

Economic, Social and Cultural Rights: International Legal Obligations - An Explainer

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Access to Justice For Social Rights
Addressing The Accountability Gap

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1.1 Introduction / Background

This briefing document has been prepared for the Nuffield Foundation project on 'Access to Justice For Social Rights: Addressing the Accountability Gap', led by Dr. Katie Boyle. It forms the first part of four briefings that explore and explain the international legal obligation to provide the rights to food, housing and social security. These rights form part of the UK's international legal obligations to protect economic, social and cultural rights (ESC rights). In 1976, the UK government ratified the International Covenant for Economic, Social and Cultural Rights (ICESCR). The ICESCR requires States, including the UK, to progressively realise an array of ESC rights. This can be demonstrated at an international level but should also be realised through the States domestic legal system. The rights it contains are broad and range from the rights to housing, food, health, education, social security, to labour rights and the right to cultural identity. At their heart lies the notion of human dignity. However, despite innumerable UN conferences, international committees, state reports, and a wealth of legal commentary on the extent of the obligations contained within the ICESCR, there remains a perceived lack of clarity as to what the obligations mean in practice. Often the nature of the obligations under this treaty are misunderstood and erroneously side-lined as of lesser status than civil and political rights, such as the right to vote or the right to a fair trial.¹ This is evident in the UK where many core civil and political rights are incorporated via the Human Rights Act 1998 with no corresponding legislative framework for ESC rights. It is approaching 40 years since the UK's ratification of the ICESCR and yet

none of the rights it contains have been placed on a legislative footing, nor incorporated in the domestic legal system via other means to ensure legal remedies are available. Other international treaties the UK has signed up to also include protections for ESC rights but the focus of this briefing is to better understand the obligations under ICESCR.² In so doing, it becomes easier to navigate the broader international and regional framework in connection with ESC rights and what steps are required to ensure their protection at the domestic level.

Since devolution in the UK in 1998, the devolved nations, particularly Scotland, but also Wales and Northern Ireland (NI) to some degree, are all recognising the need for ESC rights to be given recognition in domestic law, with effective remedies made available for those who have suffered due to a violation of their ESC rights.³ As the duties imposed by the ICESCR have been explored and debated, their practical application has become clearer and their need in society ever more evident. Increasingly, academics and civic society across the UK are approaching issues such as homelessness, food insecurity, inadequate and discriminatory social security payments, and healthcare as being legal human rights, over a political or economic choice. Incorporation of ESC rights is being discussed in a manner which it has never been before and there is an opportunity for human rights defenders and advocates throughout the UK to amplify such rhetoric and ensure political action is taken to domestically recognise ESC rights as enforceable, justiciable human rights. Barriers remain to their mainstreaming in both legal and political discourse, often driven by

misconception. A separate study under this Nuffield Project has been conducted with practitioners throughout the UK, giving rise to a wealth of issues driving a widening accountability gap.

Where this and the subsequent briefings on food, housing, and social security intend to provide clarity is on the basis for such rights. The language the ICESCR uses and encourages States to adopt, as well as provide an overview of practice in relation to ESC rights which are provided domestic protection around the world. The briefings are designed for those who seek to advance the realisation of ESC rights in the UK and further afield, hold power to account for rights violations, and ensure judicial remedies are made available to all. This first briefing considers the international obligations under ICESCR setting out the duties and sub-duties it contains, and before concluding, brings to light some common critiques of ESC rights together with responses to those critiques.

1.2 International Obligations

In the aftermath of the second world war, States around the world came together to declare an International Bill of Rights that would seek to affirm human dignity and the realisation of innate human rights. The International Bill of Rights consists of the Universal Declaration of Human Rights 1948,⁴ the International Covenant on Civil and Political Rights 1966,⁵ and the International Covenant on Economic, Social and Cultural Rights 1966.⁶ The framework sought to protect civil, political, economic, social and cultural rights on an equal footing.⁷ The rights were declared interdependent and indivisible – meaning the fulfilment of one right is dependent on the protection of all others. The UK has often accepted the obligations of civil and political rights, but not ESC rights, which have historically been interpreted as lacking clear obligations for their realisation, with States and commentators alike often referencing their realisation as aspirational or ‘promotional’.⁸ Many commentators of the time questioned the rights enshrined within the Covenant, citing them as too broad and general, leading to vague or unspecified duties and obligations. Thankfully, much has been done to dispel these concerns and provide State parties to ICESCR with clear, tangible obligations for its realisation. However, before it is possible to delve

into States duties under the ICESCR, it is important to acknowledge that the rights are interrelated, interconnected, and indivisible nature of rights.⁹ This established principle provides recognition of the fact civil and political rights cannot be realised without provision for the economic, social, and cultural, and the vice versa. There is not and cannot be a hierarchy of human rights.

1.2.1 Progressive Realisation

In relation to ESC rights, the primary obligations can be derived from Article 2 ICESCR. The duty to progressively realise, or to progressively achieve, ESC rights is derived from international law.¹⁰ Article 2(1) of ICESCR states that:

*“Each State Party to the present Covenant undertakes to **take steps**, individually and through international assistance and co-operation, especially economic and technical, to the **maximum of its available resources**, with a view to **achieving progressively the full realization of the rights** recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”¹¹ (emphasis added)*

The progressive realisation obligation entails States must take steps to the maximum available resources to achieve ESC rights without delay. The nature of State party obligations has been further elaborated in documents supplementary to the treaty, in particular General Comment 3 (1990) on the nature of States parties’ obligations and the Limburg Principles (1986).¹² Today, progressive realisation can be understood as constituting a multitude of interlinked obligations which work in tandem to ensure ESC rights are gradually realised over time. This graduality cannot be used as an excuse by States parties for non-fulfilment. Importantly, progressive realisation contains both immediate and progressive obligations.¹³ In other words, measuring progressive realisation not only requires a determination of whether a State is moving expeditiously and effectively towards the goal of full implementation, but also, an assessment of current performance.

1.2.2 Duty to ‘Take Steps’

First and foremost, Article 2(1) requires States to ‘take steps’ towards the full realisation of ESC

rights. Whilst progressive realisation implies by its definition that there is a journey towards full realisation over time, there are also immediate obligations that are neither progressive nor subject to available resources – they are immediate and absolute. Taking steps can be understood as a duty to design strategies and programmes to achieve the full realisation of ESC rights.¹⁴ Steps taken must be deliberate, concrete, and targeted.¹⁵ This is a process-based duty. In other words, the obligation gives rise to the right to a process and the development of a policy to achieve a rights-compliant outcome. Whilst the immediate realisation of a particular right might not always be possible, a component of the duty to progressive realisation is that there is a plan in place to achieve fulfilment (a process/policy to achieve fulfilment). A violation of this right might amount to a failure to reasonably plan, strategise and implement policies/programmes to achieve a right. A remedy might amount to an order that compels the duty bearer to design a plan/strategy that could be viewed as reasonable. Courts that review whether the duty has been met would require to deploy a more expansive test than the UK *Wednesbury* reasonableness test.¹⁶ International law requires reasonableness to go further than irrationality – it has been described as ‘proportionality inflected reasonableness’.¹⁷ The UN Committee on Economic, Social, and Cultural Rights (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.¹⁸

1.2.3 Duty to Respect, Protect, Fulfil

The steps that States must take are often categorised along a ‘sliding slope’ of realisation, where there are what can be understood as ‘waves of duties’ where the general trend is upwards on a progressive scale.¹⁹ The sliding slope analogy replaced the problematic categorisation of rights as either ‘positive’ (resource-dependent) or ‘negative’ (cost-free) in nature (both civil and political rights as well as ESC rights can contain both negative and positive aspects). A more accurate framing aligns with the analogy to **respect, protect and fulfil all rights**.²⁰ This approach suggests that *‘the individual be protected from interference by the State in exercise of certain freedoms [respect]; that the State protect the individual from interference by other actors, whose conduct the State is in a position of control [protect]; and that the State provide certain public goods that would be undersupplied if their provision were left to market mechanisms [fulfil]’*.²¹ This means States should take concrete steps progressively improve the ESC rights to the maximum of their available resources (i.e. the amount of revenue the State generates).

The duty to respect:

The State must take steps to refrain from acting in a way that would undermine the right – i.e. take any action that results in reducing the right.

The duty to protect:

The State must also take action to prevent others from interfering with enjoyment of the right, including private third parties that may be responsible for operationalising the right. For example, in relation to housing this would extend to private landlords or building contractors, or in the care sector both public and private care providers and so on – this duty directly engages with the horizontal reach of duties/rights.

The duty to fulfil:

The State must facilitate, promote, and provide for rights by taking the necessary steps to ensure ESC rights can be enjoyed by all to the maximum of its available resources. Fulfilling ESC rights imposes

a duty on States to adopt “enabling strategies” to ensure that the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the **maximum of available resources**.²²

1.2.4 Duty to gather and deploy maximum available resources (MAR)

The duty to gather and deploy the maximum available resources (MAR) to achieve progressive realisation can be broken down into sub-categories. First, there is an expectation that States will prepare and plan budgetary allocation in advance in order to realise ESC rights. This does not mean that a State must use all of its resources on meeting ESC rights, but rather that it must use the maximum available resources that can be expended for a particular purpose without sacrificing other, essential services.²³ In order to meet the obligation, States must ensure that resources are generated in a manner that reflects national economic growth. In other words, there is a correlation between overall national wealth and the generation of revenue through tax resources. If, for example, government spending on the realisation of ESC rights is dropping relative to GDP or other government expenditures, this is a ‘strong indication that there are available resources but that a particular right has not been prioritised’, thus falling short of the obligation.²⁴

Second, according to the international framework, the allocation of resources must be **effective** (achieve its aim), **efficient** (achieve the highest quality with minimum waste/effort), **adequate** (sufficient to meet the thresholds of dignity/ progressive realisation) and **equitable** (prioritisation of the most marginalised with the aim of achieving substantive equality). Adequacy can be further broken down to sub-categorisations of **availability**, **adequacy**, **acceptability**, and **quality** (the AAAQ framework). Third, an important point to note is that resources should not be viewed as purely financial, but also human, social, technological, information, natural, and administrative resources can be considered.²⁵ States can demonstrate how each of these resources are deployed as part of any national strategy / policy. The means through which meeting this obligation is assessed is not fully fleshed out in international law. Compliance with the duty is

largely left within the discretion of State parties to demonstrate what steps it has taken to deploy resources to realise ESC rights. Assessment of whether the State is meeting its obligations would be dependent on whether the State can demonstrate and justify that its approach is reasonable. In the UK for example, it could be assessed against whether the State is taking reasonable steps using the more expansive reasonableness test described above. By disaggregating data to better understand how money is spent and the potential hidden gaps in allocation of funding this framing can help see how different groups are impacted including those protected under international human rights law and who face potential intersectional inequality (including women, children, disabled persons, ethnic minorities, among others). This type of budget analysis is already underway across the UK from the perspective of gender justice.²⁶

In Scotland there is already significant progress in setting out appropriate benchmarks and indicators, both in terms of budgetary allocation and assessment of progress for several national targets, including compliance with human rights.²⁷ The National Performance Framework (NPF) offers an opportunity to demonstrate how the State is meeting its resource allocation obligations across ESC rights. If executed using the principles of effectiveness, efficiency, adequacy, and equity as part of both budget generation as well as allocation, then the Scottish Government would be well placed to demonstrate that it is meeting its MAR obligations under ICESCR through the NPF. This would require including ESC rights explicitly as an outcome accompanied with appropriate structure, process, outcome indicators.²⁸ For example, the fulfilment of rights could be set out as an outcome itself and appropriate indicators could include how the State has taken steps to respect (structure), protect (process) and fulfil (outcome) the rights with a particular emphasis on how budget allocation is deployed from the outset to achieve effectiveness, efficiency, adequacy, and equity in the delivery of services. There is an interdisciplinary Human Rights Budgeting Working Group currently working on this in Scotland.²⁹ They would be well placed to provide further evidence and guidance to the NPF on how best to implement international obligations in relation to the allocation of resources.

In relation to Wales, while human rights budgeting has not been explored in the same expansive manner as in Scotland, there has been work carried out in relation to children's rights budgeting. As the UN Convention on the Rights of the Child (UNCRC) includes both ESC rights and civil and political rights, and echoes the language used in ICESCR requiring the use of progressive realisation including MAR, children's rights budgeting provides some insight into how these obligations are approached in the Welsh context.³⁰ Work remains at a preliminary stage and budgeting for children's rights is still not mainstream in Wales, but, it demonstrates a first shift in understanding the realisation of all rights requires the use of State resources. There has been some pioneering work carried out on human rights budget analysis in NI. It has been a key focus for a group of leading human rights scholars who have been able to demonstrate how effective a tool the budget can be for realising ESC rights³¹ with examples of its operation in practice in relation to adequate housing.³² These examples provide a framework from which to build on the potential of budget analysis to further rights realisation.

1.2.5 Duty to ensure non-discrimination

States must ensure non-discrimination so that access and delivery of rights occurs in a way that does not exclude groups, particularly those who are marginalised and possibly 'hidden' from the system. Before designing and implementing an inclusive system to deliver / provide a right decision makers should explore and understand those who are disadvantaged and excluded, and what their needs and vulnerabilities are.³³ This means gathering and generating 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 people are not denied access to the system or inadvertently excluded from the government's strategy. This approach means that 'a deeper evidence base can improve the understanding of how programmes can best address structural and societal power imbalances, while also encouraging greater equity and empowerment for society's most disadvantaged members.'³⁴ The operation of the 'benefit cap' under the UK's welfare reform provides an example of

how groups are disproportionately impacted by a system that has not been developed to address societal power imbalances or to create greater equity amongst groups that are marginalised. The benefit caps could amount to a violation of international law. It is not sufficiently protected in domestic law³⁵ and in some cases, disproportionately impacts, and therefore discriminates against, the disabled, children, and single mothers.

1.2.6 Duty to provide a minimum core

The minimum core obligation (MCO) acts as a basic minimum threshold below which no one should fall. It is the absolute minimum criteria that is immediately applicable to all States in the fulfilment of ESC rights. It should be understood as complementary to progressive realisation rather than an alternative. Critics of the MCO doctrine are concerned that by setting minimum criteria, States will be concerned with achieving minimum standards rather than reaching beyond minimum criteria to progressive standards. Those in favour of the doctrine argue that it is required to ensure that, at the very least, minimum criteria are in place to avoid destitution. There is also disagreement as to what the MCO constitutes in both the literature and practice.³⁶ By way of brief summary, these arguments centre around whether the obligation requires all States to meet the same minimum absolute standards (such as basic survival and the provision of shelter, food, water and sanitation).³⁷ Others argue for a relative standard to apply.³⁸ For example, is the MCO relative to the wealth and resources of the State in question meaning a wealthier nation will be held to higher standards than a State with less resources at its disposal?³⁹ International law suggests that 'minimum core' is legally binding and most likely non-derogable (meaning States cannot justify non-compliance).⁴⁰ However, what it means in practice is not necessarily always clear. Some of the UN General Comments elaborate on what is required to meet a minimum core threshold in relation to a particular right.⁴¹ In practice, the UN legal position has been to place the onus on States themselves to determine what actually constitutes an MCO in any given context dependent on a number of variables such as the right in question, the resources available, the measures taken and the prevailing social, economic, cultural, climatic, ecological and other conditions.⁴² Best practice

would suggest that States adopt both absolute and relative criteria to assess MCO compliance.⁴³ Again, measurement and indicators for minimum core obligations could feature as part of national frameworks of action plans to ensure realisation of the MCO for everyone across the UK's jurisdictions.

By way of example, in relation to the right to food, an absolute standard might be that everyone has food security. Failure to comply with this obligation would be a *prima facie* breach of the MCO obligation.⁴⁴ A relative standard would require States to go further, where minimum criteria would include strategies of ensuring sustainable farm to fork policies that negate reliance on food banks, beginning with prioritisation of those who face the most vulnerable situations. Progressive realisation would go further again, where policies and strategies would aim to develop progressive improvement through food strategies that prioritise nutrition and quality of produce beyond minimum standards across the population. These different approaches can be viewed as the 'waves of duties' that progressive realisation imposes – where the MCO is a non-derogable (i.e. a non-negotiable and immediately enforceable) obligation that works alongside progressive realisation beyond minimum criteria.

In some countries the MCO doctrine is closely linked to the constitutional right to a social minimum.⁴⁵ It is part of the constitutional arrangements in Germany (*Existenzminimum*), Switzerland (*conditions minimales d'existence*), Colombia (*minimo vital*) and Brazil (*mínimo existencial*). The key determining factor is whether or not the **dignity of the right holder has been violated**. Dignity can act as a threshold for minimum compliance criteria and provides an example of a potential duty to comply that would give rise to an immediately enforceable obligation (i.e. if dignity is violated then remedies can be more outcome orientated rather than focussing on reasonable policies/ strategies). Should the provision of basic essentials to ensure the dignity of the person be undermined there is a breach of the social minimum doctrine. Current discussions in the UK on the incorporation of international human rights treaties, most notably in Scotland, provides an opportunity to define what the minimum core means in reality via policy and a rights-based

evaluative framework.⁴⁶ Any such process for setting core obligation standards, must be formulated via a participatory approach that includes those impacted by policies in decision making processes about what constitutes a minimum and what steps are required to progressively improve living conditions.⁴⁷ Any process for setting the minimum core of ESC rights which lacks meaningful participation risks its legitimacy to the people for which it is set.

1.2.7 Limitations and non-regression

States are under a duty to avoid measures which reduce access to or delivery of the right (non-regression). The principle of 'non-regression', also referred to as the duty not to take retrogressive steps, is key to decision making frameworks for governments. It imposes a duty on States to ensure that there is no 'backsliding' on rights provision. In other words, progressive realisation is not subject to periods of decline, even in the most difficult of circumstances, including national or international crises.⁴⁸ Indeed, it is in times of crisis that States must do all they can to avert any backsliding in the realisation of ESC rights as failure to do so can result in longer term damage.⁴⁹ The CESCR suggests that regressive measures that amount to a "*general decline of living and housing conditions directly attributable to policy and legislative decisions by State Parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.*"⁵⁰ More closely, backward steps in the provision of rights are counterproductive to progressive realisation. In international law, any retrogressive step in relation to ESC rights requires the most careful consideration.⁵¹ Any violation of a right because of a deliberate retrogressive measure can only be justified in the most exceptional of circumstances and States must be able to explain that the action is reasonable, proportionate, non-discriminatory, temporary, and that it does not breach the minimum core obligation.⁵² Further, as recent work by Liebenberg on non-retrogression in South Africa has brought forward, the doctrine provides a potential tool from which to hold States accountable for regressive budgetary allocations.⁵³ For a recent example in the UK, the reversal of the £20 uplift to Universal Credit payments is a retrogressive step for ESC rights and thus a violation of the doctrine of non-regression.⁵⁴

1.2.8 Access to an effective remedy

States are under a duty to provide access to an effective remedy if there is a failure to meet the obligations imposed by progressive realisation. This includes facilitating access to a legal remedy in court if necessary, implying the existence of both a substantive and procedural duty toward rights-bearers on the part of State parties.⁵⁵ Remedies may also include administrative, judicial, and legislative actions.

The three potential functions of a remedy are:⁵⁶

- a) its capacity to place the right-holder in the same place prior to the social right violation (restitution);
- b) ensure ongoing compliance with a social right (equilibration);
- c) engage with the feature of the legal system that caused the rights violation (non-repetition).

Remedies should also be appropriate, sufficient, and accessible, in order to meet these aims.⁵⁷ Domestic remedies for social rights violations usually take three broad forms: individual (they help address a violation for one person), programmatic (they address a systemic issue that impacts lots of people), and hybrid (they achieve a mixture of both individual and systemic relief). A singular focus on any one of these could produce problems. Courts that focus solely on individual cases may jeopardise relief for a broader class of petitioners, while leaving intact a systemic feature of a legal system that may require attention, thereby being unable to ensure non-repetition of the rights violation. Likewise, delivering only systemic relief may leave individual petitioners without access to a remedy. The world over, hybrid remedies that combine individual and systemic relief have been the most 'effective' kind, while also being capable of engaging with structural constitutional principles like the separation of powers and parliamentary sovereignty that seek to constrain judicial power in jurisdictions like the UK.

Hybrid remedies of the kind referred to above may also take the form of collective litigation in situations involving multiple complainants and multiple duty bearers. Such 'dialogic' forms of judicial remedies

are especially suited to claims involving ESC rights, which may often require an institutional expertise that courts may not have. Resolving violations of social rights may often require an institutional expertise that courts do not have. In such cases, courts may consider the meaning and content of rights but defer back to the decision maker in relation to the remedy. The court can also play an important role in mitigating inter-institutional confrontation where more there may be more than one department responsible (this can include between executive departments at the national level or indeed disputes about obligations between the national and devolved level). Dialogic forms of judicial remedies can be innovative in nature in an exploration of how best to address systemic issues. In such kinds of remedies, courts can act as an intermediary between different rights holders and duty bearers to find an effective remedy that requires multiple duty bearers to respond as part of a structural interdict (a hybrid remedy that can offer individual and systemic relief potentially involving multiple applicants and multiple defendants).

1.3 Addressing the theoretical objections to ESC rights as legal rights

Since their inception, ESC rights have suffered 'four overarching' theoretical objections to their application.⁵⁸ While these objections have in many respects been addressed in theory,⁵⁹ dispelling these objections to the recognition of ESC rights remains an important duty in human rights advocacy. While this section does not intend to delve into the vast theory required to contemplate the origins of these objections, crossing law, politics, and philosophy, it aims to provide a brief summary of the objections made, and where defenders of ESC rights can countenance such objections in practice. Firstly, according to Boyle's review of such arguments, there is the question of who is responsible for fulfilling ESC rights. In brief, it has been argued that without clear duty-bearers how can ESC rights be legally enforceable.⁶⁰ In a UK society over reliant upon private providers for basic essentials and the once defined lines between public and private provision more obfuscated, it remains a relevant and essential critique to address. To do so, the 'triangular relationship' between the State, providers, and recipients of ESC rights, as laid forth by Gauri and

Brinks, provides a helpful conceptualisation and tool for how the State remains the key duty bearer.⁶¹ Where providers can be public or private: *"The State (sitting at the top of the triangular hierarchy) owes duties to the recipients of ESR through provision or the allocation of resources, and fulfils duties via providers through the regulation of how ESR require to be addressed. The providers then owe private obligations to the recipients through a horizontal application of ESR under the regulatory framework put in place by the State."*⁶² Where a State delegates responsibility for services such as housing, health, or social security by way of example, each of which are essential to the realisation of ESC rights, the State cannot contract out of its obligations. In other words, in such situations both the provider and the State should be held responsible for complying with human rights. Even where there is an insufficient regulatory framework to ensure the private provider complies the State cannot use this as an excuse for non-compliance, the State will always hold responsibility as the primary duty-bearer.

The second objection centres on whether ESC rights can legitimately be enforced.⁶³ Here, while it can be a complex matter as to what institutions are best placed to address ESC rights violations, it is clear the courts must exist in a central role but are not solely responsible. Different avenues to remedy can and should exist, with courts fulfilling their role as a means of 'last resort'.⁶⁴ In the UK, there are a number of avenues which can be explored first, from political representation and complaints to ombudsmen, to internal complaints mechanisms, inspectorates, and regulatory frameworks.⁶⁵ These differing avenues all serve as important mechanisms able to address and remedy specific ESC rights violations when provided with the right resources and explicit mandate. In the UK there is a historical reluctance to accept the court as an important actor in a multi-institutional framework for ESC accountability. The arguments against enforceable ESC rights reflect the critiques of social rights adjudication (discussed below). Whilst it is important to get the democratic balance right, the research suggests that the court should be there as an accountability mechanism if the legislature and executive fail to meet international legal obligations.

The third objection outlined relates to cost. Who bears the costs for supporting such a rights framework and the provision of effective remedies?

Evidently related to the above, it questions whether the costs of realising and remedying ESC rights in the UK, via institutional and legal mechanisms, can theoretically be justified and practically allocated for. There are a range of rebuttals to such concern for ESC rights. Firstly, all rights realisation requires adequate resourcing, whether that be for civil and political rights or for ESC rights. Remedying rights violations is resource intensive, but this should not act as an argument for not doing so. On the contrary, it should act as an incentive for duty-bearers to ensure rights are not violated in the first place. Further still, the objection on the grounds of costs does not consider the resources saved through ensuring realisation of ESC rights. This has been and remains a key argument used when discussing the costs of access to justice and the provision of legal aid across the UK.⁶⁶ It is misguided to become solely discouraged by the cost of providing adequate housing, access to nutritious foods, or a base social security scheme. The more pressing question must be what is the cost to the State of not doing so?

There remains a fourth and final theoretical objection raised against ESC rights. According to Boyle, it relates to the argument 'that one ESR right may be conceptually, or empirically, incompatible with another'.⁶⁷ Otherwise described as 'impossibility'.⁶⁸ The fact all rights are not always compatible has been well debated since their inception and relates equally to ESC rights as well as civil and political. Balances are required and the principle of indivisibility means this applies equally to civil and political rights as to ESC rights. For example, freedom of expression may impact upon privacy and freedom to protest on rights to security. What is critical to understand in relation to impossibility, is that *'within any substantive system there can be appropriate limitations and safeguards to ensure the appropriate balance between rights that can be secured, as can limitations on rights be employed through many of the same mechanisms applied to CPR. It is not proposed that all ESR are absolute and non-derogable'*.⁶⁹ ESC rights may at times compete, but this cannot form a sound basis for their rejection as enforceable rights. It is simply a reflection of the complexity in providing universal human rights and exercising a balance between rights, through for example proportionality assessments.

1.4 The court's role in upholding ESC rights

The role of the court in upholding ESC rights is seen as one of the major challenges to introducing ESC rights that are legally enforceable as part of court adjudication. The critiques of ESC rights adjudication can be understood as constituting four waves: (i) the anti-democratic critique (that ESC rights are complex matters of economic and social policy and the courts are not the appropriate democratic forum for their resolution), (ii) the indeterminacy critique (that ESC rights are indeterminate and that their vagueness hinders effective enforcement), (iii) the incapacity critique (that courts are ill-equipped to deal with complex matters of economic and social policy and lack the expertise for resolving such disputes) and the (iv) pro-hegemonic critique (that ESC rights adjudication in practice results in the court acting as a pro-hegemonic exercise of power, further exacerbating existing inequalities in the distribution of resources).⁷⁰

Whilst addressing these critiques requires careful consideration, they do not present as insurmountable barriers to effective ESC rights adjudication. A response to the anti-democratic critique proposes that whilst courts should remain a means of last resort, they must perform a democratic function in holding other branches to account when violations of rights occur, and that democratic legitimacy is struck by balancing appropriate weak v strong⁷¹ forms of review depending on the circumstances. In other words, sometimes courts should adopt deferential roles in the adjudication of ESC rights, requiring States to justify their approach, adopting weak review mechanisms such as limited tests of irrationality, and ordering declarators that are deferential in nature rather than usurping the role of the legislature or executive. In other circumstances, particularly when there is a violation of a fundamental norm, where the applicant's dignity or minimum core is breached, courts can perform more interventionist forms of review, enhanced forms of scrutiny and issue stronger remedies. The research suggests that courts should strike a balance and use an aggregate of appropriate remedies as a means of responding to ESC rights violations.⁷² This approach is familiar (although arguably under-utilised) by the UK judiciary. For example, judicial

review can act as an important safeguard in cases of destitution or risk to life, where an aggregate of remedies provides immediate interim relief, together with deferential orders to revisit the decision-making process on a longer timeframe with courts performing a supervisory role.⁷³

An often-versed concern about ESC rights adjudication is that there is no jurisprudence (like the jurisprudence of the European Court of Human Rights in the determination of civil and political rights) to help guide the national bodies on what ESC rights mean in practice. However, this critique overlooks a rich array of comparative and international jurisprudence on ESC rights.⁷⁴ Responses to the indeterminacy critique propose that courts, along with other actors in a multi-institutional framework should perform a role in giving meaning and content to rights. The argument goes that all branches of the State – including the legislature, executive and judiciary – should be open to interpreting the meaning of rights.⁷⁵ It is the dialogue between the legislative, executive and judicial branches that can help give meaning to rights, a role that courts should not abdicate.⁷⁶

Responses to the incapacity critique follow a similar vein, that courts must equip themselves with the relevant expertise and evidence to assess compliance with ESC rights, including the deployment of *amicus curiae*, as well as drawing on a broad range of sources. In addition, court procedures must adapt to better facilitate collective responses to systemic problems.

Responses to the pro-hegemonic critique argue that courts can act as an important mechanism and 'institutional voice' for those who are politically disenfranchised.⁷⁷ Legal processes should take steps to embrace **counter-majoritarian** adjudication.⁷⁸ This can be constituted along the lines of broader rules around standing, enhanced opportunities for third party or strategic litigation, and enabling collective class-actions or group proceedings.⁷⁹ More appropriate remedies are required to help the court embrace this role such as the deployment of structural remedies when systemic issues arise.⁸⁰ In other words, as we argue above, the often systemic nature of ESC rights violations requires new remedial responses that go beyond individual relief.

1.5 Concluding Remarks

In 1998, Leckie in discussing the ICESCR speaks an unfortunate truth: *'No other treaty has been violated in as obdurate or as frequent a way as the ICESCR'*.⁸¹ Over 20 years on, this continues to ring ominously true. Considering the obligations outlined above, human rights violations continue to be widespread throughout both developing and developed economies in the world. The UK has growing inequality and poverty, with political and economic decision-making entrenching them deeper into society. ESC rights can provide a renewed path to building a fairer and more just society. For them to progress into such a tool in the UK, there is a need to incorporate these rights into the domestic legal systems across the UK and its devolved jurisdictions. There are a range of methods available to State parties to carry out such incorporation and this will be discussed in more depth throughout the consequent briefings on specific social rights. The aim of this briefing has been to provide a resource for institutions, public and private, NGOs, and legal practitioners throughout the UK with a base level of information on ESC rights and their associated international legal obligations. There remains much which could not be covered, and the remaining three briefings provide a focus on three different, specific rights contained in the ICESCR and provide a more in-depth overview as to how the obligations discussed here, can be put into practice.

Endnotes

- 1 This erroneous sidelining of ESC rights is outdated and the remnants of a 'legal fictions'. See Mónica Feria Tinta (2007) 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection off Human Rights: Beyond Traditional Paradigms and Notions' 29 Human Rights Quarterly 431, [p.432]. For a full discussion on the misunderstood separation of rights into separate categories, see Katie Boyle *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020).
- 2 The rights protected in international law fall under treaties 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.
- 3 Katie Boyle and Edel Hughes (2018) 'Identifying routes to remedy for violations of economic, social and cultural rights' 22(1) The International Journal of Human Rights. See also, Simon Hoffman et al (2021) 'Strengthening and advancing equality and human rights in Wales' Welsh Government 54/2021; And Katie Boyle (2015) *Economic, Social and Cultural Rights in Northern Ireland: Legitimate and Viable Justiciability Mechanisms for a Conflicted Democracy* as found in Alice Diver & Jacinta Miller (eds.) Justiciability of Human Rights Law in Domestic Jurisdictions (Springer 2015) [pp.173-195].
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- 5 UN General Assembly, International Covenant on Civil and Political Rights, resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Hereinafter the 'ICCPR'.
- 6 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. Hereinafter the 'ICESCR'. The UDHR, ICCPR and the ICESCR are collectively known as the International Bill of Rights.
- 7 The World Conference on Human Rights, Vienna Declaration and Program of Action, UN GAOR, Word Conference on Human Rights, 48th Session, 22d plen. Mtg., UNDoc.A/CONF.157/24, PART I, 23; For an account of the historical development of the principle of indivisibility see Daniel Whelan *Indivisible Human Rights, A History* (University of Pennsylvania Press 2010); See also, Manfred Nowak *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd eds) (Engel 2005) where it states 'it is today recognised that all human rights are equal, indivisible and interdependent' [p.20].
- 8 Ian Brownlie *Principles of Public International Law* (Oxford Clarendon Press 1979).
- 9 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.
- 10 The UK has signed up to a number of international treaties which espouse the need to progressively realise rights, including the ICESCR, the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and the UN Convention on the Rights of the Child (UNCRC).
- 11 Article 2(1) UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Hereinafter ICESCR Art 2(1).
- 12 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant), 14 December 1990, E/1991/23; and UN Commission on Human Rights, note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), 8 January 1987, E/CN.4/1987/17.
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- 16 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. The bar for reasonableness in the UK context is much weaker than the international test. Under *Wednesbury* reasonableness a duty 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".
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- 21 See discussion in Olivier de Schutter *Economic, Social and Cultural Rights as Human Rights* (2nd edn) (CUP 2014).
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- 73 By way of example see the case of *QH v Secretary of State for the Home Department* [2020] EWHC 2691 (Admin) (07 October 2020).
- 74 The following database gives an overview of ESCR adjudication: <https://www.escr-net.org/caselaw> . Courts must have clear instructions on their role, whether in the constitution or in enabling statutory frameworks, as well as having regard to appropriate sources in interpreting social rights, including both international human rights law and comparative law both of which can offer normative frames of reference when interpreting domestic law. For example, see the South African Constitution Article 39 interpretation clause guiding the court including with reference to international law and comparative law
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The Access to Justice for Social Rights: Addressing the Accountability Gap project explores the barriers faced by rights holders in accessing justice for violations of social rights across the UK. The project seeks to better understand the existing gaps between social rights in international human rights law, and the practice, policy and legal frameworks across the UK at the domestic level. It aims to propose substantive legal solutions – embedding good practice early on in decision making as well as proposing new legal structures and developing our understanding of effective remedies (proposing substantive change to the conception of ‘justice’ as well as the means of accessing it).

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