Equality, Human Rights and Constitutional Reform in Scotland

A Report for the Equality and Human Rights Commission

Ewart Communications
January 2014
November 2013
Ewart Communications
Abbey Business Centre
20–23 Woodside Place
Glasgow G3 7QF
Tel: 0141 582 1207 carole@ewartcc.com www.ewartcc.com
## Contents

**Executive Summary**  

**1. Introduction**  
1.1 Introduction  
1.2 Background  
1.3 UK Constitutional Developments and Internal Diversity  
1.4 Promoting and Protecting Human Rights and Equality in Scotland  
1.5 Promoting and Protecting Human Rights and Equality at a UK Level  
1.6 Ongoing Human Rights and Equality Proposals Relating to Scotland’s Devolved Government  
1.7 Conclusion  

**2. Evidence Base**  
2.1 Constitutional Content and Rights  
2.2 Constitutional Process and Rights Protection  
2.3 Home grown or International: Flexibility in International Law  
2.4 Comparing Constitutional Systems  
2.5 ECtHR Judgements  
2.6 National Human Rights Institutions  
2.7 Views on Constitutions and Constitutional
Protection: NGOs and Civil Society

3 International Examples Relevant to Scotland

3.1 Germany
3.2 Spain
3.3 South Africa
3.4 Iceland
3.5 New Zealand
3.6 Conclusion

4. What Lessons can Scotland Learn?

4.1 Motivation
4.2 Process
4.3 Who Serves on the Constitutional Assembly?
4.4 Flexibility and Interpretation
4.5 Content
4.6 The Role of International Law
4.7 Monitoring and Enforcement

5. Conclusions and Further Questions

5.1 Conclusions
5.2 Some Questions

Appendix 1 – Methodology
Appendix 2 – Some Useful Resources
Thanks to:
All the people who gave their time to be interviewed for this report. Your knowledge and analysis were invaluable. Thanks also to Euan Page at the EHRC for his comments and feedback on drafts of this report.

About Ewart Communications
The research project has been undertaken by Carole Ewart, an independent consultant with an extensive knowledge and track record in public policy and human rights, having worked with 97 organisations in the last 16 years. Professor Christine Bell, a leading researcher on constitutional law who has in-depth experience of the practical application of human rights, has acted as an adviser to the project in relation to international comparisons and offered detailed comments on the draft report. Christine is a full-time member of academic staff at the University of Edinburgh. The consultant and advisor have written and advised in an independent capacity and have no party-political or formal ties with Scottish referendum campaigns.
Executive Summary

Unlike many countries, the UK does not have a formal written constitution, but rather a vast collection of laws that set out rights and the business of government. Yet, widespread concerns persist that the promotion and protection of rights in practice fall short of formal legal commitments. The backdrop to this report is the Scottish and UK Governments’ agreement to hold a referendum on Scotland’s constitutional future on 18 September 2014 and the opportunity it creates to consider the role that equality and human rights can, and should, play in Scotland.

The report identifies key issues and opportunities for the promotion and protection of equality and human rights, which can be used by all sides of the debate on Scotland’s constitutional future. The report identifies and examines some interesting and potentially useful international models for the promotion and protection of equality and human rights from which Scotland could learn.

A report of this size cannot provide an exhaustive review of international best practice, nor is it designed to provide a set of concrete recommendations. Rather, it aims to inform and provoke discussion as well as underline the centrality of equality and human rights to all sides of the debate on Scotland’s future. Among the challenges it identifies, and the questions it raises, are:

1. Existing powers: Given that Scotland has a quasi-constitution already in the form of the Scotland Act 1998, and that Scotland already has a distinctive regulatory framework for equality across devolved bodies, what further steps are required to ensure that human rights are respected,
protected and fulfilled by duty-bearers and rights-holders? Is there a need for a better examination, understanding and application of existing legal and non-legal measures in Scotland to enable informed choices? How do we ensure that issues of access to justice, promoting an equality and human rights culture and ‘buy-in’ by state institutions to human rights and equality laws are addressed whether there is a new constitution or not? Given that the Scottish Human Right’s Commission’s National Action Plan (SNAP) is being developed at the time of writing this report, additionally what is the most effective and inclusive method for driving change within a reasonable timeframe, and what will success look like?

2. Ownership: How can a process of constitutional change be designed by, and therefore ‘owned’, by the country to which it applies? Whilst it can be useful to look to other countries and learn from their experience, the detail and aspirations of the constitution must be rooted in domestic culture and values. Whilst it is possible to systematically incorporate internationally ratified treaties, e.g. the UN Convention on the Rights of People with Disabilities, there are challenges in implementing international norms effectively in domestic practice.

3. A shared language: How do we ensure a broad ‘buy-in’ to the idea of a constitution from the public as well as key influential groups such as the media? People and institutions of the State need to have a shared understanding of what impact equality and human rights law can have on people’s lives and offer solutions to the problems they face. This is about more than informing people of their rights and better ensuring that individuals have appropriate means of redress and support when they have
experienced human rights abuses or discrimination, important though these matters are. There are also wider challenges in relation to ensuring that citizens and institutions recognise the value of using equality and human rights as principles to shape decision-making and deliver fairer outcomes.

4. How distinctive is Scotland? It is sometimes suggested that there is less public and media hostility to human rights and equality in Scotland than in some other parts of the UK. How strong is the ‘rights’ culture actually in Scotland and is it distinctive from the rest of the UK? Is our culture of ‘rights’ something to be built on, or does it contain barriers to the equal enjoyment of human rights?

5. Structures, evidence and learning: What kind of institutional/structural change might be required for Scotland to better respect, protect and fulfil equality and human rights obligations? What countries should be the subject of more detailed research in order to understand what relevance their experience has to Scotland and then assess what lessons Scotland can learn? What can Scotland learn from international evidence on the challenges and opportunities around the alignment of equality and human rights promotion and protection? Who will lead on the gathering of evidence and promotion of learning?
Chapter 1 Introduction

‘The UK remains almost unique in having neither a written constitution nor a Bill of Rights written to reflect its own circumstances.’

UK Commission on a Bill of Rights

1.1 Introduction

This is a short report on a very big issue – it can only introduce key areas for further research, thought and public debate.

The debate ahead of the 2014 referendum in Scottish independence affords an important opportunity to examine some of the wider questions about the kind of country we want to live in, and the role of human rights and equality in realising this vision, regardless of Scotland’s future constitutional status. But it also poses the question of how different types of constitutional change might impact on the promotion and protection of human rights and provision for equality. This report focuses on how human rights and equality can be better promoted and protected whatever the outcome of the referendum debate: whether the status quo remains, whether there are additional powers given by the UK state to the devolved Scottish Parliament (sometime called ‘devo-more’ or ‘devo-plus’), or whether independence is voted for by the electorate in Scotland.

---

1.2 Background

Whatever the result of the referendum vote on independence for Scotland, change beckons. There is an emerging political consensus that, even in the event of a ‘no’ vote, there may be opportunities to devolve further powers to Scotland. While there has been no formal commitment to do so, the Prime Minister has suggested the establishment of a UK-wide constitutional convention in the event of a ‘no’ vote on independence, arguing that further devolution of powers to Scotland should be considered as part of a UK-wide debate. The Former Prime Minister Gordon Brown, who is opposed to independence, has called for a written constitution that recognises the Scottish Parliament as ‘irreversible’.

This report is not intended as an exhaustive and comprehensive assessment of international models for protecting rights. However, it does provide some evidence of the relationship between constitutional models and the protection of equality and human rights, in the hope of inspiring debate over effective mechanisms for Scotland. The report also examines non-legislative measures that have prompted progressive change in other jurisdictions.

---

2 See http://betterscotland.net/blog/entry/the-choice-we-face-further-devolution-vs-separation
5 2 September 2013, www.bbc.co.uk/news/uk-scotland-scotland-politics-23928469
1.3 UK Constitutional Developments and Internal Diversity

The UK has no formal written constitution, although it is bound by international and EU law, the European Convention on Human Rights (ECHR), laws passed by the UK and Scottish Parliaments, as well as common law. However the Human Rights Act 1998 has put in place what is arguably a form of Bill of Rights, and the Scotland Act 1998, like the other devolution statutes, provides a constitutional structure for the country.

A number of different processes and debates relating to the constitutional arrangements of the United Kingdom are underway, all with different political drivers. These processes have the potential to change the current constitutional arrangements, and with them, the protection of human rights and equality. A full examination is beyond the scope of this report, but we outline the most significant developments briefly below.

a) **A codified UK constitution.** At the UK level the Political and Constitutional Reform Committee of House of Commons (a select committee) is conducting an inquiry into whether the UK should have a codified constitution (that is to say, written in some form). It is supplementing this inquiry with an inquiry into the constitutional role of the judiciary if there were a codified UK constitution.

---

6 ‘The rules of law not derived from statute but from other sources such as judicial decisions, authoritative writings, Roman law or custom’, in *Green Glossary of Scottish Legal Terms*, 3rd edition, 1992.

7 ‘The Constitutional Role of the Judiciary if there were a Codified UK Constitution’, inquiry announced 3 September 2013, available at [www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/inquiries/](http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/inquiries/)
b) **Proposals for development of the UK’s current devolved arrangements into a federal structure.** The Liberal Democrats have published a policy consultation into political and constitutional reform that covers a broad range of matters, including federalisation.\(^8\) A fully federal model would be an alternative way of bringing more devolution to Scotland, raising the issues we explore under that heading.

c) **Proposals for a UK Constitutional Convention.** At the UK level the Political and Constitutional Reform Committee of House of Commons is also conducting an inquiry into whether the UK should have a Constitutional Convention to fashion a new constitution for the UK.\(^9\)

d) **Proposals for a UK Bill of Rights.** In 2011, the UK Government established a Commission on a Bill of Rights\(^10\) and in its conclusions, a majority of the Committee accepted the complexity of a UK Bill but broadly endorsed the idea: ‘Any future debate on a UK Bill of Rights must be acutely sensitive to issues of devolution and, in the case of Scotland, to possible independence, and it must involve the devolved administrations.’\(^11\) However, behind this apparent consensus, the eight individual reports filed by members indicate that the Commissioners


reached this conclusion for very different reasons, and contemplated quite different types of Bills of Rights.12

Two commissioners (Helena Kennedy and Philippe Sands) explicitly rejected the Commission’s central assessment of the value of a UK Bill of Rights:13

‘We are unable, however, to join our colleagues on the central issue, namely whether in principle we are in favour of a UK Bill of Rights. It is impossible to speak of principle when the true purport is not being addressed explicitly and would include, for some at least, a reduction of rights ... We note ... that our colleagues in the majority have, in our view, failed to identify or declare any shortcomings in the Human Rights Act, or in its application by our courts. We consider that it would be preferable to leave open the possibility of a number of options that, without prioritisation, could be addressed by a future Constitutional Convention. ...’14

At the time of this report’s publication, the UK Government has not responded to this Report and no further developments on a UK Bill of Rights are expected prior to the UK General Election in 2015.

14 Ibid., pg. 222.
e) **The Scottish Government will hold a referendum** with a single question on whether Scotland should be independent. A White Paper published by the Scottish Government in February 2013 entitled ‘Scotland’s Future: From the Referendum to Independence and a Written Constitution’ sets out a commitment to have a written constitution post any successful referendum. The possibility of a new constitution for Scotland, as suggested by the First Minister, raises the question of what Scotland’s approach to human rights protection in the text of the constitution might be, and what best practice it could draw on.

f) **Proposals to modify the UK’s international commitments, including international human rights and equality standards.** More recently, proposals are already in place with regard to a referendum on continued UK membership of the European Union. With the EU responsible for a raft of equality standards, for example equal pay for work of equal value, leaving it would have equality implications, and could lead to changes to domestic equality legislation. In October 2013, the UK Ministry of Justice launched a review ‘about how the EU’s competence on fundamental rights affects the UK’, as part of the wider cross-Government ‘EU Balance of Competence Review’ launched in July 2012. The Government’s new focus on individual human rights acquired by membership of the EU complements its existing interest in domestic


assertion of ECHR rights, which are acquired by UK membership of the Council of Europe.

g) **Radical revision of welfare, health and social service provision.**

Austerity measures have led to a radical reshaping of key elements of welfare, health and social service provision, with a potential impact on rights. For example, radical changes have taken place in the NHS in England in the Health and Social Services Act, which include a duty to ‘promote’ a comprehensive health service, which is rather different from a duty to provide such a service.

h) **Other UK developments.** The Multiparty Agreement Reached in Negotiations, 10 April 1998 (Belfast or Good Friday Agreement), whose key governmental commitments were placed in a British–Irish Treaty with international legal status, provided for the development of a Bill of Rights for Northern Ireland and an ‘All Ireland’ charter of rights, neither of which has been achieved. In Wales, the Silk Commission\(^{17}\) is currently examining the potential for further devolution of powers to Cardiff Bay, and the EHRC in Wales has made the case for the full devolution of the Public Sector Equality Duty, and enhanced powers to build on the Human Rights Act 1998 and the Equality Act 2010.\(^{18}\)

---

\(^{17}\) [http://commissionondevolutioninwales.independent.gov.uk/](http://commissionondevolutioninwales.independent.gov.uk/)

1.4 Promoting and Protecting Human Rights and Equality at UK level

A review of the current arrangements for promoting and protecting human rights and equality in the UK is beyond the scope of this report; however, some key aspects of the framework will be mentioned.

Incorporating International Standards

The UK has signed and ratified many major human rights treaties at the international and European levels. It has incorporated the ECHR into domestic law. Notably, Section 6 of the Human Rights Act 1998 (HRA) requires all public authorities to comply with the ECHR. This duty covers thousands of UK public authorities, such as the UK Border Agency and the Department of Work and Pensions as well as local authorities, health boards and housing associations in Scotland. The HRA incorporates the ECHR, but omits some of its provisions, such as Article 13, ‘the right to redress’.

Other international equality and human rights treaties ratified by the UK have not been incorporated into domestic law – although their provisions remain binding on the UK government as a matter of international law.

The UK Government undertakes the production of ‘compliance’ reports to the Council of Europe, e.g. on the Framework Convention for the Protection of National Minorities. Also the UK submits ‘Periodic Reports’ to the United Nations both under the Universal Periodic Review mechanism of the UN Human Rights Council and in order to comply with its treaty monitoring obligations under human rights treaties such as the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the UN Convention on Economic, Social and Cultural Rights (ICESCR). One report is submitted by
the UK government, which receive submissions from Scotland Northern Ireland and Wales for inclusion in the UK wide report. Civil society, such as Engender, the Human Rights Consortium Scotland, the Coalition for Racial Equality and Rights, the Scottish Association for Mental Health and the Glasgow Disability Alliance, submit ‘shadow’ reports. National Human Rights Institutions (NHRIs) such as the Scottish Human Rights Commission and the GB Equality and Human Rights Commission also submit reports. Scotland’s Commissioner for Children and Young People (SCCYP) submits reports on the UN Convention on the Rights of the Child (UNCRC).

**Domestic Protection: UK**

Human Rights and Equality are both reserved and devolved functions. At the UK level, the UK Government passes national legislation on equality and human rights that impact on Scotland. For example, the Equality Act 2008 included a power to establish the GB Equality and Human Rights Commission (EHRC), which delivers specific functions in Scotland, England and Wales (but not Northern Ireland).\(^\text{19}\) In 2013 the UN Committee on the Elimination of Discrimination against Women (CEDAW) made recommendations on improving domestic protection and ‘urged’ the UK to bring into force the provisions of the Equality Act (2010) relating to (a) the introduction of a new public sector duty on socio-economic inequalities; (b) the recognition of multiple forms of discrimination; and (c) the need to publicise gender pay information.\(^\text{20}\)

Although the UK is legally bound to comply with CEDAW under international law, there is no mechanism forcing it to comply with these recommendations.

\(\text{19} \) The Northern Ireland Human Rights Commission already existed; see [www.nihrc.org/](http://www.nihrc.org/)

‘National’ Reach of Human Rights Bodies

The GB EHRC operates with respect to central government, and has a remit in Wales and Scotland. In Scotland, the GB EHRC has a statutory remit to promote and monitor human rights that are reserved matters, e.g. human trafficking; has a statutory remit to promote and monitor human rights and equality; and has a statutory remit to protect, enforce and promote equality across the nine ‘protected’ grounds – age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment. Responsibilities include undertaking assessments and agreements to ensure compliance with the Public Sector Equality Duty (PSED), publishing recommendations and information, supporting discrimination cases in its own name and intervening in other legal proceedings. The EHRC has the power to take combined equality and human rights cases, and it may, with the consent of the Scottish Human Rights Commission, undertake work on human rights issues in policy areas within the competence of the Scottish Parliament.21

The EHRC, the NIHRC and the SHRC are all national human rights institutions (NHRIs) accredited by the International Coordination Committee (ICC).22 All have been awarded Status A as they conform to the Paris Principles,23 which set out the functions to be undertaken by an NHRI.

---

21 Equality Act 2006, Section 7(4).
The UK Parliament has established a Joint Committee on Human Rights with cross-party membership, which has a remit to consider, for example, matters relating to human rights in the United Kingdom.²⁴

1.5 Promoting and Protecting Human Rights and Equality in Scotland
While Scottish institutions, including the Scottish Parliament, must therefore act in accordance with national legislation and comply with the international legal commitments of the UK, human rights and equality are also woven into the devolution settlement in Scotland.

Scotland Act 1998 – Human Rights
Section 29 of the Scotland Act 1998 requires MSPs to comply with the ECHR as well as EU Law when passing legislation at the Scottish Parliament. Section 57 of the Scotland Act 1998 requires Scottish Government Ministers, to comply positively with the ECHR. This duty covers, for example, the Minister for Housing and Communities.

The Scotland Act 1998 ensures that Scottish Ministers understand their responsibility for observing and implementing international obligations, defined not simply by reference to the specific Convention rights defined in the Human Rights Act, but in terms of all international obligations (see Schedule 5, Section 7 (2) (a) and Section 126 (10)). If Scottish Ministers fail to meet these obligations they may be subject to enforcement action against them on the part of the Secretary of State by virtue of Section 58 of the Scotland Act 1998.

When the Scottish Parliament exercises its devolved authority to define human rights it has consistently gone beyond the ECHR. For example the Scottish Human Rights Commission (SHRC) has a duty to promote and encourage best practice in relation to human rights, defined in ECHR as well as other human rights contained in a ratified, international treaty, e.g. International Covenant on Civil and Political Rights (ICCPR). The Scottish Parliament has also passed distinctive legislation that has protected and promoted specific social, economic, civil, political, cultural and economic rights, for example, relating to homelessness, or to the special needs of vulnerable groups, for example on incapacity and adult protection.

Scotland Act – Equality

This is one of the most complex and at times uncertain policy areas in the Scottish devolution settlement. The Scotland Act provides a wide definition of equal opportunities and devolves two important areas, so that the Scottish Parliament and Scottish Government have specific powers:

- The encouragement (other than by prohibition or regulation) of equal opportunities and, in particular, the observance of the equal opportunities requirements.
- The imposition of duties on Scottish public authorities and cross-border public authorities in relation to their Scottish functions.

Studies suggest that there is limited freedom for the Scottish Parliament and Scottish Government to act on equal opportunities.\textsuperscript{28} In 2009 the EHRC commissioned two research reports and a discussion paper into whether devolution had helped achieve a fairer Scotland and what the opportunities were for strengthening progress towards equality in the future. This research suggested that the Scottish Parliament’s impact in tackling inequality over the last ten years, while positive, has also been limited. Key barriers to progress included uncertainty about the scope of devolved equal opportunity powers, limited accountability and scrutiny.\textsuperscript{29}

**Existing Differences**

There is already a distinctive regulatory framework for equality covering key devolved public bodies in Scotland, in the form of the Scottish Specific Equality Duties.\textsuperscript{30} These require councils, health boards, the police and others, among other things, to use evidence and set outcomes for different protected characteristics in a way not required in England.

There are also significant structural and intuitional differences in Scotland. The EHRC can support individual combined equality and human rights cases, and the Scottish Human Rights Commission, although not empowered to take individual cases, has a range of promotional and monitoring powers and duties, and can undertake sectoral inquiries.\textsuperscript{31} Unlike the UK Parliament, the


\textsuperscript{29} ‘An uncertain mix: equality and Scottish devolution’, reports available on EHRC website, available at \url{www.equalityhumanrights.com/scotland/research-in-scotland/an-uncertain-mix-equality-and-scottish-devolution/}

\textsuperscript{30} Scottish Government website, available at \url{www.scotland.gov.uk/Topics/People/Equality/PublicEqualityDuties}

Scottish Parliament has no dedicated human rights committee. Human rights are considered to be an integral part of the business of each committee, but a study published by Glasgow University concluded that there was room for improvement after studying the work of all parliamentary committees in November 2011:

‘Although we are limited by the terms of reference to a single calendar month, the evidence for the period reveals a widespread disregard of the normative and institutional framework for conceptualizing and analyzing human rights issues. Although there is no evidence to suggest that this is deliberate, most Committees did not seize the opportunity to imbue human rights in their respective field of activities.’

There is however an Equal Opportunities Committee, which is one of the eight mandatory Committees and has a remit to ‘consider and report on matters relating to equal opportunities and upon the observance of equal opportunities[]’

This committee has worked on many areas – such as independent living for disabled people, Gypsy/Traveller accommodation and female genital mutilation – that have clear human rights dimensions.

1.6 Ongoing Human Rights and Equality Proposals Relating to Scotland’s Devolved Government

The current context also sees a range of plans and proposals relating to improving human rights and equality provision in Scotland.

---

33 Standing Orders, Rule 6.9.
SHRC National Action Plan on Human Rights

The Scottish Human Rights Commission (SHRC) believes that Scotland:

‘needs a more systematic approach to assure and not assume the realization of human rights in practice. Strong human rights based legal and policy frameworks must be translated into more consistent and positive outcomes. Following the recommendation of the United Nations, the Commission is therefore facilitating the development of Scotland’s National Action Plan for Human Rights.’ (SNAP)34

SNAP has been drafted and consulted upon, and the initiative is supported by the Scottish Government, the Convention of Scottish Local Authorities (COSLA), NHS Scotland, and other public sector bodies and NGOs. SNAP will be published on 10 December 2013.

Domestic incorporation of other international human rights standards

There are also suggestions that Scotland could move essentially to incorporate other international human rights standards, in addition to the ECHR. In particular, recent debate has concerned the UN Convention on the Rights of the Child. The campaign for incorporation is supported by a range of NGOs,35 as well as the Scotland’s Commissioner for Children and Young People (SCCYP).

The Scottish Government has resisted on the grounds that it may lack the powers, and any such move might dilute its required commitment to the ECHR.

In May 2012, UNICEF UK published a legal opinion, commissioned from Aidan O’Neill QC, to explore powers under current devolved arrangements (the Scotland Act 1998) to incorporate the UNCRC into domestic Scots law. The opinion states:

‘Paragraph 7(2)(a) of Schedule 5 of the Scotland Act 1998 puts it within the legislative competence of the Scottish Parliament to “observe and implement international obligations”. In principle it is therefore within the powers of Scottish Government and Scottish Parliament to directly and fully incorporate the CRC into domestic Scots law in relation to devolved issues. In doing so, enforceable rights and new channels of redress would be created within the Scottish judicial system.’

He also noted, ‘Scottish courts also already have an obligation where possible to interpret and apply the provisions of domestic law consistently with any relevant UK treaty obligations. As such, the Children (Scotland) Act 1995 and the Equality Act 2010 should already be interpreted and applied consistently with the CRC.’

1.7 Conclusion

We have provided a brief overview of the current and changing legal and public policy environment in Scotland in respect of equality and human rights. Change may happen in respect of devolved as well as reserved functions. Clarity about existing powers and moves for reform are critical to understanding what opportunities exist to better respect, protect and fulfil human rights and equality in Scotland.
Chapter 2 The Evidence Base

‘One of the most significant challenges to the full realization of human rights still remains [their] practical implementation at the national level, [and] in this regard, parliaments and national human rights institutions have a critical role to play.’

Vladlen Stefanov, UN Human Rights office, 2012

It is difficult to establish an evidence base that suggests which particular forms of constitutional structure are better at protecting rights than others. However, we identify some of the most useful questions that need to be answered. Through research and interviews with human rights advocates, it is clear that many ‘practitioners’ have already identified a number of factors that are considered relevant to the relationship between constitutional provision for rights and effective protection of human rights. The following is a brief review of the main conclusions of desk-top research and interviews.

2.1 Constitutional Content and Rights

Professor Chris McCrudden, drawing on historical comparison with constitutional developments in Ireland, has specifically addressed the challenge of Scotland developing its own Constitution and has posed four questions that need to be considered if rights are to be effectively protected in any new constitutional arrangement:

37 Speaking at an expert gathering on the relationship between NHRIs and parliaments in Belgrade, Serbia, 2012, available at www.ohchr.org/EN/NewsEvents/Pages/ParliamentsAndNHRIs.aspx
1. How do you think that a human rights culture can best be created and sustained? That is – what is the relationship between constitutional provision for rights and the broader rights culture?

2. Do you want your constitutional rights provisions to be largely symbolic, or instrumental, or both?

3. Is it your aim to create an ‘autochthonous’ (that is ‘home-grown’) set of constitutional rights, that is, one that reflects essentially local interests and local history; or do you want a set of constitutional rights provisions that is outward-looking and more ‘universal’ in its orientation?

4. Is your preferred set of constitutional rights one that is essentially conservative (small ‘c’), or transformative?  

Most notably, Professor McCrudden identifies two problems with assuming that particular forms of incorporation of constitutional rights lead to particular outcomes: first, he suggests that to achieve improved rights protection there is a need for a shared theory of human rights with some consensus over the answer to the questions above; second, he suggests that the role of the courts in interpreting sets of constitutional rights may still take rights development in a different direction.

McCrudden identifies the strands of the theory of human rights using a variety of texts and examples:

• ‘Traditional’ rights that individuals have simply in virtue of their humanity – either ‘the human person being made in the image of God’, or an ‘understanding of what it means to be human’.  

• An ‘agreement-based’ understanding of human rights, focused on human rights being derived from some degree of consensus or ‘common’ view of what human rights are, seeing international human rights, for example, as properly reflecting the core, or basic minimum of that agreement.

• A ‘political’ view, in which human rights are seen as a ‘political doctrine constructed to play a certain role in political life’. This is ‘essentially, a functional account which seeks to theorize practice’.  

In respect of the role of the Courts in interpreting human rights, attention must be given as to what frames of reference will be given to the Courts and the judiciary. Professor McCrudden points out that in Ireland there was a different approach taken by the drafters and enforcers of rights respectively: ‘It is noticeable that the relative autonomy enjoyed by the courts in constitutional interpretation resulted in the Irish courts largely ignoring the foreign models drawn on at the stage of drafting, in favour of drawing strength from other foreign comparisons that appealed to the judiciary but may not have found particular favour with the constitution makers.’ And he goes on to point out that the Court can be required to consider a range of issues in a constitution as human rights are usually just one chapter:

39 Ibid., pg 338.
40 Ibid., pg 340.
41 Ibid., pg 341.
'As with the US Supreme Court, the role of the Irish Supreme Court is to interpret the function, the meaning, and the scope of human rights in light of the overall structural function of the Constitution as a whole. The Constitution has other things to do as well as protect human rights.'

**2.2 Constitutional Process and Rights Protection**

Research has also demonstrated a connection between inclusive processes of constitutional drafting and the protections of rights. Dr Anne Smith has pointed out the dangers in a nation surrendering its cultural traditions and distinctive identity when it drafts a Constitution and rushes to copy what already exists in the minimum standards which the country is bound by, in international law. ‘In short, effective and sensitive interaction between the “local and the global” can result in a more rewarding project when those involved in formulating an indigenous Bill of Rights simultaneously reflect best international practice.’

She points out that it is sensible to compare but a Nation should have the confidence to carve its own constitutional path. as ‘The strategies hold most potential where international texts and comparative experience are viewed as benchmarks to measure whether a Bill of Rights reflects (and possibly develops) both best international practice and also the local context’.

In comparing three countries that have had to deal with legacies of conflict and discrimination – South Africa (apartheid), Canada (e.g. the displacement of

---

42 Ibid., pgs 341–342.
44 Ibid., pg 868.
Native People) and Northern Ireland (sectarianism) – she identifies that equality provisions have to occupy ‘a key position in a Bill of Rights in the sense of being central to the success of constitutional change and without which all rights in a Bill of Rights might remain empty and devoid of meaning’.\(^{45}\) To achieve this goal, she urges caution on drafting, as a ‘flexible rather than a fixed approach strengthens the equality right as it broadens the grounds prohibiting discrimination to include non-enumerated grounds’.\(^{46}\)

Dr Smith suggests that the question of ‘fit’ and the particular history of a country need to be addressed if a Bill of Rights is to be accepted and recognised by the local populace.\(^{47}\) Ultimately a balance is required: looking internationally, as well as listening to people within a country and examining domestic culture and practice, ‘can act as a means of “persuasive authority”, and “legitimation” giving credibility to a proposed solution’.\(^{48}\) These conclusions on a broad and inclusive process receive support elsewhere.\(^{49}\)

A broader frame of comparison has indicated that if a constitution-drafting process is initiated, there are questions of inclusion that apply as to who actually is involved in the drafting. We explore the relationship between process and rights further in the case studies of Chapter 3, but a wider comparative frame indicates the following types of mechanism for constitutional drafting:

\(^{45}\) Ibid., pg 868.
\(^{46}\) Ibid., pg 886.
\(^{47}\) Ibid., pg 870.
\(^{48}\) Ibid., pg 870.
• Constituent assemblies – normally created at the beginning of the state-building process in a particular country, they often also execute functions in addition to the constitution-making one (e.g. enacting other relevant laws, establishing major political institutions, designing administrative bodies and so on). Recent examples are South Africa in 1996, Venezuela in 1999 and Ecuador in 2008.

• National conferences (conventions) – are usually considerably larger in size, as well as shorter in the period of time in which they ought to exercise their mandate (normally lasts from several weeks to a few months, although there are exceptions). Despite the slightly different format, the functions executed by these conferences in many instances have been the same as those of constituent assemblies. The traditional example is France in 1789 and more recent examples are Benin in 1990, Kenya in 2005 and Nepal in 2012.

• Constitutional commissions – normally much smaller entities than the constituent assemblies or national conferences described above, mainly because their major functions are seen to be guiding and operational (such as designing the process and drafting the constitution), as opposed to the binding and more politically charged parts of constitution-making (such as adopting the end document). Constitutional commissions in most instances work in conjunction with another, larger representative body, usually the legislature, but sometimes also the national convention, or both. Recent examples are Georgia and Nicaragua in 1995 and Iceland in 2010.
A critical question in all of these bodies is who makes up the membership, and in particular the balance between elected politicians and civil society. If civil society members or other members of the public other than elected politicians are to be included, a question arises as to who or how the country chooses who is to be involved.

2.3 Home grown or International: Flexibility in International Law
As far as the UN is concerned, while ratification means a state has undertaken that its laws and policies will comply with international human rights conventions, in practice the state’s domestic law decides how compliance is achieved. Some method of domestic protection of rights, however, is required for these rights to be effective.

The UN is not prescriptive and there is no mandated form for how these rights should be implemented at the domestic level, although guidance as to good practice does exist. It is the right of each state to choose the framework that is best suited to its particular needs and its legal and political culture, and this can include measures at a sub-state level, although it is the state party rather than the region that remains accountable for the treaty obligations.50

UN treaties allow discretion about how human rights and equality are given real effect but are clear that rights must be protected. For example, the UN Convention on the Rights of Persons with Disabilities (UNCRPD), under ‘General Obligations’, requires states to ‘adopt all appropriate legislative,

50 For example in The Brighton Declaration, agreed at the ‘High Level Conference on the Future of the European Court of Human Rights’, states expressed their ‘strong commitment to fulfil their primary responsibility to implement the Convention at national level’, para 1, 19 and 20 April 2012.
administrative and other measures for the implementation of the rights recognized in the present Convention’, and to ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’. Of course, there are a variety of means of doing this; Scotland could, for example, use the National Performance Framework that currently exists as one means of progressively realising the requirements of the UNCRPD.

Despite the fact that the treaties themselves do not specify forms of domestic protection, the UN Committees, which monitor state implementation of the treaties, have tended to conclude that states should incorporate the treaties into legislation, e.g. the UN Committee on Rights of the Child requires the UK to incorporate UNCRC into domestic law.

In other treaties, the monitoring committees have suggested particular ways in which rights should be protected domestically. For example, Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights requires states to ‘take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’. There should be an ‘in-country’ system of

51 UN Convention on the Rights of Persons with Disabilities, Articles 2 (a) and 2 (d).
52 www.scotland.gov.uk/About/Performance/purposestratobjs
54 www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
monitoring progressive impact, and devices suggested include gathering robust data and producing impact statements on existing or proposed policies.  

2.4 Comparing Constitutional Systems

Some studies have attempted to consider the relationship between mode of incorporation and effective protection. The UNICEF report, ‘The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries’, focuses on application of UNCRC across 12 countries and serves, more generally, as a framework for human rights compliance. The countries examined were: Australia, Belgium, Canada, Denmark, Germany, Iceland, Ireland, New Zealand, Norway, South Africa, Spain and Sweden. No single route to implementation has been taken across the 12 countries.

The report identified a range of legislative and non-legislative measures that ensure that UNCRC makes an impact, and it is clear that it is not one thing that makes constitutions work but rather a variety of laws and practices as well as culture:

- Legislative measures: a full incorporation of UNCRC; but this has only happened in Belgium, Norway and Spain; ‘indirect incorporation’, e.g. the duty on Welsh Ministers to have regard to the CRC; ‘sectoral incorporation giving effect to UNCRC in particular areas of law’, e.g. in

---

55 Suggested by UN Committee on Economic, Social and Cultural Rights and UN Committee on the Rights of the Child.
the Children (Scotland) Act 1995 and the Standards in Scotland’s Schools etc. Act 2000.\textsuperscript{57}

- Non-legislative measures to implement UNCRC: ‘national strategies and action plans for children; child impact assessment processes to anticipate the impact of proposed laws, policies or budgetary allocations’ such as developed by SCCYP;\textsuperscript{58} ‘the establishment of children’s commissioners or ombudspersons; child budgeting or the identification, allocation and monitoring of resources spent on children and children’s services; children’s rights training, awareness raising and capacity building for all those working with and on behalf of children; and the development and collection of data on children’s lives.’\textsuperscript{59}

The UNICEF report highlighted the potential for varying degrees of compliance with UNCRC in countries depending on the authority devolved by the centre to local areas but:

‘A recurring theme was the inconsistency of approaches or divergence in the commitment to the CRC across the different internal jurisdictions, with competence varying between regions thus leading to a lack of clear accountability for children’s rights. In each country, certain areas were identified as being at the forefront of CRC implementation (such as Victoria in Australia, Catalonia in Spain, Berlin in Germany and, in different respects, the Flemish and French Communities in Belgium).’\textsuperscript{60}

\textsuperscript{57} Ibid., pg 3.
\textsuperscript{58} \url{www.sccyp.org.uk/resources/impact-assessments}
\textsuperscript{60} Ibid., pg 5.
2.6 National Human Rights Institutions

It is useful to reflect that the UK is unusual in having three “A Status” NHRI (the Equality and Human rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission), each with distinct remits and jurisdictions. The International Co-ordinating Committee for National Human Rights Institutions (ICC) provides that, except for exceptional circumstances, each Member State may have only one A status NHRI. Where other human rights institutions exist in a country, the ICC encourages these institutions to cooperate and coordinate their work together with the national A-status body. The UK falls within the “exceptional circumstances” category due to its constitutional arrangements and, most importantly, in line with a commitment made by the UK Government in the Belfast (Good Friday) Agreement of 10 April 1998.

2.7 Views on Constitutions and Constitutional Protection: NGOs and Civil Society

Through discussion and interviews with civil society groups and NGOs plus desktop research, we have gathered views on what they consider important to the assertion and application of rights in a variety of constitutional settings. Whilst constitutional rights are common internationally, their equal enjoyment varies widely. Civil society and non-governmental organisations (NGOs) have

---


articulated a range of legislative and non-legislative measures that need to be in place for constitutional rights to be effective in practice. This list is in no order of priority as there is a general sense that a range of factors needs to be in place to make constitutional rights enforceable as well as effective.

**Progressive Rights**

- At the drafting/amending of constitutions, or the reframing of unwritten constitutions, it is important to agree and list rights that are to be equally enjoyed and that reflect existing international law such as LGBT rights, and the rights of children, women and disabled people, marginalised groups such as Gypsies/Travellers and vulnerable groups such as older people.
- It is important to win the argument/persuade the public that there is a business case for equality and human rights making a positive impact and achieving the broader goals of society.
- There is a duty to inform people of their rights, to target information at specific groups to ensure equal enjoyment of rights, and for effective public information campaigns to be ongoing rather than sporadic. In practice this should be a partnership of the public, private and voluntary sectors that also involves the media.
- A press and media that is not hostile to the Constitution is necessary for people to be given reliable information about rights and their impact, and to allow people to scrutinise the record of ‘duty holders’.

**Implementation**

- Clarity is needed on who is the duty holder, i.e. who has to comply with the listed rights, to ensure accountability.
• The government needs to comply with existing reporting duties to measure impact and outcomes accurately and regularly, to ensure transparency. Article 31 of the UN Convention on the Rights of People with Disabilities (UNCRPD) was highlighted as a good model, requiring states to monitor implementation, e.g. by gathering data.63

• Practical training should be provided for all public officials so that individual staff members can ‘make rights real’ and organisations can put in place the right funding and operational mechanisms to ensure compliance. This may include an explicit ‘whistle-blowing policy’ for human rights violations, e.g. in health and social care.

• The relevant NHRI should have robust powers including the pursuit of public authorities that fail to publish reports on impact and instigate inquiries to prevent abuse.

• Any Constitution needs a review process so that the Constitution has the ability to adapt to changing jurisprudence.

• The state should ratify the individual right of petition to UN treaties, where they exist, e.g. the UK has committed to this mechanism only for CEDAW and UNCRPD.64

Better Access to Rights

• There should be a right to access free legal advice for the poorest.

---

63 Article 31 of the UN Convention on the Rights of People with Disabilities.
64 For more information on where the right of individual petition exists internationally but the UK has not yet agreed to the process, see the chart on the EHRC website at ‘UN treaty monitoring scorecard’, available at www.equalityhumanrights.com/human-rights/our-human-rights-work/international-framework/monitoring-and-promoting-un-treaties/
• Accessible remedies are required for alleged breaches of rights and in particular no expensive court fees should be charged, as they effectively bar people from accessing justice.

• ‘Victim’ should be defined broadly so that more than one person can take a case, which can reduce the isolation of the individual as well as demonstrate that it is not a ‘one off’ case. This is particularly useful to ensure strategic litigation effects change rather than cluttering the courts with many cases.

• A Constitutional Court should be established to adjudicate, expertly, on matters rather than using the general court system. There should be clarity about the impact of case law, and a duty to apply Court decisions within the country.

• Human rights protection should be supported by an independent and effective civil society, which has the funds to advise people of their rights, build capacity and knowledge within its sector of constitutional rights and participate in the international monitoring of compliance with ratified human rights treaties.

• People need to see themselves as ‘rights-holders’ and have the confidence and resilience to assert their rights on a daily basis. The state should also see people as rights-holders. This can prevent the need to use the law, as problems are sorted out at an early stage.

• There should be broad support and respect for the Constitution from the state and its arms such as the military, and faith and belief groups, as well as all political parties.

In addition to a Constitution, the international process has been viewed as effective. In respect of an international court deciding on domestic cases, e.g.
ECtHR, whilst it is appreciated that it can be a protracted and costly process, it is recognised that the process and outcome can influence the state to act. The obligation of such courts to supervise the implementation of judgements is also considered crucial, e.g. the Committee of Ministers supervises ECtHR judgements and will not ‘sign off’ a case unless it is satisfied that the judgement has been implemented.\(^{65}\) This can take a long time, e.g. \textit{A v UK} took eleven years.\(^{66}\)

The treaty review process at the UN has also been considered an effective addition to constitutional rights. The reviews of internationally ratified treaties by UN Committees of Experts, who are independent, enable a focused examination of country compliance and practice on human rights. The production of ‘Concluding Observations’ provides a ‘report card’ on what actions need to be taken over the next five to seven years. Governments are expected to give effect to the recommendations, and can be urged as well as monitored during the reviews by the work of NHRIs as well as by an empowered and resourced civil society.

The more frequent Universal Periodic Review Process, and mid-term reviews by the UN, allow a broader but perhaps less detailed evaluation of compliance by the Human Rights Council (HRC). The HRC is made up of elected state representatives. As well as considering evidence from NHRIs, both processes permit written submissions and oral interventions by NGOs and can participate in a dialogue at pre-hearing meetings with UN Treaty Committees. However

\(^{65}\) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 46, para 2.
\(^{66}\) Final Resolution (CM/ResDH(2009)75) was adopted by the Committee of Ministers on 16 September 2009 at the 1,065th meeting of the Ministers’ Deputies on \textit{A v UK} 1998, Application No. 25599/94.
the effectiveness of civil society participation is dependent on those who know about it, understand how each committee as well as the UPR process works, and have the knowledge to influence outcomes by submitting evidence and capitalising on opportunities that attendance offers at the UN in Geneva, e.g. meeting with and briefing Committee members.
Chapter 3 International Examples Relevant to Scotland

Countries throughout the world have adopted a variety of ways to respect, protect and fulfil human rights and equality. This section focuses on what Scotland can learn, but the initial challenge was on choosing which countries to examine.

The method was first to focus on relevance and examine countries that have already been considered to be relevant comparators. This included countries that, like Scotland within the UK, are politically decentralised, such as Spain and Germany. These countries were the subject of a Scottish Parliament briefing on ‘Political Decentralisation’ in 2009.67 The challenge is to identify what steps have been taken, within a devolved structure, to define, respect, promote, protect and enforce human rights and equality, and to identify any learning points for Scotland.

A second approach has been to briefly examine two countries that have been specifically highlighted during the debate on the Constitution in Scotland. Iceland and New Zealand have been suggested as having interesting processes of constitutional design.

Third, we wanted to examine enforceable economic and social rights as a means of driving progress, equally, and selected South Africa. This country is familiar to Scotland and has been cited by NGOs, academics and NHRIs in Scotland for its promotion of certain human rights, e.g. when sentencing,

courts in South Africa are now obliged to consider the impact on children if a parent is imprisoned.\(^{68}\)

The limited nature of this study leaves open the question of direct causal links between improved outcomes and the exercise of constitutional/human rights in each of the countries. There is a range of sources that could be drawn on by a more detailed investigation but the complexity of the challenge may prove quite daunting. However the summaries below set out some basic information about human rights, equality and constitutions, and exposes some of the challenges as well as the questions that may be posed to any of the proposed constitutional outcomes for Scotland, including devo-static, devo-max or independence.

In examining each of the countries below, the only pattern that emerges is one of difference. Even in countries with devolved political structures, there are differences. We have therefore sought to highlight those aspects that are relevant to Scotland including both legislative and non-legislative differences. The evidence points to a range of factors that need to be considered when developing constitutional frameworks. Despite division within countries, constitutions have been agreed evidencing that nations can achieve secure legal agreements on substantial and controversial issues.

\(^{68}\) In \textit{S v M} (2007), the Constitutional Court of South Africa ruled that all judges must take the likely impact on children into account when a parent faces imprisonment.
Regional and Central Protection of Rights

3.1 Germany

Context and Relevance

Germany is a constitutional model that serves as an interesting example from which Scotland can learn, as it has a central government with ‘exclusive’ powers similar to the UK including foreign affairs, defence and immigration as well as broad powers devolved to the 16 Länder.69

When East and West Germany united in 1990, the Basic Law of the Former Federal Republic of Germany, adopted in 1949, was adapted for the new single German state.70 The Basic Law is the German constitution. A letter from the then Federal President Richard von Weizsaecker, points out:

‘Thus all Germans now live under a constitution which protects the dignity and basic rights of man, regulates public life and facilitates peaceful change. No constitution, of course, can endow us with the ability to achieve such things. We ourselves must give life to it.’71

Home-grown or international standards?

The Basic Law covers a broad range of national matters as well as individual rights. For example it sets out the federal form of government: e.g. a Lower House of Parliament (Bundestag), and an Upper House of Parliament (Bundesrat), and defines the sovereign power of the 16 Länder. The Basic Law

71 General Electric’s Germany & Europe Round Table reproduce letter at www.constitution.org/cons/germany.txt
acknowledges ‘human rights as the basis of every community, of peace and of justice in the world’, and that ‘basic rights bind the legislature, the executive and the judiciary as directly enforceable law’.72

Germany has adopted a particular approach to economic issues that allows for nationalisation, and ‘Land, natural resources and means of production’ are permitted by law to be transferred into public ownership.73 The more pro-European/international approach of modern Germany is also reflected in provisions that are outward looking:

- Article 23 sets out the relationship with the European Union; Article 24 (1) permits ‘The Federation, by a law, to transfer sovereign powers to international organisations’;
- Article 25 states, ‘The general rules of public international law form part of the Federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory.’

However concern has been expressed at the UN about Germany’s failure to ratify some international human rights treaties such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.74 More positively, Germany has already ratified the Optional Protocol on UNCRC, which permits the right of individual petition to the UN Committee on the Rights of the Child – although an insufficient number of countries have ratified, so the Protocol is not yet in force.

72 Basic Law, Article 1, available at www.gesetze-im-internet.de/englisch_gg/index.html#gl_p0040
73 Ibid., Article 15.
Like the UK Parliament, the German Bundestag has an 18-member ‘Committee on Human Rights and Humanitarian Aid’, which aims ‘to help stop violations of and avert threats to human rights – both in Germany and also at the international level’. The Committee makes proposals for improvements to the Federal Government and the German Bundestag.

Regional versus central protection of rights

It is the shared responsibility of the federal government and the 16 Länder to uphold and promote human rights. The federal form of government enables each Land (state) to govern and define the rights of people via its own constitution and government, in addition to the Basic Law.

States are permitted to adopt their own constitutions. Berlin is a city, a Land, and is divided into 12 boroughs. It is represented in the Bundestag with 12 constituency seats and has four representatives in the Bundesrat. The House of Representatives is Berlin’s state parliament and currently has 149 members. The Berlin Senate is the state government and consists of the Governing Mayor, also the federal state’s premier, and up to eight Senators.

The Berlin constitution was the subject of a 1995 referendum, and was approved with 75.1 per cent of the votes cast. In addition to listing rights, it covers arrangements for government, administration, finance and the administration of justice. The constitution can be amended, e.g. as on 17

75 German Parliament website, available at www.bundestag.de/htdocs_e/bundestag/committees/a17/
March 2010. Berlin’s constitutional court monitors compliance with the constitution.77

It could be argued that Berlin has a transformative constitution, as its preamble has the intent of protecting ‘the freedom and the rights of every individual, to afford democratic order to the community and the economy, and to serve the spirit of social progress and peace’. The constitution permits affirmative action to achieve equality between men and women: ‘The Land shall be obliged to create and safeguard equality and the equal participation of women and men in all fields of social life. Affirmative action shall be permissible in order to redress existing inequalities.’78 Article 11 obliges the Land ‘to ensure equal conditions for people with and without disabilities’, and the impact of Berlin’s obligations was recently independently assessed when the European Commission announced it had won the ‘Access City Award 2013’ ‘in recognition of Berlin’s comprehensive and strategic approach to creating an accessible city for all’.79

The Constitution reflects the local priorities and culture. For example in terms of social and economic rights, its goals include the right to adequate housing particularly for people of low income,80 the right to education, including the promotion of vocational training,81 and environmental conservation. Priorities that are addressed include children’s rights:

‘All children are entitled to develop their personalities, to be raised without violence, and to the special protection of the community against violence, neglect, and exploitation. The state shall respect, protect, and promote the rights of children as individual personalities and shall ensure that their living conditions are suitable for children.’82

The constitution mirrors national rights, e.g. the protection of privacy.83 The constitution is about rights, but also places duties on Berlin:

‘Everybody shall have the right to work. It shall be the responsibility of the Land to protect and promote this right. The Land shall contribute to creating and maintaining jobs and to ensuring a high level of employment within the framework of the macroeconomic equilibrium. If no employment can be provided, there shall be a claim to maintenance from public funds.’84

Effectiveness

The protection of individual human rights in Germany is in principle the responsibility of the courts. Under the Basic Law anyone who believes their

80 Basic Law for the Federal Republic of Germany, Article 28 (1) on the Government website at www.constitution.org/cons/germany.txt
81 Ibid., Article 20(1).
82 Ibid., Article 13.
83 Ibid., Article 16.
84 Ibid., Article 18.
The social and economic rights of asylum seekers were protected by a recent case. The Higher Social Court of the state of North Rhine-Westphalia submitted a case to the Federal Constitutional Court for review, doubting that the benefits given to asylum seekers complied with Germany’s constitution. In 2012 the German Constitutional Court ruled that provisions governing basic cash benefits in the Asylum Seekers Benefits Act were unconstitutional as they were too low to guarantee a ‘Minimum existence, protected as human dignity in Article 1 sec. 1 in conjunction with Article 20 sec. 1 of the Basic Law’. The Court ruled that Germany must immediately increase basic cash benefits for asylum seekers and refugees, effective from 1 January 2011.

In explaining its decision the Court ruled that ‘The benefits are evidently insufficient because they have not been changed since 1993 despite considerable price increases in Germany. Furthermore, the amounts provided have not been comprehensibly calculated, nor is it apparent that a realistic,
needs-oriented calculation has been made that serves to presently secure the recipients’ existence.’  

The German Institute for Human Rights, (a Status A NHRI established in 2001) cannot receive individual complaints, and is thus similar to the SHRC. There is also the Federal Anti-discrimination Agency (FADA), which was established when the General Equal Treatment Act entered into force in August 2006.

The Human Rights Council Universal Periodic Review of Germany in 2013 provides more information on the effectiveness of the constitutional protection of human rights.  

3.2 Spain  
Context and Relevance  
Spain’s well-established system of asymmetric devolution has many similarities to the system in the UK. It has three levels of government, and the Constitution provides for exclusive powers, shared powers and implementation powers.  

- The National Parliament (Cortes Generales) is made up of the Congress of Deputies (Congreso de los Diputados) and the Senate (Senado) with exclusive powers including immigration, foreign policy and the monetary system.  

---

89 Ibid.  
91 ‘Comparative Political Briefing’, by Christine Stuart, SPICe Briefing 09/19, 9 July 2009.  
92 For a more detailed breakdown of powers see Committee of the Regions, European Union website at
• There are 17 regional, autonomous communities whose powers include organisation of regional government institutions, public order, health and hygiene. Each has its own parliament, president, government, administration and Supreme Court, and there are significant variations in the range of powers devolved.93 There are also two autonomous cities.

• Local governance is broken down into 50 provinces whose functions include promoting economic and social development (but for a variety of reasons there are tremendous differences between the competencies of the Provinces) and 8,111 municipalities (whose functions can vary depending on the number of inhabitants but include local road maintenance and municipal police).94

Home-grown or international standards?
The Constitution of Spain was passed by the *Cortes Generales* on 31 October 1978 and quickly thereafter ratified by the Spanish people in a referendum on 7 December 1978 to ensure and embed its legitimacy. It provides for a single but diverse nation:

‘The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and

---

93 ‘Comparative Political Briefing’, by Christine Stuart, SPICe Briefing 09/19, 9 July 2009.
94 For a more detailed breakdown of powers see Committee of the Regions, European Union website at http://extranet.cor.europa.eu/divisionpowers/countries/MembersLP/Spain/Pages/default.aspx
guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all.'

National diversity is routinely expressed in a variety of ways, e.g. the official website of the constitution is in Spanish, Basque, Valencian, Galician and Catalan. In the event of conflicts on competences between the central and regional authorities, the Constitutional Court will make a determination.

Home-grown elements of the Constitution include:

- Structure – by defining Spain as a parliamentary monarchy after decades of dictatorship.
- Legacy of history – Chapter 5 sets out the circumstances for the ‘Suspension of Rights and Liberties’, e.g. when martial law has been declared under the terms of the constitution.
- Values – some of the rights reveal particular concerns/interests. Examples include Article 18, ‘The right to honour …’ and Article 39 (2), ‘The law shall provide for the investigation of paternity’.
- A broader definition of rights than ECHR that covers economic and social rights. For example Article 40, ‘The public authorities shall … devote special attention to carrying out a policy directed towards full employment’, and Article 41, ‘The public authorities shall maintain a public Social Security system for all citizens who will guarantee adequate social assistance and benefits in situations of hardship,

95 Article 2 of the Constitution appears in English on the Spanish Constitutional Court website at www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx
96 Ibid.
97 Ibid., Article 1 (3) and Articles 56–65.
especially in cases of unemployment. Supplementary assistance and benefits shall be optional.’

- Environmental rights are included and define the state’s duties even in respect of private companies that are alleged to have damaged the environment. Article 45: ‘The public authorities shall safeguard rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential collective solidarity. Criminal or, where applicable, administrative sanctions, as well as the obligation to make good the damage, shall be imposed, under the terms established by the law, against those who violate the provisions ...’\(^98\)

The Constitution is designed to be transformative, as the preamble expresses a ‘desire to establish justice, liberty and security’, and to promote ‘the well-being of all its members’. It also defines a distinctive culture, as the preamble sets out a purpose ‘to protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions, and of their languages and institutions’; and Articles 2, 3.2, and 3.3 include the recognition of linguistic, cultural, and national pluralism.

In addition to these home-grown elements, international influence is clearly visible:

- The drafters copied and adapted existing international and European human rights norms. For example Article 15, ‘Everyone has the right

\(^{98}\) See decision from ECtHR in *Lopez Ostra V Spain* (Application no. 16798/90), 9 December 1994, as an example of how the domestic constitution failed to protect the Article 8 right to respect private and family life in respect of emissions from a local factory.
to life and to physical and moral integrity, and may under no circumstances be subjected to torture or to inhuman or degrading punishment or treatment’, has clearly drawn on Article 3 of the ECHR.

- On the interpretation of rights, there is provision to look beyond Spanish jurisprudence. For example Article 10 (2) states, ‘The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.’ Article 39 (4) states, ‘Children shall enjoy the protection provided for in the international agreements which safeguard their rights’, and Spain has incorporated UNCRC into domestic law.

Regional versus central protection of rights

The enjoyment of human rights will vary across Spain due to the split in powers of the central, regional and local governments. Catalonia illustrates the limits of regional authority as well as the devolved competency in interpreting rights.

Catalonia, one of the 17 autonomous regions, has an elected coalition Government that is seeking a referendum on independence from Spain, and the issue has exposed the limitation of regional powers in relation to the constitution. The national government in Madrid refuses to sanction even a non-binding referendum on the basis that it is unconstitutional. The Catalan Government has adopted a ‘Declaration of Sovereignty’, but the national government appealed against it on the grounds that it was unlawful. The Constitutional Court, the supreme interpreter of the Constitution, has decided
to suspend the Declaration and, at the time of writing this report, will now have to decide definitively whether the Declaration is constitutional or not.

Some argue that the constitution is inflexible, others that the process of interpreting the constitution is problematic. Some are quite happy with the outcome so far. It is interesting to note that the preamble to the Constitution ‘guarantees democratic co-existence under the Constitution and the law, in accordance with a fair social and economic order’ and will ‘promote the progress of culture and of the economy in order to ensure a worthy quality of life for all’. As Catalonia is responsible for one-fifth of Spain’s economy its departure from Spain would have a significant impact.\(^99\)

Some parties are supporting a ‘third way’, which is a ‘renewal’ of the constitution and ‘federalist’ approach to territorial reform in Spain.\(^100\)

The exercise of devolved authority can raise human rights issues. Amnesty International has highlighted concerns about a proposed planning law:

‘In September, the Catalan government presented a bill to amend legislation on the establishment of places of worship. The bill aimed to drop the requirement for municipalities to provide available space to build new places of worship. The lack of availability of places of worship was

\(^99\) See also The Human Rights Institute of Catalonia (IDHC), available at [www.idhc.org/eng/](http://www.idhc.org/eng/)

particularly severe for religious minorities including Muslims and Evangelical Christians.\textsuperscript{101}

The extent of devolved government in Spain permits a variety of local rules that have a direct impact on human rights. Amnesty International has reported that two municipalities in Catalonia, ‘Lleida and El Vendrell, modified their regulations to ban the wearing of full-face veils in municipal buildings and spaces. Thirteen other municipalities in the region had initiated the process to introduce a similar ban. In June, the High Court of Justice of Catalonia endorsed the ban in Lleida, finding that concealing the face was at odds with the principle of equality between women and men.’\textsuperscript{102}

Effectiveness

The structure is in place for ‘duty holders’ and for people to assert their rights:

• Chapter 4 of the Constitution ‘Guarantees Fundamental Rights and Liberties’ by placing duties on all public authorities to respect defined rights and liberties.

• Citizens have the right to ‘assert [their] claim to protect the liberties and rights recognised ... by means of a preferential and summary procedure in the ordinary courts and, when appropriate, by submitting an individual appeal for protection to the Constitutional Court’.\textsuperscript{103} There are cases where people do assert their rights, such as an employee who asserted his ‘right to secrecy in communications’, but the Court ruled in

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{101}] Amnesty International website, available at www.amnesty.org/en/region/spain/report-2012
\item[\textsuperscript{102}] Ibid.
\item[\textsuperscript{103}] Article 53, Constitution appears in English on Spanish Constitutional Court website, available at www.tribunalconstitucional.es/en/constitucion/Pages/ConstitucionIngles.aspx
\end{enumerate}
\end{footnotesize}
favour of the employer who had inspected and acted upon an employee’s derogatory communications found on a messaging system on a work computer.\(^{104}\) However there are also complaints that asserting economic rights during austerity has been problematic.\(^{105}\)

• In addition to the Constitution a range of Acts and strategies to protect human rights exist and a number have been highlighted by the UN Committee on Economic, Social and Cultural Rights, including a ‘National Strategy for the Social Inclusion of the Gypsy Population 2012–2020’.\(^{106}\)

However the practicalities of enforcing rights are the subject of some controversy:

• Despite a duty on the public sector to respect equal rights, delivering this commitment locally can create problems. The Committee on Economic, Social and Cultural Rights recently expressed its concern that ‘the decentralization of competencies in relation to economic, social and cultural rights has led to disparities in the enjoyment of these rights in the 17 autonomous communities’\(^{107}\). The Committee urged Spain to take action ‘to ensure that disparities between autonomous communities in terms of social investment and cuts in social welfare

\(^{104}\) Case overview provided in ‘Spanish Constitutional Court sides with employer on inspection of an employee’s derogatory communications’, by Cynthia O’Donoghue and Katalina Chin. Posted on Global Regulatory Enforcement Law Blog and published 18 April 2013.

\(^{105}\) See Centre for Economic and Social Rights website at www.cesr.org/section.php?id=161

\(^{106}\) ‘Concluding Observations of the UN Committee on Economic Social and Cultural Rights: Spain’, UN, 6 June 2012, para 5.

\(^{107}\) Ibid., para 9.
services do not lead to inequitable or discriminatory enjoyment of economic, social and cultural rights'.

- Arguably the terminology in the Constitution is aspirational about rights, rather than about guaranteeing the practical impact of rights: e.g. Article 43, ‘The right to health protection is recognised’. The same UN Committee complained that with the exception of education, ‘economic, social and cultural rights are considered by the State party only as “guiding principles” of social and economic policy, legislation and judicial practice’. This in part explains why the Committee concluded that austerity measures had a ‘disproportionate impact on disadvantaged and marginalized individuals and groups, especially the poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies ...’

- UNICEF has highlighted a problem in upholding children’s rights: ‘a significant and ongoing issue for Spain appears to be ensuring consistency in law and practice across the 17 autonomous communities.’

- Longstanding issues still require to be addressed, e.g. the UPR of Spain led to recommendations from the Human Rights Council, that were accepted by the Government, on combating racial and sexual discrimination. These recommendations had already been identified

---

108 Ibid., para 9.
109 Ibid., para 6.
110 Ibid., para 8.
over the years by other UN Committees, such as the Human Rights Committee.  

- More recently Spain has ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2010) and the International Covenant on the Rights of People with Disabilities (2007), which allow people to use an international mechanism to settle alleged domestic human rights abuses.

Interesting Processes of Constitutional Design

3.3 South Africa

Context and Relevance

A new constitutional state was set up following the end of apartheid. South Africa is a democratic republic. The Constitution of the Republic of South Africa was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. ‘The Constitution is the supreme law of the land. No other law or government action can supersede the provisions of the Constitution.’

Process

---

113 See Office of the High Commissioner for Human Rights website at www.ohchr.org/EN/ProfessionalInterest/Pages/OPCESCR.aspx
The process of adopting the constitution was part of the reconstruction of a new nation that was emerging from racial and political divisions. ‘South Africa’s Constitution was the result of remarkably detailed and inclusive negotiations – difficult but determined – that were carried out with an acute awareness of the injustices of the country’s non-democratic past.’

- An interim constitution provided the basis for deliberations. It was adopted in 1994 and set out rights as well as defining the structure of government. Its overall purpose was ‘a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms’.

- An elected constitutional assembly, representative of the majority of people in the country, drew up the final Constitution.

- There was an unprecedented, wide and deep consultation process and education programme that itself led to codification of socio-economic rights.

- The Constitution was explicitly stated to be transformative with a notion of rights as central: it was to enshrine equality, rights and democracy. For example the preamble states that its purpose is to ‘improve the quality of life of all citizens and free the potential of each person’. Hence socio and economic rights are justiciable, as the constitution is regarded

---

115 Brand South Africa website, available at www.southafrica.info/about/democracy/constitution.htm
as a driver for achieving human rights and as offering access to justice for individuals.

Home-grown or international standards?
A full spectrum of rights – civil and political and socio-economic and cultural – is included, reflecting domestic priorities: equality (Article 9) privacy (14), freedom of expression (16) environment (24) housing (26), health care, food, water and social security (27). The existence of these rights is a formal recognition of their importance, to be enjoyed equally, and can be enforced through the courts.

There is a clear international reference point for interpreting rights contained in the South African Constitution: ‘When interpreting the Bill of Rights, a court, tribunal or forum: must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.’117 For example there has been progress on giving effect to the UNCRC in South Africa as (now retired) Judge Albie Sachs explained that in his groundbreaking judgement he chose to not send a mother, convicted of a crime, to jail as it was not in the best interests of the child. The child’s interests have to be taken into consideration in line with UNCRC.118

Effectiveness

117 Ibid., Section 39(1).
118 In the 2007 South African case of S v M, in a judgement from the Constitutional Court, he wrote that the best interests of the child should be taken into account in sentencing decisions involving primary caregivers and that this should become a ‘standard preoccupation of all sentencing courts’. Holyrood Conferences website, at www.holyrood.com/2009/06/putting-children-first/
Particular interest has focused on the implementation of socio-economic rights in the Constitution. There have been some major successes, for example, a ruling that forced the government to provide anti-retroviral drugs to pregnant mothers (in fact resulting in them being provided more generally), rulings that the concept of equality is to take account of past circumstances, and enforcement of rights to housing. However, the key South African housing case also offers an example of the potential limits of individual case decisions and the unwillingness of the courts to be prescriptive about how governments address acknowledged failings of the system.

In the case of *Grootboom v Oostenberg Municipality and Others*, the Constitutional Court ruled that adults and children who were homeless and living in a sports field without security of tenure and adequate shelter had suffered a breach of their constitutional rights. General government action to address the acknowledged substantial housing shortage had not been sufficient in this specific case, as it had ‘failed to meet the Constitutional test of reasonableness in that it was focussed only on medium- and long-term objectives and did not include measures to provide short-term relief to those in desperate need’. However the Court did not accept that there was a ‘core obligation’, and ruled that socio-economic rights do not impose any direct

---


121 *Grootboom v Oostenberg Municipality and Others*, 2000 (3) BCLR 277.

122 *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277.
obligation on the state to provide socio-economic goods and services to anyone, only a qualified obligation to adopt a reasonable programme.

Sandra Uebenberg, of the Socio-Economic Rights Project in Cape Town, has criticised the timidity of the judgement and warned about the broader implications:

‘The standard for determining the minimum core obligation should be informed by its underlying purpose: the desire to protect vulnerable people from serious social and economic threats to their survival, health, and basic functioning in society. Without a recognition of this basic standard, the enjoyment of all other rights is imperilled and the foundational constitutional values of human dignity, equality and freedom will, to borrow the memorable phrase from Soobramoney, “have a hollow ring”.’

Emphasising the dulling effect on future cases she points out ‘the underlying purpose of recognising minimum core obligations can guide the evaluation of whether, in concrete cases, a particular service or resource must be provided by the state to the applicants’. It is useful to note that the High Court had initially provisionally concluded that ‘tents, portable latrines and a regular supply of water’ might be the types of basic state intervention appropriate in this case.

---

124 Ibid., pg 175.
125 Ibid., pg 168.
Irene Grootboom, the main litigant in the case, died in 2012, in dire circumstances, without her right to shelter being realised.

**Lessons for Scotland**

The South African case shows that socio-economic rights can be made justiciable without unduly infringing the role of politicians in making social and economic policy choices. The economic rights acknowledged by the courts did practically change many people’s lives, and it is progress for individuals to be able to assert their rights in court. Even in *Grootboom*, although the duty-holders know they have to build more houses, what is in dispute is how fast they can do so given that too many people are still living in awful conditions. The ‘right’ is not in dispute, only the speed at which the country is respecting the right. A positive spin on this case is that the existence of the justiciable right puts pressure on the duty-holder to do much more, and more quickly.

There are lessons for Scotland on the vision and powers of its NHRI, which has been awarded Status A by the ICC. The mandate of the South African Human Rights Commission (SAHRC) is detailed in the Constitution and its duties include ‘monitoring and assessing the observance of human rights’. Its vision is understood as an ongoing process: ‘Transforming society. Securing rights. Restoring dignity’, and is a recognition that the Constitution has charged it not just with promoting respect for human rights but also with a ‘culture of human rights’. Its powers include the authority to ‘take steps and secure

---

appropriate redress where human rights have been violated’, 129 and to give that power effect and ensure accountability in respect of the equal enjoyment of social, economic and environmental rights.

‘Each year, the Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.’ 130

As the SAHRC’s powers are transformative and are directed at evaluating state compliance with human rights duties as well as assessing individuals’ enjoyment of rights, it has a range of powers to drive progress on compliance, particularly on economic and social rights. How this works in practice is a matter for further research but there are signs of its proactive strategy, e.g. the website prominently provides a link for anyone to lodge an abuse of human rights, and a current campaign is on the ‘right to food’.

3.4 Iceland

Context and Relevance

Iceland is a parliamentary democracy with two levels of administration – the national/central government and 76 municipalities (local authorities). 131 The President, members of the Icelandic Parliament (Althingi) and local authorities are elected in general elections held every four years.

Iceland has a Constitution that can be traced back to 1874, which has been amended several times, e.g. the Parliament has agreed to incorporate provisions of the ECHR into domestic law. In 2008 in the aftermath of Iceland’s banking crisis, there was a demand for the citizens of Iceland to rewrite their own Constitution. The recent process of undertaking this exercise offers lessons for Scotland.

Iceland has no NHRI accredited by the ICC. However there is an Althing Ombudsman who is elected by the Parliament for a period of four years and whose powers include investigating written complaints.

Process

This example is distinctive as the impetus for revising the existing Constitution came from the public. Defining, respecting and protecting rights was a reaction to the grave financial difficulties that the country faced following the collapse of the banks. In fact, layers of organisation went into what has been portrayed as a publicly inspired initiative:

- A civil society organisation, ‘The Ministry of Ideas’, gathered together a cross-section of society, as well as several prominent people, and let them outline what they felt ought to be the priorities in the constitutional process – what issues and matters should be covered.

---

133 Act No. 85/1997 on the Althing Ombudsman.
• The Althingi (Parliament) appointed a constitutional committee of seven to prepare the ground and organize a national assembly comprising 950 individuals drawn at random from the national registry.

• In 2010, the selected 950 members listed a set of values and issues to be addressed in the new Constitution, which included ‘several national traits, including strong protections for the natural environment and national sovereignty, as well as the right to unprecedented access to public information’. Increasing public participation in the democracy was also a key feature.

• A Constitutional Assembly/Council, made of up 25 ‘ordinary’ citizens elected by their peers, was tasked with drafting. There were 522 candidates and the elections were organised by the Government. Elected participants brought a range of expertise, e.g. Thorvaldur Gylfason is Professor of Economics at the University of Iceland. After some dispute, its membership was ratified by the Government. The aspirational and general statements in the ‘final’ text prompted some to argue that constitutional experts were needed to work on the draft, not to change the meaning but provide technical expertise.

• Groups got organised to lobby and ensure that their priorities were included in the final draft. For example, ‘UNICEF Iceland, the Ombudsman for Children and the City of Reykjavik launched a participation project to ensure that the opinions of children were heard and taken into account in the constitutional amendment process ...

   Article 12 deals specifically with the rights of children and includes two

134 The Foundation for Law, Justice and Society, available at www.fljs.org/content/new-constitution-index-unveiled-conclusion-constitutions-programme
135 See ‘A Review of Iceland’s Draft Constitution’, by Zachary Elkins (University of Texas), Tom Ginsburg (University of Chicago), James Melton (University College London), Comparative Constitutions Project, 14 October 2012.
new provisions relating to best interests and the right to express views.’\textsuperscript{136}

At all stages, ‘social media’ and the wide use of IT enabled more people to have a direct input.\textsuperscript{137}

**Outcome**

- A draft Constitution was presented to Parliament by the Constitutional Council in July 2011.

- Researchers from the Comparative Constitutions Project concluded that ‘The draft has noticeably more rights than does the current Icelandic constitution, but significantly less than does that of other recent constitutions such as those of Bolivia and Kenya’.\textsuperscript{138} The researchers have also pointed out that the draft is unusual in respect of protecting the rights of disabled people and combating discrimination on the grounds of sexual orientation: ‘the new draft now identifies a new set of categories protected from discrimination. Such categories now include disability, sexual orientation and genetic character as well as more conventional categories like age, race, and gender.’\textsuperscript{139}

- In autumn 2012 a non-binding national referendum was held on the merits of the draft, which included six questions for voters ‘for their


\textsuperscript{138} See ‘A Review of Iceland’s Draft Constitution’, by Zachary Elkins (University of Texas), Tom Ginsburg (University of Chicago), James Melton (University College London), The Comparative Constitutions Project, 14 October 2012, pg 3.

\textsuperscript{139} Pg 5, Ibid.
general opinion of the draft as well as their opinion of particular elements such as the provision for natural resources, the role of the church, the electoral system for the legislature, and a provision regarding national referenda on legislation’.  

A majority of those who voted were in favour of the draft.

- In November 2012, the Parliament invited the Venice Commission, the Council of Europe’s Advisory Body on Constitutions, to provide an opinion on the draft. In forming an opinion, the Commission travelled to Iceland and spoke to a range of state and non-state actors, e.g. political parties and NGOs. Its ‘Opinion’ of March 2013 contained some criticisms of the draft.

- Elections were held in April 2013, leading to a change of government. The current situation has been achieved under two distinct administrations with the former apparently more in favour of reforming the constitution than the latter.

**Lessons for Scotland**

At the time of writing this report, the draft constitution has not been approved, although some recommendations were accepted, e.g. on the procedure for amending the constitution. A number of problems emerged that offer lessons for Scotland:

- Prompted by the economic problems of 2008, in fact the process has taken some time and the public mood appears now less focused on

---


constitutional reform as a method of preventing further economic crises and more on securing alternative checks and balances on the political and economic system.

- There had been resistance to the redrafting process throughout, and opponents, and those who did not feel strongly, have become increasingly influential. As Professor Thorvaldur Gylfason has pointed out, ‘Understandably, the prospect of 25 individuals over whom the political parties had no control being about to begin their work guided by a legal mandate to revise the constitution in broad accord with the conclusions of the national assembly made some politicians uneasy’.142

- The credibility of the process of drafting was called into question with some pointing out that it was not as ‘populist’ or as inclusive as portrayed.

- The Supreme Court also became involved as it was asked to rule on technical aspects of the process of elections to the constituent assembly. The Court ruled the election null and void. However the Government stepped in and appointed the same 25 people anyway.

- The process of amending the Constitution is procedurally difficult and protracted.143

The Icelandic process has been innovative, and received a lot of international attention as a new form of constitution-making model. By creating international interest and a national momentum, there was a major ‘discussion’ on values and rights in Iceland. Ultimately there has been an

apparent lack of political will and public support to ensure constitutional reform, e.g. to increase the level of individual rights protection. The Venice Commission has repeatedly urged no quick drafting, or amending, of constitutions but a balance needs to be struck so that progressive actions are delivered to realise reform and meet with the public’s reasonable expectations.144

3.5 New Zealand

Context and Relevance

New Zealand is a parliamentary democracy, and part of the Commonwealth, and Queen Elizabeth II is still head of State. The current unwritten constitution model is similar to the UK, with some significant differences: for example the Electoral Act 2003 and the Constitution Act 1986 can only be amended by a referendum or 75 per cent of Members of Parliament. However other legislation, including the Bill of Rights Act 1998 can be amended in the same way as ordinary legislation.145

New Zealand has an NHRI, which has been awarded Status A by the ICC. The ‘Human Rights Commission’ is a different model from Scotland as, although there is a lead Commissioner, Commissioners are appointed to have lead

responsibility for different areas, i.e. the Equal Employment Opportunities Commissioner and the Race Relations Commissioner.\textsuperscript{146}

New Zealand provides a useful example as a process that is already underway for considering ‘constitutional issues’, and whether to move to a written constitution. The process is instructive as the consultation involves the population as well as other key stakeholders.

Process
The latest initiative builds upon work already undertaken: in 2005, the Parliament’s Constitutional Arrangements Committee held an inquiry into the existing constitutional arrangements.\textsuperscript{147} To revisit the matter less than ten years later suggests an underlying and sustained dissatisfaction with the current constitutional arrangements.

- The current process has been led by the elected government, which appointed an independent 12-member independent Advisory Panel on the Constitution. It included people ‘from many walks of life, different ethnicities and regions’ with ‘knowledge and experience in community engagement, local and central government, media, education, politics and Māori society’.\textsuperscript{148}
- The remit of the Panel, defined in ‘Terms of Reference’, is to advise – not to make decisions. The Panel assured people that any changes would be

\textsuperscript{148} Constitutional Advisory Panel website, available at www.cap.govt.nz/The-Panel
the result of a longer deliberative process. The Panel is responsible for: informing the public of current constitutional arrangements; ensuring the information provided is balanced and clear; seeking the views of as many people as possible; and reporting to the Government with advice, including any points of broad consensus where further work is recommended.

• The consultation process has been structured around ‘constitutional issues’, e.g. a written constitution and Māori representation in local and national government.

• The Panel proactively sought the public’s views by publishing a discussion document, ‘A Constitution: the Conversation So Far’, in September 2012 and further submissions were sought in response to specific questions and prompts in 2013, including: should the New Zealand Constitution have a higher legal status than any other laws?; should our Constitution be written in a single legal document and why?; who should have the power to decide whether legislation is consistent with the Constitution – parliament or the courts? Submissions could be made until 31 July 2013.

• The Panel took part in 100 ‘conversations’ across the county where they heard directly from people.

Outcomes

• The Panel has a dedicated website explaining its remit, work and progress to date.149 The transparency combats any confusion as to purpose and ensures accountability.

• There is a clear five-step work-plan ranging from ‘preparing the ground’, which included ‘developing the tools and relationships necessary for

149 Ibid.
successful engagement’, to ‘deliberating’ and then ‘reporting’. The process of engagement was understood to be as important as the Panel’s deliberations, and also regarded as essential in ensuring a representative report.

- Evidence of effective engagement includes 5,270 written submissions and two surveys that have been received from 1,092 young people, of which 116 are from groups.

- The Panel has to report back by December 2013 and its proposals brought to the Government in 2014, so there is a clear timeline against which people can measure progress.

Lessons for Scotland

Although New Zealand is perceived to be very similar to the UK, there are in fact significant differences not just in the need to respect and protect Māori rights but in the country’s theory of rights. For example it is the first Westminster-style government to ban the corporal punishment of children in the home, which has still not been achieved in the UK. Despite the differences, there remains a number of learning reference points for Scotland.

- The process has benefited from clear government backing: the Panel is responsible to the Deputy Prime Minister and the Minister for Māori

---

Affairs, its work is funded by Government, and the Panel is supported by a secretariat based in the Ministry of Justice.¹⁵³

- The Deputy Prime Minister and Minister for Māori Affairs can commission research and reports from experts to help in the task – this can develop a general understanding of the constitutional issues that interest/concern the public.

- The strategy is to engage with politicians of all parties, e.g. the Cross-party Reference Group of Members of Parliament will be consulted on major findings and reports prior to their being presented to the Cabinet.¹⁵⁴

- The Advisory Panel has brought together a range of experts from different fields, e.g. farming, business and the media, as well as NGOs. This provides credibility, expertise and generates respect for the ‘diverse skills base’ of those tasked with producing the report.

- The Panel is united in shared purpose to consider ‘constitutional issues’, which is a broad theme, and a written constitution is just one part of the wider brief, i.e. in addition to human rights, attitudes to the working of Parliament will be explored.

- The focus is on process – to inform, listen, record and consider people’s views on a range of constitutional issues – rather than to advise Government.

- The terms of reference acknowledge that there is a task to inform the population about the current constitutional set-up before it can begin an informed discussion about any change or about the options for change.

¹⁵⁴ Ibid., para 2.
Very often with human rights and equality there is a need to debunk myths as well as enabling a factual and constructive conversation.

- The remit of the Panel could be replicated in Scotland: ‘Informing the public of current constitutional arrangements, ensuring the information provided is balanced and clear; seeking the views of as many people as possible; reporting to the Government with advice, including any points of broad consensus where further work is recommended.’

- The process thus far has been inclusive with written, online and email submissions sought, as well as developing the ‘conversation’ on Facebook. The process has engaged Māori and young people.

- There were resources on the Panel’s website to help encourage and support informed discussion. Such enabling tools could prove indispensable in securing the views of traditionally ‘hard-to-reach’ groups.

- It is understood that ‘A key outcome of our work will be an informed conversation with and amongst the people of Aotearoa New Zealand about constitutional issues’, and that is something which Scotland needs too, as is the understanding that this conversation is a longer process just than the work of the Panel.

As this consultative process is still underway, it will be important to monitor its impact and outcomes to clarify what further lessons Scotland may learn.

3.6 Conclusion

Whilst there are interesting developments within all those countries above, there is no one model that can be taken off the shelf for Scotland to replicate,

whatever the constitutional future. Instead, we can learn from a range of state and sub-state initiatives.

1. As regards the choice between home-grown and international standards, the countries studied used a mix of approaches.
2. Countries seem to choose creative ways to marry international commitments (the incorporation of international standards) and domestically defined rights.
3. Consideration needs to be given to effective protection of rights at both regional and national levels, with the capacity to protect and promote rights at both levels.
4. Process matters. In contemporary constitution-making processes, there has been considerable innovation in producing constitutions and the processes adopted, since process matters both to content and subsequent ownership and implementation.
5. While broad civic involvement is seen as good practice, the record on implementation shows that politicians need to be fully involved for Constitutions to be implemented.

These are matters we will pick up on in the conclusion.
Chapter 4. What Lessons Can Scotland Learn?

The purpose of this report is to identify some relevant, practical lessons and pose questions for those debating and planning constitutional change and its relationship to the protection of human rights and equality. From our work, we realise that there is little empirical research providing easy answers on which constitutions better protect human rights and make a positive impact on people lives – usually the positive impact is due to a variety of factors, some legislative, some non-legislative and some cultural. There is a lack of an ‘evidence base’ for showing that a particular set of institutional arrangements, for example, constitutionally protected human rights, or the incorporation of international standards, best protects rights in practice. There are some studies, however, which have some relevance to this question as they ask the right questions, and it is up to those in Scotland with an interest in constitutional change to consider their answer.

What we do know is that Constitutions are hard work and the process of inception to delivery and beyond has to be inclusive and involve political buy-in, as well as effective application across the three primary institutions of government – the executive, the legislature, and domestic courts.

Based on the preliminary discussion above, we have identified seven areas that require attention by those considering constitutional change: motivation, process, the role of international law, flexibility, content, enforcement and monitoring. Within all these headings there are a range of cultural as well as legislative and non-legislative considerations.
4.1 Motivation

Whether constitutional change is brought about by a vote for independence, devo-max or devo-static, it is important to be clear whether it is a defensive, reactive or positive initiative. The motivation will influence the content as well as the enforcement of human rights provisions. Thus far, there is no groundswell of support from the public in Scotland to move away from the current situation of having no ‘formal written constitution’.

There was opposition to a UK Bill of Rights in Scotland in 2011 during the consultation process undertaken by the UK Bill of Rights Commission.\(^\text{156}\) This contrasts with over 30,000 responses submitted to the Northern Ireland Office on the framework for a Bill of Rights proposed by the Northern Ireland Human Rights Commission in 2010, and the initial popularity of the initiative to redraft the constitution in Iceland.

Although the idea is finding support amongst individual politicians such as Gordon Brown MP, others such as Iain Gray MSP from the same political party, are less enthusiastic. Gray recently wrote:

‘The human rights we already have embedded in our unwritten constitution are for the most part qualified rather than absolute, and have proven themselves adaptable to changing times. They recognise that one person’s

freedom can impinge on another’s rights, and allow us to strike that balance fairly and relatively quickly.’\footnote{157}

4.2 A Shared Theory and Understanding of Rights

There is no real evidence that Scotland has a shared understanding of equality and human rights. The UK Bill of Rights Commission noted that ‘while polls suggest that the public throughout the UK in fact react very similarly to questions on human rights issues, the meetings that we had, particularly in Scotland and Wales, produced in general very little support for a UK Bill of Rights. Calls for a UK Bill of Rights were generally perceived to be emanating from England only.’\footnote{158}

The Commission on a UK Bill of Rights did not undertake any polling of public opinions on human rights, arguing that polling is ‘notoriously unreliable’, but stating that even polls by third parties suggest no great difference across the UK on public attitudes to human rights. What they do highlight is that ‘even the most enthusiastic advocates of the UK’s present human rights structures accept that ... there is a lack of public understanding and “ownership” of the Human Rights Act’.\footnote{159}

Polling in Scotland is rare but results confirm the view that there is a gap in public understanding about human rights. A MORI Scotland poll commissioned by the Justice 1 Committee of the Scottish Parliament on the public’s views on human rights in 2005 revealed:

\footnote{157}{‘Listing our rights serves only to curtail them’, \textit{Scotsman}, 12 February 2013.}
\footnote{158}{‘A UK Bill of Rights? The Choice Before Us, Volume 1’, para 43.}
\footnote{159}{Ibid., para 80.}
• 29 per cent said the term human rights in Scotland meant nothing to them, or formed no associations with the term – most commonly in working-class respondents;

• 23 per cent feel that there is inadequate protection of human rights in Scotland, twice those that feel there is excessive protection (11 per cent);

• Women and working class people are more likely to feel that protection is inadequate.\(^\text{160}\)

In 2010 a study was published, commissioned by the EHRC, which explored the Scottish public’s understanding of the concepts ‘equality’, ‘fairness’ and ‘good relations’, and its conclusions included:

• ‘Participants had difficulty engaging with the subject matter which, for many, was subjective and not something that they could easily conceptualise or find words to explain.

• ‘Although most people agreed that fairness and equality are a good thing, discriminatory and prejudicial views were still evident when case studies of specific situations were discussed. There was a fairly dominant belief that making everyone equal was unrealistic because it was unattainable.\(^\text{161}\)’

---


There is a need for some work on identifying the extent of knowledge about rights. There are models available. For example, ‘A recent study indicated that approximately 42 per cent of children in Iceland were aware of children’s rights, compared to 54 per cent in Norway and 58 per cent in Sweden. The study also highlighted that 60 per cent of children in Iceland learned about children’s rights in school, compared to approximately 80 per cent in Norway and Sweden.’\textsuperscript{162}

There is a danger that discussion of constitutional reform focuses not on extending and deepening human rights protection, but on cataloguing the ‘rights’ we currently have, and considering whether there is a hierarchy of rights, e.g. whether social and economic rights should be just as enforceable as civil and political rights. What is not clear is any consensus on the questions ‘do Constitutions improve governments?’, do ‘constitutions empower people?’ and ‘do constitutions create a more fair society?’ Constitutions with enforceable rights can clearly play an important role in clarifying clearly applicable, clearly articulated rights. However the extent of their impact varies hugely. In practice we need to obtain positive answers to such questions as ‘will a constitution for Scotland empower people and create a fairer society?’ to secure the theoretical consensus that will begin the process of developing a written Constitution. Thereafter we need to reflect on what greater institutional/structural protections are needed, such as the creation of a constitutional court.

4.3 Who Serves on the Constitutional Assembly?

Membership is determined by those in charge of the process, such as the Government in New Zealand. If the intent is to be inclusive there are a range of methods to be deployed: quotas for selection that would ensure participation from variety of social groups, as in Benin in 1990; appointing the members according to their official positions in particular organisations/institutions, which are broadly representative of politicians/academics/civil society, etc., as in Georgia in 1995. Countries have used different mechanisms to ensure a measure of civil society and political participation.

A clear remit, transparency in the process, having the right financial resources, developing tools for engagement, following a clear timetable and ensuring opportunities for reflective deliberation are also key.

The Venice Commission, the Council of Europe’s Advisory Body on Constitutions, has played a leading role in advising on constitutions that comply with the standards of Europe’s constitutional heritage: democracy, the rule of law and elections. The Venice Commission can assist states, for example in respect of constitutional reforms, regionalism and international law issues, and Scotland could choose to access its expertise.163

The Commission asserts that ‘The adoption of a new and good Constitution should be based on the widest consensus possible within society and ‘a wide and substantive debate involving the various political forces, non-governmental organisations and citizen associations, the academia and media

163 For more information see Venice Commission website at www.venice.coe.int/WebForms/pages/?p=01_Const_Assistance
is an important pre-requisite for adopting a sustainable text, acceptable for the whole of society and in line with international texts’. The Venice Commission has produced a paper on referenda in Europe, which was prompted by the draft Iceland Constitution. Based on the practice in 30 countries, guidelines are being developed and will be published later in 2013.

4.4 Flexibility and Interpretation

Constitutions should be crafted to enable developments and adaptation over time, e.g. the South African Constitution has been amended 17 times since 1996. New issues can be addressed as constitutional issues but via new legislation, e.g. France adopted ‘The Charter for the Environment’ in 2004 to add to its Constitution. The Charter sets out rights, e.g. Article 1, ‘Each person has the right to live in a balanced environment which shows due respect for health’, as well as responsibilities, e.g. Article 2, ‘Each person has a duty to participate in preserving and enhancing the environment’.

As the ECHR is construed as a ‘living treaty’ and capable of adaptation to meet modern issues, case law demonstrates its capacity to deliberate on emerging issues, e.g. whether freedom of information equates with Article 10 of the ECHR, ‘the right to receive and impart information’. Similarly a constitution may develop through interpretation and case law, but this may prove unsatisfactory as such an approach depends on cases coming to court.

---

164 Available at Venice Commission website, www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)010-e, pg 5
166 French National Assembly website at www.assemblee-nationale.fr/english/#Charter
former Equal Opportunities Commission (EOC) pointed out in evidence to the Scottish Commissioner for Human Rights Bill that Scotland does not have a history of strategic litigation, casting doubt on the effectiveness of this reactive approach.

How the Constitution might be interpreted will impact on the day-to-day exercise of rights and delivery of obligations. When cases come to court a purposive approach to their interpretation is often considered to be linked to a transformative potential. The South African model is instructive as it does permit international guidance on interpreting rights:

(1) When interpreting the Bill of Rights, a court, tribunal or forum—
   (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   (b) must consider international law; and
   (c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.168

As countries move to adopt international standards, an amendment to the Constitution is not always necessary. For example Spain passed ‘Act No. 12/2009 of 30 October 2009, on the right of asylum and subsidiary protection,

168 Section 39, Interpretation of Bill of Rights South Africa – Constitution.
which incorporates European directives and covers the protection of the rights set forth in the Convention relating to the Status of Refugees’.\textsuperscript{169}

4.5 Content
Research undertaken by the Comparative Constitutions Project has emphasised, ‘Still, drafting the right text has been found to be surprisingly important for constitutional mortality’.\textsuperscript{170}

A nation sets out its value base, as well as its vision, in a Constitution. Agreeing the content can be a controversial as well as a healing process. Fundamental cultural and historical issues, often contentious, can be settled via a Constitution. For example the French Constitution establishes a secular state but respects the rights of people to hold beliefs: ‘France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis.’\textsuperscript{171}

The Swedish Constitution provides an intriguing model as it consists of four fundamental laws and reflects the (then) priorities of the country: the Instrument of Government, the Act of Succession, the Freedom of the Press Act, and the Fundamental Law on Freedom of Expression.\textsuperscript{172}

\begin{flushright}
\textsuperscript{170} ‘A Review of Iceland’s Draft Constitution’, by Zachary Elkins (University of Texas), Tom Ginsburg (University of Chicago), James Melton (University College London), Comparative Constitutions Project, 14 October 2012, pg 10.
\textsuperscript{171} Article 1, French National Assembly website, available at [www.assemblee-nationale.fr/english/](http://www.assemblee-nationale.fr/english/)
\textsuperscript{172} Swedish Government website, available at [www.government.se/sb/d/2707/a/15187](http://www.government.se/sb/d/2707/a/15187)\end{flushright}
Historically, there has been discussion as to whether there is a hierarchy of human rights, with some governments emphasising the importance of civil, political and cultural rights over social and economic rights. In more recently developed constitutions, in which the inclusion of socio-economic rights has been viewed as important, there has been some disappointment about implementation. Sandra Uebenberg, Project Coordinator of the Socio-Economic Rights Project at the University of the Western Cape, has concluded that in South Africa, ‘[t]he impact of socio economic rights on people’s lives has been, overall, disappointing when levels of violence, poverty and homelessness are considered’. However at least people now have a list of enforceable rights and pragmatically, there will always be concerns about interpretation and the priority of delivering rights when there are competing demands on public funds.

For those in Scotland seeking help in developing a Constitution, there is a range of resources available:

- The United Nations Rule of Law unit and its work relating to Constitution-making, including several case studies from the post-conflict settings;
- Guidance Note by Secretary General on ‘United Nations Assistance to Constitution-making Processes’;

---

173 ‘South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?’ by Sandra Uebenberg (Associate Professor, Project Coordinator, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape), 2009, available at [www.saflii.org/za/journals/LDD/2002/2.pdf](http://www.saflii.org/za/journals/LDD/2002/2.pdf)


• The Institute for Democracy and Electoral Assistance, IDEA (EU) and its work on the constitution-building process;\textsuperscript{176}

• An informative and in-depth analysis of several processes, examining their representativeness and public participation: ‘Constitution Building Process and Democratization: A discussion of twelve case studies’, IDEA;\textsuperscript{177}

• Joint online platform, an initiative of the Comparative Constitutions Project and Institute for Peace, providing reports and links that are relevant to different constitution-making processes.\textsuperscript{178}

4.6 The Role of International Law

It is useful for Scotland to consider the following external factors, and how they might steer internal activity:

• What impact will extra-territorial laws have on domestic legal cases, and what capacity will the court have to refer cases to other courts? For example Italy has a Constitutional Court, which has, in 2013, sought a preliminary ruling from the European Court of Justice (ECJ) and stayed proceedings pending receipt of that ruling. The case, which had been referred to it by two district courts, involved employment legislation and

\textsuperscript{176} International Institute for Democracy and Electoral Assistance, available at www.idea.int/cbp/


\textsuperscript{178} Comparative Constitutions Project, website bibliography on constitutional development across the world, available at http://constitutionmaking.org/files/constitutionmaking_bib.pdf
was ruled to involve the meaning of Directive 1999/70/EC, and so fell to be resolved by the ECJ.\textsuperscript{179}

- What impact will ratified international treaties and the Concluding Observations from the UN Treaty Review Bodies have on defining the rights, enforcement mechanisms and the process of evaluating rights?
- What impact will existing rules have on the design of our NHRI? In addition to the exhortations of the committee enforcement bodies of the anti-discrimination UN treaties, that a body be established to promote and protect equality for racial minorities, children and women, EU directives require an enforcement body.\textsuperscript{180}
- How will we interpret international rules on the powers of the NHRI? The UN ‘Recognizes that, in accordance with the Vienna Declaration and Programme of Action, it is the right of each State to choose the framework for national institutions, including the Ombudsman, mediator and other national human rights institutions, which is best suited to its particular needs at the national level, in order to promote human rights in accordance with international human rights instruments’.\textsuperscript{181} The Paris Principles provide benchmarks against which proposed, new and existing NHRIs can be assessed or ‘accredited’ by the International Coordinating Committee’s (ICC) Sub-committee on Accreditation.\textsuperscript{182} Due to new rules,

\textsuperscript{179} Judgement No. 207 of 2013, Italian Constitutional Court website, available at www.cortecostituzionale.it/ActionPagina_1205.do
opinions on an NHRI’s effectiveness or otherwise will now be sought by the ICC from civil society and that may impact on their accredited status.

4.7 Monitoring and Enforcement

Constitutional rights need to have an enforcement mechanism, and often this is a court. The composition of a Constitutional Court can be varied. For example it can be made up only of lawyers; or the Spanish Constitutional Court, for example, is made up of 12 judges appointed by the King and members can be more widely drawn to include ‘magistrates and prosecutors, university professors, public officials and lawyers, all of whom must have a recognized standing with at least fifteen years’ practice in their profession’. 183

The ECtHR has a range of powers if cases are won but does not make large financial awards; it rather makes payments for ‘just satisfaction’, and will meet provable legal costs in bringing a case. Other courts have a range of disposals, e.g. requiring a monument to be built commemorating the life of someone who has been murdered.

4.8 Structures and Institutions

As the international examples demonstrate, there is plenty of evidence on which to draw in considering how Scotland could better protect and promote human rights and equality, using the powers and budget of its NHRI, creating a Constitutional Court or developing the expertise of judiciary and courts to deal with human rights issues and access to justice mechanisms for ordinary people. In the event of significant constitutional change, or even if the status

---

183 Part IX of the Constitution. The website of the Constitutional Court is not in English, see www.tribunalconstitucional.es/en/tribunal/Pages/Tribunal.aspx. See also www.lamoncloa.gob.es/idiomas/9/espana/leyfundamental/titulo_novento.htm
quo remains after September 2014, it is important that thought is given to structures, powers, mandates and coordination, so we are confident that the best arrangements are in place.
Chapter 5. Conclusion and Further Questions

From a comparative analysis, we have concluded that there is much to consider in agreeing to change the current legal framework for the protection of rights. A series of questions arise that can help clarify the purpose and nature of any reform.

5.1 Conclusion

Providing a realistic comparison of international examples and their relevance for Scotland first requires a realistic assessment of the role of current legislative and non-legislative measures in the protection and promotion of human rights in Scotland. There is a danger that we seek change without first understanding the activity, success and potential of our existing human rights framework.

The devolved settlement allows Scotland to develop a distinctive route with regard to the protection of human rights and equality, with or without further constitutional change. However, further constitutional change could also bring further opportunities, as well as challenges. A written constitution has many attractions, particularly that it offers a list of rights that can be enforced; however, it remains only part of a much broader culture and institutional framework that is needed to make rights real.

Examining the evidence base persuades us that Scotland (or the UK) must develop its own framework. We agree with Professor Chris McCrudden that the question of constitutional and human rights provision in any new constitutional settlement needs to be theorised by those who undertake it.
Scotland, within the UK, can point to having taken a different approach to equality and human rights. Even when human rights have been politically challenging for Scottish Executive and Scottish Government ministers, they have never suggested a lack of commitment to the Human Rights Act, or the ECHR (although they have criticised Supreme Court judgments). In fact the current Scottish Government has stated that in the event of the UK repealing the Human Rights Act, it would incorporate it for Scottish devolved powers, and the Government’s plans for a written Constitution and an independent Scotland, include a clear commitment to European human rights standards.\(^{184}\) Similarly, there is no suggestion in Scotland of a political appetite to amend or repeal the Public Sector Equality Duty. The supremacy of human rights, defined by ECHR and EU law, over the Scottish Parliament is also distinctive from its status under Westminster – the Scotland Act 1998 permits the striking down of Scottish Parliament legislation if it is not competent, e.g. if it breaches ECHR.

The devolved settlement has enabled Scotland to legislate, distinctively, on a range of matters including those that operate in tandem with UK-wide legislation, e.g. freedom of information.\(^{185}\) The Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002 operate in tandem with the European Directive on access to environmental information, which is given domestic effect in the Environmental Information (Scotland) Regulations


\(^{185}\) The Freedom of Information Act applies to UK government departments, including those operating in Scotland, and public authorities in England, Wales and Northern Ireland. The Freedom of Information (Scotland) Act provides a right to information held by Scottish public authorities, including the Scottish Executive and Scottish Parliament.
and the Environmental Information Regulations. The result is a body of distinctive as well as unified laws, which come together to provide a basis for protecting human rights and equality.

There are already specific non-legislative measures that build upon the current legal framework in Scotland, and could continue with or without a constitution. For example the Scottish Human Rights Commission believes that Scotland ‘needs a more systematic approach to assure and not assume the realization of human rights in practice. Strong human rights based legal and policy frameworks must be translated into more consistent and positive outcomes’. Following the recommendation of the United Nations, the Commission is therefore ‘facilitating the development of Scotland’s National Action Plan for Human Rights’. The Action Plan has been the subject of detailed consultation and the initiative is supported by the Scottish Government, COSLA, NHS Scotland, and other public sector bodies and NGOs. The Action Plan will be published in December 2013.

Tradition states that the people of Scotland are sovereign and that they have the power to determine the form of government best suited to their needs, which is in contrast to the UK principle of parliamentary sovereignty. Whilst the constitutional debate has brought an integration of human rights into public policy in Scotland, it is not clear that there is an understanding of what

human rights and equality mean and how people understand a constitution will impact on and benefit their lives.

5.2 Some Questions
As the purpose of the study is to explore the way in which different constitutional options might impact on the protection of human rights and on equality, we do not make firm recommendations. Rather we set out the following questions, which we think should be asked of any future constitutional change:

1. Existing powers: Given that Scotland has a quasi-constitution already in the form of the Scotland Act 1998, and that Scotland already has a distinctive regulatory framework for equality across devolved bodies, what further steps are required to ensure that human rights are respected, protected and fulfilled by duty-bearers and rights-holders? Is there a need for a better examination, understanding and application of existing legal and non-legal measures in Scotland to enable informed choices? How do we ensure that issues of access to justice, promoting an equality and human rights culture and ‘buy-in’ by state institutions to human rights and equality laws are addressed, whether there is a new constitution or not? Given that the Scottish Human Right’s Commission’s National Action Plan (SNAP) is being developed at the time of writing this report, additionally what is the most effective and inclusive method for driving change within a reasonable timeframe, and what will success look like?
2. **Ownership:** How can a process of constitutional change be designed by, and therefore ‘owned’, by the country to which it applies? Whilst it can be useful to look to other countries and learn from their experience, the detail and aspirations of the constitution must be rooted in domestic culture and values. Whilst it is possible to systematically incorporate internationally ratified treaties, e.g. the UN Convention on the Rights of People with Disabilities, there are challenges in implementing international norms effectively in domestic practice. There is also a popular myth that international standards are a ‘gold standard’, when in fact they constitute a set of minimum rights, and domestic law, policy and practice can exceed, as well as fail, any comparison.

3. **A shared language:** How do we ensure a broad ‘buy-in’ to the idea of a constitution from the public as well as key influential groups such as the media? People and institutions of the state need to have a shared understanding of what impact equality and human rights law can have on people’s lives, and offer solutions to the problems they face. This is about more than informing people of their rights and better ensuring that individuals have appropriate means of redress and support when they have experienced human rights abuses or discrimination, important though these matters are. There are also wider challenges in relation to ensuring that citizens and institutions recognise the value of using equality and human rights as principles to shape decision-making and deliver fairer outcomes.

4. **How distinctive is Scotland?:** It is sometimes suggested that there is less public and media hostility to human rights and equality in Scotland than
in some other parts of the UK. How strong is the ‘rights’ culture actually in Scotland and is it distinctive from the rest of the UK? Is our culture of ‘rights’ something to be built on, or does it contain barriers to the equal enjoyment of human rights?

5. **Structures, evidence and learning:** What kind of institutional/structural change might be required for Scotland to better respect, protect and fulfil equality and human rights obligations? What countries should be the subject of more detailed research in order to understand what relevance their experience has to Scotland and then assess what lessons Scotland can learn? What can Scotland learn from international evidence on the challenges and opportunities around the alignment of equality and human rights promotion and protection? Who will lead on the gathering of evidence and promotion of learning?
Appendix 1 Methodology

In addition to desk-top research, information and views were sought from a range of domestic and international NGOs, civil society organisations and relevant bodies: Engender, the Glasgow Disability Alliance, the Human Rights Consortium Scotland, Amnesty International Scotland, CHILDREN 1ST, Together, the Quaker United Nations Office in Geneva, UPR Info Geneva and ICC Geneva.

A meeting of the United Nations Human Rights Committee on 22 July 2013 was also attended in Geneva; a meeting convened by SCCYP on the Children and Young People (Scotland) Bill and a meeting of the HRCS, was addressed by the Equality and Diversity Forum on its ‘Communications Hub’ on public perceptions of human rights.
Appendix 2 Some Useful Resources

There are many useful resources that can be accessed, listed below:

Comparing civil, political, and socio-economic rights
Professors David Law and Mila Versteeg have developed a ‘constitution index’ to measure how well nations uphold the civil, political, and socio-economic rights they enshrine in their constitutions.

http://www.fljs.org/content/new-constitution-index-unveiled-conclusion-constitutions-programme

General comments
Those UN Committees charged with monitoring state compliance with ratified UN treaties have produced a range of information that can be used to inform domestic application of rights and duties. For example the UN Committee on Economic, Social and Cultural Rights has produced ‘General comment No. 9: The domestic application of the Covenant’ and ‘General comment No. 3: The nature of States parties obligations’ (Article 2, para 1) (Annex III).


Open Society Initiative
Academic Council on the United Nations System

http://acuns.org/am2014/
The Commission’s publications are available to download on our website: www.equalityhumanrights.com. If you are an organisation and would like to discuss the option of accessing a publication in an alternative format or language please contact engagementdesk@equalityhumanrights.com. If you are an individual please contact the Equality Advisory and Support Service (EASS) using the contact methods below.

Equality Advisory and Support Service (EASS)
The Equality Advisory Support Service has replaced the Equality and Human Rights Commission Helpline. It gives free advice, information and guidance to individuals on equality, discrimination and human rights issues.

Telephone: 0808 800 0082
Textphone: 0808 800 0084

Opening hours:
09:00 to 20:00 Monday to Friday
10:00 to 14:00 Saturday
Closed on Sundays and Bank Holidays

Website: www.equalityadvisoryservice.com
Post: FREEPOST Equality Advisory Support Service FPN4431