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This briefing provides an introduction to human rights law in Scotland. It covers Scotland’s relationship with the European Convention on Human Rights, the EU Charter of Fundamental Rights and UN treaties, as well as the powers of the Scottish Parliament in relation to human rights, and the potential implications of Brexit for human rights law in Scotland.
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EXECUTIVE SUMMARY

- Scotland’s human rights obligations derive from several overlapping sources, including treaties and traditions.

- Human rights can be distinguished as: ‘civil and political’ or ‘economic, social and cultural’; first, second or third generation rights; absolute or qualified; positive or negative obligations.

- The UN treaties on human rights are international obligations that the Scottish Parliament is bound to respect but which do not have effective enforcement machinery attached.

- The European Convention on Human Rights places limits on the powers of the Scottish Parliament and may be enforced through the European Court of Human Rights or the UK courts.

- The EU Charter of Fundamental Rights places limits on the powers of the Scottish Parliament and may be enforced through the European Court of Justice or the UK courts.

- Human rights are not explicitly devolved and human rights matters may straddle devolved and reserved areas of competency.

- The Scotland Act 2016 makes income tax and social security benefits shared functions, potentially increasing the possibilities for conflict over the Sewel convention’s operation.

- The Scotland Act 2016 devolves some welfare powers to the Scottish Parliament and increases the ability of the Scottish Government to design schemes relating to energy efficiency and fuel poverty.

- In 2016, the Scottish Parliament Equal Opportunities Committee became the Equalities and Human Rights Committee (EHRiC).

- On the UK’s exit from the EU, on the present terms of the proposed repeal Bill, EU law is expected to continue to apply to the UK without the adjudication of the European Court of Justice.

- On the UK’s exit from the EU the Scottish Parliament would ordinarily gain full devolved competence over Justice and Home Affairs, Agriculture, Fisheries and the Environment.

- Brexit does not directly affect the UK’s relationship to the European Convention on Human Rights, but makes it easier for the UK to withdraw from the Convention in the future.

- It is likely that repeal of the Human Rights Act and its replacement with a British Bill of Rights would invoke the Sewel Convention.
The House of Lords EU Justice Sub-Committee has reported that repeal of the Human Rights Act risks constitutional upheaval with the devolved nations and “unravelling the constitutional knitting for very little”.

A Scottish Bill of Human Rights has been considered unnecessary and undesirable so long as the Human Rights Act remains in force.

Should the Human Rights Act be repealed, or should Scotland become independent, the prospect of a Scottish Bill of Rights may gain new momentum.

This briefing also includes a timeline of legislative developments, useful definitions (of a ‘human rights based approach’, the ‘Sewel Convention’, ‘Henry VIII clause’), short case studies and flowcharts mapping avenues of redress of human rights cases in courts.
WHY BOTHER WITH HUMAN RIGHTS?

The human rights insight is that none of us has a guaranteed space among the fortunate, that the border between affluence and misfortune is more porous than we assume. Human rights are for us all but likely to be called upon only when we need them. And rich and fortunate though we might seem, these are not guaranteed conditions: we will grow old, we may be visited unexpectedly by the police, an onset of mental ill-health may leave us vulnerable; our lives may change suddenly for the worst.


Human rights are key to the pressing issues that surround us. Climate change, the refugee crisis, Brexit, government surveillance powers, land reform and tax reform all demand a degree of human rights understanding. Human rights offer a way of balancing the interests of diverse groups and individuals affected by these challenges and others. More than that, human rights are intended to protect the inherent dignity of all human beings.

The preamble to the Universal Declaration of Human Rights 1948, the cornerstone of the modern human rights movement, asserts:

[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.

Human rights have been cultivated as law, politics and philosophy. This briefing is principally concerned with their grounding in law. That said, at a time of constitutional change, and as an engine of law-making, the Scottish Parliament naturally has an interest in reaching beyond existing law and understanding the influence of human rights on governance generally.

Human rights have relevance across all Scottish Parliament Committees. They have recently been explicitly incorporated into the remit of the Equal Opportunities Committee (Standards, Procedures and Public Appointments Committee 2016). The Equal Opportunities Committee was renamed the Equalities and Human Rights Committee (EHRiC) in September 2016.

In the last Parliamentary Session, human rights were central to the work of several Committees at the Scottish Parliament: the Justice Committee, the Rural Affairs, Climate Change and Environment Committee, Local Government and Regeneration Committee, Devolution (Further Powers) Committee, Equal Opportunities Committee, European and External Relations Committee, Justice Sub-Committee on Policing, Referendum (Scotland) Bill Committee, and the Welfare Reform Committee.

This briefing considers the impact of Brexit on human rights law in Scotland. It considers the legislative options for maintaining and developing human rights law in Scotland including the debates and dimensions surrounding a Scottish Bill of Human Rights.

As economic, social and cultural rights are a key area of growth nationally and internationally, these rights are given specific focus in a forthcoming SPICe briefing by Kirsteen Shields (2017).
The modern concept of human rights is traditionally traced to the ideas and texts adopted at the time of the Enlightenment: John Locke’s Second Treatise of Government (1690), Jean-Jacques Rousseau’s The Social Contract (1762), Thomas Paine’s The Rights of Man (1791), the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789).

They can also be traced to ideas embedded in the Scottish Enlightenment around the same time: David Hume’s An Enquiry Concerning the Principles of Morals (1751), Francis Hutcheson’s Reflections on the Common Systems of Morality (1724) and Adam Ferguson’s Essay on the History of Civil Society (1767). Concepts of freedom, equality and human dignity are as old as recorded history however - if not universally experienced.

The ‘human rights’ that are debated today are found in treaties drafted in the aftermath of the Second World War. At that time, human rights were specifically invoked to limit the power of states to oppress or persecute their own peoples, and most significantly, to protect minorities from the wills and whims of majorities.

Today the Scottish Government, as part of the UK, is obliged to respect human rights laws made at international, regional and national levels. The nature and scope of human rights obligations differ between these strands, as will be explained in this briefing.

The following timeline illustrates key points in the development of human rights law in the UK and in Scotland.
In 1948, world leaders gathered at the UN General Assembly in Paris to adopt the *Universal Declaration of Human Rights*. The UK was a founding member.

This was followed by the drafting of the *European Convention on Human Rights (ECHR)* by the newly formed Council of Europe in Rome in 1950. The UK was a founding member.

In 1966 the UK adopted the ECHR Protocol on the **right to individual petition**, in doing so individuals in the UK were given the right to take cases to the European Court of Human Rights in Strasbourg.

The UK subsequently became party to (signed and ratified) the UN core treaties on human rights, including the UN ICCPR in 1976, the UN ICESCR in 1976 and the UN CRC in 1991.

The United Kingdom *joined the European Economic Community* (later to become the European Union) on 1 January 1973.

The UK Parliament passes the *Scotland Act 1998* granting devolution to Scotland.

In 1998 the UK Parliament passed the *Human Rights Act 1998*, creating obligations for UK courts to consider the compatibility of UK legislation with the ECHR.

In 2009 the *Treaty of Lisbon* entered into force giving full legal effect to the *Charter of Fundamental Rights of the European Union*. The Charter falls under the jurisdiction of the European Court of Justice.

In 2000 the *Charter of Fundamental Rights of the European Union* (the EU Charter) was proclaimed but was not given full legal effect.

In 2016, the UK voted to leave the European Union.

In 2016, the UK Parliament passed the *Scotland Act 2016* conferring greater devolution to Scotland with new devolved competences in welfare provision.
TYPOLOGY OF RIGHTS

Within the broad category of human rights, several points of distinction can be made. These distinctions are not uncontroversial and the categorisation of rights under these headings has been criticised by scholars as arbitrary distinctions masking political reservations. Nonetheless, they are an important part of the lingua franca of human rights and should be understood from the outset.

NATURE OF RIGHTS

A distinction is commonly made between civil and political rights and economic, social and cultural (ESC) rights.

Civil and political rights relate to the ‘personal integrity’, sometimes termed ‘freedom’ of an individual; for example the right to life, right to liberty, and free speech.

Economic, social and cultural rights relate to the satisfaction of human needs and are generally associated with the equality of individuals; for example the right to health, the right to food, and the right to adequate housing.

In their seminal text on Human Rights Law in Scotland (2011), Jim Murdoch, Professor of Law at the University of Glasgow and Lord Robert Reed, Justice of the Supreme Court, argue that these conceptually differing approaches to rights relate to contrasting political traditions. Specifically that civil and political rights may be deemed to be the ‘classic’ freedoms of liberal capitalist democracies, and economic, social and cultural rights form the basis of socialist conceptions of states. The jurisprudence of the European Court of Human Rights (ECtHR) does not prioritise one view over the other but permits states the discretion to balance interests through the design of rights which allows for exemptions and, secondly, through the doctrine of ‘margin of appreciation’. The ‘margin of appreciation’ reflects a recognition by the ECtHR that – in certain circumstances, and within certain limits - national authorities (including national courts) are better placed than the court itself to determine the outcome of the process of balancing individual and community interests.

A third category that is often omitted is environmental rights such as the right to a healthy environment, the right to clean air and the rights of future generations.

GENERATIONS OF RIGHTS

Human rights are often split into three branches in relation to their level of development in law, i.e.:

- codification - written into treaty law
- implementation - written into domestic laws and practices
- adjudication - decided upon in courts.

Civil and political rights are generally considered to be the first to be implemented - written into domestic laws - and are therefore described as ‘first generation’ rights. Economic, social and cultural (ESC) rights were considered to be subject to ‘progressive realisation’ and are described as ‘second generation’. Thirdly, there are collective rights, described as ‘third generation’ rights which include the right to a healthy environment and the right to development. Often these rights are codified but not implemented, but in some cases they are in the early stages of codification.
Naturally, as law develops and rights move through these stages of development, these categorisations become increasingly inaccurate. ESC rights are for instance included in many modern constitutions and treaty law, for example, the Charter of Fundamental Rights of the European Union (the EU Charter) (2000).

**ABSOLUTE OR QUALIFIED?**

A further classification of rights relates to the quality of a right as absolute or qualified. An absolute right is a right that must be fully observed at all times. A qualified right is a right that may be subject to limitations or exceptions.

At the international and regional levels, there are very few absolute rights. Established absolute rights are, ‘the right to be free from slavery and forced labour’ and, ‘the right to be free from torture or from inhuman or degrading treatment or punishment’. These rights are set out in the European Convention on Human Rights (ECHR or hereinafter ‘Convention’) and the United Nations International Covenant on Civil and Political Rights (ICCPR).

Most rights deriving from the Convention, and hence incorporated into UK law via the Human Rights Act 1998 (HRA), are qualified. For example, the right to life is qualified. So long as the use of force is no more than absolutely necessary (which is often the issue), the state may lawfully kill an individual in defence of any person from unlawful violence or; in order to effect a lawful arrest or detention or; in action lawfully taken to quell a riot or insurrection. Similarly, the right to property is limited and the state may interfere with an individual’s right to property so long as it pursues a legitimate aim, the state action is considered to be proportionate to that aim and it is prescribed in law.

**POSITIVE OR NEGATIVE OBLIGATIONS?**

The Convention operates a two-pronged approach to states’ human rights obligations, dividing these into two categories: negative obligations and positive obligations.

Negative obligations essentially require states not to interfere in the exercise of rights. In contrast, positive obligations require states to do something.

In the view of the Council of Europe (2007), the prime characteristic of positive obligations is that, in practice, they require national authorities to take the necessary measures to safeguard a right. This may mean adopting reasonable measures to actively protect rights.

**POLICIES OR LAWS?**

It has been argued that some rights - generally ESC rights, should be formulated as policy goals to be fulfilled at the discretion of the government of the day and should not be treated as legal obligations to be enforced by judges. The broad argument is that the adjudication of ESC rights by the courts will involve judges in political questions of resource allocation and that this distorts the traditional role of the judiciary.

In the first series of Reith Lectures to be given by a serving judge, Lord McCluskey (1986) said:

“[W]hen a judge begins to think that justice demands a ‘yes’ but the law requires a ‘no’, he has to stop and remember that judges have no general responsibility for considering the greatest good of the greatest number, or for advancing social or moral aims. Except insofar as such ideals are already woven into the law they apply, judges cannot think or judge in these terms […] the judge’s role is to be not an architect but a bricklayer.”
According to a strict application of the separation of the powers doctrine, it is for Parliament to create rights and for courts to interpret but not create the law. Consequently, courts have been cautious in interpreting rights in order to not impinge on the roles of the executive or the legislature, in particular with regard to economic, social and cultural rights.

HUMAN RIGHTS PROTECTIONS IN SCOTLAND

This section outlines in broad terms how human rights are protected in law in Scotland.

The diagram below demonstrates the bearing of international legislation on UK courts. The UN treaties have an influence on UK law but cannot be relied on in court (denoted by the perforated line). In contrast, the European instruments – the Convention and the EU Charter - are treated as sources of UK law by UK courts, and they also have independent courts at the European level (denoted by the gavel symbol). As economic, social and cultural rights are sometimes treated differently, they are considered more closely in the next section.
THE UN TREATIES

Under the Scotland Act 1998 (section 58 in conjunction with Schedule 5, para 7 (2)), Scotland is obliged to respect ‘international obligations’. In respect of human rights, Scotland’s ‘international obligations’ are found in the UN treaties.

At the international level, Scotland, as part of the UK, is a signatory to the Universal Declaration of Human Rights and the UN core human rights treaties including:

- International Covenant on Economic, Social and Cultural Rights (date of entry into force 1976)
- International Covenant on Civil and Political Rights (1976)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)

These treaties do not subject the UK to the jurisdiction of an adjudicative body. There is no ‘World Court of Human Rights’ linked to membership of the UN treaties. Instead, the UK may be subject to specific UN inquiries and communications. A general review of states’ human rights performance is also undertaken by UN bodies attached to the treaties. As a member of these treaties, the UK is also obliged to respect the UN Concluding Observations issued by the human rights treaty bodies. In other words, enforcement of the UN obligations normally takes place at the level of international law and not in the UK courts.

EUROPEAN OBLIGATIONS

The general view is that the strongest human rights protections occur at the European level. The Convention (1950) and the Charter of Fundamental Rights of the European Union (the EU Charter) (2000) protect a wide range of human rights and allow individuals to take cases to supranational courts; the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) respectively.

The legal effects of the Convention and the EU Charter will be considered separately below.

The European Convention on Human Rights (‘Convention’)

The Convention covers civil and political rights such as the right to freedom from torture and the right to a fair trial. It also covers economic, social and cultural rights such as the right to property and the right to education. Convention case-law has relevance across the full range of Scottish Parliament policy areas and was recently considered in the development of the Land Reform (Scotland) Act 2016 and the Named Person (2016) legislation.

In 1966, the UK ratified the Convention’s ‘right to individual petition’. This transformed the UK’s relationship with the Convention as it enabled UK citizens to take a case (‘complaint’) to the ECtHR in Strasbourg. Although the majority of complaints submitted to the ECtHR are deemed inadmissible and are rejected, the ECtHR has nonetheless taken numerous decisions of significance to UK law and policy.

If the ECtHR receives a complaint and finds a violation of one of the Convention rights, the UK is under an obligation to provide an effective remedy to the situation under Convention Article
13. The Council of Europe (2013) has advised that, under Convention Article 46, the UK has an obligation to abide by the final judgment of the ECtHR in any case to which it is a party.

However, there are no direct means of enforcing these obligations legally (enforcement is largely a political process). The UK government has recently ignored decisions of the ECtHR without real consequence (see Case Study 2 below).

Below are examples of Scottish and UK human rights cases on parental rights and prisoners’ rights decided by the ECtHR.
Case Study 1: Example of a Scottish case at Strasbourg

In *Campbell and Cosans v The United Kingdom*, ECHR 25 FEB 1982, the European Court of Human Rights decided that the threat of corporal punishment in schools amounted to a denial of the right to education in Article 2 of Protocol no 1 of the Convention. The case concerned two children who refused to accept corporal punishment at Scottish schools.

The applicants were awarded expenses, and a minimal amount of compensation, by the UK government. On receiving the judgment one of the children’s parents, Mrs Campbell, reportedly commented that: "*The result of the case will benefit all British children.*"

The judgment did not automatically create a ban on corporal punishment in the UK but, four years later, the UK Parliament passed legislation banning corporal punishment in all state schools in the UK.
Case Study 2: Example of a UK case at Strasbourg

In *Hirst v the United Kingdom (No 2) [2005] ECHR 681* the ECtHR ruled that a blanket ban on British prisoners exercising the right to vote was contrary to the ECHR Article 3 of Protocol No. 1 – the right to free elections. John Hirst, a self-taught lawyer, petitioned the ECtHR while serving a life sentence for manslaughter in Rye Hill prison, Warwickshire.

The ECtHR did not state that all prisoners should be given voting rights, rather that interferences had to be proportionate and cited the nuanced position on prisoners voting rights taken by a number of other European states.

The body responsible for enforcing judgments of the ECtHR, the Council of Europe's Committee of Ministers, has twice called upon the UK to respond to the ECtHR's judgment.

No changes to legislation were made during the last Labour Government. The Conservative Government has recently refused to act on the judgment and has indicated that it does not intend to bring forward legislation to give prisoners voting rights.
These cases demonstrate the impact of ECtHR decisions on UK law. It should be noted that the Campbell and Cosans case occurred prior to the Scotland Act 1998 and the Human Rights Act 1998. Had either of the cases above concerned legislation of the Scottish Parliament, it is likely that the legislation would have been declared invalid by UK courts before reaching Strasbourg, as demonstrated in Case Study 3 below.

THE EUROPEAN CONVENTION AND THE HUMAN RIGHTS ACT 1998

In 1998, the UK Parliament passed the Human Rights Act (HRA) 1998. The HRA served to reduce the likelihood of UK cases reaching the ECtHR by introducing a stronger internal check on the compatibility of UK legislation with the Convention. The UK remained a full member of the ECHR however.

HRA section 6 (1) provides that it is “unlawful for a public authority to act in a way which is incompatible with a Convention right”. Individuals can bring proceedings in the courts if a public authority has acted in breach of the Convention (HRA section 7).

This gives UK courts the power to hear challenges to UK legislation that may be incompatible with the Convention. The impact of HRA based challenges from UK courts differs whether it relates to UK or Scottish legislation. Due to provisions in the Scotland Act 1998, essentially giving priority to the Convention, the impact on Scottish legislation is stronger (see below).

If the complaint relates to legislation of the UK Parliament the Court may issue a HRA s.3 or HRA s.4 decision.

- HRA s.3 states that “so far as it is possible to do so” legislation must be read and given effect by the courts in a way which is compatible with Convention rights. This enables courts to interpret legislation more widely and more innovatively than is normally permissible under the rules of interpretation.
- HRA s. 4 enables a court to issue a “declaration of incompatibility” if it is satisfied that UK legislation is not compatible with a Convention right. Once a declaration of incompatibility is issued, the UK Parliament can reconsider the legislation that potentially conflicts with the Convention. This does not automatically invalidate the legislation and the UK Parliament may decide to leave it in place.

If the complaint relates to legislation of the Scottish Parliament and a UK Court decides that Scottish legislation is not compatible with the Convention, the effect is to declare that legislation invalid. This is also described as ‘striking down’ legislation.

These provisions are integrated into the Scotland Act 1998 s. 29 (d) and s. 57 (2)) which limit the power of the Scottish Government and the Scottish Parliament to make laws which are not Convention compliant. Rather than being returned to Parliament for reconsideration, the incompatible legislation can be simply struck down by courts. This means that the legislation is deemed to not have effect.

This is a stronger effect than that which the Convention bears on legislation of the UK Parliament. If an Act of the UK Parliament is considered to breach the Convention, the courts cannot ‘strike down’ the law. Instead, they can only ask the Parliament to reconsider the law.
The effect on legislation of the Scottish Parliament is demonstrated in the following case study on the ‘Named Person’ legislation in 2016.

Case Study 3, Example of a Scottish case decided by the UK Supreme Court: The ‘Named Person’ legislation.

In Christian Institute and others (Appellants) v. The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51, the UK Supreme Court found that the information sharing provisions in relation to the Named Person Service in Part 4 of the Children and Young People (Scotland) Act 2014 were beyond the legislative competence of the Scottish Parliament as they breached ECHR (‘Convention’) Article 8, the right to private life.

According to Art 8(2) ECHR, the state may legitimately interfere with the right to private life so long as it is (a) in accordance with the law and (b) is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The UK Supreme Court found that the information sharing provisions proposed risked interference with the right to respect for private and family life, without justification. Specifically, they were not sufficiently clear and, as a result, the measures proposed were not ‘in accordance with the law’. The relevant section of the Act had yet to come into force. The Scottish Government agreed to make the necessary legislative amendments and implement the changes ‘nationally at the earliest possible date’ (expected to be August 2018).

1 For more examples of ECHR (‘Convention’) cases impacting UK law see Annex 1.
THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION
( THE EU CHARTER)

The EU Charter is broader than the Convention. While it incorporates the Convention, it contains numerous updated versions of Convention rights. For instance, the right to marry is not confined to men and women in the EU Charter, but allows for same sex marriages, unlike the wording (but not the effect) of the Convention. The Charter also features an express right to data protection which, under the Convention, can only be protected as part of the right to private life.

In addition, the Charter contains important additional protections in the area of social rights and social security benefits, and a stand-alone anti-discrimination clause.

In 1972, the UK Parliament passed the European Communities Act (EC Act) 1972 which, in simple terms, gives EU law priority over conflicting national law. As a result, legislation of the UK and the devolved parliaments should not conflict with EU law, including the EU Charter. The European Court of Justice (ECJ) issues judgments that member states are obliged to respect.\(^2\)

Case Study 4: Example of an ECJ case with implications for the UK

In N.S v Secretary of State for the Home Department (C-411/10), NS, an Afghan national who had entered the EU via Greece, claimed asylum in the UK. Applying the EU Dublin Convention II, the UK sought to return him to Greece but he challenged the deportation order on grounds that the treatment of asylum seekers in Greece amounted to degrading treatment contrary to Articles 1, 4, 18, 19, and 47 of the Charter. The case was referred to the ECJ in Luxembourg for clarification.

The ECJ found that the rights relied on under the Charter gave the same protection as Article 3, the corresponding right under the ECHR. If applying EU law (in this case the Dublin Convention II to transfer NS back to Greece) risked violating those rights, it should be disapplied.

\(^2\) For more examples of ECJ cases impacting UK law see Annex 2.
UK legislation

At UK level, the effect of the EU Charter is fundamentally different from that of the Convention. If the ECJ or a national court decides that a piece of UK legislation is in conflict with the EU Charter, it is only ‘disapplied’ in the case before the Court. This does not render an Act of Parliament ‘void’. The UK Parliament may then consider whether to repeal the legislation on their terms, knowing that to not do so would risk further litigation at the ECJ. In contrast, as noted above, UK legislation which breaches the ECHR can only lead to a “declaration of incompatibility”, meaning that the UK Parliament is obliged to reconsider the legislation, but it may remain in force without consequence.

However, one limitation of the EU Charter’s effect is that it is only binding on the Member States, ‘when they are implementing Union law’ (Article 51 (1) of the EU Charter). A Member State is deemed to implement EU law when it acts within the scope of EU law. This is typically the case in two types of situation. First, situations where the UK acts on the basis of EU law (EU regulations, directives or decisions); and secondly, where the UK derogates from one of the EU’s four freedoms – i.e. free movement of goods, persons, services and capital - In contrast, the Convention does not require domestic provisions to have a European link in order to be subject to rulings of the European Court of Human Rights.

Scottish Parliament legislation

As noted earlier in this briefing, the Scottish Parliament does not have competence to legislate in contravention with EU law, including the EU Charter. Any legislation of the Scottish Parliament that does so will be considered void. The same provision that limits the competence of the Scottish Parliament in relation to the ECHR limits its competence in relation to EU law; that provision is the Scotland Act 1998 s.29 (2) (d):

“An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. A provision is outside that competence so far as […] it is incompatible with any of the Convention rights or with EU law”.

Likewise, the powers of Scottish Ministers are similarly constrained under s. 57 (2): “A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law”.

Avenues of legal redress: Scottish legislation

The flowchart (below) demonstrates the avenues of legal redress for potential human rights violations resulting from Scottish legislation, affecting human rights protected in the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union.

Avenues of Redress for Human Rights Violations: Scottish legislation
Avenues of legal redress: UK legislation

The flowchart below demonstrates the avenues of legal redress for potential human rights violations resulting from UK legislation, affecting human rights protected in the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union.

Avenues of Redress for Human Rights Violations: UK legislation
THE COMPETENCE OF THE SCOTTISH PARLIAMENT ON HUMAN RIGHTS

Human rights have occasionally been declared as devolved on the grounds that they are not strictly reserved. For example, in a House of Commons debate on ‘The Human Rights Framework: Scotland’ in March 2016, Richard Arkless MP commented:

“I certainly hope that the Minster is aware that human rights are not listed in any form within schedule 5 to the Act, meaning that they are—as a matter of fact and of constitutional law—devolved in their entirety to Scotland.”

In practice, human rights overlap with, and are implicit within, both devolved and reserved areas of competency.

For example, human rights related competences of criminal justice, prisons, health, and education, are devolved under Scotland Act 1998 Schedule 5. Human rights related competences on constitutional issues, immigration and treaty making powers are reserved (under the Scotland Act 1998, Schedule 5, Para 7, para 1). Moreover, any area of legislation can have human rights consequences and a human rights dimension.

EXAMPLE OF HUMAN RIGHTS COMPETENCE CROSSOVER IN PRACTICE

A good example of the crossover between devolved and reserved competences that can occur within a single piece of legislation is the Immigration Act 2016. The Act enlists private sector actors as agents of immigration control and affects inter alia the labour market, residential tenancies, bank accounts, driving licences, immigration officers’ enforcement powers, immigration detention, and support for migrant children.

The Act creates a new offence of leasing accommodation to disqualified migrants. It also gives landlords new powers to terminate tenancies. These powers only apply to England. However, the Act contains a provision (section 42) which allows the Secretary of State to make such regulations as he or she considers appropriate for enabling any of the residential tenancies provisions to apply in relation to Wales, Scotland or Northern Ireland. This is known as a ‘cross-border Henry VIII clause’ (see below).

Definition: A “Henry VIII” clause
A “Henry VIII” clause was defined by the House of Lords Select Committee on the Scrutiny of Delegated Powers as “a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny”.

When the UK Parliament seeks to legislate on an area of devolved competence, the Sewel Convention is invoked. In the view of Tom Mullen, Professor of Constitutional Law, University of Glasgow, and Sarah Craig, Senior Lecturer in Law, University of Glasgow, (Mullen and Craig (2016) in this instance the consent of the Scottish Parliament should have been sought. This is because the residential tenancies provisions would have such a large effect on an area of policy that has generally been regarded as devolved (i.e. landlord and tenant law)(Mullen and Craig).


The Scotland Act 2016 is intended by the UK Government to deliver the Smith Commission Agreement. The Act increases the powers of the Scottish Parliament on human rights matters by:

- Increasing responsibility for welfare policy and delivery in Scotland through the devolution of some welfare powers to the Scottish Parliament and /or the Scottish Ministers (ss. 29, 30, 34);
- Increasing the scrutiny powers of the Scottish Parliament for specific bodies, and increasing the ability of the Scottish Government to design schemes relating to energy

Definition: The Sewel Convention

The Sewel Convention is that the UK Parliament should not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

The Convention is an essential feature of the devolution settlement as, despite the Scotland Act 1998, the UK Parliament retains authority to legislate for Scotland on any issue under Scotland Act 1998 section 28 (7).

The Scotland Act 2016 s. 2 places the Sewel Convention on a statutory footing, whereas previously it had been contained in a Memorandum of Understanding.
efficiency (ss59-62) and fuel poverty (s.58) by the devolution of functions to the Scottish Ministers.

The Scotland Act 2016 makes income tax and social security benefits shared functions, potentially increasing the possibilities for conflict over the Sewel Convention’s operation. The link between welfare and human rights is increasingly recognised, as is the link between poverty and human rights.

UNRESOLVED COMPETENCES: THE HUMAN RIGHTS ACT 1998


If the UK Parliament wishes to repeal the HRA and replace it with a British Bill of Rights, the consent of the Scottish Parliament may be required under the Sewel Convention. Experts (see Mark Elliot (2015) and Christine Bell (2016)) are in agreement that this will depend on the extent to which the proposed British Bill of Rights alters human rights protections in the UK, as discussed further under the section on Brexit.

THE SCOTLAND ACT AND SCOTTISH HUMAN RIGHTS COMMISSIONS

The Scotland Act 1998 reserved equal opportunities to the UK Parliament, but with the exception that the Scottish Parliament could encourage equal opportunities and impose duties on public bodies. The Scotland Act 2016 devolved further powers under the heading of equal opportunities. The new powers allow the Scottish Parliament to: introduce gender quotas to public boards; and, introduce protections and requirements in relation to public bodies, which supplement existing provisions in the Equality Act 2010, but do not modify existing provisions.

As previously mentioned, human rights are not reserved under the Scotland Act 1998 (as amended). They are implicit in both devolved and reserved areas of competency.

This division of competences is reflected in the work Scottish Human Rights Commission and the Equality and Human Rights Commission. The former covers issues arising from devolved matters, the latter covers issues arising from reserved matters in Scotland. As Chris Himsworth (2011), Professor of Constitutional Law, University of Edinburgh, notes:

“[H]uman rights are not, in terms, reserved under the Scotland Act and it was, therefore, seen as wholly competent for the Scottish Parliament to legislate to establish the Scottish Human Rights Commission (SHRC). On the other hand the Scotland Act does exclude from Parliament’s competence the power to legislate on equal opportunities and the UK-level Equality and Human Rights Commission has correctly been given powers in those areas by the UK Parliament. That Commission is expressly prohibited from straying into areas within the SHRC’s own remit.”
SCOTTISH HUMAN RIGHTS BODIES

The Scottish Human Rights Commission and the Scottish Parliament’s Equalities and Human Rights Committee both have mandates to pursue the protection of human rights in Scotland. Their different powers, composition and legacy are set out in the following diagram.

THE HUMAN RIGHTS BASED APPROACH

The Scottish Human Rights Commission has led the integration of the ‘human rights based approach’ in Scotland.

The ‘human rights based approach’ is a method of systemising human rights throughout processes and practices. The approach can be useful in helping to define process and to justify choices made in pursuit of particular policy objectives or reforms. For example, a human rights based approach to tax reform would seek to integrate human rights principles into every stage of the reform process including stakeholder engagement, consultation, review and publication. These principles are broadly described as; non-discrimination, participation, accountability, legality and empowerment.
Definitions: The human rights based approach

The **UN Office of the High Commissioner for Human Rights (2006)** defines a human rights-based approach as one that, “*identifies rightsholders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations*”.

The **Scottish Human Rights Commission (2009)** describes a human rights based approach as “*about using international human rights standards to ensure that people’s human rights are put at the very centre of policies and practice*”. It does so by identifying principles (rather than rigid rules) to guide and review practice and policy within organisations.
BREXIT

Following the UK European Union membership referendum on 23 June 2016 and the Miller decision(s)\(^3\) we do not yet know if, when and how exactly the UK will withdraw from the EU. The current human rights framework will therefore continue to apply until the UK leaves the European Union.

**Brexit and Scotland: Constitutional forecasting**

In terms of the prospective options for Scotland on the UK’s exit from the UK, Eve Hepburn (2016), lecturer at the University of Edinburgh, has set out four pathways for constitutional revision in Scotland:

- The UK does not exit the EU after all.
- The UK’s exit from the European Union requires approval of the devolved administrations.
- Devolved approval is not sought but Scotland tries to maintain EU membership.
- “If all else fails” Scotland holds another referendum on independence.

Notwithstanding that Scotland may try to negotiate some sort of a special relationship with the EU, the UK’s exit from the EU has implications for human rights in the UK in at least three ways:

- The impact of Brexit on the effect of the EU Charter;
- The impact of Brexit on scope of competences devolved to the Scottish Parliament, and;
- The impact of Brexit on a possible withdrawal from the ECHR.

**IMPACT ON THE EFFECT OF THE EU CHARTER**

The UK Government has stated an intention to withdraw from the EU by passing the ‘Great Repeal Bill’. The Bill is to be introduced in 2017. The Bill’s purposes are (i) to repeal the European Communities Act 1972 and (ii) to ensure that EU law that has not already been implemented in national law remains in force from the date of withdrawal.

On the present terms of the proposed repeal Bill, EU law is expected to continue to apply to the UK. As Mark Elliot (2016) explains:

“That is because the Government has — sensibly and inevitably — concluded that the vast body of EU law cannot simply be made to vanish overnight. The chaos that would ensue if it did would be profound. Against that background, the Great Repeal Bill, far from getting rid of EU law from the UK legal system, will preserve it.”

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\(^3\) R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union [2016] EWHC 2768.
It is not yet known whether an exception will be made for the EU Charter. Jo Murkens, (2016) Associate Professor in the Department of Law at the LSE, considers that:

“After Brexit, [the EU Charter] will automatically take on full legal effect in UK law. The negotiated British protocol, which ensures that the Charter does not extend the powers of the Court of Justice of the EU over United Kingdom law, will be redundant.”

It may remain but it seems unlikely that it will be possible to bring cases to the ECJ post Brexit. Furthermore, as the Charter only applies in relation to the application of EU law, it would be largely redundant in the absence of EU law.

RETURN OF FULL DEVOLVED COMPETENCES TO THE SCOTTISH PARLIAMENT

In relation to the return of EU competences to the Scottish Parliament, Justice and Home Affairs, Agriculture, Fisheries and the Environment have been identified as principal devolved competences that have been subject to EU law. On the UK’s exit from the EU, these competences would ordinarily remain as competences of the Scottish Parliament, as is set out in a paper for the Scottish Parliament Committee on Culture, Tourism, Europe and External Relations by Alan Page (2016), Professor of Constitutional Law, at the University of Dundee. As human rights have relevance across all matters, increased powers for the Scottish Parliament would equate to increased powers over potential human rights matters.

BREXIT’S INFLUENCE ON WITHDRAWAL FROM THE ECHR

Although, Brexit will not directly affect the UK’s relationship to the ECHR, there is a question mark as to whether the removal of membership of the EU further reduces incentives to comply with Convention decisions and makes Convention withdrawal easier and therefore more likely.

The question of withdrawal from the Convention is implicitly tied to the repeal of the Human Rights Act 1998. The UK government has stated an intention to repeal the HRA by replacement with a British Bill of Human Rights.

The UK government has stated intentions to repeal the HRA and varying intentions to withdraw from the ECHR, for example in a speech to the media on 25 April 2016. In April 2016 the now Prime Minister, Theresa May, reversed her previous position and stated that on the grounds that the debate is divisive, she will not campaign to leave the Convention. This position was changed again on 5 October 2016 when, at the Conservative Party Conference, the Prime Minister announced an intention to exempt the UK military from the Convention.

Conor Gearty (2016b), Professor of Human Rights Law and Director of the Institute of Public Affairs at LSE and Barrister at Matrix Chambers, sets out reasons against the repeal of the Human rights Act as follows:

- The Human Rights Act respects parliamentary sovereignty.
- The European Court of Human Rights does not rule over the UK courts.
- The Human Rights Act protects us all.
- Repeal risks fragmenting the United Kingdom
Repeal of the HRA would not automatically result in withdrawal from the Convention. Were the HRA to be repealed and not replaced, there would be increased not decreased reliance on the Convention and greater likelihood of UK individuals petitioning the European Court of Human Rights. Repeal of the HRA 1998, with continued membership of the Convention would be a reversion to the legal framework in place prior to the introduction of HRA 1998, where individuals might experience fewer internal checks in UK courts before taking cases to ECtHR.

In 2010, Joshua Rozenberg QC reported that Lord Hope believed courts would still be bound by human rights law and precedent were the Human Rights Act 1998 to be repealed:

“If you were to take away the Human Rights Act now, all that jurisprudence is there… And the right of individual petition will be there. And we will still have to recognise that if we take a decision which is contrary to the human rights convention, somebody is going to complain to Strasbourg and that may cause trouble for the UK. So it’s very difficult to see how simply wiping out the Human Rights Act is really going to change anything until we withdraw from the convention – which, personally, I don’t think is conceivable.”

The debate therefore turns not on repeal of the Human Rights Act but on its replacement with a British Bill of Rights. If, as Gearty (2016b) and others fear, the British Bill of Rights represents, “merely a camouflage with which to disguise the sharp reduction in rights protection that repeal of the Human Rights Act would necessarily entail”, this has consequences for Scotland that ought to require legislative consent and raises the issue of the Sewel Convention, as explained in the following section.

A BRITISH BILL OF HUMAN RIGHTS

The question of withdrawal from the ECHR is implicitly tied to the repeal of the Human Rights Act 1998. As set out in the preceding section, the UK government has stated an intention to repeal the HRA by replacement with a British Bill of Human Rights.

In a report on the Government’s proposal to introduce a UK Bill of Rights, Baroness Kennedy of the Shaws, Chairman of the House of Lords EU Justice Sub-Committee, commented:

“Our evidence from the Secretary of State for Justice was the first time the Government has explained why it wants to introduce a British Bill of Rights. The arguments seemed to amount to restoring national faith in human rights and to give human rights a greater UK identity. The proposals he outlined were not extensive, and we were not convinced that a Bill of Rights was necessary.”

The House of Lords EU Justice Sub-Committee report on the Government’s proposal to introduce a UK Bill of Rights (2016) says that the Government’s proposals:

- Will not depart significantly from the existing Human Rights Act.
- Are likely to “affirm” in a Bill of Rights all the rights contained within European Convention on Human Rights [as Stated by the Secretary of State], making the necessity of a Bill of Rights unclear.
- May damage the UK’s standing within the Council of Europe and the EU, and its moral authority internationally.
- May lead to an increasing reliance on the EU Charter of Fundamental Rights in UK courts if the scope of the Human Rights Act is reduced.
- Risk constitutional upheaval with the devolved nations, with the consequence that the proposed UK Bill of Rights could end up as an English Bill of Rights.
REPEAL OF THE HUMAN RIGHTS ACT AND THE SEWEL CONVENTION

Whether the UK can repeal the Human Rights Act without consent from the devolved administrations is subject to debate. Mark Elliot (2015), Professor of Public Law, University of Cambridge and Christine Bell (2016), Professor of Constitutional Law, University of Edinburgh distinguish between repealing the Human Rights Act and repealing and replacing it (with a British Bill of Human Rights). They agree that the latter would require consent of the Scottish Parliament by way of a Legislative Consent Memorandum (LCM) under the Sewel Convention.

Furthermore when, in May 2016, the House of Lords EU Select Committee (2016) took evidence on its inquiry on ‘The UK, the EU and British Bill of Rights’, it concluded that:

“The evidence demonstrates that the Scottish Parliament and Northern Ireland Assembly are unlikely to give consent to a Bill of Rights which repealed the Human Rights Act (we did not receive evidence on this point from the National Assembly for Wales). Were the UK Government to proceed without such consent, it would be entering into uncharted constitutional territory (para 182).”

The Committee continued:

“The difficulties the Government faces in implementing a British Bill of Rights in the devolved nations are substantial. Given the seemingly limited aims of the proposed Bill of Rights, the Government should give careful consideration to whether, in the words of the Secretary of State, it means unravelling the constitutional knitting for very little (para 30).”

The SHRC (2011) has submitted that repeal of the Human Rights Act could lead to a piecemeal approach to human rights legislation in the UK, where Scotland, Northern Ireland and Wales create their own human rights acts or bills of rights is undesirable and would be disadvantageous to human rights protections at present.

A SCOTTISH BILL OF RIGHTS

In the early 1990s, the Scottish Constitutional Convention, a cross party association that developed a framework for Scottish devolution, advocated that the Convention should be incorporated as a first step in Scotland, followed by a Scottish Bill of Rights. Since devolution in 1998, the SHRC has been established without a Scottish Bill of Human Rights.

Scotland’s competence to pass a Scottish Bill of Human Rights hinges on its competence over human rights as a devolved matter. The view of the Scottish Government seems to be that it does have competence to pass a Scottish Bill of Human Rights. As expressed by Richard Arkless MP (Dumfries and Galloway) (SNP) in a recent House of Commons debate on ‘Human Rights Framework: Scotland’: “Of course, the Scottish Parliament could legislate for a Scottish Bill of Rights, but it has absolutely no plans to do so.”

This is supported by the views of some academics. For example in an evidence session to the Scottish Parliament Equalities and Human Rights Committee on 3 November 2016, Dr Cormac Mac Amhlaigh commented:

“I argue that the Scottish Parliament could also produce a Scottish bill of rights because human rights are a devolved matter. The Human Rights Act 1998 is not
devolved legislation, but human rights is a devolved competence so Scotland could certainly do something parallel within its competence.”

Prof Aileen McHarg (commentary to Lallands Peat Worrier 2015) has also indicated that, should the Human Rights Act be repealed, it would be possible for Scotland to create a Human Rights Act to apply to local authorities and devolved public authorities. However this may lead to conflicts of laws in matters concerning reserved matters, were the Scottish courts to attempt to override Westminster legislation with the new Scottish legislation.

This does prevent the Scottish Parliament from legislating for stronger rights protections in distinctly devolved areas, e.g. housing or food. To the extent that Scotland has competence over matters affecting economic, social and cultural rights, it may be possible for the Scottish Parliament to pass a Scottish Bill of Economic, Social and Cultural Rights, so long as this would be complementary with the Human Rights Act 1998 (as Scotland does not have the power to repeal that legislation see Elliot (2015b)).

However, recent events would suggest that the UK government believes that Scotland requires its consent to pass a Scottish Bill of Rights. In 2015, the Guardian reported that Scotland was offered a clear power to put in place its own ‘Scottish Bill of Rights’ if it would give consent to repeal of the Human Rights Act 1998. In Sept 2015, First Minister Nicola Sturgeon reportedly, “laid to rest suggestions that SNP MPs might abstain on Conservative plans to scrap the Human Rights Act in exchange for a Scottish bill of rights”.

**DESIGNING A SCOTTISH BILL OF HUMAN RIGHTS**

Should the Human Rights Act be repealed or should Scotland become independent, the prospect of a Scottish Bill of Rights may gain new momentum.

The content of the Bill would be subject to debate and consultation. In 2008, Kenny MacAskill, the then Cabinet Secretary for Justice, in evidence to the UK Joint Committee on Human Rights, speaking of a Scottish Bill of Rights in an independent Scotland stated:

“It would be predicated upon the ECHR with a few additional matters and [with] the logic that it is the minimum and it can be added to, so that is ultimately where we would like to get to, but that is a matter for our national conversation to some extent.”

In terms of constitutional design, a report undertaken by Human Rights & Social Justice Research Institute (2010) identified the followed key principles based on global best practice that should underline the drafting of a Bill of Rights: Non-regressive; Transparent; Independent; Democratic; Inclusive; Deliberative and participative; Educative; Reciprocal; Rooted in human rights; Timed; Symbolic; Designed to do no harm; Respectful of the devolution settlements.

If Scotland wished to provide greater rights protections than currently exist, for instance in the area of ESC rights, it could predicate a Scottish Bill of Human Rights on the UN ICESCR. Several countries refer to UN ICESCR in their constitution or constitutional documents. At present, the Scottish Parliament can refer to international treaties and ask that ministers have reference to them when making decisions, but it cannot fully incorporate in the sense of making them constitutional laws that all courts must uphold.

Predicating the Bill on the UN ICESCR would have the effect of fully incorporating that treaty so that any legislation which does not respect the UN ICESR obligations is invalid, replicating the
design of the Human Rights Act in respect of the Convention and the EC Act in respect of EU legislation.

For further information on ESC rights see the SPICe Briefing on ESC Rights forthoming in early 2017.
ANNEX 1

Specific examples from case law of the ECHR (‘the Convention’):

- **Rights of homosexuals and transsexuals**: Dudgeon v UK (1981), the criminalisation of homosexuality in Northern Ireland was illegal. Also, Goodwin v UK (2002), the right to legal recognition of the post-operative sex of a male to female transsexual.

- **Protection of journalist sources and freedom of expression**: Financial Times Ltd and Others v. the UK (2009); Goodwin v UK (1996); Observer and Guardian v. the UK (1991); Sunday Times v UK (1979).

- **Freedom of Religion**: Eweida and Others v. the UK (2013), concerning the right to wear a Christian cross at work.

- **Children**: Z and Others v. the UK (2001) - the state has positive obligation to protect. Also A. v. the UK (1998).

- **Right to life**: McCann and Others v. the UK (1995), restrictions on lawful interference with right to life; McKerr v. the UK and Hugh Jordan v. the UK (2001), obligation to undertake full and public investigation in respect of police shootings.

- **Freedom of Association and trade unions**: Redfearn v. the UK (2012); Wilson and the National Union of Journalists and Others v. the UK (2002); Young, James and Webster v. the UK (1981).

- **Limits to police powers, surveillance and data protection**: R.E. v. the United Kingdom (2015) covert surveillance of legal consultations breached right to respect for private life; Gillan & Quinton v UK (2010), limiting police powers to stop and search individuals without reasonable suspicion of wrongdoing; Liberty and Other Organisations v. the UK (2008), surveillance of external communications of human rights lawyers breached right for private life; Malone v. the UK (1984), police powers to intercept telephone calls and the lack of any legislation to regulate this breached right to respect for private life.

For a list of UK cases before the European Court of Human Rights between 1975-2016 see House of Commons Briefing Paper Number 05611, 12 May 2016, ‘UK cases at the European Court of Human Rights since 1975’. Available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05611#fullreport

This Annex first appeared in the Scottish Universities Legal Network on Europe (SULNE) position paper by Tobias Lock and Kirsteen Shields (Lock and Shields 2016).
Specific examples from case law from the Charter of Fundamental Rights of the European Union (the EU Charter):

- **Discrimination by association:** In Coleman v Attridge Law (2008) direct discrimination was defined to cover discrimination by association. Later incorporated into the Equality Act 2010.

- **Digital privacy:** In Digital Rights Ireland (2014) the ECJ held that the electronic retention of some kinds of personal data affected the Charter rights guaranteed in Article 7 (right to private life) and Article 8 (right to protection of personal data). Further, in Vidal-Hall v Google Inc (2015), the Court of Appeal held that the Data Protection Act 1996 (which limited the circumstances in which damages could be awarded for distress suffered because of a breach of that Act) conflicted with privacy rights under Articles 7 and 8 of the Charter and must be disapplied.

- **Protection from discrimination for trans people:** P v S and Cornwall County Council (1996) led to amendments to the Sex Discrimination Act to provide protection from discrimination on grounds of gender reassignment in employment.

- **Sex discrimination and equal pay:** ECJ case law has led to greater protection in domestic law in a number of areas. These include extending equal pay to include all forms of pay including pensions; giving women special protection against discrimination during pregnancy without the need for comparison with, for example, a sick man; extending the protection against harassment; and ensuring full compensation for discrimination. (See further Equality and Human Rights Commission online summaries. Available at: [https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights](https://www.equalityhumanrights.com/en/our-human-rights-work/impact-eu-membership-equality-and-human-rights))

- **Reduced state immunity:** In Benkharbouche v Embassy of the Republic of Sudan (2015), the Court of Appeal held that the law on state immunity, which prevented the claimants from accessing the courts to enforce their employment rights, breached fair trial rights under the Charter.

This Annex first appeared in the Scottish Universities Legal Network on Europe (SULNE) position paper by Tobias Lock and Kirsteen Shields (Lock and Shields 2016).
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