destitution, has been interpreted more broadly by the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) which endorses a "multi-dimensional understanding of poverty", defining it

> "as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."[28]

So understood it is apparent that the cost-of-living crisis is nothing more than a manifestation of poverty.

2021), pp.120–122; Cahill-Ripley and Graham, "Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice" [2022] *Journal of Human Rights Practice* 225, 228; Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (2022), pp.82–88.

[20] C. O'Cinneide, "Austerity and the Faded Dream of a 'Social Europe'" in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014), p.186.

[21] R. Earwalker and R. McDonald, *Briefing: Strengthen Social Security for a Stronger Economy* (Joseph Rowntree Foundation, October 2020), p.4.

[22] Newman, Mant and Gordon, "Vulnerability, Legal Need and Technology in England and Wales" (2021) 21 *International Journal of Discrimination and the Law* 230, 239.

[23] Fineman, '"Vulnerability and Inevitable Inequality" (2017) 4 *Oslo Law Review* 133, 147.

[24] M. Robinson, "Taking Stock of the Human Rights Agenda Sixty Years On Symposium: Reflecting on the 60th Anniversary of the Universal Declaration of Human Rights" (2009) 24 *Maryland Journal of International Law* 1, 6.

[25] Cahill-Ripley and Graham, "Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice" [2022] *Journal of Human Rights Practice* 225, 227.

[26] S.I. Skogly, "Is There a Right Not to Be Poor?" (2002) 2 *Human Rights Law Review* 59, 73–74.

[27] Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (2022), see Ch.3, pp.49–75.

[28] Committee on Economic and Social Rights CESCR, "Substantive Issues Arising in The Implementation of The International Covenant on Economic, Social and Cultural Rights: Poverty and The International Covenant on Economic, Social and Cultural Rights" (2001) UN Doc. E/C.12/2001/10 at [8].

Whilst the CESCR recognises that poverty engages a range of human rights, only the right to an adequate standard of living, which is contained within art.25 of the UDHR,[29] is explicitly mentioned in the Declaration's text. This right has been understood to mean living above the context-specific poverty line,[30] and the realisation of this right is the antithesis of poverty. It follows that if the right to an adequate standard of living were realised then poverty could not occur. If poverty cannot occur, cost-of-living crises as understood in this article cannot occur. This point is especially pertinent when it is recognised that the right to an adequate standard of living enshrines a "right to security in the event of … other lack of livelihood in circumstances beyond his control".[31] Livelihood has been understood to relate to survival and standards of living.[32] This evokes the idea of structural and systematic causes of poverty and is indicative that the drafters of this provision envisioned that the right would protect against poverty in the face of such causes. It is clear that the text of the provision was explicitly designed to ensure that the right to an adequate standard of living would apply when structural factors—such as a polycrisis—reduce individual capacity to secure their right to an adequate standard of living. As such, the conceptualisation of the right to an adequate standard of living within the UDHR envisioned that this right would be engaged when human beings face poverty due to factors beyond their control. This can be understood to include market shocks caused by global crises.

Even though the text of international human rights provisions offers protection against poverty, this protection does not filter into practice within the United Kingdom. There is a lack of common law or statutory protection against poverty.[33] More so, civil and political rights are prioritised and ESCRs, which better protect against poverty,[34] are not directly justiciable. Consequently, those seeking to leverage human rights against poverty in the United Kingdom have often turned to the European Convention on Human Rights (ECHR).[35] Such claims have been sought via "three principal 'gateways'", namely arts 2, 3, and 8 of the ECHR,[36] and it is well settled that in certain circumstances some protection can be sought against poverty through specific Convention rights.[37] This protection has been limited, however, to certain groups of vulnerable people despite the fact that poverty is itself a form of vulnerability which undermines resilience.[38] Clearly, the ECHR, and civil and political rights, do not directly protect against poverty. Rather, as Lord Scott made clear, "there is no ECHR right to be provided by the state with a minimum standard of living"[39] and poverty has been held to be compatible with the Convention. This demonstrates the ineffectiveness of "the European Convention on Human Rights—and the Human Rights Act [1998] which enshrines this domestically within the UK—as a tool for tackling" both poverty and the associated

[29] United Nations General Assembly, Universal Declaration of Human Rights (Adopted 10 December 1948) UNGA Res 217 A(III), art.25(1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

[30] A. Eide, "The Right to an Adequate Standard of Living Including the Right to Food" in A. Eide et al (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd edn (Dordrecht: Kluwer International Law, 2001), pp.133–134.

[31] United Nations General Assembly, Universal Declaration of Human Rights (Adopted 10 December 1948) UNGA Res 217 A(III), art.25(1).

[32] F. Ellis, "Household Strategies and Rural Livelihood Diversification" (1998) 35 *The Journal of Development Studies* 1, 4.

[33] M. Simpson, G. McKeever and C. Fitzpatrick, "Legal Protection Against Destitution in the UK: The Case for a Right to a Subsistence Minimum" (2023) 86 *Modern Law Review* 465.

[34] L.D. Graham, "Using a Human Rights Framework to Tackle Destitution: The Component Rights" in C.-M. Smyth, R. Lang and J. Thompson (eds), *Contemporary Challenges to Human Rights Law* (Cambridge: Cambridge Scholars, 2020), pp.318–356; L.D. Graham, "The Right to the Continuous Improvement of Living Conditions as a Response to Poverty" in J. Hohmann and B. Goldblatt (eds), *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (Oxford: Hart Publishing, 2021), pp.65–85.

[35] See C. O'Cinneide, "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights" [2008] E.H.R.L.R. 583; M. Simpson, "'Designed to Reduce People…to Complete Destitution': Human Dignity in the Active Welfare State" [2015] E.H.R.L.R. 66.

[36] O'Cinneide, "A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights" [2008] E.H.R.L.R. 583, 584.

[37] This has been accepted in the British courts, see the seminal case of *R. (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 A.C. 396. This has been accepted also by the European Court of Human rights: see *MSS v Belgium and Greece* (App. No.30696/09), judgment of 21 January 2011.

[38] L.D. Graham "The gatekeeping function of vulnerability in public law and human rights" (2024) Apr *Public Law*; see also K. Morris "Vulnerability, Care Ethics and the Protection of Socioeconomic Rights via Article 3 ECHR" (2023) 23 (4) *Human Rights Law Review* 1.

[39] *R. (Limbuela)* [2006] 1 A.C. 396 at [66]. See also P. Billings and R.A. Edwards, "R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department—a Case of 'Mountainish Inhumanity'?" (2006) 13 *Journal of Social Security Law* 169.

non-realisation of ESCRs within the UK.[40] Given the limits of the ECHR in responding to poverty, alternative mechanisms have been explored. With respect to preventing destitution, McKeever, Simpson and Fitzpatrick have, for example, suggested the creation of a statutory duty to protect against destitution.[41] Cahill-Ripley and Graham have, concerning accountability and justice for poverty, explored the use of Community Based Poverty Truth Commissions.[42] Graham has argued that human rights must address poverty from the perspective of ESCRs as opposed to civil and political rights.[43] Similarly, this article proposes that there is a need to fulfil the promise of the UDHR by better realising ESCRs to address poverty and through doing so build societal resilience to address the current, and to prevent future, cost-of-living crises.

Fulfilling the promise of the UDHR to address the poverty perma-crisis and build resilience to crises

The cost-of-living crisis has been the intensification in both depth and scale of poverty and evidences a lack of resilience, and state responsiveness, to poverty. From the perspective of human rights, this lack of state responsiveness has been partly caused by the marginalisation of ESCRs. This marginalisation is at odds with the aspirations of the UDHR. Speaking on the 60th anniversary of the UDHR, near 15 years ago at the time of another global crisis (the 2008 global financial crisis), Robinson recognised that one of the two ways in which the UDHR "distinguishes itself from other great constitutional documents" is through the recognition that "human rights were not only universal but also indivisible-that is, civil and political rights, on the one hand, and social, economic, and cultural rights, on the other".[44] The hopeful suggestion made by Robinson 15 years ago that "we are at a stage where there is a potential both to make the 'true agendas' of human rights-the balance between civil and political rights and economic, social, and cultural rights-more respected and implemented in practice" has not been realised.[45] This is of course in part due to the non-legally binding nature of the UDHR.[46]

However, from the CESCR's definition of poverty above, it is clear that poverty is a human rights issue: one which transcends distinctions between *civil and political rights* and ESCRs. In practice, however, there exists an imbalance between civil and political rights and ESCRs. It is this failure to live up to the promise of the UDHR which has allowed the cost-of-living crisis to take hold. Consequently, the potential of these rights not only to respond to the cost-of-living crisis but also to serve to prevent future cost-of-living crises is not being realised. Realising the promise of the indivisibility of civil and political rights and ESCRs—thus redressing the neglect of ESCRs—is required to realise the promise of the UDHR.

Currently, however, the UDHR (and most ESCRs) are not directly justiciable in the United Kingdom. This non-justiciability of ESCRs undermines their effective implementation.[47] This in turn reduces state responsiveness to the non-realisation of ESCRs, including towards poverty, which reduces societal resilience. This reduced societal resilience exacerbates the impact of broader crises which creates the context in which cost-of-living crises can—and will continue to—occur. When justiciability is understood

[40] Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (2022), p.20.
[41] Simpson, McKeever and Fitzpatrick, "Legal Protection Against Destitution in the UK: The Case for a Right to a Subsistence Minimum" (2023) 86 *Modern Law Review* 465.
[42] Cahill-Ripley and Graham, "Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice" [2022] *Journal of Human Rights Practice* 225.
[43] Graham, *International Human Rights Law and Destitution: An Economic, Social and Cultural Rights Perspective* (2022), see Ch.6, pp.121–151.
[44] Robinson, "Taking Stock of the Human Rights Agenda Sixty Years On Symposium: Reflecting on the 60th Anniversary of the Universal Declaration of Human Rights" (2009) 24 *Maryland Journal of International Law* 1, 4.
[45] Robinson, "Taking Stock of the Human Rights Agenda Sixty Years On Symposium: Reflecting on the 60th Anniversary of the Universal Declaration of Human Rights" (2009) 24 *Maryland Journal of International Law* 1, 14.
[46] T. Obokata and R. O'Connell, "Ambition, Achievement and Potential: The UK and the Universal Declaration of Human Rights at Sixty" (2010) 14 *The International Journal of Human Rights* 394, 395.
[47] Y. Berthelot, "Economics and Human Rights—Two Separate Worlds?" in W.B. Eide and U. Kracht (eds), *Food and Human Rights Development: Volume II* (Cambridge: Intersentia, 2007), p.19; M. Tveiten, "Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience" in W.B. Eide and U. Kracht (eds), *Food and Human Rights Development: Volume I* (Cambridge: Intersentia 2006), p.163.

to mean the extent to which an alleged violation of ESCRs "is suitable for judicial or quasi-judicial review at the domestic level",[48] the justiciability of ESCRs requires that ESCRs are given legal status (recognised) and secondly that the courts are willing to deliver judgments enforcing the realisation of such rights (responsiveness).[49] The UK courts largely do not recognise or respond to ESCR-based claims directly. This is for a range of complex, and often constitutional, reasons including, inter alia, "budgetary implications"[50] and related questions over the separation of powers.[51] In the UK this has manifested itself in the courts being "concerned to be seen as interfering unduly in areas of economic and social policy deemed to be the prerogative of the legislature".[52] To echo Simpson et al, it is for Parliament to take action to incorporate protection against poverty.[53] However, rather than statutory protection against destitution this article advances the claim that Parliament should incorporate the ESCRs required to avoid poverty into domestic law, thus providing recognition and responsiveness to ESCRs.

Not only is this required to meet the promise of the UDHR but, also, realising ESCRs can serve to increase societal resilience to global and societal crises. Indeed, vulnerability theory emphasises "the importance of the state's acceptance of responsibility for creating and supporting systems that promote resilience across the lifespan and across populations".[54] It has been suggested that "Improving the material living conditions of the poor may, therefore, improve the broader living conditions of all in society".[55] This constitutes a utilitarian argument. However, as the analysis in this article makes clear, improving the material living conditions of the most disadvantaged in society offers the potential to build societal resilience to future cost-of-living crises. This is because when market shocks occur, less people would be on the verge of want and as such market shocks would not undermine the affordability of essential goods and services. In understanding poverty as the non-realisation of a range of human rights, it follows that reduced poverty—and the improved realisation of human rights which would stem from this—are conducive to greater resilience within society. This constitutes a more principled and normative argument—beyond this utilitarian one alone—in support of building societal resilience to cost-of-living crises through the incorporation—and stronger realisation—of ESCRs.

Conclusion

Whilst there is a great deal to celebrate on the 75th anniversary of the UDHR, there remains much work still to be done towards fulfilling the promise of this foundational instrument of international human rights law. The 75th anniversary of the UDHR has coincided with an intensification in depth and scale of poverty. This intensification of poverty has been labelled a cost-of-living crisis. Yet, an inability to meet the cost-of-living—that is poverty—is both prevalent and prolonged and long predates the recognition of this crisis. Accordingly, this article has suggested that it is poverty itself, rather than the intensification of poverty, which should be recognised as a crisis: or, more accurately, a perma-crisis. The intensification of this perma-crisis—labelled the cost-of-living crisis—has occurred because of a lack of societal resilience

[48] F. Coomans, "Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context" in F. Coomans (ed.), *Justiciability of Economic and Social Rights* (Cambridge: Intersentia, 2006), p.4.

[49] M. Langford, "Judicial Review in National Courts: Recognition and Responsiveness" in E. Riedel et al (eds), *Economic, Social and Cultural Rights in International Law* (Oxford: Oxford University Press, 2014), p.419.

[50] Tveiten, "Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience" in *Food and Human Rights Development: Volume I* (2006), p.170.

[51] Coomans, "Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context" in *Justiciability of Economic and Social Rights* (2006), pp.4–5.

[52] S.-A. Way et al, "Economic and Social Rights in the 'Great Recession'" in E. Riedel and others (eds), *Economic, Social and Cultural Rights in International Law* (Oxford: Oxford University Press, 2014), p.104. The UK Supreme Court has illustrated such sentiments in the case of *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] A.C. 223.

[53] See Simpson, McKeever and Fitzpatrick "Legal Protection Against Destitution in the UK: The Case for a Right to a Subsistence Minimum" (2023) 86 *Modern Law Review* 465.

[54] N.A. Kohn, "Vulnerability Theory and the Role of Government" (2014) 26 *Yale Journal of Law and Feminism* 1, 9.

[55] Graham, "The Right to the Continuous Improvement of Living Conditions as a Response to Poverty" in *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* (2021), p.83.

to market shocks stemming from a broader polycrisis. This lack of societal resilience exists because ESCRs have been neglected, resulting in higher rates of poverty and higher rates of people on the verge of poverty. In sum, greater state recognition of, and responsiveness to, ESCRs would ensure greater resilience to market shocks (and crises) which in turn will prevent future cost-of-living crises. The alternative is to continue onwards lacking such resilience, all but making future cost-of-living crises inevitable. Not only would greater state recognition of, and responsiveness to, ESCRs foster social resilience to prevent future cost-of-living crises but this would also serve to fulfil the promise of indivisibility as envisioned by the UDHR.

The UDHR and UK Human Rights Law: Prospects for an Imaginative Future

Merris Amos*

Human rights; Universal Declaration of Human Rights

Abstract

After 75 years, the Universal Declaration of Human Rights (UDHR) continues to command widespread respect both nationally and internationally. But this unique status has generally not inspired United Kingdom (UK) politicians to push for the further expansion of national human rights guarantees, or judges to utilise the UDHR to its full potential as an interpretative tool. Nevertheless, it has had some impact and the purpose of this article is to explain the various ways in which the UDHR has influenced national human rights law to date. Based on this assessment, also considered are what realistic prospects there are to capitalise on this historic instrument in order to secure a more imaginative future for the UDHR in UK law, policy and practice.

Introduction

The place of the Universal Declaration of Human Rights (UDHR) in United Kingdom (UK) law is a neglected topic in national human rights discourse. Debates and discussions about human rights protection in the UK are more usually dominated by proposals to replace the Human Rights Act 1998 (HRA) with a UK Bill of Rights, and the possibility that the UK may eventually de-ratify the European Convention on Human Rights (ECHR). Human rights defenders are, understandably, consumed by efforts to retain existing protections and there is little time, or capacity, to think about anything else. But, in the midst of this task, it is also important to look up and around and appreciate that after 75 years, the UDHR continues to hold a unique place in the canon of human rights instruments, albeit its promises are still far from realised in our society or in our law.

Whilst only a declaration, not a treaty, and therefore not legally enforceable in international or national law, the UDHR has considerable traction in the public imagination similar to that enjoyed by Magna Carta. In particular, its history, and the words in its Preamble, have given it a status not enjoyed by the HRA or the ECHR.[1] By contrast to the HRA, you are unlikely to see a reference to the "hated" UDHR[2] and it has not yet made any of our senior politicians "physically ill".[3] Such is its import, and gravitas, the UK Independence Party promised in its 2015 election manifesto that its Bill of Rights (to replace the HRA) would complement the UDHR and also include all of the human rights we have acquired in law since Magna Carta.[4] This ambitious project did not come to pass, albeit its prospects were very remote given

* The views expressed in the material contained in the *European Human Rights Law Review* are not necessarily those of the Editors, the Editorial Board, the publisher, or other contributors.

[1] See further, T. Obokata and R. O'Connell, "Ambition, achievement and potential: the UK and the Universal Declaration of Human Rights at sixty" (2010) 14 I.J.H.R 394.

[2] See, for example, J. Slack and I. Drury, "Gove's first big job: axe Labour's hated Human Rights Act" (11 May 2015), *The Daily Mail*.

[3] Former Prime Minister David Cameron on 3 November 2010 in the House of Commons stated that it made him 'physically ill' to even contemplate having to give prisoners the vote. HC Deb (3 November 2010), Vol.517, col.921.

[4] *Believe in Britain UKIP Manifesto 2015* (London: UKIP, 2015), p.53.

that the UDHR protects a far more extensive list of human rights than, at least for the foreseeable future, is ever likely to be reflected in national human rights law.

Given this unique status of the UDHR, the purpose of this article is to assess how it has influenced the development of national human rights law and what prospects there might be for an imaginative future. First, how the UDHR is used to provide background and context to modern human rights law is considered. Second, how the UDHR has been utilised as a principle of interpretation in a variety of different ways is examined. Third, there is a brief discussion of the utilisation of the UDHR outside of the field of human rights law. Finally, the article concludes with an assessment of what prospects there are for a more imaginative future for human rights law inspired by the UDHR.[5]

Providing background and context to modern human rights law

The UDHR is often used by judges to deliver a history lesson on the origins of human rights law. As noted above, more than 75 years on, the UDHR has considerable moral force backed by an inspiring story of states coming together following the horrors of the Second World War and judges may convey this history as a part of their judgment. Whilst this might have very little influence on the outcome of the proceedings, it is not unimportant given the salient reminder that human rights were fought for, are universal (not merely a European invention), and that the HRA is actually very limited when compared to a statement of rights drafted in 1948. Furthermore, to dampen beliefs that human rights have nothing to do with the history of English law, UDHR history lessons might also include an explicit reference to the English common law roots of the UDHR and how, in turn, the UDHR directly inspired the EHCR.

An early example is the judgment of Lord Steyn in Diane Pretty's case in the House of Lords in 2001 shortly after the HRA had come into force. According to Lord Steyn:

> "The theme of the Declaration of 1948 was universal. It involved a common conception of human rights capable of commanding wide acceptance throughout the world despite huge differences between countries in culture, in religion, and in political systems."[6]

Therefore, he explained, any proposal that it should require states to guarantee a right to euthanasia or assisted suicide would have been "doomed to failure".[7] Carrying on with this theme, he stated that the "aspirational text" of the UDHR was the point of departure and inspiration for the ECHR although this "embodied in some respects a narrower view of human rights".[8] He pointed out that the ECHR, unlike the UDHR, contains "no guarantees of economic, social and cultural rights". He also contrasted the guarantees of equality in the two texts.[9]

The absence of economic, social and cultural rights from the ECHR has been the subject of comment from others. It has been observed that the ECHR, unlike the UDHR, does not create rights to social security[10] although, despite this, there are European Court of Human Rights (ECtHR) judgments in which social, cultural and economic rights feature "either tangentially, or centrally, notwithstanding their apparent exclusion by the signatories in 1950".[11] In short, by contrast to the UDHR, the ECHR is seen as a wholly western European project:

[5] Only the jurisprudence of national courts is considered, although it is important to note that this jurisprudence has also been influenced directly and indirectly through the UDHR jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union.
[6] *R. (Pretty) v DPP* [2001] UKHL 61; [2002] 1 A.C. 800 at [56]. See also *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 A.C. 110 at [210]–[211].
[7] *R. (Pretty)* [2002] 1 A.C. 800 at [56].
[8] *R. (Pretty)* [2002] 1 A.C. 800 at [56].
[9] Article 7 UDHR and art.14 ECHR.
[10] *Re Taylor's Application for Judicial Review* [2020] NIQB 78 at [114].
[11] *Ainte (Material Deprivation)* [2021] UKUT 203 (IAC) at [51].

> "the drafters selected from the Universal Declaration of Human Rights only those civil and political rights believed to best reflect democratic values: the economic rights ideologically vaunted by the eastern bloc were deliberately omitted".[12]

With respect to the common law origins of the UDHR, according to the High Court, Blackstone in his *Commentaries* set out a number of natural or basic rights which he said were recognised by the common law and this was a major source for the declarations made in the American colonies. When these "natural rights" were again acknowledged in England in the late 1940s "it was for the purpose of their being codified in the form of the Universal Declaration and the European Convention".[13] The common law roots of the UDHR, such as the writ of habeas corpus, were referred to by the Supreme Court in its judgment in *Belhaj v Straw*:

> "the core prohibition in international law of detention without legal basis or recourse to the courts corresponds to a fundamental principle of English public policy. Like English law's rejection of torture it is an essential feature of our constitutional order. It has traditionally been traced, at any rate since the time of Sir Edward Coke, to the 29th article of Magna Carta. Charles James Fox is not always a useful source of constitutional principle, but most lawyers would agree with his famous description of the writ of habeas corpus as the 'great palladium of the liberties of the subject'".[14]

The Court of Appeal has also held that the right to liberty has the status of a fundamental right "so regarded since at least the time of the well-known provisions of clause 39 of Magna Carta" which was eventually reflected in art.9 of the UDHR and art.5 of the ECHR.[15]

The UDHR as an interpretative tool

An overarching principle of interpretation

History lessons on the origins of the UDHR and the ECHR help to place modern human rights law in context. One step further is for the spirit of the UDHR, its Preamble, or its history, to be used as an overarching principle of interpretation. For example, it was observed by the Supreme Court in its judgment in *Moohan*,[16] concerning the blanket ban on prisoners voting in the Scottish independence referendum (somewhat conversely to the eventual conclusion), that the concept of "universal entitlement to participate in the political process" is the "natural concomitant of the underlying premise of all human rights law" as recognised in art.1 of the UDHR.[17]

The Court of Protection held in a judgment about the application of art.5 EHCR to a seriously disabled woman, that the historical context of art.5, informed by the UDHR, was "aimed at the midnight knock on the door; the sudden disappearance; the prolonged detention"[18] not at the circumstances of this woman. And, in concluding that evidence obtained by torture was inadmissible in legal proceedings, the House of Lords made reference to the history of international human rights law and the prohibition on torture:

> "The preamble to the United Nations Charter (1945) recorded the determination of member states to reaffirm their faith in fundamental human rights and the dignity and worth of the human person and to establish conditions under which justice and respect for the obligations arising from treaties

[12] *Ainte (Material Deprivation)* [2021] UKUT 203 (IAC) at [51].
[13] *J v Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB); [2013] 1 W.L.R. 2734 at [64].
[14] *Belhaj v Straw* [2017] UKSC 3; [2017] A.C. 964 at [272].
[15] *Secretary of State for Justice v RB* [2011] EWCA Civ 1608; [2012] 1 W.L.R. 2043 at [53].
[16] *Moohan, Petitioner* [2014] UKSC 67; [2015] A.C. 901.
[17] *Moohan, Petitioner* [2015] A.C. 901 at [76]. Article 1 provides: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."
[18] *Tower Hamlets LBC v TB* [2014] EWCOP 53 at [58].

> and other sources of international law can be maintained. The Charter was succeeded by the Universal Declaration of Human Rights 1948, the European Convention 1950 and the International Covenant on Civil and Political Rights 1966, all of which (in articles 5, 3 and 7 respectively, in very similar language) provided that no one should be subjected to torture or inhuman or degrading treatment".[19]

The Supreme Court has also held that Parliament expects the United Nations (UN) Security Council to act in accordance with human rights, given the UN Charter and the UDHR, and therefore would not have appreciated the possibility that the Security Council would decide on measures affecting the rights of persons in the UK, without providing them with a means of effective challenge before a court.[20]

The principle of human dignity

In the Preamble to the UDHR, human dignity is mentioned twice. Reference is made to the "inherent dignity and the equal and inalienable rights of all members of the human family" and the "dignity and worth of the human person". In art.1 of the UDHR, it is stated that "[a]ll human beings are born free and equal in dignity and rights".[21] Whilst outside of the courtroom human dignity is a well known justification for the protection of human rights,[22] these references in the UDHR have allowed some judges to use the principle to explain, philosophically, why they have decided as they have.

The principle of human dignity plays a particular role in the work of the Court of Protection. For example, in a 2021 decision, Justice Hayden explained the application of the principle to the "many challenging decisions" that the Court of Protection is required to take as follows:

> "Thus, the slaughter of the Somme, the insidious and corrosive rise of fascism in Europe and the awful abomination of the Holocaust provide the backdrop to both documents. This was a period when the world had real cause to confront and analyse the importance of human dignity. What is most striking is that dignity does not appear as a mere facet of fundamental human rights but is emphasised as entirely central and integral to them. As is clear from the respective preambles to both instruments, human dignity is afforded paramount status."[23]

There are many other examples where respect for human dignity has played an interpretative role, including decisions on the continuation of life sustaining treatment for a baby boy;[24] the existence of discrimination on the ground of sexual orientation;[25] and the verdict to be reached by a coroner.[26]

Boosting the strength of a Convention right

In national jurisprudence, the UDHR clearly has a role to play in boosting the importance of human rights law generally. Furthermore, with respect to the Convention rights protected by the HRA, the fact that a right is also set out in the UDHR is often used to emphasise that the particular Convention right under consideration is very important. These boosting powers of the UDHR have been applied to a number of rights. For example, the right to marry, as set out in art.12 ECHR, has been held to be a "strong right" as it follows and "gives teeth" to art.16 of the UDHR[27] and that, accordingly, forced marriage is a violation

[19] *A v Secretary of State for the Home Department* [2005] UKHL 71; [2006] 2 A.C. 221 at [30] per Lord Bingham.
[20] *A v HM Treasury* [2010] UKSC 2; [2010] 2 A.C. 534 at [154].
[21] Dignity is also mentioned in arts 22 and 23 of the UDHR.
[22] See further B. Douglas, "Undignified rights: the importance of a basis in dignity for the possession of human rights in the United Kingdom" [2015] P.L. 241.
[23] *North West London Clinical Commissioning Group v GU* [2021] EWCOP 59 at [42] and [45]. He is referring to the UDHR and the UN Charter.
[24] *Guy's and St Thomas' NHS Foundation Trust v A* [2022] EWHC 2422 (Fam) at [54]. See also *R. (A) v East Sussex CC (No.2)* [2003] EWHC 167 (Admin) at [86].
[25] *Lee v Ashers Baking Co Ltd* [2018] UKSC 49; [2020] A.C. 413 at [35].
[26] *R. (Lagos) v HM Coroner for City of London* [2013] EWHC 423 (Admin) at [44].
[27] *R. (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] 1 A.C. 287 at [13].

of "internationally recognised human rights standards".[28] Article 14 ECHR has been observed to have its history in arts 1 and 2 UDHR, the general principles of equality and non-discrimination.[29] It has been noted that the right against retrospective legislation in art.7 ECHR closely follows that of art.11(2) of the UDHR.[30]

It has been held that considerable importance attaches to family relationships in modern international human rights law, particularly given that art.16.3 of the UDHR proclaims that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the state".[31] Similar support is lent by the art.11(1) of the UDHR to the presumption of innocence as reflected in art.6(2) of the ECHR.[32] In its judgment in *Barclay*,[33] the Supreme Court traced the history of the right to free elections:

> "Consequently the right to free elections as an essential element of the developing international law of human rights was recognised in Lauterpacht's own draft International Bill of the Rights of Man (Article 10), in the American Law Institute's 1944 draft Statement of Essential Human Rights (Article 16), in the Inter-American Juridical Committee's 1946 draft Declaration of the International Rights and Duties of Man Page 3 (Article XIII), and in the Universal Declaration of Human Rights adopted by the General Assembly in 1948 (Article 21(1)), and later in the International Covenant on Civil and Political Rights (1966) (Article 25) and the American Convention on Human Rights (1969) (Article 23)."[34]

Alongside numerous other international conventions, art.5 of the UDHR has been held to support the universal opposition to torture and the importance of making this right effective.[35] The Court of Appeal has explained that this "ius cogens finds its expression in a number of places" including art.5 of the UDHR.[36] And the High Court has held that art.5 UDHR gives weight to the international prohibition and stigmatism attached to a state's acts of torture.[37]

The same boosting powers of the UDHR have been applied to common law rights. For example, it has been confirmed that the right to liberty does not exist because of any international human rights law, but because, as art.1 of the UDHR states, "all human beings are born free" and it is the common law which provides a remedy for an infringement of that "inherent fundamental right".[38]

Determining the scope of Convention rights and the limits of the common law

Whilst it can add to the weight of a human rights argument, using the UDHR to boost the importance of a Convention right already protected by the HRA usually has very little impact on the outcome of the proceedings. Far more important is the impact, if any, the UDHR might have on determining the actual scope of a Convention right. Although the UDHR is held in high regard, it is rarely used in argument. Therefore, the opportunity for a judge to use it as a tool to determine the scope of a Convention right is not a regular occurrence. There are some examples, although more often than not, the UDHR has been used as an interpretative tool to limit the scope of a Convention right from what it might have otherwise been.

[28] *Sheffield City Council v M* [2022] EWHC 128 (Fam) at [1]; *R. (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 A.C. 621 at [9].
[29] *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 at [58]; *Kiani v Secretary of State for the Home Department* [2015] EWCA Civ 776; [2016] Q.B. 595 at [14].
[30] *R. v Docherty (Shaun Kevin)* [2016] UKSC 62; [2017] 1 W.L.R. 181 at [29]; and *R. (Reilly) v Secretary of State Work and Pensions* [2014] EWHC 2182 (Admin); [2015] Q.B. 573 at [53].
[31] *R. (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68; [2015] 1 W.L.R. 5055 at [31].
[32] *R. v Lambert (Steven)* [2001] UKHL 37; [2002] 2 A.C. 545 at [33].
[33] *R. (Barclay) v Secretary of State Justice* [2009] UKSC 9; [2010] 1 A.C. 464.
[34] *R. (Barclay)* [2010] 1 A.C. 464 at [3].
[35] *R. v TRA* [2018] EWCA Crim 2843; [2020] Crim. L.R. 263 at [14].
[36] *R. v Ahmed (Rangzieb)* [2011] EWCA Crim 184; [2011] Crim. L.R. 734 at [28].
[37] *R. (Mohamed) v Secretary of State Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin); [2009] 1 W.L.R. 2579 at [143].
[38] *R. (Hemmati) v Secretary of State for the Home Department* [2018] EWCA Civ 2122; [2019] Q.B. 708 at [193]–[194].

For example, in his judgment in *Mohammed*,[39] Lord Sumption, wishing to go beyond the limitations of art.5 ECHR, noted that it was unique among international codes of human rights protection and that its exhaustive list of six grounds authorising a deprivation of liberty was not reflected in the International Covenant on Civil and Political Rights (ICCPR) "which is an expansion in treaty form of the Universal Declaration of 1948".[40] This can be contrasted with Lady Hale's earlier judgment in *Al-Jedda*,[41] where she used the open ended terms of art.9 of the UDHR—the general prohibition of arbitrary detention—as a contrast to the limited grounds of art.5 ECHR, and explain why art.5 should remain as it was:

> "The drafters of the Convention had a choice between a general prohibition of 'arbitrary' detention, as provided in article 9 of the Universal Declaration of Human Rights, and a list of permitted grounds for detention. They deliberately chose the latter. They were well aware of Churchill's view that the internment even of enemy aliens in war time was 'in the highest degree odious'. They would not have contemplated the indefinite detention without trial of British citizens in peace time".[42]

In its judgment in *Kennedy*, a majority of the Supreme Court used the UDHR to support its conclusion that art.10 ECHR did *not* include a right of access to information observing that the word "seek" appears in the UDHR at art.19, but not in the ECHR:

> "But it is worth noting that the original draft of article 10 prepared by the Committee of Experts provided a right 'to seek, receive and impart information ideas', and that, in the light of its presence in the prior Universal Declaration of Human Rights, some significance must attach to the subsequent omission of the word from article 10".[43]

Article 29(1) of the UDHR, "everyone has duties to the community", has been utilised to support the conclusion that there is no absolute right to protest afforded by either arts 10 or 11 ECHR.[44] It was also observed by the House of Lords in *Brown v Stott* that art.29 of the UDHR expressly recognises the "duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others".[45] This supported its conclusion that the art.6 ECHR right against self-incrimination was not an absolute right and had to be balanced against the public interest in the enforcement of road traffic laws.

It has been held that the right to education in art.2 of Protocol 1 to the ECHR is more limited than the corresponding right in the UDHR as its inclusion in the ECHR was controversial.[46] Using the UDHR to bolster his reasoning, Lord Scott in his judgment in *Qazi*[47] explained that the rights of landlords to recover possession of their property should be unaffected by human rights guarantees:

> "The Universal Declaration and the Convention were the product of the horrors of fascism which led to World War II and the Holocaust. One of the recitals to the former records that 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind'. The intention of these instruments was to enshrine fundamental rights and freedoms. It was not the intention to engage in social engineering in the housing field. It was, in 1948 and 1950, when these instruments came into being, and it still remains, the province of individual signatory states to decide for themselves what social housing legislation to introduce. Thus, if a signatory state chose not to provide any security of tenure to residential tenants, so that on the expiry of every tenancy

[39] *Mohammed v Secretary of State Defence* [2017] UKSC 2; [2017] A.C. 821.
[40] *Mohammed* [2017] A.C. 821 at [42].
[41] *R. (Al Jedda) v SS for Defence* [2007] UKHL 58; [2008] 1 A.C. 332.
[42] *R. (Al Jedda)* [2008] 1 A.C. 332 at [122].
[43] *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] A.C. 455 at [98] and [214].
[44] *Austin v Commissioner of Police of the Metropolis* [2005] EWHC 480 (QB); [2005] H.R.L.R. 20 at [593].
[45] *Brown v Stott* [2003] 1 A.C. 681; [2001] 2 W.L.R. 817.
[46] *Re Croskery's Application for Judicial Review* [2010] NIQB 129 at [20].
[47] *Qazi v Harrow LBC* [2003] UKHL 43; [2004] 1 A.C. 983.

> the landlord would become entitled to recover possession, this state of affairs would offend neither article 12 of the Universal Declaration nor article 8 of the Convention".[48]

Whether or not art.8 encompasses a right to citizenship remains unresolved despite frequent references to art.15 of the UDHR as reflecting the importance of nationality in international law.[49]

In a similar fashion, attempts to use the UDHR to develop common law human rights protection have not been successful and all indications are that the UDHR operates mostly as a ceiling on any novel developments. For example, the Court of Appeal in its judgment in *Begum*[50] dismissed the argument that art.15 UDHR, the right to a nationality and the right not to be arbitrarily deprived of nationality, were part of customary international law and therefore the common law. The court held that the status of customary international law in interpreting and applying the common law were not a matter requiring resolution on the appeal as "safeguards to protect against the risk of arbitrariness" and the "minimum requirements of a right to an independent review of a deprivation decision by a judicial or administrative body" were principles well-recognised in English public law.[51]

Arguments in the Supreme Court in *Elgizouli* that the "death row phenomenon" was contrary to customary international law, based on art.5 UDHR, were also not successful. It was held that in the absence of firm, tangible evidence that the process of evolution had been completed, or that there was a general practice, it was impossible to accept the arguments based on customary international law.[52]

Further back, in the European Roma Rights Centre's challenge to UK pre-entry clearance at Prague Airport,[53] the House of Lords confirmed that art.14 of the UDHR provides that "everyone has the right to seek and to enjoy in other countries asylum from persecution" but confirmed that those who drafted this provision "rejected a proposal that a right to asylum should be granted".[54] Nevertheless, Lady Hale made reference to art.2 of the UDHR as supporting the House of Lords' conclusion that the Prague operation was carried out in a discriminatory fashion:

> "In this respect it was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party. It is commonplace in international human rights instruments to declare that everyone is entitled to the rights and freedoms they set forth without distinction of any kind such as race, colour, sex and the like: see, for example, the Universal Declaration of Human Rights 1948, article 2; the International Covenant on Civil and Political Rights 1966, article 2; the European Convention on Human Rights, article 14; and the Refugee Convention itself in article 3".[55]

Whilst there are some judgments where the UDHR has been used as a tool to support a more generous and expansive interpretation of Convention rights, these are not as numerous. For example, concluding that humanist beliefs engaged art.9 of the ECHR, the High Court had regard to the UDHR and the general comment on art.18 UDHR from the UN Human Rights Committee.[56] It has been held that the ability to take employment is an aspect of private life and in reaching this conclusion the High Court made reference to the right to work as set out in the UDHR and the European Social Charter.[57] The UDHR has also been cited, and influential, in relation to difficult procedural questions such as the application of the HRA to a

[48] *Qazi* [2004] 1 A.C. 983 at [123].
[49] See, for example, *Re Chuinneagain's Application for Judicial Review* [2022] NICA 56 at [76]; and *R. (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56; [2017] A.C. 365. Article 15 UDHR provides: (1) Everyone has the right to nationality; (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.
[50] *Begum v Special Immigration Appeals Commission* [2020] EWCA Civ 918; [2020] 1 W.L.R. 4267 at [108].
[51] *Begum* [2020] 1 W.L.R. 4267 at [108].
[52] *R. (Elgizouli) v Secretary of State for the Home Department* [2020] UKSC 10; [2021] A.C. 937 at [151].
[53] *R. (European Roma Rights Centre) v Immigration Officer Prague Airport* [2004] UKHL 55; [2005] 2 A.C. 1.
[54] *R. (European Roma Rights Centre)* [2005] 2 A.C. 1 at [14] per Lord Bingham.
[55] *R. (European Roma Rights Centre)* [2005] 2 A.C. 1 at [98].
[56] *Smyth's Application for Judicial Review* [2017] NIQB 55 at [46].
[57] *R. (Tekle) v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin) at [35].

particular fact situation. For example, in determining the scope of diplomatic immunity when there were concerns for the welfare of the children of a diplomat and his wife, the High Court noted that neither the UDHR nor the ICCPR contained any provision reconciling the human rights guaranteed with the immunities of diplomats.[58] Therefore, whilst art.3 of the ECHR was not as effective as it was for other children, they were not without protection.

The UDHR outside of the human rights context

Outside of the human rights context, the UDHR has had a little more impact as a tool of interpretation. For example, taking into account the words in the Preamble "if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression", the Court of Appeal concluded that "violence in a justified cause cannot be said to be the exclusive prerogative of governments". Therefore, when formulating a definition of "terrorism", it was clear to the Court of Appeal that "despite the commonality of view that terrorism was detestable, subtle refinements and differences about its true meaning could legitimately arise for discussion."[59]

The UDHR has played an important role in developing the definition of persecution in the context of the law of asylum and it has been held that the UDHR is "fundamental to a proper understanding" of the Refugee Convention.[60] For example, in *HJ (Iran)*,[61] the UDHR was important to the Supreme Court's conclusion that if a person had a well-founded fear that he would suffer persecution on being returned to his country of nationality were he to live openly as a gay man, he was to be regarded as a refugee for the purposes of the Refugee Convention even though, because of the fear of persecution, he would in fact live discretely and avoid suffering actual harm. It was noted that the reference in the Preamble to the UDHR to equal rights showed that "counteracting discrimination was a fundamental purpose of the Convention" and that this was also expressed in art.2. This was despite the fact that sexual orientation is not mentioned in the UDHR itself:

> "No mention is made of sexual orientation in the preamble or any of its articles, nor is sexual orientation mentioned in article 1A(2) of the Convention. But coupled with an increasing recognition of the rights of gay people since the early 1960s has come an appreciation of the fundamental importance of their not being discriminated against in any respect that affects their core identity as homosexuals. They are as much entitled to freedom of association with others of the same sexual orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight".[62]

The ground of persecution on the basis of membership of a particular family has also been developed utilising the UDHR given that art.16(3) provides that the "family is the natural and fundamental group unit of society" and that art.2 provides that everyone is entitled to the rights and freedoms set forth in the UDHR without distinction of any kind such as birth or other status. The House of Lords has held:

> "It is a commonplace that society may discriminate against a person because of his or her family membership (that is, an aspect of his or her 'birth or … status'). Families of criminals for example often suffer in this way. It is reasonable to say that the inclusion of the reference to 'birth or other status' in the UDHR was some recognition of this kind (among other kinds) of discriminatory tendency".[63]

[58] *Barnet LBC v AG* [2021] EWHC 1253 (Fam); [2021] Fam. 404 at [61].
[59] *R. v F* [2007] EWCA Crim 243; [2007] Q.B. 960 at [24].
[60] *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 A.C. 596 at [14] per Lord Hope. See also *Islam v Secretary of State for the Home Department* [1999] 2 A.C. 629.
[61] *HJ (Iran)* [2011] 1 A.C. 596 at [14] per Lord Hope.
[62] *HJ (Iran)* [2011] 1 A.C. 596 at [14] per Lord Hope.
[63] *K v Secretary of State for the Home Department* [2006] UKHL 46; [2007] 1 A.C. 412 at [65].

The UDHR has also been utilised in the ongoing debates about nationality and citizenship stripping. Article 15 of the UDHR provides that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. However, as noted above, it has not yet been held by a UK court that art.8 ECHR encompasses this right, although it has been held that in addition to the "practical benefits conferred by citizenship, a person's nationality may be a matter of profound psychological importance to them".[64] Citizenship stripping is lawful although it is not lawful to make someone stateless as a result. This was confirmed by the Supreme Court in its judgment in *Al-Jedda* making reference to art.15 UDHR:

> "The evil of statelessness became better understood following the re-drawing of national boundaries at the end of the two world wars of the twentieth century and following, for example, the Reich Citizenship Law dated 15 September 1935 which provided that all Jewish people should be stripped of their citizenship of the German Reich".[65]

Prospects for an imaginative future

The UDHR does have a special status which encourages and permits judges to refer to it in their decisions. It provides background and context to modern human rights law, in particular the HRA and ECHR rights, and is a reminder of the history of the framework and also the English common law roots of many of the guarantees. Beyond this it is also used as a tool of interpretation, both as an overarching principle, and as conduit for the use of the principle of dignity in judicial decision making. It can also be deployed to boost the importance of particular Convention rights, and also common law rights.

However, when it comes to using the UDHR to expand the scope of human rights protection, there is reluctance. It is true that in the absence of submissions referring to the UDHR, judges rarely have the opportunity to consider creative UDHR arguments. Nevertheless, there are quite a few examples of the UDHR being used to limit the scope of Convention rights from what they might have otherwise been, and its use to impose a ceiling on any progressive development of common law rights. Outside of the human rights law context it has had a more marked impact on the development of the law of asylum. However, the very clear opportunity to use art.15 of the UDHR, in conjunction with art.8 ECHR to declare citizenship stripping unlawful has not been taken.

With its 75th anniversary celebrations once again highlighting this profound achievement, the UDHR will undoubtedly continue to enjoy an elevated status in the public consciousness, but its prospects for an imaginative future in national human rights jurisprudence should the current trajectory continue are not strong. Keir Starmer in his maiden speech to Parliament in 2021 quoted Roosevelt's description of the UDHR as the "international Magna Carta of all men everywhere". And, in a later article he described the UDHR as a "set of exercisable rights — agreed upon collectively by nations — that apply to everyone, wherever they are in the world".[66] But at least in the UK, to a large extent this well spring of opportunity has not really been capitalised on in law, policy or practice.

For the UDHR to reach its potential, there needs to be much more reference to it in academic and public discourse and in legal proceedings particularly where UDHR rights are not reflected in national guarantees.[67] At a time when the UK Parliament has recently passed some of the most draconian immigration laws in its history, it is important to remember the support from the UDHR for the universality and inalienability of human rights, and the principle of respect for human dignity it inspires and protects. According to the

[64] *Re Y (Children in Care: Change of Nationality)* [2020] EWCA Civ 1038; [2021] Fam. 199 at [6].

[65] *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62; [2014] A.C. 253 at [12]. See also *R. (Agyeman) v Secretary of State Foreign and Commonwealth Affairs* [2010] EWHC 2180 (Admin); [2010] A.C.D. 92 at [14]; and *EB (Ethiopia) v Secretary of State for the Home Department* [2007] EWCA Civ 809; [2009] Q.B. 1 at [67]–[68].

[66] K. Starmer, "Roosevelt's legacy: human rights after Brexit" [2017] E.H.R.L.R. 103.

[67] In its *Report of the Commission on the UK's Future* (Labour: London 2022) Labour has proposed four new social rights relating to health, schooling, poverty and housing.

UDHR everyone has the right to recognition everywhere as a person before the law (art.6), the right to seek and to enjoy in other countries asylum from persecution (art.14) and the entitlement to a social and international order in which the rights and freedoms in the UDHR can be fully realised (art.28). In 25 years' time when we are celebrating the UDHR's 100th anniversary, it is important to ask if we will we be celebrating remarkable developments in jurisprudence, or lamenting another long period of lost opportunity.

The Supreme Court's Recent Approach to Unincorporated Human Rights Treaties

Lewis Graham*

Dualism; Human rights; International law; Supreme Court

Abstract

The United Kingdom's (UK) constitution is a dualist one, and international human rights treaties which have not been incorporated into domestic law by Parliament will not have direct legal enforceability. However, this does not mean that unincorporated human rights treaties have no effect at the domestic level whatsoever, although the nature and extent of this effect is contestable and subject to ongoing judicial debate. In this article I argue that the UK Supreme Court (UKSC) has recently adopted a position which is, on the whole, relatively resistant to the influence of unincorporated international human rights law, recognising its application only under quite narrow circumstances. The current UKSC judges appear to endorse a more rigid and conservative conception of dualism compared to their predecessors.

Introduction

We know from the Supreme Court's judgment in the *Miller I* case that international law and domestic law "operate in independent spheres".[1] We know that the United Kingdom (UK) constitution is, to quote Lord Mance, "fundamentally dualist".[2] We know, therefore, that human rights treaties which have been implemented via domestic legislation by Parliament have legal effect and can be considered by courts. Unincorporated human rights treaties agreed by the executive do not have legal effect, and so should not be considered by courts.[3] So far, so straightforward.

Equally, however, we know that the UK constitution is not so simple. The kind of rigid dualism which would prevent judges from undertaking *any* consideration of international law in domestic cases is, at best, a caricature of the true position. Dualism does not mean, and has never meant, that international law issues, including those related to unincorporated human rights treaties, will never come before domestic courts.[4] But the exact circumstances under which this influence will be felt is not always clear-cut and, over time, judges have differed between one another as to the appropriate scope and strength of this influence. In this article, I suggest that over recent years, the judges of the Supreme Court have adopted a fairly *narrow position* as to what the proper influence of international law in general, and unincorporated human rights treaties in particular, should be in the domestic setting.

For the purposes of this article, I suggest that there are (at least) five distinct ways in which international human rights treaties can have potential influence on the operation of domestic law: first, by direct

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[1] *R. (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61 at [55]. See also *Re Allister* [2023] UKSC 5; [2023] 2 W.L.R. 457 at [28] and [30] (repeating the language of "independent spheres") and *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] A.C. 223 at [78] (invoking the language of "separate spheres").

[2] Lord Mance, "International Law in the Supreme Court", lecture given at King's College London, 13 February 2017 at 1.

[3] This vision of dualism has been espoused in some parts of the press: see e.g. S. Barrett, "Changing the Northern Ireland Protocol won't break the law" (13 June 2022), *The Spectator*, who suggests that international law is "pretend" law, made "real" only when it is incorporated via Act of Parliament, upon which it becomes "actual, enforceable law". Before that point, according to Barrett, we need not consider it at all.

[4] Lord Mance, "International Law in the Supreme Court", lecture given at King's College London, 13 February 2017 at 7.

enforcement via the judiciary; second, by influence upon the European Convention on Human Rights (ECHR); third, as an influence upon domestic statutory interpretation; fourth, as an influence on the development of the common law; fifth, when it is voluntarily relied upon by parties to a case. I make no claim that these categories are exhaustive. But they usefully reflect the circumstances in which the Supreme Court has had an opportunity to consider international law in recent years, and, I hope, are therefore sufficiently illustrative for present purposes.

Below, I consider each of these modes of influence in turn, and analyse how they have been treated in recent decisions of UK Supreme Court. Overall, I suggest that the cases indicate a distinct judicial attitude towards unincorporated international law on the part of the court, certainly one which is more sceptical of its influence compared to earlier incarnations, through its commitment to a fairly traditional—some might suggest *outdated*—conception of the dualist constitution.

Route one: direct enforcement of international treaties

The first, and most direct, route of influence is the direct judicial enforcement of international treaties in the domestic realm. Understandably, arguments of this kind have always been given short shrift by domestic judges. The well-known position is that unincorporated international treaties of any kind "do not form part of domestic law" and therefore "can create no rights or obligations under domestic law".[5] It may be somewhat surprising, then, to see that in the case of *SC* Lord Reed was careful to explicitly confirm that it would be inappropriate for the court to determine whether a domestic provision complied with the United Nations Convention on the Rights of the Child (UNCRC), on the basis that it was an unincorporated treaty.[6] In a later case brought by The Project for the Registration of Children as British Citizens, the court confirmed that the UK constitution "exclude[s] a challenge to the validity of … legislation on the ground of inconsistency with … international law".[7] And in the case of *JB*, the court roundly rejected the idea that "this court should examine whether the United Kingdom has violated provisions of an unincorporated international treaty".[8]

Richard Ekins has lauded this dicta, arguing that it "vindicates constitutional dualism".[9] But that is true only in a very trite way. *This particular effect* of dualism was never really in doubt. The court has never seriously considered directly implementing international law, or invalidating primary legislation on the basis of some incompatibility with it.[10] Indeed, looking slightly more closely, it appears that the parties in these cases were not arguing for this kind of direct implementation (or at least not exclusively). Rather, they were arguing that international law should, in each case, have influence via one of the alternative routes described below. The parties were not challenging the notion that "domestic courts cannot determine whether [the UK] has violated its obligations under unincorporated international treaties" directly.[11] That is not what the parties were advocating for in these cases.

Nevertheless, the court saw these cases as a useful opportunity to reinforce a strong message about international law: unincorporated treaties have no (direct) validity in domestic law. Those arguing otherwise should stay away. The domestic judges are concerned (only) with the domestic law.

[5] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418 at 499; *Belhaj v Straw* [2017] UKSC 3; [2017] A.C. 964 at [123]; *R. (Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin) at [25].

[6] *R. (SC)* [2022] A.C. 223 at [76]–[78].

[7] *R. (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] A.C. 255 at [56].

[8] *Local Authority v JB* [2021] UKSC 52; [2022] A.C. 1322 at [120].

[9] R. Ekins, "Convention rights, child tax credits and the constitution" (2021) L.Q.R. 551, 553.

[10] It is acknowledged that a small number of judges, from time to time, have suggested that the default position in relation to the inapplicability of unincorporated international law might be modified with respect to certain human rights treaties: *Re McKerr's Application for Judicial Review* [2004] UKHL 12; [2004] 1 W.L.R. 807 at [49]–[50] (Lord Steyn); *R. (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at [254] (Lord Kerr). These arguments have never received majority support.

[11] *R. (SC)* [2022] A.C. 223 at [84].

Route two: influence on the ECHR

The European Convention on Human Rights does *not* fall into the same category as the unincorporated treaties considered above. Putting to one side the debate as to whether it is strictly accurate to say that the Human Rights Act 1998 (HRA) *incorporated* the ECHR,[12] it is, at minimum, clear that the HRA was intended, largely, to mirror the content of the European Convention, and that rulings of the Strasbourg Court have significant (if not decisive) influence on the interpretation of the HRA at the domestic level.

The European Court of Human Rights (ECtHR) often looks to the standards set out in various unincorporated international human rights treaties when defining the scope and content of rights. It has held that the ECHR "cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law".[13] Sometimes, in filling this vacuum it practically imports standards directly from treaties into the jurisprudence of the Convention. As such, given that unincorporated human rights treaties influence the case law of the European Court of Human Rights, which in turn influences the domestic interpretation of the HRA, can it be said that, *via the HRA and ECHR*, unincorporated international human rights treaties might have a conduit into UK law?

For example, the UNCRC has had particularly acute influence on the Strasbourg case law relating to children and art.8 of the ECHR. In an earlier domestic case, Lord Reed confirmed that "it is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere".[14] As a result, he thought it was "clear… that the UNCRC can be relevant to questions concerning the rights of children under the ECHR".[15] On this basis, the Supreme Court felt able to say, in the 2011 case of *ZH*, that when it comes to the proportionality exercise under art.8(2), "the Strasbourg Court will expect national authorities to *apply*article 3(1) of UNCRC".[16]

Other areas in which international human rights treaties have had notable influence on the scope and content of specific ECHR rights include the UN Convention on Rights of Persons with Disabilities (UNCRPD), which has been particularly influential when it comes to art.14 of the ECHR[17] and the European Convention Against Trafficking (ECAT), which has particular relevance for art.4 of the ECHR.[18]

How has the Supreme Court approached this route? In theory, the court has remained open to this kind of indirect influence, acknowledging in *SC* that the substantive content of the ECHR jurisprudence is often influenced by relevant international treaties,[19] and, more notably, that aspects of these unincorporated human rights treaties might therefore have some influence at the domestic level, "to the extent they have been given effect by" the ECHR case law.[20]

In practice, however, the scope for such influence has been very narrow indeed. In *SC*, when considering the extent of the impact of the two-child tax credit limit on children, the court refused to consider the standards found in art.3(1) of the UNCRC, in the very same provision that was considered directly relevant in *SG*, and practically directly applicable in *ZH*, above. Lord Reed said that the influence of the UNCRC in the ECHR case law "clearly… has not" given "direct legal effect to unincorporated treaties"[21] at the domestic level, and to consider the content of the UNCRC would be to, in effect, impermissibly "directly incorporate … specific obligations on the contracting states via the Convention".[22] Whilst the court did

[12] Consider *R. v Lyons* [2002] UKHL 44; [2003] 1 A.C. 976 at [27]; *Re McKerr* [2004] 1 W.L.R. 807 at [64]–[66].
[13] *Neulinger v Switzerland* (2010) 54 E.H.R.R. 1087 at [131].
[14] *R. (SG)* [2015] 1 W.L.R. 1449 at [83].
[15] *R. (SG)* [2015] 1 W.L.R. 1449 at [86].
[16] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 A.C. 166 at [25] (emphasis mine). See also *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 W.L.R. 3690 at [10]–[11].
[17] See e.g. *Burnip v Birmingham City Council* [2012] EWCA Civ 629; [2013] P.T.S.R. 117 at [19]–[22].
[18] See e.g. *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9; [2020] 1 W.L.R. 1373 at [17]–[33].
[19] *R. (SC)* [2022] A.C. 223 at [80].
[20] *A v Criminal Injuries Compensation Authority* [2021] UKSC 27; [2021] 1 W.L.R. 3746 at [33]. See also *R. (SC)* [2022] A.C. 223 at [86].
[21] *R. (SC)* [2022] A.C. 223 at [79].
[22] *R. (SC)* [2022] A.C. 223 at [83].

expressly disapprove of some earlier cases which relied on art.3(1) directly, it did not suggest that cases such as *ZH* had been wrongly decided. Similar statements were made in other cases, such as in *A and B*, where the court disapproved of reliance on the ECAT,[23] and in the case of *AB*, in which the court rejected the relevance of General Comments of the UNCRC to the interpretation and application of the domestic HRA.[24]

How can the court's acceptance of the validity of this route in theory be squared by its almost wholesale rejection of its application?

The court appears to be drawing a line between permissible and impermissible influence based on two considerations. Firstly, it has considered the *extent* of the influence of unincorporated human rights treaties: the court might be open to those treaties playing some background role, and some influence on the general norms adopted by the European Court, but it has been resistant to what it calls "passporting"[25] or the "wholesale adoption"[26] of substance from an unincorporated source to the ECHR. Secondly, the court has been much more comfortable with the influence of treaties where this has already, in a sense, taken place at the Strasbourg level, where international standards have already been translated into the content of a given Convention right. The court is much more reluctant to assess and apply the standards of international law itself, even if there has already been a clear steer, or perhaps a positive requirement, for it to do so on the part of the Strasbourg Court.

Even if such a dividing line can be drawn, its boundaries are very unclear. Why does the potential influence of the UNCRC in a case like *SC* amount to impermissible "passporting", whereas in cases such as *ZH* it did not? If the Strasbourg Court has directly integrated the standards of some international treaty, why should the domestic judges balk at the idea of assessing these standards themselves, looking at the relevant documents and case law if necessary? It seems the court has tried to justify its approach—keeping the door open to unincorporated treaty influence in the context of the ECHR in theory but resisting its influence in practice—by defining "passporting" widely and imposing a bar to application which is almost impossible to surmount in practice. This, naturally, has resulted in unincorporated human rights treaties having a very limited influence in domestic law, even in circumstances where the case law ECHR case law might permit—or even require—the courts to do otherwise.

Route three: an influence on statutory interpretation

In the classic case of *Brind*, the House of Lords considered that:

> "[I]t is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it".[27]

The court was considering the ECHR which, at the time, had not been incorporated into domestic law. But these comments apply with the same force to other unincorporated treaties, including (and perhaps especially) those relating to human rights standards, in relevant and applicable cases.[28] In the case of *Smith v Smith*, Lady Hale said the following:

[23] *A v Criminal Injuries Compensation Authority* [2021] 1 W.L.R. 3746 at [33].
[24] *R. (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] A.C. 487 at [64].
[25] *R. (SC)* [2022] A.C. 223 at [85].
[26] *A v Criminal Injuries Compensation Authority* [2021] 1 W.L.R. 3746.
[27] *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696 at 747. See also *R. v Secretary of State for the Home Department Ex p. Venables* [1998] A.C. 407 at 499.
[28] *Alcom v Republic of Columbia* [1984] A.C. 580; *United States v Nolan* [2015] UKSC 63; [2016] A.C. 463 at [27]–[28] and [45]–[47].

> "Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken."[29]

This does not mean that there is an absolute obligation to construe legislation in line with international law. Parliament retains the power to legislate in a way which is out of step with international standards if it wishes, and the courts will uphold this. But there is, in theory, a "strong presumption" that domestic law should ordinarily follow applicable international law standards, and that Parliament would intend a compatible construction to be adopted.[30]

The recent jurisprudence of the Supreme Court has not been totally resistant to this kind of influence. Indeed, it has recognised that where a domestic statute was passed *for the specific purpose of* incorporating international obligations, the relevant international conventions relating to those obligations should form a relevant consideration in the interpretation of the domestic statute.[31] The court has also drawn on customary international law standards when interpreting domestic rules in relation to an arbitration enforcement against another sovereign state.[32] But in both of these cases, the domestic statute was intended, much like the ECHR, to implement or at least substantially mirror international obligations. What about the influence of unincorporated international law on statutory interpretation more generally?

Here, the court has been much less open. In the case of *JB*,[33] for example, the court rejected the argument that it should consider whether its interpretation of a domestic statute relating to mental capacity and sexual consent would conflict with the UNCRPD. This was not a rejection of the idea that it was not possible to interpret the law harmoniously with international standards; it was a rejection of the idea that international law should be relevant to the court's enquiry at all. Rather than framing the argument as relating to statutory interpretation, engaging the rules and presumptions set out in cases such as *Brind* and *Smith*, the court instead framed it as one advocating for the direct application of international law (it rejected "the contention that this court should examine whether the United Kingdom has violated provisions of an unincorporated international treaty" as it had done so in cases such as *SC*, above).[34] This is of course not true—the parties were claiming that the interpretation of the relevant domestic statute ought to be guided by principles of international law, insofar as it was possible to do so. But the very mention of an unincorporated human rights treaty by the claimant seemed to shut the door to any such construction.

It should be noted that in the *Independence Referendum Bill* case, the court did acknowledge the continued existence of a "strong presumption" that domestic legislation should be interpreted "in a way which does not place the United Kingdom in breach of its obligations in international law",[35] at least where there exists a significant degree of ambiguity as to the proper meaning of the domestic provision. On the facts, the court did not need to consider that issue any further, because no potential incompatibility with international rules arose in that case.[36] As such, we have yet to see an example of the current Supreme Court adopt the conforming interpretation principle, at least expressly, leaving the continued influence of unincorporated human rights treaties on domestic statutory interpretation in question. The hostile reconstruction of this argument in *JB* certainly does not inspire confidence.

[29] *Smith v Smith* [2006] UKHL 35; [2006] 1 W.L.R. 2024 at [78].
[30] *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 A.C. 471 at [122] and see Lord Mance, "International Law in the Supreme Court", lecture given at King's College London, 13 February 2017 at 8.
[31] *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48; [2022] 1 C.L.C. 275; *Basfar v Wong* [2022] UKSC 20; [2023] A.C. 33 at [16]–[17].
[32] *General Dynamics United Kingdom Ltd v Libya* [2021] UKSC 22; [2022] A.C. 318 at [57]–[59].
[33] *Local Authority v JB* [2022] A.C. 1322.
[34] *Local Authority v JB* [2022] A.C. 1322 at [120].
[35] *Re Scottish Independence Referendum Bill* [2022] UKSC 31; [2022] 1 W.L.R. 5435 at [87].
[36] *Re Scottish Independence Referendum Bill* [2022] 1 W.L.R. 5435 at [88]–[91].

Route four: An influence on common law development

A fourth way in which unincorporated international treaties might influence domestic law is via influencing the shaping or development of the common law. There are many judicial statements suggesting that international law norms, including those emanating from unincorporated human rights treaties, can and should have an influence on the development of common law standards.[37] Perhaps the most straightforward dicta comes from Lord Hughes in the case of *SG*: "international treaty obligations may guide the development of the common law".[38]

In contrast to when it is conducting statutory interpretation, when judges are considering the development of the common law, the direct intent of Parliament plays only a peripheral role. Of course, the judges must not act contrary to the wishes of the legislator but, as Lord Mance said in *Keyu* (a case strictly concerning customary international law rather than unincorporated treaties, but there is no reason why the same principle would not apply): international law standards "can and should shape the common law" and when it is sensible and appropriate to do so, judges can "adapt" these international law standards within the common law without the need for Parliamentary approval.[39]

Yet in the court's recent case law it is hard to find any evidence of international law contributing to the development of the common law (indeed, it is hard to find much evidence of the court choosing to develop the common law *at all*).[40] In the House of Lords cases of *A (No.1)*, concerning the circumstances under which national security emergencies might justify derogation from human rights standards, and *A (No.2)*, concerning the use of evidence which may have been obtained from the use of torture, Lord Bingham in particular infused his exegesis of the common law's approach to fundamental rights with references to the lofty international law standards on the protection of liberty and opposition to torture.[41] We may have expected to see the same when the Supreme Court came to examine the case of *Elgizouli* in 2020.[42] In that case, the court was asked to rule on the legality of the UK Government's involvement in information sharing with United States (US) authorities, some of which would likely contribute to the imposition of the death penalty against a British citizen. The claimants sought to argue that this action flouted common law standards, infused as it was, as the judges once at least claimed, with respect for the right to life and the dignity of the person. The court refused to find the transfer of information unlawful on common law grounds.[43] In sharp contrast to the *A* cases, it was only Lord Kerr, the lone dissenting judge, who drew on international and comparative law standards when considering the scope of any common law rights in play.[44] The majority instead focused, perhaps disproportionately, on bringing about what the legislature had intended; one of the reasons Lord Hodge gave for refusing to develop the common law in this case was the fact that "it is Parliamentary legislation rather than the common law which has created and delimits the right to life".[45] Notwithstanding the existence of other relevant cases in which the judges have expressly recognised a common law right to life,[46] there was no consideration here as to whether Parliament would have nevertheless "intended" the courts to ignore the powerful international law standards on the facilitation of the death penalty, or if it could have been intended that the common law should be so supine as to be incapable of evolving to protect against the fundamental human rights problems arising in this case. Once

[37] *Lyons* [2003] 1 A.C. 976 at [13] and [27]; *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71; [2006] 2 A.C. 221 at [27]; *R. v Mid Glamorgan Family Health Service Ex p. Martin* [1995] 1 W.L.R. 110 at 118. See also Lord Mance, "International Law in the Supreme Court", lecture given at King's College London, 13 February 2017 at 1; S. Fatima, "The Domestic Application of International Law in British Courts" in C. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019), p.494.

[38] *R. (SG)* [2015] 1 W.L.R. 1449 at [137].

[39] *R. (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] A.C. 355 at [150].

[40] See L. Graham, "Has the Supreme Court become more conservative in public law cases?" forthcoming, *Modern Law Review*.

[41] See e.g. *A v Secretary of State for the Home Department (No.1)* [2004] UKHL 56; [2005] 2 A.C. 68; *A (No.2)* [2006] 2 A.C. 221.

[42] *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2021] A.C. 937.

[43] The court did find that the transfer of information was unlawful for other reasons.

[44] Compare e.g. Lord Kerr at [107]–[134], Lord Carnwath at [196]–[198] and Lord Hodge at [233].

[45] *Elgizouli* [2021] A.C. 937 at [232].

[46] E.g. *R. v Secretary of State for the Home Department Ex p. Bugdaycay* [1987] A.C. 514.

again, wholly domestic considerations operated so as to completely exclude the influence of international human rights laws.

Route five: voluntary reference

The final way for unincorporated international human rights treaties to have some kind of influence in domestic law considered in this article is for those treaties, or certain terms within them, to be expressly and voluntarily incorporated into some law—or some private legal right?—which can be enforced at the domestic level.

The first way this might happen is for two parties to agree to be bound by certain rules of international law. Through the interpretation and enforcement of that agreement, the courts may have to grapple with unincorporated international law. For example, a contract may contain an arbitration agreement which stipulates that certain rules recognised in an unincorporated international treaty would apply to it. These kinds of cases are not controversial from a dualist perspective; private parties are free to set the terms of their personal legal relationships as they see fit, so long as they act within the law. Indeed, in its recent case law, the court has readily considered international law rules which were specifically provided for and incorporated into an agreement between private parties.[47]

Otherwise, legislation or other domestic rules might expressly require certain bodies to either comply with specific international law frameworks, or to expressly take those frameworks into account as part of their domestic legal duties. Courts have always adopted the position that, in the absence of any legislative obligation to do otherwise, a decision-maker *may*, but need not, take international law into consideration when exercising discretion.[48] As such, it is only when the law expressly (and in the case of unincorporated treaties, entirely voluntarily) makes reference to the content of unincorporated human rights treaties that the courts will have any jurisdiction to review the approach of public bodies towards them. Even when this is the case, the courts have always exercised a significant degree of deference in this area, for example, by requiring that a decision-maker's interpretation of such a treaty be assessed not to the ordinary correctness standard but to a lower "tenability" standard instead.[49]

Unsurprisingly, the court's recent approach to unincorporated international treaties does not disclose a more robust, activist approach. If anything, the court has been even more cautious, and even more deferential, than it has been previously. The court's judgment in the *Friends of the Earth*[50] is illustrative in this respect, showed an enthusiasm for dualism, even in the context of interpreting a statutory duty which arguably required the executive to engage with considerations of international law. Broadly, the case concerned the interpretation of the Planning Act 2008 which requires public bodies to explicitly consider, and account for, "government policy" in relation to combatting climate change when making certain decisions and policies.[51] The claimants argued that, in the creation and adoption of a qualifying policy in relation to airport expansions, the Secretary of State had breached this obligation by failing to make any reference to the UK's commitment to carbon targets which it undertook when signing the Paris Agreement in 2015.

The court held that the ratification of agreements in international law, such as the Paris Agreement, did not constitute a relevant "policy" to be taken into account for the purposes of the Planning Act. This was because "[r]atification is an act on the international plane" and any obligations flowing from this "are not part of UK law and give rise to no legal rights or obligations in domestic law".[52] Quite why this fact, which

[47] *Kabab-Ji SAL* [2022] 1 C.L.C. 275 at [41].
[48] *R. (Yam) v Central Criminal Court* [2015] UKSC 76; [2016] A.C. 771 at [35].
[49] *R. (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] A.C. 756; *R. (Friends of the Earth) v Secretary of State for International Trade* [2023] EWCA Civ 14; [2023] 1 W.L.R. 2011 at [40] and [55].
[50] *R. (Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] P.T.S.R. 190.
[51] Planning Act 2008 s.5(8).
[52] *Friends of the Earth* [2021] P.T.S.R. 190 at [108].

affects the direct effect of international legal obligations, should constrain the interpretation of the ostensibly unqualified definition of relevant "policies" in the Planning Act is unclear (especially given that the UK's commitment to the Paris Agreement had been repeatedly confirmed by ministers before Parliament).

Whatever the merits of the court's decision,[53] two things are clear: firstly, that the government's international law commitments operate as something less important, or are certainly taken less seriously, than their domestic law equivalents. Why else would a statutory definition of "policies" be presumed to apply exclusively to the domestic context? This fits perfectly in line with the dualist idea that domestic actions "count" whereas international ones do not. Secondly, it seems that the court has been reluctant to recognise even a statutory requirement for public authorities to *consider*, much less *comply with*, international law, including unincorporated international human rights law, in domestic statutes. It seems only a very express obligation to do so would convince a court to even *consider* a decision-maker's treatment of unincorporated international law in a domestic case.

Conclusion

Domestic courts have never shown much enthusiasm for overly ambitious arguments intending to translate unincorporated international law, including human rights law, into the domestic setting.[54] Time and time again, the lack of any direct effect attaching to such treaties has been emphasised by the judges.[55] That said, subject to appropriate qualifiers, conditions and limits, courts *have* been receptive to these treaties having some kind of indirect effect, whether it be through influence on the ECHR, the notion of conforming interpretation when performing statutory interpretation, the inherent flexibility in the development of the common law, or the voluntary undertakings referencing certain treaties specifically, whether by private parties, the executive or the legislature.

I have suggested, however, that whilst the Supreme Court remains committed to the existence of these avenues in theory, it has, in practice, interpreted the scope for unincorporated human rights treaties to have any kind of influence quite narrowly. Dualism has emerged again as the court's driving premise;[56] the independent (and supreme) standing of the domestic constitution must trump considerations such as consistency, justice, and ultimately, compliance with international law.

The *potential* influence of unincorporated human rights treaties in the UK domestic framework is considerable. Its *actual* influence has always been fairly modest. The Supreme Court's recent jurisprudence suggests that in future, its influence will be weaker than ever.

[53] On which see the convincing arguments of J. Bell and E. Fisher, "The Heathrow Case in the Supreme Court: Climate Change Legislation and Administrative Adjudication" (2023) 86(1) M.L.R. 226.

[54] See e.g. *R. v Jones (Margaret)* [2006] UKHL 16; [2007] 1 A.C. 136.

[55] Such a position had been "firmly established" by the time of *JH Rayner* [1990] 2 A.C. 418; *R. (SG)* [2015] 1 W.L.R. 1449 at [90].

[56] See references in the court's case law e.g. *R. (SC)* [2022] A.C. 223 at [78]; *Re Allister* [2023] 2 W.L.R. 457 at [28]–[31]; *Project for the Registration of Children as British Citizens* [2023] A.C. 255 at [56].

Bringing the International Covenant on Civil and Political Rights Home?

Dominic McGoldrick*

Human rights; International law

Abstract

This article is a thought-experiment. Given that the United Kingdom's (UK) Human Right Act 1998 has had over two decades to bed down, could and should the same model be extended to the International Covenant on Civil and Political Rights 1966, thereby giving "further effect to rights and freedoms guaranteed" under that Covenant? This could also serve to reinforce the 1998 Act and thereby continue the UK's evolutionary embrace with international human rights law. The article critically examines the UK's role in the development of the Covenant, the use of the Covenant in UK law and practice, and what a Covenant incorporation Act might look like. Finally, it considers the issues and challenges in adopting a model of incorporation based on the 1998 Act.

Introduction

As is well known, the Human Rights Act 1998 (HRA) was devised to give "further effect to rights and freedoms guaranteed under the European Convention on Human Rights" (ECHR)[1] and to "bring rights home".[2] On any credible assessment the HRA has achieved the latter objective. At the end of 2022, there were 99 pending applications before the European Court of Human Rights (ECtHR) against the United Kingdom (UK), representing the lowest rate of applications to the ECtHR per capita of all state parties to the ECHR. The number of cases communicated by the ECtHR to the government annually remains very low, with only two findings of violations made against the UK. Out of more than 1,000 interim measures granted in 2022 against parties to the ECHR, only five were granted against the UK.

This article is very much a thought-experiment. Given that the HRA has had over two decades to bed down, could and should the HRA model for the ECHR be extended to the Covenant,[3] thereby giving "further effect to rights and freedoms guaranteed under the International Covenant on Civil and Political Rights" (the Covenant)?[4] This could also serve to reinforce the HRA,[5] and thereby continue the UK's evolutionary embrace with international human rights law.[6]

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[1] Preamble to the Human Rights Act 1998 (HRA).

[2] *Rights Brought Home: The Human Rights Bill*, Cm.3782 (1997).

[3] The loss of the EU Charter of Rights might also prompt consideration of this issue. However, the UK's view is that, "The non-incorporation of the Charter of Fundamental Rights into UK law by the EU (Withdrawal) Act 2018 does not affect the substantive rights that individuals already benefit from in the UK, as the Charter was never the source of those rights": *Eighth periodic report on International Covenant on Civil and Political Rights submitted by UK*, CCPR/C/GBR/8, para.8.

[4] *United Nations Treaty Series*, Vol.999, p.171.

[5] D. Fottrell, "Reinforcing the Human Rights Act—the Role of the International Covenant on Civil and Political Rights" [2002] *Public Law* 485.

[6] D. McGoldrick, "The United Kingdom's Human Rights Act 1998 in Theory and Practice" (2001) 50*International and Comparative Law Quarterly* 901. Of course, the HRA itself has been the subject of persistent critiques in terms of its legitimacy, see R. Wolfsteller, "Out of sync: The failed translation of international human rights in the creation of the UK Human Rights Act" (2020) 19 *Journal of Human Rights* 325. Conservative governments have regularly promised to repeal or reform it, or to pass legislation designed to undermine it, e.g. the Illegal Migration Act 2023.

From the Universal Declaration of Human Rights (1948) to the Covenant (1966)

The non-legally binding Universal Declaration of Human Rights (UDHR) was the first part of the design for the International Bill of Rights. The Bill was completed in 1966 by the adoption of the legally binding Covenant, its (First) Optional Protocol (OP1) providing for the possibility of individual communications alleging violations of the Covenant, and the International Covenant on Economic, Social and Cultural Rights.[7]

The Preamble to the Covenant recognises that,

> "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights".

Both the Covenant and OP1 entered into force on 23 March 1976.

The UK and the Covenant

The UK played a major role in the drafting of the Covenant, which was a political as well as a legal process.[8] Nuanced opposition to measures often crossed ideological and political boundaries.[9] As with other states, the UK pursued its national and international interests. International human rights were predominantly viewed as an issue for export only.[10] This can explain the often-large degree of hypocrisy or inconsistency between principle and practice. The drafting period, 1947–66, coincided with the Cold War and extensive decolonisation.[11] Within the UK there were significant policy differences between the Foreign Office, which was generally more positive about the project, and the colonial office, which was more defensive and concerned about its consequences.[12] By 1951, the UK considered that the prudent course was to delay the Covenants for as long as possible.[13]

The UK signed the Covenant on 16 September 1968.[14] It ratified it on 20 May 1976, shortly after it had entered into force. By its act of ratification, the UK extended the ICCPR to Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, the Ducie and Oeno Islands, St. Helena and its dependencies (Ascension Island and Tristan da Cunha), and the Turks and Caicos Islands. The UK has not ratified the Covenant's OP1. It ratified the Covenant's OP2 (on abolition of the death penalty) in 1999. The UK has been a strong proponent against the use of the death penalty as a matter of principle.

The Human Rights Committee and monitoring systems

The only mandatory monitoring system under the Covenant is a periodic reporting system. The reports are considered by the Human Rights Committee (HRC), the Covenant's monitoring body. When the UK

[7] C.N.J. Roberts, *The Contentious History of the International Bill of Rights* (Cambridge: Cambridge University Press, 2015).

[8] D. McGoldrick and N. Parker, "The United Kingdom Perspective on the International Covenant on Civil and Political Rights" in D. Harris and S. Joseph (eds), *The Covenant and United Kingdom Law* (Oxford: Oxford University Press, 1995), p.69.

[9] R. Normand and S. Zaidi, *Human Rights at the United Nations: The Political History of Universal Justice* (Bloomington: University of Indiana Press, 2008), pp.197–242.

[10] A.W.B. Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 2001).

[11] D.A. Kay, "The Politics of Decolonization: The New Nations and the UN Political Process" (1967) 21 *International Organization* 786; D.P. Forsythe, "The UN and Human Rights, 1945–85" (1985) 100 *Political Studies Quarterly* 249; R. Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010); S.L.B. Jensen, *The Making of Human Rights* (Cambridge: Cambridge University Press, 2016).

[12] Simpson, *Human Rights and the End of Empire* (2001). For parallel concerns in relation to the ECHR see A. Lester, "Fundamental Rights: The UK Isolated" [1984] *Public Law* 53.

[13] Simpson, *Human Rights and the End of Empire* (2001), p.815.

[14] E. Schwelb, "The UK Signs the Covenants on Human Rights" (1969) 18 *International and Comparative Law Quarterly* 457.

Report is being considered there are also an extensive number of submissions or shadow reports from civil society organisations and devolved administrations.[15] The HRC issues Concluding Observations on each report. There is an optional individual petition (OP1) and an inter-state complaint procedure (arts 41–2) which have never been invoked. The UK's early ratification allowed it to seek to secure membership of UK nationals on the HRC. It did so from 1978–2016: Sir Vincent Evans (1976–84), Rosalyn Higgins (1984–1996), Lord Colville (1996–2000), Sir Nigel Rodley (2000–2016). The HRC is not a court, and its members are not judges. Rather it is a committee of 18 independent experts, many but not all of whom are lawyers. They are elected by state parties from nominations by states.[16] The treaty body election guidelines seek to achieve equitable geographical distribution in addition to representation of different types of civilisations and legal systems among the state parties, which helps ensure that no one region or culture dominates.

The Covenant and UK law

The UK's general view of the Covenant[17] and the ECHR were that changes were not necessary as the rights were already ensured by UK legislation and the common law.[18] That proved wrong with respect to the ECHR, with 329 violations found in 567 judgments up to 2022,[19] though the first adverse decision of the ECtHR did not come until 1975.[20] The seven sets of Concluding Observations of the HRC on the UK (1978–2015)[21] similarly suggest that there are a significant number of areas where the UK may be in violation of the Covenant. The 2015 Observations and recommendations were directed towards, inter alia, accountability for conflict-related violations in Northern Ireland, accountability for human rights violations committed by British forces abroad, racism and xenophobia, stop and search powers, non-discrimination and gender equality, violence against women, counter-terrorism, right of entry and deprivation of citizenship, self-inflicted deaths, including in custody, and self-harm in custody, termination of pregnancy in Northern Ireland, torture, diplomatic assurances and non-refoulement, corporal punishment, immigration detention, fair trial and administration of justice, administration of juvenile justice, government surveillance and interception of communications, and prisoners' right to vote.[22]

"Incorporation" of the Covenant

The general Covenant obligation imposed on states is to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction. However, there is no requirement that "the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law".[23] Though there is no Covenant obligation to incorporate the rights into domestic law in any particular way,

[15] See, for example, as of 19 January 2024, there were thirty submissions from civil society organizations in relation to the United Kingdom's Eighth Periodic Report, UN Doc. CCPR/C/GBR/8 (11 November 2021), all available at UN Treaty Body Database *https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx*, under United Kingdom.

[16] V. Carraro, "Electing the Experts: Expertise and Independence in the UN Human Rights Treaty Bodies" (2019) 25 *European Journal of International Relations* 826.

[17] F. Klug, K. Starmer and S. Weir, "The British way of doing things: the United Kingdom and the ICCPR, 1976–94" [1995] *Public Law* 504.

[18] Simpson, *Human Rights and the End of Empire* (2001). For a comprehensive presentation of the UK's and British Overseas Territories constitutional, political and legal structure, see UN Doc. HRI/CORE/GBR/2011, paras 3–44. For an updated but reduced version see *Common core document forming part of the reports of States parties*, UK (updated 2022), available at: *https://assets.publishing.service.gov.uk/media/62861de8e90e071f69f225e3/uk-common-core-document-2022.pdf*.

[19] ECtHR, *Violations by Article and by State*, available at: *https://www.echr.coe.int/documents/d/echr/stats_violation_1959_2022_eng*.

[20] *Golder v UK* (App. No.4451/70), judgment of 21 February 1975.

[21] Fottrell, "Reinforcing the Human Rights Act—the Role of the International Covenant on Civil and Political Rights" [2002] *Public Law* 485, 493–494; Klug, Starmer and Weir, "The British way of doing things: the United Kingdom and the ICCPR, 1976–94" [1995] *Public Law* 504. The Eighth Report is scheduled to be considered in 2024.

[22] CCPR/C/GBR/CO/7.

[23] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRC, General Comment (GC) 31, para.13 (2009), UN Doc. CCPR/C/GC/33. Incorporation of the Covenant necessarily carries costs and risks. Cf. J.L. Goldsmith, "Should International Human Rights Law Trump US Domestic Law?" (2000) 1 *Chicago Journal of International Law* 327 ("[A] domesticated Covenant would generate enormous litigation and uncertainty, potentially changing domestic civil rights law in manifold ways.").

the same was true of the ECHR and ECHR rights. However, the view of the HRC is that "Covenant guarantees may receive enhanced protection in those states where the Covenant is automatically or through specific incorporation part of the domestic legal order".[24] It has consistently recommended that the UK incorporate the Covenant. In 2001, it regretted that the UK, "while having incorporated many Covenant rights into its domestic legal order through the Human Rights Act 1998, has failed to accord the same level of protection to other Covenant rights, including the provisions of Articles 26 and 27".[25] In its most recent concluding observations in 2015, the committee noted that the Covenant was not directly applicable in the UK and throughout its overseas territories and Crown dependencies, and recalled that several Covenant rights were not covered by the HRA. It was concerned about the slow progress in introducing the Bill of Rights for Northern Ireland and about the lack of a comprehensive mechanism for reviewing existing gaps and inconsistencies between the domestic human rights legal framework and the rights as set forth in the Covenant. The UK should, inter alia, ensure that any legislation passed in lieu of the HRA was aimed at strengthening the status of international human rights, including the provisions of the Covenant, in the domestic legal order, and provide effective protection of those rights across all jurisdictions.[26]

Of course, international treaties ratified by the UK are not usually directly incorporated into UK law. It is a fundamental principle of UK constitutional law that an unincorporated treaty does not form part of the law of the UK.[27] In general, the UK complies with its international obligations by enacting or amending domestic legislation to ensure compatibility with its treaty obligations.[28] To date, the HRC's "incorporation" of (or more precisely giving further effect to) the ECHR is the exception to the rule.[29] It represented a "major shift in how the UK political and legal system works".[30] It affords a privileged status to one international human rights treaty only,[31] to the detriment of others and, in the view of some, to the detriment of the common law.[32] There is no real doubt that because of the HRA it is the ECHR that has stolen the limelight. It is therefore rather unsurprising that the Covenant has had had little or relatively little impact on UK law, policy and practice,[33] and that there are a limited number of commentaries on the Covenant in general[34] and its impact on UK law in particular.[35] The Covenant plays a role in the formulation of British Government policy, both at home and abroad. At home, draft legislative or other proposals are scrutinised by the Foreign, Commonwealth and Development Office Legal Advisors if it is thought there is any risk of incompatibility with the UK's international obligations, including those under the Covenant. A 1995 study found that it was rarely cited in judicial decisions between 1972 and 1993.[36] The situation

[24] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRC, General Comment (GC) 31, para.13 (2009), UN Doc. CCPR/C/GC/33.

[25] CCPR/CO/73/UK, para.7.

[26] CCPR/C/GBR/7, para.5.

[27] *R. (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] A.C. 223 at [77]–[78] and [91]–[96].

[28] *Common core document forming part of the reports of States parties*, UK, UN Doc. HRI/CORE/GBR/2011, paras 3–44 and para.151.

[29] *R. (SC)* [2022] A.C. 223 at [79].

[30] *Common core document forming part of the reports of States parties*, UK, UN Doc. HRI/CORE/GBR/2011, para.158. How the HRA works is explained in *Core Report*, paras 154–169; McGoldrick, "The United Kingdom's Human Rights Act 1998 in Theory and Practice" (2001) 50 International and Comparative Law Quarterly 901.

[31] "The only treaty to which the Human Rights Act gives domestic legal effect is therefore the Convention": *R. (SC)* [2022] A.C. 223 at [79].

[32] *R. (Osborn) v Parole Board* [2013] UKSC 61; [2014] A.C. 1115; *Kennedy v Charity Commission* [2014] UKSC 20; [2015] A.C. 455; *Independent Review of the HRA*, CP 586 (December 2021), available at: *https://assets.publishing.service.gov.uk/media/61b8531c8fa8f5037778c3ae/ihrar-final-report.pdf*; M. Elliot, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 C.L.P. 85.

[33] McGoldrick and Parker, "The United Kingdom Perspective on the International Covenant on Civil and Political Rights" in Harris and Joseph (eds), *The Covenant and United Kingdom Law* (1995); Fottrell, "Reinforcing the Human Rights Act—the Role of the International Covenant on Civil and Political Rights" [2002] *Public Law* 485; Klug, Starmer and Weir, "The British way of doing things: the United Kingdom and the ICCPR, 1976–94" [1995] *Public Law* 504. Rosalyn Higgins' comment in 1995 that for judges 'the Covenant is as far off as the moon' may have been substantially correct then but would now be less accurate now: R. Higgins, "Foreword" in D. Harris and S. Joseph (eds), *The Covenant and United Kingdom Law* (Oxford: Oxford University Press, 1995), p.xvii.

[34] S. Joseph and M. Castan, *The ICCPR: Cases, Materials, and Commentary*, 3rd edn (Oxford: Oxford University Press, 2013): W.A. Schabas, *Nowak's CCPR Commentary*, 3rd edn (Kehl: Engel, 2019).

[35] Harris and Joseph (eds), *The Covenant and United Kingdom Law* (1995).

[36] Klug, Starmer and Weir, "The British way of doing things: the United Kingdom and the ICCPR, 1976-94" [1995] *Public Law* 504.

has changed significantly since then and citation of the Covenant is much more frequent. As of 9 November 2023, a basic *Westlaw* search for citation of the Covenant in the UK jurisdiction found 507 cases. Yet it is undoubtedly fair to state that the Covenant has not, "become a central part of human rights adjudication in the way the ECHR did prior to the Human Rights Act".[37]

In 1999 the government published a review of the UK's position under various international human rights instruments including the Covenant. The outcome was that the government's position on the Covenant was unchanged: it retained all of its reservations; it would not incorporate the Covenant or sign the OP1; and that the position would be reviewed again "after the implementation of the Human Rights Act".[38] After another review in 2004, the government decided to ratify the Optional Protocol to the United Nations (UN) Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), allowing individuals to bring complaints to the UN Committee which supervises that treaty, but decided not to accept rights of individual petition under other UN human rights treaties, including OP1. It was also decided to maintain the existing position in relation to a wide range of human rights treaties, additional protocols and reservations.[39]

With respect to possible incorporation of the Covenant there is a limited precedent. Through the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (UNCRC Bill), the Scottish Parliament proposed to give an analogous degree of incorporation to the UN Convention on the Rights of the Child, using provisions similar to, but not exactly the same as, those in the HRA. However the Bill was held by the UK Supreme Court to breach the limitations imposed on the legislative competence of the Scottish Parliament by the Scotland Act 1998.[40] But that judgment must be understood in its devolution context. In 2023, the Scottish Government launched a consultation on a new Human Rights Bill for Scotland which would incorporate four international human rights treaties, within the limits of devolved competence, but not including the Covenant.[41]

The rights in the ECHR and the Covenant

As noted, the HRA was designed to give "further effect" to the ECHR. Both the ECHR and the Covenant are "civil" and "political" rights instruments. The HRA is a misnomer in the sense that it should be termed the "Civil and Political Human Rights Act". Unsurprisingly, given its adoption 16 years after the ECHR, the Covenant is the "more comprehensive human rights instrument".[42] The substantive provisions of the Covenant and the ECHR are broadly very similar. The remaining differences are art.10 (treatment of persons deprived of their liberty and the aim of penitentiary systems being reformation and rehabilitation), art.13 (expulsion of aliens lawfully in the territory), art.14(3)(g) (freedom from compulsory self-incrimination), art.24 (protection of children), art.25 (rights of political participation), art.26 (equality and non-discrimination) and art.27 (minority rights).[43] Concluding observations of the HRC on the UK have been directed to many of these articles, particularly arts 26 and 27.

[37] S. White, "Has incorporation of the European Convention of Human Rights secured better judicial enforcement of human rights in England and Wales?" (Ph.D. Thesis, University of Dundee, 2021), p.199.

[38] *Review of Human Rights Instruments* (Human Rights Unit, Lord Chancellor's Department, Amended August 1999).

[39] Department for Constitutional Affairs, *Report on the UK Government's Inter-Departmental Review of the UK's Position under various International Human Rights Instruments*, July 2004.

[40] *Re Attorney General's Reference, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 W.L.R. 5106; G. Cowie, "The power to make laws for Scotland: The Treaty Incorporation Bills Reference" [2022] *Public Law* 189.

[41] A Human Rights Bill for Scotland: consultation (15 June 2023), available at: *https://www.gov.scot/publications/human-rights-bill-scotland-consultation/*.

[42] Lord Steyn, "Human Rights: The Legacy of Mrs Roosevelt" [2002] *Public Law* 473, 480.

[43] No additional Protocol to the ECHR on minority rights has been adopted, see S.E. Berry, "The Siren's Call? Exploring the Implications of an Additional Protocol to the ECHR on National Minorities" (2016) 23 *International Journal on Minority and Group Rights* 1. On minorities in the UK see Advisory Committee On The Framework Convention For The Protection Of National Minorities, *Fifth Opinion on the United Kingdom* (8 December 2022), available at: *https://rm.coe.int/5th-op-uk-en/1680ab55b4*.

Some of the significant differences between the Covenant and the ECHR have been reduced by additional substantive ECHR Protocols and diminished by evolutive interpretations by the ECtHR.[44] The one major difference in rights that has not been closed by an additional protocol or by interpretation has been the right of self-determination, considered below.

Covenant rights and Covenant obligations

The Covenant parallels the ECHR in that the obligations are immediate; are both negative and positive in nature; do not have direct horizontal effect as a matter of international law; protect individuals against acts committed by state agents and also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities; apply to all persons who may be within their territory and to all persons subject to their jurisdiction, regardless of nationality; and have a degree of extra-territorial application.[45] In addition to effective protection of Covenant rights, states parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.[46]

UK and (First) Optional Protocol

UK opposition to OP1 was linked to the colonial question which led to conflicts between the foreign and colonial offices. As noted, the UK has not ratified OP1[47] and this may be the most critical factor in the lack of knowledge of and publicity for the Covenant.[48] The issue has been the subject of irregular reviews. In response to the government's 2004 review, the Joint Human Rights Committee of House of Lords/Commons considered that the "the Government has not put forward compelling reasons for non-acceptance of rights of individual petition".[49] The government responded with a clearer articulation of its reasoning, namely, that (i) the UK has strong legislation against discrimination, including discrimination against ethnic minorities and the disabled. In addition, the HRA gives further effect in the United Kingdom to civil and political rights in the ECHR. These cover many of the rights in the UN treaties and allow access to these rights in the UK domestic courts; (ii) given that the UN monitoring committees which would receive individual petitions from citizens are not courts, and cannot award damages, or produce a legal ruling on the meaning of the law, the practical value to the individual UK citizen is unclear; (iii) extensive use of individual petition as a means of seeking to explore the legal meaning of a treaty's provisions could lead to a significant cost to public funds in preparing submissions of the government opinion on the subject matter of the petition.[50]

Following the model of the HRA

If modelled on the HRA, what would be the objectives of a Covenant incorporation Act and how would it be legally constructed? The objectives of incorporation of the Covenant would broadly parallel those of the HRA, viz: (i) "bringing Covenant rights home": individuals in the UK would be able to enforce

[44] See, in particular, Protocols 4, 7 and 12. Article 14 ECHR prohibits discrimination in the realisation of Convention rights but the text does not include a right to equality before the law. Protocol 12 provides for an autonomous right to equality but the UK has not ratified it.

[45] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRC, General Comment (GC) 31, paras 5–6, 8, 10, 12 (2009), UN Doc. CCPR/C/GC/33.

[46] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRC, General Comment (GC) 31, paras 15–20 (2009), UN Doc. CCPR/C/GC/33.

[47] One notable difference between the ECHR and OP1 is that NGO's cannot bring claims under the latter.

[48] "I am convinced that the Covenant's low profile turns mostly upon this factor": Higgins, "Foreword" in Harris and Joseph (eds), *The Covenant and United Kingdom Law* (1995), p.xviii.

[49] *Review of International Human Rights Instruments*, Seventeenth Report of Session 2004–05, HL Paper 99/HC264 (31 March 2005).

[50] *Review of International Human Rights Instruments*, Seventeenth Report of Session 2004–05, HL Paper 99/HC264 (31 March 2005), Appendix 3, Government Response to the Committee's Seventeenth Report of Session 2004–05 on *The Review of International Human Rights Instruments*.

their Covenant rights in UK courts;[51] (ii) the creation and further development of a 'rights culture' within the UK and, in particular, in government; and (iii) to enable UK courts to contribute to and help shape Covenant jurisprudence, making a distinctive British (UK) contribution to it.

Following the Preamble to HRA the aim of the Act would "give further effect to the rights and freedoms in the Covenant and OP2". This would be a bigger step than the HRA because, as noted, the Covenant has not been given as much effect as the ECHR had before 1998. In the same way that the HRA created "Convention rights",[52] the Act would create "Covenant rights" in UK domestic law.[53] The Act would give effect to the Covenant as it has effect as matter of international law, that is, subject to any reservations and derogations.[54] Reservations could similarly be subjected to periodic review.[55]

"Covenant Rights" in UK domestic law

The Covenant rights might be confined to those in its Part III, namely arts 6–27. It would thus omit the general obligations to implement and provide effective remedies on the same basis as under HRA, namely that the first is the inter-state guarantee and the second is provided by the Act itself. The general obligation to ensure that Covenant rights are ensured equally to men and women (art.3) is arguably covered as an individual right by the equality and non-discrimination rights in art.26.

The inclusion of art.1 on self-determination (in both Covenants) is more explicable on political than legal grounds.[56] The HRC have largely avoided its controversies by interpreting it as a group right, a view shared by the UK, rather than an individual one and so not justiciable under OP1.[57] On that basis it might not be included in the category of "Covenant rights" (this was the approach in the Hong Kong, New Zealand, ACT and Victoria Bills of Rights). The consideration of self-determination in the UK Supreme Court's judgment in *Reference by the Lord Advocate of devolution issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998*[58] would suggest that it would be narrowly interpreted in any event. The reference concerned a Scottish Independence Referendum Bill which made provision for a referendum on the question, "Should Scotland be an independent country?". The Scottish National Party (intervening) made submissions founded on the right to self-determination in international law. The court rejected those submissions. First, the principle of self-determination was simply not in play here. The scope of the principle was considered by the Supreme Court of Canada in the *Reference re Secession of Quebec*.[59] It considered that

> "the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the

[51] Of course, this objective is less intuitive because, as the UK has not accepted OP1, it does not really carry substantive or rhetorical weight to say that rights are being brought home from Geneva.

[52] Per Lord Nicholls in *Re McKerr* [2004] UKHL 12 at [34]; *R. (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 A.C. 1312 at [53]. See Lord Sales, "The Developing Jurisprudence of the Supreme Court on Convention Rights" (Scottish Public Law Group Conference, 5 June 2023), available at: *https://www.supremecourt.uk/docs/SPLG%20Conference%20Keynote%20Speech%20-%20L%20Sales%20-%205%20June%2023.pdf*.

[53] There are also a number of Acts where the technique used is that x is the law unless it contravenes an individuals' Convention rights. See, e.g., UK Borders Act 1977 ss.32–33. The same legislative technique could be used with respect to "Covenant rights". Australia has also used that technique: see the Human Rights (Sexual Conduct) Act 1994.

[54] HRA ss.14–16.

[55] HRA s.17.

[56] R. McCorquodale, "Group Rights", in D. Moeckli et al, *International Human Rights Law*, 4th edn (Oxford: Oxford University Press, 2022), pp.363–373.

[57] *Kitok v Sweden* (UN HRC Comm. No.197/85), 27 July 1988, para.6.3. This has been repeatedly followed.

[58] *Reference by the Lord Advocate of devolution issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31; [2022] 1 W.L.R. 5435 at [84]–[91].

[59] *Reference re Secession of Quebec* [1998] 2 SCR 217.

> ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions".[60]

It went on to say that in other circumstances peoples were expected to achieve self-determination within the framework of their existing state:

> "A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally".[61]

In the Supreme Court's view these observations applied with equal force to the position of Scotland and the people of Scotland within the UK. They were also consistent with the UK's submission to the International Court of Justice's Advisory Opinion on *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*.[62]

Interpretation of Covenant rights

A court or tribunal determining a question which has arisen in connection with a Covenant right would be obliged to "take into account" the HRC's specified jurisprudence under the Covenant. As with s.2 HRA, the jurisprudence would not be legally binding.[63] Specifying what should be regarded as that jurisprudence is more complicated. The Views and Decisions of the HRC under OP1 are not legally binding. Therefore, they are unlike the judgments of the ECtHR but arguably similar to those of the former European Commission on Human Rights, which are included in s.2 HRA to be taken account of. The HRC's General Comments (GCs) are intended to reflect the HRC's jurisprudence on the interpretation of the Covenant.[64] Views on the status of GC's vary. Some view them as authoritative interpretations of the treaties, while others view them as unsystematic and unfounded statements deserving no recognition in the law.[65] To date, the HRC has issued 37 GCs. It was notable that the UK specifically disagreed with the GC on reservations.[66] However, that does not mean that it necessarily agrees with the interpretations propounded in the GCs on substantive rights. Whether the Concluding Observations of the HRC would be taken into account is a more difficult question. They are not legally binding as such. Although they are directed to the particular state and may contain policy recommendations, it is often possible to deduce the HRC's view of the relevant legal interpretation or obligation.

[60] *Reference re Secession of Quebec* [1998] 2 SCR 217 at [138].

[61] *Reference re Secession of Quebec* [1998] 2 SCR 217 at [154].

[62] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010), available at: *https://www.icj-cij.org/sites/default/files/case-related/141/141-20100722-ADV-01-00-EN.pdf*. For the UK's Written Statement see: *https://www.icj-cij.org/sites/default/files/case-related/141/15638.pdf*.

[63] *Independent Review of the HRA*, CP 586 (December 2021), pp.23–94; *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104 at [48].

[64] H. Keller and L. Grover, "General Comments of the HRC and their Legitimacy", in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge University Press, 2012), pp.121–7.

[65] Keller and Grover, "General Comments of the HRC and their Legitimacy", in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012), pp.118–119; K. McCall-Smith, "Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer" in S. Lagoutte et al (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford: Oxford University Press, 2016), p.27.

[66] Observations by the US and the UK on General Comment No. 24(52), UN Doc. A/50/40 (1995); reprinted in (1995) 16 *Human Rights Law Journal* 423.

It has become much more common for UK judgments to reference the HRC's GCs. GCs 15 and 29 were referred to in *A v Home Secretary (No.1)*,[67] concerning the detention of suspected foreign terrorists. *A v Home Secretary (No.2)*,[68] on the prohibition of torture referenced GC 20. Immigration and asylum judgments are amongst the most frequent cases to invoke the jurisprudence of the UN treaty bodies.[69] For example, in *RT (Zimbabwe) v Secretary of State*,[70] the UK Supreme Court examined a series of cases revolving around asylum-seeking refugees from Zimbabwe who did not only claim not to support the current Zimbabwean regime but simply had no political views whatsoever. In considering the exercise of the right to freedoms of thought, conscience, and religion as well as the freedom of expression, the court referenced GC 22 on art.18 and GC 34 on art.19. It is even more common for the ECtHR to reference the HRC's jurisprudence.[71] So when UK courts take account of that jurisprudence under s.2 HRA, this jurisprudence will necessarily be brought to the attention of UK courts, as in *Kennedy v The Charity Commission*.[72] Other notable recent references to Covenant rights include *Ryan's application for Judicial Review*;[73] *Suffolk CC v RD*;[74] and *DH (Particular Social Group: Mental Health) Afghanistan*.[75]

Interpretation of legislation

Following ss.3–4 HRA, so far as it is "possible" to do so, all legislation, whenever enacted, would have to be "read and given effect in a way which is compatible with the Covenant rights". Though there have been a small number of striking uses of s.3, by and largely it has operated in a sensible and credible manner.[76] If it does not prove possible then, as under s.4 HRA, a Declaration of Incompatibility (DoI) could be made by higher courts.[77] Any declaration would not affect the validity, continuing operation or enforcement of the provision in respect of which it is given and would not be binding on the parties to the proceedings in which it is made.[78]

In practice there has been a relatively limited number of DoIs.[79] Since the HRA came into force on 2 October 2000 until the end of July 2023, 47 have been made. Of these, 12 have been overturned on appeal (and there is no scope for further appeal).[80] Effective action has been taken in response to every final DoI in the sense that there has been a response, even if minimal.[81]

[67] *A v Home Secretary (No.1)* [2004] UKHL 56; [2005] 2 A.C. 68 at [59]–[61] and [63] (Lord Bingham).

[68] *A v Home Secretary (No.2)* [2005] UKHL 71; [2006] A.C. 221 at [34] (Lord Bingham).

[69] See also *R. (Agyeman) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWHC 2180 (Admin); [2010] A.C.D. 92 at [13], referencing HRC's GC 27 on freedom of movement.

[70] *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 A.C. 152. In *R. (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42; [2023] 1 W.L.R. 4433 at [22] the Supreme Court referred to GC 31 (on *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*).

[71] *Marguš v Croatia* [GC] (App. No.4455/10), judgment of 27 April 2014, citing HRC's GC 20; *Magyar Helsinki Bizottság v Hungary* [GC] (App. No.18030/11), judgment of 8 November 2016 at [141], citing GC 34.

[72] *Kennedy* [2015] A.C. 455 at [186] (Lord Wilson), noting the ECtHR's reliance on HRC's GC 34 on a right of access by the media to information of public interest held by public bodies.

[73] *Ryan's application for Judicial Review* [2020] NIQB 47.

[74] *Suffolk CC v RD* [2020] EWHC 323 (Fam).

[75] *Re DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC).

[76] See *Independent Review of the HRA*, CP 586 (December 2021), pp.177–254. For a recent of example of where a reading down was not considered possible see *Jones v Birmingham City Council* [2023] UKSC 27; [2023] 3 W.L.R. 343.

[77] Per HRA s.5, the Crown would have the right to intervene.

[78] Per HRA s.4(6).

[79] S. Stark, "Facing facts: judicial approaches to section 4 of the Human Rights Act 1998" (2017) 133 *Law Quarterly Review* 631.

[80] Stark, "Facing facts: judicial approaches to section 4 of the Human Rights Act 1998" (2017) 133 *Law Quarterly Review* 631; Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2022–2023, CP 958 (November 2023), Annex A.

[81] For example, the UK response to DoI on prisoner voting was extremely minimal but passed muster with the Committee of Ministers of the Council of Europe.

Acts of public authorities and miscellaneous provisions

An Act on the Covenant could parallel the complex provision of s.6 HRA making it unlawful for a public authority to act in a way which is incompatible with a Covenant right. It could also parallel the HRA's provisions on proceedings, judicial remedies, judicial acts, remedial action,[82] and the very important discipline of s.19 parliamentary statements of compatibility.

Issues, challenges and reflections

The HRA model has in many ways been an ingenious mode of further effect/incorporation. It could technically be extended, mutatis mutandis, to the Covenant. There is pressure from devolved administrations, particularly from Scotland, and particularly with respect to the UN Convention on the Rights of the Child,[83] and from disability advocates,[84] to go in beyond the HRA's incorporation of the ECHR.[85] But what would be the most significant legal and policy issues, challenges or concerns with such an extension? Judged by state participation, the Covenant and its two OPs have strong international legitimacy. As of 19 January 2024, there were 173 State Parties to the Covenant, 116 to OP1 and 90 to OP2. The UK Government strongly supports the work of the UN treaty bodies and regards them as central to the broader human rights system.[86] The UK continues to remain aloof from OP1. Its position is becoming increasingly insular. If the UK did accept OP1, it could do so with a reservation to exclude admissibility if the same matter has been considered by ECtHR. Close allies and fellow parties to the ECHR such as France, Germany, Italy and Ireland, are all parties to OP1, as are all other European Union (EU) members. None of them align with the UK's argument for non-ratification. Even the Russian Federation is a party. All regions of the world apart from Asia are well represented as state parties. Incorporating the Covenant but not ratifying OP1 loses an important jurisprudential anchor. The UK currently plays no part in developing the HRC jurisprudence under OP1.[87]

As noted, the HRC is not a court, and its members are not judges. The HRC has openly acknowledged that its function under OP1 is not, as such, that of a "judicial body".[88] However, it considers that,

> "the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions".[89]

Particularly under OP1 it has sought to take an approach to interpretation which is credible, realistic and consistent. In the vast majority of cases its jurisprudence aligns with that under the ECHR. The comparison should not be overstated, but it is arguable that a number of the other treaty bodies, dealing with economic and social rights, children and disability, have adopted a less legalistic and more advisory,

[82] HRA ss.7, 7A, 8, 9 and 10.

[83] K. McCall-Smith, "Entrenching children's participation through UNCRC Incorporation in Scotland" (2023) 27(8) The *International Journal of Human Rights* 1181.

[84] *R. (Crowter) v Secretary of State for Health and Social Care* [2022] EWCA Civ 1559; [2023] 1 W.L.R. 989; *Re Spuc Pro-life Ltd's Application for Judicial Review* [2023] NICA 35; K. Ramaswamy, "Legality of disability selective abortion: discrimination and privacy laws under the ECHR" [2023] E.H.R.L.R. 333.

[85] See also *The Making of Bills of Rights: Relevant International Human rights Law Obligations—an analysis of the UK's Obligations* (Bonavero Institute, 2023), available at: *https://www.law.ox.ac.uk/sites/default/files/2023-01/Bill%20of%20Rights%20FINAL.pdf*.

[86] *Eighth periodic report on International Covenant on Civil and Political Rights submitted by UK*, CCPR/C/GBR/8, para.3.

[87] Even if it did ratify and a UK national was a member of the HRC, by convention they would not participate in a communication concerning the UK.

[88] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRC, General Comment (GC) 31, para.11 (2009), UN Doc. CCPR/C/GC/33.

[89] "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRC, General Comment (GC) 31, para.11 (2009), UN Doc. CCPR/C/GC/33.

policy and recommendatory approach.[90] For example, in *R. (AB) v Secretary of State for Justice*,[91] Ouseley J was critical in suggesting that the CRC Committee "may well be trying to bring about what it sees as desirable changes in policy and practice", but was "not performing a judicial function". The Court of Appeal in that case, *R. (AB)*,[92] referred to the CRC Committee's GC 10 as a "recommendation for future action, not a statement of the current law".

Like the ECtHR, the HRC applies a "living instrument" approach to interpretation. It considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.[93] One potentially significant risk for states is that the HRC asserts that it does not afford states a "margin of appreciation" in the implementation and interpretation of ECHR rights. So it appears possible that in the same situation the ECHR would not be violated whereas the Covenant would be.[94]

However, many other states have clearly regarded the HRC's jurisprudence as sufficiently qualitative, though there is always fallback position based on its non-binding status. Australia, for example, has disagreed with the HRC's interpretation of what is an "arbitrary" detention in an immigration context.[95] As noted, taking into account the HRC's jurisprudence is a more complicated process than that under s.2 HRA. Under the latter the scope for domestic courts to develop the interpretation of Convention rights has also been somewhat curbed by the Supreme Court. As it explained in *Jones v Birmingham City Council*,[96] "the principle is well established that it is not the function of that court to undertake such a *substantial development* of Convention rights. Rather, it is intended that the rights enforced domestically under the HRA and those enforced in Strasbourg *should, in general, correspond*" (Emphasis added).[97] The "objective of the HRA that the rights and remedies available in Strasbourg should also be available before domestic courts would be at risk of being undermined if domestic courts were to go further in the development of new rights and remedies *than they could be fully confident that the Strasbourg court would go*, because a contracting state cannot itself go to Strasbourg to have the matter corrected". (Emphasis added).[98] While it was "open to domestic courts to apply principles established in the Strasbourg court's case law to novel situations, it was not the function of domestic courts *to establish new principles of Convention law*". (Emphasis added).[99] In *Jones* the Supreme Court could not be "*fully confident that the Strasbourg court will in future develop Convention rights under art.6(1) in the manner contended for by the appellant and, accordingly, such a development should not be anticipated*". (Emphasis added).[100] One could assume that the UK courts and tribunals would be similarly restrained in making any substantial development of Covenant rights.

[90] Cf. "I would like to think that it is not a coincidence that a semi-judicial body such as the CRC found it easier to expand extraterritorial human rights obligations than the ECtHR, which imposes binding judgments (and thus obligations) on the states parties concerned": L. Raible, "Extraterritoriality between a rock and hard place" (2021) 82 *Questions In Law* 7.

[91] *R. (AB) v Secretary of State for Justice* [2017] EWHC 1694 (Admin); [2017] 4 W.L.R. 153.

[92] *R. (AB (A Child)) v Secretary of State for Justice* [2019] EWCA Civ 9; [2019] 4 W.L.R. 42 at [95].

[93] *Judge v Canada* (UN HRC Comm. No.829/1998), 13 August 2003, para.10.3.

[94] D. McGoldrick, "A Defence Of The Margin Of Appreciation And An Argument For Its Application By The HRC" (2016) 65 *International and Comparative Law Quarterly* 21. In *SEH v Netherlands*, UN Doc. CCPR/C/139/D/3236/2018 (19 December 2023), para 7.9, the HRC stated that State parties enjoy a 'margin of appreciation' in assessing whether and to what extent differences in otherwise similar situations justify different treatment.

[95] *A v Australia* (UN HRC Comm. No.560/1993), 3 April 1997.

[96] *Jones* [2023] 3 W.L.R. 343 at [38].

[97] *Jones* [2023] 3 W.L.R. 343 at [38], citing *R. (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323, per Lord Bingham at [20]; *R. (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 A.C. 100 per Lord Bingham at [29].

[98] *Jones* [2023] 3 W.L.R. 343 at [38], citing *R. (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] A.C. 153 at [106], per Lord Brown.

[99] *Jones* [2023] 3 W.L.R. 343 at [38], citing *R. (Animal Defenders International)* [2008] 1 A.C. 1312, per Baroness Hale at [53]; *Manchester City Council v Pinnock* [2011] 2 A.C. 104 per Lord Neuberger at [48]; *Smith v Ministry of Defence* [2013] UKSC 41; [2014] A.C. 52; *R. (AB) v Secretary of State for the Home Department* [2021] UKSC 28; [2022] A.C. 487, per Lord Reed at [53]–[59]; *R. (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] A.C. 559, per Lord Reed at [63].

[100] *Jones* [2023] 3 W.L.R. 343 at [38].

The Privy Council, whose membership is largely composed of members of the UK's Supreme Court, has extensive experience of interpreting Bills of Rights, not uncommonly based on the Covenant.[101] It has referred extensively to decisions of the human rights treaty bodies. In *Pratt v Attorney General for Jamaica*,[102] in interpreting the phrase "inhuman or degrading punishment or other treatment" in s.17(1) of the Jamaican Constitution, it referred, inter alia, to views of the HRC. Although "not of legally binding effect", it considered that the views of the HRC "should be afforded weight and respect".[103]

Other states have given the Covenant degrees of incorporation, most notably for these purposes, Australia, New Zealand, and Hong Kong, where the Covenant largely plays the role that the ECHR plays in Europe.[104] In *R. v Sin Yau-ming*,[105] the Hong Kong Court of Appeal commented that it would give "considerable weight" to the comments and decisions of the HRC as well as the jurisprudence under the ECHR "in so far as they reflect the interpretation of articles in the [ICCPR]" and are directly related to the relevant domestic legislation. The courts of South Africa have also firmly established the role of treaty body jurisprudence as an interpretative tool and indispensable source of law. Since the passage of the 1996 South African Constitution, the Constitutional Court has been particularly willing to utilise the HRC's GCs and Views under OP1[106] in an effort to interpret rights stemming from the Constitution's Bill of Rights.

Concluding comments

As acknowledged at the beginning, this article is very much a thought-experiment. Given the consistent governmental and media attacks on the HRA over the last two decades, any thought of adding a parallel system related to the Covenant is something of a pipedream. But the rights in the Covenant and the jurisprudence of the HRC constitute significant elements of an international human rights framework that is under attack from critical academics and populist and nationalistic forces in states, though neither group offers any credible alternative.[107] Thinking in imaginative, but hopefully credible, ways about how further effect could be given to the Covenant in the UK should not be a lost cause.

[101] *Day v Governor of the Cayman Islands* [2022] UKPC 6 at [54], specifically relying on the Views of the HRC in *Joslin v New Zealand* (UN HRC Comm. No.902/1999), 17 July 2002.

[102] *Pratt v Attorney General for Jamaica* [1993] UKPC 1 (2 November 1993).

[103] *Pratt* [1993] UKPC 1 at [44].

[104] M. Groves, J. Boughey and D. Meagher(eds), *The Legal Protection of Rights in Australia* (Oxford: Hart, 2019); M.S.R. Palmer and D.R. Knight, *The Constitution of New Zealand* (Oxford: Hart, 2022); A. Cooray, *Constitutional Law of Hong Kong*, 4th edn (Alphen aan den Rijn: Wolters Kluwer, 2021); 247-331; M. Kanetake, "UN Human Rights Treaty Monitoring Bodies Before Domestic Courts" (2018) 67 *International and Comparative Law Quarterly* 201.

[105] *R. v Sin Yau-ming* (1991) HKPLR 88 at [3].

[106] South Africa is a party to OP1.

[107] For robust defences see H. Hannum, *Rescuing Human Rights* (Cambridge: Cambridge University Press, 2019); G. de Burca, *Reframing Human Rights in a Turbulent Era* (Oxford: Oxford University Press, 2021).

Advancing Human Rights Law in Scotland

Nicole Busby*

Devolution; Human rights; Scotland

Abstract

The Scottish Government's ambitious plans to incorporate a suite of United Nations (UN) treaties into Scots law alongside the UN Convention on the Rights of the Child are intended to distinguish it from the United Kingdom (UK) Government through its leadership in the field of human rights. However, although it is often said that human rights are hardwired into Scotland's constitutional arrangements by way of its devolved settlement, the path to incorporation has been far from smooth. Furthermore, the Scottish Government's record in countering the social and economic inequality which results in deep intergenerational poverty is questionable even though many relevant policy areas, including health, housing and education, are devolved. This article explores the extent of Scotland's freedom to act on the advancement of human rights and concludes by assessing the likely outcomes of incorporation.

Introduction

The 75th anniversary of the Universal Declaration of Human Rights (UDHR) provides an ideal opportunity to take stock of recent attempts to advance human rights law in Scotland. The Declaration, which continues to be the central reference point for the common standards of achievement for all people and all nations, remains aspirational in Scotland where inequality continues to grow. Current developments include ambitious plans to bring the economic, social and cultural rights provided by a suite of international human rights treaties into Scots law as a means of bolstering and supplementing the civil and political rights incorporated at United Kingdom (UK) level by the Human Rights Act 1998 (HRA). It is possible to trace a line from the codification of human rights by the UDHR which, by way of its non-binding status is afforded an unyielding timelessness and simplicity, and the complex legal gymnastics that have thus far characterised the process of incorporating international human rights into Scots law.

At the time of writing the Scottish Parliament has just passed a revised Bill to incorporate the United Nations (UN) Convention on the Rights of the Child (CRC)[1] and the Scottish Government has recently closed its public consultation on a Human Rights Bill for Scotland,[2] which is intended to incorporate the International Covenant on Social, Economic and Cultural Rights (ICESCR) along with the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Convention on the Elimination of Racial

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[1] The UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill was unanimously passed by the Scottish Parliament for the second time on 7 December 2023 and now awaits royal assent. The original Bill was passed in March 2021 but was subsequently referred by the Law Officers to the Supreme Court under s.33 of the Scotland Act 1998. The Supreme Court ruled that aspects of the Bill were outside the legislative competence of the Scottish Parliament: see *Re Attorney General's Reference, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42; [2021] 1 W.L.R. 5106. The Bill was amended for reconsideration under s.36(5) of the Scotland Act 1998. This is the first time the reconsideration procedure has been used.

[2] The consultation was published on 15 June 2023 and closed on 5 October 2023. The Scottish Government has committed to passing the Bill by May 2026. See Scottish Government, *A Human Rights Bill for Scotland Consultation* (2023), available at: *https://www.gov.scot/publications/human-rights-bill-scotland-consultation/*, hereinafter "the Consultation (2023)".

Discrimination (UNCERD). The UK is the state party to these treaties, but it is for the Scottish Government to consider, observe and implement the treaty rights in areas of devolved policy. The Scottish Government contributes directly to the UN Committee review process to ensure that UK state party reports reflect Scotland's approach to protecting and promoting human rights,[3] which in recent years has diverged from that of the UK Government in terms of how such rights are envisaged, perceived and communicated to the public and also in regard to the legal and policy ambition for their realisation. Scotland is not alone among the devolved nations in pursuing a different, more positive agenda. It was the Senedd's incorporation of the CRC in Wales[4] which led the field in this respect and, despite the stalemate over the proposed Bill of Rights for Northern Ireland,[5] campaigning for better realisation of human rights continues.[6] Differences in how human rights are perceived between the devolved nations and the UK Government raise some interesting questions about whether and how these perceptions can actually shape the provision of rights and, if so, what the impact might be in the longer term.

This article considers the extent of Scotland's freedom to act on the advancement of human rights in ways that differ substantially from the approach at UK level. In the first section, the scope offered by devolution as a foundation and driver for the progression of human rights in Scotland is explored through the existing example of the HRA. The second section provides an overview of the Scottish Government's incorporation agenda focusing on the proposed multi-treaty Human Rights Bill. Its potential to impact positively on the lives of people in Scotland is considered with a particular focus on whether incorporation provides a viable means of closing the accountability gap in the protection of economic, social, cultural, and environmental rights. The article concludes by weighing up the risks to the advancement of human rights in Scotland. The central argument is that, even though the prospects for progression may be limited and the transformative impact of the new framework a long-term ambition, this does not mean that efforts to utilise whatever means the devolved institutions have at their disposal to achieve advancement is meaningless. Any opportunity to better respect, protect and fulfil human rights by drawing down their international provision into domestic law will bring a multitude of benefits, albeit over the longer term, and should be taken.

Devolution as a foundation and driver for human rights

It is often said that the HRA is hardwired into Scotland's devolution settlement. It is certainly the case that the interplay between the Scotland Act 1998 (SA) and the HRA provides a floor below which human rights protections in Scotland cannot fall. This is provided for by a series of constitutional obligations placed on the Scottish Parliament, the Scottish Government, and all public bodies in Scotland. Section 29 of the SA provides that the Scottish Parliament cannot legislate in a way that is incompatible with the ECHR and legislation must be read as far as is possible to ensure compliance with the Convention.[7] The Scottish Government[8] and all public bodies including the courts[9] must act compatibly with the Convention. Furthermore, the HRA and the Equality Act 2010 are "protected enactments" placing them beyond the

[3] It also publishes position statements which provide detail of Scottish-specific activity aimed at giving effect to the rights in each treaty. See, for example, Annex A to the *Universal Periodic Review 2022: Scottish Government Position Statement* (October 2022), available at: *https://www.gov.scot/publications/universal-periodic-review-2022-scottish-government-position-statement/pages/19/*.

[4] The Rights of Children and Young Persons (Wales) Measure 2011 operates by requiring the Welsh Ministers, when exercising any of their functions, to have due regard to certain specified provisions of the CRC. See further, S. Hoffman, "Devolved and evolved: human rights in Wales", in this issue of the E.H.R.L.R.

[5] Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland* (2008), available at: *https://nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf*. See also Northern Ireland Assembly, *156/17–22 Report of the Ad Hoc Committee on a Bill of Rights* (2022), available at: *http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/ad-hoc-bill-of-rights/reports/report-on-a-bill-of-rights/report-of-the-ad-hoc-committee-on-a-bill-of-rights.pdf*.

[6] See, for example, the work of the Human Rights Consortium: *https://www.humanrightsconsortium.org/our-work/*.

[7] Scotland Act 1998 s.101.

[8] Scotland Act 1998 s.57.

[9] Scotland Act 1998 s.6.

power of the Scottish Parliament to amend.[10] Together these provisions result in a multi-institutional constitutional framework for human rights protection so that the Scottish Parliament, the executive and the judiciary must each act as a guarantor of human rights.[11] Devolution thus provides a minimum level of human rights protection for the civil and political rights provided for by the HRA. In Scotland, the Convention rights have the same meaning as they do under the HRA, not only in terms of its black letter provision but also regarding the interpretive rules it lays down. This is important in framing our understanding of human rights in Scotland and it is sometimes overlooked or ignored in discussions on human rights at the UK level. The most recent example of this being the debates concerning the British Bill of Rights Bill and repeated threats by UK Ministers to remove the UK from the ECHR.

Whereas the constant need to protect the status quo for human rights can have a chilling effect on progress beyond ECHR protection at the UK-level, at the devolved level the Convention at least in theory provides a non-negotiable foundation on which to build and progress. The Convention however does not act as a ceiling so that it is at least possible that human rights protections in the devolved nations could go further than the ECHR. In addition, whilst the HRA protects human rights in reserved areas in each jurisdiction, the SA provides a greater degree of ECHR protection in devolved areas. This affords human rights a foundational status in devolved jurisdictions that does not exist at the UK level.

Alongside the constitutional foundation, other features of civil and political life in Scotland combine to embolden and embed a human rights-based awareness within relevant institutions. Scotland has its own National Human Rights Institution (NHRI) in the form of the Scottish Human Rights Commission (SHRC), charged with a general duty to promote human rights and to encourage best practice in relation to human rights.[12] The SHRC, which operates alongside the Great Britain-based Equality and Human Rights Commission, has powers to recommend changes to law, policy and practice; promote human rights through education, training and research; and to conduct inquiries into the policies and practices of Scottish public authorities.

In 2016 the Scottish Parliament's Equal Opportunities Committee became the Equalities and Human Rights Committee[13] and was charged with a particular responsibility for human rights. The Parliament's human rights road map has focused on the need to

> "be bolder and to strengthen our existing procedures and processes, to make human rights more central to our work and how we undertake our scrutiny function and to be an exemplar of international best practice to other parliaments".[14]

The current Scottish Government's commitment to human rights[15] has informed the provision of relevant legislation concerned with the delivery of public services in Scotland. For example, the Social Security (Scotland) Act 2018 which established a remodelled social security system for Scotland, by which some benefits are devolved, attempts to ground it in a framework which acknowledges that access to social security is a human right. It does this by providing a list of Scottish social security principles[16] which serve as

[10] Scotland Act 1998 Sch.4.

[11] K. Boyle and N. Busby, "Subnational incorporation of economic, social and cultural rights—can devolution become a vehicle for progressive human rights reform?" (2023) 74(1) NILQ 63.

[12] Scottish Commission for Human Rights Act 2006 s.2.

[13] Reconstituted as the Equalities, Human Rights and Civil Justice Committee in June 2021.

[14] See The Scottish Parliament, *"Committee unveils roadmap to ensure Scottish Parliament a human rights guarantor*" (26 November 2018), available at: *https://archive2021.parliament.scot/newsandmediacentre/110313.aspx*.

[15] See Scottish Government, "Human rights", available at: *https://www.gov.scot/policies/human-rights/*.

[16] Social Security (Scotland) Act 2018 s.1.

> "the values that ought to guide the functioning of the newly established framework. It thus gives statutory expression to a particular vision of what a social security system should be, in a way that is without parallel in any other piece of UK legislation."[17]

Furthermore, the participative approach,[18] aimed at improving the way people are involved in policymaking and service delivery has fostered and enabled important collaborative working with Scottish civil society, resulting in impactful legislation grounded in lived experience. For example, the feminist organisations that comprise Scotland's women's sector have had a positive impact on the recognition of women's human rights as evidenced in cornerstone legislation such as the Domestic Abuse (Scotland) Act 2018 which criminalised psychological domestic abuse and coercive and controlling behaviour.[19]

Despite this apparently positive environment for human rights-based engagement and its impact on socially progressive policy and law-making, the Scottish Government's record on improving the lives of those most in need is sketchy. Recent research by the Joseph Rowntree Foundation (JRF) reveals that over one million people, accounting for almost a fifth of the total population, live in poverty in Scotland. Nearly half of this number (490,000) live in very deep poverty.[20] This is of particular concern as recent years have seen a reversal of the decline in poverty rates which took place between 1999–2002 to 2009–12 when the percentage of those living in poverty fell from 24% to a low of 18%. Over the following decade, however, the trend in the After Housing Costs relative poverty rate has reversed, climbing to 21% in 2019–22. Most worryingly, very deep poverty has steadily increased, trapping nearly 1 in 10 people in 2019–2022.[21] Around a quarter of those living in poverty are children and the JRF predicts that, without longer-term intervention on the part of the Scottish Government, the statutory child poverty targets for 2030–31 are unlikely to be met. Poverty in Scotland is starkly gendered: for example, of those trapped in persistent low pay, 72% are women[22] and, despite the fact that employment remains a reserved policy area, there are a number of interventions that the Scottish Government could take to address in-work poverty.[23] Furthermore, employment aside, most of the key areas in which policy could have a positive impact are devolved including health and social services, housing, education and training, and the environment. In highlighting the direct connection between the urgent need to address poverty in Scotland and a human-rights based approach to law and policymaking, the Poverty Alliance has launched a campaign aimed at encouraging and supporting communities to "add human rights to their collective power".[24]

As this section has shown, despite a constitutional framework which establishes that the ECHR provides a minimum level of human rights protection and the existence of responsive institutions committed to the realisation and furtherance of human rights, there is still plenty of room for improvement, not least in shifting the seemingly intractable levels of deep intergenerational poverty experienced within many communities across Scotland. The answer may well lie in improvements, not to the protection of the civil and political rights entrenched under devolution, but rather to the social, economic and cultural rights framework provided for under international human rights law. "Human rights" as a policy area is not reserved to the UK Parliament, so that the devolved legislatures may act to enhance human rights protection in their territories, including by implementing international treaties, albeit only within the limits of devolved

[17] C. O'Cinneide, "The Social Security (Scotland) Act 2018—A rights-based approach to social security?" (2019) 23(1) *Edinburgh Law Review* 117.

[18] See the Scottish Government's "Participation Framework" (17 February 2023), available at: *https://www.gov.scot/publications/participation-framework/*.

[19] M. Scott and E. Ritch, "Gender justice advocates and the making of the Domestic Abuse (Scotland) Act 2018" in J. Devaney et al (eds), *The Routledge International Handbook of Domestic Violence and Abuse* (Abingdon: Routledge, 2021), p.590.

[20] Joseph Rowntree Foundation, *Poverty in Scotland* (2023), available at: *https://www.jrf.org.uk/report/poverty-scotland*.

[21] Carla Cebula and Chris Birt, "Deepening poverty in Scotland—no one left behind?", Joseph Rowntree Foundation (18 April 2023), available at: *https://www.jrf.org.uk/report/deepening-poverty-scotland-no-one-left-behind*.

[22] Joseph Rowntree Foundation, *Poverty in Scotland* (2023), p.5.

[23] Joseph Rowntree Foundation, *Poverty in Scotland* (2023), pp.9–10.

[24] The Poverty Alliance, "Rights in Action", available at: *https://www.povertyalliance.org/rights-in-action/*.

competence. This brings us to the Scottish Government's current plans to incorporate economic, social, cultural and environmental rights into Scots law.

Incorporating international human rights law in Scotland

In 2017 the (then) First Minister announced the establishment of an Advisory Group on Human Rights Leadership (FMAG) which, operating independently from the government and in collaboration with around 50 civil society organisations, would make recommendations on how Scotland could continue to lead by example in the field of human rights. FMAG published its recommendations in 2018.[25] A National Taskforce on Human Rights Leadership was subsequently established to make policy recommendations which would inform development of a new statutory human rights framework for Scotland, along with the associated requirements of a public participatory process and capacity-building to enable its effective implementation. In its report, the Taskforce recommended incorporation of ICESCR, the UNCRPD, CEDAW and the UNCERD in a multi-treaty Bill, together with additional rights on the environment, equality, older persons and access to justice.[26] By the time the Taskforce reported in 2021, a parallel process led by the children's rights sector in Scotland under the umbrella organisation Together (Scottish Alliance for Children's Rights) and the Children and Young People's Commissioner Scotland, had resulted in a Bill to incorporate the UNCRC into Scots law.[27] The Bill was passed unanimously by the Parliament in March 2021 and, paired with the Scottish Governments' endorsement of the Taskforce's recommendations, looked set to secure Scotland's place as "an international leader in respecting and enhancing human rights".[28] Progress was however stalled when the CRC Bill was referred to the Supreme Court by the Law Officers for the Secretary of State.[29] Although the court held that the Bill required certain technical changes relating to devolved competence,[30] it also stated that the reference took no "issue with the Scottish Parliament's decision to incorporate the UNCRC and the ECLSG. That is recognised to be a matter for the Scottish Parliament".[31] An amended version of the Bill was reconsidered and passed by the Scottish Parliament in December 2023.[32]

There is no doubt that the Scottish Government's confidence in its ability to progress its plans for incorporation of, not only the UNCRC, but also the suite of treaties covered by the planned multi treaty Bill, was badly shaken by the UK's Government's challenge to the UNCRC Bill. As the Human Rights Bill consultation shows,[33] the original proposals to move to a full compliance model for the UNCERD, CEDAW and the UNCRPD have been somewhat tempered. As might be expected given the passage of time since the FMAG's original vision for enhanced protection through incorporation, there is wide interest in what the proposed legislation will mean for the lives of those in Scotland. This interest is evident among the many civil society organisations which represent the interests and views of those with lived experience of poverty and other forms of disadvantage in Scotland and who have responded to the consultation in great number.[34] Can the high expectations surrounding the Human Rights Bill be met?

[25] *Report of the First Ministers Advisory Group on Human Rights Leadership* (2018), available at: *https://humanrightsleadership.scot/*.

[26] Scottish Government, *Report of the National Taskforce for Human Rights Leadership* (12 March 2021), available at: *https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/*.

[27] UNCRC (Incorporation) (Scotland) Bill, available at: *https://www.gov.scot/publications/implementing-united-nations-convention-rights-child-introductory-guidance/pages/5/*.

[28] Scottish Government, *Foreword to the Report of the National Taskforce for Human Rights Leadership* (2021).

[29] Under the Scotland Act 1998 s.33: *Re Attorney General's Reference, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] 1 W.L.R. 5106.

[30] Removing provisions relating to obligations placed on the UK Parliament and UK Ministers.

[31] *Re Attorney General's Reference, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] 1 W.L.R. 5106 at [4].

[32] See fn.1 above.

[33] The Consultation (2023).

[34] For a bank of responses from across civil society, see Human Rights Consortium Scotland, "Scottish Human Rights Bill Consultation Responses", available at: *https://hrcscotland.org/scottish-human-rights-bill-consultation-responses/*.

The potential impacts of incorporation

The answer to this question will depend on the extent to which incorporation can provide effective access to justice for economic, social and cultural rights as well as providing the means by which institutions, including the Scottish Government, can be held to account for breaches of such rights. Incorporation is of course a process, not an event, and although the passage of the Scottish Human Rights Bill will mark an important point in that process it will, by no means, result in immediate transformation, but rather the strengthening and continuation of an important shift towards a human rights-based approach in Scotland's public services provision. In this sense the legislation itself is both monumental and anodyne: although the new framework has the potential to be truly transformative,[35] not only in improving the lives of those most in need but also in ensuring equal access to public services regardless of gender, race, disability, age or LGBTI status,[36] its ability to effect real change will depend largely on how it is implemented in the "small places, close to home"[37] by the housing officer, teacher, social worker and other duty bearers. In the current author's view, the proposals for the Bill offer some comfort in this respect.

Rather than focusing solely on the compliance-based "command and control" method of implementing change, the proposed approach is for a reflexive regulatory model, aimed at fostering and enabling a system of self-regulation for public authorities.[38] Of course, compliance is crucial, and the consultation document suggests that this will be achieved through a staged process by which ICESCR and the right to a healthy environment will be directly incorporated into Scots law initially by way of compliance duty on public bodies and, as far as possible private actors, delivering devolved public functions for a specified period moving to a duty to comply. Compliance will be demonstrated by progressively realising the rights and ensuring the delivery of minimum core obligations, which will be identified through a participative process.[39] The success of this approach will depend on improvements in access to justice and effective enforcement as well as a systematic programme of human rights education and training for all duty bearers supported by comprehensive guidance.[40] Further details of these important elements are still to be worked out, taking account of the responses to the consultation and through the participation of a wide representation of rights holders. Given the complexity of the framework which requires to be built from the bottom up, realisation of a full compliance model is a slow burner, the full fruits of which will be enjoyed by future generations.

The "interim" plan to incorporate ICESCR and the proposed model for the remaining treaties, UNCERD, CEDAW and UNCRPD, adopts a somewhat different approach which, if successfully implemented, should be capable of shorter-term success. ICESCR aside, the use of positive duties as the sole method of incorporation is largely attributable to the need to navigate "equal opportunities" which remains a reserved policy area,[41] and which is subject to existing provision by way of the Equality Act 2010. Procedural duties will be placed on listed public authorities to implement the provisions contained in the treaty texts. If the preferred method, referred to in the consultation document as "the direct treaty text approach"[42] is adopted, the texts would be redacted to take account of reserved policy and to avoid overreach and potential interference with the actions of public authorities in reserved areas. In short, the lessons of the UNCRC (Scotland) Bill's trip to the Supreme Court appear to have been learned. The procedural duty will require public authorities to consider the treaty rights "in a holistic way both when delivering ICESCR rights and

[35] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), Ch.3.

[36] In line with the Taskforce's Recommendations 6 and 7, consideration is being given to how best to include provision for older people and LGBTI communities.

[37] E. Roosevelt, "The Great Question", Address to the United Nations in New York on 27 March 1958.

[38] B. Hepple, *Transformative Equality: The Role of Democratic Participation* (2013), available at: *https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_SirBobHepple.pdf/d2fc160a-5b89-456a-9505-bffa977796de*.

[39] See National Taskforce Recommendations 1b, 2 and 13 and the Consultation (2023), at Part 4.

[40] See National Taskforce Recommendations 17, 18, 21, 22, 25 and 26.

[41] Scotland Act 1998 Sch.5, L2, as amended by s.37 of the Scotland Act 2016.

[42] The Consultation (2023), Part 4.

in their overall decision-making".[43] Its success will depend largely on the commitment and leadership of the Scottish Ministers.

The positive or procedural duties proposed under the new framework have as their existing counterparts the Public Sector Equality Duty (PSED)[44] and the Fairer Scotland Duty (FSD).[45]PSED in particular has had a poor record in Scotland and beyond, not least because of the difficulty in evidencing any positive impact on equality outcomes as a result of public authorities' apparent compliance with the duty.[46] The role of the state in this respect is front loaded and relatively hands off with little responsibility beyond specification of the duty, namely the need to pay due regard to the intended outcomes, and enactment of the framework for achieving it by way of regulations and guidance. The duty bearer, in the equality context the employer or service provider, is then left to determine how best to meet the duty with their actions, subject to reporting requirements which seek to ensure that some relevant action is taken. Enforcement for not taking any action, or for taking insufficient action is managed by the Equality and Human Rights Commission through its regulatory role[47] and generally consists of a light touch approach to encourage compliance, with court action used as a last resort. Although the intention of PSED is to mainstream equality and to impart structural and systemic change in contrast to the system of "one-off" remedies for individual breaches of the negative equality rights regime,[48] there is little hard evidence to suggest that this has been achieved[49] and inequalities related to the protected characteristic groups and on the grounds of socio-economic disadvantage continue to exist and have, in some areas of service provision, widened in the decade or so since the PSED was introduced.[50]

Although the proposed Human Rights Duties (HRDs) may look like those which constitute PSED, they are fundamentally different. If implemented fully and in alignment with the existing equality duties, the HRDs have the potential to catalyse PSED and the FSD by enabling a system of reflexive regulation underpinned by stronger state accountability and enforcement mechanisms. This is because, once incorporated, the HRDs will link directly to the international system inducing a shift in state obligation from the laissez faire approach underpinning PSED, to the imposition of positive obligations on the state, in the guise of the Scottish Ministers, which will have to act to ensure the achievement of specific outcomes.

The Taskforce recommended that there should be a participatory process to define the core minimum obligations and "an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right".[51] This approach has application in the identification of the content and reach of the HRDs themselves. ICESCR's provisions are broad and may not give rise to an immediate entitlement by way of a directly justiciable right but, rather, the state's adoption of a specific action might be required to improve a right holder's access to a particular resource. For example, activity to improve women's right to health might be the delivery of an educational programme targeted at raising healthcare professionals' awareness of relevant issues and associated needs. In this way, the imposition of duties can assist states in their achievement of full rights realisation over time by

[43] The Consultation (2023), Part 4.

[44] Equality Act 2010 s.149; The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

[45] Equality Act 2010 s.1, the socio-economic duty (SD) implemented in Scotland as the Fairer Scotland Duty in April 2018 and in Wales in March 2021. The SED has not to date been implemented in England.

[46] See Equality and Human Rights Commission, *Reviewing the Aims and Effectiveness of the Public Sector Equality Duty in Great Britain* (August 2018), available at: *https://www.equalityhumanrights.com/sites/default/files/review-of-public-sector-equality-duty-psed-effectiveness.pdf* and, on the Scottish specific duties, Equality and Human Rights Commission, *Effectiveness of the PSED Specific Duties in Scotland*, available at: *https://www.equalityhumanrights.com/sites/default/files/2022/our-work-effectiveness-of-psed-specific-duties-scotland-2018.pdf*.

[47] Equality Act 2006, see further Equality and Human Rights Commission, *A guide to regulation of the Public Sector Equality Duty in England, Scotland and Wales*, available at: *https://www.equalityhumanrights.com/sites/default/files/policy_on_regulating_the_public_sector_equality_duty_scot.pdf*.

[48] S. Fredman, "The Public Sector Equality Duty" (2011) 40(4) I.L.J. 405.

[49] See Equality and Human Rights Commission, *A guide to regulation of the Public Sector Equality Duty in England, Scotland and Wales*.

[50] Equality and Human Rights Commission, *Is Britain Fairer?* (June 2019), available at: *https://www.equalityhumanrights.com/sites/default/files/2021/is-britain-fairer-2018.pdf* and *Is Scotland Fairer?*, available at: *https://www.equalityhumanrights.com/sites/default/files/2021/is_scotland_fairer_accessible_1.pdf*.

[51] Taskforce Recommendation 13.

creating the legal or administrative norms required to make rights provision available and accessible. The duty is therefore placed on the state to take action to put the framework in place and to activate it with due speed so that the right holder's entitlement to the resource comes into play.

This process of progressive realisation and the use of the reflexive approach through the imposition of positive duties based on minimum core obligations emphasises the importance of direct incorporation of the treaty texts which, underpinned by an interpretative clause,[52] will require duty-bearers, including courts and tribunals to read, apply and interpret the rights in line with the international human rights law framework including General Comments, recommendations of UN Committees, concluding observations of treaty monitoring bodies, and other relevant international and regional mechanisms. This dynamic interaction, underpinned by appropriate mechanisms for assessment and monitoring at national level,[53] will assist in identifying the nature and extent of the duties against appropriate standards as well as the specific state actions required. As the consultation document outlines, alternative methods of incorporation are available including transposition of the combined text of the treaties,[54] but it is critical that the link between international jurisprudence and the state's obligation to respond to ensure progressive realisation is maintained by way of the direct treaty text approach.

Conclusions

In summary, although the route to full incorporation is a long and complex one, there is real potential for the proposed multi-treaty Bill to impact positively on rights provision in Scotland. Positive impact is possible not only through full realisation of the economic, social and cultural rights contained in ICESCR which line up directly with many key areas of devolved policy, but also by extension of the non-discrimination principle through the imposition of a framework of positive duties targeted at achieving a human rights-based approach to public service delivery. However, realisation of this ambition carries risks as well as opportunities.

Alongside the operational risks relating to the methods of implementation and in many respects constitutive to them, are the restrictions imposed by devolution on Scotland's ability to advance social, economic and cultural rights. The long path to incorporation has undoubtedly been lengthened by the limitations of the devolution settlement, but it has also been strengthened by the constitutional framework for human rights protection provided by the SA. This framework reaches across Scotland's public institutions and has had a positive impact on the perception and acceptance of human rights as wholly relevant to public service delivery. That is not to say that respect for human rights is always present in relevant decision-making processes, and it is in this regard that incorporation can potentially have the greatest and most immediate effect through the imposition of positive duties alongside an enhanced rights regime. The difference that the constitutional embeddedness of human rights has made to Scotland is that it accords them an appropriate status, placing them beyond question and invulnerable to the vagaries of political will. This brings us to the greatest current threat to the advancement of human rights in Scotland: that arising from the UK Government's hostility.

The approach to human rights at UK level has a direct effect on Scotland as a devolved nation, dependent in many respects on the UK as the state party to the international treaties. Although Scotland can act to incorporate the treaties, its ability to do so is restricted where such action may interfere with reserved matters, either by imposing duties on UK authorities acting in reserved areas or by giving Scottish courts the power to interpret UK laws in ways the UK Parliament did not originally intend.[55] Even so, the UK

[52] Taskforce Recommendation 10.
[53] Presumably to be set out in the proposed Human Rights Scheme—see National Taskforce Recommendation 15.
[54] The Consultation (2023), Part 4.
[55] See *Re Attorney General's Reference, United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] 1 W.L.R. 5106.

Government's choice of human rights advancement as the battle ground on which to exert its power cannot appear other than provocatively regressive. There are alternative ways of dealing with such apparent conflict. Rather than challenging Scotland's incorporation of the UNCRC, a more progressive administration might have welcomed the advancement of protections emanating from treaties which the UK as the signatory state has ratified. The UK Government could have seized the moment by incorporating the treaties at UK level. Of course, the CRC case is not the only example of the UK Government's regressive approach to human rights and its casual disregard for devolution,[56] but it does serve as a stark reminder that Scotland must act with caution in fulfilling its ambitions as its ability to advance human rights remains intertwined with political will at Westminster. This does not mean that Scotland should not act in this respect. On the contrary, the UDHR serves as a beacon for human rights, representing our commitment to the realisation of those rights and reminding us that every small step towards that goal is a significant one.

[56] Other recent examples include the proposals for a British Bill of Rights (withdrawn in June 2023) which would have repealed and replaced the HRA, and the Gender Recognition Reform (Scotland) Bill passed by the Scottish Parliament in December 2022 which, despite gender recognition being a devolved matter, has been blocked by the UK Government after the Secretary of State for Scotland issued an order under s.35 of the Scotland Act 1998 preventing the Bill from proceeding to royal assent. The case was heard in the Outer House of the Court of Session which ruled that the UK Government had acted lawfully. See: Opinion of Lady Haldane in the petition for Judicial Review of the Gender Recognition Reform (Scotland) Bill (Prohibition on Submission for Royal Assent) Order 2023 (8 December 2023), available at: *https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2023csoh89.pdf?sfvrsn=f2051764_1*. The ruling may now be appealed to the Inner House of the Court of Session by the Scottish Government, and ultimately to the Supreme Court.

Devolved and Evolved: Human Rights in Wales

Simon Hoffman*

Devolution; Human rights; Universal Declaration of Human Rights; Wales

Abstract

The Universal Declaration on Human Rights (UDHR) is a statement of entitlements for all humanity, setting forth civil and political rights, as well as economic and social rights. The aspiration of the UDHR is given legal form in international law through United Nations (UN) human rights treaties. These treaties, and associated commentaries by UN Treaty Monitoring Bodies require state parties to adopt a range of measures to realise human rights, including legal, administrative, judicial, educative and other measures. This article will discuss how Wales, a small, devolved nation which forms part of the United Kingdom, has made efforts to embrace the ambition of the UDHR, and to progress human rights through law and policy. The article also discusses the potential for Wales to progress human rights in the future, including discussion of recommendations from recent research commissioned by the Welsh Government on a progressive human rights agenda, and how these recommendations are being implemented.

Introduction

The Universal Declaration on Human Rights (UDHR) is a statement of entitlements for all humanity, setting forth civil and political rights (C&PRs), as well as economic and social rights (ESRs).[1] The UDHR Preamble calls on "every organ of society" to "promote progressive measures" for the "effective recognition and observance" of all human rights. The aspiration of the UDHR is given legal form in international law through United Nations (UN) human rights treaties.[2] These are more directive in allocating responsibility for progress on human rights to states which are party to human rights treaties.[3] Several commentaries by UN Treaty Monitoring Bodies (TMBs) confirm that state parties should adopt a range of measures to realise treaty rights, including legal, administrative, financial, judicial, educative and other measures.[4] This article will discuss how Wales, a small nation which forms part of the United Kingdom (UK), has sought to progress human rights through high level leadership.

In 1999 devolution took effect in Wales when certain executive functions were transferred from the UK Government to an elected corporate National Assembly for Wales (the Assembly), including competence over some secondary legislation.[5] Since 1999 changes to Welsh devolution have seen Wales-national institutions given additional competence over policy and legislation (collectively "public policy").[6] This enlargement of devolution has seen the establishment of a Welsh Government to exercise

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[1] Universal Declaration on Human Rights 1948 (UDHR).

[2] See United Nations, *The Core International Human Rights Treaties* (1 May 2006), available at: *https://www.ohchr.org/en/publications/reference-publications/core-international-human-rights-treaties* (UN core treaties).

[3] For example: UN core treaties, Covenant on Civil and Political Rights art.2; Covenant on Economic, Social and Cultural Rights art.2.

[4] For example: Human Rights Committee, *General Comment No.31, The nature of the general legal obligation imposed on States parties to the covenant* (UN, 2004), para.7; Committee on Economic, Social and Cultural Rights, *General Comment No.3, The nature of States parties obligations* (UN, 1998), para.7.

[5] Government of Wales Act 1998 (GWA 1998).

[6] For an historical overview: Welsh Parliament/Senedd Cymru, "History of devolution" (7 October 2021), available at: *https://senedd.wales/how-we-work/history-of-devolution/*.

executive functions in devolved areas, and the extension of legislative competence over primary legislation first to the Assembly then to its successor, a Welsh Parliament known as the Senedd.[7] While there remain areas of competence reserved to the UK Government and Parliament, changes to the architecture of Welsh devolution have increased the potential for Wales to progress human rights through devolved public policy. This article will explain how Welsh institutions have used public policy to direct the conduct of Welsh Ministers, and to a lesser extent some public authorities, toward compliance with international human rights. It will demonstrate how these institutions have necessarily been innovative, driven by a need to evolve public policy within the changing parameters of Welsh devolution.

While, for reasons which will become apparent the focus below will largely be on the UN Convention on the Rights of the Child (CRC),[8] it will be argued below that experience in the area of children's rights has potential to influence progress on human rights in Wales more broadly. The article will contend that while progress has been and continues to be inhibited by limitations on devolved competences, these limitations have contributed to an evolved approach which reflects the ambition of the UDHR and the expectations of TMBs on human rights leadership. The final section of this article will discuss recommendations from recent research commissioned by the Welsh Government on a progressive agenda on human rights in Wales, and how these recommendations are being implemented.

Toward an evolved approach

In 1998, UK legislation gave effect to devolution in Wales, as well as Scotland and Northern Ireland.[9] The arrangements for devolution were, and remain, asymmetrical with institutions in both Northern Ireland and Scotland being granted different powers to Wales.[10] When devolution took effect in Wales in 1999 it was limited to the transfer of certain executive functions from the UK Government to an elected Assembly with competence over policy and some secondary legislation. The Assembly at that time has been described as a "social policy body" as it lacked many levers of control over legislation available to UK-state institutions.[11] Achieving consensus proved a challenge during the early years of Welsh devolution, with several political parties represented in the Assembly. However, the topic of children's rights proved an exception, and so the Assembly set about proclaiming a commitment to children's rights through policy statements and by unanimously adopting the CRC as the foundation for all policy-making affecting children.[12]

Whilst this is significant for children's rights, it is also relevant more broadly as signalling the Assembly's willingness to embrace human rights as a framework for policy. It is also worth noting that the CRC is a document of both C&PRs and ESRs, further signalling a readiness to embrace the full breadth of human rights in the discharge of policy-making functions.[13] This approach has found its way into other Welsh Government strategies, most recently to promote the right of disabled people to independent living, where policy is expressly based on the UN Convention on the Rights of Persons with Disabilities (CRDP);[14] and,

[7] Government of Wales Act 2006 (GWA 2006), Wales Act 2017.
[8] See: UN core treaties.
[9] GWA 1998; Scotland Act 1998; Northern Ireland Act 1998.
[10] For a recent account of the asymmetries of UK devolution see: *Introduction to devolution in the UK* (London: House of Commons Library, 2022), available at: *https://researchbriefings.files.parliament.uk/documents/CBP-8599/CBP-8599.pdf*.
[11] I. Butler and M. Drakeford, "Children's rights as a policy framework in Wales" in J. Williams (ed.), *The Rights of the Child in Wales* (Cardiff: University of Wales Press, 2013), p.10.
[12] NAW, Record of Proceedings, 14 January 2004 (Cardiff: NAW). Repeated in a number of policy documents fully discussed by contributors in Williams (ed.), *The Rights of the Child in Wales* (2013).
[13] The commitment to ESRs was given effect in, for example, Welsh Assembly Government, *A Fair Future for Our Children: The Strategy of the Welsh Assembly Government for Tackling Child Poverty* (Cardiff: Welsh Assembly Government, 2005). The NAW established a de facto executive in 2002 known as the Welsh Assembly Government. It was not until 2007, following enactment of the Government of Wales Act 2006, that legislation established a formal Welsh Government, giving Welsh Ministers executive authority on the Welsh Assembly Government.
[14] UN core treaties. Welsh Government, *Action on Disability: The right to independent living* (Cardiff: Welsh Government, 2019), available at: *https://www.gov.wales/sites/default/files/publications/2019-09/action-on-disability-the-right-to-independent-living-framework-and-action-plan.pdf*, pp.1–2.

in its flagship strategy, a *Programme for Government* promoting well-being in Wales which sets out an intention to incorporate international human rights treaties into Welsh law (discussed below).[15]

Evolving the public policy framework

In 2006, UK legislation established a Welsh executive known as the Welsh Government and conferred primary law-making powers in prescribed areas (referred to as "Fields") on the Assembly.[16] These changes afforded Welsh institutions greater control over public policy in Wales, but limitations remained. Notably for present purposes, the Assembly was not given express competence over human rights.[17] However, human rights were not irrelevant to the conduct of devolved public policy. A common feature of devolution in Wales, Scotland and Northern Ireland is that the devolved executives and legislatures are prohibited from exercising their functions in a manner which is not compatible with rights under the European Convention of the Human Rights incorporated into UK law by the Human Rights Act 1998 (Convention rights).[18] Convention rights are woven into the fabric of devolution, providing a common thread amongst the UK Government and the three devolved executives, and distinguishing the devolved legislatures from the UK Parliament, which is not bound by Convention rights.[19] However, Convention rights are regarded as C&PRs and merely establish boundaries for the conduct of devolved institutions where those rights are engaged by public policy. This framing is primarily prohibitive, offering hardly any guidance on how devolved functions might be exercised to meet the ambition of the UDHR to progress C&PRs, or ESRs.

Limitations on competence might have restricted the Welsh Government and the Assembly to a focus on embedding human rights through policy. However, when the Assembly gained primary law-making competence, Welsh Ministers looked for an opportunity to give effect to the CRC through legislation. This presented itself in 2008 when the UK Parliament conferred a new legislative competence on the Assembly to pass legislation to safeguard the well-being of vulnerable children, with well-being defined to include securing rights.[20] While this was far from a direct conferral of competence over human rights, Welsh Ministers nevertheless sought to exploit the reference to rights to introduce primary legislation to incorporate the CRC into Welsh law. At the time primary legislation in Wales was referred to as a Measure, and so the Assembly passed the Rights of Children and Young Persons (Wales) Measure 2011 (the 2011 Measure). This requires Welsh Ministers to have due regard to Pt 1 of the CRC and prescribed articles of its first and second optional protocols in the exercise of all their functions.[21] The due regard duty means that Welsh Ministers must take children's rights meaningfully into account when exercising their functions, but are not bound to act in compliance with those rights, nor is there any remedy provided for a child who feels their rights have been violated.[22] At the time the legislation was passed it was the view of Welsh Ministers and non-governmental stakeholders that it was not possible to make the CRC enforceable in Wales, influencing the legal form of incorporation adopted by the 2011 Measure.[23]

A full discussion of the 2011 Measure is beyond the scope of this article. However, for present purposes there are several points worth noting about the due regard approach to incorporation. The 2011 Measure

[15] Welsh Government (WG), *Programme for Government—Update* (Welsh Government: Cardiff, 2021).

[16] GWA 2006 Sch.5, for Fields (now repealed). The NAW established a de facto executive in 2002 known as the Welsh Assembly Government.

[17] Although many Fields set out in GWA 2006 Sch.5, are areas where policy will have an impact on human rights, for example: education; health; housing (Fields 5, 9, 11).

[18] GWA 2006 ss.81 and 108A (similar provisions are included in the devolution statutes for Scotland and Northern Ireland). Convention rights are set out in the Human Rights Act 1998 (HRA 1998) Sch.1.

[19] HRA 1998 s.6(3).

[20] National Assembly for Wales (Legislative Competence) (Social Welfare and Other Fields) Order 2008 (SU 2008/3132) para.3.

[21] Rights of Children and Young Persons (Wales) Measure 2011 s.1.

[22] For a discussion of due regard and accountability under the 2011 Measure: S. Hoffman and J. Williams, "Accountability" in Williams (ed.), *The Rights of the Child in Wales* (2013), p.167.

[23] J. Williams, "General legislative measures of implementation: individual claims, 'public officer's law' and a case study on the UNCRC in Wales" (2012) 20(2) *International Journal of Children's Rights* 224; S. Hoffman, "Incorporating the UN Convention on the Rights of the Child in Wales" in U. Kilkelly, L. Lundy and B. Byrne, *Incorporating the UN Convention on the Rights of the Child into National Law* (Cambridge: Intersentia Ltd, 2021), p.99.

may be seen as Welsh law-making adapting or evolving to fit within the limitations of devolution. It may also be seen as having consequential impacts on how human rights more broadly might be progressed in Wales. Perhaps foremost amongst these is that the Welsh Government, the Assembly and more recently the Senedd have demonstrated an increasing confidence to pursue Wales-only legislation on human rights, and rights-based principles. This has included sectoral legislation incorporating the CRC but also the CRPD in the field of additional learning needs education,[24] and the CRC and the UN Principles for Older Persons in the field of social care,[25] making these conventions and principles relevant to the discharge of functions by certain public authorities in Wales. This willingness to embrace human rights conventions and principles as legal frameworks for public policy has not gone unnoticed by civil society in Wales. Organisations working in the field of disabled people's rights, women's rights and housing rights have sought to persuade Welsh Ministers to incorporate the CRPD,[26] the Convention on the Elimination of Discrimination Against Women (CEDAW),[27] and the right to adequate housing as constitutional Welsh law.[28] The Welsh Government responded positively in a 2021 update to its *Programme for Government*, signalling an intention to incorporate the CRPD and CEDAW, and to introduce a Welsh right to adequate housing.[29]

A further consequence of the legal form of the 2011 Measure is that attention is necessarily given to promoting non-legal mechanisms to secure better compliance with children's rights and to enhance Ministerial accountability. To promote compliance the 2011 Measure requires Welsh Ministers to make and publish a Children's Scheme setting out steps they will take to comply with the due regard duty.[30] To promote accountability the 2011 Measure requires Welsh Ministers to report periodically to the Assembly (now the Senedd) on progress to comply with the due regard duty.[31] The first Children's Scheme (2014) and a revised version (2021) both set out steps to embed due regard to the CRC in Welsh Government decision-making and action.[32] Amongst these are: impact assessment, to predict the likely impact of proposals for public policy on children's rights; training on the CRC for all Welsh Government officials; steps to be taken to promote participation and empowerment of children; and, raising awareness of children's rights. On participation, the 2011 Measure promotes engagement between the Welsh Government, and children and the Children's Commissioner for Wales (the CCfW) by requiring Welsh Ministers to involve them in the preparation of the Children's Scheme.[33] The 2011 Measure also promotes engagement with the international framework of children's rights by requiring Welsh Ministers to have regard to reports and commentaries published by the Committee on the Rights of the Child (the Committee) in the preparation of the Children's Scheme.[34] These legal devices give children and the CCfW an opportunity to influence how the Welsh Government implements children's rights through public policy, and provide a route by which public policy in Wales can embed internationally recognised good practice guidance.

[24] Additional Learning Needs and Education Tribunal (Wales) Act 2018 ss.7 and 8.

[25] Social Services and Well-being (Wales) Act 2014 s.7.

[26] Disability Wales, "Bring Us Our Rights: Disabled People's Manifesto" (2020), available at: *https://www.disabilitywales.org/wp-content/uploads/2020/12/DW-Manifesto2020-E.pdf*.

[27] WEN Wales, *CEDAW: Strengthening and Embedding Women's Rights in Wales* (March 2020), available at: *https://wenwales.org.uk/wp-content/uploads/2020/03/CedawBriefing.WenWales.Booklet.pdf*.

[28] As an aspect of the right to an adequate standard of living under art.11 of the Covenant on Economic, Social and Cultural Rights. Tai Pawb, the Chartered Institute of Housing Cymru, and Shelter Cymru, *The Right to Adequate Housing in Wales: Feasibility Report* (June 2019), available at: *https://sheltercymru.org.uk/policy_and_research/the-right-to-adequate-housing-in-wales-feasibility-report/*.

[29] Welsh Government (WG), *Programme for Government—Update* (Welsh Government: Cardiff, 2021), p.7 and p.14.

[30] Rights of Children and Young Persons (Wales) Measure 2011 s.2.

[31] Rights of Children and Young Persons (Wales) Measure 2011 s.4.

[32] Welsh Government/Llwodraeth Cymru, *Children's Rights Scheme 2014* (8 October 2020), available at: *https://www.gov.wales/childrens-rights-scheme-2014*; Welsh Government/Llwodraeth Cymru, *Children's Rights Scheme 2021* (December 2021), available at: *https://www.gov.wales/sites/default/files/publications/2021-11/draft-childrens-rights-scheme.pdf*.

[33] T. Aspinwall and R. Croke, "Policy advocacy communities: the collective voice of children's NGOs in Wales" in Williams (ed.), *The Rights of the Child in Wales* (2013), p.35 (and other contributions in this text).

[34] Rights of Children and Young Persons (Wales) Measure 2011 s.3.

While the intention behind the 2011 Measure is to give effect to the CRC in Wales, for present purposes it is significant that it deploys or promotes mechanisms which are often suggested as key steps to effective achievement of human rights generally. For example, incorporation or integration of human rights treaties into national law is prioritised by several TMBs, while the Children's Scheme introduces administrative and educative mechanisms which are amongst the measures identified as key to state party adoption of a human rights approach.[35]

Ongoing evolution of the approach to human rights

This article contends that the approach to human rights in Wales is an evolved approach. In one sense, this is demonstrated by the way in which Welsh devolved institutions have sought to exploit opportunities to embed some human rights treaties and principles through public policy, taking care to adapt to the contours of devolution. A second sense in which this approach is evolved is the way in which different levers of public policy have been used to embed both C&PRs and ESRs: these include incorporation, but also non-legal procedures to promote compliance, accountability, and participation of stakeholders, and to raise awareness of human rights. It is contended that the key features of children's rights in Wales establish a pattern-book for an evolved or progressive approach to human rights through public policy more broadly, reflecting the ambition of the UDHR for progressive measures to achieve realisation of both C&PRs and ESRs. Whether this evolved approach will contribute to future progress on human rights in Wales remains to be seen, with initial signs seeming somewhat (although not wholly) positive.

In 2020, the Welsh Government commissioned research on how Wales might strengthen and advance equality and human rights (the 2020 research).[36] Significantly, in 2017 the Senedd's legislative competence was extended when Wales moved from conferred model of devolution to a reserved model. Under a reserved model, legislative competence on any matter is assumed unless expressly reserved to the UK Parliament.[37] Partly motivated by a desire to use Welsh legislative competence to the fullest extent to promote human rights, and partly in response to increasing hostility toward human rights from the UK Government, Welsh Ministers were keen to receive recommendations on how human rights might be progressed in Wales through devolved public policy.[38]

The 2020 research undertook a literature review and scoping of relevant legal and policy frameworks on human rights, equality and well-being in Wales, before gathering evidence from professionals and people with lived experience of equality and human rights issues. Evidence was received through surveys, interviews, workshops, Welsh Government standing policy forums,[39] and focus groups. In total 169 professional stakeholders, 69 people from diverse groups representative of those with lived experience, and 30 children and young people participated in the evidence gathering phase of the 2020 research. Based on a literature review, the evidence gathering phase on human rights was structured around a number of themes: incorporation of human rights, the value and methods of enforcement, guidance, monitoring, and raising awareness of human rights. Participants were also asked for their assessment of what currently

[35] Committee on the Rights of the Child, *General Comment No.5*; Human Rights Committee, *General Comment No.31*; Committee on Economic, Social and Cultural Rights, *General Comment No.3*; Danish Institute for Human Rights, *Applying a rights-based approach: An inspirational guide for civil society* (DIHR: Copenhagen, 2007); Committee on Economic, Social and Cultural Rights, *The pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development* (5 April 2019), available at: *https://sustainabledevelopment.un.org/content/documents/21780E_C.12_2019_1_edited.pdf*; UN Population Fund, "The Human Rights-Based Approach" (24 November 2023), available at: *https://www.unfpa.org/human-rights-based-approach*.

[36] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (Cardiff: Welsh Government, 2021), available at: *https://www.gov.wales/strengthening-and-advancing-equality-and-human-rights-wales*.

[37] GWA 2006 as amended by Wales Act 2017. Reserved matters are set out in GWA 2006 Sch.7A and Sch.7B.

[38] For example, the Welsh Government expressed concern about the UK Government's proposal (which it is no longer progressing) to repeal the Human Rights Act 1998: *The Welsh Government's Response to the 'Human Rights Act Reform: A Modern Bill of Rights' consultation, launched by the UK Government on 14 December 2021*, available at: *https://www.gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf*. On the human rights situation in the UK generally: Human Rights Watch, *World Report: Events of 2022* (2023), available at: *https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf*, p.651.

[39] On race, disability, older people and faith.

works to progress human rights in Wales, and on areas for improvement. The data from participants was collated and analysed adopting a reflexive approach, initially to identify and code general themes and then through further familiarisation, to confirm overarching themes (e.g. views on value of legal integration and raising awareness, the need for guidance), and to generate sub-themes (on practices, procedures or necessary resources).[40] The findings from the research are presented in a research report, *Strengthening and Advancing Equality and Human Rights in Wales 2021* (the 2021 report) which sets out 40 recommendations under nine headings: Legislation and Leadership; Guidance; Impact Assessment; Process Alignment; Monitoring; Accountability and Enforcement; Raising Awareness; and Covid-19. Space does not permit a full discussion of the 2021 report and so what follows is a selective account focussing on recommendations on how the Welsh Government should develop (or evolve) the public policy framework in Wales to progress human rights.

The 2021 report confirms that the Senedd has competence to observe and implement the UK's international obligations, which is taken to include human rights obligations arising from treaties to which the UK is a state party.[41] It notes a strong desire amongst research participants for further incorporation of international human rights treaties into Welsh law. While the Welsh Government has indicated an intention to incorporate the CRPD and CEDAW, the 2021 report notes a broader desire in Wales for a holistic approach to embedding more UN conventions. Some research participants explained why they see incorporation as an important step. Reasons given include the need to secure compliance and to provide for mechanisms for redress where rights are violated.[42] As already noted, the due regard model of incorporation used in the 2011 Measure does not provide a redress mechanism for individuals whose rights are breached. The 2021 report notes dissatisfaction with due regard as an underpinning of support for enforceable human rights.[43] However, it also identifies a number of strengths of the due regard approach, drawing in part on research in 2018 for the Equality and Human Rights Commission in Wales on the impact of the 2011 Measure: notably, the way in which due regard encourages attention to human rights in policy development and its potential (demonstrated by the Children's Scheme) to mainstream human rights into policy development.[44]

The 2021 report recommends further incorporation of international human rights into Welsh law and for Welsh Ministers to examine how this might be achieved in a way which provides for judicial enforcement. The Welsh Government accepted these recommendations and established a Legislative Options Working Group (the Working Group) to examine options for legislation within the current framework of devolution, as well as non-legislative options to support implementation of human rights incorporated into Welsh law, or to embed those rights which are deemed incapable of incorporation because of reservations to devolved competences.[45] At the time of writing the Working Group is yet to present its findings, but an initial report confirms it is examining options to incorporate the UN core treaties in a way which makes rights enforceable, and that it is engaging with relevant stakeholders to determine how non-legislative mechanisms might support embedding of rights in the Welsh public policy framework.[46]

While acknowledging support for legislation to incorporate more human rights in Wales, the 2021 report notes dissatisfaction with current Welsh legislation on human rights (discussed above). Research

[40] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), Ch.3, "Methodology".

[41] GWA 2006 Sch.7A, para.10(3) expressly *excludes* observing and implementing international obligations from a reserved competence over "Foreign Affairs", which remains with the UK Parliament.

[42] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), Ch.4 "Legislation"; Ch.5 "Human Rights Incorporation".

[43] For example, evidence noted at paras 5.20 and 5.21: Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021).

[44] S. Hoffman and S. O'Neill, *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (Cardiff: Equality and Human Rights Commission, 2018); Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021): Strengths of due regard are discussed at para.5.23 and aspects of mainstreaming at paras 6.18–6.23.

[45] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021).

[46] Legislative Options Working Group, *Interim Report*, September 2023, presented to the Welsh Government Human Rights Advisory Group. Not yet published, author's personal archive.

participants highlighted an implementation gap between the aspirations of public policy and the lived experience of many individuals and groups who experience ongoing deficit in their access to services and resources otherwise guaranteed by human rights.[47] To help address this deficit the 2021 report draws on learning from the 2011 Measure (as discussed above), as well as the literature on human rights implementation and a human rights approach.[48] It makes a number of recommendations to promote better recognition of human rights by Welsh Ministers and public authorities at all stages of policy development and implementation.[49] These recommendations reflect features of the pattern-book for an evolved approach to human rights which emerged from the experience of children's rights in Wales, and include: signalling support for human rights in all significant policy and strategic documents; carrying out human rights impact assessments; and, involving people with an interest, including those with lived experience, in developing public policy targets and outcome indicators.[50]

In addition to the Working Group, the Welsh Government has established a Human Rights Advisory Group (the Advisory Group) to monitor progress on the 2021 report recommendations, with members drawn from civil society and academia.[51] Welsh Ministers have also committed to developing a Human Rights Approach and, referring to discrete policy areas specifically children and older people, point at ongoing collaborative work to embed a rights-based approach.[52] This includes work with the Future Generations Commissioner for Wales to prepare non-statutory guidance on how the Well-being of Future Generations (Wales) Act 2015 (the 2015 Act) and human rights can "work together".[53] The 2015 Act prioritises sustainable development as an objective for public authorities in Wales including Welsh Ministers, and establishes seven well-being goals to embed this objective in public policy.[54] There are certainly connections between human rights and well-being, perhaps most usefully articulated in the UN resolution, *Transforming our world: the 2030 Agenda for Sustainable Development* (the 2030 Agenda). The 2030 Agenda declares a vision of a world where: "physical, mental and social well-being are assured" and of "universal respect for human rights…equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity".[55] The 2030 Agenda goes on to describe a relationship between equality, human rights and well-being based around the UN sustainable development goals. Similarly, the UN Committee on Economic, Social and Cultural Rights has described the relationship between sustainable development and socio-economic human rights as a "fundamental pillar" of the 2030 Agenda and sustainable development.[56] It is certainly the case that some well-being goals set out in the 2015 Act reflect objectives in the 2030 Agenda: for example, a more equal Wales, a resilient Wales, a healthier Wales.[57] However, in the context of the Welsh public policy framework, approaching human rights through the vehicle of well-being raises a number of concerns.

[47] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), para.6.18, drawing on participant views but also evidence from other research. See: Equality and Human Rights Commission, *Is Wales Fairer? The state of Equality and Human Rights* (Cardiff: Equality and Human Rights Commission, 2018).

[48] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), Ch.6, "The implementation Gap"; Ch.7, "Impact Assessment".

[49] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), paras 3.19 and 12.2.

[50] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), recommendations 2–4, 6–8, 17–20, and 22.

[51] "About HRAG": Welsh Government, *Action to strengthen human rights in Wales: 2018 to 2022* (17 October 2022), available at: *https://www.gov.wales/action-strengthen-human-rights-wales-2018-2022-html*.

[52] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), section B.

[53] *Welsh Government response to the 'Strengthening and Advancing Equality and Human Rights in Wales' research report* (Cardiff: Welsh Government, 2022), available at: *https://www.gov.wales/sites/default/files/publications/2022-05/response-report.pdf*, section B.

[54] Well-being of Future Generations (Wales) Act 2015 ss.2–5. The well-being goals are set out in s.4: a resilient Wales, a prosperous Wales, a healthier Wales, a more equal Wales, a Wales of cohesive communities, a Wales of vibrant culture and thriving Welsh language, a globally responsible Wales.

[55] UN General Assembly (UNGA), *Transforming our world: the 2030 Agenda for Sustainable Development* (UNGA, 2015), available at: *https://sdgs.un.org/documents/ares701-transforming-our-world-2030-agen-22298*, paras 7 and 8.

[56] Committee on Economic, Social and Cultural Rights, *The pledge to leave no one behind: the International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development* (2019), para.4.

[57] Well-being of Future Generations (Wales) Act 2015. See e.g. UNGA, *Transforming our world: the 2030 Agenda for Sustainable* Development (2015), on resilience and equality at paras 7 and 8, and on health at para.26.

The 2015 Act well-being goals do not include reference to human rights and the 2021 report draws attention to concerns raised by research participants about a lack of connectivity between well-being and human rights as public policy agendas in Wales, with well-being seen as diverting attention away from recognition and enforcement of human rights.[58] Research participants also commented that the well-being goals in the 2015 Act are vague, leading to a perception that Welsh legislation is weak, "lacks teeth" and fails to protect human rights.[59] While it is welcome that the Welsh Government has expressed a commitment to a Human Rights Approach, there is a risk that a continued focus on well-being as a driver of public policy in Wales will distract attention away from human rights. This risk is accentuated by the Welsh Government's response to recommendations in the 2021 report for human rights to be the basis for setting targets and outcome indicators for public policy.[60] While the Welsh Government has expressed general agreement with these recommendations it has been ambivalent on how they might be put into effect. For example, on human rights as outcome indicators, Welsh Minsters have suggested that some existing well-being indicators in Wales embed human rights, although reference to the indicators themselves are hardly convincing on this point: with a tendency toward generalised pointers of well-being, with very few indicators which directly or indirectly refer to how people experience human rights guarantees.[61] And while Welsh Ministers have suggested there "could be scope to widen this coverage [of indicators] in some key areas" it seems this is likely to be through elaboration of well-being indicators, rather than the development of a new set of bespoke human rights outcome indicators as contemplated in the 2021 report.[62]

Another area of concern relates to the 2021 report recommendation that the Welsh Government should introduce a Human Rights Impact assessment to prioritise human rights in the development and implementation of public policy.[63] The Welsh Government has committed to updating the tools and guidance accompanying its Integrated Impact Assessment (IAA) which officials apply to assess proposals for public policy.[64] At the time of writing the IAA template used by Welsh Government officials has been updated to include a section on "Human Rights".[65] However, at the time of writing, fully 26 months after the 2021 report, the Welsh Government has yet to yet to report to the Advisory Group on the content of a new IAA template or on guidance on human rights to accompany the IAA.

A further set of recommendations in the 2021 report deal with public education on human rights. The 2021 recommendations urge a comprehensive educative programme on human rights. The Welsh Government response notes that the revised curriculum for Wales requires schools to include education on human rights.[66] These developments are welcome, and consistent with the expectation that human rights leadership includes the adoption of educative measures. What is less positive is that the Welsh Government appears reluctant to demonstrate leadership toward Higher Education institutions in Wales by requiring them to include human rights in Higher Education curricula. Instead, the Welsh Government suggests that this would usurp the function of the Law Council of Wales, and undermine the independence of universities

[58] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), Ch.4 "Legislation".
[59] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), para.4.20.
[60] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), recommendations 4, 11, 13,16, 24.
[61] Welsh Government, "National Well-being Indicators" (29 September 2022), available at: *https://www.gov.wales/wellbeing-wales-national-indicators*.
[62] Welsh Government, *Welsh Government response to the 'Strengthening and Advancing Equality and Human Rights in Wales' research report* (2022), p.9.
[63] Welsh Government, *Strengthening and Advancing Equality and Human Rights in Wales* (2021), Ch.7, "Impact Assessment", recommendations 17–22.
[64] Welsh Government, *Welsh Government response to the 'Strengthening and Advancing Equality and Human Rights in Wales' research report* (2022), section D. Welsh Government Integrated Impact Assessment, Information on Integrated Impact Assessment, available at: *https://www.gov.wales/sites/default/files/publications/2021-03/atisn14824doc10.pdf*.
[65] It has not been possible to download a blank IAA template. The Welsh Government publishes completed IAAs. An example, on an Infrastructure Bill, may be found here: Welsh Government Integrated Impact Assessment (February 2023), available at: *https://www.gov.wales/sites/default/files/publications/2023-06/infrastructure-wales-bill-integrated-impact-assessment.pdf*.
[66] Welsh Government, *Welsh Government response to the 'Strengthening and Advancing Equality and Human Rights in Wales' research report* (2022), section E.

in Wales.[67] This appears to be an abdication of responsibility not least because in relation to the CRC at the very least, the Committee has stated that it "expects to see the [CRC] reflected in professional training curricula…and educational curricula at all levels".[68] But also, because a comprehensive review of justice in Wales, set up by the Welsh Government in 2019, recommended that "[a]ll university and college education providers in Wales should teach Welsh law as part of the ordinary undergraduate syllabus".[69] Welsh law already embeds a number of human rights treaties and work is progressing to incorporate more treaties. Welsh universities play a key role in training medical, legal, education, social care and other professionals, many of whom will go on to practice in Wales. Through direct delivery, or through service planning functions, these practitioners will often deal directly with individuals who require advice on human rights (for example, legal professionals) or access to services where human rights should be to the fore in determining how services are planned and delivered (for example, health or social care). The Welsh Government's reticence to demonstrate leadership in this area may detrimentally impact how practitioners understand, advise on, apply or otherwise engage with the Welsh human rights framework in their professional lives.

Conclusion

This article has demonstrated how public policy in Wales has evolved to accommodate the changing architecture of devolution to embed progressive measures to progress human rights through public policy. With the move to a reserved model of devolution the stage is set for Wales to make further progress, drawing on a ready bank of accumulated experience in the field of children's rights and the 2021 report recommendations, which themselves draw on a wealth of experience from amongst civil society in Wales. There is reason to be optimistic about where Wales will go next on human rights, bearing in mind the ongoing commitment to incorporation and the anticipated outcome from the Working Group.[70] However, there are challenges ahead. The obsession with well-being as a driver of public policy in Wales has potential to distract from progress on human rights, and key recommendations in the 2021 report on impact assessment and raising awareness may not be fully implemented. If public policy in Wales is to embrace the ambition of the UDHR for progressive measures to achieve human rights, the Advisory Group and civil society generally, as well as interested Senedd Members, will need to be vigilant to ensure the Welsh Government delivers on its commitment to strengthen and advance human rights.

[67] Welsh Government, *Welsh Government response to the 'Strengthening and Advancing Equality and Human Rights in Wales' research report* (2022), section E.

[68] Committee on the Rights of the Child (Committee), *General Comment No.5*, para.54.

[69] Commission on Justice in Wales, *Justice in Wales for the People of Wales* (Cardiff: Commission on Justice in Wales, 2019), available at: *https://www.gov.wales/sites/default/files/publications/2019-10/Justice%20Commission%20ENG%20DIGITAL_2.pdf*, recommendation 48.

[70] On 5 September 2023 the Chief Whip and Minister for Social Justice, Jane Hutt MS, confirmed that the Welsh Government continues to see incorporation as a key step toward protecting human rights in Wales. Letter to Sioned Williams MS, Chair of the Senedd Cross Party Group on Human Rights. Author's personal archive.

Book Review

Internally Displaced Persons and International Refugee Law, by Bríd Ní Ghráinne, (Oxford University Press, 2022), £87.00, ISBN: 9780198868446.

Refugees and Internally Displaced Persons (IDPs) share much in common: most significantly all are displaced, often for protracted periods, and have left behind homes, family connections, and livelihoods.[1] Yet, from the perspective of the law, they are distinct. Refugees are those who are outside their country of origin and fall within the scope of the definition in art.1A of the 1951 Refugee Convention.[2] IDPs, meanwhile, remain in their country of residence and fall within the description in the United Nations (UN) Guiding Principles on Internal Displacement.[3] In 2022, the number of displaced persons across the globe—including refugees and IDPs—surpassed 100 million, for the first time.[4] With new drivers of displacement, such as climate-related events, operating alongside protracted and emergent conflicts, this number is only set to increase in the coming years.

Against this backdrop, Ní Ghráinne's, *Internally Displaced Persons and International Refugee Law* is most timely. Amidst the context of a growing framework of protection for IDPs, the book centres on the question of the extent to which such a framework "complements, conflicts with, or undermines international refugee law".[5] As the author rightly notes, despite the wealth of scholarly literature on international refugee law, the interactions between the refugee and IDP frameworks have, to date, been largely overlooked.[6] Yet, given the close links in practice, understanding these normative interactions is arguably essential. Moreover, through her thorough and careful analysis of the relationship between international refugee law and IDPs, Ní Ghráinne "challenges the practice of invoking IDP protection efforts as alternative to asylum".[7]

After setting out the central focus and arguments of the book in Ch.1, Ch.2 provides the necessary contextual background, addressing the relationship between IDPs and refugees. After succinctly elucidating some of the shared characteristics of all displaced persons, the chapter highlights some of the key distinctions between refugees and IDPs. Chief among such differences, especially from the perspective of the law, is the fact that refugees have crossed an international border (and meet the other conditions of refugee status),[8] while IDPs remain in their country of origin.[9] Yet, Ní Ghráinne also highlights that, in practice there is a degree of fluidity between the two categories, with many persons falling into both categories at different stages of their displacement journey.[10] Against the backdrop of these—and other—similarities and differences, the chapter moves on to begin the exploration of the relationship between IDPs and refugees. Ní Ghráinne argues that a real risk of internal displacement would probably not, in itself, be enough to satisfy the requirements of the refugee definition.[11] On the question of whether there ought to be a merging of the two frameworks, Ní Ghráinne argues that there are good reasons for maintaining the present distinction.[12] As such, the chapter concludes by raising the question of the possible

[1] B. Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (Oxford: Oxford University Press, 2022), pp.26–27.
[2] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[3] United Nations High Commissioner for Refugees (UNHCR), *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1197/39. Addendum: Guiding Principles on Internal Displacement* (11 February 1998) UN Doc. E/CN.4/1998/53/Add.2 (Guiding Principles).
[4] UNHCR, Global Trends: Forced Displacement in 2022 (2023), 2.
[5] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.2.
[6] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.4.
[7] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.6.
[8] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137, art.1A(2).
[9] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.28.
[10] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), pp.26–27.
[11] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.32.
[12] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.34.

"complementarity" and "conflict" between international refugee law and the IDP framework.[13] It is these possible conflicts that are explored in more detail in subsequent chapters.

Before turning to explore some of the relevant intersections and potential points of conflict in more detail, Ch.3 constitutes a comprehensive overview of the legal and institutional framework for the protection of IDPs. Here, Ní Ghráinne carefully sets out the key aspects of the history and content of the IDP protection framework, paying close attention to those aspects of most relevance to the book's focus. For example, she carefully charts and assesses the era of "preventative protection", and some of the underlying policy reasons behind the efforts to establish "safe zones".[14] The chapter then turns to the subsequent development of the IDP legal and institutional framework. This includes the soft law Guiding Principles—many of which are based on existing "hard" law but articulated in the context of IDPs', as well as two regional treaties which create binding obligations. The author also provides a comprehensive, yet concise, overview of relevant norms within other relevant fields of international law, including international human rights law, international humanitarian law, and international criminal law. As a whole, the chapter acts as useful overview of the IDP protection frameworks in itself, as well as in the context of its interaction with international refugee law.

Following this, Chs 4–6 turn to analyse, in more detail, three important intersections between the IDP and refugee law frameworks, beginning in chapter 4 with an assessment of the internal protection alternative (IPA), a refugee law doctrine which holds that if protection is available elsewhere in one's country of origin, they will not qualify for refugee protection. The pertinent question in this chapter is the extent to which "becoming an IDP on return is relevant to the IPA enquiry".[15] Through a careful analysis rooted in treaty law rules and state practice, Ní Ghráinne argues that, "the IDP label does not carry significant weight" in an IPA assessment.[16] As the author rightly notes, the IPA doctrine is not explicitly set out in the Refugee Convention's definition, and domestic interpretations reveal "divergence".[17] The chapter nevertheless sets out three criteria "that are generally accepted as forming part of the IPA inquiry".[18] These are: "(i) the IPA must be accessible to the applicant; (ii) there must be no effective protection from the original risk of persecution, and (iii) there must be no new risk of being persecuted or of *refoulement*".[19] Through a thorough assessment of these criteria, as well as some additional criteria identified in the practice of some states, the chapter argues that ultimately it is the aforementioned criteria, that remain central to the "IPA inquiry".[20] The "IDP label" therefore may be relevant but given the wide range of circumstances present across the "spectrum of displacement" it is not, Ní Ghráinne claims, "particularly helpful".[21]

In Ch.5, the attention turns to UNHCR's role in IDP protection and the extent to which the assistance provided by UNHCR may constitute "protection of that country" in a way that would preclude those fleeing from subsequently accessing refugee protection and thus, undermine its core mandate. Ní Ghráinne provides the necessary context by elucidating the criteria that must be present for UNHCR's engagement in IDP protection, which include state consent.[22] She also provides a careful analysis of the interpretation of "protection of that country", which is a key component of the Refugee Convention's definition.[23] That analysis, which is rooted in art.31(1) of the Vienna Convention on the Law of Treaties (VCLT), argues

[13] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.35ff.
[14] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.41ff.
[15] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.89.
[16] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.89.
[17] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.93.
[18] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.93.
[19] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.93, referring to B. Ní Ghráinne, "Safe Zones and the Internal Protection Alternative" (2020) 69 *International and Comparative Law Quarterly* 335.
[20] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.113.
[21] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.113.
[22] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.119.
[23] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.125; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137 art.1A(2).

that it is the "protection of State authorities" that falls within the scope of "protection of that country".[24] This, however, may include other actors, including international organisations, where there is genuine accountability to the state for actions taken. Through a thorough assessment that draws from state practice, the author demonstrates how "standard of protection" required is "very high" and that UNHCR does not appear to meet such a standard. Further, Ní Ghráinne argues that it is, in fact, "not capable … of providing such protection".[25] The chapter's detailed analysis leads to the conclusion that UNHCR "is not, at least as a matter of law, undermining its primary mandate towards refugees".[26]

The book's final substantive chapter explores art.1D of the Refugee Convention and questions whether protection offered by UN agencies other than the UNHCR could trigger its applicability.[27] Historically, this article has been applied only in the context of the protection provided to Palestinian refugees by the UN Relief and Works Agency (UNRWA).[28] As the author notes, the question of art.1D's application beyond this is an important one, since there are various UN agencies engaged in IDP protection through the cluster approach. Ní Ghráinne rightly notes that states might rely on the "ordinary meaning" of art.1D or on the "living instrument" approach to treaty interpretation, to claim that agencies other than UNRWA would trigger the applicability of art.1D. Yet, she puts forward a compelling—VCLT centred—argument that such interpretations are incorrect. The Refugee Convention's *travaux préparatoires* reveal the context for a "special meaning" to art.1D; one that, in the author's analysis "is limited in its applicability to those who its drafters intended—Palestinian refugees receiving protection from UNRWA".[29] Nevertheless, in light of UNHCR's position and evidence from state practice in England and Wales, the chapter leaves open the possibility of art.1D applying in other contexts, and provides a thorough analysis from that perspective.[30] Yet, the textual interpretation in this chapter also leads to the conclusion that art.1D would not apply to IDPs who had received protection from UNHCR. Chief among the reasons for such a conclusion is the fact that when persons are applying for refugee status, they have already crossed an international border and are no longer, in fact, IDPs.[31]

Taken together, the analyses across the book's chapters form Ní Ghráinne's central claim; namely, that protection provided to IDPs "cannot—at least in legal terms—be a substitute for granting refugee status unless it constitutes effective protection from persecution and there is no danger from *refoulement*".[32] Yet, as the author rightly notes, the ultimate determination will come from domestic courts, and in a context of ever more displaced persons, and ongoing "contemporary challenges", subsequent jurisprudence may adopt a different approach.[33]

As a whole, the book provides an excellent exposition of the intersections between international refugee law and the IDP protection framework. It does so through an analysis not only of the relevance of one's (potential) characterisation as an IDP within refugee status determination processes, but also through an assessment of the impact of protection provided by UNHCR and UNRWA. Such questions have—until now—remained underexplored, yet they are arguably ever more important in the present context: one where the number of displaced persons is at an all-time high, and where there is increasing hostility towards refugees in law, policy and practice.[34]

[24] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.134; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 arts 30–32.
[25] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.153.
[26] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.155.
[27] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.156ff.
[28] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.158.
[29] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.164.
[30] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.165ff.
[31] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.173ff.
[32] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.1.
[33] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.185.
[34] Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (2022), p.185. For more, see e.g., F. Webber, "On the Creation of the UK's 'Hostile Environment'" (2019) 60(4) *Race and Class* 76; T. Gammeltoft-Hansen and J.C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence" (2015) 53(2) *Columbia Journal of Transnational Law* 235.

The book's greatest strength lies in the careful and systematic approach to treaty interpretation adopted by the author; one that is clearly and firmly rooted in the Vienna Convention on the Law of Treaties. Thus, while it is certainly a necessary addition to the bookshelf of refugee and IDP law scholars, students, and practitioners, it will also be of interest to public international law scholars more broadly.

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