ECONOMIC AND SOCIAL RIGHTS IN SCOTLAND: LESSONS FROM THE PAST; OPTIONS FOR THE FUTURE

A lecture for International Human Rights Day 2014[1]

by

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Introduction

As well as being International Human Rights Day, yesterday was European Lawyers Day. There is, I think, a link between the two in the context of the context of the subject which we are discussing today, since that subject is, on one view, about access to justice. Is it intelligible to acknowledge economic and social rights and at the same time to leave those rights, for practical purposes, unenforceable? If the rights are to be, at least to some degree, enforceable, to what degree, by what means, and in what forum? Ultimately, this can look like a question about the role which lawyers and courts should have. But it is, I think, really a question about whether people should have access to means of vindicating economic and social rights.

My remit is to look at the ways in which human rights instruments have been implemented within our domestic legal order in the past, with the aim of

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providing a basis for thinking about the future implementation and enforcement of economic and social rights in Scotland. I proceed on the basis that the question is not whether we should or should not implement economic and social rights, but is how we should do so. After all, the UK has ratified the International Covenant on Economic and Social Rights[2] and is bound in international law to perform its treaty obligations under the Covenant in good faith[3].

On that view, the question is, ultimately, one of technique – by what mechanism or mechanisms does or should the UK fulfil the obligations which it has undertaken[4]? But it is very far from being a technical question. It is a question which has significant implications for the distribution of powers within the domestic legal order – in effect, for constitutional law.

The existing status of economic and social rights in Scotland

The traditional approach within the United Kingdom has been to pursue the progressive realisation of the rights articulated in the Covenant by taking measures, including legislation and the adoption of policies and programmes, to that end – rather than by incorporating the rights as such into domestic

[2] I take the Covenant as the paradigm instrument dealing with economic and social rights. There are, of course, others, including the ILO Conventions and CEDAW. For detailed commentary on the Covenant, see B Saul, D Kinley and J Mowbray, *The International Covenant on Economic, Social and Cultural Rights,* 2014.

[3] Vienna Convention on the Law of Treaties, Article 26.

[4] I assume that under any constitutional future which may reasonably be contemplated, we will continue to adhere to the dualist theory of international law, under which it forms part of domestic law only if and to the extent that it has been made so by the legislature. Although this theory might be regarded as now being qualified to some extent, as a result of EU law and the incorporation of the Convention, these are not true exceptions to the general principle, since EU law and the Convention in turn depend on legislation for their status in domestic law. As a general proposition, it seems to me that the dualist theory remains sound, on democratic grounds. See generally P Sales and J Clement, *International Law in domestic courts: the developing framework* (2008) 124 LQR 388.

law[5]. But, if we are looking at economic and social rights more broadly, this must already be qualified, within the ambit of EU law, since the Charter of Fundamental Rights and Freedoms itself includes economic and social rights[6]. And provisions of the international Covenant may be referred to in domestic litigation involving EU law or Convention rights insofar as the Court of Justice of the EU or the Strasbourg Court, as the case may be, would rely on such provisions as part of the international law context for the interpretation of the law in that context.

It is worth remembering also that some at least of the rights contained in the European Convention on Human Rights[7] have implications of a social or economic nature[8]. For example, in *Limbuela,* Lord Bingham of Cornhill observed that[9]:

> "A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life."

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[5] On the UK's approach to the International Covenant, see E. Bates, "The United Kingdom and the International Covenant on Economic, Social and Cultural Rights", Ch. 11 of MA Baderin and R McCorquodale, *Economic, Social and Cultural Rights in Action,* 2007.

[6] The Charter derives its force within domestic law from the European Communities Act 1972.

[7] Which has force in domestic law by virtue of the Human Rights Act 1998 and the Scotland Act 1998.

[8] This has been explicitly acknowledged by the Court: *Airey v. Ireland* (1979-80) 2 EHRR 305, para. 26; *N v. United Kingdom* (2008) 47 EHRR 39, para. 44.

[9] *R (Limbuela) v. Secretary of State for the Home Department* [2006] 1 AC 396, para. 7. It has been argued that the facts of *Limbuela* illustrate: (a) that the democratic branches of government may not take economic and social rights as seriously as the might; and (b) that the Courts may provide a constitutional check on such failings even if the case is intensely political and has resource implications: E. Bates, op. cit., pp. 288-293.

It is evident that this is different from a general right to an adequate standard of living, such as is recognised under Article 11 of the ICESC. But Lord Bingham's observation illustrates that the distinction between civil and political rights, as recognised in the European Convention, and economic and social rights, is not a solid, or at least a simple, one.

Lessons from the past

When we consider the lessons which might be drawn from previous approaches to the implementation within the UK of international human rights instruments, it would, I think, be wrong – particularly in the context of economic and social rights - to ignore the traditional UK approach. After all, fundamentally, the realisation of rights to healthcare, to education and to an adequate standard of living must fall on the legislative and executive parts of the state. Economic and social rights depend for their realisation on programmes of legislative and executive action. One model of implementation of the UK's international obligations would be – as hitherto has been the case - to leave it to conscientious action by the legislative and executive arms of the state[10] to establish structures and institutions which respect and promote those rights[11]. Nor is this model necessarily inconsistent with access to

[10] The United Kingdom Parliament may – subject, by convention, to legislative consent from the Scottish Parliament in relation to matters within devolved competence – legislate to implement the UK's international obligations. The Scottish Parliament has power within the limits of legislative competence specified in section 29 of the Scotland Act 1998 to implement international obligations of the United Kingdom (paragraph 7(2) of Schedule 5 to the Scotland Act 1998) – but is not bound to do so: *Friend v. Lord Advocate* 2008 SC (HL) 107, para. 8. The Smith Commission Report states that "The Scottish Parliament can legislate for socio-economic rights in devolved areas": para. 60. This does not seem to add anything to the current state of the law.

[11] The Covenant does not stipulate the specific means by which it is to be implement in the national legal order, and international law does not require its direct incorporation, provided that the means used for its implementation within domestic law produce results which are consistent with the full discharge of the State's obligations: ESCR Committee, General Comment 9, *The domestic application of the Covenant* (1998) para. 5. However, General Comment 9 does state that incorporation is desirable (para. 8); and the ESCR Committee has been

justice: those structures may, themselves, incorporate provisions for adjudication through the tribunal system or otherwise.

Moreover, methods of ensuring Government accountability, which do not involve full incorporation and judicial enforcement of the rights themselves, can be envisaged. The Scottish National Action Plan model – of auditing and monitoring of the implementation of fundamental rights – might well be a more effective approach for securing systemic change than waiting for individual cases to arise. The SNAP Model might well, for aught yet seen, prove to be a truly effective model for achieving the progressive realisation of the rights in question.

But if we wish to go further, our experience within the UK of implementing international human rights discloses different possible approaches.

The first model is full *constitutionalisation*. Under this model, the right in question forms part of the constitutional framework which binds the institutions of the state. We are familiar with this in two contexts. First, the Charter of Fundamental Freedoms, which has constitutional status within the EU and provides a basis upon which legislative and executive acts within the ambit of EU law may be struck down. Secondly, under the Scotland Act 1998, a provision of an Act of the Scottish Parliament is not law insofar as it is incompatible with the European Convention on Human Rights[12]; and we have become very familiar with the way in which the powers of the devolved institutions, both legislative and executive, are constrained by the Convention rights – such that provisions of public general statutes may be reduced (struck down) if they are incompatible with Convention rights[13].

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critical of states party (including the UK) for not incorporating the Covenant rights into domestic law.

[12] Scotland Act 1998, section 29; the powers of the Scottish Government are similarly limited under section 57.

[13] E.g. *Henderson v. HM Advocate* 2011 JC 96; *Cameron v. Cottam* 2013 JC 12, 2013 JC 21; *Salvesen v. Riddell* 2013 SC (UKSC) 236.

The second model is that reflected in the *Human Rights Act.* The Human Rights Act, in fact, contains within it three different models, each of these could, in principle, be utilised separately in relation to any other international instrument. Firstly, there is the strong interpretive obligation which lies on courts and other public authorities to interpret and give effect to legislation in a manner which is compatible with Convention rights. Secondly, section 6 makes it unlawful for any public authority to act incompatibly with Convention rights, and the Act provides access to a range of remedies should a public body act unlawfully in this way. Thirdly, the Courts are empowered to declare that a provision in an Act of the UK Parliament is incompatible with Convention rights, though – by contrast with the model of full constitutionalisation – the Court may not reduce the provision, but must leave it to Parliament to decide whether or not to amend the legislation. In relation to this third element, the substantive question which the Court requires to ask itself is precisely the same as it is under the model of full constitutionalisation; the difference is in the remedial regime[14].

A third model is offered by the Welsh and Scottish legislation dealing with the *UNCRC.* Section 1 of the Rights of Children and Young Persons (Wales) Measure 2011 contains the following provision: "From the beginning of May 2014, the Welsh Ministers must, when exercising any of their functions, have due regard to the UNCRC requirements". Section 2 requires them to make a scheme setting out how they intend to fulfil that obligation. Section 1 of the Children and Young People (Scotland) Act 2014 states: "The Scottish Ministers must – (a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements and (b) if they consider it appropriate to do so, take any of the steps identified by that consideration". Both the Welsh

[14] Under a full constitutionalisation model, the Court may suspend the effect of a finding that a provision in legislation is invalid, in order to allow the legislature time to remedy the position: Scotland Act 1998, section 102; see e.g. *Salvesen v. Riddell, supra.* But ultimately the Court may reduce the offending provision. By contrast, under the Human Rights Act model, the matter is left to Parliament – or, in practice, to the Government, subject to Parliamentary control.

and the Scottish regimes include reporting obligations[15]. The different statutory formulations are, I think, different in their effects. On the analogy of the public sector equality duty, the "due regard" duty incumbent upon the Welsh Ministers requires them to have the regard appropriate, in the particular circumstances, to the relevant requirements of the UNCRC[16]. This should, in principle, empower the Court to decide whether or not the Ministers have had the appropriate level of regard[17]. The requirement in the Scottish Act is framed differently. Even if the Scottish Government identifies steps which would or might secure better or further effect of the UNCRC requirements, they need take those steps only "if they consider it appropriate to do so". This does not seem to me to be a meaningless obligation: the Scottish Government would be in breach of statutory duty if it did not keep the specified matters under consideration; and the reporting obligation, for all its weaknesses, does expose the Government to Parliament scrutiny in relation to the steps which it has taken[18]. But the scope for judicial scrutiny of the way

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[15] Under the Scottish Act, this applies to specified public authorities as well as to Scottish Government: section 2.

[16] Cp *R (Baker) v. Secretary of State for Communitioes and Local Government* [2008] EWCA Cvi 141, para. 31.

[17] Prima facie, one might think that the regard appropriate to an international obligation of the UK would be to implement that obligation. On that view, the sole question would be whether or not the obligation is engaged. But it may be that the intention behind the "due regard" formula is to signal that, provided due regard has been had to the UNCRC requirements, those requirements may be outweighed by other considerations relevant in the circumstances.

[18] It is a significant weakness that the reports which the Scottish Government and public authorities are obliged to produce need disclose only the steps which have been taken; not the steps which were considered and rejected; far less the process of reasoning by which the Scottish Government drew conclusions on these matters. If the Scottish Government is to fulfil the duty incumbent upon it under section 1, it must apply its mind to what the UNCRC requirements are; to whether or not there are any steps which they could take which would or might secure better or further effect in Scotland of those requirements; and to whether or not it is appropriate to take any of those steps. The question of whether the Scottish Government has correctly understood the UNCRC requirements is something which might (if it were to be disclosed) be susceptible to judicial review. However, even if the Government's thinking were to be disclosed, the approach which the Court would take to that question may be open to argument. In some situations, the Court has intervened only if the interpretation offered by the executive was not a tenable one - *R (Corner House Research) v. Director of the Serious Fraud Office* [2009] 1 AC 753; applied in the context of the UNCRC by the

that the Government fulfills its obligations under section 1 of the Act, though perhaps not entirely absent, is – presumably deliberately - limited.

Justiciability

Let me say something about the contention that economic and social rights are not "justiciable"[19]. Some of the rights under the Covenant are, on the face of it, as readily justiciable as rights under the European Convention, which are already part of our domestic law. Article 13(3) of the Covenant, on respect for the liberty of parents to choose for their children schools and to ensure the religious and moral education of their children in accordance with their own convictions covers the same ground as Article 2 of the First Protocol to the European Convention on Human Rights. The provisions of Article 8 of the Covenant on trade union rights overlap with – indeed are more specific than - the requirements of Article 8 of the European Convention on freedom of association, as those requirements have been applied to the freedom to join a trade union. The principle of non-discrimination, articulated in Article 2(2) of the Covenant should be no more complex to apply to economic and social rights than to civil and political rights[20]. But there are other rights, which are not familiar to those of us who have experience of the European Convention – such as the right to work (Article 6), the right to social security (Article 9), the right to an adequate standard of living (Article 11) and the right to health

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Northern Ireland Court of Appeal in *McCallion* [2013] NI 1 – though, in other contexts, the Court has been willing to interpret international treaty obligations for itself: *R v. Secretary of State for the Home Department ex parte Launder* [1997] 1 WLR 839, cp *Al-Sirri v. Secretary of State for the Home Department* [2012] 3 WLR 1263, paras. 36ff.

[19] For a detailed analysis, see J King, *Judging Social Rights,* 2012.

[20] The enactment of a principle of non-discrimination as regards economic and social rights could be significant – it would, at least, mean that the court would no longer have to address whether or not a particular welfare benefit is or is not a "civil right" for the purposes of Article 6 of the Convention, or a "possession" for the purposes of Article 1 of the First Protocol (cp *Ali v. Birmingham City Council* [2010] 2 AC 39) - and would not, on the face of it, raise materially more complex issues than those which can already arise under Article 14 of the European Convention, or, indeed, under the Equality Act 2010.

(Article 12). These are not rights of a sort with which our courts have been used to dealing. They depend to a material extent on choices as to the allocation of resources; indeed, ultimately, not only on the level of economic development of a particular state, but on macro-economic decisions about fiscal and economic policy – as well as choices as to means and methods. Such choices are quintessentially the function of democratically accountable institutions of the state.

It does not follow, though, that the enactment of such rights into domestic law would be meaningless or incapable of raising issues which could be adjudicated upon. Indeed, the experience of countries which have incorporated economic and social rights into their domestic constitutional structures indicates the contrary[21]. The approach of the South African Constitutional Court approach usefully illustrates the point.

(i) In *Government of the Republic of South Africa v. Grootboom*[22] the Court considered Section 26(2) of the Constitution, which provides that "The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of" the right to have access to adequate housing. The Court held: (a) that this Section required the state to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing; (b) that the programme must include reasonable measures to provide relief for people who had no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations; and (c) that the state housing programme in the area of the Cape Metropolitan Council fell short of this requirement.

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[21] For a survey, see International Commission of Jurists, *Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioners Guide,* 2014; and for an analytical discussion of the problem of justiciability, see J. King, *Judging Social Rights,* 2012.

[22] [2000] ZACC 19.

(ii) In *Minister of Health v. Treatment Action Campaign (No. 2)*[23] the Court considered Section 27 of the South African Bill of Rights, which provides:

> "(1) Everyone has the right to have access to –
> (a) health care services (including reproductive health care);
> …
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights."

The Government had devised a programme to address the risk of mother to child transmission of HIV/AIDS, which had identified nevirapine as the drug of choice, but which restricted the availability of that drug in the public sector to research and training healthcare facilities. The Constitutional Court held that the restriction was not reasonable.

(iii) In *Mazibuko v. Johannesburg*[24] the Court considered Section 27(1)(b) of the Constitution, which provides that everyone has the right to have access to sufficient water. The Court held that the City's policy to supply 6 kilolitres of free water per month to every accountholder in the city and to install pre-paid water meters was lawful.

The South African Constitutional Court has recognised that the state is not obliged to go beyond available resources or to achieve a particular right immediately. "All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis"[25]. It has further recognised[26]:

> "… that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries

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[23] [2002] ZACC 15.
[24] [2009] ZACC 28.
[25] *Treatment Action Campaign (No. 2), supra,* para. 35.
[26] Ibid., paras. 37-38.

necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in *Soobramoney*:

> "The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

In *Mazibuko* the Court summarized its approach as follows[27]:

> "… the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in *Treatment Action Campaign No. 2* the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the right is progressively realised."

I do not suggest that these examples from the South African jurisprudence represent the only valid approach to constitutional adjudication of social and economic rights[28], or indeed the one which our courts would or

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[27] Para. 67.

[28] For example, the South African Constitutional Court has rejected the concept that there is a minimum core content to economic and social rights, which must be respected: *Mazibuko,* para. 52. This concept has been applied elsewhere: see e.g. Decision T-760 of 2008 of the Constitutional Court of Colombia, described in

should adopt if we were to incorporate economic and social rights into our law; but it does illustrate that a court, alive to the respective roles of legislature and executive on the one hand, and court on the other, can responsibly adjudicate on social and economic rights. The oft-made assertion that economic and social rights are not "justiciable" suggests that there is a conceptual problem with the judicial enforcement of economic and social rights. In reality, the question is, it seems to me, not a conceptual one at all, but is whether or not, as a matter of constitutional analysis, we consider that it is a good idea to give our courts the sort of jurisdiction which the South African Constitutional Court has. It is a discussion not about concepts but about the distribution of power. Moreover, it is, I think, misleading to see the discussion exclusively or even principally in terms of the power of the court vis-à-vis the democratically accountable legislative and executive parts of the state. Courts only act if litigants bring cases before them. Incorporation gives power to people – it enables them to advance their interests through the courts, to an enforceable judgment, and not merely through the political process. It is, as I said at the outset, about access to justice.

Although the justiciability issue does not seem to me to be a conceptual one, that should not blind us to the challenge which our courts would face in addressing economic and social rights, if we were to implement them in our law. In addressing the European Convention on Human Rights, the Courts have available the extensive jurisprudence of the European Court of Human Rights, which they are, indeed, obliged to take into account[29]. They can therefore usually, with some degree of confidence, ascertain the content and ambit of the right in question in international law, as it has been authoritatively articulated by that Court. And where the Strasbourg

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International Commission of Jurists, supra, n. 21, pp. 56-57. Rather to similar effect, the German Constitutional Court has held that provisions regulating the cash benefits available to asylum seekers were not compatible with the right to a minimum level of existence (*Existenzminimum*), which emerged from the right to human dignity (Article 1.1 GG) and the principle of a social welfare state (Article 20.1 GG): 1 BvL 10/10 (18 July 2012), described in International Commission of Jurists, supra, n. 21, pp. 208-9.

[29] Human Rights Act 1998, section 2.

jurisprudence is undeveloped, our courts can, by application of the *Ullah* principle, decline to rush ahead of the Strasbourg Court. In dealing with the Charter, likewise, our Courts have a ready help in the shape of a preliminary reference to the Court of Justice.

Outside the ambit of EU law, there is no such ready mechanism in relation to economic and social rights. Nor is there an authoritative Court which interprets the Covenant in international law – though there is some help to be obtained from the General Comments of the ESCR Committee; and there is now an Optional Protocol, which will no doubt generate a body of decisions in individual cases over time, albeit not decisions by a Court. It does not seem to me that it is an insuperable objection, if we take the view as a matter of policy that economic and social rights should be incorporated or recognised in our domestic law. If that step is taken, lawyers and courts will learn the necessary techniques – just as they have done with the Convention. Domestic courts have, in recent years, become more used to dealing with a range of international materials than they were in the past – and, indeed, may have to do so when they apply EU law and interpret Convention rights. The same point could have been made about a number of the rights recognised in the UNCRC, and yet we have felt able to adopt at least the measures which I have described to oblige certain public authorities to address the rights in the UNCRC. And there is a body of jurisprudence from other courts considering how to approach adjudication on economic and social rights[30]. But it is as well, if we are to contemplate incorporation, that we recognise that it would involve a leap of faith in the way that incorporation of Convention rights, with the extensive jurisprudence of the Strasbourg Court, did not.

Let me, then, make some observations about the issue of distribution of power, which, in my view, is at the root of the concerns about the incorporation of economic and social rights into domestic law. There are, I think, a number of related points which may be made about the suitability of economic and social rights for adjudication in the courts, but they come down,

[30] See B Saul et al, supra, n 2; International Commission of Jurists, supra, n 21.

ultimately to the view that this would involve an illegitimate or undesirable involvement of the Court in decisions which are properly ones for the democratically accountable arms of the state. I cannot do better than to quote the UK Government[31].

> "A Government would be constrained by budgetary resources in achieving the progressive realisation of these rights; thus a judicial decision that a Government should have made greater progress in one area such as health would amount to a judgment against a Government's policy decision to prioritise investment in another, such as education. This would take decisionmaking on the basic policy agenda and priorities away from an elected Government.
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> Decisions on the best means to realise progressively these rights are essentially policy choices which do not lend themselves to justiciable procedures. Some people may judge that the realisation of these rights requires targeted interventionist policies. Others may judge that the best chances for improvement come from allowing the market and broader economic policies to advance the economic environment within which people can achieve these rights. To illustrate the point it is logical that the right to adequate housing is not the right for everyone to have a house provided by the government. For some people it may mean being provided with shelter when they cannot provide it for themselves. For most people it means the government providing an economic environment in which they can earn sufficient income to be able to afford accommodation. The measure of an individual's right to housing might therefore come down to a test of Governmental economic policy."

Decisions by the courts in the public law field often have potential implications for resource allocation. Decisions on civil and political rights certainly can have such implications. Let me give you two illustrations from my own professional experience. Firstly, in *Napier v. Scottish Ministers*[32], the immediate issue was whether or not the pursuer's Article 3 rights had been infringed by the conditions in which he was held in Barlinnie, which still had a slopping out regime at the time when he was held there on remand. Lord Bonomy's decision that they had been infringed was issued in April 2004. By

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[31] Foreign & Commonwealth Office, *Economic Social and Cultural Rights. Civil and Political Rights. A history and UK progress 2003-4,* quoted in Bates, op. cit., pp. 279-280.

[32] 2005 1 SC 229, on appeal 307.

September 2006, the Scottish Government had eliminated slopping out throughout the prison estate, except at Peterhead[33]. Secondly, in *SK v. Paterson*[34] the Court held that the absence, prior to June 2009, of any provision whereby state-funded legal representation could be made available to an adult parent for the purposes attending a children's hearing if that adult was unable without such representation, to participate effectively at the hearing, was incompatible with Articles 6, 8 and 14 of the Convention. As it happened, the law had been amended prior to the hearing in the case, but if it had not been, the decision would have required the creation of a scheme which could secure that. Article 6 requires, in effect, the establishment of a system of criminal legal aid, but it also requires that in certain circumstances, legal assistance must be made available in civil cases[35].

The potential impact of Convention rights on the freedom of government to prioritise resources was particularly clear in *Napier's* case. By 1994 the Government had declared a target of eliminating slopping out by 1999. However, by the time Mr. Napier was detained in Barlinnie, that had slipped and the Government could not say when that would be achieved. Lord Bonomy found that the Government could have eliminated slopping out by 2001, but had deliberately clawed back £13 million from the prison budget to spend on other priorities in the Justice Department, such as drug enforcement agency, tackling domestic violence and establishing a victim support scheme. In effect, the earlier fulfillment by the Prison Service of its aim of eliminating slopping out would have been at the expense of those other worthwhile aims. It is of the essence of constitutionalised rights – including civil and political rights - that they may constrain the freedom of decision and action of the executive and, indeed, of the legislature.

Equally, notwithstanding *Napier*, I doubt if anyone – certainly any judge being invited to adjudicate – would be under any illusion that the realisation of economic and social rights requires policy choices (including policy choices at

[33] Auditor General's 2005/6 Report on the Scottish Prison Service, para. 9.
[34] 2010 SC 186.
[35] *Airey v. Ireland* (1979-80) 2 EHRR 305.

a very high level between fundamentally different political philosophies of action) and the allocation of budgets and that these are matters for Ministers[36]. Courts are, in my experience, generally acutely conscious of the limitations of their competence, of the democratic legitimacy which attends policymaking by Parliament and by an executive accountable to Parliament, and of the subsidiary and limited role which the Courts may accordingly properly play in checking executive and legislative action. It does not follow that the Courts can or should play no role. We might not wish the Courts to decide which is the best means of securing progressive implementation of economic or social rights; but we might, at the same time, decide that it would be useful to allow them, for example, to adjudicate on whether the government has addressed itself to the question of how best to secure that progressive implementation, and whether or not, in doing so, it has discriminated in a manner incompatible with the Covenant. The question of whether the Courts should be given that role - or any other role in relation to economic and social rights - seems to me, ultimately, to be a political or constitutional question, not a conceptual one.

Prospects for the future

If human rights are indivisible, then can we fail to take economic and social rights seriously? We must not sell short our commitment to civil and political rights, but if we focus only on civil and political rights, do we not run the risk that our discourse becomes detached from the basic concerns of most people – the right to an adequate standard of living, the right to enjoy the highest attainable standard of physical and mental health, the right to education? These rights, after all, reflect commitments which the United Kingdom has chosen to make in international law.

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[36] E.g. *R v. Secretary of State for the Environment Transport and the Regions ex parte Spath Holme Ltd* [2001] 1 WLR 15, 396 per Lord Bingham of Cornhill; *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48, 72 per Lord Woolf.

On no view, does the progressive realisation of economic and social rights depend primarily on litigation – whether brought by individuals, NGOs or human rights organisations. It depends on legislative and executive action – on the effective deployment of resources in a well-organised way to secure these ends. And this in turn requires decisions to be made about ends and means, as well as decisions as to macro-economic policy and about the allocation of resources – which must, if they are to be acceptable, be taken by democratically accountable decisionmakers. And it is important that we do not forget that we live in a constitutional democracy - in which it is one of the functions of our elected legislators to hold the executive account on behalf of their constituents. There is a serious argument that it is in the forum of democratic debate that these decisions should be made, an argument from democracy against the constitutionalisation of rights in this area[37].

So we could, as a society, acknowledge the importance of economic and social rights, and yet take the view that, within our constitutional arrangements, these are obligations of the state which fall to be implemented by the legislature and the executive, acting conscientiously with a view to fulfilling the UK's international obligations. We could take the view that, in our system, domestic adjudication by the courts is not necessary to that end – indeed, that it would run the risk of skewing decisionmaking and of drawing the judiciary into controversial decisions in a manner which might undermine their traditional role[38]. There may be steps which can be taken, short of incorporation, to scrutinise, audit and monitor the actions of government and legislature in implementing economic and social rights through initiatives like the Scottish National Action Plan. And if we wish to state in law the obligations of the executive in relation to economic and social rights, we could do this in the manner which has been done in relation to the UNCRC.

And yet … Even if adjudication on economic and social rights will only play a subsidiary role in the progressive realisation of those rights, should we

[37] Cp T Bingham, *The Rule of Law,* 2010, pp. 167-168.
[38] Cp the arguments advanced against incorporation of the European Convention on Human Rights in McCluskey, *Law, Justice and Democracy,* 1986.

not at least consider the case for such adjudication? The South African Constitutional Court has observed that[39]:

> "Social and economic rights empower citizens to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights".

If, as a society, we consider the progressive realisation of economic and social rights (or, at least, particular economic and social rights) to be amongst the fundamental commitments to which we collectively adhere, is there not a case for that to be reflected in our law – even in our constitutional or basic law? Should we give our own citizens the power to hold their government to account for the manner in which it addresses those commitments? No doubt there will be disagreement on these questions – but it seems to me that, if we take seriously the indivisibility of fundamental rights, this is a debate which we should have.

[39] *Mazibuko, supra,* para. 58.