



Incorporating Human Rights in Scotland

Glossary of Key Terms

<p>Absolute right If a human right is considered ‘absolute’ it is not permissible for states to interfere the right or make reservations or derogations from that right, even in a case of emergency or threat to national security. Not many rights are absolute. One example is the right to be free from torture.</p>	
<p>Accession to a treaty ‘Accession’ is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and accepted by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.</p>	Vienna Convention on the Law of Treaties, arts 2 (1) (b) and 15
<p>Conflict of norms In public international law this refers to a situation where applying and obeying one norm (law or rule) leads to or could lead to the violation of another norm is known as a ‘conflict of norms’.</p>	Marko Milanović (2009), 72
<p>Constitutional incorporation A process whereby international human rights law is made part of the national legal system through a reference in the constitution. This is a form of ‘indirect’ incorporation.</p>	
<p>Core international human rights treaties The nine core UN human rights treaties are the CERD, ICCPR, ICESCR, CAT, CEDAW, CRC, CRPD, CED, and CMW. Each of these treaties has established a UN treaty body (also called a Committee) of experts to monitor implementation of the treaty provisions by its States Parties.</p>	‘Human Rights Bodies - Complaints Procedures’ (OHCHR)
<p>Derogation A ‘derogation’ refers to an exemption from or relaxation of a rule or a right following entry into force of the treaty for the state party. Under what conditions a derogation can be made by states depends on the treaty containing the laws that are being derogated from. A state must officially declare a state of emergency that threatens the life of the nation in order to make a legitimate derogation. Even where this is done, there can be no derogation from absolute rights.</p>	‘Derogation’ (Lexico); derogation provisions can be found in ECHR, art 15(1) and ICCPR, art 4

<p>Declaration of incompatibility</p> <p>Under the Human Rights Act 1998, a High Court (or above) in the UK may make a declaration of incompatibility where an Act of Parliament is fully or partly incompatible with the European Convention on Human Rights. Because of parliamentary sovereignty, a declaration of incompatibility does not in itself invalidate the legislation but gives parliament the option to do so.</p> <p>This is distinct from 'strike down power', which is where a court invalidates a law.</p>	<p>Jonathan Law (2015)</p>
<p>Direct incorporation</p> <p>'Direct 'incorporation' refers to when an entire international treaty is made part of domestic law through either transformation or transposition, whereby a state enacts domestic law that gives effect to the treaty, using its original wording, and makes it binding upon public authorities and enforceable in domestic courts.</p> <p>The UK Human Rights Act 1998 is an example direct incorporation in a dualist legal system, where an Act of parliament (domestic legislation) expressly intends 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.' In monist legal systems, direct incorporation happens automatically. But this will not always mean that the treaty rights are given direct effect.</p>	<p>Kasey McCall-Smith (2019), 430; Rebecca Thorburn Stern (2019)</p>
<p>Dualist legal system (dualism)</p> <p>A dualist legal system treats the international and domestic systems of law as separate and independent of one another. International law therefore must be authorized by a domestic law in order to be applicable in that domestic legal system, for example through incorporation. The UK is an example of a dualist legal system. (See also monist legal system below).</p>	<p>Madeleine Chiam (2018)</p>
<p>Due regard duty</p> <p>The 'due regard duty' places an obligation on duty-bearers to pay 'due regard', in other words 'observe' specific considerations, such as a particular human rights treaty, when exercising their functions and powers.</p> <p>The due regard duty exists in UK equality law and recognised in the Rights of Children and Young Persons (Wales) Measure 2011. It falls short of a duty to comply fully with certain human rights provisions, such as the duty of compliance set out in section 6 of the Human Rights Act 1998.</p>	<p>Simon Hoffman, Sean O'Neill (2018)</p>
<p>Enforceability</p> <p>Enforceability of a human right refers to the availability of institutions and procedures that can provide a remedy for the breach of that right. Such institutions may both prevent breaches and deliver effective redress through either judicial or administrative paths when a right is violated.</p>	<p>Kasey McCall-Smith (2019), 429.</p>

<p>Entry into force</p> <p>The point in time at which a treaty becomes binding on the States Parties. Typically, this relates to the manner agreed by the negotiating states, such as the number of ratifications or accessions to the relevant treaty plus a certain number of days. For example, 'The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession'.</p>	<p>Vienna Convention on the Law of Treaties, art 84</p>
<p>Equality and Non-discrimination</p> <p>All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.</p>	<p>'Human Rights Principles' (United Nations Population Fund, 2005)</p>
<p>General comment/recommendation</p> <p>General comments or recommendations are interpretations of a certain human right or issue published by Treaty Bodies, such as the Human Rights Committee. General comments provide guidance on the application and implementation of the UN human rights treaties usually based on common trends across periodic reviews, individual communications decisions and other bilateral contact with the States Parties by the treaty bodies. These are considered a type of jurisprudence.</p>	<p>'Working with the United Nations Human Rights Programme' (Office of the United Nations High Commissioner for Human Rights (OHCHR), 2008)</p>
<p>Human rights-based approach</p> <p>'Taking a human rights-based approach is about making sure that people's rights are put at the very centre of policies and practices. The PANEL principles are one way of breaking down what this means in practice:'</p> <ul style="list-style-type: none"> • Participation • Accountability • Non-Discrimination and Equality • Empowerment And • Legality 	<p>'PANEL principles' (Scottish Human Rights Commission)</p>
<p>Human Rights Council</p> <p>An inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights globally and for addressing human rights violations and making recommendations on them. It can discuss all thematic human rights issues and situations that require its attention throughout the year.</p>	<p>'Welcome to the Human Rights Council' (OHCHR)</p>
<p>Implementation</p> <p>The process by which states give effect to the provisions in a treaty which they have ratified and, in some cases, incorporated into national law. It involves a diverse range of legislative, administrative, policy and other appropriate measures that ensure that the rights in the treaty are realised in practice and do not simply remain words in a document.</p>	<p>Kasey McCall-Smith (2019), 428</p>

<p>The UN treaty bodies often say that incorporation is the first step toward implementation.</p>	
<p>Incorporation Incorporation refers to the process that makes an international treaty part of national law, so that the treaty provisions may be directly applied by national courts, in other judicial bodies and by public authorities. Incorporation is an element of and possible starting point for implementation of international law and can take different forms: direct, indirect or sectoral/piecemeal incorporation. Each form can incorporate a treaty as a whole or in part, respectively referred to as full or partial incorporation.</p>	<p>Kasey McCall-Smith (2019), 428-29; Rebecca Thorburn Stern (2019), 277</p>
<p>Indirect incorporation Indirect incorporation gives a treaty <i>some</i> effect in national law by means of another legal mechanism. For example, if a provision in a national constitution stipulates that courts and public authorities should take a given human rights treaty into account. Another example is the Welsh due regard duty for the UNCRC.</p>	<p>Kasey McCall-Smith (2019), 433; Rebecca Thorburn Stern (2019), 268</p>
<p>Individual communication Treaty bodies of the core international human rights treaties may, under certain conditions, consider individual complaints (also called communications) from individuals similar to bringing a case against the state in a domestic court. Anyone can lodge a complaint with a Committee against a State:</p> <ul style="list-style-type: none"> • That is party to the treaty in question providing for the rights which have allegedly been violated; • That has accepted the Committee’s competence to examine individual complaints, either through ratification or accession to an Optional Protocol, or by making a declaration under a specific article of the Convention <p>Complaints can be brought by third parties on behalf of individuals, if they have given their written consent or, without, for example, where a person is a victim of an enforced disappearance. A notable distinction is that unlike court cases in the domestic legal system, this process is conducted entirely on the basis of written submissions by the claimant and the State Party.</p>	<p>‘Human Rights Bodies - Complaints Procedures’ (OHCHR)</p>
<p>Indivisibility of human rights Human rights are <i>indivisible</i>. Whether they relate to civil, cultural, economic, political or social issues, human rights are inherent to the dignity of every human person. Consequently, all human rights have equal status and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights.</p>	<p>‘Human Rights Principles’ (United Nations Population Fund, 2005)</p>

<p>Interdependence and interrelatedness of rights Human rights are <i>interdependent</i> and <i>interrelated</i>. Each right contributes to the realisation of a person’s human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.</p>	<p>‘Human Rights Principles’</p>
<p>Jurisprudence Jurisprudence can refer to the body of judgments and decisions from courts as sources of law and interpretation. For example, cases from the European Court of Human Rights are referred to as the jurisprudence of the European Court of Human Rights. General Comments, final views and other decisions from UN Treaty Bodies are also referred to as ‘jurisprudence’.</p>	<p>‘Jurisprudence’ (Merriam Webster) Kasey McCall-Smith (2019a), 345</p>
<p>Justiciability Justiciability refers to the ability of a right-holder, whose rights have been violated, to lodge a complaint and claim an enforceable remedy before an independent and impartial court or a quasi-judicial body (such as a tribunal or UN treaty body). In the UK, international laws must generally be incorporated by national law to be justiciable (see dualism above).</p>	<p>‘Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability’ (International Commission of Jurists, 2008)</p>
<p>Legal Aid Legal aid helps pay for legal advice, mediation, or representation in court. It can be claimed from the government by people eligible according to certain criteria, such as lack of financial resources.</p>	
<p>Living instrument doctrine The living instrument doctrine refers to the notion developed by the European Court of Human Rights, that the European Convention on Human Rights is a ‘living instrument’ meaning that the convention rights should be interpreted in light of present-day developments including technological and scientific changes, evolving human rights standards, and new moral and ethical standards. This approach has been adopted across the Inter-American and African human rights systems and is followed by the UN treaty bodies.</p>	<p>‘ECHR-Introduction’ (Hembach Legal)</p>
<p>Monist legal system (monism) In a monist legal system international law and domestic law are seen as forming a single universal legal system, with international law typically ranking above domestic law. In contrast to in dualist legal systems, international treaties are automatically applicable in monist systems once they have been ratified by the state. However, this does not necessarily mean that the rights contained in such treaties are automatically enforceable.</p>	<p>Madeleine Chiam (2018)</p>

<p>Negative obligations/rights Negative obligations place a duty on public authorities to refrain from acting in a way that unjustifiably interferes with human rights. Most human rights place both negative and positive obligations on the state.</p>	<p>'Some Definitions' (Council of Europe)</p>
<p>Norm harmony Norm harmony (normharmoni) is often referred to in Nordic legal systems when discussing the incorporation of international human rights treaties. Here norm harmony exists when domestic laws are consistent with the international law in question. In case of norm harmony, the domestic law therefore does not need to be amended.</p> <p>For example in Danish law, when considering whether a treaty should be incorporated, legislators will first examine if Danish law is already in accordance with a given treaty or provision. If it is, it is considered that the treaty provisions are already being complied with under the current situation, without making any changes by further incorporating the treaty as such into domestic law.</p>	<p>Davíð Thór Björgvinsson (2015), 62</p>
<p>Obligation to respect, protect and fulfil Human rights obligations are typically explained in the following typology: <u>The obligation to respect</u> means that states must not act in a way that violates people's human rights. <u>The obligation to protect</u> means that states must protect people's rights from being violated by the actions of others, for example, corporations. <u>The obligation to fulfil</u> requires states to be proactive in taking measures that assist individuals and communities to enjoy their rights.</p>	<p>'International Human Rights Law' (OHCHR)</p>
<p>Optional protocol 'A new [supplementary] treaty which modifies another treaty (generally adding additional procedures or substantive provisions). The European Convention on Human Rights has 13 protocols, separate treaties which update the original, added gradually between 1952 and 2002.'</p>	<p>'Glossary of terms' (Equality and Human Rights Commission, 16 May 2016)</p>
<p>Parliamentary supremacy Parliamentary supremacy is a constitutional principle in the UK, which makes the UK Parliament the supreme legal authority. This means that courts strike down an Act of parliament even if they conflict with international law. In this instance courts are limited to issuing a declaration of incompatibility.</p>	<p>'Parliament's authority' (UK Parliament)</p>
<p>Participation and Inclusion All people have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being. Human Rights-based approaches require a high degree of participation by communities, civil society, minorities, women, young people, indigenous peoples and other identified groups.</p>	<p>'Human Rights Principles' (United Nations Population Fund, 2005)</p>
<p>Periodic review A mechanism of review conducted by all of the treaty bodies. The States Parties to all of the core human rights treaties undertake to submit reports on the measures they have adopted which give effect to the</p>	<p>International Covenant on Civil and Political Rights, art 40</p>

<p>rights recognized in the treaty and on the progress made in the enjoyment of those rights. For each treaty a State Party is required to submit a report within one year of the entry into force of the treaty and thereafter in a periodic cycle determined by the treaty body. Following the initial report, a State Party may utilise a consolidated treaty reporting process in relation to all of the human rights treaties it is party to.</p>	
<p>Positive obligations/rights Positive obligations place a duty on public authorities to take active steps in order to safeguards and ensure human rights. For example, by undertaking an investigation, providing a service or enacting legislation. Most human rights place both positive and negative obligations on the state.</p>	<p>'Some Definitions' (Council of Europe)</p>
<p>Public authorities In the context of human rights law, public authorities are agents of the state such as the government, law enforcement agencies, local authorities, hospitals and other agencies or organisations that provide public services or functions that can be described as governmental or attributable to the state.</p>	<p>"What defines a 'public authority' – and why it matters" (Ward Hadaway, 15 July 2015); Human Rights Act 1998</p>
<p>Public interest litigation Litigation that goes beyond the interest of one individual on issues that are in the interest of the public or a specific group of people. Typically initiated on behalf of individuals by NGOs or other organisations, with the aim of setting legal precedent and changing law and policy.</p>	<p>Human Rights Consortium (2018)</p>
<p>Principle of consistent interpretation National law should be interpreted consistent with international law, but in the case of conflict national law prevails.</p>	<p>Dauid Thór Björgvinsson (2015), 65</p>
<p>Qualified/limited rights In contrast to absolute rights, 'qualified' or 'limited' rights can be interfered with under specific circumstances where a compromise is necessary, such as in the interest of national security or where required to respect the rights of another individual or group. An example is the right to freedom of speech. Most human rights are qualified or limited rights.</p>	<p>Equality and Human Rights Commission (2016)</p>
<p>Ratification When a state ratifies an international treaty, it consents to be bound by the treaty provisions. Treaties often allow for a timeframe after ratification where the state can adopt the necessary measures to give effect to the treaty in the domestic legal system.</p>	<p>Vienna Convention on the Law of Treaties, arts 2(1)(b), 14(1) and 16</p>
<p>Redress In the event of a human rights violation, a State Party to a convention has an obligation to provide timely, adequate, and effective reparations to the victim of the violation. The right to redress includes the corresponding right of victim to seek reparations in the event of a violation.</p>	<p>Lisa Magarrell, Lorna Peterson, (2010), 8-9</p>

<p>Reparations 'Recompense given to one who has suffered legal injury at the hands of another; to make amends, provide restitution, or give satisfaction or compensation for a wrong inflicted; it also refers to the thing done or given to the injured party.'</p>	Dinah Shelton (2015)
<p>Reservation 'A unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.' Effectively, this is a legal statement included by the State Party indicating how it intends to alter the terms of the treaty after the text has been adopted.</p>	Vienna Convention on the Law of Treaties, art 2(1)(d)
<p>Scotland Act 1998 An Act passed by the UK Parliament which devolves certain legislative powers to the Scottish Parliament. This means that the Scottish Parliament can legislate on issues such as Scottish agriculture, forestry and fisheries, or tourism and sport among other matters, independently of the Westminster Parliament. The UK Parliament cannot normally legislate on devolved areas without the approval of the Scottish Parliament.</p> <p>Some important legislative matters remain reserved to the competency of the UK Parliament, such as immigration, equalities, and employment, meaning that the Scottish Parliament cannot enact laws specific to Scotland in these areas. If they do, these laws can be struck down and declared invalid by UK courts.</p> <p>Scotland's devolved powers were extended in 2012 and 2016 after the independence referendum.</p>	Scotland Act 1998
<p>Sectoral or piecemeal incorporation Where an individual provision of a treaty is made part of domestic law, but often without specific reference to the treaty itself. This method only incorporates parts of a treaty for example in relation to a specific right within a treaty, while ignoring other rights outlined within the treaty.</p>	Kasey McCall-Smith (2019), 430
<p>Special Procedures of the Human Rights Council. The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social.</p> <p>Among other functions, special procedures undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to states and others in which they bring alleged violations or abuses to their attention.</p>	'Special Procedures of the Human Rights Council' (OHCHR)

<p>Special Rapporteur (UN) An independent expert appointed by the Human Rights Council to examine and report back on a country situation or a specific human rights theme. This position is honorary, and the expert is not United Nations staff nor paid for his/her work. The Special Rapporteurs are part of the Special Procedures of the Human Rights Council. They are often referred to as 'mandate holders'.</p>	<p>'Special Rapporteur on the right to privacy' (OHCHR)</p>
<p>State Party A country that has ratified or acceded to that particular treaty and is therefore legally bound by the provisions in the instrument under international law.</p>	<p>'Introduction to the Convention on the Rights of the Child' (UNICEF)</p>
<p>Strike Down Power The strike down power refers to the ability of a court to invalidate a piece of legislation that is incompatible with a human rights obligation. Compare with a declaration of incompatibility.</p>	
<p>Transformation/translation Transformation or translation refers to a method of incorporation whereby the treaty provisions are reformulated or reworded and adopted as part of domestic legislation.</p>	<p>Rebecca Thorburn Stern (2019), 269</p>
<p>Transposition Transposition refers to a method of incorporation whereby the provisions of a treaty are given effect in domestic legislation using the exact language of the treaty.</p>	<p>Rebecca Thorburn Stern (2019), 269; Esin Örüçü (2002)</p>
<p>Treaty A treaty is an international agreement concluded between states in written form and governed by international law. It places binding legal obligations on the states that commit to the agreement through ratification, accession or any other accepted method. The agreement may be described as a treaty, convention, covenant, etc.</p>	<p>Vienna Convention on the Law of Treaties, art 2(a)</p>
<p>UN Treaty Bodies or UN Human Rights Treaty Bodies UN Treaty bodies or UN human rights treaty bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, are committees made up of independent experts tasked with monitoring and publishing guidance on the interpretation and implementation of the core international human rights treaties.</p>	<p>'Human rights treaty bodies' (OHCHR)</p>
<p>Universal Declaration of Human Rights (UDHR) Adopted by the UN General Assembly on 10 December 1948, the UDHR is the basis of the core international human rights treaties. The UDHR, however, is not a treaty but a non-binding resolution of the UN. Several of the human rights recognised in the UDHR are binding due to their recognition in other treaties, such as the prohibition against torture, which is also found in the Convention against Torture and ICCPR article 7.</p>	

<p>Universal Periodic Review A mechanism of the Human Rights Council under which the human rights situation of all UN Member States is reviewed every 5 years.</p> <p>The result of each review is reflected in the Final Report of the Working Group, which lists the recommendations the State under review should implement before the next review.</p> <p>3 key stages of the UPR:</p> <ul style="list-style-type: none"> • Preparation for the Review and reporting on treaty implementation • Review of the human rights situation of the state under review and adoption of the Report • Implementation of Recommendations and reporting at mid-term 	OHCHR, 'What is the UPR?' (UPR Info)
<p>Universality and Inalienability of rights Human rights are universal and inalienable. All people everywhere in the world are entitled to them. The universality of human rights stems from the words of Article 1 of the Universal Declaration of Human Rights (UDHR): 'All human beings are born free and equal in dignity and rights.'</p>	'Human Rights Principles' (United Nations Population Fund, 2005)

Terms highlighted in **bold** are defined elsewhere in the glossary.

Table of international and regional human rights instruments to which the United Kingdom is bound.

Treaty	Area of protection	Governing body	Ratified by the UK?
CERD (Convention on the Elimination of All Forms of Racial Discrimination)	Discrimination against minority groups	UN Committee on the Elimination of Racial Discrimination	1968
ICCPR International Covenant on Civil and Political Rights)	Civil and political rights	UN Human Rights Committee.	1976
ICESCR (International Covenant on Economic Social and Cultural Rights)	Economic, Social and Cultural rights, global.	UN Committee on Economic, Social and Cultural Rights	1976
CEDAW (The Convention on the Elimination of all Forms of Discrimination Against Women)	Women's rights	UN Committee on the Elimination of Discrimination Against Women	1986
CAT (Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment)	Torture, inhuman and degrading treatment	UN Committee Against Torture	1987
CRC (Convention on the Rights of the Child)	Children's rights	UN Committee on the Rights of the Child	1991
CRPD (International Convention on the Rights of Persons with Disabilities)	Persons with disabilities	UN Committee on the Rights of Persons with Disabilities	2009
ECHR (European Convention on Human Rights)	Mainly civil and political rights (Europe)	European Court of Human Rights and the Council of Europe	1951
EU Charter of Fundamental Rights	Based on the ECHR and the ESC (Europe)	Court of Justice of the European Union and the EU Agency for Fundamental Rights	As an EU member state
ESC (European Social Charter (revised))	Some social and economic rights, particularly worker's rights (Europe)	European Committee of Social Rights, Council of Europe.	The UK has signed (1996) but not ratified the ESC.

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