**An international perspective: Why does the UN Committee on Economic, Social and Cultural Rights encourage incorporation?**

Many thanks to the Scottish Human Rights Commission for the invitation to join you all at this Seminar on Incorporation and Justiciability of Economic, Social and Cultural Rights.

I am very glad to be here for a number of reasons.

First of all, the two interrelated issues of incorporation and justiciability are of paramount interest to the work of the Committee so far as both have a direct impact on the realization of Covenant rights on the ground. Unfortunately advances made in both fields are far from satisfactory, so every opportunity to further pursue the relevance of both requirements at national level is very welcome.

This also a good moment to reiterate the value of the core human rights treaties for the UK, in the Brexit and post-Brexit context.

Last but not least, the Committee welcomed the engagement of the Scottish Human Rights Commission at the time of its last dialogue with the UK in 2015 and the very useful report it provided. Both the background information and the potential questions to the national delegation were very useful and I do hope our Concluding Observations did justice to at least some of the issues raised. The Committee is looking for opportunities to strengthen its ties with National Human Rights Institutions not the least because of its recently instituted follow-up procedure regarding concluding observations that deserve priority attention. The procedure was adopted after the UK presented its 2015 report but it will certainly apply in the next reporting round.

When we think of ESCR it is important that we go back to the human rights vision so beautifully spelt out in the Universal Declaration of Human Rights of which we celebrate the 70th anniversary. This vision is captured in the four freedoms – freedom of speech and expression; freedom to worship in his /I would add, her own way; freedom from fear; and freedom from want, this last freedom widely interpreted as a synthesis of economic and social rights.

At the 1993 II World Conference on Human Rights in Vienna the at the time 171 UN member states unanimously proclaimed that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

In terms of the international human rights discourse the bridge had been crossed but unfortunately the materialisation of this statement did not follow suit. Economic, social and cultural rights are still placed in a subsidiary position to civil and political rights. Perhaps the best example of this unequal status is the lack of incorporation of the Covenant in the domestic legal order of many States that have ratified it.

When States are confronted with this unequal status given to ESCR in relation to CPR and on how this fails to comply with the basic principle of indivisibility and interdependence of all human rights, a common response is that economic, social and cultural rights, while not being considered as fundamental rights, are directive principles of State policy that ensure if not the same, at least a comparable degree of protection as for civil and political rights.

Part of the argument for this hierarchy of rights is that the principles of universality, indivisibility, interdependence and interrelatedness of all human rights do not imply equal implementation and this provides the justification for economic, social and cultural rights to be viewed as effectively “second class rights” – aspirational, and therefore vague, unenforceable and non-justiciable, given their imprecise content, only to be fulfilled “progressively” over time.

The other part of the argument is that the direct applicability of the Covenant rights is incompatible with the doctrine of the supremacy of the parliament. In other words, if these rights were to become the basis for judicial decisions, judges would be entitled to enter the realm of politics which is reserved for parliament.

Just as a footnote it would be fair to add that even States that have incorporated the Covenant do not provide significant examples of case law where it was invoked. One justification offered is that the rights are already protected constitutionally and therefore there is no need to invoke specific Covenant provisions but there may be other factors like lack of knowledge about the Covenant and the misperception that international norms on economic, social and cultural rights are not self-executing.

Fortunately, against the artificial division of human rights into first class rights that ensure the freedoms and second-class rights that are mostly aspirational, there is jurisprudence of many constitutional courts that proves that human rights are universal, indivisible and interdependent and therefore, justiciable. We hope the views of the Committee on individual communications under the Optional Protocol to the ICESCR, building on the decisions of national and regional complaint mechanisms will provide further jurisprudence on the issue. Following its standard procedure, the Committee asked the UK for its position on ratifying the OP but did not get any reassurance that it was even under consideration.

In the 2015 report to the Committee I referred to earlier, the SHRC suggested that we ask the UK delegation to outline the steps the SP had taken to give full legal effect to the ICESCR in domestic law and provide an effective remedy for victims of all violations of economic, social and cultural rights in line with the Committee’s General Comment No. 9.

This is the GC adopted in 1998, on the domestic application of the Covenant. It is important to refer to the date of adoption because 20 years later our experience would advise us to be more prescriptive on incorporation. Given that the means chosen to give effect to Covenant rights in national law are also subject to review as part of the Committee’s examination of State Party’s compliance with its obligations under the Covenant, the Committee is now much more aware of the importance of incorporation.

As stated in the GC, the central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so “by all appropriate means”, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant in line with the fundamental requirements of international human rights law. In other words, Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

Our dialogue with the UK for many years now is an example of a failed conversation. Since there is no specific provision in the ICESCR that requires them to incorporate the Covenant or to accord to it a specific status in the domestic legal order, States parties like the UK hold the view that other methods of implementation of the ICESCR, through appropriate legislation and administrative measures, ensure the fulfilment of their obligations under the Covenant. What experience has proved is that non-incorporation weakens the status and the scope of these rights, on one hand, while, on the other, Covenant rights cannot be applied directly by domestic courts, which restricts access to effective legal remedies for violations. Till now, many economic and social rights have not been incorporated into law and policy in the UK, which means that there is no guarantee of an effective remedy in case of violations.

A more recent example of a failed conversation was with New Zealand, last March. In the New Zealand Bill of Rights, economic, social and cultural rights do not enjoy equal status with civil and political rights; Covenant provisions are still not fully incorporated into the State party’s domestic legal order despite the recommendations made by the Constitutional Advisory Panel in 2013 and the New Zealand Bill of Rights lacks supremacy over other statutes and legislation adversely affecting human rights, despite declarations of inconsistency made by the Human Rights Review Tribunal and the courts under the Human Rights Act. The Committee appreciated the change in the posture of the recently elected Government towards economic, social and cultural rights but regretted the fact the non-acceptance of incorporation remains unchanged, at least for the time being.

An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches depending significantly upon the approach adopted to treaties in general in the domestic legal order. In her very comprehensive paper on Economic, Social and Cultural Rights in Scotland, Katie Boyle has given us an excellent overview of the current protection of ESCR and how they may be better protected in the future. She also explores constitutional approaches to ESC incorporation and constitutional models and ESC rights.

The Committee often refers States to the use of constitutional provisions according priority to international human rights treaties over domestic laws.

This issue has come up more strongly in recent dialogues with States in conflict or post-conflict situations, for example with the Central African Republic where the Committee reiterated that the recognition of economic, social and cultural right can contribute to overcome certain profound causes for the conflict, including unequal treatment between different parts of the country or different population groups or the grabbing of resources by a few. It further added that economic, social and cultural rights have a role to play in the transitional justice system of reparation to victims and guarantees of non-repetition.

Civil and political rights are generally included in peace agreements, but there is scarce mention of economic, social and cultural rights, probably because they are still considered subsidiary to fundamental rights and freedoms, to be fulfilled by policies based exclusively on availability of resources and therefore subject to future economic development and the approval of the International Financial Institutions and donor countries. Given that in some donor countries economic, social and cultural rights are considered as policies or in the best case as benefits but seldom as entitlements that entail State obligations, it is easy to understand why they are not part of peace agreements.

It may be true that constitutional rights primarily set aspirational goals, but it is certainly true that rights that are in the Constitution, or in a Bill of Rights, are much more likely to be further object of framework laws to guarantee universality and even national plans for implementation with in-built accountability mechanisms.

Let me give you just one example. In countries that were under fiscal adjustment programs during the austerity period, one of the first measures to be taken was to cut drastically in social spending with the corresponding negative impact on the enjoyment of economic, social and cultural rights. But countries that had constitutionalized some or all of these rights did have some safeguards in place that protected rights holders from even more long-lasting consequences.

During our dialogue with the UK delegation in 2016, we indicated our assessment that if there was one right particularly subject to erosion in the country, it was the right to social security, that has a recognized impact on the enjoyment of a number of other rights and ultimately on the right to an adequate standard of living.

We recommended that the UK review the entitlement conditions and reverse the cuts in social security benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, and restore the link between the rates of State benefits and the cost of living so as to provide a level of benefits sufficient to ensure an adequate standard of living, including access to health care, adequate housing and food. We also recommended a review in the use of sanctions in relation to social security benefits that need to be used proportionately and should be subject to prompt and independent dispute resolution mechanisms.

The threats to the enjoyment of the right to social security are well documented in the Update Report of the Equality and Human Rights Commission on Great Britain’s implementation on the International Covenant on Economic, Social and Cultural Rights, entitled Progress on Socio-Economic Rights in Great Britain launched in March. In many cases the levels of social security benefits are not sufficient to cover the basic cost of living, which led the European Committee on Social Rights, in January, to find the UK in breach of its obligations under the right to social security, due to the fact that benefit levels are well below the poverty line.

It is very welcome that under the Scottish social security principles social security is considered as a human right essential to the realization of other human rights; that a social security charter will be drafted in broad consultation with people with lived experience of the social security system; and that a Scottish Commission on Social Security will scrutinize legislative proposals and report to Parliament and Ministers on the assessment to the extent to which expectations in the Charter are being fulfilled.

**A final step which could be taken to complete this progressive vision of a rights based system would be the full incorporation of the right to social security through a duty on the government and public implementation bodies to comply with international human rights law.**

As we all know, non-discrimination and equality between men and women are essential cross cutting principles for the enjoyment of human rights. Having ESCR in the Constitution at a national level would also lead States, including the UK, to strengthen their anti-discrimination and equality legal framework and encourage them to enact framework legislation that would provide the overarching legal architecture for a coherent non-discrimination framework, the prohibition of intersectional discrimination and integrated policies to combat the root causes of discrimination.

Whilst equality of opportunity is an area mainly reserved to Westminster it is welcome to see the Scottish Government taking what steps it can within devolved competence to advance the grounds of discrimination through the “Fairer Scotland“ socio-economic duty addressing inequalities of outcome in strategic decisions. This clearly enhances accountability and potentially draws attention to specific dimensions of accessibility, availability, acceptability and quality of goods and services required for the realization of economic, social and cultural rights that are not available on an equal basis for all.

There are 2 other important aspects.

The first is the allocation of maximum available resources for progressive realisation.

The fact that ESCR are not given the status and relevance they deserve in domestic law and policy, but rather remain to be realized by fragmented programs and ad-hoc support measures that do not comply with a human rights-based approach, has obvious consequences on the allocation of resources guaranteed by the national budget, in themselves scarce and subject to negotiation between line ministries at times with conflicting priorities.

Generally speaking, progressive realisation of economic and social rights seems to have come to some kind of a standstill across the board, and again, constitutional recognition of ESCR is a reminder to States of their overarching political and social contract with all those living under their jurisdiction.

The second is the direct relation between the incorporation of the Covenant in the domestic legal order and the adoption of a National Human Rights Action Plan that would help States to operate more strategically to ensure their human rights efforts are better coordinated and human rights progress on the ground is more effectively monitored.

The response by the UK government to the Committee’s question on the adoption of a National Human Rights Action Plan is self-explanatory. There is no plan to establish a plan covering the UK, the British Overseas Territories and the Crown Dependencies. The development and management of such a plan would, in the opinion of the Government, have implications in the context of devolution as well as in the relationship between the UK, the BOTs and the CDs. However, and here comes a different approach, Scotland’s National Action Plan for Human Rights, developed by the Scottish Human Rights Commission and launched in December 2013, reflects a strong commitment to the equal enjoyment of human rights, including economic, social and cultural rights.

The Scottish Government, through its commitment to the implementation of SNAP 2013-2017, has committed to explore the benefits and implications of incorporation of the UK international obligations, including ICESCR in Scotland and the SHRC has used SNAP as a way to review implementation of international human rights treaties in Scotland. According to the existing constitutional framework the Scottish Parliament has the devolved competence to legislate with a view to implementing and observing international legal obligations. It is therefore within the power of the Scottish Parliament to incorporate ICESCR in relation to devolved areas, including education, housing and health and part of social security, for example regarding social care and disability payment assessments, if I understand correctly.

The Scottish Parliament and Government have a golden opportunity to implement the International Covenant on Economic, Social and Cultural Rights (ICESCR) in a way that will ensure consistency between law, policy and practice. I do hope that the renewed Scotland’s National Action Plan on Human Rights will be a positive move in the right direction including by strengthening the implementation of the concluding observations of the UN treaty bodies.

I left the issue of the reform of the Human Rights Act and the introduction of a Bill of Rights to the end, simply to reiterate what has been our position for many years - that any new human rights legislation should be aimed at enhancing the status of human rights, including economic, social and cultural rights in the domestic legal order and provide effective protection for those rights across all jurisdictions.

Effective incorporation of international human rights standards enshrined in the UN core human rights treaties that are universal and interconnected is fundamental for sound, integrated and coherent economic and social policies. States that ratify these treaties do so out of their own free will and are bound by their provisions. They have legal, political and moral responsibilities towards their people, in particular those most in need of protection.

Scotland is in a privileged position to carry out these responsibilities and we do look forward to the next report of the UK to assess how far aspirations have become reality.

Virginia Bras Gomes

21 May 2018