



# THE RIGHTS REFERENDUM

The future of human rights  
in Scotland

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# 1. INTRODUCTION

Scotland's Referendum on Independence, on 18 September 2014, is a unique and significant event. It offers an important opportunity to debate the aspirations of Scotland's people and politicians, whether as an independent state or part of the United Kingdom.

Such a process cannot take place without considering how these aspirations will affect human rights, and indeed a clear understanding of our human rights and how to protect them.

Amnesty International wants to find out how those who will govern Scotland after the referendum will ensure human rights at home and abroad will be better recognised, understood and enforced, regardless of the outcome of the vote.

Amnesty does not take a position on the outcome of the independence referendum, the merits of a constitution or Bill of Rights, and whether Scotland should apply or be recognised as a member of the United Nations or the European Union.

## What are human rights?

Human rights are the fundamental entitlements and freedoms that we can, and should, expect in our lives. We should, for example, be able to expect to live our lives in freedom, to be free from torture and ill-treatment, and to have access to adequate education, housing and social security.

The United Nations describes human rights as:

*'..rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.'*

These rights are enshrined in the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948. While many human rights are given strength through legislation, they do not exist as a result of legislation; everyone simply has rights by virtue of being human.

Human rights are sometimes split into two categories in human rights treaties:

- Political and civil rights – including the right to life, freedom of religion, freedom of speech and freedom of assembly
- Economic, social and cultural rights – including the right to health, the right to education and the right to an adequate standard of living

These rights are indivisible, interdependent and interrelated. The differentiation remains important, however, in the context of the current Scottish devolution settlement.

## The importance of human rights in Scotland's referendum debate

States – national governments – bear the primary responsibility for making human rights a reality. They must do this in three different ways.

- They must respect, and not violate, people's rights.
- They must protect people's rights and ensure that others do not abuse these rights.
- They must fulfil people's rights, making them a reality in practice.

The implementation of human rights in Scotland is both split and partial. Split, because human rights are included in both UK and Scottish legislation, with reserved and devolved areas of policy falling under different legislation. And partial because the UK has only signed up to seven of the nine international treaties regarded as core by the United Nations. Only one regional treaty has been embedded within UK and Scots law<sup>1</sup>.

Amnesty International believes that, regardless of the outcome of the referendum, everyone living in Scotland should have their full complement of rights recognised. These rights should be understood by all and enforceable by the individuals or institutions tasked with protecting them.

Equally, we believe that Scotland must play its part in ensuring that the human rights of those living in other countries are also recognised, understood and enforceable. This can be achieved directly, for example through direct diplomatic intervention, or indirectly through Scottish businesses operating internationally.

## 2. THE CURRENT STATUS OF HUMAN RIGHTS IN SCOTLAND

### Treaties

The human rights that form the basis of modern treaties and legislation are enshrined within the Universal Declaration on Human Rights. The UK was a member of the United Nations General Assembly that adopted this Declaration in 1948, having also been a member of its drafting committee.

The Declaration itself is not legally binding, but the international treaties that followed are.

### International treaties

The UN identifies nine core international human rights treaties. The UK is a party to seven of these, having signed and ratified the following:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of all forms of Discrimination against Women
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

The UK has chosen not to be a party to the following treaties:

- International Convention for the Protection of All Persons from Enforced Disappearance
- International Convention on the Protection of the rights of All Migrant Workers and Members of Their Families

Each of the nine treaties is overseen by what is known as a ‘treaty body’; a United Nations committee of independent human rights experts. States that are party to a treaty must submit regular reports to this body, which then assesses the state’s compliance with the treaty.

The majority of these treaty bodies will accept complaints from individuals. The exceptions are those overseeing the Convention on the Rights of the Child and Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The UK Government ‘*remains to be convinced of the added practical value to people in the United Kingdom of rights of individual petition to the United Nations*’<sup>2</sup>. It only supports the right for an individual to petition a treaty body in the case of two treaties: the Convention on the Rights of Persons with Disabilities and Convention on the Elimination of Discrimination against Women.

### Regional treaties

The UK is a member of the Council of Europe and a party to the European Convention on Human Rights (ECHR) and the European Social Charter, among others. The Council of Europe also established the European Court of Human Rights in Strasbourg to enable individuals to take action if they felt a state had breached their ECHR-based rights.

The Human Rights Act 1998 embedded the ECHR into UK legislation. This means that individuals can now seek justice in a UK court if they feel that their rights have been infringed. Action can also still be taken in the European Court of Human Rights in Strasbourg if someone believes a violation of an ECHR-based right has occurred.

ECHR rights are also written into the Scotland Act 1998<sup>3</sup>, which established the Scottish Parliament and Scottish Government. As a result, the Scottish Parliament can only pass laws compatible with the human rights provisions contained within the ECHR<sup>4</sup>.

The UK, as a member of the European Union, is required to be a party to the European Convention on Human Rights and is also bound by the Charter of Fundamental Rights of the European Union. This embeds political, civil and economic human rights into the operation of the European Union.

## **International relations**

International relations are an area reserved for the UK Government, with foreign policy being delivered through the Foreign and Commonwealth Office. While the UK Government sets foreign policy, it is agreed that it will engage with the Scottish Government where its interests are relevant. The Scottish Government makes international visits, and receives international delegations, but these are conducted in relation to its devolved areas of responsibility.

The Scottish Government's ability to influence the signing of, or reporting on, international human rights treaties is limited. The UK Government retains the power to sign up to a treaty and any optional protocols related to it.

The UK Government is also responsible for the Universal Periodic Review process, by which it reports on its progress towards fully respecting its human rights obligations. This process also enables it to question or make recommendations in relation to the review of another state's progress. The Scottish Government contributes to this process, but only through the UK Government's responses and not in its own right.

## **Monitoring compliance within the UK**

While international and regional treaties, and the Human Rights Act itself, are areas of policy reserved for the UK Government, human rights themselves are not wholly a reserved issue.

The responsibility for monitoring compliance with human rights obligations in Scotland therefore lies with two bodies; the Equality and Human Rights Commission (EHRC) and the Scottish Human Rights Commission (SHRC).

The EHRC is Great Britain's national human rights institution and, in Scotland, is responsible for human rights relating to reserved policy areas such as immigration, welfare and defence. The SHRC is Scotland's national human rights institution and is responsible for overseeing human rights in devolved areas of legislation such as justice, housing and social care.

### 3. THE FUTURE LEGAL FRAMEWORK FOR HUMAN RIGHTS

#### In the event of Scotland remaining in the United Kingdom

The inclusion of human rights within the Scotland Act, as well as the Human Rights Act, results in an entwined and complicated legal framework. It means that, if Scotland's population votes to remain part of the UK, rights at home and abroad could be enhanced by either the UK or Scottish Government. Only the UK Government could reduce rights arising from the Human Rights Act<sup>5</sup>.

At a UK level, the UK Government could choose to become a party to the two remaining international human rights treaties it has so far failed to sign up to. It could also ratify a number of optional protocols relating to the nine international treaties which enhance the rights contained within them.

The UK Government could decide to give individuals in the UK greater recourse to justice through the individual treaty bodies. For example, it could adopt the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. By doing so it would enable individuals to petition the Committee on Economic, Social and Cultural Rights, the body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights.

Finally, it could also legislate to include more rights within domestic legislation. The Commission on a Bill of Rights, for example, proposed consideration of the benefit of additional rights relating to equality of opportunity and civil and criminal justice<sup>6</sup>.

How easily human rights covering Scotland could be enhanced or downgraded by the UK Government, without the Scottish Government's agreement, is a subject of debate<sup>7</sup>. Since the Human Rights Act covers all of the UK, and some of the rights contained within the Act relate to responsibilities devolved to Scotland, any changes would seem to invoke the Sewel convention. This requires that:

*'The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.'*<sup>8</sup>

If the Sewel convention is invoked, a Legislative Consent Motion would need to be passed by the Scottish Parliament, giving permission for the UK Parliament to legislate on devolved matters. This is not automatically agreed; the Scottish Parliament voted against such a motion relating to social security reform in 2011.

At a Scottish level, like Wales and Northern Ireland, the Scottish Parliament can extend the scope of its international human rights obligations, within its devolved powers, on conventions including the ECHR<sup>9</sup>. Many of the economic, social and cultural rights contained in the international and regional treaties could therefore be included in Scottish legislation.

Wales is the only nation to have used these powers to date, incorporating the Convention on the Rights of a Child into its domestic law in 2011<sup>10</sup>. By doing so it ensured individuals could challenge their government in the Welsh courts if they felt their rights were being infringed.

## In the event of Scotland voting to become independent

In relation to international treaties, it is agreed that an independent Scotland would have to apply to join the United Nations<sup>11</sup>. The UK Government analysis highlights that:

*'Examples of UN treaties to which a new Scottish state would be entitled to succeed as of right would include the International Covenant on Civil and Political Rights, which guarantees basic human rights for all [and] the UN Convention Against Torture.'*<sup>12</sup>

It is also agreed by the UK<sup>13</sup> and Scottish<sup>14</sup> governments that it is likely that the European Convention on Human Rights would continue to apply to Scotland uninterrupted without the need for Scotland to ratify it in its own right. The Scottish Government states that, under the continuity of law principle, the Human Rights Act would remain in force after independence until the Scottish Parliament repealed or amended it<sup>15</sup>.

The outcome of an independent Scotland's negotiations with the European Union would determine whether, and on what timescale, an independent Scotland would be covered by the Charter of Fundamental Rights of the European Union.

In relation to the promotion of human rights internationally, as an independent state, Scotland would be able to sign up to, promote internationally, and incorporate into domestic legislation, any human rights treaties it agreed with.

## 4. ENHANCING HUMAN RIGHTS

Amnesty International does not take a position on the outcome of the independence referendum, the merits of a constitution or Bill of Rights, and whether Scotland should apply or be recognised as a member of the United Nations or the European Union.

Amnesty believes that whoever governs Scotland after the referendum must demonstrate a strong commitment to human rights both at home and abroad.

In particular, we believe they must demonstrate:

1. A willingness to be bound by an international and regional framework of human rights
2. A commitment to make basic rights such as an adequate standard of living, housing, and social security, enforceable
3. A desire to play a strong role in enhancing the recognition of human rights internationally
4. A commitment to use Scotland's economic, as well as political, interests to advance human rights at home and abroad

### HUMAN RIGHTS AT HOME

#### 1. The commitment to human rights

A willingness to be bound by an international and regional framework of human rights

*'The next Conservative manifesto will promise to scrap the Human Rights Act... if leaving the European convention is what it takes to fix our human rights laws, that is what we should do.'*<sup>16</sup>

*'We seek a country with a written constitution protecting not just the liberties for the people but enunciating the rights of the citizen.'*<sup>17</sup>

The Conservative Party, currently the majority party in the UK coalition government, and the SNP, the party in government in Scotland, display markedly different attitudes in public in relation to human rights. It is, however, by no means certain that either government will be under the same leadership beyond the UK Parliamentary elections in 2015 and Scottish Parliamentary elections in 2016. It is the governments that follow these elections that will decide the future of human rights as they affect Scotland.

Amnesty International calls for those who will govern Scotland in the future, whichever party or parties it is constructed from and whatever constitutional form it takes, to publicly embrace the sanctity of human rights. It is the responsibility of government to ensure that the human rights of Scotland's people are legally recognised, understood by all, and easily enforceable.

A government's willingness would be evidenced by:

#### • The use of positive language and messages about human rights

There is no doubt that the public can be sceptical about human rights. Much of this scepticism is a result of opinion either created by, or channelled through, the media.

The Law Society of England and Wales highlights that human rights *'ideals and benefits have been...badly misrepresented by people, some of whom clearly have their own axes to grind, but others of whom really ought to know better, including governments.'*<sup>18</sup>

Governments have a unique opportunity to set a positive tone for any public debate around human rights and they must use this opportunity.

- **The ratification of all international and regional human rights conventions**

Scotland, and the UK, is not a party to two of the nine core international human rights treaties. It is a similar situation for a number of the optional protocols that strengthen these treaties.

International and regional human rights treaties must form the basis of Scotland's human rights framework. We do not accept the 'pick and choose' approach to human rights, where only certain treaties or articles are ratified or made enforceable by their inclusion within domestic legislation or a constitution.

- **Ensuring people understand human rights and that government policies and practices reflect, and are underpinned by, human rights**

Amnesty believes that a 'human rights-based approach' should be adopted to ensure people recognise their rights and that rights are respected. The Scottish Human Rights Commission defines this approach as '*empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights*'.<sup>19</sup>

Amnesty International funds and delivers a strong human rights education programme across the UK. Through this we aim to play our part in ensuring children and young people understand their rights and those of others around the world. Such a programme can only have full effect, however, if it fits within a state-funded and endorsed programme of education for those aged three to eighteen.

In addition, awareness raising is required for those not in formal education. This can be through public awareness raising programmes or by encouraging community involvement and participation in the development of public bodies' policy and practice.

The recognition and enforcement of rights is, however, not solely the responsibility of those who hold the rights. Those responsible for enforcing them, including the police, legal profession, and judiciary, cannot be expected to understand the importance of recognising rights without training. Equally, those responsible for providing public services, including education, housing, and prisons must also understand and be equipped to embed human rights, and demonstrate respect for them, in their work.

- **Developing effective mechanisms to ensure rights are realised**

If individuals are to be able to realise their human rights, they must be able to challenge their government to demonstrate compliance. Equally, a government cannot be committed to recognising rights unless it enables this.

Three approaches can be taken to enabling such challenges. Firstly, a government can sign up to the additional protocols to international and regional treaties which allow individuals to directly petition a treaty body. Secondly, a government can ensure that rights are embedded in domestic legislation, or a constitution, to enable action to be taken to challenge compliance in the state's courts. Sufficient legal aid must be made available for this purpose.

Finally, the national human rights institution or institutions responsible for overseeing human rights must be able to effectively advocate on behalf of individuals. Amnesty believes that those covering Scotland should adhere to the UN's Paris Principles<sup>20</sup>. In particular, we believe such an institution should have a mandate, and the powers necessary to receive, consider and resolve complaints alleging violations of human rights.

## 2. The reality of human rights

A commitment to make basic rights such as an adequate standard of living, housing, and social security, enforceable

*'The [Scottish Human Rights] Commission believes that there is, at present, insufficient legal protection for economic, social and cultural rights in the UK.'*<sup>21</sup>

The focus of UK human rights legislation to date has primarily been on political and civil rights. These include the right to life, freedom of religion, freedom of speech, and freedom of assembly. It is these rights which generally form the basis of the UK's Human Rights Act.

Economic, social and cultural rights are, however, also a part of the Universal Declaration of Human Rights. The international treaty covering them was published in the same year as the treaty covering civil and political rights, and the UK has ratified both.

Most economic, social and cultural rights, such as the right to adequate housing, education, and social security are not included within UK legislation. They are therefore generally not legally enforceable in Scotland or the UK. The only route by which the UK's performance against these rights can be challenged is through the Universal Periodic Review process, which is insufficient.

A government's commitment would be evidenced by:

- **The embedding of rights contained in the International Covenant on Economic, Social and Cultural Rights into legislation covering, for example, housing, health, and social security**

The Welsh Government has demonstrated that economic, social and cultural rights, as included in the Convention on the Rights of the Child, can successfully be incorporated into legislation.

Recognising that governments have widely differing resources, international law allows for the fact that making economic, social and cultural rights a reality can only be achieved progressively over time. However, the duty of governments to respect and protect these rights and to ensure freedom from discrimination is immediate. A lack of resources is no excuse.

Although governments may need time to realise economic, social and cultural rights, this does not mean they can do nothing. They must take steps towards fulfilling them. As an initial step, they must prioritise 'minimum core obligations', the minimum essential levels of each of the rights.

- **Full acceptance of the European Social Charter, as amended**

Like the ECHR, the European Social Charter was developed by the Council of Europe. It, however, includes social and economic rights rather than political and civil ones.

The UK Government ratified the Charter in 1962, with some exclusions. It has not ratified a number of additional protocols which amend and enhance the Charter.

Like the international treaties, appraisal of a state party's performance is performed by monitoring of reports submitted by the state. The UK has opted not to be a party to the process by which its implementation of the Charter can be challenged by UK-based organisations.

## HUMAN RIGHTS ABROAD

### 3. The world of human rights

A desire to play a strong role in enhancing the recognition of human rights internationally

*‘Scotland will vote on whether to become an independent country. If it opts to leave, what remains of Britain will cut a greatly diminished figure on the world stage.’<sup>22</sup>*

*‘It would be crucial for Scotland to pursue its foreign policy goals through the use of soft power if it was to succeed in punching above its weight internationally. Here, Scotland already performs well and if it could improve upon this by, for instance, providing innovative leadership, developing an economic niche or by highlighting its strategic importance, it could carve out a global role.’<sup>23</sup>*

Amnesty International has demonstrated over the past fifty years that shining a light on human rights abuses internationally can prevent them occurring, end them or provide redress for them. As a signatory to the core international human rights treaties, those governing Scotland after the referendum must use their international standing to highlight and address human rights abuses.

A government’s desire would be evidenced by:

- **A willingness to speak out where evidence exists of another state’s serious failure to respect, protect or fulfil human rights regardless of whether this could threaten Scotland’s economic interests**

The issues faced by both the UK and Scottish Governments in their relations with China are a good example of the challenges governments face. China offers exceptional economic opportunities but is also responsible for serious human rights abuses.

Amnesty does not accept human rights being traded away for economic gain. We believe that human rights should form part of any trade negotiation, ensuring that developments in both business and human rights go hand in hand.

- **Demonstrating leadership in the advancement of human rights on the international stage**

Amnesty expects a government to demonstrate leadership in the implementation of human rights at home, and to work with other states to ensure they deliver on their human rights commitments. Action to improve human rights in other states must be an explicit policy objective for Scotland’s future government or governments and not an offshoot of other policy objectives.

- **Providing support to other states, and their activists and non-governmental organisations, who wish to pursue greater human rights through peaceful activism**

Scotland has a wealth of legal and practical knowledge of implementing human rights that could be of significant benefit to other states, their non-governmental organisations, and individual activists. These should be made available, alongside humanitarian and economic aid, to help other countries develop and embed a strong and resilient human rights culture and legal framework.

#### 4. The business of human rights

A commitment to use Scotland's economic, as well as political, interests to advance human rights at home and abroad

*'The Universal Declaration [of Human Rights] states that "all organs of society" have human rights responsibilities. The good news is that a broad global consensus exists on what these responsibilities mean for business.'*<sup>24</sup>

Globalisation has significantly changed the world we live in, with companies that operate internationally gaining unprecedented power and influence in the world economy. Such companies can cause harm by directly abusing human rights, or by colluding with others who violate human rights.

Despite this potential to cause significant harm, there are few effective mechanisms at national or international level to prevent corporate human rights abuses or to hold companies to account. In response to this challenge, in 2011 the UN Human Rights Council adopted the Guiding Principles for Business and Human Rights. These principles aim to ensure business plays its role in the promotion of human rights.

The UN's approach is understandable when a company such as Coca-Cola has a turnover ten times the gross domestic product of Swaziland, in which it has a major production plant<sup>25</sup>. But the principles are not simply about what business does; they require a genuine partnership between state and business with a joint aim of delivering improved human rights.

A government's commitment would be evidenced by:

- **Adopting the 'Protect, Respect and Remedy' Framework**

The Guiding Principles for Business and Human Rights, also known as the Ruggie Principles, are based on three pillars. The first is the duty of a state to protect human rights. The second is the corporate responsibility to respect human rights. The third is the responsibility of the state and corporate body to provide a remedy to those whose rights have been infringed.

Those governing Scotland cannot expect to simply rely on business to implement better human rights. It must play the role of an active partner if it is to realise the potential gains offered by improving the impact of business operations.

- **Encouraging Scottish companies, and those with a significant presence in Scotland, to make respect for human rights an integral component of their business operations**

Scotland has a number of large industries, such as oil, banking, food and drink, many of which have large overseas operations or influence. Considerable support is provided to these by government through trade councils, research and development funding and enhancing international relations, among other policy initiatives.

Amnesty believes that those governing Scotland after the referendum should have, as a specific policy objective, the encouragement of business to commit to the UN principles. Governments should also play a stronger role in reviewing corporate performance on the promotion and protection of human rights.

# ENDNOTES

- 1 The European Convention on Human Rights is incorporated into the Human Rights Act 1998
- 2 UK Government (2012) *International Covenant on Civil and Political Rights: Seventh Periodic Report from the United Kingdom, the British Overseas Territories, the Crown Dependencies*
- 3 s. 29(2)(d) and s. 57(2)
- 4 S. 57(2) states that ‘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’.
- 5 S. 4(1) of the Scotland Act 1998 states that ‘An Act of the Scottish Parliament cannot modify the Human Rights Act 1998’
- 6 Commission on a Bill of Rights (2012) *A UK Bill of Rights? The Choice Before Us*, Volume 1, pp33-34
- 7 C. O’Cinneide ‘Human Rights, Devolution and the Constrained Authority of the Westminster Parliament’ UK Const. L. Blog 4th March 2013
- 8 UK Government, Scottish Ministers, Welsh Ministers, Northern Ireland Executive Committee (2012) *Memorandum of Understanding and Supplementary Agreements*, p8
- 9 para. 7(2) of Schedule 5 of the Scotland Act 1998
- 10 Through the Rights of Children and Young Persons (Wales) Measure 2011
- 11 Scottish Government (2013) *Scotland’s Future* p461 and UK Government (2013) *Scotland analysis: devolution and the implications of Scottish independence* p132
- 12 UK Government (2013) *Scotland analysis: devolution and the implications of Scottish independence*, para 3.28, p53
- 13 UK Government (2013) *Scotland analysis: devolution and the implications of Scottish independence* (Full report including annex and glossary) para 140, p98
- 14 Scottish Government (2013) *Scotland’s Future* p568
- 15 Scottish Government (2013) *Scotland’s Future* p340, para 2
- 16 Theresa May MP, UK Government Home Secretary, speaking at the 2013 Conservative Party conference
- 17 Alex Salmond MSP, First Minister of Scotland, speaking at the 2013 SNP National Conference
- 18 Lucy Scott-Moncrieff, president, The Law Society of England and Wales, speaking at London School of Economics presidential lecture, 22.1.12
- 19 SHRC website: *What is a human rights based approach?*
- 20 Adopted in 1993 by the UN General Assembly, these outline the minimum standards required in relation to independence from the state and for effective functioning
- 21 Scottish Human Rights Commission (2009) *Submission to the United Nations Committee on Economic, Social and Cultural Rights*
- 22 The Economist ‘Turning Inwards’ Nov 9th 2013
- 23 House of Commons Foreign Affairs Committee (2013) *Foreign policy considerations for the UK and Scotland in the event of Scotland becoming an independent country*
- 24 Mary Robinson, writing on the World Economic Forum website
- 25 The Guardian, 18.11.13, *In Swaziland, Coke Holds Sway With the King*



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