

Incorporation of UNCRC

Draft Working Paper

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Introduction

1. This paper seeks to address some of the legal issues around incorporation of UNCRC, it does so with a view to identifying potential concerns/barriers and proposing ways forward for creating a model of incorporation that embodies best practice internationally and comparatively whilst contextualising the approach within the unique devolved constitutional framework of Scotland. The paper is set out in a question/ answer format for ease of reference.

Question 1: Can Scotland incorporate the UNCRC into domestic law?

2. As with devolution in Northern Ireland and Wales, the Scottish constitutional framework is restricted in terms of legal competence along a reserved v devolved division of power. The Scottish Parliament cannot legislate in relation to matters reserved to Westminster¹ and cannot modify protected Acts listed under Schedule 4 of the Scotland Act 1998, including the Human Rights Act and the Scotland Act 1998. Reserved matters remain the sole authority of Westminster legislation and devolved matters primarily fall within the remit of the devolved legislature and executive (Westminster retains power to legislate in devolved matters but by convention does not do so without seeking permission).² The Scotland Act 1998 also requires compliance with the ECHR and EU law granting rights derived from these systems constitutional status within the devolved settlement. Section 101 of the Scotland Act compels the reading of Acts of the Scottish Parliament to be read as narrowly as is required to be within devolved competence and any act by the Scottish Ministers is deemed *ultra vires* if it is in breach of ECHR or EU law (section 57) or encroaches on a reserved matter (section 54). Similar provisions constitute the devolved settlements in Northern Ireland³ and Wales.⁴

¹ Section 29 and Schedule 5 Scotland Act 1998

² See Sewell Convention, Scotland Act 2016 s 2

³ See Northern Ireland Act 1998, s.6(1)(c) (legislative competence); s.24(1)(c) (Ministerial competence); s.83 (interpretation of Acts of the Assembly)

⁴ See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly)

3. "Observing and implementing international obligations" falls within the devolved competence of the Scottish Parliament.⁵ The Scottish Parliament can introduce legislation that implements international obligations, including incorporating international human rights standards into the devolved framework of governance.
4. As Lord Brodie has observed,

*'Section 29(2)(b) [of the Scotland Act 1998] provides that a provision is outside the competence of the Scottish Parliament so far as it relates to the matters which are reserved to the United Kingdom Parliament. Schedule 5, which is given effect by section 30, defines reserved matters. Paragraph 7 has the result of including among reserved matters, "international relations", but excludes from "international relations", observing and implementing international obligations. The Scottish Parliament therefore has the power to legislate with the object of observing and implementing international obligations.'*⁶
5. The Scottish courts when faced with implementing international obligations through the common law do not consider ratified treaties binding unless the legislature has already incorporated the treaty into domestic legislation.⁷ While the courts may have regard to international treaties and reports of international organisations as an interpretative source of law they are not deemed to form part of the domestic legal system and are not binding on the court unless otherwise instructed by the legislature.⁸
6. Scotland can incorporate international treaties into domestic law as means of implementing and observing international obligations within the confines of devolution. Incorporation through legislation is required before a court is bound to directly enforce the rights contained therein. In order to meet the threshold of "incorporation", the rights in the UNCRC would need to be legally binding and enforceable in court. Scotland therefore needs to find a model of incorporation that both respects the devolved v reserved division of power whilst also giving effect to the UNCRC in so far as it is possible to do so within the sphere of devolved competence. Advice from a breadth of constitutional experts on this particular point is key in order to ensure any model devised is within the competence of the Scottish Parliament – i.e. the question is not whether, but how to incorporate.

Question 2: How can Scotland incorporate UNCRC?

7. Incorporation of international human rights law in a dualist state can take many different forms.⁹ It can be understood as means of internalising international law either directly, indirectly or on a sector by sector basis.¹⁰ Another approach is to identify the gateway, or 'port' through which international law becomes domestically binding.¹¹ For example, is the

⁵ Schedule 5 para.7(1)-(2) Scotland Act 1998 implementation of international obligations is an exception to the reservation of 'Foreign Affairs' to Westminster.

⁶ Lord Brodie in *Whaley & Anor v. Lord Advocate* [2003] ScotCS 178 (20 June 2003) para.44

⁷ Lord Hodge, *Moohan & Anor v The Lord Advocate* [2014] UKSC 67 (17 December 2014), para.30

⁸ International treaties do not form part of the law of Scotland unless they are incorporated into domestic law through legislation – this was confirmed by Lord Brodie in *Whaley & Anor v. Lord Advocate* [2003] ScotCS 178 (20 June 2003) para.44.

⁹ Katie Boyle and Edel Hughes, Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights, (2018) International Journal of Human Rights Vol 22. 43-69. See also Rosalynd Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994)

¹⁰ Kasey McCall-Smith, Incorporating International Human Rights in a Devolved Context, European Futures, 17 September 2018 <http://www.europeanfutures.ed.ac.uk/article-7114>

¹¹ Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry', (2006) 115 Yale Law Journal 1564

international obligation imported via the constitution, legislation, the common law, or through opening a channel to an international complaints mechanism?¹² Constitutional theory tells us that incorporation of rights ought to impose obligations on the different branches of government: legislative, executive and judicial, where each is held to the same standard and compliance with rights forms part of the rule of law.¹³ Regardless of the approach taken, the key component that determines the difference between softer mechanisms of 'implementation' and stronger forms of 'incorporation' is that incorporation ought to ensure access to an effective remedy for a violation. Essentially domestic incorporation of international norms, be that direct, implicit or sectoral, should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right.¹⁴ The key requirement to meet the threshold of "incorporation" rather than implementation is that there is a remedy for a breach of an incorporated right. In other words, as has been stipulated by the UN Committee on Rights of the Child, "incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice."¹⁵

8. The position in Scotland is slightly more complex than in a non-devolved entity because the international obligations are state party obligations, i.e. the UK's obligations. As discussed above, it is within the power of the Scottish Parliament to implement and observe international obligations.¹⁶ In other jurisdictions, state obligations are presumed to be the responsibility of the devolved region, such as is evident in the cantonal system in Switzerland. Whilst there is no duty on the Scottish Parliament to enact incorporating legislation, it is within the power of the parliament to do so should it wish. Nonetheless, an important point to note here is that it is not within devolved competence to legislate in such a way that UNCRC prevails over national law. For example, the Scottish Parliament cannot place UNCRC on a higher status to UK primary legislation, it can only make provision within the confines of the devolved powers.

Can the Scottish Parliament incorporate through legislation?

Legislative Solution – direct and full incorporation within devolved competence

9. The consultation response deals with a number of different means of incorporation. This paper deals specifically with the proposal to consider 'direct and full' incorporation in so far as this is possible to achieve. This model of incorporation is most likely to achieve the aims of both making the rights domestically enforceable whilst respecting the interdependent and indivisible integrity of the treaty rights. In other words – how far can Scotland go to achieve the policy of a 'gold standard' of incorporation within devolved

¹² Boyle and Hughes *Routes to Remedy for Violations of Economic, Social and Cultural Rights*. For a discussion of the incorporation of children's economic and social rights under international law into the domestic law of various jurisdictions, see A. Nolan, *Children's Socio-economic Rights, Democracy and the Courts* (Oxford: Hart Publishing, 2011).

¹³ Jeff King, *Judging Social Rights* (Cambridge University Press 2011)

¹⁴ Katie Boyle, *Models of Incorporation and Justiciability of Economic, Social and Cultural Rights*, Scottish Human Rights Commission, (2018) at 14. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77-80; UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution/ adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para.4.

¹⁵ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.22.

¹⁶ Para.7

competence? The draft [Children's Rights \(Scotland\) Bill 2019](#) is a helpful example of how this might be achieved.

10. There are other examples of direct incorporation of international obligations into domestic law including for example incorporation of the ECHR through the Human Rights Act and the Scotland Act; or incorporation of EU law and the EU Charter of Fundamental Rights under the European Communities Act. The EU Continuity (Scotland) Bill also sought to incorporate the EU Charter of Fundamental Rights into Scots law post-Brexit. The Scottish Government conceded that the relevant provision modified the subsequent EU Withdrawal Act (a protected Act under Schedule 4 of the Scotland Act 1998), however, the court left the door open to the Scottish Parliament's competence to 'self-regulate' on other international obligations. When the Scottish Parliament seeks to abide by international obligations in an Act of the Scottish Parliament it is essentially recreating those obligations as a matter of purely domestic law. This can be understood as creating a form of domestic law that reflects and gives effect to international law. While the enabling provisions are derived from international law their juridical source would be "purely domestic".¹⁷ It is within this space that incorporation can occur.

11. Incorporation Models can follow different approaches:

UNCRC Incorporation Model	Details	Barriers to adopting this route	Constitutional Safeguards	Outcome
<p>MODEL A*</p> <p>Scottish Parliament legislative framework full incorporation (UNCRC Act for Scotland)</p> <p>* This could be based on a Scotland Act or Human Rights Act structure – see UNCRC incorporation advisory group proposal - Children's Rights (Scotland) Bill 2019</p>	<p>Scottish Parliament imposes 'self-regulatory' legislation, which incorporates UNCRC or imposes domestically drafted form of UNCRC rights that ensures indivisible and interdependency.</p> <p>This model can go further than IHRL where appropriate</p>	<p>This would need to comply with the current reserved v devolved framework and carefully crafted to ensure within devolved competence of Scottish Parliament.</p> <p>For example, an incorporation provision that sets out</p>	<p>Enhanced role of the Scottish Parliament in <i>ex ante</i> review of legislation.</p> <p>Equality and Human Rights Committee to assess compliance with UNCRC rights before passage of subsequent legislation.</p> <p>Court has power to oversee compliance with Act and offer remedies for non-compliance (including</p>	<p>Positive enforcement of UNCRC with various options for constitutional safeguards.</p> <p>Most comprehensive form of UNCRC protection with powers and responsibilities shared between institutions.</p> <p>Does not cover reserved areas – cannot compel public/</p>

¹⁷ Para.31

			interpretative obligation, ultra vires remedy, declaration of incompatibility, compliance duties on parliament and executive, court can potentially strike down unlawful legislation ¹⁸).	private bodies, parliament or executive to act in a way that reserved legislation prohibits.
MODEL B UK/ Scottish Parliament legislative framework based on Human Rights Act structure	Either UK or Scottish Parliament could adopt a similar structure to Human Rights Act that extends to UNCRC	This would need to comply with the current reserved v devolved framework. It is beyond the competence of the SP to amend the HRA.	This option includes an interpretative clause; a duty on public bodies to comply and courts can issue declaration of incompatibility	This is a less robust constitutional framework in terms of judicial overview. Declarations of incompatibility are not binding on Parliament and do not affect the application of the law. There is a strong element of deference to the legislature.
MODEL C UK Parliament legislative framework based on Scotland Act structure	UK Parliament could extend scope of section 29 of Scotland Act 1998 to include rights enshrined in UNCRC or	Requires political support by majority of UK Parliament – it is not within devolved competence of the SP to amend	This framework is how the ECHR is currently protected in Scotland.	Positive UNCRC enforcement Human rights affirmative framework providing

¹⁸ Constitutionally it is not clear whether the Scottish Parliament has the power to impose self-regulation by limiting its own competence, binding the Scottish Parliament in relation to subsequent legislation unless expressly repealed. The answer lies in the interpretation of 'modification'. The Scotland Act prohibits modification of the Scotland Act 1998 (Schedule 4). The Scotland Act sets out the Scottish Parliament's competence (section 29). Changing or adding to the list of areas that are beyond the competence of SP does not necessarily 'modify' s29. For a discussion on this see judgment by the Supreme Court EU Continuity Bill case [2018] UKSC 64 (13 December 2018) para.50-51 'the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.'

	Scottish Parliament could seek s.30 Order to implement.	the Scotland Act 1998.	The judiciary are tasked with the responsibility to review compatibility and can declare unlawful legislation ultra vires.	UNCRC rights with constitutional status in Scotland. Under this model the judiciary play a role in scrutinising substantive compatibility.
MODEL D UK/Scottish Parliament legislative framework based on duty to have due regard to UNCRC (or other international treaties) – this is not incorporation but a means of implementation/ integration that might help support incorporation	Similar to the Equality Act 2010 public sector equality duty or the duty imposed by the Welsh Assembly to have due regard to the UN Convention on the Rights of the Child	This would need to comply with the current reserved v devolved framework.	This option requires that the judiciary play a supervisory role in ensuring compliance with the duty to have due regard. This is a procedural duty to take into consideration and does not necessarily result in a substantive human rights compliant outcome.	Weaker type of enforcement (does not amount to incorporation) Procedural protection of UNCRC rights May help with initial implementation of UNCRC rights as part of decision making process.
MODELE UK Parliament signs the UK and Scotland up to the international complaints mechanism	Optional Protocol to UNCRC on a Communications Procedure. This would not be dissimilar to the way complaints can currently be raised with the European Court of Human Rights or the Court of Justice of the European Union.	This would require implementation through Westminster.	The decisions of the committees may not necessarily be made automatically binding giving parliament time to implement change in order to comply with any findings of	Weaker type of enforcement unless decisions of committees made binding. Improved scrutiny of UNCRC compliance and access to

	There is a supranational adjudication body that can determine compliance with UNCRC within remit of the Protocol.		non-compliance.	alternative remedies.
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12. The significant challenge facing the Scottish Parliament will be to ensure that a balance is struck between ensuring any proposed Bill is within the legislative competence of the Scottish Parliament whilst respecting the interdependent and indivisible nature of the treaty. Treaties are designed to be read as a whole, and human rights by their nature are both universal and interdependent – meaning to deconstruct them proves difficult as it may undermine their full meaning and risk undermining their full enjoyment. In other words, the question before the parliament will be how best to deal with incorporating the treaty in its fullest sense whilst avoiding encroaching on reserved matters. The UNCRC Incorporation Advisory Group model reflects **Model A** above. It proposes a single incorporation provision which restricts the application to the Convention to the exercise of devolved functions and devolved law:

“Clause 2. On commencement of this Act the Convention and the Optional Protocols are part of Scots law

- a. In relation to the exercise of devolved functions.*
- b. In relation to devolved law as amended from time to time.”*

13. This provision seeks to incorporate the treaty but limit its application to areas of devolved governance. It is in some respects a blunt instrument because the treaty engages with both reserved and devolved areas. However, there are some benefits to this approach, including allowing flexibility for complex cases where both reserved and devolved functions are engaged (see below). This is not the first example of a treaty engaging with both reserved and devolved functions across multiple layers of governance. Until such time as EU departure is secured or not, the EU Charter of Fundamental Rights, for example, forms part of UK law under the European Communities Act 1972. The enforceability of the Charter will only “bite” when the relevant right is invoked within the scope of EU law.¹⁹ The EU Charter also applies to across both reserved and devolved areas. The application of the treaty and compliance with it requires a degree of navigation across these multiple jurisdictional spaces. Nonetheless, the Charter remains a standalone text and Member States cannot seek to deconstruct the Charter at the domestic level – it comes as a package. When the UK sought to opt out of some of the Charter provisions²⁰ the Court of Justice of the European Union made it clear that the Optional Protocol did not exempt the UK from its obligations under EU law.²¹ And when the Scottish Parliament sought to retain the binding force of the Charter in the EU Continuity Bill it sought to incorporate the Charter as it applied to devolved law, rather than seek to pick out specific provisions.

¹⁹ Åkerberg Fransson, Case C-617/10, ECLI:EU:C:2013:105

²⁰ Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the European Union to Poland and to the United Kingdom annexed to the TEU and the TFEU

²¹ Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, judgment of 21 December 2011, ‘Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions’ at para.120

14. Of course, any incorporating provision(s) must be in compliance with the unique devolved framework in Scotland. Ultimately the Bill should seek to incorporate the UNCRC in so far as it is possible to do so within the terms of devolved competence. This requires technical expertise of drafting provisions which ensure compliance with UNCRC extends to the Scottish Parliament, the Scottish Ministers, public authorities exercising functions in devolved areas and, where possible, private bodies operating in devolved areas or exercising public functions in devolved areas on behalf of the state.

Question 3: How will decision makers know whether the UNCRC applies in the exercise of their devolved/reserved functions?

15. Decision makers should already be complying with UNCRC as part of the UK's obligations in international law. It is lawful for public bodies to act in a UNCRC compliant way all of the time (unless prohibited by statute). A provision that restricts the applicability of the treaty when engaging with primary legislation may be helpful (something similar to section 6 HRA that clarifies that a public authority exercising devolved functions must act compatibly with UNCRC unless as the result of primary legislation the authority could not have acted differently).

16. The state party (the UK) has already signed up to the UNCRC and so compliance across both reserved and devolved functions forms part of the state's obligations. Nonetheless, as discussed above, the treaty is not domestically binding on decision makers unless incorporated into domestic law. Of course, as a matter of good practice decision makers should already be complying with the UNCRC. By seeking to incorporate the rights, however, the Scottish Parliament would be offering the rights a new status in devolved areas of law by making them legally enforceable and making non-compliance in devolved areas unlawful and therefore subject to remedies for non-compliance.

17. If a broad brush approach is taken to an incorporating provision, such as clause 2 of the [Children's Rights \(Scotland\) Bill 2019](#) how will decision makers know whether they are exercising devolved or reserved functions and whether or not the UNCRC is binding? It would be beyond the competence of the Scottish Parliament or Scottish Ministers to encroach on reserved areas or to create new obligations in reserved areas. Nonetheless, UNCRC compliance already forms part of reserved functions under the context of the state party's international obligations, decision makers with both reserved and devolved functions will be acting lawfully when complying with UNCRC (unless primary legislation prohibits them).

18. However, if there is an area of reserved law that prohibits compliance with the UNCRC then reserved law emanating from Westminster (either primary or secondary) will prevail over an Act of the Scottish Parliament. This is not dissimilar to the manner in which the ECHR takes on different legal status under reserved and devolved law. As a general rule, compliance with ECHR is mandatory. Under the Scotland Act 1998, it is unlawful to act in a manner incompatible with the ECHR in devolved areas and any devolved legislation passed that is incompatible with the ECHR is null and void. However, under the Human Rights Act, if the UK Parliament has legislated incompatibly with the ECHR in either reserved or devolved areas of law the statutory provision remains in force and any decision maker bound by the legislation must comply with the incompatible Act until such time as

Parliament repeals it. Decision makers should be navigating this complex jurisdictional space by seeking to comply with the ECHR all of the time, unless an Act of the UK Parliament prohibits it.²²

19. In the same manner, incorporation of UNCRC in Scotland can only apply to devolved areas of law, however decision makers can operate on a basis that there is a presumption in favour of UNCRC compliance across both reserved and devolved law, unless reserved law prohibits it. This could be dealt with in guidance around what UNCRC incorporation means for decision makers.
20. The main distinction between the operation of compliance with UNCRC in devolved areas and compliance in reserved areas is that the Scottish Parliament would have competence to provide a remedy for a breach of the former, but not for a breach of the latter.

Question 4: What role should private bodies play?²³

21. This question is not addressed in the consultation but attention should be drawn to the principle of international law that the contracting out or out-sourcing of rights-related functions and services to private bodies does not reduce or remove the state's responsibility as the ultimate bearer of rights duties under the UNCRC.

Question 6: What should be considered in relation to access to justice for a violation of a right?²⁴

22. Access to court
 - Ensure legal standing is sufficiently broad (beyond victimhood status)
 - Ensure sufficient legal aid provision is in place
 - Ensure that cases can be raised in the public interest
 - Ensure that rules on standing and other procedural requirements reflect the position of children in different situations (e.g., children with disability or living in poverty).
23. Participation
 - Ensure that children are able to participate in proceedings that affect them and that there is sufficient provision in place to ensure their voice is heard and their views accorded due weight.
24. Appropriate intensity of review
 - Cases involving human rights violations require a more intense form of judicial review.
 - Reasonableness review requires to go beyond irrationality to more closely reflect the test applied at the international level.²⁵
 - Proportionality and especially careful scrutiny required.

²² See section 6 HRA and the distinction made in *Limbuella* for example, *Regina v Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent) Regina v Secretary of State for the Home Department (Appellant) ex parte Limbuella (FC) (Respondent) Regina v Secretary of State for the Home Department (Appellant) ex parte Tesema (FC) (Respondent) (Conjoined Appeals)* 2005 UKHL 66 para. 4-5

²³ General Comment No.16 (2013) On State obligations regarding the impact of the business sector on children's rights.

²⁴ Please see recent publications on this including Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (SHRC 2018) and Katie Boyle, [The First Minister's Advisory Group on Human Rights Leadership: a new path forward on incorporation of economic, social, cultural and environmental rights](#), (2019) 4 *European Human Rights Law Review* 361-373

²⁵ *IBID*

- Substantive review of the evidence with regard to the inputs of the decision-making process and the outcome of such - and not just the decision making process itself.
- Courts should be in mind the particular dependence of children on courts when it comes to asserting their rights, given the limited degree of control children can exercise over decision-makers at an individual or a systemic level

25. Counter-majoritarian principle²⁶

- Courts should facilitate group proceedings and multi-party actions, in particular for cases of a systemic nature, such as many children facing the same violation who can raise an act collectively
- Courts should acknowledge children's relative exclusion from democratic law and policy-making decision-making and bear this in mind when considering UNCRC cases that come before them.

26. Remedial

- Remedies should be both flexible and effective.
- Courts can consider whether to play a supervisory role in ensuring compliance with a judgment.
- Innovative approaches to systemic issues and structural cases – courts should be able to respond to a systemic issue. In Scotland it is key any future rights reform engages with the work of the Scottish Civil Justice Council in the process of writing up the new procedural rules under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

Question 5: What is an effective remedy?

27. One of the requirements of international law in the area of human rights is that there should be an "effective remedy" for a violation of a right. The definition of an effective remedy is far reaching and goes beyond financial compensation.²⁷ The UN Committee on the Rights of the Child states in General Comment No.5 that for rights to have meaning, effective remedies must be available to redress violations.²⁸ Remedies can include penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties. They can also include satisfaction, such as effective measures aimed at the cessation of continuing violations and guarantees of non-repetition.²⁹

28. In many respects our judicial review process is already well equipped to deal with an array of different remedies:

Reduction: This involves the court quashing the original decision and giving the issue back to the decision maker to look at again.

Declarator: An authoritative statement that an individual or body has a specific right or duty.

Suspension and interdict: An order for suspension stops something currently being done. An interdict is used to prevent a threatened wrong occurring or the continuance of current wrongdoing.

²⁶ For more on the position of children with regard to democratic law and policy decision-making, see Aoife Nolan, *Children's Socio-economic Rights, Democracy and the Courts* (Oxford: Hart Publishing, 2011).

²⁷ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147

²⁸ General Comment no.5 (2003) para.24

²⁹ UN Basic Principles and Guidelines on the Right to a Remedy para.22

Specific performance or specific implement: the court orders the respondent to do something which they are under a legal duty to do.

Liberation: used where there has been wrongful or illegal imprisonment.

Interim orders: Interim orders, such as an interim interdict, can be applied for at the start of a case, pending a final decision as a temporary solution.

Damages financial compensation can be awarded in judicial review actions if there can be shown to be a ground entitling the petitioner to such an award by virtue of another specific part of the law (Convention rights/ EU law).

29. In relation to the UNCRC a violation of a right could result in a declarator, for example - a deferential remedy that allows the decision maker to correct the unlawful act. In other circumstances an interdict or an order for specific implement might be required to either stop an action or require an action to be undertaken in order to ensure compliance.
30. One of the key issues that will come up will be whether the court should have the power to declare an ASP as unlawful (ultra vires – similar to the remedy available under Scotland Act) or whether the remedy available to the court should be restricted to a declaration of incompatibility (similar to the remedy available under the Human Rights Act). This issue was raised in the recommendations of the First Minister’s Advisory Group on Human Rights Leadership.³⁰ A declaration of incompatibility may not be sufficient to meet the threshold of an “effective remedy” as defined in international law unless the declarations of the court are systematically given effect to by the government/ parliament.³¹
31. As discussed above – this issue also engages the reserved v devolved division of power and at its crux is the question of whether the Scottish Parliament can limit its own competence without modifying the Scotland Act 1998 through a form of self-regulation.³² There is uncertainty and disagreement about this point and so careful consideration should be given and a breadth of views taken from constitutional experts.

Question 5: What kind of remedies would work for systemic issues?

32. As with many human rights treaties, particularly those engaging with economic and social rights, new and innovative ways of dealing with systemic issues are required if the legal system is to adjust to new rights and new remedies being incorporated into domestic law.
33. In Scotland multi-party actions have been addressed on ad hoc basis by identifying a lead case that can act as a test case and sisting (suspending) other cases while awaiting for the outcome of the lead case.³³ Following suggested reform recommended in reports of both the Scottish Law Commission (1996)³⁴ and the Scottish Civil Courts Review (2009)³⁵

³⁰ <https://humanrightsleadership.scot/w-p-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> p.33

³¹ *Burden v UK* Application No 13378/05, Judgment, 12 December 2006

³² See FN 19 and discussion above on ‘self-regulation’

³³ See Rule of Court 22.3(6) available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap22.pdf?sfvrsn=8>

³⁴ Scottish Law Commission, *Report No. 154, Multi-Party Actions* (1996), para.64.

³⁵ Scottish Civil Court Review (2009), Volume 2, chapter 13, pp.152-155, available at <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

the Court of Session rules were amended to facilitate the adoption of new procedures for multi-party cases to be initiated at the direction of the Lord President allowing more flexibility for case management by the nominated judge (Rule 2.2).³⁶ Multi-party procedures have been facilitated under Rule 2.2 on a number of occasions to deal with systemic issues, including claims under the Damages (Asbestos-related Conditions) (Scotland) Act 2009³⁷ and in response personal injury actions relating to the use of vaginal tape and mesh.³⁸ Rule 2.2 may offer a potential route to remedy for multi-party cases as part of a cultural shift in human rights adjudication around systemic human rights violations.

34. Further reform under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will provide for group litigation in the Court of Session. Further detail on the group procedure for judicial review will be set out in new rules of court to be developed by the Scottish Civil Justice Council.³⁹ It is important that the processes engaging with incorporation of international treaties, including the UNCRC, also engage with the Civil Justice Council on the new group procedures. For example, how will these procedures operate in relation to systemic issues specifically around child rights issues, will they be sufficient to ensure access, standing, participation and remedies appropriate to child rights issues?
35. There is more scope for exploring the possibilities that multi-party actions or group cases can provide in terms of dealing with systemic violations. Comparative experience indicates that courts must adapt procedures to deal with systemic violations by facilitating access to a collective procedure with multiple stakeholders, multiple defenders and through the deployment of structural remedies.⁴⁰ Responding to this need in the deployment of effective remedies was something that the First Minister's Advisory Group recommended in December 2018.⁴¹

Mythbusting

Myth: Some of the rights in UNCRC are not justiciable and cannot be reviewed or enforced by the court. This is especially true of rights relating to education, housing or social security – in other words, economic and social rights.

Response: The justiciability of economic and social rights is a long misunderstood area. For the avoidance of doubt, it is important to note that the justiciability of such rights already occurs on a day to day basis across the UK. Courts are well-equipped to deal with such claims and often times the remedies employed will be more deferential in nature. From a comparative perspective, where children's economic and social rights form part of legislative and

³⁶ See Rule of Court 2.2 available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10>

³⁷ Court of Session No.2 of 2012, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>

³⁸ Court of Sessions Directions No.2 of 2015 and No.2 of 2016, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>

³⁹ Policy Memorandum, Civil Litigation (Expenses And Group Proceedings) (Scotland) Bill, para.94

⁴⁰ César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', (2011) 89 Texas Law Review 1669 at 1671 and David Landau, 'The Reality of Social Rights Enforcement' (2012) 53(1) Harvard International Law Journal 189 at 192

⁴¹ First Minister's Advisory Group on Human Rights Leadership, *Recommendations for a new human rights framework to improve people's lives*, Report to the First Minister (December 2018) available at <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf> at 29 and 35

constitutional law in other jurisdictions, the courts in these jurisdictions (e.g., in South Africa and Ireland) have proven well able to apply these rights in the cases before them.

Myth: Some of the UNCRC rights are too vague to have any real meaning.

Response: The indeterminacy critique of some UNCRC rights is also a very much misunderstood area. Many areas of law, including human rights law, requires interpretation in order to give meaning to law. There are numerous sources which help with the interpretation of UNCRC including decisions of the Committee, General Comments, as well as comparative jurisprudence. The court, as well as the parliament, and the executive, each have a responsibility to give substance to the scope and content of rights when they interpret them. An incorporation Bill could contain a provision about what sources of law must be given regard to when interpreting such rights. It should be noted that human rights provisions as often phrased broadly (see, e.g., Article 8 ECHR) and that this has not prevented UK, including Scottish courts, from applying them in their decision-making.

Myth: The existing statutory regime will be replaced by the UNCRC and the existing system is better in many respects.

Response: The UNCRC can be considered as a baseline from which to work from. If the domestic system is already better then incorporation of UNCRC will not reduce rights – it acts as a floor through which no one should fall below. Article 41 of the UNCRC makes clear that '[n]othing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party ...' It is thus clear that even on the terms of the UNCRC itself, incorporation of that instrument could not result in the weakening any aspects of the domestic system that offers superior protection to child rights than the UNCRC.

Myth: The UNCRC does not reflect our complex statutory framework where we have already sought to address complex legal issues, such as different statutory thresholds for the age of majority.

Response: The UNCRC is a flexible and pragmatic instrument. Most international human rights law is flexible, allowing for diverse domestic interpretation of international norms. This means that domestic governments and parliaments can give effect to the international norms in the way most appropriate to that domestic context (not dissimilar to the margin of appreciation principle). It is also important to remember that the vast majority of rights under the UNCRC are not absolute. Interference can be justified if that interference is consistent with the limitations set out in the UNCRC.

Myth: Economic and social rights are positive and resource dependent and therefore not enforceable by courts (see for example Articles 24-28 UNCRC).

Response: Civil and political rights (see for example Articles 15 and 40 UNCRC) are also resource dependent and can be reviewed and enforced by courts. The rights that contain socio-economic dimensions, such as Article 27, require the state to take appropriate measures to ensure children enjoy an adequate standard of living. Courts reviewing whether this duty has been complied with would assess the reasonableness of the steps taken to ensure this right meaning it would be up to government and public authorities responsible for giving effect to the right to justify their approach in doing so.

Myth: Courts are ill-equipped to deal with the flood of litigation that will inevitably flow from the domestic incorporation of a new treaty.

Response: As with all adjustments to statutory right regimes whether derived from international law or not, there are numerous avenues through which remedies can be sought before access to a court is necessary and/or appropriate. Indeed, it is already an established principle in UK human rights adjudication that all other attempts to remedy a matter must be exhausted before a court will consider a case. This means using internal complaints mechanisms, appeal processes, and other administrative remedial processes. Ultimately the best means of ensuring compliance with rights is to embed that compliance early on in law, policy and budget decision-making processes.⁴² Tools that can be used to ensure such *ab initio* law and policy compliance in the context of the UNCRC include child rights impact assessment and child rights budgeting, which have been employed effectively in numerous jurisdictions. Recourse to the courts should not be a means of first resort but should always be available as a means of last resort. As discussed above, the judiciary in Scotland has already established different mechanisms for dealing with large-scale group procedures, and there is an opportunity to refine that process through the multi-party group proceedings legislation and subsequent consultation process.

⁴² For more on this, see Aoife Nolan, 'Fit For Purpose? Human Rights in Times of Financial and Economic Crisis' (2015) 4 *European Human Rights Law Review* 358.