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The Great Anglo-Scottish Human Rights Divide

Abstract

There arguably exists something of a great human rights divide stretching across the ninety-six miles of the Anglo-Scottish border from the Solway Firth on the west coast to the town of Lamberton in the east. As Scotland appears to take impressive strides forward in human rights implementation, England seems to lag ever further behind international best practice. But how can two countries so closely linked in central governance display such seemingly divergent attitudes and approaches to human rights? This article seeks to explore this apparent polarisation in more detail and to investigate the factors that might be underlying it. In particular, it questions whether Scotland is more progressive when it comes to human rights because the people are more accepting of human rights as a concept worth upholding, or whether this ostensible national acceptance of human rights is instead clever political posturing on the part of the Scottish Government to paint a picture of a country that differs to such an extent from its southern neighbour that it really ought to be independent.

Key Words: national human rights compliance, Anglo-Scottish comparison, human rights politics

1. Introduction

There arguably exists something of a great human rights divide stretching across the ninety-six miles of the Anglo-Scottish border from the Solway Firth on the

west coast to the town of Lamberton in the east. As Scotland appears to take impressive strides forward in human rights implementation, England seems to lag ever further behind international best practice. But how can two countries so closely linked in central governance display such seemingly divergent attitudes and approaches to human rights? This article seeks to investigate this apparent polarisation in more detail and to explore the factors that might be underlying it. What is it about each of these social and political landscapes that causes such divergence?

Perhaps most notably here, human rights are visibly at the heart of Scottish policy-making. During the SNP's campaign for independence, their stated vision was 'of a Scotland, fit for the 21st century and beyond, which is founded on the fundamental principles of equality and human rights...', and they made the explicit promise to 'safeguard and strengthen Scotland's equality and human rights framework, and maintain our existing strong commitment to the European Convention on Human Rights' (ECHR) (Scottish Government, 2013: 332-333). Whilst the significance of these commitments faded when the SNP's bid for independence was unsuccessful, the next section will show that human rights nevertheless remain central to Scottish political identity, at the heart of policy documents that make a real difference to the lived experiences of people in Scotland.

This political landscape contrasts sharply with that of Scotland's southern neighbour, where the Conservative Party forms the HM Government; a party that has demonstrated antipathy at best, and outright hostility at worst, towards human rights protections in recent years. For example, they proposed in 2012 to repeal

the Human Rights Act 1998 and replace it with a British Bill of Rights, likely to not only undermine Scotland's devolution settlement and the Northern Irish Good Friday Agreement, but also to dilute important human rights protections related to terrorism and the prohibition of torture (Anno, 2015). Whilst this plan was temporarily shelved in the wake of the Brexit referendum, the UK Government initiated an Independent Human Rights Act Review in December 2020, with a report from this review expected shortly. The Conservatives have also previously intimated a desire to withdraw the UK from the ECHR altogether (Commission on a Bill of Rights, 2012; Asthana and Mason, 2016).

This distrust of human rights in England has not been an exclusively partisan issue. Tony Blair's Labour Government also demonstrated a degree of human rights scepticism, through its so-called 'third way' of viewing the rights we enjoy as reflecting the duties we owe (Klug, 2000: 61) and through its hostile response to the controversial ECHR ruling on prisoner voting rights in 2005.¹ Additionally, and as will be explored in Section three, when politicians in England speak about human rights or when such rights feature in the media, it is often in a manner that disparages the whole notion of these as something of a criminal's charter, protecting only those deemed to be society's most unworthy: prisoners, criminals or those claiming on tenuous grounds that they have a right to a family life in the UK (PIRC, Counterpoint and Equally Ours 2016: 16; Ireland, 2018).

The human rights landscapes north and south of the border thus appear to be polarised. This article seeks to explore this in more detail and to investigate the factors that might be underlying it. It questions in particular whether differing approaches to human rights could stem from deeper political and social differences

between the two countries, or whether political posturing and national identity construction play a part in Scotland's framing as a human rights-friendly nation, antithetical to its southern neighbour. With this in mind, the next section offers current examples of key differences in human rights implementation between the two nations, highlighting where Scotland has taken progressive human rights measures in contrast to where England can be seen to be lagging behind international best practice. Section three then considers the possible reasons behind these divergent approaches. It explores whether Scotland is ostensibly more progressive on human rights issues because the people are generally more accepting of human rights as a concept worth upholding, or whether it is instead political posturing on the part of the Scottish Government to paint a picture of a country that differs to such an extent from its southern neighbour that it really ought to be independent.

2. A Scottish Human Rights-Based Approach

It has been observed that 'human rights in Scotland are part of a potent social justice discourse that is largely absent from many equivalent debates in England' (Harrison, 2014), and this is likely to reflect the fact that there has been a concerted effort on the part of policy makers to link human rights to the lived experiences of Scottish people. Human rights are not an abstract, distant concept – or indeed viewed as something benefitting only those unworthy in society – but are relevant in day-to-day decision-making and have a place at the heart of broader public policy debates on issues like health, education and criminal justice. Indeed, in the Scottish Government's Programme for Government for 2021-22, there is an explicit commitment to ensure 'that equality, inclusion and human rights should underpin decision-making and delivery across the work of government and the wider public

sector in Scotland’ (Scottish Government, 2021: 15). A few current examples will serve to demonstrate this human rights-based approach towards law, policy and practice underpinning the work of both the Scottish Government and an increasing number of public bodies north of the border.

Scotland has introduced policies that seek to ensure human rights play a vital role in strategic decisions at the highest levels of devolved government. In 2013, for example, the Scottish Government launched its National Action Plan for Human Rights (SNAP), in keeping with international best practice. Human Rights Action Plans seek to ensure ‘that areas of social policy such as education, health, poverty, and social security are framed through the lens of human rights and that various national policies are in line with human rights-based approaches to development’ (Chalabi, 2018). SNAP, therefore, represented a commitment from a variety of sectors, including government, civil society and public authorities, to apply a human rights based approach within governance and decision-making.

The first phase of SNAP ended in 2017 with some criticism of the level of support, commitment and resources offered by the Scottish Government. Those with lived experiences of human rights were often excluded from SNAP initiatives due to lack of financial support, for example, and Scottish Government staff were often unable to invest sufficient time and resources to SNAP (Ferrie, 2019). Plans are currently being finalised for SNAP 2, with this phase described as ‘a collaborative programme of action that brings together people with lived experiences of human rights issues, civil society organisations, government and public authorities with a shared aim of building a Scotland where everyone’s human rights are fully respected, protected and fulfilled’ (SNAP, 2019: 14). It explicitly seeks to address

the shortcomings of SNAP around delivery, governance and resourcing (Scottish Human Rights Commission, 2020: 57-58).

In addition to SNAP, Nicola Sturgeon announced in January 2018 the establishment of an Advisory Group on Human Rights Leadership with the aim of making recommendations on ‘how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights’ (Donald, 2018). Part of the Advisory Group’s remit was to consider if and how to incorporate the rights included within United Nations treaties into Scottish law and governance, and one of their key proposals was an Act of the Scottish Parliament that would establish a new framework of human rights designed to improve the daily lives of people in Scotland (First Minister’s Advisory Group on Human Rights Leadership, 2018: 7). The recommendations made by the Advisory Group led to the creation in early 2019 of a National Taskforce for Human Rights Leadership with the aim of planning the new Act of the Scottish Parliament that would provide direct legal protection for a range of international human rights. The National Taskforce for Human Rights Leadership Report was published in March 2021, setting out its detailed recommendations and evidence base for establishing a statutory framework for human rights that would ‘bring internationally recognised human rights treaties into domestic law to protect and advance the realisation of human rights for everyone in Scotland’.² A planned consultation on the draft Human Rights Bill is included with the Scottish Government’s Programme for Government for 2021-22 (Scottish Government, 2021: 10).

England, by contrast, has lagged considerably behind Scotland in the development of a National Action Plan for Human Rights, despite this being a requirement in many international documents recognised by the UK Government. For example, as far back as 1993, the World Conference on Human Rights recommended that States draw up national action plans outlining measures for improving the promotion and protection of human rights (UN General Assembly, 1993: Part II, C, para 71). The UN Office of the High Commissioner holds a database of National Human Rights Action Plans, revealing 38 countries to have had such plans in place at some point over the past 25 years (OHCHR). England, Wales and Northern Ireland do not feature in this database, making Scotland the only part of the UK with a recognised National Action Plan for Human Rights in place. Whilst HM Government did publish a National Action Plan for Business and Human Rights in 2013, this was concerned exclusively with UK companies understanding and managing human rights (HM Government, 2013). The UK was strongly encouraged by the UN High Commissioner for Human Rights to develop a national human rights action plan following its Universal Periodic Review in 2017, but no measures have yet been taken to this end (UN High Commissioner for Human Rights, 2017).

Returning to Scotland, perhaps of most significance from a human rights implementation point of view has been the Scottish Government's commitment to incorporating the provisions of the UN Convention on the Rights of the Child (1989) (UNCRC) into domestic law to the maximum extent possible within the devolved powers of the Scottish Parliament. This is in line with international best practice, where domestic incorporation of rights is strongly encouraged to ensure that the necessary legal structures, processes and substantive outcomes for human

rights protection are in place. As a result of this commitment, the UNCRC (Incorporation) (Scotland) Bill was passed unanimously by the Scottish Parliament on 16 March 2021, ensuring that a children’s rights-based approach will be implemented and embedded across governance, policy-making and the carrying out of public duties, and that children, young people and their representatives will be able to enforce their UNCRC rights in court. This built on the existing duty under s 2(1) of the Children and Young People (Scotland) Act 2014 for Scottish Ministers to consider how they might secure better or further effect in Scotland of the UNCRC requirements. Whilst the UK Government mounted a legal challenge to the competency of the UNCRC (Incorporation) (Scotland) Bill on the grounds that the legislation could place obligations on UK Ministers – this has now been heard by the Supreme Court and the judgment is expected soon – the Bill’s unanimous passing through the Scottish Parliament is indicative of a broader move towards ensuring that children’s rights are protected, respected, fulfilled and enforceable. The Bill contains a combination of proactive and reactive measures which, when supported by effective implementation, ‘have the potential to provide for a world-leading model of UNCRC incorporation’ (Together, 2020: 1).

The Welsh Government has also indirectly incorporated the UNCRC through the Rights of Children and Young Persons (Wales) Measure 2011, though has not yet gone as far as direct incorporation. Meanwhile, successive UK Governments have resisted calls from UN treaty bodies to incorporate the UNCRC into English domestic law. The UK has been consistently encouraged, including within the latest concluding observations of the UN Committee on the Rights of the Child in 2016, to bring domestic legislation ‘in line with the Convention in order to ensure that the principles and provisions of the Convention are directly applicable and

justiciable under domestic law’ (Committee on the Rights of the Child, 2016: III, A, para 7(a)). Previous UK Governments have dabbled in deeper engagement with the UNCRC, but have not gone so far as to propose direct incorporation. Under the 2007-2010 Labour Government (and in direct response to the 2008 Concluding Observations of the Committee on the Rights of the Child), the Department for Children, Schools and Families published a report outlining a commitment to working progressively towards implementation of the UNCRC (Department for Children, Schools and Families, 2009). The report has now been consigned to the National Archives, without anything close to a progressive replacement for UNCRC implementation in England.

Whilst space constraints limit the opportunity for consideration of further progressive human rights measures being taken in Scotland, a couple of these merit at least a mention. First, the National Performance Framework – a framework setting out desirable National Outcomes for Scotland – has been aligned with the UN Sustainable Development goals, including the addition of an explicit outcome that Scotland will ‘respect, protect and fulfil human rights and live free from discrimination’ (Scottish Government, undated). And, secondly, in November 2020, the main provisions of the Children (Equal Protection from Assault) (Scotland) Act 2019 came into force, removing the defence of reasonable chastisement for parents and carers and making it unlawful to physically punish a child in any way in Scotland. England, by contrast, still retains defences for reasonable punishment,³ despite the Committee of the Rights of Child’s strongly advising in 2016 that the UK should ‘prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences...’ (Committee on the Rights of the Child, 2016: para 41(a)).⁴

Of course, these disparities are not exclusively the result of a different ideological commitment north of the border. Amongst other things, they are likely to be influenced by the more accessible devolved Parliament and relatively compact political geography of Scotland enabling more effective collaboration between government and civil society organisations, and the fact that the Scottish Government appears to be less sceptical of the role and input of experts in the legislative process. There is also a more important and visible role for the ECHR in Scotland. Scottish Parliament legislation must have an accompanying ECHR or Human Rights Act compatibility statement made by the lead Minister on the Bill and the Presiding Officer, and will be declared invalid if not ECHR compliant. However, the above examples speak to a widening human rights gap between north and south, with measures being taken in Scotland towards constructive human rights implementation and compliance versus apparent human rights stagnation in England.

This point is further reinforced by the Scottish Government's response to Westminster policies that negatively impact upon society's most vulnerable. There are examples of the Scottish Government doing what it can within its devolved powers to counter the damaging consequences of Westminster decisions, including: the introduction of measures to effectively mitigate the detrimental effects of the controversial bedroom tax through the use of discretionary housing payments (Berry, 2014); the immediate extension of free school meals for children during school holidays when a Westminster majority had originally voted against the proposal (Scottish Government, 2020);⁵ and the introduction in February 2021 of the Scottish Child Payment in response to the UK Government's two-child limit

on child tax credit and the corresponding ‘rape clause’ controversy (The Guardian, 2018). With regard to the latter, the Scottish Government explicitly acknowledge that they are countering the UK Government’s approach by ‘putting in place a devolved social security system with dignity and respect at its heart’ (Scottish Government: 2019: 7).

3. Understanding the Anglo-Scottish Human Rights Divide

The previous section has highlighted some clear differences in the human rights landscapes of Scotland and England. This leads naturally on to the question of why this might be the case, and this article explores two possible scenarios. Firstly, is Scotland more progressive when it comes to human rights because people in Scotland are more accepting of human rights as a concept worth upholding? Or is this ostensible national acceptance of human rights rather clever political posturing on the part of the Scottish Government to portray the country as so different from England that it should become an independent nation? Perhaps it is a balance of both of these factors, or something else at play altogether?

3.1 Are People in Scotland Simply More Accepting of Human Rights?

Let us turn first to the idea of people in Scotland generally being more accepting of human rights, and here it is instructive to begin with consideration of how attitudes to human rights differ north and south of the border. In 2009, the Equality and Human Rights Commission published a report on public perceptions of human rights in England and Wales (Kaur-Ballagan, 2009). At this time, two thirds of their respondents felt that human rights were meaningful to them in everyday life, and there was strong support for a law to protect human rights in Britain (2009: 8). However, a significant 80% of respondents agreed that ‘some

people take unfair advantage of human rights’, and 42% felt that ‘the only people who benefit from human rights are those that don’t deserve them’ (2009: 16). Subsequent research carried out by the then Equality and Diversity Forum in 2012 found that 26% of respondents in the UK (excluding for the purposes of this research Northern Ireland) held negative attitudes towards human rights and human rights laws, with 22% holding strongly positive, supportive attitudes (Equally Ours, 2013: 7-10). The remainder of the respondents held conflicting or ambivalent opinions, frequently citing uncertainty around how human rights were relevant to their lives (2013: 8-10).

Research carried out by the Scottish Human Rights Commission (SHRC) in 2018 (somewhat later than the English research) suggests, however, that the picture in Scotland is different. The SHRC found that 42% of those sampled were supportive of human rights, agreeing with positive statements about human rights and disagreeing with negative ones (2018: 6). Whilst 44% of respondents were conflicted or disengaged with human rights (agreeing with both positive and negative statements about human rights, or not holding firm views on such statements), only 13% were opposed to human rights (2018: 6). These figures suggest more positive attitudes to human rights when compared with the prior Equality and Diversity Forum data for the UK.⁶

The front pages of newspapers in the UK have carried notoriously sensationalist headlines such as ‘Human rights farce’ (The Sunday Express, 2006); ‘The danger is we’ve become immune to Human Rights lunacy. It’s vital we stay angry’ (Hastings, 2013); and ‘Human rights is a charter for criminals and parasites our anger is no longer enough’ (Mail on Sunday, 2012). Even our current Prime Minister, Boris

Johnson, has been castigated for speaking in derogatory terms about the criminal justice system being ‘hamstrung’ by ‘lefty human rights lawyers, and other do-gooders’ (Woodcock, 2020). And again, this is not an exclusively partisan trend, with Jack Straw controversially referring to the Human Rights Act as a ‘villain’s charter’ in 2008 (Sparrow, 2008). It is not difficult to understand how this hyperbolised or erroneous discourse around human rights can influence the views of great swathes of the general public.

Much of this anti-human rights rhetoric has centred on the notion that European institutions have no place deciding on issues that ought to be within the remit of the national courts (Struthers, 2017: 172), with Lord Dyson observing in 2011 that criticisms of the European Court of Human Rights (ECtHR) are in all likelihood fuelled by xenophobia and Euro-scepticism (Lord Dyson, 2011: 19). For example, former Justice Secretary, Chris Grayling, claimed in 2013 that the ECtHR has “nothing to offer the UK”, and that European judges were unjustifiably imposing “ever-more-detailed legal requirements on Parliament” (Bowcott, 2013). Other Conservative MPs have similarly maintained that the UK ought to remove itself from the jurisdiction of a supranational quango, with Jon Henley identifying ‘the belief among many Conservatives that loudly defending “British sovereignty” and attacking all things European will not lose them any votes’ (Henley, 2013). The outcome of the Brexit referendum in June 2016 was arguably testament to this, and indeed, it became apparent that the difference between the EU and the Council of Europe was neither well-known nor understood (Fung, 2016). It seems many people assumed that an exit from the EU would automatically result in a curbing of the powers of European judges to intervene in domestic human rights issues (Full Fact, 2016).

But here, attitudes north of the border differ, for unlike England, Scotland voted decisively to remain in the EU. Whilst the overall UK result of the vote was 52% to 48% in favour of leaving, Scotland voted 62% in favour of remaining in the EU, compared with 47% in England. Scotland was also the only Home Nation in which not a single constituency voted in favour of leaving, and the capital city, Edinburgh, had the highest percentage of remain voters at 74.4%. There has also been less animosity in the Scottish media towards the judicial institutions of Europe, perhaps owing to the mixed nature of Scotland's legal system. Because the Scottish system represents elements of both common and civil law, it relies upon adherence to principle rather than precedent, with recognition of the vital role of juristic writers and judges in enunciating these principles (MacQueen, 2012: 46). Cowan et al observe that this is indicative of an openness to comparative perspectives (2019: 6), perhaps in part explaining the lesser degree of animosity towards Europe and European institutions in Scotland (Johnstone, 2019).⁷

3.2 Is it in the Best Interests of the Scottish Government to 'Other' England?

Having presented some evidence in support of the suggestion that there may be a difference in attitudes towards human rights in Scotland and England (see also Ireland, 2018), it becomes interesting to consider the elements that might feed into the construction of a Scottish national identity that is broadly more supportive of human rights. How could a sense of national identity that is more human rights friendly and sympathetic to those in less fortunate positions have been constructed?

The prevailing view in academic scholarship is that of the modernist approach: national identity is a constructed sense of belonging representing ‘shared notions of community that are thought to be distinct from other nations, where markers of identity represent constitutive elements that distinguish one nation from others’ (Versterdal, 2019: 9). It is said to be socially constructed but with a fundamental role for political elites, through their leadership and influence, in the process of shaping national identity (Leith, 2012: 41). In the aftermath of devolution, Tristan Clayton applied Anssi Paasi’s four-stage model of regional identity construction to Scotland, showing the ways in which Scottish consciousness has been established in terms of its history, territory and people (2002: 820). He identified in particular: Scotland’s history and strong sense of territorial cohesion; its symbolic identity which has ‘instilled the Scottish people with a sense of being different, despite three hundred years of Union with England’; its identity framing institutions, in particular its legal and educational systems and the Church of Scotland; and its distinct identity and presence as a unique and separate part of Britain (2002: 820; Passi, 1986). And, according to Andrew Mycock, flowing from this has been the development of a shared set of ‘Scottish values’ based around equality, humanity and decency (2012: 55). Certainly this notion of the Scots as a more compassionate people is a rhetoric that has been employed to good effect by the SNP, with Alex Salmond espousing in 2007 that independence would carve out an identity for Scotland that is based on ‘a peaceful, inclusive, civic nationalism – one born of tolerance and respect for all faiths, colours and creeds’, and the 2019 SNP manifesto proclaiming that independence would allow Scotland ‘to become the open, tolerant, inclusive and democratic nation we are determined to build’ (Mycock, 2012: 54; SNP, 2019).

It seems a rather obvious point to make that the pro-independence SNP is likely to want the people of Scotland to feel an innate sense of difference from their southern neighbours. In recent years, the Scottish Government has arguably further entrenched the notion of Scotland's individuality by making small cosmetic changes that embed the idea of independence: for example, changing the name of the Scottish Executive to the Scottish Government and replacing the Royal Arms with the Saltire in 2007 entrenches the idea of independent Scottish political power; and including the Gaelic language in the logo of the Scottish Parliament emphasises Scotland's unique culture, heritage and linguistic distinctiveness. The SNP have also strongly encouraged the teaching of Scottish studies and pre-union Scottish history within formal education (though have been criticised for permitting the use of school resources that contain inaccurate or misleading information and have been denigrated as 'arrant propaganda' (Sanderson, 2020)). These seemingly innocuous changes nevertheless serve to reinforce the notion that Scotland is *different* to England: it has native languages, its own history and its own political identity. And it simply cannot be disputed that voting patterns in Scotland differ from those in England: for 42 of the past 76 years Scotland has been ruled by UK governments that were rejected at the ballot box by the Scottish people. Whilst Scots may only be 'marginally more left-wing and liberal' (McCrone, 2020) than their English counterparts, the centre of Scotland's electoral gravity is undoubtedly further to the left, and as a rule of thumb, left-wing politics tends to be more supportive of human rights (Dobson et al, 2017: 10-18; SHRC, 2018: 10 and 15).

According to David Campbell, national identity is in many ways developed through images and notions of 'foreignness' (1998: 61-62). The SNP may therefore be engaging in identity construction where the preservation and reproduction of

national identity are constituted through the construction of an ‘external threat’ (Vesterdal, 2019: 10). As recognised by Clayton back in 2002, as a nationalist party committed to independence, the SNP ‘must engage in rhetoric that serves to ‘Other’ Britain in various ways, in order to secure the stability and authenticity of the Scottish community and legitimize the claim to national self-determination’ (2002: 830). This notion of the ‘othering’ of England can be more effectively reinforced through the construction of an image of Scotland that is unquestioningly distinctive; a Scotland that is more progressive and more embracing of human rights. It is unsurprising, therefore, that the political stance of the SNP has been ‘to portray Scottish deprivation as a negative effect of membership of the British Union such that economic problems are seen as being an inevitable outcome of insensitive British policies’ (Clayton, 2002: 828). Mainstreaming human rights within key Scottish Government policy documents arguably becomes an effective means of visibly countering unpopular, and in many cases ostensibly unjust, decisions being made at Westminster.

Indeed, a subtle ‘othering’ of England – combined with a corresponding reinforcement of independence as the most advantageous step for Scottish people – is evident in the Scottish Government’s human rights policy documents. For example, Nicola Sturgeon’s Advisory Group on Human Rights Leadership has noted that ‘from a human rights perspective, a progressive approach to law and policy can be claimed to have been part of the political instinct of those in parliament and government in Scotland throughout the period of devolution’ (First Minister’s Advisory Group on Human Rights Leadership, 2018: 17). One can imagine that the only thing missing from this assertion is the silent opening ‘In contrast to HM Government...’, particularly when the progressive nature of the

proposed Scottish measures is emphasised by a subsequent standalone paragraph stating simply that the framework of rights ‘would certainly constitute leadership within the UK context’ (First Minister’s Advisory Group on Human Rights Leadership, 2018: 17). Nicola Sturgeon also stressed in 2017 that ‘the Scottish Government is committed to standing up for human rights, particularly in the face of risks created by Brexit and the UK Government’s proposals to repeal the Human Rights Act’ (First Minister’s Advisory Group on Human Rights Leadership, undated), and her Advisory Group on Human Rights later emphasised that the need for an Act of the Scottish Parliament establishing a new framework of human rights is greater than ever because:

Brexit poses a clear risk of regression in terms of human rights. Now is the time to do all that can be done, within the limitations of devolution, to prevent such regression, to keep pace with progressive developments in the EU and to continue to provide leadership (First Minister’s Advisory Group on Human Rights Leadership, 2018: 17).

These statements contain clear criticism of the UK Government’s policies conflicting with Scotland’s political and social ethos and threatening its values. To utilise in a different context the ‘them’ and ‘us’ binary that is often employed to suggest that Western societies uphold human rights and non-Western societies fail to do so (Krappman, 2006: 61), there are parallels between the human rights-friendly image promoted by the Scottish Government versus the ostensible antipathy displayed towards human rights by those in power at Westminster.

And this, in turn, leads on to a further compelling reason for the Scottish Government to actively engage with and uphold human rights, and to distance itself from questionable human rights decisions being made at Westminster. If Scotland is seen to be complying with international human rights obligations, it has the opportunity to utilise this soft power to validate itself as a key player in international relations (Nye, 2004). This would represent a positive step towards becoming a successful independent nation with a seat at the table on its own merits. Whilst, of course, not the only reason for Scotland to respect and uphold human rights, this outcome is likely to be appealing to a party with an pro-independence agenda. Indeed, Nicola Sturgeon has stressed that ‘Scotland has a well-earned reputation as a leader in human rights, including economic, social and environmental rights’ (Scottish Government, 2017), and her Advisory Group on Human Rights Leadership explicitly stated that their proposed new framework of human rights ‘will enable Scotland to be a responsible global citizen and to be judged positively against international standards’ (First Minister’s Advisory Group on Human Rights Leadership, 2018: 8).

In an article discussing Norwegian identity construction in the context of human rights, Knut Vesterdal notes that it may not actually be in a state’s interest to promote human rights, leading as it may to challenges to state authorities and institutions (2019: 11). He observes that states may therefore be embracing human rights somewhat hypocritically, with the expectation that there will be international benefits of doing so (2019: 11). In the context of Scotland and England, this reward is perhaps less likely to be exclusively international in nature, and more likely to relate to the SNP carving out an identity for Scotland as a responsible, unique country with the potential to become a successful independent nation. This

is not to say that the Scottish Government does not actively respect and uphold international human rights norms with the intention of building a more tolerant, peaceful and democratic society, but it is likely to be embracing human rights both as a tool for building a more just society *and* as an objective of foreign policy (Vesterdal, 2019: 12; Baehr and Castermans-Holleman, 2004).

Concluding Remarks

Through various measures, including those offered as examples in Section two, Scotland has carved out an image for itself as a responsible, just, tolerant and human rights-friendly nation. And through direct action, such the unanimous passing of the UNCRC (Incorporation) (Scotland) Bill, it is honing this positive image by practising what it preaches. It is easy for governments to simply state in relevant reports and policy documents that they are taking steps towards greater human rights protection. Indeed, the UK Government does this regularly, but much of the rhetoric is around human rights as a set of normative values rather than as a political tool for changing domestic law and empowering individuals to challenge rights violations.⁸ As Vesterdal notes, ‘human rights are obviously rooted in values, but are at the same time something different; rights claims can be asserted in both national and international courts of justice, whereas values cannot’ (2019: 15). The Scottish Government has demonstrated its willingness to take these further steps, demanded of international bodies, of translating human rights obligations into domestic law or enacting legislation to give effect to normative human rights principles. The UK Government, by contrast, relies rather more heavily on talk of respecting and upholding human rights, but with little by way of visible action on incorporation or implementation of international human rights treaties and obligations.

It can be argued that Scotland must fight to remain a progressive human rights-friendly nation when laws that impact upon human rights and many decisions about pay, tax and pensions, all take place at Westminster. Scotland's metaphorical hands appear to be tied by a central Government that differs in its outlook and political agenda. It could also be argued, however, that this makes it easier for the Scottish Government to posture on human rights matters in those areas where it has scope, safe in the knowledge that potentially unpopular decisions impacting on human rights in areas such as fiscal policy lie beyond their political remit. Nevertheless, by mitigating the detrimental outcomes of questionable decisions taken by the UK Government, such as the Bedroom Tax discussed above, the Scottish Government not only reverses the harmful effects of certain Westminster policies, but also further hones its own image as a government that genuinely cares about social justice, human rights, and society's most vulnerable.

Whilst initiatives such as SNAP have not necessarily been as effective as originally intended, in part due to under-funding by the Scottish Government, its launch at least demonstrated a government taking active steps towards putting human rights at the heart of policy-making and practice. And in the 2019 evaluation of SNAP, it is acknowledged that 'growing support from the First Minister and the Scottish Parliament generally for Human Rights has been notable in recent years' (Ferrie, 2019: 61). The realisation of measures, such as national action plans for human rights, is harder to achieve than the commitment is to make, but Scotland is taking those initial steps, attempting to navigate through the complicated maze of human rights compliance and implementation. This all seems a far cry from the human rights position south of the border. Having a national action plan for human rights

is not only considered to be international good practice, but is an obligation in many of the international human rights documents adopted or signed up to by the UK Government.

To return to our opening questions from Section three, therefore, is Scotland more progressive when it comes to human rights because Scottish citizens are more accepting of human rights as a concept worth upholding? Or is this ostensible national acceptance of human rights rather clever political posturing on the part of the Scottish Government to paint a picture of a country that differs to such an extent from its southern neighbour that it really ought to be independent? Perhaps the answer lies somewhere in the middle. There does appear to be a genuine and pressing concern at government level in Scotland to tackle injustice and inequality through targeted policy measures. And whilst this is, of course, too reductive to represent the full picture, it certainly appears to be the case that the SNP can mainstream human rights at the highest levels of devolved government in Scotland without the backlash that may follow if the UK Government pursued the same course. The Scottish human rights landscape is different to England because Scotland as a country is different, both in the left positioning of its devolved Government and in its desire to tackle human rights issues. But there is likely to be another element at play here. Scotland is governed by a political party with a pro-independence stance. When the Scottish Government prioritises human rights issues, or reverses dubious human rights decisions made by Westminster, it offers the SNP the opportunity to argue that if Scotland had free rein over all political matters, then these decisions would not be made in the first place.

References

- Anno, C. (2015) Should the Human Rights Act 1998 be repealed in favour of a 'British Bill of Rights'? <https://www.lepetitjuriste.fr/should-the-human-rights-act-1998-be-repealed-in-favour-of-a-british-bill-of-rights/> [Accessed 21 January 2021]
- Asthana, A. and Mason, R. (2016). UK must leave European Convention on Human Rights, says Theresa May. *The Guardian*, 25 April 2016.
- Baehr, P. R. & Castermans-Holleman, M. (2004). *The Role of Human Rights in Foreign Policy*. Basingstoke: Palgrave Macmillan.
- Berry, K. (2014). *SPICe briefing: the "Bedroom Tax"*. The Scottish Parliament. https://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_14-67.pdf. [Accessed 7 January 2021]
- Bowcott, O. (2013) European courts have nothing to offer UK, says justice secretary. *The Guardian*, 18 December 2013.
- Campbell, D. (1998) *Writing Security: United States Foreign Policy and the Politics of Identity*. Minneapolis: University of Minnesota Press.
- Chalabi, A. (2018). Added values of national human rights action planning for the UK in the age of Brexit. *UK Constitutional Law Association*. <https://ukconstitutionallaw.org/2018/04/30/azadeh-chalabi-added-values-of-national-human-rights-action-planning-for-the-uk-in-the-age-of-brexit/> [Accessed 7 January 2021]
- Clayton, T. (2002). 'Politics and nationalism in Scotland: a Clydeside case study of identity construction' 21 *Political Geography* 813-843.
- Commission on a Bill of Rights (2012). *A UK Bill of Rights? The choice before us*. (volume 1).
- Committee on the Rights of the Child (2016). *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*. (CRC/C/GBR/CO/5)
- Cowan, S., Kennedy, C. and Munro, V. (2019). *Scottish Feminist Judgments: (Re)Creating Law from the Outside In*. England: Hart
- Department for Children, Schools & Families (2009). *Working together, achieving more*. <https://webarchive.nationalarchives.gov.uk/20130405145058/https://www.education.gov.uk/publications/eOrderingDownload/01084-2009BKT-EN.pdf>

[Accessed 7 January 2021]

Department for Children, Schools and Families (2009). *UNCRC: Priorities for action*. https://dera.ioe.ac.uk/10541/7/01099-2009BKT-EN_Redacted.pdf

[Accessed 7 January 2021]

Dobson, J., Lloyd, F. and Shorthouse, R. (2017). *Individual identity: understanding how conservatives think about human rights and discrimination*. Bright Blue.

https://brightblue.org.uk/wp-content/uploads/2018/01/Individual_Identity.pdf

[Accessed 7 January 2021]

Donald, A. (2018). Written evidence of Dr Alice Donald to the Joint Committee on Human rights (AET0050)

[http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedoc](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/enforcing-human-)

[ument/human-rights-committee/enforcing-human-](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/enforcing-human-)

[rights/written/83682.html#_ftn56](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/enforcing-human-) [Accessed 7 January 2021]

Equally Ours (2013). *Telling the story of everyone's rights, every day*.

<https://www.disabilityrightsuk.org/sites/default/files/pdf/TelltheStory.pdf>

[Accessed 7 January 2021]

Ferrie, J. (2019). *Evaluation of Scotland's National Action Plan for Human Rights (SNAP) 2013-2017*.

First Minister's Advisory Group on Human Rights Leadership (2018)

Recommendations for a new human rights framework to improve people's lives

<https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> [Accessed 7 January 2021]

First Minister's Advisory Group on Human Rights Leadership (undated)

<https://humanrightsladership.scot> [Accessed 7 January 2021]

Full Fact (2015). The debate over human rights law. <https://fullfact.org/law/debate-over-human-rights-law/> [Accessed 7 January 2021]

Fung, B. (2016). The British are frantically Googling what the E.U. is, hours after voting to leave it. *The Washington Post*, 24 June 2016

<https://www.washingtonpost.com/news/the-switch/wp/2016/06/24/the-british-are-frantically-googling-what-the-eu-is-hours-after-voting-to-leave-it/>

[Accessed 7 January 2021]

The Guardian (2018). The Guardian view on the tax credit 'rape clause': a disturbing part of a greater wrong. *The Guardian*, 18 April 2018

<https://www.theguardian.com/commentisfree/2018/apr/18/the-guardian-view-on-the-tax-credit-rape-clause-a-disturbing-part-of-a-greater-wrong> [Accessed 26 January 2021]

Harrison, J. (2014). An interview with Alan Miller: the upstream dream. *Lacuna Magazine*, June 17 2014 <https://lacuna.org.uk/openlacuna/an-interview-with-alan-miller-2/> [Accessed 7 January 2021]

Hastings, M. (2013). The danger is we've become immune to human rights lunacy. It's vital we stay angry. *The Daily Mail*, 9 July 2013 <http://www.dailymail.co.uk/debate/article-2359048/The-danger-weve-immune-Human-Rights-lunacy-Its-vital-stay-angry-says-MAX-HASTINGS.html> [Accessed 7 January 2021]

Henley, J. (2013). Why is the European court of human rights hated by the UK right? *The Guardian*, 22 December 2013 <http://www.theguardian.com/law/2013/dec/22/britain-european-court-human-rights> [Accessed 7 January 2021]

Hind, S. (2020). Paedo fails in 'human rights' court bid to stop child protection rules limiting his freedom. *Daily Record*, 10 July 2020 <https://www.dailyrecord.co.uk/news/scottish-news/paedo-fails-human-rights-bid-22331517> [Accessed 7 January 2021]

HM Government (2013). *Good business: implementing the UN Guiding Principles on Business and Human Rights*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf [Accessed 7 January 2021]

Ireland, R. (2018). Here's what the public really thinks about human rights. *Each Other*, 4 Jun 2018 <https://eachother.org.uk/public-human-rights/> [Accessed 7 January 2021]

Johnstone, L. (2019). Scotland and Brexit: 'People are embarrassed over what their friends from the EU have to go through'. *Euronews*, 30 September 2019 <https://www.euronews.com/2019/09/27/scotland-and-brex-it-people-are-embarrassed-over-what-their-friends-from-the-eu-have-to-go> [Accessed 7 January 2021]

Kaur-Ballagan, K., Castell, S., Brough, K. and Friemert, H., (2009). Public perceptions of human rights. Equality and Human Rights Commission.

- Klug, F. (2000). *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*. England: Penguin Books.
- Krappman, L. (2006). The rights of the child as a challenge to human rights education. 5(1) *Journal of Social Science Education* 60-71.
- Leith, M.S. (2012). The view from above: Scottish national identity as an elite concept. 14(1) *National Identities* 39-51
- MacQueen, H.L. (2012) Two toms and an ideology for Scots Law: TB Smith and Lord Cooper of Culross in Zimmermann, R. and Reid, K. (2012) *A History of Private Law in Scotland: Introduction and Property*. Oxford: Oxford University Press
- Mail on Sunday Comment (2012). Human rights is a charter for criminals and parasites our anger is no longer enough. *The Daily Mail*, 15 July 2012), <http://www.dailymail.co.uk/debate/article-2173666/Human-rights-charter-criminals-parasites-anger-longer-enough.html> [Accessed 7 January 2021]
- McCall, C. (2020). Build human rights museum in Greenock to explain Scotland's slavery links, says SNP MSP. *Daily Record*, 15 June 2020 <https://www.dailyrecord.co.uk/news/politics/build-human-rights-museum-greenock-22196130> [Accessed 7 January 2021]
- McCrone, D. (2020). Who do you say you are? The politics of national identity. *Centre on Constitutional Change*, 26 August 2020), <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/who-do-you-say-you-are-politics-national-identity> [Accessed 14 September 2021]
- Mycock, A. (2012). SNP, identity and citizenship: Re-imagining state and nation. 14(1) *National Identities* 53-69.
- Nye, J. S. (2004). *Soft Power: The Means to Success in World Politics*. New York: Public Affairs.
- Office of the High Commissioner for Human Rights. National plans of action for the promotion and protection of human rights. <https://www.ohchr.org/en/issues/plansactions/pages/plansofactionindex.aspx> [Accessed 7 January 2021]
- Paasi, A. (1986). The institutionalization of regions: A theoretical framework for understanding the emergence of regions and the constitution of regional identity. 164 *Fennia* 105–146.
- PIRC, Counterpoint & Equally Ours (2016). Building bridges: connecting with values to reframe and build support for human rights)

<https://counterpoint.uk.com/wp-content/uploads/2018/04/Building-Bridges.pdf> [Accessed 7 January 2021]

Sanderson, D. (2020). SNP quango promoting ‘dangerous propaganda’ in schools with warped version of Scottish history. *The Telegraph*, 9 December 2020
<https://www.telegraph.co.uk/politics/2020/12/09/snp-quango-promoting-dangerous-propaganda-schools-warped-version/> [Accessed 7 January 2021]

Scottish Government (2020). Funding for those who need it most
<https://www.gov.scot/news/funding-for-those-who-need-it-most/> [Accessed 8 November 2020]

Scottish Government (2021). A fairer, greener Scotland: Programme for Government 2021-22.

Scottish Government (2019). Scottish Government Position Paper. Scottish Child Payment.

Scottish Government (2017). 2017-18 Programme for Government’
<https://news.gov.scot/speeches-and-briefings/2017-18-programme-for-government> [Accessed 8 November 2020]

Scottish Government (2013). Scotland’s Future: your guide to an independent Scotland.

Scottish Government (undated). <https://nationalperformance.gov.scot/what-it> [Accessed 25 January 2021]

Scottish Human Rights Commission (2018). Building a human rights culture in Scotland: insights from audience research.
https://www.scottishhumanrights.com/media/1754/building_a_human_rights_culture_scotland.pdf [Accessed 7 January 2021]

Scottish Human Rights Commission (2020). Developing Scotland’s second National Action Plan for Human Rights.

SNAP 2: Proposal for Scotland’s Second National Action Plan for Human Rights (September 2019).

SNP (2019). Stronger for Scotland: 2019 Manifesto. https://s3-eu-west-2.amazonaws.com/www.snp.org/uploads/2019/11/11_27-SNP-Manifesto-2019-for-download.pdf [Accessed 7 January 2021]

Sparrow, A. (2008). Jack Straw plans to ‘rebalance’ Human Rights Act. *The Guardian*, 8 December 2008

<https://www.theguardian.com/politics/2008/dec/08/human-rights-act-straw>

[Accessed 7 January 2021]

Struthers, A. (2017). Debunking the “Criminals’ Charter”: Education as an antidote to human rights sensationalism. 2 *European Human Rights Law Review* 169-179

The Sunday Express (2006). Human rights farce. *The Sunday Express*, 7 June 2006 <http://www.express.co.uk/news/uk/859/Human-rights-farce> [Accessed 7 January 2021]

Together (2020). UNCRC (Incorporation) (Scotland) Bill.

https://www.togetherscotland.org.uk/media/1735/crc_ehric_response_161020_final.pdf [Accessed 7 January 2021]

UN General Assembly (1993) *Vienna Declaration and Programme of Action* (A/CONF.157/23).

UN High Commissioner for Human Rights (2007). Letter from UN High Commissioner for Human Rights to Boris Johnson.

<https://lib.ohchr.org/HRBodies/UPR/Documents/Session27/GB/UKHCLetter.pdf> [Accessed 7 January 2021]

Vesterdal, K. (2019). Championing human rights close to home and far away: human rights education in the light of national identity construction and foreign policy in Norway. 2(1) *Human Rights Education Review* 5-24.

Woodcock, A. (2020). Conservative conference: Boris Johnson’s attach on ‘lefty human rights lawyers’ branded shocking by Bar Council. *The Independent*, 6

October 2020 <https://www.independent.co.uk/news/uk/politics/boris-johnson-priti-patel-human-rights-lawyers-b838216.html> [Accessed 7 January 2021]

¹ *Hirst v UK (No.2)*, No. 74025/01 [GC], 6.10.2005; & *Greens and MT v UK* Nos. 60041/08 and 60054/08, 23.11.2010. Scotland now allows prisoners serving sentences of less than 12 months to vote in Scottish Parliamentary and local elections: Representation of the People Act 1983, s3(1A). The UK changed the law to allow those on temporary licence to vote and ensured that prisoners given custodial sentences are made aware that they will lose their right to vote.

² Scottish Government, National Taskforce for Human Rights Leadership website: <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>; National Taskforce for Human Rights Leadership, National Taskforce for Human Rights Leadership Report (March 2021).

³ Children Act 2004, s58.

⁴ The UK (excluding Scotland and Wales) is in the minority in Europe in not outlawing corporal punishment in the home - France, Belgium and the Czech Republic are the only EU member states to have neither laws against corporal punishment, nor commitments to this end.

⁵ The UK Government subsequently made a U-turn on the issue in light of significant criticism and a campaign by Premier League footballer, Marcus Rashford.

⁶ Similar divergences can be observed regarding attitudes towards other social justice issues, including refugees and asylum seekers (Survation (2019). New poll of scots highlights positive attitudes towards refugees. <https://www.survation.com/new-poll-of-scots-highlights-positive-attitudes-towards-refugees/> [Accessed 19 January 2021] and Tent Foundation (2016). Public perceptions of the refugee crisis: cumulative report November 2015-2016. New York: Tent Foundation.

⁷ Attitudes to Europe in Scotland have seemingly created a new line of division in the debate about Scottish independence, with 2018 data showing that Eurosceptics are less likely than Europhiles to support independence: Phillips, D., J. Curtice, M. Phillips & J. Perry (eds), British Social Attitudes: The 35th Report (2018, London, The National Centre for Social Research) at https://www.bsa.natcen.ac.uk/media/39220/bsa_35_scotland.pdf.

⁸ This has historically been the case with the UNCRC, where documents have stressed concepts such as ‘awareness raising’ and ‘collaboration’ over incorporation or implementation: see e.g. Department for Children, Schools & Families, ‘Working Together, Achieving More’ (2009) at <https://webarchive.nationalarchives.gov.uk/20130405145058/https://www.education.gov.uk/publications/eOrderingDownload/01084-2009BKT-EN.pdf>; & Department for Children, Schools and Families, ‘UNCRC: Priorities for Action’ (2009) at https://dera.ioe.ac.uk/10541/7/01099-2009BKT-EN_Redacted.pdf. A new Human Rights Tracker, created by the Equality and Human Rights Commission, seeks to highlight where the UK is falling short on its human rights commitments, irrespective of what is stated in relevant policy documents: <https://humanrightstracker.com/en/>.