

The Existing Human Rights Framework and the Potential for Change: A Legal Analysis

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1 Key questions

- Which rights are protected?
- What is level of protection of those rights?
- What is their legal status in Scots law?
- How are they enforced?

2 Legal Sources of Human Rights

- International treaties
 - International Covenant on Civil and Political Rights (ICCPR)
 - International Covenant on Economic, Social and Cultural Rights (ICESCR)
- ECHR & European Social Charter
- EU Treaties & secondary legislation
- UK/Scottish legislation
- Common law

2 Levels of Protection in Human Rights Treaties

States may be obliged to:

- ‘Respect’ rights
 - ‘Protect’ rights
 - ‘Fulfil’ rights
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- obligations to refrain from interfering with liberties
 - obligations to secure rights against interference by other individuals or groups
 - positive obligations to achieve appropriate outcomes

3 Human rights treaties in Scots law

- Treaties do not become part of Scots law merely by virtue of ratification.
- International Treaties require enactment (e.g. by Act of Parliament or by Act of the Scottish Parliament) to have full effect in Scots law.
- Absence of fundamental law – doctrine of sovereignty of Parliament - means Parliament is free (a) not to enact legislation giving effect to HR treaties and (b) to enact legislation inconsistent with treaty rights.

3 Human rights treaties in Scots law

- Rights in EU law have enhanced legal status compared to other treaty rights by virtue of European Communities Acts 1972 (ECA).
- ECHR rights have enhanced legal status by virtue of Human Rights Act 1998 (HRA) and Scotland Act 1998 (SA).

4 Which rights are protected by ECA/HRA/SA

- The HRA protects mainly civil and political rights (because ECHR does);
- The UK has not ratified protocols 4, 6, and 7 (various rights including freedom of movement and certain criminal process rights);
- EU treaties and legislation (which are given effect by ECA) protect both civil and political rights and certain economic rights (e.g. free movement of goods and persons, right to establish a business).

4 Protection of other treaty rights in Scots law?

- Examples of such treaties include:
 - European Social Charter
 - UN Convention on the Rights of Child
- Specific rights contained in such treaties may be protected by specific legislation or the common law; but
- No other treaties have been translated as a whole into domestic law or given the enhanced status of ECHR rights and EU law rights.

5 What is level of protection of ECHR rights?

- All ECHR rights/freedoms include an obligations on the state to ‘respect’ the right (i.e. refrain from interfering with the liberty of the individual).
- Some also oblige the state to ‘protect’ the right, i.e. to take some positive action to secure rights against interference by other individuals or groups.
- Occasionally the European Court of Human Rights requires the state to ‘fulfill’ the right, i.e. give material assistance to secure a right (e.g. the right to a fair trial implies state funded legal representation in some but not all cases).

5 What is level of protection of EU rights?

- Many EU rights are liberty rights (e.g. the right to establish a business in any member state) and so the obligation on the Member State is to ‘respect’ the right.
- Some rights may also require the Member State to ‘protect’ or even ‘fulfill’ the right.

5 What level of protection for other treaty rights

- This depends on the treaty concerned
- Economic and social rights often require the state to ‘protect’ and ‘fulfill’ the right as well as to ‘respect’ it.

6 Legal status of ECHR rights in Scots law?

- Acts of the Scottish Parliament are unlawful to the extent that they are not compatible with Convention rights (SA).
- In general the discretionary powers of public bodies should be exercised compatibly with Convention rights (HRA, SA).
- Common law rules may have to be adjusted to comply with ECHR (HRA).

6 Legal status of EU rights in Scots law?

- In cases of conflict between rights guaranteed by EU law and Scots law, EU law should prevail and our courts should give effect to it.
- The only exception is where an Act of the UK Parliament expressly derogates from the right in question – so far this has not happened.

6 Legal status of other treaty rights?

- These are protected only to the extent provided for in statute or common law.
- Statutes and common law rules which are incompatible with these rights may be enforced and applied.

7 How are ECHR rights enforced?

- A victim of a rights violation may raise a court action against the public authority responsible.
- ECHR arguments may be raised as a defence to legal action.
- ECHR arguments may be made in any relevant legal proceedings e.g. a court case or an appeal to a tribunal.
- Equality and Human Rights Commission (EHRC) has powers (a) to investigate suspected human rights violations and issue notices to remedy violations and (b) apply for interdict to restrain a person from committing an unlawful act and (c) support individuals to take legal action.
- Scottish Human Rights Commission has more limited powers.

7 How are EU rights enforced?

- European Commission may take enforcement proceedings.
- Private parties may raise legal actions to enforce rights.

7 How are other treaty rights enforced?

- These can be enforced only to the extent provided for in statute or common law.
- In some areas there may be a relevant agency with a promotion or enforcement role, e.g. Scotland's Commissioner for Children and Young People.

8 Options for change: Independence

A newly independent Scotland would have to decide:

- Which rights should be protected?
- What should be the level of protection of those rights?
- What should be their legal status in Scots law?
- How should they be enforced?

8 Which rights should be protected?

- Only civil and political rights?
- Or social and economic rights as well?
- If so, which social and economic rights?
 - the right to work?
 - the right to education?
 - the right to health care?
 - the right to housing?
 - the right to a decent standard of living?

8 What should be the level of protection?

- Which of these rights should be seen as
 - imposing an obligation on the Scottish state merely to respect rights?
 - to respect and protect rights?
 - to respect, protect and fulfil rights?

8 What should be the legal status of rights?

- protected by ordinary legislation?
- protected by a legally enforceable codified constitution?
- Enhanced legal protection but not in a codified constitution e.g. the model of the HRA?

8 How should the rights be enforced?

- Leave it to individuals to pursue legal action?
- A public body with a mission to promote human rights and take enforcement action?

9 Options for change: staying in the UK

The same basic questions arise as with independence:

- Which rights should be protected?
- What should be the level of protection of those rights?
- What should be their legal status in Scots law?
- How should they be enforced?

9 Options for change: staying in the UK

Under the existing system the constraints on enhancing legal protection of human rights are:

- Scottish Parliament may not legislate on reserved matters
- Reserved matters are also a constraint on action by the Scottish Government
- Financial constraints.

9 Options for change: staying in the UK

- Further devolution might result in more powers being devolved therefore giving the Scottish political system greater freedom to take action on human rights.
- Changes to the financing of devolved government may affect the ability to take certain actions.