

Human Rights and Scotland's Constitutional Future

Scottish Constitutional Futures Forum (SCFF), Human Rights Consortium Scotland, Glasgow Human Rights Network, and Glasgow Refugee, Asylum and Migration Network

Introduction

On 18 March and 1 May 2013, at the Scottish Parliament and Glasgow City Chambers respectively, the Scottish Constitutional Futures Forum (SCFF), Human Rights Consortium Scotland, Glasgow Human Rights Network, and Glasgow Refugee, Asylum and Migration Network came together at the Scottish Parliament to discuss the place of human rights and Scotland's constitutional future; an issue which has been largely side-lined in the independence debate to date. The seminars were supported financially by the Thomas Paine Initiative and by the organizations involved. The seminars provided a useful space for academics, civil society actors, politicians and grassroots activists to consider, and to offer and exchange their perspectives on, two key questions: 'where are we now?'; and 'where are we going?' (For programmes see the the end of the report).

Seminar One addressed: **Where we are now? Human rights and the Independence Debate.**

Seminar Two addressed: **The Human Rights Question: What sort of Scotland, and what sort of constitutional future?**

Participants mapped the framework for the protection of human rights in Scotland, identified shortcomings in the realisation of rights, and discussed the place of human rights in the wider debate concerning independence.

Where are we now?

At both seminars, speakers set out the existing legal and institutional framework for the protection of human rights in Scotland: a multi-layered rights system based on international treaties which the United Kingdom has ratified, particularly the European Convention on Human Rights; at the EU level, the European Union Charter of Fundamental Rights; and, at the Scottish level, the twin pillars of the Scotland Act 1998 and the Human Rights Act 1998; stressing that human rights protection cuts across both devolved and reserved competences. Prof. Alan Miller of the Scottish Human Rights Commission focused on, first, the disparity between the robust structures for the protection of civil and political rights (through the European Convention system and, at the domestic level, the Human Rights Act) and the weaker position of social, economic and cultural rights, which are not accorded the same status or protection, and second, the need for a National Action Plan in Scotland concerning human rights protection.

There was general agreement that Scotland's existing framework for the protection of human rights is solid, but that it could be improved. Many contributions noted that it is the less effective implementation of social and economic rights in Scotland in comparison to civil and political rights that most engages the public and which has the greatest impact on their lives, and that there is a disjuncture between the generally sound rights protection framework and a clear rights-based rhetoric at the highest political level, and often underwhelming results on the ground, which is the

* Thanks are due to Tom Daly, PhD Student, University of Edinburgh for completing an earlier draft of this report.

ultimate 'litmus test' of any rights protection system. Participants identified various deficiencies, such as a lack of human rights awareness affecting the legislative process in the Scottish Parliament, a need for greater human rights education across both officialdom and Scottish society as a whole, difficulties in obtaining legal representation in human rights cases, shortcomings in other areas, such as mental health practices and legislation, procurement practices for care services and welfare cuts, and broader issues such as racism, sectarianism and xenophobia in Scottish society.

While contributors generally suggested that the referendum process should provide an opportunity for taking stock of Scotland's human rights regime and charting a way forward, it was perceived that human rights have been largely absent from the independence debate itself to date. Neither side of the debate has focused on human rights arguments or articulated their human rights approaches for the future, and the lack of clarity concerning the outcome tends to hinder concrete discussion of what options for enhancing rights protection are available.

Representatives of civil society organisations noted the difficulty in engaging in the debate without taking a position regarding the outcome, which has affected their ability to insert a human rights dimension into the wider discussion, while grassroots activists noted a deep feeling of disempowerment in communities across Scotland with regard to their own perception of their ability to effect change, whether through the referendum, or more specifically, in relation to the protection of their rights. More fundamentally, participants discussed whether pursuing change through the language of human rights adds values to claims or hinders discourse by cloaking it in abstraction, and whether the abstract nature of human rights language can add clarity to the independence debate, which is itself couched in abstract language. There was general consensus on the pressing need, beyond the independence referendum, for a debate which addresses the theoretical underpinnings of human rights in a way that resonates with the public and political actors, with a view to ensuring that the gap between rhetoric and results concerning rights protection is addressed.

The debate about human rights and constitutional change in Scotland also takes place against a backdrop of on-going UK-wide instability with regard to human rights. In Seminar one Dr Colm Ó Cinnéide of University College London provided a brief tour d'horizon of the historical controls for rights protection in the United Kingdom, noting that the UK is exceptional in eschewing extensive reliance on judicial mechanisms to protect human rights, before discussing key developments in human rights policy and discourse at Westminster, particularly the debates concerning the legitimacy of the European Court of Human Rights, withdrawal from the Court, judicial enforcement of the Human Rights Act at the national level, and the connection between these debates and the question of membership of the EU. This discussion illustrated the extent to which human rights in the UK has entered a period of uncertainty and contingency – the Human Rights Act appears under attack, as does British commitment to the ECHR and the legal and political framework of the EU.

Prof. Chris McCrudden of Queen's University Belfast provided a description of the constitutional settlement achieved through the Northern Ireland peace process, considering whether this could provide any lessons for Scotland (power point attached). Key issues noted were that human rights developments in Northern Ireland were generally not focused on judicial mechanisms, the failure to pursue protection of socio-economic rights, the failure to enact a Bill of Rights, and the relation between the centre and periphery in the sphere of human rights protection – including the extent to which Northern Ireland may depart from norms in the rest of the United Kingdom (e.g. in its electoral arrangements and equality protections in the public sector) and the destabilising effect of the prominence accorded to the centre.

Where are we going?

A *leitmotif* of the two seminars was the enduring lack of clarity concerning the implications of the referendum for Scotland's constitutional future and, more specifically, human rights protection.

At the first seminar, Prof. Christine Bell of Edinburgh University assessed the rights implications of different possible processes and outcomes of the independence referendum, whether it is a 'no' vote, which would maintain the status quo or which might lead to more devolution, or a 'yes' vote leading to independence (power point attached). It was noted that the range of possible developments and constitutional outcomes has rendered debate on human rights in Scotland more difficult, as there is no clear path forward. A number of possible ways of enhancing rights protection in Scotland were set out, and it was noted that the devolution arrangements put certain constraints on measures for enhancing rights protection, or differentiation in rights protection.

At the second seminar, Humza Yousaf (MSP, Scottish National Party) reaffirmed the SNP position that independence would advance human rights protection, particularly through the adoption of a codified constitutional text with entrenched protection of both civil and political and socio-economic rights, retention of the courts' existing review powers concerning legislation under devolution, the ratification of key international instruments such as the European Convention on Human Rights, and by bringing reserved matters under the present devolution arrangements under constitutional control in an independent Scotland. James Kelly (MSP, Scottish Labour Party) argued that independence would hinder rights protection due to diminution of the public purse and by cutting Scotland off from human rights activism in the rest of the United Kingdom.

However, there was a definite sense that, whatever the outcome of the independence referendum, change will be coming to Scotland's system for the protection of human rights: the outcome will simply present different pathways for pursuing improvements. Should Scotland remain in the United Kingdom, progress could be pursued through the Scottish Human Rights Commission's National Action Plan, greater recognition of social and economic rights, a human rights scrutiny committee for the Scottish Parliament (whether by establishing a new committee or expanding the existing Equal Opportunities Committee), and reform to procurement mechanisms and welfare scrutiny measures, among others. The Scottish context would also be affected by developments in the UK as a whole, concerning the continuing revision of the welfare system and the philosophy underpinning that system, and the big, interrelated, constitutional questions of the UK's adherence to the European Convention on Human Rights, membership of the EU and enactment of a Bill of Rights, none of which appears amenable to any speedy or easy resolution and all of which pit traditional conceptions of the subsidiary role of the judiciary against a more enhanced role for the judiciary under the Human Rights Act. Should Scotland become an independent nation, some of the same improvement measures could be pursued, but more significant questions would arise regarding precisely what international human rights treaties the new state would ratify, what enforcement mechanisms it would sign up to, and the nature and range of rights that would be expressly guaranteed in a new written constitution.

Participants emphasised time and again that Scotland's constitutional future and the development of its human rights protection framework is not happening in a vacuum but is influenced by, of interest to, and impacts on, external actors and frameworks. Scotland's constitutional future and human rights future, whether in the United Kingdom or as an independent state, will involve sharing, both of sovereignty at the EU level, and of constitutional space in the British Isles. Scotland's human rights future will also be constructed, at least in part, through a comparative approach which identifies best practice elsewhere and which draws on the experiences of others. The approach taken in Scotland will be watched closely in other parts of the United Kingdom.

The global dimension to the question of human rights and Scotland's constitutional future was also stressed. The road Scotland takes in its enhancement of rights protection will be of interest to other nations in the world, not least in the Council of Europe and the European Union. Developments at Westminster, particularly concerning adherence to the European Convention on Human Rights, will impact on Scotland even if it opts for independence, and have global resonance and implications for the entire system of international human rights law. Outside the legal sphere, Scotland's civil society organisations have been influenced by practice elsewhere, with, for instance, the Human Rights Consortium Scotland modelled on its counterpart in Northern Ireland. Questions of a greater foreign policy role for Scotland, under 'devo more' or independence, with regard to peacekeeping, denuclearisation, renewable energy and secession conflicts, and the practices of Scottish companies operating abroad, directly concern human rights outside the country. Whether the referendum outcome is a 'yes' or 'no' vote, Scotland's future path will continue to be observed from near and far.

The fierce urgency of now

Ultimately, the uncertainty of the future led, over the two seminars, to a more intense focus on the present. Time and again in Holyrood and Glasgow City Chambers participants echoed (though not expressly) Martin Luther King's exhortation of the "fierce urgency of now". Participants repeatedly stressed that the human rights question is not an academic issue, but about improving the lives of people in Scotland and addressing the core question of what type of society Scotland is to be; and that, regardless of the independence referendum and its outcome, the immediate task is to identify how protection of the human rights of individuals in Scotland can be enhanced. There was general consensus that a 'culture change' in Scotland, to ensure that people understand their rights, that political apathy is countered, that public bodies are aware of individual rights in the delivery of services, and that communities are empowered to advocate for greater rights protection, is vital in order to bridge the existing gap between rhetoric and reality, and to 'rediscover' the transformative power of human rights at the grassroots level.

Human Rights and Scotland's Constitutional Future
Monday 18th March 2013

Where we are now? Human rights and the Independence Debate.

10.15-10.30 - Coffee and Welcome

Session One: 10. 30-11. 45: Chair, Elaine Webster, University of Strathclyde

Human rights protection in Scotland: The current framework, recent developments and issues, Dr. Elisenda Casanas-Adam, Edinburgh Law School

International Human Rights Law: Bringing Rights Home to Scotland whatever the future, Alan Miller, Scottish Human Rights Commission

Coffee Break 11.45-12.00

Session Two: 12.00-1.15: Chair, Sarah Craig, University of Glasgow

The Changing Face of Human Rights in the UK: Bills of Rights, the Council of Europe and the EU, Dr Colm O' Cinneide

Rights and the Development of Constitutional Settlements: Lessons from Northern Ireland, Professor Chris McCrudden, Queen's University of Belfast

1.15-2.15 Lunch

Session Three 2.15-3.45: Chair, Professor Tom Mullen, University of Glasgow

Scottish Constitutional Futures: An evaluation of the rights implications of different constitutional options and processes

Professor Christine Bell, University of Edinburgh

Round Table Response

- Tam Baillie, Scotland's Commissioner for Children and Young People
- Carole Ewart, Human Rights Consortium for Scotland
- Dr Ima Jackson, The Glasgow Refugee, Asylum and Migration Network
- Tanveer Parneez, Black and Ethnic Minority Infrastructure in Scotland

The Human Rights Question: What sort of Scotland, and what sort of constitutional future?

1st May 2013, 10am-4pm

City Chambers, Glasgow

This second seminar will examine how those involved in civil society groups are working to promote and protect rights, and consider the extent to which the referendum context affects this work. The seminar will consider questions such as: whether groups conceive of, and articulate their work in human rights terms, or in other terms? To what extent are human rights issues seen as important to the constitutional debate? Are human rights particularly served by one constitutional future or another? How might human rights be useful to articulating a vision of the future that might inform constitutional development in Scotland, whether through an on-going development of devolution, or an alternative constitutional future?

Outline draft programme

09.45-10.00 **Welcome and coffee**

10.00-10.15 **City Chambers welcome and reply**

Dr Kurt Mills, School of Social and Political Sciences, University of Glasgow

10.15-10.30 **Reflections on Seminar one**

Professor Christine Bell, School of Law, University of Edinburgh

10.30-11.45 Plenary Session: Constitutional futures and human rights in Scotland

Chair: Dr Kurt Mills, School of Social and Political Sciences, University of Glasgow

Humza Yousaf MSP; Scottish National Party

Annabel Goldie MSP, Scottish Conservative Party

Patrick Harvie MSP, Scottish Green Party
(plus further speaker TBC)

11.45- 12.15 Breakout Session: In what sense does the independence debate present opportunities or obstacles for change?

12.15-1.00 Lunch

1.00- 2.00 Plenary Session: The existing human rights framework: Gaps and potential

Chair: Sarah Craig, School of Law, University of Glasgow

Professor Tom Mullen, School of Law, University of Glasgow

Carole Ewart, Human Rights Consortium Scotland

Professor James Mitchell, University of Edinburgh

2.00-2.45 Breakout Session: Discussing the agenda for change

2.45 -3.00 Break

3.00- 3.50 Plenary Session: Closing plenary: Realising human rights in Scotland: Challenges and next steps

Chair: Dr Elaine Webster, Centre for the Study of Human Rights Law,
University of Strathclyde

Tam Baillie, Scotland's Commissioner for Children and Young People

Chris Oswald, Equality and Human Rights Commission

Professor Alan Miller, Scottish Human Rights Commission

Twimukye Mushaka, Poverty Alliance

3.50-4.00 Thanks and close

Dr Elaine Webster, Centre for the Study of Human Rights Law, University of Strathclyde