

# SHRC

Scottish  
Human Rights  
Commission

## Models of Incorporation and Justiciability for Economic, Social and Cultural Rights

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Rights Commission**

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The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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# Foreword

Over the past five years, and since the Commission published its last paper authored by Dr Katie Boyle on Economic, Social and Cultural Rights, the debate in Scotland around strengthening accountability for the implementation of international human rights standards has significantly progressed. Stimulated, in part, by the decision at a UK level to leave the European Union; in part, by the newly devolved powers; and in part, by the fallout from the global financial crisis and Westminster driven “austerity” measures and “welfare reform” the Scottish Parliament, Government, First Minister and civil society have all increasingly engaged in debate around the protection and implementation of economic, social and cultural rights (ESCR).

The Commission has brought ESCR into the foreground of its work to develop a human rights culture in Scotland. We set out our broad vision for the realisation of ESCR in our input to the government’s “Creating a Fairer Scotland” initiative in 2015. This set out the need for ESCR to be embedded through law, policy and practice. Since then we have worked to follow up on each of these strands, raising awareness and understanding of ESCR across all actors; supporting communities to use the rights in their advocacy for change; contributing expertise to the revised National Performance Framework and developing further thinking and emerging practice on human rights budgeting.

Above all however the Commission has continued to make the case for the incorporation, or domestic enforceability of international human rights standards, in particular ESCR. This is because accountability is the cornerstone of human rights and we believe that further culture change can be driven by a backstop of legal protection and judicial enforcement.

This report highlights that there is an accountability gap in the UK and in Scotland when it comes to the implementation and enforcement of ESCR and other rights contained in international law. This means that when it comes to the realisation of the rights to an adequate standard of living, health, housing, food or social security people have limited recourse to human rights law where their rights are not met in practice.

The research shows how countries all over the world from Germany and Switzerland to South Africa and Colombia have stronger laws and stronger accountability processes for these rights. The research shows how around 65 countries globally explicitly enshrine ESCR in their constitutions, around 12 in Europe. Alongside this countries such as Finland and Sweden have built in parliamentary scrutiny of whether ESCR are being implemented. The research demonstrates how Scotland has the opportunity to draw from this and build on its existing laws, judicial reasoning, legal remedies and parliamentary processes to better protect a broader range of human rights.

The First Minister's Advisory Group on Human Rights Leadership, of which the Commission is a member, reports later this year on the protection of economic, social and environmental rights. It is clear from this research that there is wealth of experience and practice globally which Scotland can learn from, replicate and build on.

We thank Dr Boyle, formerly of the University of Roehampton and now the University of Stirling, for this valuable work at this important time.

**Judith Robertson**

Chair of the Scottish Human Rights Commission

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# 1. Introduction

The incorporation of international law into domestic law means embedding legal standards as set out in international law and making them enforceable at the domestic level. This incorporation can take many different forms. This paper seeks to set out some of the ways through which Scotland could incorporate economic, social and cultural (ESC) rights into the domestic legal framework. Traditionally incorporation has been understood as a way of directly embedding international law into the domestic legal system through domestic legislation or in a constitutional text. This paper embraces a much broader and fuller understanding of incorporation essentially encapsulating a variety of means through which international legal standards are internalised into the domestic legal system and coupled with effective remedies. The paper therefore looks at models of incorporation as well as justiciability mechanisms (how rights can be enforced in court).<sup>1</sup>

Ultimately it is for each state to decide how best to give effect to international human rights obligations in its specific constitutional context. Incorporation and justiciability of ESC rights is not a new phenomenon. It has occurred across the globe in different ways. This paper sets out potential pathways for Scotland so that processes on human rights reform continue to be informed by evidence and best practice drawing from a number of the international comparative examples.

Scotland is already on a journey of incorporation in relation to a number of human rights. For example, it is following in the footsteps of other jurisdictions including Norway, Belgium, Spain and most recently Sweden<sup>2</sup> in its proposals to incorporate ‘the principles of the UN Convention of the Rights of the Child’.<sup>3</sup> The UNCRC is a treaty that encapsulates the civil, political, economic, social and cultural rights of the child. In addition, the First Minister’s Advisory Group is tasked with considering how Scotland can continue to lead by example in human rights, including economic, social, cultural and environmental rights and potential incorporation of those rights into domestic law.<sup>4</sup> This paper is intended to help facilitate the ongoing discussions on how Scotland can embed international human rights law into the domestic framework.

## 2. What do we mean by economic, social and cultural rights?

Following on from the Second World War nations throughout the world sought to declare a commitment to dignity and human rights. This culminated in the Universal Declaration of Human Rights in 1948 followed by two subsequent Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties are known collectively as the International Bill of Rights.<sup>5</sup> The international human rights structure comprises of civil, political, economic, social and cultural rights as established in the International Bill of Rights. Civil and political rights include rights such as the right to a fair trial or the right to vote. Economic, social and cultural rights include rights such as the right to education, the right to fair employment conditions, the right to adequate housing and the right to the highest attainable standard of healthcare. It was intended that each of the rights (civil, political, economic, social and cultural) would be implemented concurrently and according to the principle of indivisibility.<sup>6</sup> Subsequent international treaties at both the international and regional level have confirmed the legally binding status of these rights and their indivisible nature.<sup>7</sup>

One of the major challenges facing Scotland, and the rest of the UK, is that the legal system only provides for a select number of rights – largely civil and political (CP) rights, and not economic, social and cultural (ESC) rights, under the current constitutional frameworks. This is out of step with constitutional arrangements comparatively speaking (see table of constitutions protecting CPESC rights below at Annex A.). This creates accountability gaps in ensuring access to justice for those rights not currently protected under the Scotland Act 1998, the Human Rights Act 1998, the European Communities Act 1972 or the common law.

### 3. Why incorporate ESC rights?

The benefits of incorporating ESC rights are self-evident in many respects – it means that individuals will have better access to rights directly relating to their conditions of living. This includes the better protection of employment rights<sup>8</sup>, rights relating to pensions<sup>9</sup>, rights which protect an adequate standard of living (including access to adequate housing and food)<sup>10</sup>, rights relating to health and healthcare<sup>11</sup> and rights relating to education,<sup>12</sup> among others. It would ensure that vulnerable and marginalised groups, including children, the elderly, the disabled and the unemployed receive protection in the progressive realisation of their rights. ESC rights enforcement assists in the alleviation of the causes and consequences of poverty.<sup>13</sup> There is significant scope to mainstream ESC rights as part of an approach to policy formation and the wider decision making process in the same way that the European Convention of Human Rights (ECHR) features. There is a significant accountability gap for those experiencing violations of ESC rights in Scotland and the UK more widely. This is because domestic law does not currently protect the full body of international human rights law and as a result people are left without access to remedies when a violation of their right occurs.

## 4. Addressing the ESC accountability gap

There is an accountability gap in the UK and Scottish legal systems with regard to the protection of ESC rights. The implementation and observance of the full body of international human rights law is not captured under the UK domestic constitutional framework, or currently under the devolved framework, meaning domestic statutes and policies are not necessarily implemented or measured with full reference to international human rights law. As a result decision makers in Scotland are not always under a statutory duty to take international human rights law into consideration when performing their functions.<sup>14</sup>

The UK at the national level has agreed to be bound by a number of international treaties that do not take on enforceable legal obligations unless incorporated into domestic law. The enforceability of the rights contained in international treaties varies across the UK jurisdictions meaning different rights and remedies exist for civil, political, economic, social and cultural rights depending on where you live. Some jurisdictions have more progressive measures than others in connection with different rights<sup>15</sup> and the devolved structures themselves create different frameworks for equality and human rights meaning there is no universal application or operation of a normative national standard for human rights law but multiple different regimes at play at the same time.<sup>16</sup> This picture is further complicated by withdrawal from the EU and the impact of Brexit, including the loss of remedies for violations of civil, political, economic, social and cultural rights available under EU law.<sup>17</sup>

In submissions to the United Nations treaty monitoring processes the UK cites the Human Rights Act 1998 and the devolved statutes each of which partially incorporate the ECHR into domestic law as evidence of complying with international human rights obligations.<sup>18</sup> However, although there is a possibility of extending the interpretation of CP rights to include socio-economic dimensions, relying on the ECHR treaty as a human rights document is inherently limited because the treaty does not cover all aspects of all human rights.<sup>19</sup> The UK also cites the application of domestic statutes and policies as examples of implementing ESC rights in accordance with international legal obligations<sup>20</sup> as well as equality legislation and legislation providing for legal aid.<sup>21</sup> However, domestic statutes relating to areas such as health, welfare, housing, employment, education and access to legal aid are not necessarily benchmarked against international standards meaning that statutory rights do not necessarily reflect the state's international obligations. An example of this would be the National Minimum Wage Act 1998 which sets a minimum hourly income for workers in the UK. The purpose of this Act is to ensure that persons who are working are able to earn sufficient remuneration for work in order to support an adequate standard of living.



However, on an independent examination of the UK national minimum wage the European Social Committee has determined it unfit for purpose and 'manifestly unfair' in achieving the aim of raising workers out of poverty.<sup>22</sup> Relying on legislative and administrative implementation of rights without reference to international standards (at least implicitly) creates an accountability gap for the UK as state party to international treaties. The UK has not incorporated these obligations into domestic law and continues to dismiss calls for incorporation from the UN Committee responsible for overseeing compliance with the International Covenant on Economic, Social and Cultural Rights.

For example, in 2014 when responding to the UN Committee on ESC Rights the UK rejected the incorporation or justiciability of ESC rights stating:

'There is no provision in the ICESCR that requires States Parties to incorporate the Covenant into domestic law or to accord to it a specific status in domestic law. The UK Government therefore continues to consider that its method of implementation of the ICESCR, through appropriate legislation and administrative measures, ensures the fulfilment of its obligations under the Covenant.'<sup>23</sup>

The UN Committee responded by reiterating concerns about the UK's accountability gap stating:

'While the Committee takes note of the State party's views on the incorporation of the Covenant rights into the domestic legislation, the Committee regrets that the Covenant rights cannot be applied directly by domestic courts, which may restrict access to effective legal remedies for violations of Covenant rights. The Committee...urges the State party to fully incorporate the Covenant rights into its domestic legal order and ensure that victims of violations of economic, social and cultural rights have full access to effective legal remedies.'<sup>24</sup>

Incorporation coupled with effective legal remedies is a way of closing this accountability gap.

# 5. The nature of state obligations to respect, protect and fulfil ESC rights

The nature of ESC rights requires states to respect, protect and fulfil these rights in order to **progressively achieve** them to the **maximum available resources**.<sup>25</sup> Some rights require immediate implementation, meaning that there is a 'minimum core' that is non-derogable. Other rights require a greater degree of progressive realisation through various degrees of enforcement.<sup>26</sup> It is also possible to place limitations on some rights in the same way interference with CP rights can be justified in certain circumstances. Incorporation of the rights into the domestic legal system would reflect the varying levels of fulfilment required with scope to balance fulfilment of a right against other countervailing factors. For example, ESC rights implementation does not mean granting everyone immediately the right to the highest attainable standard of health, or granting everyone the right to a privately owned dwelling house and so on. There is a sensible and balanced approach to ESC implementation which allows for the balancing of rights (including competing rights), the potential to place limitations on rights in accordance with the law and which takes into account the allocation of limited resources across multiple areas of policy.

## The principle of indivisibility

The principle of indivisibility is an important aspect of the purpose and function of human rights and means that the fulfilment and enjoyment of one right is dependent on the protection and fulfilment of another.<sup>27</sup> That is to say for example that the right to life is dependent on the right to adequate health care, the right to an adequate standard of living and the right to adequate housing. Likewise, full enjoyment of the right to vote and the right to political participation is dependent on exercise of the right to education and the right to freedom of expression, the right to protest or the right to collectively bargain. The full enjoyment of civil and political (CP) rights is therefore dependent on the protection and fulfilment of ESC rights – the preparatory work to the international treaties reveals that protecting civil and political rights and not economic social and cultural rights was considered an "anachronism in the twentieth century to provide for the protection of one without the other."<sup>28</sup>

## Progressive realisation

The nature of the obligation in international law requires that states respect, protect and fulfil ESC rights. This means states should progressively improve the protection of rights to the **maximum of their available resources** (i.e. the actual and potential resources the state can generate in order to effectively implement them). The State must take steps to refrain from acting in a way that would undermine ESC rights – i.e. take any action that results in breaching the rights (the duty to **RESPECT**); the State must also take action to prevent others from interfering with enjoyment of ESC rights, including private third parties that may be responsible for administering access/ delivering ESC rights (the duty to **PROTECT**); and the State must facilitate, promote and provide the ESC rights by taking the necessary steps to ensure the right can be enjoyed by all to the maximum of its available resources (the duty to **FULFIL**). States should avoid measures which reduce enjoyment of ESC rights (**non-retrogression**). Any violation (breach) of a right can only be justified in the most exceptional of circumstances and States must be able to explain that the action was reasonable, proportionate, non-discriminatory and that all other potential alternatives were considered.

In addition, it is also important to note that states obligations include facilitating access an effective remedy if there is a failure to meet human rights obligations.<sup>29</sup> This includes facilitating access to a legal remedy in court if necessary.<sup>30</sup>

## Minimum core

Over and above the duty to respect, protect and fulfil, or to progressively realise, ESC rights there is a requirement that all States must provide a basic level of rights enjoyment with immediate effect. This is called a minimum core. This can be understood as a non-negotiable absolute right to a basic level of subsistence below which no person should fall. The minimum core means providing a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.<sup>31</sup>

## Human Dignity as a Social Minimum

Many countries embed the right to a social minimum reflecting the concept of the minimum core – i.e. a social floor that ensures no one falls into destitution. According to constitutional theory, a minimum level of subsistence is a constitutional essential for the functioning of a democracy.<sup>32</sup> This is premised on the idea that people need to be able to access basic essentials in order to participate in society and facilitate genuine autonomy.<sup>33</sup> Often the threshold for assessing compliance with a minimum level is based on the concept of human dignity.<sup>34</sup> The approach of an absolute minimum guarantee is evident, for example, in the constitutions of Germany (*'existenz minimum'*)<sup>35</sup>, Belgium (*'minimex'*),<sup>36</sup> Switzerland (*'conditions minimales d'existence'*),<sup>37</sup> Colombia (*minimo vital*) and Brazil (*'mínimo existencial'*)<sup>38</sup>. There is no such constitutional guarantee to a basic minimum in the UK or Scotland at the moment.

## Non-discrimination

Non-discrimination is an important cross-cutting component of international human rights law present across all of the human rights treaties and the principal focus of some of the core treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women. Equality and non-discrimination in international human rights law requires states to take steps to eliminate discrimination in order to achieve substantive equality of outcome and address structural injustices. International law requires that access and delivery of human rights, including ESC rights should not exclude groups, particularly those who are marginalised and possibly 'hidden' from the system.

This means that before designing and implementing inclusive systems that provide ESC rights decision makers should explore and understand who are the disadvantaged and excluded social groups and what their needs and vulnerabilities are.<sup>39</sup> This means generating, analysing and basing decisions on disaggregated data across various characteristics including gender, age, geographic location, ethnicity, health status, economic status etc. It is important that a reliable evidence base is developed to ensure that those who may be hard to reach are not denied access to human rights. Likewise, the substantive nature of the duty means taking additional positive steps to address systemic equality issues. For example, positive steps under CEDAW could involve a positive obligation to produce a strategy for increasing women's participation in political life or funding initiatives to eliminate sexism in schools.<sup>40</sup> A deep and rich human rights and equality evidence base is needed to improve our understanding of how law and policy can 'best address structural and societal power imbalances, while also encouraging greater equity and empowerment for society's most disadvantaged members.'<sup>41</sup> This requirement goes far beyond the legal obligations that exist domestically in the Equality Act 2010 that prohibits non-discrimination on the basis of different protected characteristics.

## 6. What do we mean by 'incorporation'?

Incorporation of ESC rights requires the domestic internalisation of international norms. This can occur through a variety of pathways or 'ports'.<sup>42</sup> As set out in diagram 1 below, incorporation can occur by constitutionalising international standards (putting the rights into the constitution), through legislative or administrative adoption of international human rights norms, by signing up to an international complaints mechanism and complying with its decisions domestically or through a judicial approach to incorporation through the common law.<sup>43</sup> These pathways form part of the various building blocks used in different constitutional models and they are not mutually exclusive – international human rights law can be embedded through these different 'ports' individually or concurrently. Different constitutional models are discussed in more detail below.

**Diagram 1: Building blocks of incorporation**



As explained above, incorporation of international law into domestic law means embedding legal standards as set out in international law and making them enforceable at the domestic level. This is a requirement of a dualist state where international law is not automatically applicable when a state signs and ratifies a treaty. The state must go through a two-stage process of first, agreeing to the treaty at the international level and then second, embedding the treaty in domestic law to make it enforceable domestically. In so doing the state can take steps to internalise the international legal regime in a way that makes most sense in any particular given domestic context – there is therefore a degree of flexibility in the means of incorporation whether it be direct, indirect or on a piecemeal basis.<sup>44</sup>

Ultimately the test of effective implementation of human rights requires incorporation to reach a sufficient threshold including ensuring that the international normative content is not diluted or undermined and that an effective remedy is available for a violation. The degree of flexibility in a broad definition of incorporation is helpful in terms of ensuring that rights are able to flourish within the legal regime in which they are embedded. In so doing it is legitimate for the state to further elaborate and prescribe more fully the normative content of the right at a domestic level, using international law as a reference point and important tool for interpretation, whilst also leaving room for domestic law to go further than the international framework.

Essentially domestic incorporation of international norms should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right. Remedies can also take on many different forms and this is discussed in more detail below.

# 7. What do we mean by 'justiciability'?

## The legal status of ESC and the 'justiciability' of rights

Historically, the legal status of ESC rights has been misunderstood.<sup>45</sup> This was based on confusion about how ESC rights should be implemented.<sup>46</sup> As a result, subsequent measures to protect human rights, both at the regional and domestic level have erroneously focussed on CP rights and relegated ESC rights to aspirational rights, political goals or issues that depend solely on the legislature to accommodate.<sup>47</sup> It has long been understood that CP rights are enforceable in the court, meaning they are 'justiciable'.<sup>48</sup> When a state has incorporated CP rights into the constitutional framework it means that the courts can intervene to provide a remedy when the legislature or executive fail to uphold or comply. Now the literature and international best practice acknowledge that ESC rights are binding international legal standards and that they are amenable to judicial enforcement<sup>49</sup>.

The Committee on Economic, Social and Cultural Rights (the body responsible for overseeing implementation of the ICESCR) has called for justiciable remedies<sup>50</sup> for violations of ESC rights to be made available.<sup>51</sup> The Committee also indicates that a blanket refusal to recognise the justiciable nature of ESC rights is considered arbitrary and that, ideally, ESC rights should be protected in the same way as CP rights within the domestic legal order.<sup>52</sup> This means that states should explore how best to protect ESC rights within their own domestic framework.

It is now more commonly accepted in the literature and in practice that ESC rights can be judicially enforceable, or, that they ought to be – whereby effective remedies should be available for violations of ESC rights in the same way they are available for CP rights.<sup>53</sup> Outstanding questions now relate as to how best to deliver justiciable remedies, or, through what mechanisms might ESC rights be best protected within a particular constitutional framework in a feasible and legitimate way.

# 8. Can Scotland incorporate ESC Rights?

## Does Scotland have competence to incorporate?

Under the terms of devolution the Scottish Parliament has the devolved competence to observe and implement international obligations in devolved areas.<sup>54</sup> It is primarily the responsibility of the legislature to set out the way in which human rights law should be protected, including what role the executive and judiciary should play. Lord Brodie in the case of *Whaley* stated that ‘the Scottish Parliament has the power to legislate with the object of observing and implementing international obligations’ if it so chooses to do so.<sup>55</sup>

The United Nations human rights monitoring bodies have advised that the fulfilment of human rights requires states to take action at the domestic level in order to create the necessary legal structures, processes and substantive outcomes for human rights protection. Several UN Committees have recommended that the UK both incorporates international human rights law as well ensure effective justiciable remedies are made available for non-compliance.<sup>56</sup> For example, the UN Committee on the Rights of the Child suggests that fulfilment of international obligations should be secured through incorporation of international obligations<sup>57</sup> and by ensuring effective remedies, including justiciable remedies are made available domestically.<sup>58</sup>

In the context of devolution the Committee further suggests that any process of devolution must ensure that devolved authorities have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of international human rights law.<sup>59</sup> The UN Special Rapporteur on Adequate Housing has called for increased engagement in complying with ESC rights at the devolved level and highlighted that the effective application of rights at the local and subnational levels is critical for enhanced accountability at the devolved level.<sup>60</sup>

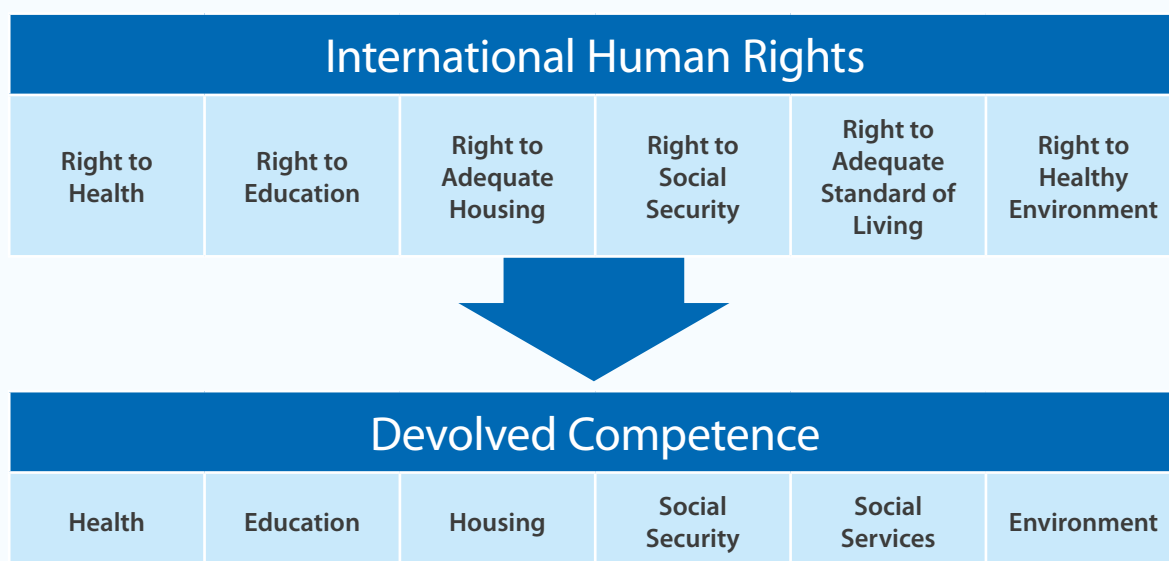
It would not be unusual comparatively speaking for Scotland as a devolved nation to take the lead as a duty bearer fulfilling the state’s international obligations in respect of the devolved areas it has responsibility for governing. There are examples of devolved legislatures where primary responsibility for the observance of international human rights law rests with the devolved legislature, such as in Switzerland, where international obligations are the responsibility of cantonal legislatures.<sup>61</sup> In some instances the cantonal legislatures introduce more robust human rights mechanisms than at the confederal state level.<sup>62</sup> Likewise, in Argentina, both the federal (national) state and provincial (devolved) states have directly incorporated international human rights treaties into their constitutions and both federal and provincial courts are responsible



for enforcing them.<sup>63</sup> In the USA, San Francisco has partially incorporated the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) at a city and council level.<sup>64</sup> In Canada, there are national, provincial and territorial laws protecting human rights.<sup>65</sup> Scotland could take steps to benchmark the implementation of rights in devolved areas against international standards. In this sense it would be setting an example of best practice for other UK jurisdictions to follow.

In Scotland accountability at the devolved level is critically important because ESC rights engage with so many devolved competencies:

**Diagram 2: ESC Rights Directly Engaging with Devolved Powers**



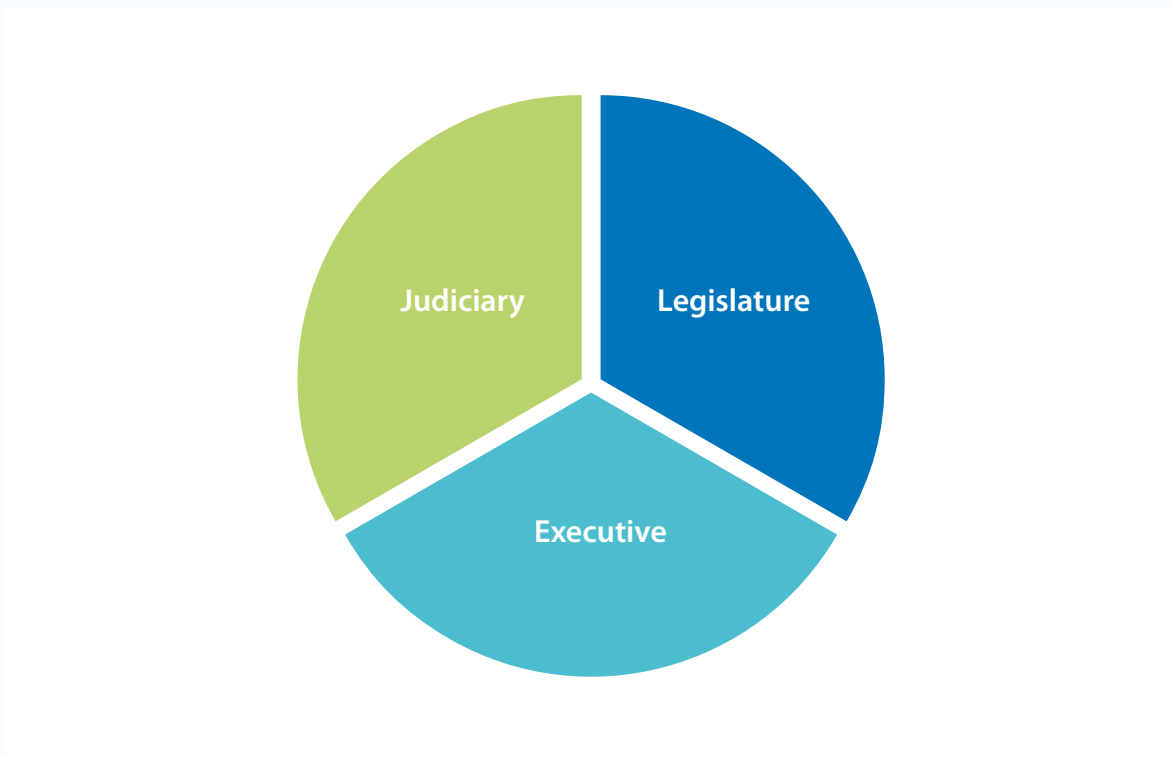
## Reserved areas

Of course, one of the barriers to full incorporation of international human rights law into domestic law is that it would not be possible for Scotland to take steps to fully implement international human rights law in reserved areas. This means restrictions are in place at the devolved level in relation to some of the reserved areas engaging with human rights including employment, trade, immigration, foreign affairs, national security, data protection, some areas of social security and equal opportunities.<sup>66</sup> The constitution itself is a reserved area<sup>67</sup>, as is the Human Rights Act 1998 and the Scotland Act 1998, meaning that any changes to these Acts is beyond the competence of the Scottish Parliament. The Scottish Parliament can legislate in devolved areas, and this includes 'observing and implementing' international human rights obligations in devolved areas. However, under the terms of devolution it is important to be aware that some areas remain the sole responsibility of the state and the UK Parliament.

# 9. Comparative constitutional models

International human rights standards can be incorporated into domestic law through many different models some of which are explored here. Scotland, and the UK, can learn lessons from these comparative models. Some countries have directly incorporated ESC rights into their written constitution.<sup>68</sup> In Scotland and the UK the constitution is not written down in one text but comprises of many different sources of law, including in some cases statutes that take on constitutional significance, such as the Human Rights Act 1998, the Equality Act 1998 and the Scotland Act 1998. An imaginative approach to constitutional models means thinking beyond the traditional single source constitutional text when considering the best approach in Scotland’s unique devolved constitutional arrangement. The models discussed below include consideration of the roles of the different institutions of government – the legislature, the executive and the judiciary. This is a multi-institutional approach to ESC rights that recognises the importance of engaging each branch of government in decisions impacting on ESC rights.

**Diagram 3: Constitutional building blocks**



The following tables contain sample constitutional models that demonstrate the different approaches to incorporation of international human rights law as well as the different judicial mechanisms used to enforce it. The constitutional models can differ significantly across countries and so too do the mechanisms which ensure access to a remedy. This means we see a broad range of constitutional guarantees coupled with a wide variety of different approaches adopted by courts in protecting those constitutional guarantees. The approaches that courts take are important because it gives us insight into the different types of 'justiciability' available (adjudication by a court).

Justiciability mechanisms can offer different degrees of enforcement – sometimes courts are very reluctant to interfere with guaranteeing rights (they are deferential to parliament/government) and other times the court will take significant steps in protecting rights (they uphold the constitution and act as the guarantor of human rights). Each of these approaches is discussed below. Ultimately it is for each state to create the legal structures and implementation mechanisms to effectively provide for human rights. At a basic level however it is important to remember that normally there requires to be some form of legal structure in place, a process that leads to a human rights compatible outcome and a remedy available should the structure or process fall short.

## Argentina

The Argentinian Constitution was amended in 1994 and a number of international treaties were explicitly incorporated into the Constitution, including the International Covenant on Economic, Social and Cultural Rights.<sup>69</sup> This is a 'rights affirmative' constitutional framework where the compliance with international human rights and constitutional rights is the default position, which, can be denounced by the executive if two thirds of each chamber of the parliament approve (creating a rights-affirmative framework with the option for parliamentary derogation).<sup>70</sup> The distribution of powers in Argentina is separated into both federal and provincial autonomy (national and devolved). In addition to the changes to the national constitution there were also a number of changes at the provincial level with individual states adopting constitutional amendments with better protection for ESC rights.

## Finland

In Finland ESC rights receive constitutional protection. The constitutional provisions dealing with ESC rights in the Finnish model are directed at the legislature: the right to citizenship (Article 5); the right to equality before the law (Article 6); educational rights (Article 16); the right to language and culture (Article 17); the right to work (Article 18); and the right to social security (Article 19) are all required to be given effect to through subsequent legislation.<sup>71</sup> The constitutional mandate to fulfil the ESC obligations is therefore directly addressed to the legislature. In this sense, the constitution imposes a mandatory obligation on the legislature to legislate for the protection and fulfilment of ESC rights. This model is therefore consonant with the doctrine of parliamentary supremacy but with the caveat that if the legislature fails to meet its constitutional

obligations the court can intervene. In Sweden a similar pre-enactment review process is in place. It is argued that that this type of *ex ante* review of legislation through the Parliamentary system makes it difficult (although not impossible) to legislate in a way that infringes fundamental rights.<sup>72</sup> The court, however, ought to be available as a means of last resort to ensure executive and legislative compliance.<sup>73</sup> The UN Committee on Economic, Social and Cultural Rights has raised concerns that the Finnish and Swedish constitutional arrangements do not adequately facilitate access to justiciable remedies for violations of ESC rights potentially meaning that *ex post* judicial review is not yet sufficiently developed.<sup>74</sup>

## Switzerland

In Switzerland the default position is that responsibility to implement international obligations is at cantonal level.<sup>75</sup> It is therefore the responsibility of the devolved legislatures to implement international human rights law, including ESC rights. Some cantons go further than the federal level in introducing more extensive human rights protections.<sup>76</sup> However, as with Sweden and Finland the UN Committee on Economic, Social and Cultural Rights has raised concerns that some provisions of ICESCR cannot be directly invoked before the courts in Switzerland creating an accountability gap in terms of justiciable remedies.<sup>77</sup>

## Colombia

The Constitution divides human rights into three groups: fundamental rights, ESC rights and collective and environmental rights (chapters 1, 2 and 3). The Constitution also places international treaties on a domestic constitutional footing (articles 44 and 93). The ESC rights included in the constitution relate to health, housing, work and education, among others. The Constitution also protects vulnerable and disadvantaged groups within society with particular measures for children, women, the elderly and disabled people (articles 46-47). Responsibility for safeguarding the Constitution is assigned to the Constitutional Court (article 241). As a result, there has been a 'profound change' in the legal culture of the country with considerable advancements made in the judicial enforcement of ESC rights.<sup>78</sup>

The main mechanism for the judicial protection under the constitution is the *tutela* device (article 86). The *tutela* enables a person to file a writ of protection before any court or tribunal for the immediate protection of her or his 'fundamental constitutional rights.' All decisions by ordinary judges on a writ of protection are sent to the Constitutional Court and are susceptible to review. Magistrates in the Constitutional Court can review *tutelas*, and where appropriate, will group cases together in order to address structural problems such as for example if an issue emerges that applies to a large group of vulnerable people the cases will be merged together and the court will issue a collective remedy.

## Germany

In Germany human rights take on constitutional status. Constitutional rights do not include all economic and social rights, however the constitution does provide for a right to dignity (Article 1.1 Basic Law) that the court has interpreted as constituting minimum standards (*existenzminimum*) across particular social rights.<sup>79</sup> Governance responsibilities are divided between the federal level (Bund) and the devolved level (Länder) including compliance with human rights obligations.<sup>80</sup> The court has interpreted the constitution to include minimum obligations in the context of ESC rights.<sup>81</sup>

## South Africa

The South African model also adopts a mixture of substantive rights recognition, together with safeguards and limitation clauses contained in the Constitution. Rights are also afforded protection to different degrees along the respect, protect, promote, fulfil axis.<sup>82</sup> Some 'negative' rights enjoy immediate protection such as the right not to be evicted without fair procedure.<sup>83</sup> Some rights are afforded non-derogable status, such as rights relating to children.<sup>84</sup> Other rights are considered to be subject to progressive realisation such as the right to access adequate housing and the right to access health care, food, water and social security.<sup>85</sup> There is a general limitation clause under section 36 whereby rights may be limited if reasonable and justifiable in an open and democratic society.<sup>86</sup> The South African Constitutional Court has adjudicated upon and enforced ESC rights employing a 'reasonableness' review in assessing state compliance.

## Sweden

Sweden has recently taken a significant step in partially incorporating the UN Convention of the Rights of the Child into domestic law.<sup>87</sup> The legislation passed in June 2018 will come into force in January 2020. The new UNCRC Act clarifies that courts and legal practitioners must "consider the rights contained in the Convention on the Rights of the Child and that [t]he rights of the child must be considered in deliberations and assessments made in decision-making processes in cases and matters that concern children."<sup>88</sup> It is not yet clear to what degree UNCRC rights will be enforceable by the court. There is a tripartite process underway where the UNCRC implementation process will be supported through capacity building, a legal audit of where change is required to comply with the UNCRC (mapping the gaps and how to address them) and the development of extensive guidance to assist decision makers in compliance once the UNCRC is incorporated.

Table 1: Constitutional Models

Country	Means of incorporation	Role of legislature/executive	Role of court	ESCR outcome
Argentina	Constitutional Text and Direct Incorporation	Strong	Strong	Strong
Finland	Constitutional Text	Strong	Weak	Strong
Switzerland	Devolved competence	Strong	Weak	Moderate
Colombia	Constitutional text and reference to international law	Strong	Strong	Strong
Germany	Social minimum – human dignity	Strong	Strong	Moderate
South Africa	Constitutional Text	Strong	Strong review/weak remedies	Moderate
Sweden	Legislation incorporating UNCRC	Strong	Not yet clear but may be weak if procedural duty to consider	Moderate
UK	None	Non-binding recommendations of JCHR may involve pre-legislative scrutiny	Only if under rubric of something else	Weak
Scotland	None	None	Only if under rubric of something else	Weak

Table 2: Role of Legislature/Executive/Judiciary and ESC Outcome

Incorporation Model	Detail	Role of legislature/executive	Role of Court	ESC outcome	Within devolved competence?
Rights enabling Act/ Devolved Human Rights Act (holistic/ sectoral or both)	Direct incorporation or implicit incorporation through a 'constitutional statute' <sup>89</sup>	Strong	Strong	Strong	Yes, to some degree in relation to devolved areas.
Amending Scotland Act 1998	ss.29/101/57 amended to include ICESCR	Strong	Strong (ultra vires remedy)	Strong	No, would require Westminster to legislate
Amending Human Rights Act 1998	s.1 amended to include ICESCR	Strong	Moderate (declaration of incompatibility)	Moderate depending on whether legislature/executive responds	No, would require Westminster to legislate
International Complaints mechanisms	Sign up to Optional Protocol ICESCR/ ESC Collective Complaints Mechanism	Strong (should respond to complaints)	Weak/ None	Moderate depending on whether legislature/executive responds	No, would require Westminster to legislate
Common law	Implementation of international human rights standards through the common law	Weak	Strong but on a case by case basis	Weak – Strong depending on degree of enforcement	Falls within the mandate of the judiciary not the legislature/executive.

Table 3: Models of incorporation for Scotland

Constitutional Model for ESC rights	Details	Barriers to adopting this route	Constitutional Safeguards	Outcome
<p><b>MODEL A*</b></p> <p>Scottish Parliament legislative framework full incorporation (Human Rights Act for Scotland)</p> <p>* This could be based on a Scotland Act or Human Rights Act structure or something more like constitutional texts from the examples listed above with constitutional rights.</p>	<p>Scottish Parliament imposes 'self-regulatory' legislation, which incorporates international human rights including ICESCR or imposes domestically drafted form of CPESC rights.</p> <p>The model could also enshrine rights and leave further detail to be later defined and implemented by Parliament (Finnish model).</p>	<p>This would need to comply with the current reserved v devolved framework and so consideration of reserved areas such as equality<sup>90</sup> would need to be considered in terms of devolved competence.</p>	<p>Enhanced role of the Scottish Parliament in ex ante review of legislation.</p> <p>Equality and Human Rights Committee to assess compliance with CPESC rights before passage of subsequent legislation.</p> <p>Court has power to oversee compliance with Act and offer remedies for non-compliance (including interpretative obligation, ultra vires remedy, compliance duties on parliament and executive, court can strike down unlawful legislation).</p>	<p>Positive enforcement of CPESC with various options for constitutional safeguards.</p> <p>Most comprehensive form of CPESC protection with powers and responsibilities shared between institutions.</p> <p>Does not cover reserved areas such as employment law and equality law.</p>



Constitutional Model for ESC rights	Details	Barriers to adopting this route	Constitutional Safeguards	Outcome
<p><b>MODEL B</b></p> <p>UK/ Scottish Parliament legislative framework based on Human Rights Act structure</p>	<p>Either UK or Scottish Parliament could adopt a similar structure to Human Rights Act that extends to ESC/ ICESCR.</p>	<p>This would need to comply with the current reserved v devolved framework. It is beyond the competence of the SP to amend the HRA.</p>	<p>This option includes an interpretative clause; a duty on public bodies to comply and courts can issue declaration of incompatibility.</p>	<p>This is a less robust constitutional framework in terms of judicial overview.</p> <p>Declarations of incompatibility are not binding on Parliament and do not affect the application of the law.</p> <p>There is a strong element of deference to the legislature.</p>
<p><b>MODEL C</b></p> <p>UK Parliament legislative framework based on Scotland Act structure</p>	<p>UK Parliament could extend scope of section 29 of Scotland Act 1998 to include rights enshrined in the International Covenant of Economic, Social and Cultural Rights (ICESCR)</p>	<p>Requires political support by majority of UK Parliament – it is not within devolved competence of the SP to amend the Scotland Act 1998.</p>	<p>This framework is how the ECHR is currently protected in Scotland. The judiciary are tasked with the responsibility to review compatibility and can declare unlawful legislation ultra vires.</p>	<p>Positive ESC enforcement</p> <p>Human rights affirmative framework providing ESC rights with constitutional status in Scotland.</p> <p>Under this model the judiciary play a substantive role in scrutinising compatibility.</p>

Constitutional Model for ESC rights	Details	Barriers to adopting this route	Constitutional Safeguards	Outcome
<p><b>MODEL D</b></p> <p>UK/Scottish Parliament legislative framework based on duty to have due regard to ICESCR (or other international treaties)</p>	<p>Similar to the Equality Act 2010 public sector equality duty or the duty imposed by the Welsh Assembly to have due regard to the UN Convention on the Rights of the Child.</p>	<p>This would need to comply with the current reserved v devolved framework.</p>	<p>This option requires that the judiciary play a supervisory role in ensuring compliance with the duty to have due regard. This is a procedural duty to take into consideration and does not necessarily result in a substantive human rights compliant outcome.</p>	<p>Weaker type of enforcement</p> <p>Procedural protection of ESC rights</p> <p>May help with initial implementation of ESC rights as part of decision making process.</p>
<p><b>MODEL E</b></p> <p>UK Parliament signs the UK and Scotland up to an international complaints mechanism/</p>	<p>Optional Protocol to ICESCR or Collective Complaints Mechanism under European Social Charter. This would not be dissimilar to the way complaints can currently be raised with the European Court of Human Rights or the Court of Justice of the European Union.</p>	<p>This would require implementation through Westminster.</p>	<p>The decisions of the committees may not necessarily be made automatically binding giving parliament time to implement change in order to comply with any findings of non-compliance.</p>	<p>Weaker type of enforcement unless decisions of committees made binding.</p> <p>Improved scrutiny of ESC compliance and access to alternative remedies.</p>

# 10. Role of the Legislature Enforcing Human Rights

The legislature can play one of the most significant roles in ensuring that ESC rights are incorporated and enforced, including by designing and delivering legislation which sets out ESC rights as legal standards. In addition, the legislature can play an important role as an accountability mechanism in the review of legislation before it is passed to ensure that it is compliant with ESC rights. The Finish legislative model demonstrates how the Parliament can act as an important accountability mechanism and guarantor of human rights by conducting pre-legislative scrutiny:

## Legislative Models and Pre-legislative Scrutiny

### Case Example: Finland

Under the Finish constitution there is a process of pre-legislative scrutiny that ensures any legislation passed by Parliament is fully compatible with constitutional rights, including ESC rights. This is a 'rights-affirmative' constitutional framework that operates on a presumption in favour of human rights compatibility rather than an ad hoc approach.<sup>91</sup> This constitutional model imposes a duty on the legislature to introduce legislation to fulfil the right. There is only a limited role for the court which can review legislation if it is found that it does not comply with the constitution.<sup>92</sup>

The Constitutional Law Committee makes its decision on the compatibility of legislation after listening to constitutional and human rights experts. These decisions are not politically motivated but based on legal standards. The decisions of the Committee are not binding on Parliament but are considered to carry sufficient weight that by convention Parliament complies with them.

However, this review is reactive rather than proactive. For example, when parliament was reforming welfare legislation in 2003 the CLC declared the already in force provisions of the 'partial labour market subsidy' unconstitutional (those living with parents received only 60% of unemployment benefit). The provisions had formed part of the welfare state before the constitution was revised in 1995. It was not until the provisions came before the CLC under the 2003 reform that the constitutionality of the existing legislation to be retained was scrutinised. The subsidy was transformed in to a means tested subsidy in order to comply with ILO Convention 168 on Employment Promotion and Protection against Unemployment.<sup>93</sup>

In Scotland, there is ex ante (pre-legislative) review of human rights in the Scottish Parliament to some extent (in accordance with the Scotland Act 1998).<sup>94</sup> This occurs through non-disclosed assessments by the Executive and the Presiding Officer of the Scottish Parliament before legislation is passed. There is a requirement for the relevant Minister and the Presiding Officer to make a statement of compatibility in relation to each Bill being considered. However these limited reviews do not take the full body of international human rights law into consideration meaning that ESC rights, for example, are not regularly reviewed as part of the pre-legislative process. The recently expanded remit of the Equality and Human Rights Committee (EHRC) could be expanded further to include ESC rights. There would be scope for broadening the current pre-legislative scrutiny arrangements in order to ensure that all human rights are being taken into consideration across parliamentary business, by the EHRC and by other committees. Effective human rights scrutiny by committees is a particularly important aspect of accountability in the parliament because the legislature is unicameral.

The United Nations Office of the High Commissioner on Human Rights and the Inter-Parliamentary Union has recommended that '[h]uman rights should thoroughly permeate parliamentary activity'.<sup>95</sup> Ideally the Scottish Parliament EHRC should work towards supporting the other Committees to engage with international human right norms as part of their remit through an awareness raising campaign and the adoption of additional resources managed by the Committee such as cross-parliamentary 'Human Rights Rapporteurs'.<sup>96</sup>

A renewed remit for the EHRC would require sufficient support and resources. Ex-ante review could be supported by a panel of human rights and constitutional experts (including expertise on ESC rights). Compatibility decisions of the EHRC and the expert advice received could be published to ensure transparency. The decisions of the Committee may not necessarily be binding but should carry sufficient weight in guiding the legislature on human rights compliance.

# 11. Role of the Court Enforcing ESC Rights

The court is the accountability mechanism that can offer an effective remedy for a violation of ESC rights if the legislature and executive have failed to comply. ESC adjudication and the legal enforcement of rights can occur through a 'myriad of forms' some of which offer greater protection than others.<sup>97</sup> The tables below set out some of the comparative case law to demonstrate the different ways that the court approaches the enforcement of ESC rights to different degrees.

## Comparative Case Law Analysis

### Case Example: Germany

The German constitution recognises the right to human dignity.<sup>98</sup> Whilst there is no specific or explicit guarantee to far reaching ESC rights the courts have interpreted the right to human dignity as requiring a minimum level of social assistance. In the *Hartz IV* case the German constitutional court found that there is a 'fundamental right to the guarantee of a subsistence minimum that is in line with human dignity.'<sup>99</sup> This is an example of 'human dignity' providing the threshold for assessing compliance with the right to social security. The court declared the social security system unlawful when it failed to comply with the right to human dignity and when the means of calculating minimum subsistence (*existenzminimum*) were fundamentally flawed. The court found that, 'It is the socio economic right of every needy person to be provided, via statutory law, with material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural, and political life.'<sup>100</sup>

The *Hartz IV* case in Germany has provided a transformative and innovative approach to the right to social security that sets out a substantive standard as well as a procedural right. The court directly referenced Germany's obligation to comply with Article 9 ICESCR when assessing the minimum subsistence in a subsequent case dealing with asylum seekers.<sup>101</sup> This could be compared with the weaker constitutional approach where justiciability assesses whether the legislature has provided a statutory scheme for social security rather than supervise the threshold met or the means of calculating a minimum level. In Hungary for example, the court has adjudicated on the right to social security but only so far as to determine whether a system has been implemented

rather than examine the adequacy of the system itself.<sup>103</sup> This approach is more closely aligned with the UK and potentially Scotland – where even if the legislative scheme is available, accessible and affordable – it may not necessarily be benchmarked against an appropriate threshold or standard in terms of its adequacy.

The *Hartz IV* decision stresses that there is a fundamental guarantee to a constitutional minimum that covers the material conditions that are indispensable for a person's physical existence (for example, housing, food, and clothing), for a minimum participation in human interaction (for example, telephone costs), and for a minimum participation in social, cultural, and political life (for example, membership in sport clubs, and going to the cinema).<sup>104</sup>

In Scotland the *Hartz IV* adjudication helps to demonstrate how the determination of entitlement (section 19 of the Social Security (Scotland) Act 2018) could be measured against human rights standards to ensure that the level of subsistence available is compatible with human rights and human dignity. In the first instance this would place a duty on the state, or any public or private body acting on its behalf, to implement a process for defining entitlement in a human rights compatible way (a procedural duty) as well as ensuring that this process should result in an outcome meaning that no person faces living in destitution (a substantive duty). This could also involve providing the courts with a role to supervise whether the legislature and/ or executive are enacting a social security scheme that employs a methodological approach that ensures minimum levels of subsistence across the devolved areas in an inclusive way. The proposed Scottish Social Security Commission could play an important role in assessing this – however, if the legislature fails to respond to the Commission's recommendations then, in order to ensure accountability, a remedy should be made available – this would require a role for the court. For example, if the Scottish social security scheme used incorrect data or a flawed methodology to calculate entitlement there should be a remedy available to the applicant to challenge this and the court could order that the method be corrected/ improved. This is a remedy which results in the right to a process for determining a substantive threshold. The adjudication in Germany maintained a strong deferential role to parliament and a wide margin of appreciation in terms of how best to approach and deliver the social security scheme.<sup>105</sup> Rather than view the court as usurping the role of the legislature it might be helpful to think of adjudication as an institutional dialogue – where the court can order the legislature or executive to 'rethink' a flawed policy without necessarily declaring it void.<sup>106</sup>

### Case Example: Colombia

The *tutela* device<sup>107</sup> is a fast track remedial process whereby applicants can seek to enforce constitutional rights, including ESC rights, if they require immediate protection. In the context of social security the Colombian Constitutional Court has developed the concept of *mínimo vital* (based on the German *existenz minimum*). Although the *mínimo vital* is not explicitly mentioned in the constitution it has been interpreted as implicit to the right to life, the right to health, the right to work and the right to social security.<sup>108</sup> As explained, ‘in cases of extreme urgency in which the basic subsistence of the individual and her family is in jeopardy, it is possible to file a writ of protection [*accion tutela*] as a fast-track emergency measure for the enforcement of ESC rights.’<sup>109</sup>

The courts have intervened to ensure that those in desperate need have access to a remedy as quickly as possible. For example, an elderly man living in absolute poverty requested that the state provide him with economic assistance so that he could undergo an eye operation that would allow him to recover his sight. The court found that the legislature had not complied with its duty to adopt a law to address the situation of such persons and ordered the social security system to provide the treatment.<sup>110</sup> In another case a poor elderly man who had not received a State subsidy was given access to a remedy because when he had initially applied he had been told the wrong information from the relevant administrative authority about the procedures necessary to obtain his benefit.<sup>111</sup> The *tutela* device cannot be used if there are other procedures available to remedy the situation – it is essentially a last resort in the case of absolute emergencies. For example, if the minimum conditions for a dignified life of a mother and new born depends on the payment of maternity benefits this right becomes a fundamental right that is immediately enforceable under the *tutela* device.<sup>112</sup> However, if the need is not immediate and there are other means of seeking a remedy then the *tutela* will not be necessary.

In 2004 the court combined 1,150 *tutela* cases of internally displaced people (IDP) and issued a structural remedy<sup>113</sup> in three parts:

*‘First, it mandated that the government formulate a coherent plan of action to tackle the IDPs’ humanitarian emergency and to overcome the unconstitutional state of affairs. Second, it ordered the administration to calculate the budget that was needed to implement such a plan of action and to explore all possible avenues to actually invest the amount calculated on programs for IDPs. Third, it instructed the government to guarantee the protection of at least the survival-level content (mínimo vital) of the most basic rights—food, education, health care, land, and housing. All of these orders were directed to all relevant public agencies, including national governmental entities and local authorities.’<sup>114</sup>*

This could be compared with the type of adjudication in Scotland that saw a broad based approach to human rights violations such as addressing stopping out in prisons (in order to ensure compliance with Article 3 ECHR)<sup>115</sup> or ensuring access to a solicitor in the police station (in order to ensure compliance with Article 6 ECHR)<sup>116</sup>. In these cases Scottish legislature, executive and judiciary have already developed and demonstrated capacity to deal with structural remedies for systemic human rights violations under the existing terms of devolution. Since 1997 the Colombian Constitutional Court has handed down structural remedies in relation to the social security system,<sup>117</sup> massive prison overcrowding,<sup>118</sup> lack of protection for human rights defenders,<sup>119</sup> and failures in the health care system.<sup>120</sup>

In Scotland, a similar approach to fast track 'tutelas' and potential structural remedies could be rolled out as part of access to justice enhancements. For example, the tribunal system, could potentially be utilised as a route to accessing a remedy in accordance with international human rights law in areas relating to housing, health or social security. This would require the tribunals to approach statutory duties in accordance with international human rights law in a way that does not currently feature as part of the existing inquisitorial tribunal process.

For example, in the case of social security it could require the social entitlement tribunal to play a role in interpreting what is required to meet a minimum according to international human rights law rather than solely rely on the domestic statutory regime for a definition (because the statutory regime may result in entitlements that do not meet the basic needs for human dignity). On the other hand, it could require the tribunal to consider whether a policy or a means of calculating entitlement is sufficiently robust to ensure human rights compatibility.

If the tribunal system encounters numerous cases where the same issues reappear and it appears the problem is more systemic court procedures could be developed so that the issue could be referred to the Court of Session to make a determination on a group of collective cases. The higher court could therefore take on a role similar to the Colombian Constitutional Court by issuing a structural remedy that aims to address the structural, or systemic issue, that has arisen under multiple 'tutela' style tribunal cases (this is discussed in more detail below).



### **Case Example: Argentina**

In Argentina, international human rights law has been directly incorporated into the national (Article 25) and subnational constitutions. Several cases have seen ESC rights enforced through the judiciary with reference to these international standards. For example, in *Saavedra* the court referenced UN Committee on Economic Social and Cultural Rights General Comments 4 and 7 in interpreting the right to housing.<sup>121</sup> In *Gianelli* a trial court declared that if tenants with children were threatened with forced eviction the government authority must assure alternative housing.<sup>122</sup> In *Delfino*<sup>123</sup> the court considered the conditions of government funded private hostels did not meet habitability conditions and ordered the city administration to adopt measures to provide adequate housing – the courts also imposed fines on public officials for failing to comply with a court agreement that involved ensuring adequate housing conditions of a number of families included in an emergency housing plan.<sup>124</sup>

The court in Argentina has also gone so far as to offer structural remedies where the local authority has failed in implementing ESC rights, such as the right to housing. This has included wide ranging structural remedies for collective cases involving multiple families (like a class action). In *Agüero* a collective injunction involved 86 families living in irregular conditions on state-owned land.<sup>125</sup> Initially the case was settled and the administration agreed to design a specific housing plan for the families – the administration's failure to comply led to a new injunction and to a court ordered seizure of public monies to secure funding for the promised plan. The administration adopted a plan to build 91 dwellings giving priority in the legal tender to enterprises offering jobs to residents. The administration was to offer residents access to a special line of credit where payments were not to exceed 20% of monthly income. This structural approach ensured budget, policy and outcome were all embedded in international human rights law.

## Case Example: South Africa

The jurisprudence of the Constitutional Court of South Africa employs reasonableness as the means through which to assess constitutional compatibility as initially set out in the *Grootboom*<sup>126</sup> case. This case related to an application made under sections 26 and 28 of the Constitution in relation to the right to access adequate housing and the rights of children to shelter respectively. Mrs Grootboom and 899 others had been living in poor conditions in an informal settlement. They then illegally occupied nearby private land designated for low-cost housing and were forcibly evicted. Their shacks were bulldozed and burnt and their possessions destroyed. Following an interim order issued by the High Court in favour of Mrs Grootboom and the other respondents the state lodged an appeal with the Constitutional Court. A further intermediary solution was sought between the parties, however, the state failed to adhere to the agreed terms. An urgent application was thereafter made to the Constitutional Court and the court made a declaratory order. The order required the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution (the progressive realisation of the right to housing). This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need. The court assigned responsibility to the Human Rights Commission under section 184 of the Constitution to monitor compliance with the declaratory order.

In the unanimous judgment issued by Justice Yacoob the court reaffirmed the justiciable nature of ESC rights as enshrined in the Constitution and confirmed in the Certification Judgment.<sup>127</sup> The court identified that the difficulty in giving substance to the ESC rights in the constitution related to how best to enforce the rights in any given case:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state “to respect, protect, promote and fulfill the rights in the Bill of Rights” and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.<sup>128</sup>

The judgment in *Grootboom* set out the reasonableness test as the standard of review in ESC adjudication. In this case, the state had not gone far enough to meet the needs of those in desperate need of housing, and, as a result had acted unreasonably. The court ordered the state to revisit its housing strategy and introduce a new policy that reflected its constitutional obligation to provide adequate housing. In this case the right to housing was not immediate enforceable but the state was under an obligation to adopt a policy to ensure that short and long term measures were in place to realise the right to housing.

## 12. What justiciability building blocks would Scotland need?

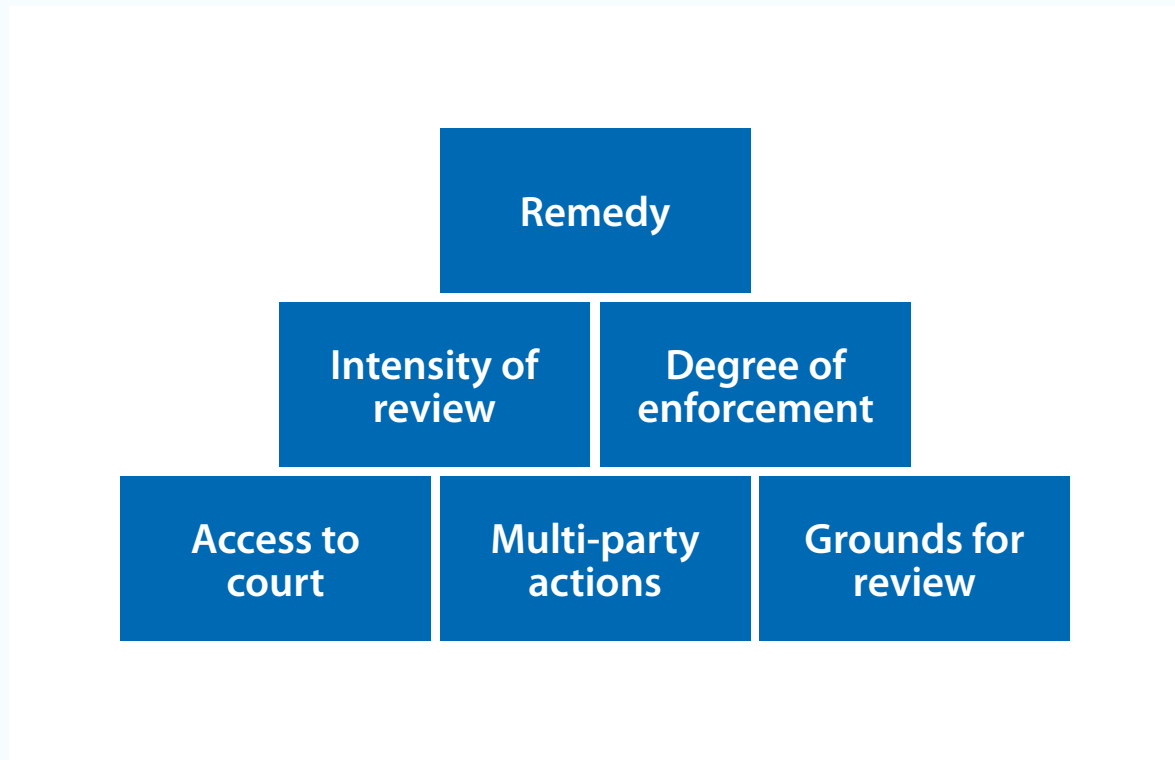
Innovative judicial remedies can occur in a constitutionally legitimate manner in ESC adjudication. Of course, there is still wide scope for deference to Parliament in the determination of rights; however, this could be one of many routes open to the judiciary in a variety of innovative remedies for ESC rights. Courts are well equipped to deal with difficult and complex legal issues with socio-economic implications. As Wolffe has highlighted, prior to his appointment as Lord Advocate:

*“Courts are... generally acutely conscious of the limitations of their competence, of the democratic legitimacy which attends policymaking by Parliament and by an executive accountable to Parliament, and of the subsidiary and limited role which the Courts may accordingly properly play in checking executive and legislative action. It does not follow that the Courts can or should play no role. We might not wish the Courts to decide which is the best means of securing progressive implementation of economic or social rights; but we might, at the same time, decide that it would be useful to allow them, for example, to adjudicate on whether the government has addressed itself to the question of how best to secure that progressive implementation, and whether or not, in doing so, it has discriminated in a manner incompatible with the Covenant. The question of whether the Courts should be given that role – or any other role in relation to economic and social rights – seems to me, ultimately, to be a political or constitutional question, not a conceptual one.”<sup>129</sup>*

Courts can employ a variety of different types of judicial review in the determination of ESC rights including reasonableness, legality, proportionality, procedural fairness, and even what has been termed “anxious scrutiny” meaning the court will step up the intensity of review when considering a decision that impacts on fundamental rights. Courts are also well equipped to develop innovative remedies in order to identify the most appropriate way of determining a case.<sup>130</sup>

Here we consider the ‘building blocks of justiciability’ and what kind of issues require to be taken into consideration when creating a framework for ESC rights adjudication.

Diagram 4: Building blocks of justiciability



## Building block: Access to Court

### Standing as an individual applicant

In Scotland an individual must be able to establish ‘sufficient interest’ in order to be able to seek judicial review of a decision.<sup>131</sup> In addition, when the case engages with human rights under the ECHR then the applicant must also establish victimhood.<sup>132</sup> For those who require to seek legal aid the Legal Aid (Scotland) Act 1986 sets out eligibility criteria including whether the Board is satisfied that the applicant has sufficient grounds for commencing legal action and whether it appears to the Scottish Legal Aid Board (SLAB) that it is reasonable in the particular circumstances of the case that the applicant should receive legal aid.<sup>133</sup> The subjective test of reasonableness by SLAB could result in some applicants struggling to secure the financial resources required to take a case – this would be particularly problematic in the sphere of ESC rights where the litigation culture is in its infancy. SLAB may, for example, examine the likely costs of any case and balance these against the benefit an applicant will get from the proceedings.<sup>134</sup> Judicial review can be expensive, and should only be used as a means of last resort. In addition, when claiming ESC rights the financial implications may not necessarily be addressed as sufficiently significant in financial terms for support to be provided by SLAB. A justice system that facilitates access to remedies for violations of ESC rights cannot be based on balancing whether or not the outcome will be of sufficient financial gain for the applicant, particularly when dealing with access to basic services such as welfare, housing or educational provision. This would suggest that the current restrictions on access to legal aid may require to be given careful consideration in order to facilitate ESC justiciability and access to an effective remedy for a violation of an ESC right.

Further restrictions can apply in the context of securing legal aid when a where a number of people have the same interest in the case. Civil Legal Aid will not be provided to more than one individual unless it can be shown that that individual will suffer serious prejudice.<sup>135</sup> This means that even where access to group litigation, or collective complaints, is facilitated, such as under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 – full access will also require to be reflected in the rules around legal aid eligibility if access to justice is to be facilitated in practice.

### **Standing in public interest litigation**

Public interest litigation has not been widely used in either the UK or in Scotland as a means of challenging societal issues on a wide scale basis.<sup>136</sup> Historically public interest litigation was not allowed in the UK and, although English courts began to hear interest group cases, this did not necessarily trickle down to devolved jurisdictions.<sup>137</sup> Holding the executive to account by means of judicial review has largely been based on a private rights model with a preference on focussing on individual concerns on a case by case basis.<sup>138</sup>

The expansion of standing in Scotland in 2012 was intended to facilitate access to public interest litigation and enhance the protection of rights beyond the private rights model.<sup>139</sup> However, when engaging with ECHR rights eligibility is still restricted by the victim test under the Scotland Act 1998 (section 100) and the Human Rights Act 1998 (section 7). This can make it difficult to establish standing in public interest litigation. Seeking judicial review in a public interest challenge should allow litigants to raise a public law issue which is of general importance even if the claimant has no private interest in the outcome of the case.<sup>140</sup> The additional threshold of establishing victim status in connection with an ECHR breach means that there is a restrictive interpretation of standing for those who might wish to intervene on behalf of large groups.<sup>141</sup> This may well undermine the justiciability of both CP and ESC rights because it may not always be possible for cases to be brought by individuals who meet the eligibility criteria in order to take a case. For example, if a housing charity wishes to raise a public interest litigation case on behalf of social housing tenants the restrictive application of standing in Scotland may mean that they cannot take a case based on Convention rights. If the enforcement of human rights is to extend to ESC rights then the tests for establishing standing should be expanded to ensure public interest cases are actionable.

## **Building block: Multi-party actions**

### **Collective litigation**

Collective litigation is another means of challenging a breach of human rights where a group of individuals take a collective group case against the state (also known as a class action or a multi-party action). Collective litigation has proved successful in dealing with systemic human rights violations under the Colombian *tutela* system where the court can group together cases in order to issue a structural remedy. The Colombian Constitutional Court has heard and decided ‘structural’ cases where it considers whether

an 'unconstitutional set of affairs' requires to be remedied.<sup>142</sup> Usually this will involve multiple applicants (collective cases) and will allow the court to review whether the state can remedy a systemic problem engaging multiple stakeholders and multiple defendants.

These type of structural cases tend to:

- (1) affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
- (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and
- (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.<sup>143</sup>

This could be compared with the type of adjudication in Scotland that saw a broad based approach to human rights violations such as addressing slopping out in prisons (in order to ensure compliance with Article 3 ECHR).<sup>144</sup> The Scottish judiciary has already developed and demonstrated capacity to deal with systemic human rights violations. Nonetheless, remedies for systemic issues in the Scottish cases tends to favour compensation as a form of remedy rather than a structural injunction to correct a systemic issue. There may be more scope to explore the possibilities of viewing alternative remedies as part of a cultural shift in addressing ESC violations. If structural issues arise in relation to ESC rights it would not be beyond the reach of the legislature, executive and judiciary to work together to remedy the matter.<sup>145</sup> For example, if a systemic problem arises in relation to human rights protection then there could be a role for the court to supervise whether the legislature and/or executive could take steps to remedy this through a form of structural injunction. Landau argues that addressing violations of social rights through a structural approach to remedies facilitates a form of social rights adjudication that positively impacts on the lives of poorer citizens and prioritises the most vulnerable.<sup>146</sup>

Traditionally multi-party actions have been addressed on ad hoc basis by identifying a lead case that can act as a test case and sisting (suspending) other cases while awaiting for the outcome of the lead case.<sup>147</sup> Following suggested reform recommended in reports of both the Scottish Law Commission (1996)<sup>148</sup> and the Scottish Civil Courts Review (2009)<sup>149</sup> the Court of Session rules were amended to facilitate the adoption of new procedures for multi-party cases to be initiated at the direction of the Lord President allowing more flexibility for case management by the nominated judge (Rule 2.2).<sup>150</sup> Multi-party procedures have been facilitated under Rule 2.2 on a number of occasions to deal with systemic issues, including claims under the Damages (Asbestos-related Conditions) (Scotland) Act 2009<sup>151</sup> and in response personal injury actions relating to the use of vaginal tape and mesh.<sup>152</sup> Rule 2.2 may offer a potential route to

remedy for multi-party cases as part of a cultural shift in human rights adjudication around systemic ESC violations.

Further reform under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will provide for group litigation in the Court of Session. Further detail on the group procedure for judicial review will be set out in new rules of court to be developed by the Scottish Civil Justice Council.<sup>153</sup> Again, there is more scope for exploring the possibilities that multi-party actions or group cases can provide in terms of dealing with systemic ESC rights violations. Comparative experience indicates that courts must adapt procedures to deal with systemic ESC rights violations by facilitating access to a collective procedure with multiple stakeholders, multiple defenders and through the deployment of structural remedies.<sup>154</sup>

Outstanding issues relate to those cases which do not necessarily fall within the existing court procedures or scope of the 2018 Act. For example, should it become clear that a number of cases are emerging at tribunal level new procedures might be considered to group the cases and 'refer up' to the Court of Session, or for the possibility to confer powers at the Tribunal level to hear systemic issues by using a multi-party approach (for example, where a systemic issue arises in the Housing and Property Chamber of the First Tier Tribunal (for private rental sector)). Likewise, similar consideration must be given to cases arising in the Sheriff Court and what procedures can be used to facilitate multi-party action or grouping of cases when systemic issues arise, such as in relation to complaints on social housing provision currently within the domain of the Sheriff Court.

## Building block: Grounds for Review

### Expanding grounds for review

ESC rights can be adjudicated upon under each of the grounds of review in the same way as CP rights. Grounds of review tend to be classified under a threefold division<sup>155</sup>: **illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness)**. Depending on whether the ground is procedural (procedural impropriety) or substantive (unlawful/ unreasonable) will determine what type of review the court will apply. The grounds for review are not intended to be exhaustive or mutually exclusive.<sup>156</sup> This means, for example that a case could be examined on the grounds that it is potentially unlawful, unreasonable and unfair, as well as on other potential grounds that might emerge in the future.

Table 4: Grounds for review

Ground of review	What does this mean?	What kind of review might be employed?
<b>Illegality</b>	Was the decision lawful?	A court will look at whether the decision is within the power of the decision or whether it is <i>ultra vires</i> (outwith the power of the decision maker). This is a substantive form of review that goes beyond looking at fair process.
<b>Irrationality</b>	Was the decision reasonable?	A court will look at the decision making process and assess whether the outcome of the process was reasonable.
<b>Procedural Impropriety</b>	Did the decision maker follow the correct procedural rules when making the decision?	The court will look at the fairness of the decision making process and the type of review will be concerned with the procedural aspects of the decision.

### Building block: Intensity of Review

Depending on the grounds for review the court can employ different types of review in the determination of ESC rights including **reasonableness, proportionality, procedural fairness and even anxious scrutiny**. Each of the types of review can vary in intensity. Likewise, sometimes various forms of review can be used at the same time, including both procedural and substantive aspects. There is scope for the court to continue to develop the intensity of review in different types of cases. Courts could, for example, develop review techniques that also examine the fairness of the outcome of a decision and its compatibility with rights similar to the approach adopted in the *Hartz IV* case in Germany (discussed above). This type of review, while in its infancy in the UK, is evident in cases such as *UNISON*<sup>157</sup>, where the court considered evidence on what constituted a social minimum when considering the fairness of tribunal fees, or in the case of *RF* where the court considered the lack of empirical evidence to justify a policy unlawful.<sup>158</sup> This type of review is categorised below as **substantive unfairness**.<sup>159</sup>



Table 5: Intensity of Review

Intensity of Review	Definition – what must the judiciary ask itself?
<b>Reasonableness</b>	Was the decision making process reasonable and rational? If not, would no other sensible person applying logic have arrived at the same outcome?
<b>Proportionality</b>	In the context of human rights decisions, was the decision the most proportionate way to achieve a legitimate aim when balancing out the alternatives and taking into account the necessity of the action?
<b>Procedural Fairness</b>	Did the decision making process follow due process, was it fair? Were all of the decision making procedures followed correctly?
<b>Anxious Scrutiny<sup>160</sup></b>	In the context of fundamental rights decisions, does the particular area and severity of the decision merit the judiciary taking a closer look at the substantive and procedural aspects of the case?
<b>Substantive Unfairness<sup>161</sup></b>	Over and above whether the process was fair, was the decision itself fair based on an independent examination of the evidence? Whilst this type of review is in its infancy <sup>162</sup> there is potential for courts to develop review that takes into consideration the fairness of substantive outcomes in terms of rights compliance. In other words, over and above reviewing the decision making process or the power ( <i>vires</i> ) to make the decision, is the outcome itself compliant with ESC rights?

In relation to ESC rights it is particularly important to be aware of the difference between different types of review such as assessing the reasonableness of a decision compared to a more substantive form of review such as proportionality or substantive unfairness. For example, if an applicant challenges the provision of social security they may seek judicial review on grounds of reasonableness and the court will assess the applicant's case based on whether or not the policy or decision relating to the provision of social welfare is 'reasonable'. The threshold for unreasonableness is high in jurisprudence across the UK. Based on the well-developed reasonableness test an action (or omission) must be "so outrageous and in defiance of logic... that no sensible person who had applied his mind to the question ... could have arrived at it".<sup>163</sup> This degree of review means that the onus of proving 'unreasonableness' rests with the applicant and that the court requires a high degree of 'irrationality' to find a matter unreasonable.

Whilst this works well in relation to some areas of human rights it may not be suitable or appropriate for all alleged violations. For example, there is a difference in challenging whether or not a long term policy is fit for purpose in the building of new houses or the immediate need of someone who is living in absolute destitution.

An expanded form of reasonableness review has been the type of review employed in South Africa ESC jurisprudence.<sup>164</sup> In the context of ESC rights it has been understood as a right to a reasonable policy (p) to access a right (x).<sup>165</sup> In other words the court assesses the process leading to a right [p(x)] rather than outcome of the process [(x)]. In the case of *Grootboom*, the court assessed the reasonableness of the housing policy in South Africa and determined that the state had not gone far enough in providing housing for those in desperate need thus acting unreasonably. The outcome was that the state was required to revisit its housing strategy (this did not provide an immediately enforceable right to Mrs Grootboom). Sometimes remedies may have no immediate material impact that results in transformative change for a particular applicant but that the longer term symbolism of the court's interjection will create the space for broader societal change.<sup>166</sup>

This can be compared with a challenge to the provision of social security payments on the grounds that it is manifestly unfair. In this case the court would assess the substantive outcome of a policy or decision when determining whether the process leading to the outcome is substantively fair. As stated above, this approach is evident, for example, in the *Hartz IV* jurisprudence in the German Constitutional Court. The court adopted a hybrid approach to judicial review where they assessed the reasonableness of the policy as well as the fairness of the outcome. The court found that the process was flawed and that the outcome was unfair. The more substantive degree of review meant that the public body had to change the process as well as the outcome in order to comply with the court's decision.

In terms of developing ESC adjudication courts may require to move beyond the traditional reasonableness review and develop other means of assessing human rights compliance. For example, this could manifest as a more thorough form of reasonableness review beyond 'irrationality' to encompass more substantive elements. The UN CESCR has for example developed reasonableness as a test that takes into consideration the following factors:

- ▶ The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
- ▶ Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- ▶ Whether resource allocation is in accordance with international human rights standards.
- ▶ Whether the State party adopts the option that least restricts Covenant rights.
- ▶ Whether the steps were taken within a reasonable timeframe.

- ▶ Whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed.
- ▶ Whether policies have prioritised grave situations or situations of risk.
- ▶ Whether decision-making is transparent and participatory.<sup>167</sup>

Similar consideration could be given for example to tests of proportionality, aspects of which are evident in the above expansive reasonableness test, and which allow a court to weigh up the different considerations a public body has had regard to in making a determination. Again this approach may not take into account whether or not the substantive outcome is unfair. Sometimes this type of review is the most appropriate but again, if the situation relates for example to a non-derogable component proportionality may not be enough. These different considerations all relate to what degree courts might enforce rights along the respect, protect, fulfil analogy.

## Building block: Degree of Enforcement

### Enforcement to varying degrees

The degree of enforcement of ESC rights is particularly important when determining whether the court is enforcing rights in a procedural sense or in a substantive one. There are various ways of viewing the different degrees of protection for ESC rights from negative (immediately enforceable) to positive (requiring action either immediately or progressively) or otherwise understood as responding to procedural v substantive obligations. Nolan et al identify degrees of enforcement through a multitude of varying degrees – from respect, to protect, to fulfil, consideration of progressive realisation and finally non-retrogressive measures.<sup>168</sup> Curtis has expanded this theory to degrees of standard starting with negative, to procedural, through equality and non-discrimination, minimum core arguments, progressive realisation, and prohibiting retrogression.<sup>169</sup> In South Africa the constitution sets out various degrees of enforcement through respect, protect, fulfil, promote. Each of the degrees of enforcement move from partial protection to full protection. This axis of protection is equally applicable to civil and political rights. Courts can therefore issue remedies that enforce CPESC rights to different degrees depending on the circumstances.

**Diagram 5: Degrees of enforcement**

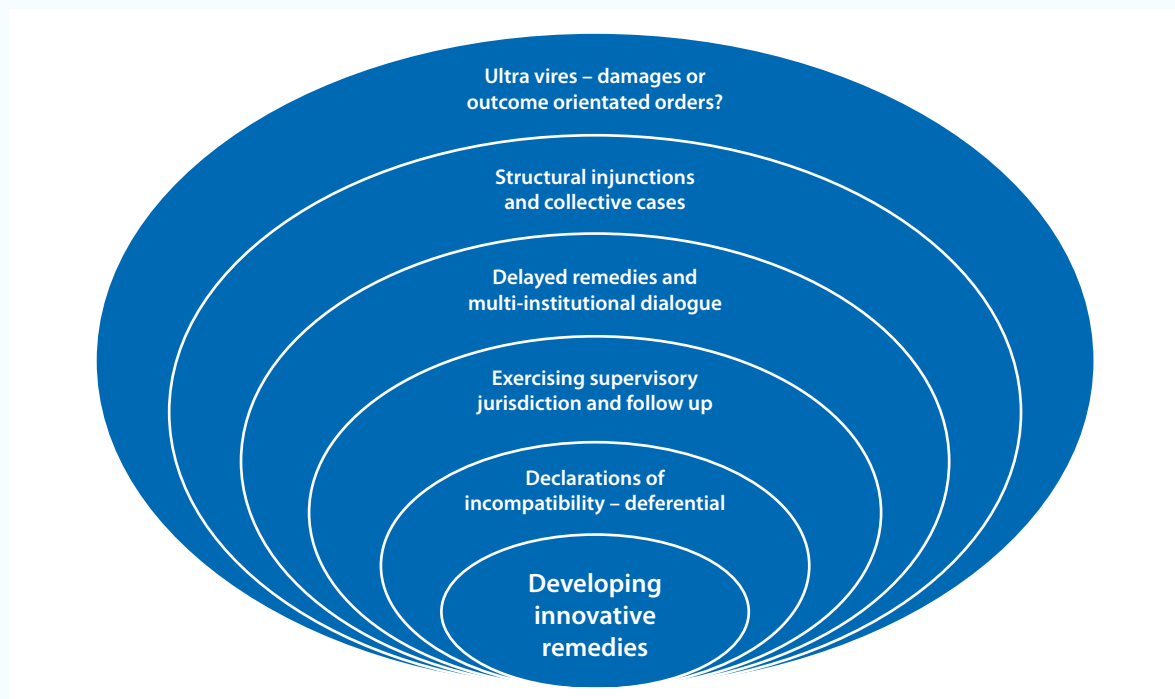


## Building block: Remedy

Courts are also well equipped to develop innovative remedies in order to identify the most appropriate way of determining a case.<sup>170</sup> In some instances courts may employ a variety of remedies to deal with different aspects of the same case, including declaratory orders, interpretative compliance outcomes, injunctions, structural interdicts, delayed remedies or interim relief with supervisory functions.

As discussed above it is important to note the difference between process and outcome remedies (or procedural v substantive enforcement of ESC rights). A process remedy will require Parliament or the Executive to revisit a process or policy, whereas, an outcome remedy will require Parliament or the Executive to revisit an actual outcome meaning substantive change. There are also distinctions to be drawn from the force of a remedy. For example, in Scotland under existing human rights law an applicant can seek an *ultra vires* remedy if the state has acted incompatibly with ECHR rights in a devolved area. This remedy has immediate effect rendering the incompatible act no longer law and in the case of devolved legislation affords the court a strike down power (the legislation is declared *ultra vires* and therefore unlawful). If the same applicant is dealing with an ECHR breach deriving from Westminster legislation then they may seek a declaration of incompatibility. This remedy does not have any effect on the incompatible legislation and does not affect its application – meaning the incompatible legislation is still law. These different remedial orders have different consequences for the applicant. Enhancing human rights protections by further embedding international law into the domestic regime would mean taking steps to develop innovative remedies in different scenarios. Here we consider existing remedies and how these might be developed in future when engaging with ESC rights.

**Diagram 6: Developing innovative remedies**



## Existing remedies available in judicial review actions

**Reduction:** This involves the court quashing the original decision and giving the issue back to the decision maker to look at again.

**Declarator:** An authoritative statement that an individual or body has a specific right or duty.

**Suspension and interdict:** An order for suspension stops something currently being done. An interdict is used to prevent a threatened wrong occurring or the continuance of current wrongdoing.

**Specific performance or specific implement:** the court orders the respondent to do something which they are under a legal duty to do.

**Liberation:** used where there has been wrongful or illegal imprisonment.

**Interim orders:** Interim orders, such as an interim interdict, can be applied for at the start of a case, pending a final decision as a temporary solution.

**Damages** financial compensation can be awarded in judicial review actions if there can be shown to be a ground entitling the petitioner to such an award by virtue of another specific part of the law (Convention rights/ EU law).

Table 6: Classification of innovative approach to remedies<sup>171</sup>

	Weak	Moderate	Strong
Type of duty (or obligation)	<b>Duty to consider rights in the decision making process (due regard)</b>	<b>Duty to design a rights-fulfilling policy (not necessarily resulting in a substantive outcome)</b>	<b>Duty to provide an rights compliant outcome</b>
Type of Enforcement	<p>Court will look at decision making process</p> <p>Deference to Parliament/ Government to remedy incompatible legislation/ action/omission</p> <p>Compliance left to discretion of decision makers</p>	<p>Court can outline procedures and broad goals</p> <p>Criteria and deadlines for assessing progress</p> <p>Decisions on means and policies left to government</p>	<p>Court can issue outcome-oriented orders</p> <p>This could include development of outcome-orientated structural interdicts in multi-party cases</p>
Type of Remedy	<p>Declaration of incompatibility – <i>Hirst</i> (no change in law – parliament could choose to ignore)</p> <p>Due regard duty under the Equality Act 2010 – PSED requires to have due regard to equality of outcomes but does not include duty to ensure equality of outcomes</p>	<p>Ultra vires declaration in <i>Napier</i> (damages awarded which led to SG addressing issue in a substantive sense – a broad goal had been inadvertently set – the symbolic nature of the deferential judgment resulted in material change)</p> <p>Reasonableness judgment in <i>Grootboom</i> (right to a reasonable housing strategy not an immediate right to a house)</p>	<p><i>Hartz IV</i> (hybrid remedy – right to a reasonable process and the right to an outcome to meet threshold of dignity)</p> <p>Structural interdict Colombia (T025 policy/ budget and outcome for IDP)</p> <p>Structural interdict in Argentina (<i>Agüero</i> –budget, plan, outcome for housing)</p>
Type of Defence	We took it into consideration	Our existing policy is reasonable	We do not have enough resources to achieve x

# 13. Conceptual Challenges and How to Overcome Them

## Myth-busting

There are some common misconceptions about the feasibility of enforcing ESC rights by judicial means that will be helpful to reflect upon in order to facilitate an informed discussion in terms of future options for Scotland. These misconceptions tend to feature legitimate concerns about the viability or legitimacy of the judiciary impeding on decisions that should be kept within the realm of the legislature or the executive. However, as demonstrated by the case study examples provided in this paper these critiques can be mitigated and overcome in well-conceived and constitutionally appropriate models of adjudication.

The **anti-democratic critique** of ESC adjudication questions whether the court can legitimately interfere in resource dependent policy areas usurping the power of the legislature or executive. However, civil and political rights are also resource dependent and at times also require the court to intervene as an accountability mechanism. When the court intervenes in civil and political rights determination it does so as an important accountability check on the executive or legislature rather than as a means of usurping the power of other branches of government. One way in which this can occur is to use different types of remedies – some of which may afford larger degrees of deference back to decision makers depending on the circumstances. The court as an intervener in the enforcement of ESC rights is therefore an important part of a multi-institutional dialogue ensuring accountability rather than a transfer of political power to the judiciary.

The **indeterminacy critique** of ESC adjudication tells us that ESC rights are too vague and that their substantive interpretation should not be left to judges or to unelected UN Committees rather than elected officials. In the same way that CP rights require interpretation so too do ESC rights – and in a similar vein, courts can play an important role in giving substance and meaning to ESC rights in the same way that they do with CP rights. This does not require the court to usurp the role of the legislature or executive. If the legislature gives clear instructions to the court on how to interpret rights it can assist in the court fulfilling its role as a guarantor of rights and thus avoiding abdication of this important judicial function. In the determination of CP rights domestic courts can refer to, and are sometimes obliged to consider (or keep pace with), a supranational court, such as the European Court of Human Rights.<sup>173</sup> A concern that sometimes emerges by those rejecting ESC justiciability is that, in the determination of ESC rights, there is no international or regional body of jurisprudence to assist in the interpretation of rights. However, this is based on a misconception. ESC

rights are adjudicated upon and are increasingly well defined in international, regional and domestic law.<sup>174</sup> There are regional mechanisms, such as the Collective Complaints Procedure under the Committee of Social Rights responsible for interpreting state obligations under the European Social Charter and the Optional Protocol to ICESCR providing a complaints mechanism function for the Committee on Economic, Social and Cultural Rights. Whilst the UK has not signed up to these regional or international complaints mechanisms (the latter of which is still in its infancy) the cases emerging from the treaty bodies can act as helpful sources of interpretation. Other regional courts, such as the Inter-American Court of Human Rights, have developed adjudication on ESC rights and its jurisprudence can act as an interpretative tool.<sup>175</sup> Likewise, other sources of interpretation can include General Comments from UN treaty bodies, treaty body decisions and recommendations and jurisprudence from other jurisdictions, such as those discussed above.

Third, the **capacity critique** tells us that courts do not have the capacity to deal with ESC rights, that there would be a flood of litigation and that judges do not have the expertise to determine the substance ESC rights or their complex relationship with other areas of governance. Again, in the same way that CP rights are subject to adjudication similar rules can apply in relation to ESC rights. For example, floods of cases can be avoided through collective litigation or the ‘test and sist’ approach used in the Scottish court system and the new procedures under Rule 2.2 or the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

Most importantly, in the same way CP rights are protected, adjudication can be a means of last resort only available after all other remedies have been exhausted. Courts can also help support their capacity by seeking expertise on ESC rights where needed, including the appointment of *amicus curiae* (a ‘friend of the court’) if required. As above, in the same way the court can draw on expertise in relation to CP or constitutional matters it can also refer to various sources of domestic and international law, comparative case law, international guidance as well as domestic experts in order to assist in capacity building when adjudicating ESC rights. When ESC rights engage with far reaching policy considerations the court can ask the legislature or executive to justify its approach, in the same way that it does so in relation to CP rights.

The complexity of adjudication in the area of human rights cuts across all different types of rights – it is not unique to the ESC rights domain. It is important to remember that some CP as well as ESC rights have core components that are non-derogable as well as components subject to limitation if justifiable. A more nuanced understanding of the nature of ESC rights helps contextualise the different ways in which the court can appropriately review ESC compatibility in a democratically legitimate way. In this sense, the critiques of ESC adjudication are important matters to address when considering how best to accommodate ESC justiciability within any given constitutional context. However, importantly, these concerns are not insurmountable barriers and should not result in the outright rejection of ESC justiciability or judicial enforcement. As Wolffe



identifies: “The question of whether the Courts should be given that role – or any other role in relation to economic and social rights – seems to me, ultimately, to be a political or constitutional question, not a conceptual one.”<sup>176</sup>

## Constitutional safeguards

As with any proposed constitutional or legislative change which alters the way human rights are protected, it is important to consider how to ensure constitutional safeguards are in place. In the UK the enforcement of human rights by the courts has traditionally been a source of contention. There is a concern that court adjudication on rights undermines the separation of powers. It is argued that judicial enforcement of rights lacks democratic legitimacy and that deference to parliament is the most appropriate approach in the determination of human right issues.<sup>177</sup>

It is acknowledged these concerns can become heightened in connection with affording the judiciary the power to determine ESC rights in areas of complex policy that directly engage the allocation of state resources. Of course, it is a legitimate concern that judicial supremacy could usurp the role of the legislature in determining matters relating to the allocation of limited resources across different socio-economic areas.<sup>178</sup> At the same time, the judiciary must be able to hold the legislature and executive to account, including in the determination of rights. This is of particular importance if the legislature has taken steps to create obligations to fulfil rights and to instruct the judiciary, as well as other public bodies, to comply with them. And so, while it may be inappropriate to afford unelected judges a monopoly on decisions regarding wide reaching policy areas with far reaching budgetary implications that does not preclude the judiciary from having any role whatsoever in the process of determining ESC compatibility.

In Colombia the court has been criticised for breaching the separation of powers by making orders which have an impact for allocation of public resources.<sup>179</sup> On the other hand, the court has been applauded for assuming its role as ‘the guardian of the constitution’ and as a guarantor of human rights.<sup>180</sup> One of the unique approaches of the court and the use of the *tutela* has been to have a safety mechanism for the **most vulnerable and the most disadvantaged** groups facing **absolute destitution**. So whilst there is an expectation that recipients should in the first place access benefits and challenge decisions through other administrative means the *tutela* device is there as a fast-track process for those in desperate need. This has resulted in under-represented groups having a means through which to promote their interests through institutional channels and has encouraged decision-makers to take ESC rights seriously and to prioritise them politically – hence avoiding the need to use *tutela* by mainstreaming the requirements for a social minimum as part of everyday policy development and the decision making process.<sup>181</sup>

In the case of Argentina the development of case law after the introduction of new constitutional guarantees leading to the enforcement of economic and social rights

required the development of new standards and criteria and a new type of litigation culture and practice in order to develop a judicial approach to the new norms that were introduced under the constitution – including the direct incorporation of international standards. One litigation mechanism to which the court responded to was when claimants faced urgent situations.<sup>182</sup> Another effective judicial mechanism was facilitating collective complaints (class actions) or responding to a number of individual claims dealing with the same issue as a means of managing a response to situations of desperation.<sup>183</sup> This is another example of how different constitutional settings adjust to the adoption of new human rights norms and is indicative of how Scotland could also adjust its own existing practice to accommodate ESC rights.

Similarly, it is important to bear in mind that litigation is not the only way to advance or protect social rights, nor is it always the most effective strategy. A court's role, while necessary, is also limited – the 'effective protection of ESC rights should be a holistic enterprise' – executive, legislative and judicial.<sup>184</sup> It is for this reason that it is helpful to reflect on the responsibilities of the legislature, executive and judiciary in a multi-institutional approach to human rights protection. In the end, if a state is serious about genuine enforcement and enjoyment of human rights then it must take steps to ensure effective judicial remedies are available, at least as a means of last resort, if the other institutional mechanisms fail to comply with international human rights standards.

## Separation of powers

Rather than view the adjudication of ESC rights as a threat to the separation of powers the constitution could reflect a multi-institutional system where compatibility with ESC rights is shared between the legislature, the executive and the judiciary – where one holds another to account and the judiciary acts as a means of last resort. There are different ways of balancing the separation of powers between institutions in any given constitution. Scotland could reflect upon the most appropriate approach in a devolved constitutional setting. The devolved framework already provides a form of constitutional status to ECHR rights and according to the UN Committee on ESC Rights countries should implement ESC rights in the same way that they do so with CP rights. In Scotland this would mean affording ESC rights a similar constitutional footing within devolved competency.

There are a variety of institutional safeguards employed throughout the world in order to ensure balance in the separation of powers when determining human rights, including ESC rights. For example, the Constitution of Argentina permits the executive to derogate from fundamental rights if there is a two thirds majority in both houses of parliament. In Canada the courts have the power to strike down unconstitutional legislation, including legislation that contravenes human rights.<sup>185</sup> However, parliament has the power to override compliance with the constitutional Charter of Fundamental Rights and Freedoms<sup>186</sup> (the 'notwithstanding' clause). This places the final say on human rights compliance back in the hands of the legislature; at the same time, the use of the clause risks strong political opposition. At the very least, it places compliance as the

default position and derogation from rights as a secondary position that can only occur in a transparent and explicit declaration following a parliamentary vote. As a result it has very rarely been used in practice in Canada and is viewed as controversial power only to be deployed in times of emergency.

The Canadian courts have also employed mechanisms such as delayed remedies to allow the legislature time to comply with judgments when violations of rights have been identified.<sup>187</sup> The delayed remedy is a mechanism through which the court can afford the other arms of state time to make the necessary changes to ensure human rights compatibility. For example in Canada the Supreme Court has previously suspended the declaration of invalidity under section 52(1) of Canada's Constitution Act 1982 for one year to allow Parliament sufficient time to avoid an eventual regulatory void.<sup>188</sup>

This approach to delayed remedies has already been applied in the Scottish context. For example, in 2013 the Supreme Court held that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with the ECHR (A1P1).<sup>189</sup> Rather than strike down the legislation, the Court used section 102 of the Scotland Act 1998 and suspended the effect of its decision for 12 months, allowing the Scottish Ministers time to ensure compatibility and to leave the means through which to make the matter compatible as one to be determined by Scottish Ministers (facilitating deference to the executive). This is an innovative approach to remedies and exemplifies the capacity of the court to meet the demands of ESC rights adjudication. Each of these examples are indicative of attempts to balance responsibility for human rights compliance between the different arms of the state in a multi-institutional framework.

# 14. Conclusion

Scotland is on a progressive human rights journey and is in the process of exploring multiple different avenues to better protect the broad array of international human rights. Following on from the SHRC paper in 2015 on ESC rights<sup>190</sup> this paper introduces the breadth of constitutional models that are utilised across the globe reflecting the different approaches to ESC enforcement already underway internationally. What is clear from the comparative analysis is that other countries have taken steps to constitutionalise, legislate, incorporate and make justiciable ESC rights. It is within the power of the Scottish Parliament to observe and implement international human rights law, including ESC rights, in devolved areas and incorporation of such rights can occur through multiple pathways. In other words, Scotland can take steps to address ESC rights in devolved areas by exploring various forms of incorporation and justiciability should political impetus embrace this journey. This includes the option of creating a framework that facilitates access to effective remedies for violations of such rights.

Ultimately, it is for the people of Scotland, through their political representatives, to choose how best Scotland is governed. This paper seeks to inform the discourse around human rights reform in Scotland so that processes associated with broader constitutional change are evidence led. Scotland can build on the international comparative experience by creating a constitutionally appropriate framework in a devolved context. The comparative analysis tells us that best practice embeds incorporation across the legislative, executive and judicial branches in a multi-institutional approach to human rights with access to innovative and effective remedies. The opportunity to develop the human rights legal framework on this basis not only sets a path for other devolved jurisdictions, or for the UK as a whole, but could place Scotland as a leading international example of best practice.

## Appendix I: Examples of Constitutions protecting ESC rights (in addition to CP rights)

### Sample Constitutions that explicitly protect economic, social and cultural rights (Europe)

Albania 1998 (rev. 2016); Andorra 1993; Belgium 1831 (rev. 2014); Bosnia and Herzegovina 1995 (rev. 2009); Croatia 1991 (rev. 2013); Czech Republic 1993 (rev. 2013); Liechtenstein 1921 (rev. 2011); Macedonia (Republic of) 1991 (rev. 2011); Montenegro 2007 (rev. 2013); Poland 1997 (rev. 2009); Portugal 1976 (rev. 2005); Slovakia 1992 (rev. 2014)

### Sample Constitutions that implicitly protect economic, social and cultural rights (Europe)

Andorra 1993; Belarus 1994 (rev. 2004); Belgium 1831 (rev. 2014); Bulgaria 1991 (rev. 2015); Croatia 1991 (rev. 2013); Finland 1999 (rev. 2011); Hungary 2011 (rev. 2016); Ireland 1937 (rev. 2015); Italy 1947 (rev. 2012); Latvia 1922 (reinst. 1991, rev. 2016); Luxembourg 1868 (rev. 2009); Moldova (Republic of) 1994 (rev. 2016); Montenegro 2007 (rev. 2013); Poland 1997 (rev. 2009); Portugal 1976 (rev. 2005); Romania 1991 (rev. 2003); Serbia 2006; Slovakia 1992 (rev. 2014); Spain 1978 (rev. 2011); Sweden 1974 (rev. 2012); Switzerland 1999 (rev. 2014); Ukraine 1996 (rev. 2014)

### Sample Constitutions that explicitly protect economic, social and cultural rights (Global)

Albania 1998 (rev. 2016); Algeria 1989 (reinst. 1996, rev. 2016); Andorra 1993; Angola 2010; Argentina 1853 (reinst. 1983, rev. 1994); Armenia 1995 (rev. 2015); Belgium 1831 (rev. 2014); Bosnia and Herzegovina 1995 (rev. 2009); Burkina Faso 1991 (rev. 2012); Burundi 2005; Cambodia 1993 (rev. 2008); Cape Verde 1980 (rev. 1992); Central African Republic 2004 (rev. 2010); Central African Republic 2013; Chad 1996 (rev. 2005); Chile 1980 (rev. 2015); Congo (Democratic Republic of the) 2005 (rev. 2011); Côte d'Ivoire 2016; Croatia 1991 (rev. 2013); Czech Republic 1993 (rev. 2013); Ecuador 2008 (rev. 2015); Egypt 2014; El Salvador 1983 (rev. 2014); Equatorial Guinea 1991 (rev. 2012); Eritrea 1997; Ethiopia 1994; Gabon 1991 (rev. 2011); Guatemala 1985 (rev. 1993); Guinea-Bissau 1984 (rev. 1996); Guyana 1980 (rev. 2016); Iran (Islamic Republic of) 1979 (rev. 1989); Iraq 2005; Lesotho 1993 (rev. 2011); Liechtenstein 1921 (rev. 2011); Macedonia (Republic of) 1991 (rev. 2011); Madagascar 2010; Mali 1992; Marshall Islands 1979 (rev. 1995); Mexico 1917 (rev. 2015); Mongolia 1992 (rev. 2001); Montenegro 2007 (rev. 2013); Morocco 2011; Mozambique 2004 (rev. 2007); Nepal 2006 (rev. 2012); Nepal 2015 (rev. 2016); Nicaragua 1987 (rev. 2014); Niger 2010; Paraguay 1992 (rev. 2011); Peru 1993 (rev. 2009); Philippines 1987; Poland 1997 (rev. 2009); Portugal 1976 (rev. 2005); Sao Tome and Principe 1975 (rev. 1990); Senegal 2001 (rev. 2009); Singapore 1963 (rev. 2010); Slovakia 1992 (rev. 2014); Suriname 1987 (rev. 1992); Swaziland 2005; Timor-Leste 2002; Turkey 1982 (rev. 2011); Turkmenistan 2008; Uganda 1995 (rev. 2005); Uzbekistan 1992 (rev. 2011); Yemen 1991 (rev. 2015)

## Appendix 2: UN Recommendations in Scotland

### Case Example: Right to adequate housing – an accountability gap?

In recent times the UK has undergone scrutiny by the UN Special Rapporteur on housing who raised significant concerns about access to the right including the adverse impact on particularly vulnerable groups including: those living in poverty, homeless persons, the disabled, the elderly, young people, the Gypsy traveller community, migrants, Roma and the catholic community in Northern Ireland.<sup>191</sup>

The UK has for a long time provided welfare and benefits through a number of different statutory schemes and when asked about implementing the right to housing the UK refers to the broad base of welfare based legislation that constitutes the structure of the welfare state.<sup>192</sup> However, the legislation, whether derived from Westminster or the devolved level, is not necessarily designed to comply with international standards, which can create a housing rights gap.

The UN Committee on Economic, Social and Cultural Rights, the body responsible for monitoring UK compliance with ICESCR has raised concerns about the 'persistent critical situation in terms of the availability, affordability and accessibility of adequate housing... in part as a result of cuts in State benefits.'<sup>193</sup> The Committee also raised concerns about the lack of social housing, forcing households to move into the private rental sector, which is also not adequate in terms of affordability, habitability, accessibility and security of tenure.<sup>194</sup>

The Committee has recommended that the state:

- ▶ addresses its housing deficit by ensuring a sufficient supply of housing, especially for the most disadvantaged and marginalised groups, including middle and low income individuals/ households, young people and persons with disabilities;
- ▶ regulates the private rental sector, including through security of tenure protection and accountability mechanisms;
- ▶ addresses bad housing, including substandard housing and conditions and uninhabitable housing;
- ▶ ensures access to adequate access to culturally appropriate accommodation for the Roma, Gypsy and Traveller communities with access to adequate services such as water and sanitation; and
- ▶ addresses outstanding issues relating to homelessness.<sup>195</sup>

### **How can Scotland comply with the right to housing?**

Scotland could implement housing legislation in compliance with the right to adequate housing as defined in international law by ensuring accessibility, affordability, availability and quality of housing in Scotland in the public and private sphere. In addition, Scotland could take steps to ensure effective remedies are available if the right to adequate housing is violated. In many respects Scotland has taken steps to provide housing in a human rights compatible way. For example, the Homelessness etc. (Scotland) Act 2003 has been commended as an example of best practice by UN treaty monitoring bodies, especially its provision relating to the right to housing as an enforceable right.<sup>196</sup> Other examples of good practice include, the Homeowner and Debtor Protection (Scotland) Act 2010; the abolition of priority need in homelessness applications in 2012; more robust tenancy arrangements introduced under the Private Housing (Tenancies) (Scotland) Act 2016; the Repairing Standard imposing an obligation on landlords to maintain minimum habitability requirements under the Housing (Scotland) Act 2006; and the Scottish Social Housing Charter 2012 which sets out standards of quality in the social housing sector.

More could be done to ensure that Scotland complies with the international standards set out in ICESCR and other international treaties. By doing so Scotland could take the lead as an example of best practice in the provision of housing. By incorporating the right to adequate housing into Scots law the existing examples of best practice could be measured against international standards to ensure gaps do not emerge – such as for example ensuring that housing is not provided in a discriminatory manner – such as excluding particular vulnerable groups (disabled, elderly, migrant communities, Scottish Gypsy Traveller community and so on).

If seeking to ensure compliance with international human rights the Scottish Parliament and Scottish Government must create a devolved framework that ensures availability; adequacy; habitability; affordability; accessibility; security of tenure; provides housing in appropriate locations and the adoption of a national housing strategy – each of the components required in international law. Part of this requirement should include ensuring access to effective remedies should for any reason access to the right to housing be undermined.

For example, in relation to Scotland specifically the Committee on Economic, Social and Cultural Rights has highlighted the chronic shortage of social housing particularly for the most disadvantaged and marginalised, such as persons with disabilities.<sup>197</sup> The UN Committee on the Rights of the Child

(UNCRC) has urged Scotland, as well as other parts of the UK, to strictly implement the legal prohibition of prolonged placement of children in temporary accommodation by public authorities; to reduce homelessness and to ensure that children have access to adequate housing that provides physical safety, adequate space, protection against threats to health and structural hazards, including cold, damp, heat and pollution and accessibility for children with disabilities; and to introduce a statutory duty for local authorities to provide safe and adequate sites for travellers.<sup>198</sup>

### Case example: Right to social security – an accountability gap?

The UN Committee on Economic, Social and Cultural Rights has consistently raised concerns that the UK is not complying with the right to social security. In the last review by the Committee it raised deep concerns about

*“the various changes in the entitlements to, and cuts in, social benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, such as the reduction of the household benefit cap, the removal of the spare-room subsidy (bedroom tax), the four-year freeze on certain benefits and the reduction in child tax credits. The Committee is particularly concerned about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living by disadvantaged and marginalized individuals and groups, including women, children, persons with disabilities, low-income families and families with two or more children. The Committee is also concerned about the extent to which the State party has made use of sanctions in relation to social security benefits and the absence of due process and access to justice for those affected by the use of sanctions.”<sup>199</sup>*

In addition the European Committee on Social Rights has concluded that the UK is not in conformity with the right to social security as required by the European Social Charter. The European Social Charter requires states to establish, maintain and progressively improve a social security system.<sup>200</sup> The Committee concluded in January 2018 that the level of Statutory Sick Pay and long-term incapacity benefits are inadequate as well as the minimum levels of employment support allowance and unemployment benefits.<sup>201</sup>



### **How can Scotland comply with the right to social security?**

Under the terms of devolution the Scottish Parliament has the devolved competence to implement international obligations in devolved areas.<sup>202</sup>

Under the initial terms of devolution much of the social security system remained a reserved matter meaning that responsibility for legislating for and implementing the right remained with Westminster. In 2016 the UK Parliament partially devolved responsibility for social security to the Scottish Parliament in areas including housing, fuel, food, and disability benefits.<sup>203</sup> The Scottish Social Security (Scotland) Act provides for a number of Social Security principles, one of which recognises that 'social security is itself a human right and essential to the realisation of other human rights'.<sup>204</sup> The Scottish Government has committed to 'delivering a rights based approach to social security'.<sup>205</sup>

There is nothing in the legislative framework that affords a statutory footing to the right to social security with reference to international law as a benchmark coupled with an effective remedy.

Prior to enactment a non-government amendment<sup>206</sup> to the legislation was introduced by the Scottish Human Rights Commission to include a duty to have due regard to the right to social security as defined in international human rights law, including Article 9 ICESCR. The Scottish Parliament considered the amendment at Stage 2 of the Bill process and rejected the proposal.<sup>207</sup> This duty if implemented could have had a potentially transformative impact by providing a legal underpinning to the Scottish Government and Scottish Parliament's previously articulated commitments to provide a statutory footing to social security as a human right. A duty to have due regard creates a procedural duty to consider, in this case the right to social security as defined in international human rights law, when implementing the statutory regime.<sup>208</sup> This duty was not included in the Act. Further steps could be taken to align the new devolved social security obligations to ensure implementation is in accordance with the requirements of international human rights law.

## References

- <sup>1</sup> See for example the definition of incorporation as developed by the UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.20. I am grateful for discussions with Professor Simon Hoffman and Juliet Chase on the UNCRC approach to incorporation.
- <sup>2</sup> New legislation passed in Sweden will see the incorporation of UNCRC into Swedish law in January 2020
- <sup>3</sup> Programme for Government 2018-2019, Scottish Government, September 2018, available at <https://beta.gov.scot/programme-for-government/>
- <sup>4</sup> First Minister's Advisory Group on Human Rights Leadership <http://humanrightsleadership.scot/>
- <sup>5</sup> The International Bill of Rights comprises of the Universal Declaration of Human Rights 1948, GA Res 217 A (III) of 10 December 1948, the International Covenant on Civil and Political Rights GA Res 2200A (XXI) of 16 December 1966 and the International Covenant on Economic, Social and Cultural Rights UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 993, GA Res. 2200A (XXI), 3 Jan. 1976
- <sup>6</sup> UN GA Res. 543 VI, 5 February 1952. The separation of the Covenants into separate treaties has caused confusion regarding the status of ESC rights. The rights were separated into separate Covenants principally to facilitate different means of implementation to allow less developed nations to 'catch up' on ESC fulfilment. This separation has since been used to undermine the legal status of ESC rights – this was not the original intention of the parties. For a discussion on this see Katie Boyle and Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, (2018) *International Journal of Human Rights* Vol 22. 43-69
- <sup>7</sup> ESC rights protected in international law fall under treaties that the state has ratified such as the International Covenant on Economic, Social and Cultural Rights 1966, UN General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; the European Social Charter (Revised) 1996, Council of Europe, ETS 163; the Convention on the Rights of the Child 1989, UN General Assembly, resolution 44/25 of 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; the Convention on the Elimination of Discrimination Against Women 1979, UN General Assembly resolution 34/180 of 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; the Convention on the Elimination of Racial Discrimination 1965, United Nations General Assembly resolution 2106 (XX) of 21 December 1965 United Nations, Treaty Series, vol. 660, p. 195; and the Convention on the Rights of Persons with Disabilities 2006, United Nations General Assembly resolution A/RES/61/106 of 24 January 2007, 76th plenary meeting; issued in GAOR, 61st sess., Suppl. no. 49. "Annex: Convention on the Rights of Persons with Disabilities": p. 2-29. Economic, social and cultural rights are sometimes referred to as simply social and economic rights, or socio-economic rights.
- <sup>8</sup> Article 6 ICESCR
- <sup>9</sup> Article 9 ICESCR
- <sup>10</sup> Article 11 ICESCR
- <sup>11</sup> Article 12 ICESCR
- <sup>12</sup> Article 10 ICESCR and partial protection in Article 2 Protocol 1 ECHR
- <sup>13</sup> See Scottish Human Rights Commission, *A Human Rights Based Approach to Tackling Poverty*, September <http://www.scottishhumanrights.com/media/1266/fairerscotlandsep2015.pdf>
- <sup>14</sup> Although not a statutory obligation the Scottish Ministers are under a duty to act in accordance with international law, including treaty obligations, under the Ministerial Code (2018), para.1.3
- <sup>15</sup> Such as the Rights of Children and Young Persons (Wales) Measure 2011 or the Children and Young People (Scotland) Act 2014
- <sup>16</sup> For example, compare the different levels of ESC enforceability in the devolved jurisdictions compared to the national (devolved statutes v HRA) or compare equality legislation in Northern Ireland with rest of GB where significant gaps emerge in protection and enforcement. For a discussion on this see Katie Boyle & Leanne Cochrane *The complexities of human rights and constitutional reform in the United Kingdom: Brexit and a Delayed Bill of Rights: Informing (on) the Process* *Journal of Human Rights* (2018) Vol.16(1) 23-46

- <sup>17</sup> R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para.78. See also Boyle and Cochrane, *ibid.*
- <sup>18</sup> United Nations International Human Rights Instruments, *Core Document Forming Part of the Reports of States parties: United Kingdom of Great Britain and Northern Ireland*, 29 September 2014, HRI/CORE/GBR/2014, p.36
- <sup>19</sup> Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: confronting a heresy' [2013] 24 *European Journal of International Law* 1157-1185, at 1173
- <sup>20</sup> See the UK's state report to ICESCR, United Nations International Covenant on Economic, Social and Cultural Rights United Kingdom, British Overseas Territories, Crown Dependencies 6th periodic report 2014
- <sup>21</sup> Core Document, p.36-37, see also UN UK Sixth Periodic Report
- <sup>22</sup> European Social Charter, European Committee of Social Rights, Conclusions XIX-3 (2010), (UNITED KINGDOM), Articles 2, 4, 5 and 6 of the Charter, December 2010, available at [https://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/UKXIX3\\_en.pdf](https://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/UKXIX3_en.pdf)
- <sup>23</sup> UN UK Sixth Periodic Report, para.11
- <sup>24</sup> E/C.12/GBR/CO/6, para.5-6
- <sup>25</sup> There are various ways of viewing the different degrees of protection for ESC rights from negative (immediately enforceable) v positive (requiring action); procedural v substantive; Nolan et al identify degrees of enforcement through a multitude of varying degrees – from respect, to protect, to fulfill, consideration of progressive realisation and finally non-retrogressive measures, Nolan et al *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Human Rights Consortium March 2007). Curtis has expanded this theory to degrees of standard starting with negative, to procedural, through equality and non-discrimination, minimum core arguments, progressive realisation, and prohibiting retrogression, Christian Curtis, 'Standards to make ESC rights justiciable: A Summary Explanation' [2009] 2 *Erasmus Law Review* 379. John Ruggie developed a respect, protect, fulfil, remedy analogy, Human Rights Council, John Ruggie 'Respect, Protect and Remedy: A Framework for Business and Human Rights' 7 April 2008, A/HRC/8/5. Each of the degrees of enforcement move from partial protection to full protection. This axis of protection is equally applicable to civil and political rights.
- <sup>26</sup> *Ibid*
- <sup>27</sup> For a discussion on the history of the principle of indivisibility see Daniel Whelan, *The Indivisibility of Human Rights, A History*, (University of Pennsylvania Press, 2010).
- <sup>28</sup> E/CN.4/529 Memorandum of Secretary General, Commission on Human Rights, Seventh Session, Agenda item 3, 29 March 1951
- <sup>29</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.4.
- <sup>30</sup> *ibid.* See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77-80
- <sup>31</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.59(a)
- <sup>32</sup> John Rawls, *Political Liberalism* (Columbia University Press) 2005.
- <sup>33</sup> Alexy, R. *A Theory of Constitutional Rights*, trans. J. Rivers (OUP 2002); Moller, K., (2009) Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights, *Oxford Journal of Legal Studies* 29(4) 757-86
- <sup>34</sup> For a discussion on the role of human dignity underpinning comparative European constitutions see Catherine Dupré, *The Age of Dignity* (OUP: 2015)
- <sup>35</sup> The German Basic Law guarantees an "Existenzminimum" which means the right to a minimum subsistence level. It is similar to the minimum core provision derived from ICESCR. See BVerfGE 125, 175 (Hartz IV), the court held that the "right to the enjoyment of a minimum subsistence level" is not simply

another facet of the right to human dignity, but a stand-alone right of autonomous value, at par.133. See also Trilsch, Mirjal, 'Constitutional protection of social rights through the backdoor: What does the « Social state » principle, the right to human dignity and the right to equality have to offer?'; <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-trilsch.pdf>. See also BVerfGE 132 where in 2012 the court went beyond the procedural protection in the previous case and recognised a substantive element to an adequate level of subsistence for asylum seekers relying on Article 9 ICESCR.

<sup>36</sup> See *Trojani* Case C-456/02 (an EU case guaranteeing access to minimum social assistance under the free movement of workers).

<sup>37</sup> Similarly, the Swiss Federal Court has found that an implied constitutional right to a 'minimum level of subsistence' (*conditions minimales d'existence*), both for Swiss nationals and foreigners, could be enforced by the Swiss Courts. See Swiss Federal Court, *V. v. Einwohnerngemeinde X und Regierungsrat des Kanton Bern*, BGE/ATF 121I 367, October 27, 1995.

<sup>38</sup> See Brazilian Federal Supreme Court (*Supremo Tribunal Federal*), RE 436996/SP (opinion written by Judge Celso de Mello), October 26, 2005. The court found that the inefficiency of public managed funds in implementation the constitutional minimum to provide for the needy cannot and should not impede execution of the obligation. This case dealt specifically with the right to education.

<sup>39</sup> Magdalena Sepúlveda, *Ensuring inclusion and combatting discrimination in social protection*, International Social Security Review, Vol. 70, 4/2017, 37

<sup>40</sup> Nicole Busby, CEDAW, How can Women's Rights be Better Realised in Scotland, Engender (2018) available at <https://www.engender.org.uk/content/publications/CEDAW-incorporation-paper.pdf>

<sup>41</sup> *ibid*

<sup>42</sup> Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006)

<sup>43</sup> Resnik/ Davis, p.420

<sup>44</sup> Kasey McCall-Smith, Incorporating International Human Rights in a Devolved Context, European Futures, 17 September 2018 <http://www.europeanfutures.ed.ac.uk/article-7114>

<sup>45</sup> Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on its Development*, (Clarendon Press OUP 1995)

<sup>46</sup> For discussions on the misconceptions surrounding the dichotomy of human rights based on a positive v negative antinomy see and Ida Koch, 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5 Human Rights Law Review 1 and for a discussion of how the dichotomy and method of implementation resulted in a misconception surrounding the status of ESC rights see Mónica Fera Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', (2007) 29 Human Rights Quarterly 431. Tinta argues that the dichotomy was based on a 'legal fiction', at 432

<sup>47</sup> See Craven

<sup>48</sup> This is clear for example in Article 2 of ICCPR which calls for justiciable remedies as part of the implementation mechanisms for civil and political rights

<sup>49</sup> The violation of an ESC right was originally not explicitly open to judicial remedies in international law. Article 2(1) ICESCR. See also Tinta 433. This assertion is supported elsewhere in the literature – see for example Varun Gauri and Daniel Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2010) and Lanse Minkler (ed.), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2013)

<sup>50</sup> A 'justiciable remedy' is a remedy granted by a court. For the purposes of this paper 'justiciability' refers to the adjudication of a right by a court.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.10

<sup>52</sup> General Comment No. 9 *ibid*

<sup>53</sup> See Tinta, see also General Comment No 9, see also Anashri Pillay, 'Economic and Social Rights Adjudication: developing principles of judicial restraint in South Africa and the United Kingdom' (2013)

Public Law 599. Pillay contends that ‘the weight of academic, judicial and political opinion has moved away from justiciability to a consideration of the most effective judicial approaches to [ESC] rights’ p.599

<sup>54</sup> para7(2)(a) Schedule 5 Scotland Act 1998

<sup>55</sup> Lord Brodie Whaley & Anor v. Lord Advocate [2003] ScotCS 178 (20 June 2003), para.44 discussing the exception to the reservation in Schedule 5 para.7(1)-(2) Scotland Act 1998

<sup>56</sup> Treaty bodies recommending incorporation: CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture; CRC/C/GBR/CO/4 (CRC, 2008) Committee on the Rights of the Child. Treaty bodies recommending justiciable enforcement and effective remedies: CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights

<sup>57</sup> *General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the child*, (2003), CRC/GC/2003/5, para 20; *Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom* (2002), CRC/C/15/Add.188, paras 8 and 9 and *Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom* (2008), CRC/C/GBR/CO/4, para 7; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture, para.7; CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13

<sup>58</sup> E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights, para.5; CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child para.7

<sup>59</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.41

<sup>60</sup> UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 22 December 2014, A/HRC/28/62, para.43

<sup>61</sup> Article 3 Federal Constitution of the Swiss Confederation, The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation. This includes incorporation of international human rights standards.

<sup>62</sup> For e.g. Geneva and Vaud.

<sup>63</sup> For a discussion on this see Christina Curtis, *Argentina, Some Promising Signs*, M. Langford (Ed) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (2008) p.165

<sup>64</sup> CEDAW, San Francisco Ordinance implementing CEDAW <http://sfgov.org/dosw/cedaw-ordinance>

<sup>65</sup> See for example the Ontario Human Rights Code or the Quebec Charter of Human Rights and Freedoms and the national Canadian Charter of Rights and Freedoms, <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada>

<sup>66</sup> Schedule 5, Scotland Act 1998

<sup>67</sup> *Ibid* Part 1

<sup>68</sup> For eg. the following countries explicitly recognise ‘economic, social and cultural rights’ in their constitutional text: Argentina 1853 (reinst. 1983, rev. 1994), Angola (2010), Macedonia 1991 (rev 2011), Bosnia-Herzegovina 1995 (rev. 2009), Cape Verde 1980 (rev. 1992), Croatia 1991 (rev.2001), Czech Republic 1993 (rev. 2002), Democratic Republic of the Congo 2005 (rev. 2011), East Timor 2002, Eritrea 1997, Ethiopia 1994, Iran 1979 (rev. 1989), Macedonia 1991 (rev. 2011), Montenegro 2007; Mozambique 2004 (rev. 2007); Nepal 2006 (rev. 2010); Nicaragua 1987 (rev. 2005); Portugal 1976 (rev. 2005); Rwanda 2003 (rev. 2010); Sao Tome and Principe 1975 (rev. 1990); Slovakia 1992 (rev. 2001); Surinam 1987 (rev. 1992).

<sup>69</sup> Article 25 Constitution of Argentina

<sup>70</sup> Article 75 of the Constitution of Argentina 1853 (reinst. 1938, rev. 1994)

<sup>71</sup> The constitutional provisions stipulate that the details of how the rights will be guaranteed require to be ‘provided by an Act’

<sup>72</sup> Thomas Bull, ‘Judges without a court – Judicial Preview in Sweden, Judicial Constitutional Review as a Last Resort’, pp.393- 420 in Campbell et.al supra n 76 at 393

- <sup>73</sup> See Kaarlo Tuori for a discussion of the Finnish system, Rights, Democracy and Local Self Governance: Social Rights in the Constitution of Finland <http://www.juridicainternational.eu/?id=12700>
- <sup>74</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Finland, E/C.12/FIN/CO/6, 17 December 2014, para.6; Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Sweden E/C.12/SWE/CO/6, 14 July 2016, para.5
- <sup>75</sup> Sovereignty rests with the cantonal legislatures under the Swiss constitution (Article 3)
- <sup>76</sup> such as in Geneva and Vaud.
- <sup>77</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant : concluding observations of the Committee on Economic, Social and Cultural Rights: Switzerland*, 26 November 2010, E/C.12/CHE/CO/2-3, para.5
- <sup>78</sup> Magdalena Sepúlveda, Colombia, The Constitutional Court's Role in Addressing Social Injustice, in M. Langford (Ed) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, p.144
- <sup>79</sup> Article 1.1 Basic Law Germany 1949 (rev. 2014)
- <sup>80</sup> BVerfGE 125, 175 (Hartz IV)
- <sup>81</sup> *ibid*
- <sup>82</sup> Section 7 of the Constitution
- <sup>83</sup> See for example *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* CCT 24/07 Medium Neutral Citation [2008] ZACC 1 – meaningful engagement and participation is required by the constitution before an eviction order can be served (no forced eviction without notice).
- <sup>84</sup> Such as the right to be protected from maltreatment, neglect, abuse or degradation; and the right to be protected from exploitative labour practices (section 28(1)(d) and (e)). See section 37(5)(c) for a table listing non-derogable rights in the South African Constitution. For a discussion on the rights of the child (particularly girls' ESC rights) in the South African Constitution see Ann Skelton, 'Girls' Socio-Economic Rights in South Africa' (2010) 26 South African Journal of Human Rights 141
- <sup>85</sup> For example, section 26 of the South African Constitution provides for the right to have access to adequate housing and section 27 provides for the right to have access to health care, food, water and social security. The constitution further provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights (Sections 26(2) and 27(2) respectively)
- <sup>86</sup> The South African judiciary review compliance with the progressive realisation of sections 26 and 27 based on a reasonableness test as developed in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) and *Minister of Health v. Treatment Action Campaign (no 2) (TAC)*, 2002 (5) SA 721 (CC)
- <sup>87</sup> <https://www.government.se/articles/2018/03/new-legislative-proposal-on-the-convention-on-the-rights-of-the-child/>
- <sup>88</sup> *ibid*
- <sup>89</sup> The concept of constitutional statutes was developed in *Thoburn v Sunderland City Council* [2002] QB 151. The common law has developed this principle in recognising both constitutional principles and constitutional provisions of a particular statute *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport*, [2014] UKSC 3, at 79, [2014] 1 W.L.R. 324 (appeal taken from Eng. & Wales); *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5 at 67
- <sup>90</sup> Reservation L2 Schedule 5 Scotland Act reserves, with some exceptions, the area of 'Equal Opportunities'
- <sup>91</sup> For a discussion on this see Katie Boyle, Economic, Social and Cultural Rights in Scotland, Scottish Human Rights Commission (2015), <http://www.scottishhumanrights.com/economic-social-cultural-rights/>
- <sup>92</sup> See Kaarlo Tuori for a discussion of the Finnish system, Rights, Democracy and Local Self Governance: Social Rights in the Constitution of Finland <http://www.juridicainternational.eu/?id=12700>
- <sup>93</sup> PeVL 46/2002 vp, p. 5.

- <sup>94</sup> See evidence provided by Dr Boyle, Human Rights Inquiry, EHRC, 29 March 2018, available at [http://www.parliament.scot/S5\\_Equal\\_Opps/Submission\\_from\\_Dr\\_Katie\\_Boyle.pdf](http://www.parliament.scot/S5_Equal_Opps/Submission_from_Dr_Katie_Boyle.pdf)
- <sup>95</sup> United Nations Office of the High Commissioner. Inter-Parliamentary Union, Human Rights, Handbook for Parliamentarians No.26 p.111
- <sup>96</sup> Evidence provided by Scottish Human Rights Commission, Human Rights Inquiry, EHRC, March 2018, available at [http://www.parliament.scot/S5\\_Equal\\_Opps/Submission\\_from\\_Scottish\\_Human\\_Rights\\_Commission.pdf](http://www.parliament.scot/S5_Equal_Opps/Submission_from_Scottish_Human_Rights_Commission.pdf)
- <sup>97</sup> Katie Boyle and Edel Hughes, Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights, (2018) *International Journal of Human Rights* Vol 22. 43-69. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994); Mónica Feria Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', *Human Rights Quarterly* 29 (2007)
- <sup>98</sup> Article 1
- <sup>99</sup> BVerfGE 125, 175 (Hartz IV), the court held that the "right to the enjoyment of a minimum subsistence level" is not simply another facet of the right to human dignity, but a stand-alone right of autonomous value, at par.133. See Trilsch, Mirjal, 'Constitutional protection of social rights through the backdoor: What does the « Social state » principle, the right to human dignity and the right to equality have to offer?', <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-trilsch.pdf>. See also BVerfGE 132 where in 2012 the court went beyond the procedural protection in the previous case and recognised a substantive element to an adequate level of subsistence for asylum seekers relying on Article 9 ICESCR
- <sup>100</sup> Casenote – Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010 By Claudia Bittner, 12 (11) *German Law Journal* (2011), 1950
- <sup>101</sup> BVerfGE 132
- <sup>102</sup> Hartz IV, BVERFGE 125, 175 (237, 238), 1 BVL 1/09 ET AL. of 9 Feb. 2010**verfg.de** headnote 1.
- <sup>103</sup> 772/B/1990/AB:ABH 1993, 196; MK 5651/1993 as discussed in Langford, Hungary, p.256
- <sup>104</sup> Hartz IV case note Bittner, p.1952
- <sup>105</sup> BVerfGE 132, Para. 64: "The fundamental right to the guarantee of a dignified minimum existence emerges from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. Article 1.1 of the Basic Law establishes this right as a human right. The principle of the social welfare state contained in Article 20.1 of the Basic Law mandates the legislature to guarantee a dignified minimum existence. In light of the unavoidable value judgments needed to determine the amount of what guarantees the physical and social existence of a human being, the legislature enjoys a margin of appreciation. This fundamental right is in essence not disposable and must be honoured as an enforceable claim to benefits, yet it needs to be shaped in detail and regularly updated by the legislature which has to orient the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life regarding the concrete needs of those concerned. In doing so, the legislature has room to shape the issue." Judgment available here: [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718\\_1bvl001010en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bvl001010en.html)
- <sup>106</sup> This is dialogical or deliberative democracy theory in action – a theory of rights adjudication where all state organs share responsibility for human rights compatibility and accountability
- <sup>107</sup> Article 86
- <sup>108</sup> Magdalena Sepúlveda, Colombia, The Constitutional Court's Role in Addressing Social Injustice, in M. Langford (Ed) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*
- <sup>109</sup> Magdalena Sepúlveda, Colombia, The Constitutional Court's Role in Addressing Social Injustice, in M. Langford (Ed) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, p.150
- <sup>110</sup> T-533/92
- <sup>111</sup> T-149/02
- <sup>112</sup> Sepulveda, p.151, see See T-568/96 – T-707/02

- <sup>113</sup> T-025 2004
- <sup>114</sup> Garavito at 1682
- <sup>115</sup> Napier v. The Scottish Ministers [2005] ScotCS CSIH\_16 (10 February 2005)
- <sup>116</sup> The Cadder judgment had wide reaching ramifications addressed through emergency legislation brought forward by the executive and passed by parliament. See Cadder v Her Majesty's Advocate (Scotland) [2010] UKSC 43 (26 October 2010) and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
- <sup>117</sup> C.C., febrero 2, 2000, Sentencia SU-090/00 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/2000/SU090-00.htm>; C.C., julio 27, 1999, Sentencia T-535/99 (slip op. at 5), available at <http://www.corteconstitucional.gov.co/relatoria/1999/T-535-99.htm>; C.C., marzo 5, 1998, Sentencia T-068/98 (slip op. at 1–2), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-068-98.htm>; C.C., noviembre 6, 1997, Sentencia SU-559/97, (slip op. at 1–2), available at <http://www.corteconstitucional.gov.co/relatoria/1997/SU559-97.htm>.
- <sup>118</sup> C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm>.
- <sup>119</sup> C.C., octubre 20, 1998, Sentencia T-590/98 (slip op. at 4), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-590-98.htm>.
- <sup>120</sup> C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>
- <sup>121</sup> Buenos Aires Supreme Court, Comisión Municipal de la Vivienda v Saavedra, Felisa Alicia y otros s/ Desalojo s/Recurso de Inconstitucionalidad Concedido 7 October 2002
- <sup>122</sup> Buenos Aires Administrative Trial Court No.3 Comisión Municipal de la Vivienda v Gianelli, Alberto Luis y otros s/Desalojo 12 September 2002
- <sup>123</sup> Buenos Aires Administrative Court of Appeals, Chamber I, Delfino, Jorge Alberto y otros v GCBA s/ amparo 11 June 2004
- <sup>124</sup> Buenos Aires Administrative Appellate Court, Chamber II, Ramallo, Beatriz v Ciudad de Buenos Aires, 30 September 2004
- <sup>125</sup> Buenos Aires Administrative Trial Court No.5 *Agüero, Aurelio E. v GCBA S/AMPARO*, friendly settlement, Dec 2003
- <sup>126</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)
- <sup>127</sup> The certification case challenged the justiciability of ESC rights enshrined in the Constitution. The court held that ESC rights hold the same positive and negative qualities that civil and political rights have and 'the fact that socio-economic rights will almost inevitably give rise to [budgetary] implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.' *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) para.78.
- <sup>128</sup> *Grootboom* ibid para.20
- <sup>129</sup> James Wolffe, ECONOMIC AND SOCIAL RIGHTS IN SCOTLAND: LESSONS FROM THE PAST; OPTIONS FOR THE FUTURE, A lecture for International Human Rights Day 2014 by W. James Wolffe QC, Dean of the Faculty of Advocates, Edinburgh School of Law, December 2014
- <sup>130</sup> See King for discussions on the different theoretical approaches that can legitimise judicial determination of ESC rights such as incrementalism, deference and prioritisation. Jeff King, *Judging Social Rights*, (CUP 2012)
- <sup>131</sup> Applicants must seek permission by establishing sufficient interest under 27B of the Court of Session Act 1988. Prior to the decision of the Supreme Court in *Axa General Insurance Ltd v the Lord Advocate* [2011] UKSC 46, standing could only be secured if an individual could establish "title and interest" to take a case – a much higher threshold than the standing requirement in England and Wales. For a full discussion on this see the *Axa* case in which the judiciary amended the common law rule on 'title and interest' in Scotland to mirror the 'sufficient interest' standing requirement in England and Wales. See Chris Himsforth, 'The Supreme Court reviews the Review of Acts of the Scottish Parliament' [2012] Public Law 205



- <sup>132</sup> Section 100 of the Scotland Act 1998 and section 7 of the Human Rights Act requires the applicant to be a victim in terms of Article 34 ECHR.
- <sup>133</sup> section 14(1)
- <sup>134</sup> Sarah Harvie-Clark, *Judicial Review*, Spice Briefing 16/62, 8 July 2016, p.35
- <sup>135</sup> Civil Legal Aid (Scotland) Regulations (SSI 2002/494), regulation 15
- <sup>136</sup> Tom Mullen *Public Interest Litigation in Scotland*. *Jur. Rev.* 2015, 4, 363–383, 363
- <sup>137</sup> For a discussion on the historical reluctance and a more recent leniency (in England) see Carol Harlow, 'Public Law and Popular Justice' [2002] 65 *the Modern Law Review* 1
- <sup>138</sup> Tom Mullen *Public Interest Litigation in Scotland*. *Jur. Rev.* 2015, 4, 363–383, 367
- <sup>139</sup> Spice Briefing, *Judicial Review*, 8 July 2016, p.14
- <sup>140</sup> *R v Lord Chancellor ex p Child Poverty Action Group* [1999] 1 WLR 347 353G
- <sup>141</sup> See *Christian Institute v Others* [2015] CSIH 64 – para.43-44 – standing established on EU law grounds but not under s100 of Scotland Act because charities could not meet victim test.
- <sup>142</sup> For an in-depth discussion on this see César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, (2011) 89 *Texas Law Review* 1669-1698
- <sup>143</sup> Garavito at 1671
- <sup>144</sup> Napier
- <sup>145</sup> Such as the response by the executive and legislature to introduce emergency legislation to deal with the fall out of systemic human rights violations following the Cadder judgment. See *Cadder v Her Majesty's Advocate (Scotland)* [2010] UKSC 43 (26 October 2010) and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010
- <sup>146</sup> David Landau, *The Reality of Social Rights Enforcement*, (2012) 53 *Harvard International Law Journal* 189
- <sup>147</sup> See Rule of Court 22.3(6) available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap22.pdf?sfvrsn=8>
- <sup>148</sup> Scottish Law Commission, *Report No. 154, Multi-Party Actions* (1996), para.64
- <sup>149</sup> Scottish Civil Court Review (2009), Volume 2, chapter 13, pp.152-155, available at <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>
- <sup>150</sup> See Rule of Court 2.2 available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10>
- <sup>151</sup> Court of Session No.2 of 2012, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>
- <sup>152</sup> Court of Sessions Directions No.2 of 2015 and No.2 of 2016, <https://www.scotcourts.gov.uk/rules-and-practice/practice-notes/court-of-session-directions>
- <sup>153</sup> Policy Memorandum, Civil Litigation (Expenses And Group Proceedings) (Scotland) Bill, para.94
- <sup>154</sup> Garavito and Landau (above)
- <sup>155</sup> *Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case)* [1985] AC 374, [1985] ICR 14
- <sup>156</sup> *Wheeler v Leicester City Council* [1985] UKHL 6 (25 July 1985)
- <sup>157</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51
- <sup>158</sup> *RF v Secretary of State for Work And Pensions* [2017] EWHC 3375 (Admin)
- <sup>159</sup> see Joe Tomlinson and Katy Sheridan, 'Judicial Review, Evidence, and Systemic Unfairness in the UK' IACL-AIDC Blog (3 September 2018) available at <https://blog-iacl-aidc.org/blog/2018/9/3/judicial-review-evidence-and-systemic-unfairness-in-the-uk>
- <sup>160</sup> Anxious scrutiny is employed in asylum cases where the court has held that only the highest standards of fairness will suffice, *Secretary of State for the Home Department v. Sittampalam Thirukumar*, Jordan

Benjamin, Raja Kumarasuriya and Navaratnam Pathmakumar, [1989] Imm AR 402, United Kingdom: Court of Appeal (England and Wales), 9 March 1989; *Kerrouche v Secretary of State for the Home Department* [1997] Imm. A.R. 610. In the case of *Pham* 2015 UKSC 19, the court noted that the tests of anxious scrutiny and proportionality may produce very similar results (the tests are not the same but when engaging with fundamental rights the tests may reach the same outcome).

- <sup>161</sup> As per Lord Steyn, ‘the rule of law in its wider sense has procedural and substantive effect’ para. Secretary of State for the Home Department, *Ex Parte Pierson, R v.* [1997] UKHL 37. Whilst in this case the issue in question was the *vires* of the decision of the Home Secretary to retrospectively increase a tariff (a power the court decided he did not have) there is potential scope for the court to move beyond this assessment to consider the substantive outcome of decisions (and whether the decision itself is fair – or complies with ESC rights). In other words, the courts may begin to develop review of the outcome of the decision based on an independent examination of the evidence. See FN below and the *UNISON* case where the court examined evidence in establishing what constituted a social minimum, *R (UNISON) v Lord Chancellor* [2017] UKSC 51. This type of review would be required to assess components of ESC compatibility, particularly on an assessment of the minimum core. The *Hartz IV* case is a comparative example where the court assesses both the procedure and the substantive outcome of the decision.
- <sup>162</sup> For a discussion of the development of evidence based judicial review in cases engaging with systemic unfairness see J Tomlinson and K Sheridan, ‘Judicial Review, Evidence, and Systemic Unfairness in the UK’ IACL-AIDC Blog (3 September 2018) available at <https://blog-iacl-aidc.org/blog/2018/9/3/judicial-review-evidence-and-systemic-unfairness-in-the-uk>. Courts may well start to develop substantive based review of outcomes moving beyond an assessment of *vires* in and of itself. See for example the court’s approach to tribunal fees in which they considered evidence on what constituted a social minimum based on criteria set by academics and the Joseph Rowntree Foundation: *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
- <sup>163</sup> *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374
- <sup>164</sup> For example, see the reasonableness test as applied in *Grootboom*
- <sup>165</sup> Amartya Sen, ‘The right not to be hungry’, in Philip Alston et al. (eds), *The Right to Food* (Martinus Nijhoff, the Hague, 1984), 70
- <sup>166</sup> César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015), p.19-21
- <sup>167</sup> Bruce Porter, *Rethinking Progressive Realisation*, Social Rights Advocacy Centre, (2015), p.6 and United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007) [CESCR, “Maximum Available Resources”]; Malcolm Langford, “Closing The Gap? – An Introduction To The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights” (2009) 27:1 Nordic Journal of Human Rights 2.
- <sup>168</sup> Nolan et al *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Human Rights Consortium March 2007)
- <sup>169</sup> Christian Courtis, ‘Standards to make ESC rights justiciable: A Summary Explanation’ [2009] 2 Erasmus Law Review 379
- <sup>170</sup> See Jeff King (above) for discussions on the different theoretical approaches that can legitimise judicial determination of ESC rights such as incrementalism, deference and prioritisation.
- <sup>171</sup> This table is developed from the remedy typology developed by Tushnet and expanded upon by Garavito and Franco, César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South* (CUP 2015), p.10 and Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009)
- <sup>172</sup> This defence would be insufficient in terms of fulfilling a statutory obligation see for example *MacGregor v South Lanarkshire Council* 2001 SC 502 and *R v Gloucestershire County Council (Ex p Barry)* [1997] AC 584
- <sup>173</sup> For example, consider the operation of the Ullah principle and section 2 of the Human Rights Act 1998

- <sup>174</sup> See for example body of case law available at <https://www.eschr-net.org/caselaw>
- <sup>175</sup> [http://www.oas.org/en/iachr/decisions/cases\\_reports.asp](http://www.oas.org/en/iachr/decisions/cases_reports.asp)
- <sup>176</sup> James Wolffe, ECONOMIC AND SOCIAL RIGHTS IN SCOTLAND: LESSONS FROM THE PAST; OPTIONS FOR THE FUTURE, A lecture for International Human Rights Day 2014 by W. James Wolffe QC, Dean of the Faculty of Advocates, Edinburgh School of Law, December 2014
- <sup>177</sup> See for example, Richard Edwards, 'Judicial Deference under the Human Rights Act' [2002] 65 Modern Law Review 859, 859
- <sup>178</sup> See for example the judicial recognition of an immediately enforceable right to highest attainable health in Brazil that resulted in more inequity in health provision, favouring the wealthy and further marginalising the poor, Octavio Luiz Motto Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 Health and Human Rights: an International Journal 33
- <sup>179</sup> Sepúlveda, p.160
- <sup>180</sup> *ibid*
- <sup>181</sup> R. Uprimny, 'Las transformaciones de la administración de justicia en Colombia' [The Transformation of the Administration of Justice in Colombia] in Boaventura de Sousa and Villegas, *El caleidoscopio de las justicias en Colombia* [The Kaleidoscope of Justice in Colombia] (Bogota: Siglo del Hombre Editores, 2001)
- <sup>182</sup> Curtis, Langford, p.181
- <sup>183</sup> *ibid*
- <sup>184</sup> Sepúlveda, p.162
- <sup>185</sup> The Charter of Fundamental Rights and Freedoms forms part of the Constitution Act 1982 granting the Charter constitutional status and part of the primacy of constitutional law. The primacy of the Constitution is guaranteed in section 52 of the Constitution Act 1982. ESC rights have been recognised under the rubric of equality under the Charter – see *Eldridge v British Columbia (Attorney General)* [1997] 2 SCR 624
- <sup>186</sup> under section 33 of the Constitution Act
- <sup>187</sup> See for example the delayed remedy employed in *Canada (Attorney General) v Bedford* 2013 SCC 72 in which the Supreme Court suspended the declaration of invalidity under section 52(1) of Canada's Constitution Act 1982 for one year to allow Parliament sufficient time to avoid an eventual regulatory void. This case concerned the legality of prohibitions on sex workers that the court found violated the safety and security of prostitutes – the difficulty with the delayed remedy route places those at risk to remain in a state of violation during the interim period in which the declaration of invalidity is suspended. For a discussion on this case and the constitutional impact of delayed remedies see: Robert Leckey, 'Suspended Declarations of Invalidity and the Rule of Law' U.K. Const. L. Blog (12th March 2014) (available at <http://ukconstitutionallaw.org/>)
- <sup>188</sup> *Canada (Attorney General) v Bedford* 2013 SCC 72. The *Bedford* case was concerned the legality of prohibitions on sex workers that the court found violated the safety and security of prostitutes – the difficulty with the delayed remedy route places those at risk to remain in a state of violation during the interim period in which the declaration of invalidity is suspended
- <sup>189</sup> *Salvesen v Riddell* 2013 SC UKSC 236
- <sup>190</sup> Katie Boyle, Economic, Social and Cultural Rights, SHRC (2015) available at <http://www.scottishhumanrights.com/economic-social-cultural-rights/>
- <sup>191</sup> Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, 30 December 2013, A/HRC/25/54/Add.2
- <sup>192</sup> See the UK Common Core Document, HRI/CORE/GBR/2014 and Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights E/C.12/GBR/CO/6, para.122-123
- <sup>193</sup> CESCR 2016 E/C.12/GBR/CO/6 (CESCR, 2016), para.49
- <sup>194</sup> *ibid*

- <sup>195</sup> CESCR 2016 E/C.12/GBR/CO/6 (CESCR, 2016), para.50
- <sup>196</sup> E/C.12/GBR/CO/5, 12 June 2009, para.29
- <sup>197</sup> E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights
- <sup>198</sup> CRC/C/GBR/CO/5 (CRC, 2016), para.71(e)
- <sup>199</sup> E/C.12/GBR/CO/6 (CESCR, 2016), para.40
- <sup>200</sup> European Social Charter 1961 Article 12(1)-(3)
- <sup>201</sup> *European Committee on Social Rights, CR\_XXI-2\_GBR Conclusions January 2018*
- <sup>202</sup> para7(2)(a) Schedule 5 Scotland Act 1998
- <sup>203</sup> Scotland Act 2016 Part 3
- <sup>204</sup> Section 1(b) of the Social Security (Scotland) Bill as introduced
- <sup>205</sup> Policy Memorandum, para.334, available at [http://www.parliament.scot/S5\\_Bills/Social%20Security%20\(Scotland\)%20Bill/SPBill18PMS052017.pdf](http://www.parliament.scot/S5_Bills/Social%20Security%20(Scotland)%20Bill/SPBill18PMS052017.pdf)
- <sup>206</sup> <http://www.scottishlegal.com/2018/01/31/human-rights-experts-call-due-regard-duty-advance-right-social-security/>
- <sup>207</sup> 8 February 2018, Social Security Committee
- <sup>208</sup> This to the protection afforded to vulnerable and marginalised groups in the UK under the Equality Act 2010 that imposes a far reaching duty to have due regard to promoting equality of opportunity between different groups when allocating resources (s149 Equality Act 2010). This is a procedural duty to have 'due regard' to positive outcomes. If public bodies do not comply the judiciary can quash the decision. See for example *Harjula v London Borough Council supra Harjula v London Borough Council* [2011] EWHC 151 (QB); *on the Application of W,M,G & H v Birmingham City Council*, [2011] EWHC 1147 Admin. The duty to have due regard to ICESCR may not necessarily have resulted in fully human rights compliant outcomes but the duty would have meant that the courts, as a means of last resort, could supervise whether decision makers had taken the necessary human rights standards into consideration when implementing the right to social security had this safeguard been implemented in the legislation.



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