OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 23 May 2023

Session 6

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Tuesday 23 May 2023

CONTENTS

Col.

DECISION ON TAKING BUSINESS IN PRIVATE 1
MINIMUM CORE OBLIGATIONS 2

EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
13th Meeting 2023, Session 6

CONVENER

*Kaukab Stewart (Glasgow Kelvin) (SNP)

DEPUTY CONVENER

Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Karen Adam (Banffshire and Buchan Coast) (SNP)
*Pam Gosal (West Scotland) (Con)
*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Paul O'Kane (West Scotland) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Professor Katie Boyle (University of Stirling)
Professor Alan Miller (University of Strathclyde)
Dr Elaine Webster (University of Strathclyde)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 23 May 2023

[The Convener opened the meeting at 09:47]

Decision on Taking Business in Private

The Convener (Kaukab Stewart): Welcome to the 13th meeting in 2023 of the Equalities, Human Rights and Civil Justice Committee. There are no apologies.

Our first agenda item is to decide whether to consider evidence in private under agenda item 3. Do we agree to do that?

Members *indicated agreement.*

Minimum Core Obligations

09:47

The Convener: The second item on our agenda is to take evidence on minimum core obligations with a focus on recommendations from the national task force for human rights leadership. I welcome to the meeting Professor Katie Boyle, chair of international human rights law, University of Stirling; Alan Miller, professor of practice in human rights law from the University of Strathclyde and also co-chair of the national task force for human rights leadership; and Dr Elaine Webster, reader in law, also from the University of Strathclyde. You are all very welcome.

We will ask you a few questions as we go on, but I first invite Professor Katie Boyle to make a few opening remarks.

Professor Katie Boyle (University of Stirling): As an opening remark, I commend the committee for its undertaking this work and thank it for hearing evidence from us. I am thrilled and delighted to finally have the opportunity to talk to the committee, and I thank it for its patience in that regard.

I thought that it might be helpful to make a few points at the outset. The first point is a caveat. When we discuss minimum core obligations, they cannot be understood in isolation from the broader duty to progressively realise economic, social and cultural rights that is contained in article 2(1) of the International Covenant on Economic, Social and Cultural Rights. MCOs are just one component of that, and all the evidence that I provide is therefore with the caveat that they should be understood on that wider basis.

The second point is that both universal and relative minimum core obligations can apply, and apply concurrently. The United Nations bodies tell us that how to implement the minimum core obligation is, in effect, at the discretion of the state, with very clear guidelines on how to do so. However, that means that both relative and absolute standards can apply, which I would class as a hybrid approach.

The third thing to say is that other countries already use the concept of a social minimum, although they do not always call it a "minimum core". They often use dignity as a threshold and we already use that as a threshold in the United Kingdom, where it is evident in jurisprudence across the UK and specifically in Scotland. Scottish courts are already accustomed to using that concept with regard to the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

Finally, the easiest way to reflect on such obligations is often to think about them from the perspective of the rights holder, thinking about how they experience violations and what that means in practice. My evidence will very much come from the perspective of the rights holder and will reflect on how they experience a violation and how that could be addressed in practice.

Professor Alan Miller (University of Strathclyde): I thank the committee for its patience. I know that you have had a long wait to hear from us, but we are here now and I look forward to engaging with you.

I will make a few comments, which I hope will frame what we can provide for you. I very much understand and respect your choice of the minimum core obligations, but I also understand that you have heard a lot about that from a lot of other witnesses, particularly in comprehensive evidence from the Scottish Human Rights Commission, so I am a little concerned that I may not have much more of use to add. You will be the judge of that.

As the convener said, I was the co-chair of the national task force for human rights leadership. To give some context, what the task force said—which was half of one of the 30 recommendations about minimum core obligations—was that there should be a public participatory process in order to determine those minimum core obligations. That was intended to ensure that individuals' lived experience and their dignity would be at the front and centre of our understanding of where that minimum level should rest. People are the experts on the cumulative impact that housing, education, social security, employment income or health have on their dignity in life. We were very clear that there should be a public participatory process, not some technical or managerial process alone.

We recognise that this is a cross-cutting issue. As we saw during the Covid pandemic, women are very often in the most precarious forms of employment and are often carers. It is important to hear from people themselves in order to understand the gender dimension.

As I said, this was half of recommendation 13 of 30. The other half of recommendation 13, as Katie Boyle said, was about the need to couple an understanding of MCOs with the duty of progressive realisation. That idea of continuous improvement and of raising the bar for MCOs—rather than having it resting on the floor—is very appropriate to a developed country such as Scotland in the 21st century.

Secondly, I think that we all understand that there will soon be a public consultation paper. We expect that a bill will be introduced to the Parliament and I look forward to engaging with you in that context, if you are interested, to understand how the consultation paper and the entirety of the draft bill align with all the task force recommendations.

Finally, it was clear to the task force—it has become ever more clear since we wrote the report just over two years ago—and it has also been my experience that the value of the bill will be made or broken by how effectively it is implemented. Uppermost in that is the bill being accompanied by practical guidance and capacity building on a human rights-based approach in order to enable its effective implementation. That was reinforced by the recent publication of Scotland's second national action plan for human rights—SNAP 2—which may be on your radar.

I am currently leading work with the UN on the development of a human rights-based approach—HRBA—toolkit for all UN country teams that is about the practical nuts and bolts of understanding the issue, particularly for public authorities, who will hopefully have a duty to develop implementation plans on how they will give effect to not only the minimum core obligations but progressive realisation.

Anyway, that is enough from me; I hope that I can contribute something useful, but I just put that doubt out there at the outset.

Dr Elaine Webster (University of Strathclyde): Good morning, everyone—I am delighted to be here. I echo what my colleagues Professor Boyle and Professor Miller said about the duty of progressive realisation and the minimum core obligations within that, and about the importance of capacity building. The prospect of the legislation is exciting in that we could have participation that could then lead to, I hope, a very sustainable piece of legislation. It is helpful for us to think long term about how we set the foundations for a better human rights framework in Scotland.

My specific expertise is around the principle of respect for human dignity and the role that that plays in human rights law. I contributed a paper on that to the academic advisory panel for the national task force on human rights leadership. The principle of respect for dignity is relevant in a number of ways to what you are interested in, including for thinking about minimum essential levels of rights and corresponding minimum court obligations.

The national task force recommended that dignity should be included explicitly as a key value underpinning the legislation. Dignity is an idea that really captures the point of what we are doing; it captures the purpose of human rights protection in law. It is symbolically very significant from the international human rights perspective and is in

line with that, but it is also practically useful to give prominence to the idea of dignity.

In my briefing paper for the academic advisory panel, I noted the potential for the idea to be used to help support a sense of public ownership over the new legislation, and I have since followed that up with a small pilot project to explore that a bit further. Dignity is relevant for understanding the minimum essential levels of a right: we look at a right in relation to a dignity-based standard that allows people to live a life in dignity or to live a dignified life. It is therefore relevant for participation.

The participatory process is a really exciting step in all these discussions, especially if it will also include public authorities. I am interested in that because I also research how different people and different roles engage with human rights law.

At the heart of a lot of what we are talking about is what the rights mean, and that has to be a fundamental first question that we ask ourselves. We have a real opportunity to build a broader understanding of human rights law.

I look forward to the discussion.

The Convener: Dr Webster, you talked about the participatory process, and I would like to start off by discussing that a little bit further and drilling into it. It would be interesting to hear how you think the participatory process should be approached. I listened carefully to Professor Miller on the cross-cutting issues, including putting lived experience at the heart of all this. I come to you first, Professor Miller, and then I will bring in your colleagues.

Professor Miller: As I said, I have worked in the UN human rights system for many years. Since the end of my term of office as chair of the Scottish Human Rights Commission, that is where I have largely spent my time. I have therefore been looking back at Scotland and contextualising where Scotland is in global terms on its human rights journey.

10:00

Sometimes, when you are in the midst of things in a country, you cannot see the wood for the trees and appreciate the assets and strengths that you have in comparison with many other countries around the world. One of Scotland's big assets, which has really come to the fore in the past five to 10 years, is the space for public participation in the formulation of laws, policies and practice. That is certainly what the task force mobilised. Our recommendations were based on wide participation that very much included those with lived experience. That is why I hope that the recommendations will be closely looked at by those drafting the human rights bill.

We have an opportunity for Scotland to demonstrate global leadership on how to go about defining the minimum core obligations, using the space of public participation. That means being innovative and ensuring that the participation is meaningful and can actually influence outcomes, rather than being tokenistic. We have been learning lessons that can ensure that that is the case. We should never forget the purpose of public participation—it is not just to be seen to do the politically correct thing or the thing that it is nice to say that you have done, or to tick a box; it is to truly get under the skin of the issue on which you are trying to make progress.

The only way to ensure that you look honestly at what progress is needed, so that you can then measure it, is by basing the approach on the lived experience of people who are suffering a denial of human rights or an inadequacy of human rights protection. They are best placed to tell us what progress we are making with our best intentions. We need to involve people with lived experience across different aspects of life, in combination with public authorities and experts who can provide technical information about existing standards and adequacy, which can be part of the evidence base. First and foremost, however, it is about Scotland taking the opportunity to demonstrate leadership and build on the asset that we have, which is the space that is denied to people in many other countries.

The Convener: Dr Webster, do you have any ideas or thoughts about including the people whom Professor Miller referred to? They are often the most disenfranchised and furthest from communication systems, and so are difficult to reach. What have other countries done that we could learn from to ensure that those voices are at the heart of the participatory process?

Dr Webster: There are of course lots of examples of participation in other countries. What we are doing here in building understanding of people's experience to inform the implementation of human rights law is really innovative—it is fair to say that it is world leading. Normally, when we look at the interpretation of rights and what they mean for people, that often happens in a piecemeal way, often through traditional interpretation, when it is too late to prevent rights violations.

There is probably not a blueprint for what we are doing, but I have certainly been involved in lots of discussions with civil society and to an extent with public authorities on the human rights framework as it is developing in Scotland, and I know that there is a huge amount of innovation, creativity and expertise. We are in unknown territory, but we have all the tools, resources and expertise that we need to do this. I reiterate how important the

process could be for implementation. The more people who understand the way that human rights law works and why it matters to them—whether that is from the perspective of lived experience or their professional role—and the more comprehensive their understanding is, the better the position that we will be in to achieve effective implementation now and in future. It is about building capacity at the same time as gaining insights from lived experience. It is a crucial part of the process that we hope to see.

The Convener: Professor Boyle, what do you think are the challenges in the participatory process? For example, might there be areas of contention around certain rights? We do not need to go into those rights because my colleagues will explore them further later. I am thinking about areas such as health, housing and education, and what is realistically achievable.

Professor Boyle: That is an important point. The aim of a participatory process is not just to reach a consensus on what a right means. There is always likely to be disagreement about the meaning and content of rights and different contexts from different groups of people. The purpose of the participatory approach that the national task force has recommended is to ensure that the voices of those with lived experience are given the level of expertise that they deserve, just like any other group would normally be in the devising of a new programme. It will be difficult to realise that in practice because, as my colleagues have said, it is certainly a novel and innovative approach, although it is not the first time that participatory approaches have been used.

Participation is an ethos that is at the heart of the international human rights framework and, from the perspective of thinking about it as an ethos, consensus building is an important part of it. However, when consensus is not reached, for example in deliberation on the context of rights, normally processes and systems would be in place to help to resolve that. When a system such as a multi-institutional framework, which is the framework that is being proposed by the First Minister's advisory group and the national task force, allows for deliberation between different expert communities to try to reach consensus, ultimately those bodies will take responsibility for giving meaning and content to rights in different settings. For example, if Parliament introduces a new piece of legislation following the passing of a human rights bill, part of that process will mean discussing the meaning and content of rights in secondary legislation, for example. That is a contribution to an on-going deliberation and conversation.

The participatory ethos requires that people with lived experience have a seat at that table and are included in the consensus building and on-going conversation, although not in a way that is like a consultation framework. Their inclusion has to be meaningful, inclusive and equal, which means taking into account things such as intersectional barriers. Some people will simply not be part of the system. They might not have engaged with civil society groups that are already in that conversation in some respects.

There is therefore a lot of work to be done to ensure that the model is inclusive. Scotland is leading in that respect. The Scottish Human Rights Commission has already set up expert advisory groups that include people with lived experience to better understand what they say is needed from economic, social and cultural rights. If you look at it from the perspective of the rights holder, research shows that people will be able to tell you what they need and when a violation occurs, and they will be able to explain the nature of how that happens in practice. Our legal system and the framework for economic, social and cultural rights in the UK and Scotland is not well equipped for that, but we have the tools to change and fix the system.

One of the big things that people often say is that the issues that they face are systemic and clustered, so they do not just face one issue but many at the same time. They will often be experiencing other problems such as living in poverty or they will have intersectional problems to deal with. They might be facing multiple barriers. There will be not only clustered but systemic issues that are faced by not just one individual; many people will be facing the same problem.

In that context, our system needs to respond better in a collective sense to provide collective justice and structural responses to those sorts of issues. The participatory model is a way of ensuring that we engage from the outset to better understand what problems people face, what violations look like and how we might better fix them earlier, rather than waiting for a court case, for example, to look at it.

The Convener: That is very helpful.

A lot of people, including people with lived experience, might not have a concept of what dignity is. If they have lived without dignity, their expectations—if they have any at all—are going to be different. How would the participatory process ensure that people with lived experience understand what dignity is and live with dignity? Who monitors that? Dr Webster, I think that that question is for you.

Dr Webster: Over many years, I have worked with different groups to look at dignity. Student nurses have been a really interesting group to work with, for example. There are remarkable

similarities in how people understand dignity. That also relates to the small pilot project that I mentioned earlier—which I did subsequently to the paper for the national task force—in which I explored whether engaging with the idea of dignity could help to support the growth of our human rights culture in Scotland. I spoke to people working in civil society about their perspectives—for themselves but also for the people whom they worked with in the community.

Dignity is an idea that people get—they understand it. It is something that is recognised more in its absence than in its achievements, and that is reflected across a vast body of academic literature, in philosophical analysis but also in social science studies with regard to how dignity is experienced. However, it is very much intuitively felt, and its real power comes from the fact that it is something that people get. People with lived experience will say that they know what dignity means—what dignified treatment would look like. In essence, it is about relationships and relationships with people who provide services.

There is an important opportunity here to recognise what people are saying about their experiences of what it means to have their dignity violated, sometimes daily. What is useful here is that we would ask these questions as part of understanding how human rights law can respond to those challenges. The process will always have an anchor in international human rights law and in the meaning and role that dignity plays in that context.

I very much see that as part of the conversation that would happen in a participatory process. We need to hear what people say. As I said earlier, there are remarkable similarities in the kinds of ideas and things that people talk about when they are asked about dignity. At the same time, it would be an opportunity to share understandings that come from international human rights law and to really understand how human rights law tries to respond to dignity violations in different ways through different mechanisms. Different human rights respond to different facets of dignity, but all human rights are grounded with the aim of protecting the dignity of human persons.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I will go back to the conversation around the participatory process and engaging with civil society. We heard from witnesses that people feel marginalised in that process. That came through very strongly from people with learning disabilities, disabled people and other groups. What you are talking about sounds great, but how, in reality, does the process work so that we bring everybody along with us in it?

Professor Miller: That is a challenge; it is not an easy thing to do. I will give you some personal examples. Yesterday, I was in a community cafe in Dundee for people affected by substance use, because I have been asked by the Government to lead and chair a national collaborative for people affected by substance use as part of the national mission on drugs.

I went to where they were—I did not ask them to come to where I was—and I asked them what progress would look like in their lives and how it could be brought about. It was a whole-day conversation. What came out of that conversation is the same as what came out through the experience that I gained through working in many countries around the world—particularly Africa.

Two things struck me about what you have to aim to get through the public participatory process. What I was told yesterday is the same as what I have been told in many other countries: dignity is not contained only within yourself. Therefore, a person needs to have a social security level of payment that is enough, or certain housing standards that are enough to realise dignity. Dignity is realised through the ability to interact with others and participate in a community with fellow human beings in the neighbourhood. Dignity is bigger than some technical accountancy-type thing that says, “What is the adequate level of income or of housing?” There is a human, universal need to interact with others.

10:15

On the topic of drugs, in Dundee—and it is the same in Glasgow and in other places—the demand from those who are so-called hard to reach is: “See me for who I am. I am not a patient, a victim or someone who is looking for charity or a handout.” That is the same thing that would be heard in Africa and in different parts of the world. People say, “Before you see me as a whole, see how I have come to this place in life and what the factors are that have led me to turn to substance use as a means of escaping the realities and the lack of dignity that I have had. Don’t make decisions on my behalf. I have the right to participate in decision making.”

The bill is so important because it will bring in, for the first time, the right to the highest attainable standard of physical and mental health, and it will change the culture. An example of the current culture is that people who are affected by substance use have a self-stigma that reflects the stigma that society has. That means that their own dignity is diminished, so they do not go to support services or demand what they need to have their path towards recovery; instead, they stay away and suffer from addiction.

Dignity is about interaction with others, seeing people for who they are and where they have come from in life, and understanding why they are at the point that they are at. Therefore, we need to know what progress should look like, what role a person has in that and what agency they have in determining the progress that will work for them. You might think that it is a difficult, abstract, academic thing, but dignity is real. It is in community cafes in Dundee, and it is in South Africa, Botswana and other countries that I have worked in.

Karen Adam (Banffshire and Buchan Coast) (SNP): Good morning, panel. The meeting has been absolutely fascinating, and I appreciate what Professor Miller said, because we need to get to the core of the disconnection and the feeling of disenfranchisement. What exactly are the obligations, and what would they look like in practice? My questions centre around that issue.

Professor Boyle: As I mentioned, minimum core obligations cannot be understood in isolation. They have to be read in conjunction with the duty to progressively achieve. The International Covenant on Economic, Social and Cultural Rights, like much legislation, whether international or domestic, does not give a full elaboration on what "duties" or "obligations" mean, so subsequent interpretation is needed to help us better understand them.

The covenant is from 1966, and it was in 1986, as part of the Limburg process, that the introduction of the concept of minimum core obligations came about. The Committee on Economic, Social and Cultural Rights, which was responsible for the interpretation of economic, social and cultural rights, produced a general comment to explain that it was the raison d'être of the treaty and the human rights framework that there should be a minimum below which no one should fall. Regardless of what you call that, most people tend to agree with that idea, and they often use the concept of dignity to describe it.

As I mentioned, countries all over the world engage with the principle and threshold in different ways. Minimum core obligations should be read as part of the broader progressive realisation duty to take steps to realise economic, social and cultural rights with the maximum available resources; to avoid regressive measures; to ensure that substantive equality is part of that framework; and to ensure that, when things go wrong, there is an effective remedy. There is a whole integral piece of machinery that works together.

With regard to how minimum core obligations might operate in practice, it is necessary to look at different sources to understand that. For example, the general comments provide guidance. There is a general comment on social security, which talks about the minimum core obligations in relation to social security, and there is a general comment on health, which talks about the minimum core obligations in relation to health. Other treaty bodies reference those minimum core obligations. Although the Committee on Economic, Social and Cultural Rights is responsible for explaining the interpretation of the International Covenant on Economic, Social and Cultural Rights, the Committee on the Rights of the Child will explain how minimum core obligations relate to children's rights. For example, it has made it very clear that measures that are regressive for children's rights are not acceptable, even in times of economic crisis, and that there is a minimum core content to those rights.

The Committee on the Rights of Persons with Disabilities has elaborated on what the concept of minimum core obligations means in relation to people with disabilities engaging in work and employment. It has explained that, in practice, that means ensuring, for example, that there is no segregation in work practices, that people have equal access to employment opportunities and training, and that substantive equality is included as part of that.

We can see in case law how other countries interpret minimum core obligations. I will give a brief example. In Germany, human dignity is used as a value, but there are absolute and relative thresholds. There was a case there in which it was said that the level of social security fell below a social minimum, which violated human dignity, and that the processes that the state undertook to reach the threshold were insufficient. Therefore, both thresholds are now applied in that context.

Another example is from South Africa, during Covid—although it was not specifically the minimum core concept that was used. There was a national programme under which children had access to free school meals—this is a familiar story to us—which the state stopped during Covid, when the schools closed. The South African constitution protects the right to food, nutrition and children's rights. Those rights are unqualified—they are absolute in nature. The court looked at the withdrawal of free school meals and said, "That's a regressive measure, which you cannot justify." It decided to issue a remedy for all the children affected, all of whom it said should receive access to free school meals. It also said that it wanted the state to produce a report to explain how it had implemented that. The realisation in practice of the minimum core concept meant that 9 million children who had not been getting access to nutrition and food got it.

That is in stark contrast to the situation in the UK, where a similar story unfolded and we did not have legislation to rely on to afford protection in

that respect. The minimum core obligations represent a different way of working.

Karen Adam: What you have said about what the minimum core obligations look like in practice brings me back to what Professor Miller said about physical and mental health potentially being one of the core obligations. In the context of substance misuse, for example, what would such a core obligation look like if it was implemented?

Professor Miller: We will find out. We do not know whether minimum core obligations are being met in Scotland. We would assume that, in the 21st century, in a developed country that is relatively rich in comparison with the rest of the world, it would be the default position that the minimum core obligations would be there and that we could focus on progressive realisation quite quickly thereafter.

I think that scrutiny is overdue of whether we have been assuming things rather than looking for assurance that, in fact, minimum core obligations are being met. That might not be as easy as we would want it to be, because there will not be—I am confident of this—sufficient data across many sectors to enable us to understand what the reality is. It is important that we speak to people who are living in real conditions in order to understand from them where we are, qualitatively speaking, because, quantitatively speaking, we might not have the data. I think that that process will shine a light on the assumption that all of us might be making that the minimum core obligations are being met, albeit that we would be entitled to think that they should be being met, given the resources that the country has.

As for what it will look like in practice, I go back to the example that you gave of substance use. I was involved in a fascinating piece of work in which I learned so much about the victims and survivors of historical child abuse, and I think that we are going to have a very similar journey in trying to address drug deaths.

It is a matter of empowerment. The survivors of historical child abuse felt complicit in the guilt associated with what had happened to them, so they held themselves back from demanding their dignity and access to justice in whatever form was appropriate to each individual. It is the same with substance use; there is a self-stigma or an acceptance of society's saying to them, "You are less deserving than the rest of us, so you are at the back of the queue—if you're even in the queue."

When, at the end of a process of about three years of working with survivors of child abuse, a cabinet secretary who was at our first meeting with the survivors, at which we were trying to begin the process of their empowering themselves and demanding their rights under international human rights law, came back to sign off the action plan that had been agreed by the survivors, the religious institutions and the local authorities, he came up to me and said, "Alan, I don't know what's been going on, but I can see the difference this human rights-based approach—which, I have to admit, I've been quite sceptical about over the years—has made. These are the same people—I recognise their faces—but they're not the same. They're looking at me straight in the eye, their shoulders are back and they're expecting me to agree to respect their rights and sign off a whole programme of measures to enable access to justice for them."

It is all about dignity—I come back to that. Those people in that room had empowered themselves; you could sense it, see it and touch it. They were human beings who were being seen for what had happened to them, for where they were in life now and for what their future needed to look like, and therefore, the responsibility was on the rest of us to organise a society that recognised and fulfilled that.

The core obligations might be the floor, but I suspect that we do not have enough of a floor yet and, although overdue, we are for the first time going to try to identify that. However, we are not going to stop there: the progressive realisation of these rights must happen in countries as relatively wealthy as the UK and Scotland.

Karen Adam: Thank you for that. Perhaps I can ask Dr Webster the next question. In light of what we have heard and your own experience, do you think that the core obligations should be universal or relative to each individual?

Dr Webster: There are different ways of thinking about the obligations, but it is helpful if we think, first, about the minimum essential levels of such rights and then about the obligations as our response to secure them. The minimum essential level for each individual will be something that we have to understand as part of the participatory process, because it is only by hearing from as many as people as possible that we can understand where to set it.

In international terms, there is a universal minimum that we can talk about, because the idea of human dignity is seen as being universal. Dignity is a really powerful concept; it contains enough content and intuitive understanding to ensure that we get what it is but it also contains enough flexibility and room to allow people to inject their own ways of seeing the world. As a concept, it is universal but flexible, too. It is a complex thing; after all, it is all about understanding how we as humans live in our societies and how we want to be recognised and relate to others.

If we are thinking about minimum essential levels, it will be necessary to engage in the participatory process with the idea of a dignified life and what that might look like. That is part of what we want to understand.

10:30

There are different ways to do that, but one option would be to come to that process with a working definition of what a "dignified life" is understood to mean from an international human rights law perspective, then to engage with people on the subject of particular rights. We would be asking people what aspects of housing, or of participation in cultural life, they think are needed to meet the threshold of being able to live a dignified life.

The minimum essential levels are the minimum; we are talking about very basic things. We in Scotland have an opportunity to be a bit more ambitious in what we regard as the basic floor, but we are still talking about very basic things. It is likely that there will be a lot of similarity, because this is about basic experiences.

Professor Boyle: Your question is extremely important and is one that lawyers, judges and different countries in the international community are all grappling with. It is important that you have correctly identified the issue. We have an opportunity to step back from that and to decide what approach should be taken.

For example, some academics will argue that there is a danger in trying to apply a relative threshold, because we should already progressively realise rights. They might use a concept such as human dignity and say that there must be a bottom layer that is absolute, universal and survival-led and should apply across the globe. However, others will argue that, because different countries are at different stages and have different prevailing circumstances, that is simply not sufficient in a country that can demonstrate the ability to go further in ensuring a universal minimum within its own particular circumstances.

There is an opportunity to reflect on adopting both approaches. An absolute minimum threshold would be one in which human dignity is used as a concept to ensure that no one falls below that. We already use that type of threshold in jurisprudence. For example, the Napier case in Scotland was about applying article 3 of the ECHR, and it was considered that prisoners who were being made to slop out were subject to inhumane and degrading treatment. That was a way of looking at whether there was a breach of their dignity.

For economic, social and cultural rights, we would apply that threshold at a slightly higher level. If there is a breach, a duty bearer might be able to respond by saying, "Actually, we've taken these steps to apply a relative threshold—we have all the data." As Alan Miller said, you need disaggregated data to be able to understand how different groups experience a particular right. The duty bearer might say, "We've undertaken these steps, this is our minimum threshold and we can justify our approach." That would be a relative threshold.

Alternatively, there might be circumstances in which there has been an absence of thought or of the opportunity to apply a minimum. In that case, there might be a need for some sort of adjudicator—whether that is a complaints mechanism, an ombudsman, a tribunal or a court—to say that the minimum has not been reached. That might happen if disaggregated data has not been taken into account and one group in a community simply does not have access to basic food, shelter, sanitation or water.

Unbelievably, that happens in our country today. The process that was undertaken when Alan Miller was chair of the Scottish Human Rights Commission revealed major gaps and obvious minimum core violations for particular groups that simply did not have access to things such as heating, water, sanitation and housing. For example, some people in the Scottish Gypsy Traveller community were being accommodated in circumstances where those basic essentials were not available. That was known to the people who were living that experience, but we would not have known about it had we not gone through the data gathering process.

Both thresholds can be applied simultaneously, if that is the approach that is decided on, and you can reflect on the different remedies that respond to that. For example, a more basic level will require much stronger intervention from an adjudication body to ensure that dignity is restored, whereas a relative approach might allow an adjudication body to respond by asking, "Have you really thought through the process? Do you have the data? If not, go back and rethink that." There are different ways of responding.

Pam Gosal (West Scotland) (Con): Good morning. I thank the witnesses for your statements so far, and for all the information that you have provided.

You may know that decisions that are taken in local authorities are heavily influenced by Scottish Government budgets. In that respect, if the local authority was considered to be in breach of any minimum core obligations but it simply had to make the cuts as a result of the Scottish Government's ring fencing of funding, who would be responsible for the breach? Given that local authorities will inevitably have different spending priorities, how will that be allocated between

national and local government? I ask Professor Miller that question first.

Professor Miller: That is a good, very searching question. As we said, we will find out, through the public participatory process and minimum core obligations, the answers to a lot of these questions as we go forward.

Over the years, I have certainly found that the situation is much as you point out. There are multiple duty bearers. Therefore, when someone raises a challenge that their minimum core obligations are, in their view, not being met, we quite often find that it is not just one public authority that might well be held accountable for that.

One of the benefits of the incorporation of treaties, however, is that the primary duty bearer in a country is the state. Essentially, the state is made up of the central Government and a whole range of public authorities, but ultimately it is the state at the highest level that has the responsibility as the primary duty bearer. It has the duty, therefore, with regard to economic and social rights, to ensure that the maximum available resources are used for the minimum core obligations and their progressive realisation.

There is an opportunity, through incorporating those treaties into our law, to simplify what can, for a small country, be a very complicated landscape with regard to who has the duty to do what to whom, and in relation to which other public authorities.

When I was doing the task force work, a number of public authorities told me that they would welcome—in housing, say—clearer lines of accountability. The same applies when we talk with front-line providers. Again, I go back to substance use; I am immersed in that work, because it is so urgent. When we talk to front-line providers in local authorities or in alcohol and drug partnerships, or in the national health service, their first reaction is sometimes to say, "Are you blaming me for the lack of minimum core obligations? I know I'm the front-line provider, but I've got limitations; I can't pull strings and levers to remedy the situation."

However, when they understand that the effect of human rights law being brought into Scotland in the way that it is envisaged that the bill will do means that the accountability will be going up the food chain, and that questions will be asked at a higher level about the use of available resources and the priorities and budgetary decision-making processes, the response is different. I have found that they tend to say, "Well, that's good—that's going to improve our working conditions, and we're going to be able to deliver better services. It's good that we're not the ones who are getting burned out and who are going to be challenged as those who are denying minimum core obligations."

That is a long way of saying that the central state, as the primary duty bearer, in partnership with other relevant public authorities, will be held to account, not the hard-pressed front line.

Pam Gosal: Thank you, Professor Miller. I will come on to housing in a—

The Convener: Sorry—Professor Boyle has indicated that she wants to come in, so I will bring her in first.

Pam Gosal: I was just saying that I will come on to housing in a minute.

The Convener: I think that Professor Boyle wanted to add something on your previous question.

Professor Boyle: I will be very brief, if that is alright.

Pam Gosal: That is fine. I think that the convener got it wrong. I was saying that I would come on to housing but that I will stick with my original question for now. Sorry—maybe I was not very clear.

Professor Boyle: Thank you. I appreciate that.

My expertise is in adjudication and access to justice so I will often go to examples involving courts to demonstrate what happens when things go wrong.

You raise a really important example. When people feel that they have duties to realise rights but simply cannot do so because the way in which the budget system works means that they do not have the money, it is important to reassure those duty bearers that the system has to accommodate those problems.

In other countries where such an issue has arisen—it arises in the context of economic, social and cultural rights as well as civil and political rights, I might add, because they are also resource intensive—you will often see that, as I mentioned earlier, issues are clustered and systemic.

I will use, as an example, a local authority that cannot meet a provision for a particular service across the board for anyone—that is, everyone is experiencing the same violation. The issue will come to the relevant adjudication body to consider. In those other countries that have tried to grapple with this issue, the adjudication body will say to the various duty bearers, "Look, you're going to have to do this. You'll need to think about this. You need to work together. We need to come up with a remedy that ensures that this violation no longer occurs". That is part of a structural response. It is a different way of working than we are used to, but it would not take a huge shift to

adapt to that because we have all the tools at our disposal to do it.

It is about collective issues and structural responses, including dealing with many different duty bearers. There are excellent examples of that in Colombian jurisprudence under the tutela system, where that is exactly what the court has done—it has got all the actors around the table and said, "There are various different levels of government here. We need to work together, because internally displaced people do not have access to housing, education, food and healthcare, and we're all going to have to work together to find a solution." The court then supervises matters to make sure that that occurs in practice. That is an example of how to deal with that situation.

Pam Gosal: Thank you, Professor Boyle. Dr Webster, would you like to add anything?

Dr Webster: I agree with that. I have nothing to add.

Pam Gosal: Convener, can I ask the housing question now?

The Convener: Yes, please continue.

Pam Gosal: In the past couple of committee meetings, the housing emergency has been raised quite a lot. I would like to better understand what the minimum core obligation would look like in practice in relation to housing. Currently, Scotland has a housing emergency—we all know that. We have record numbers of people living in temporary accommodation and many people are homeless, yet the Scottish National Party Government has slashed a lot of the budgets around that.

What impact would enshrining the right to housing into Scots law have? What would it mean in practice for the public authorities and for the Scottish Government? What implications would there be if that right was not being met?

Professor Boyle: The right to housing already exists in Scottish legislation, so that is a really good example as it demonstrates how, even if you have something in law, it does not necessarily mean that it comes to be realised in practice.

That is why you need the broader framework that is being introduced through the human rights bill. You need the early stages of proper implementation, the support and the participatory process; you need the work of Parliament to give content and to realise rights; and you need the work of Government to implement that. Ultimately, you need actions to redress things when they go wrong. I would argue that that is where the problem is in relation to much of this issue: there is no proper avenue to access justice.

The use of temporary accommodation is a good example of what might be considered a breach of a relative minimum core, because although people are being accommodated in housing, that does not necessarily meet the threshold when it comes to ensuring that they live a dignified life as they do not have access to the different components that they need to participate in society and to exercise their autonomy.

Likewise, the problem around evictions is that people often do not have representation when they are in the justice system. For example, if they are faced with an eviction notice and turn up to deal with that either in the sheriff court or in a tribunal—it depends on whether it is private or public housing—they will be unrepresented whereas, on the other side, the landlord might have lawyers. It is an access to justice issue; there is no equality of arms.

10:45

Finally, on homelessness, someone can present at the local authority as homeless and, under the Homelessness etc (Scotland) Act 2003, which was recognised internationally as a key act because it is not based on priority need, everyone is entitled to protection. If you suffer because you are unable to exercise that right, you have to raise a judicial review, which is costly and not easily done on an individual basis.

That comes back to my point about clustered and systemic problems and trying to respond to them in a more structural and collective way, ideally without needing to go to court. Nobody wants to go to court. It has to be there as a backstop, but we need to change the system to respond to the system issues that you raise in a more comprehensive way.

Pam Gosal: Thank you, Professor Boyle. Dr Webster or Professor Miller, do you have anything to add?

Dr Webster: International human rights law demands good-faith attempts. All of this has to happen within the ethos of how international human rights law works around participation, access to remedy and so on, all of which are part of a big package. We want human rights violations to be brought to light and, once they are, for the processes to be in place to address them in a way that recognises that implementing human rights, whether civil, political or economic, social and cultural rights, is not always straightforward. Therefore, there must be a plan, a time-limited strategy, communication and a coherent and collaborative effort to prioritise, whether that be through strategic or budgetary decisions, to remedy those things appropriately.

It is useful for us to bear in mind the fact that we are talking about good-faith attempts, and although that communication and collaboration can be contentious processes, they are done in a respectful way. That is reassuring. Part of the process is about reassuring public authorities in every sector. We have seen that in some work that we did on the right to housing as a case study in Scotland. There are concerns about basic things such as housing stock and how such problems can be overcome, but it is about bringing those to light, prioritisation and good-faith attempts.

Pam Gosal: Professor Boyle, you talked about a Colombian example. Will you say a little bit more about that?

The Convener: Briefly, please, in the interests of time.

Professor Boyle: I would be happy to follow up that example in writing if it would help.

Pam Gosal: Yes, please. If you could follow up with an email, that would be great.

Professor Boyle: I am happy to do so.

The Convener: That would be great. Rachael Hamilton has indicated that she would like to come in. Before she does, I have a question that follows on from Pam Gosal's questions.

Governments come and go, but the policies that they put in place can have far-reaching effects. Recently, we have been taking evidence on asylum seekers and refugees. Some of the organisations that have given the committee evidence on the Illegal Migration Bill have said that it would breach the human rights of asylum seekers and refugees. We have been looking at the tensions and the use of devolved powers to mitigate the perceived harms. How would what we are talking about fit into that context? Professor Boyle is nodding her head so I will take that as an indication that she wants to comment.

Professor Boyle: I agree that it is a difficult area to address reserved and devolved competence and how far one can go to address and mitigate the issues, and that applies to many reserved areas.

While doing some of the research that I undertook for a Nuffield Foundation study during the past five years, I spoke to practitioners about the different violations of social rights that people experience, and that aspect was brought up time and time again. In response to that, one thing is to recognise that it is important to take a maximalist approach to devolved competence, although I would defer to Professor Miller to speak about that. At the heart of all the national task force's recommendations is the need to go as far as possible within devolved competence to try to address gaps, and many areas will be cross-cutting. However, using the power to observe and implement international obligations that the UK has signed up to is a power that is devolved to the Scottish Parliament and, within that power, you can go as far as you possibly can.

The example is really important because the House of Lords—this was when it undertook the role that the UK Supreme Court now plays—intervened in immigration and asylum cases when it was felt that there was a risk of people falling into destitution. A minimum was applied to ensure that people did not fall into destitution.

That is an excellent example of where we already apply a minimum core in the UK, in the context of immigration and asylum. The position is complicated because that does not apply across the board—it applies in particular circumstances under particular legislation. However, the European convention on human rights was able to be used to step in and provide a floor in such circumstances, so that is a good example.

The Convener: That is helpful. I was thinking about the right to work, which not all asylum seekers and refugees have.

Rachael Hamilton: I will pick up on Professor Boyle's response to my colleague Pam Gosal. There is a conflict between minimum core obligations and rights that are in various articles under UN obligations, such as the right of disabled people to liberty and to live independently in the community, and rights for children and pregnant women.

How does the human rights approach help individuals? I will give an example from my constituency. A young man with learning difficulties has a place at a college but does not have supervised travel or transport to get there. We know that the rights of individuals under such articles are already being breached. In the practical context, how will the proposed approach help that person?

Professor Boyle: That is an excellent question. Current legislation might already support that individual—for example, legislation that relates to social work and social work responsibilities includes provisions on accommodating needs in different circumstances following an assessment of a person's needs—although I cannot speak to the person's particular circumstances.

We do not know yet what the proposed legislation will say because we do not have it yet, but the UN Convention on the Rights of Persons with Disabilities provides for various circumstances to support people to live independently, as you said. In the circumstances that you described, legislation might help the person to participate in their college course in the way that they wish to. The problem, which you

identified, is how we go from what is happening to the person to finding the remedy. Where do they go? We do not have the answer to that yet, because we have not seen the bill.

People in such circumstances normally say—perhaps your constituent will offer his own preference—that they do not want to go to court. Nobody wants to go to court and raise a case to get access to basic needs, but the non-judicial, non-legal routes in our system are not well equipped to deal with the matter. We need a step change. The recommendations say that a culture shift is needed, as Elaine Webster and Alan Miller said. Whoever was responsible for supporting a person would reflect on a human rights-based approach to help them to participate and live independently and would be able to use the convention, which provides rights to support the change.

If a person cannot participate for budgetary reasons, for example, you need to take a step back and work out how the budget is being spent and whether the money has been allocated to provide the maximum available resources to address all the components of progressive realisation, the minimum core and so on. There is a decision-making process to go through to reach that end.

Paul O'Kane (West Scotland) (Lab): We have touched on some of this already. I am particularly interested in how we monitor and scrutinise the minimum core obligations and in what the Parliament's role would be in that. Is there a role for the Parliament? Should parliamentary committees scrutinise whether organisations are meeting the minimum requirements? We have heard suggestions about local authorities and it is crucial to think about the Scottish Government. Who holds the Government to account and checks whether it is meeting its obligations? In connection with that, what indicators would you measure Government or public bodies against? I appreciate that that is quite a wide-ranging question, but I am keen to know what our role should be.

Professor Miller: That is a good, wide-ranging, question and is one that the task force spent a lot of time considering. We took the view that effective implementation of the human rights bill would require a multi-institutional approach from a combination of Government, public authorities, courts and the Parliament and felt that the Parliament—and your committee within the Parliament—would have a very important role to play.

One of the task force's recommendations was that the Government should be under a duty to present to the Parliament its own implementation plan—I think that the language was "a human rights scheme"—for the bill. That plan would show what practical measures the Government was taking to give effect to rights and to make them real in people's everyday lives and should be presented to the Parliament for scrutiny and accountability.

One of the components of the human rights scheme to be presented to the Parliament by the Government would be that implementation plans should be required by the Government from all public authorities, to ensure uniform and consistent implementation of the bill. The Parliament would therefore have an opportunity to look at reports from public authorities and from the Government itself.

There was a recommendation that there should be human rights-based indicators of the progress made, or not made, in implementing the bill and that those indicators should be co-designed in a participatory process with public authorities and people who have lived experience defining the indicators.

For example, in the work that I am doing in chairing a national collaborative as part of the national mission on drugs, we are developing a charter of rights, based on the coming human rights bill, for people who are affected by substance use. That charter will be co-designed with alcohol and drug partnerships and those seeking to use services and there will be agreed measures by which progress can be monitored and evaluated and by which lessons can be learned if significant progress is not being made. The Parliament has a role in overseeing all that and holding the Government and public authorities to account.

The task force looked at a number of different countries, one of which was Finland. Those who are, broadly speaking, your peers in the committee system of the Finnish Parliament have a very respected role. For example, when legislation is being introduced to the Finnish Parliament, the committee scrutinises it and takes a view as to whether it is compatible. In our case, that would mean deciding whether legislation was compatible with the human rights bill and our international obligations. That committee's voice is respected because it is based on good, authoritative evidence from human rights experts. You could supplement that with evidence from those with lived experience and could have a clear, authoritative voice within the Parliament, therefore strengthening the role of the Parliament and holding the Government to account.

Paul O'Kane: Does anyone else want to add anything? That was very helpful. This and other committees of the Parliament, absolutely have a scrutiny role and a responsibility to ensure that legislation is compatible.

I suppose that my question is partly about what happens when targets or standards are not met. In a parliamentary democracy, it can often be difficult to enforce those, if I can use that word, because of the nature of majorities. Would the courts be the place where much of that would be done, rather than the Parliament? Alternatively, is there a role for a commissioner within the Parliament or the Scottish Human Rights Commission to have those powers of redress, I suppose, and to deal with significant issues when they arise?

11:00

Professor Miller: The task force recommended different levels of accountability from different processes and institutions. We would hope to be able to resolve issues quickly, effectively and as collaboratively as possible with decision making at a local level based on human rights.

If that did not work—we all know that, with the best will in the world, it is not always going to work—the scrutiny bodies would monitor performance: the inspectorates and ombuds institutions. Their job would be made easier by the duty on public authorities to develop implementation plans that cover their commitment and how they are going to give effect to rights, along with progress indicators. The scrutiny bodies should be better placed to scrutinise the human rights performance of public authorities.

If that fails—we know that no system is perfect—there needs to be access to a judicial remedy. An improved approach can also be developed there. Katie Boyle is the person to pick that up, but the courts should be able to provide a remedy. Where they see something that is simply not working and it is systemic rather than just involving this or that individual, they should be able to look at it from a systemic point of view and consider a number of remedies.

We recommended what is called a structural interdict. If the court took a view that the system had not been designed or was not being implemented or monitored in such a way that rights were realised as an outcome, it could suspend judgment in the particular case and say, “We will give you a reasonable time to come back and show us that the system is going to remedy itself in a way that is compatible with rights. We will then look to see whether we think that that is the case.”

Within that, there is a role for the Scottish Human Rights Commission. We recommended that it should have an enhanced capacity to take test cases if it sees something systemically not working in the way that it should.

It is a multi-institutional approach, but it should be front loaded. What we call the everyday accountability sector should be as effective as possible but, as a backstop, the courts should have a better way of addressing systemic issues and making sure that structural changes take place. We should avoid individuals feeling the burden of having to take on the world simply to get something that they were entitled to way back down the food chain.

Professor Boyle: I agree with everything that Alan Miller has said. In essence, your question relates to access to justice. It is important to reflect on the fact that access to justice—in international human rights terms and as it would apply to the bill—means access to an effective remedy. That needs to be adequate, affordable, timely and effective, and there needs to be a realistic prospect of reaching an outcome that addresses the violation. At the moment, we do not have a system that accommodates that in relation to these rights.

My response to your question about where the appropriate avenue lies, is that all avenues need to be exhausted. We need to irrigate the system so that all avenues are available and all justice routes are recalibrated for these types of rights in order to try to meet that threshold of an effective remedy. If a particular route becomes an additional barrier—if it is no longer effective because it takes too long, there is not sufficient advice to support people or they cannot reach an outcome that addresses the violation—it needs to be changed, because it will essentially not meet the threshold that is required.

Given that the Parliament is one avenue for seeking justice, the Parliament itself should reflect on all the different means by which it can provide support. For example, the Scottish Public Sector Ombudsman has the power to refer systemic issues that it has noticed to the Parliament, although I do not think that that has been used in practice. The ombudsman’s current remit would need to be recalibrated to cover these particular rights, but it is a potential route that could work concurrently with the other institutions of government. The idea is to have a conversation and deliberation that involves all of us in all our different capacities in order to achieve redress for the people who have experienced violations. It is about reframing the way in which we think about justice as access to remedies, wherever they might be.

Paul O’Kane: That was very helpful.

I have a brief question on international examples. Professor Miller mentioned Finland, which was helpful, but I think that the committee would find it useful to reflect on where else in the world this has happened and what the outcomes have been. The documentation refers to Germany, Belgium, Switzerland, Colombia and Brazil and the

variety of ways in which justice is accessed in those nations, but are there any other examples that we should be focusing on?

Professor Miller: I will have a go at that. You have already cited examples that the task force looked at very closely. I often get asked whether there is some model country somewhere in the world that has something that we can just lift off the shelf and apply here, and the blunt answer is no. Every country has its strengths and weaknesses, is on a journey and has its own history, culture, traditions and ways of doing things. As a country, you really have to take responsibility yourself for charting your own course—within international human rights law—and learning as much as you can from other countries. Taking responsibility yourself is something that needs to be recognised.

You also have to take advantage of the mechanisms and tools in the UN human rights system that concretely support countries that take a path in accordance with their own ways of doing things. As I have said, I work very much within the UN human rights system. We have been talking about indicators, and there is a tool called the human rights matrix that we have developed and which is being increasingly and very effectively used by countries. You might or might not have heard of the universal periodic review; it is when every country's human rights record and performance are viewed by its peers in the Human Rights Council, and it is based on information from the countries themselves, the UN human rights system and civil society. Recommendations are then issued to the country in question.

The matrix is a tool that the Office of the High Commissioner for Human Rights has developed for each country. It takes the review's recommendations, which are all based on treaty obligations; clusters them into thematic areas so that you can translate them into terms that you might be more familiar with; aligns them with the sustainable development goals, where the crossovers are very relevant; and then enables Parliaments, Governments and civil society to track progress with implementation. It is a cycle in which countries are held to account every four to five years, and the progress indicators for which they will be held accountable as part of the cycle will be very much before their peers.

There are therefore ways and means within the UN human rights system, with mechanisms and tools that can be used to add strength to your own way forward. That will involve not just learning from other countries but leading and taking that leadership responsibility. Compared with many other countries that I have worked in, Scotland really has that responsibility, given how much space we have to have these sorts of discussions, to do innovative things, to break ground and to take a leadership role. Other countries will be able not to copy us but to look with interest at what we are doing—as in fact they are, in many respects. We should look to ourselves and use the international human rights system instead of thinking, "Can we just take something off the shelf from Finland or Colombia?" We can learn a lot from them, but we need to take responsibility ourselves.

The Convener: Before we come to the end of our session, I want to pick up on a couple of points that have been mentioned already.

Remedy and justice will look different for different people. For some people, taking a court challenge is the route that they wish to explore, but it might be that a remedy would also require non-legal routes. I am keen to hear the panel's thoughts on what kind of non-legal routes would be open to people who wish to challenge any breaches. I will start with Dr Webster.

Dr Webster: I will say something brief and then hand over to Professor Boyle to speak to remedies. As has been mentioned already, it is really important that we think about how we can support decision makers at every level to take every relevant right into consideration at the point of making decisions. That is where we need to start. It is all part of one big puzzle, but a key part of the puzzle is thinking about how decisions can be made at the point of delivery that are, with the best of intentions, human rights aligned or human rights compliant, if you like.

Even within an organisation in which people can make complaints through the usual avenues, those who are making the decisions should at that stage be thinking about which human rights are at stake. Their burden is to identify what issues are relevant, because, in any particular instance, a person might face multiple issues that could mean multiple rights are implicated and we cannot expect individuals to come to us with a list of rights that have been violated. It is about building capacity in decision making and in internal complaints processes. From there, we can start to think about going to the ombudsman and branching out.

Professor Boyle: I will mention again the importance of using effective remedy, or access to justice as it is termed in international human rights law. That means effective processes as well as effective outcomes. To go back to what I said at the beginning, we can think about it from the perspective of a rights holder. You will see this with your constituents and research tells us this time and again: when something happens and people experience a violation of their dignity and of a right, they want an apology; they want it to

stop happening; they want the issue to be fixed and they do not want it to happen to anyone else.

Our system is very individualised in nature. It relies on individuals bringing cases, which is really difficult for people who are in precarious circumstances. It also does not account for the clustered nature of the problems or the systemic issues. We rely on and place a huge burden on an individual to raise a case regardless of whether the routes are legal or non-judicial. We need to change that way of thinking to allow collective responses. Ultimately, regardless of whichever route is available to be taken, it needs to meet the threshold of being effective in nature and, at the moment, that is not what we have. From research into access to justice, we know that there are multiple barriers for people to overcome, even to use non-legal routes.

Let us go back to the start and think about this from the perspective of undergoing a journey. Something has happened to someone and they know that it is wrong but they do not know what to do about it. First, they need to be aware of their rights; they need legal consciousness of the fact that rights exist and that they are entitled to them. They also need to be aware of the processes and have knowledge of the system, and that needs to be supported with resources, whether those be financial, legal or emotional, because it is not fair to place the burden on one individual. In the mental health sector, for example, people often say that they use collective advocacy to raise such issues. There is a fear of retribution when an individual raises a case and they use a collective advocacy system to bring problems before various authorities.

We need to resolve the complexity of the system. Ideally, someone would be able to go to an ombudsman, a tribunal, or just a complaints body in the service that they are working for, but that body needs to be able to respond effectively and issue an effective remedy.

Also, people do not realise that, sometimes, if they pick one route, they can bar themselves from taking another route. People do not know enough when they engage with the system and there is not enough support to help them navigate it.

11:15

Ideally, you would have proper advice and co-located services available. Rather than asking people to come to see a lawyer, for example, you would ensure that advice providers are in places such as libraries, schools, or food banks. Food banks have unfortunately proliferated and that is where people go who experience clustered problems. There should also be support in doctors' surgeries. Those are the types of places where people should be able to get support.

When the act comes into force, it will create a transformative system in which these rights take on a legal status. That will enable routes to effective remedies, but all the non-legal routes need to be supported and slightly recalibrated. The system needs to change in order to respond to the particular types of rights and the nature of the violations. It can be done through collective advocacy and collective cases and ensuring that people are not hindered from taking another route. Always, as a backstop, we need to ensure that people have access to a court as a means of last resort and as an overall supervisory body.

Finally, in that type of clustered approach or when you are responding to something structurally, there is the importance of moving away from looking at it as an individual case. People are not looking for compensation. They genuinely want their situation restored. Often, there is a fear that you will create some kind of litigation culture but it is about trying to address the violation itself and helping to restore people to the place where they should have been. It is about avoiding the administrative mud, where people get stuck in a system that will not even be able to give a remedy at the end of the day and ensuring that we change things to enable our systems to respond differently.

That means wider definitions of standing and different types of tests than those we currently use. We need to have a broader reasonableness test to assess and interrogate compliance with rights, ensuring that we can respond collectively and structurally to problems and ensuring that economic, social and cultural rights are grounds for challenge and can be raised in different places—perhaps a bit like a devolution issue, which can be raised in lower courts and the lower courts can then refer the issue up. If, for example, an issue comes up and a tribunal does not know how to respond to it, it could refer the issue up to the inner house for a response. There are so many different mechanisms to ensure that we open paths to justice for people and move away from this individualised approach.

The Convener: So, it needs to be flexible, adaptable and responsive. I get that.

Rachael Hamilton: As I have been listening, it has dawned on me that we have not considered geographical inequalities or the ability to deliver within public bodies. What you are saying is that it is definitely not a silver bullet and we have not explored this area enough but there could be inconsistencies in outcomes across Scotland because of that.

Professor Boyle: Even in relation to the advice sector, in practice, there are advice deserts and, depending on where you live, you may or may not be able to get access to the help that you need on immigration and asylum support or housing support. If you live closer to a non-governmental organisation or a charity or if you have digital access, you might be able to get support, but that is what the minimum core obligation comes back to.

Essentially, you are trying to look at disaggregated data to understand where those gaps are. However, if you do not have that data, you will not know who is further from those structures and who can access them. We also need to reflect on the fact that many people have not engaged with the system. We do not actually know how bad things are for some people. It is about trying to ensure that we are not walking into it with our eyes closed. The more data that we have and the more that we can disaggregate it across those intersectional barriers, the better we can understand where those gaps are.

The Convener: Thank you. For my final question, I am going to go for Professor Miller, but if either of the other witnesses feels that they need to chip in, please indicate.

We have talked about non-legal routes but how might courts judge cases, given that we have difficulties in defining what the scope of minimum core obligations might be? Will courts have sufficient experience or skills to do that? What does the system need to provide for them to be able to do their job?

Do you want to respond, Professor Miller?

Professor Miller: When you said that you were going to go for me, convener, I got a bit concerned, but I can handle that question. [*Laughter*.]

There are a couple of things that I would say. First, our courts are already becoming more skilled than perhaps we realise, in that they already engage, to some extent, with international human rights law. Having had conversations with the judiciary in one way or another for decades, I think that what has happened in the past couple of decades since the Human Rights Act 1998 came into effect has broadened minds in the legal profession, including the judiciary, and the composition of the judiciary has been broadened to some extent, too.

The courts would quite rightly say that this is an area in which they have some experience. They might well say, “Why can’t we become as skilled as any courts around the world? We will raise our ability to take into account international human rights law, if that is what the Parliament wants of us. We’re quite confident that we can do it—why can’t we?” They could look at other courts and jurisprudence internationally, they could look at the general comments from treaty body committees and so on. Yes, it will be a new challenge for the judiciary, in the same way that it will be a challenge for every other institution, but it should be able to rise to it. I think, therefore, that the courts have an important role to play here.

To directly answer your question about how the courts can interpret or define a breach of a minimum core obligation, I would say that, in part, the public participatory process for defining the obligations will be very helpful, as it will give them some measurement or tool to look at. They could also look at public authorities’ implementation plans to assess and scrutinise whether the provisions are adequate and compatible with those authorities’ duties. If we have easier routes of access to justice, cases can be brought by bodies on behalf of a whole range of individuals along with interventions from other bodies with expertise, which would loosen up the system a bit. There will also be other sources of evidence that the judiciary can take into account and which will equip them to make these judgments.

I am probably ending where we began. If a judge is sitting there, saying, “Well, I’ve got this source of evidence, and I’ve got that interpretive authority,” they will have to come back to the issue of human dignity, and the courts might well ultimately come to judgments on the basis of their saying, “I’ve heard everything, and I’ve seen all kinds of evidence. The question is: is this enabling this individual to live a life of dignity or not?” That will be the final criterion that the courts will have to apply, as, indeed, other courts have begun to.

Perhaps you should give Elaine Webster the last word on this, given where we have come back to.

Dr Webster: I agree with what has been said, and I do not think that it should be concerning, either. Sometimes, there is a little bit of trepidation about the idea of a dignity standard, but that is because, intuitively, we think that we know what it means, so everyone else must know what it means, when that might be different.

As I have said, that should not be concerning. Courts around the world work with the idea of dignity; indeed, it can be found in most of the world’s written constitutions, so it is very commonly used. It is also, I would say, familiar in Scotland’s legal culture. My briefing paper for the academic advisory panel contained a section on dignity in Scots private law as a result of the way in which Roman law has been received into Scots law. On that basis alone, I would say that it is familiar in our legal system.

We also looked at the use of the language of dignity in courts across the UK and found that it comes up in thousands of cases across all the UK jurisdictions. It is therefore not unfamiliar. Moreover, the language can be found in legislation, including recent examples of legislation passed by this Parliament.

It has also been mentioned that courts use a dignity standard in adjudicating on the prohibition of inhuman and degrading treatment in the European convention on human rights, which has been part of our legal system for the past 20 years. The concept is therefore familiar, and I think that we would be in very safe hands if it comes, finally, to the point that a court has to make a decision on that basis. At the end of the day, this is all about ensuring, as much as we can, that people are being enabled to live their lives as they want.

The Convener: Thank you very much. It has been a very interesting and informative session, and it seems quite fitting that we have ended by talking about dignity. On behalf of my colleagues, I thank the panel for their contributions.

11:25

Meeting continued in private until 12:09.

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