

# Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights

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## **Abstract**

This article examines the status of economic, social and cultural (ESC) rights in Scotland and identifies routes to remedy for violations of these rights. ESC rights relate to areas such as housing, education, employment, standard of living and health. They also more broadly protect vulnerable groups such as children, the elderly, the disabled, the unemployed and minority communities. The mapping of rights conducted by the Scottish Human Rights Commission before the publication of the ‘Getting It Right’ report revealed a legal deficit in the protection of ESC rights in Scotland. The evidence identified that protection mechanisms for socio-economic rights in Scotland are either insufficient or non-existent. This article builds on the evidence by exploring the legal nature of ESC rights: how they are currently protected in Scotland and how they are protected in other jurisdictions. It then examines the concept of a ‘remedy’ in international human rights law and proposes models for the better protection of ESC rights for potential future implementation in Scotland. This includes an examination of the risks and benefits in constitutionalising or legislating for ESC rights in a way that complies with the rule of law. This, in particular, will be of interest for an international audience in a comparative sense in terms of the practical and legitimate mechanisms for justiciability and models of constitutionalisation for ESC rights in different constitutional contexts, including Scotland.

**Key words:** Economic, social and cultural rights; remedy; justiciability; constitutionalisation; enforcement models

## **Introduction**

The work undertaken by the Scottish Human Rights Commission during the scoping exercise; the publication of the ‘Getting it right’ report; and the subsequent development of Scotland’s National Action plan, identified a seismic gap in legal protections for economic, social and cultural rights in Scotland. This article builds upon this evidence base by setting out routes to remedy for violations of ESC rights in both Scotland and beyond. Its aim, therefore, is to contribute to the literature identifying practical mechanisms for justiciable ESC rights, both internationally and in the Scottish context.

To a certain extent, the adjudication of ESC rights by courts already occurs in Scotland and the UK in accordance with the rule of law. The issues discussed in this article contribute to an already existing body of practice and explores potential future developments. Historically, ESC rights have been viewed with suspicion, as explained in the first section of this article. There are many legitimate arguments that favour deference to parliament in any decision affecting socio-economic rights. However, the long-held outright rejection of ESC rights as legal standards subject to judicial scrutiny is now an outdated position.<sup>1</sup> Developments in the area have transformed the legal landscape and the way in which these rights are viewed – by governments, by civil society, by practitioners, and by the judiciary. This does not mean that there is no place for deference to parliament but rather, to what extent or in what circumstances deference should be preferred over alternative remedies. This article is most timely in this respect as, increasingly, states are constitutionalising and mainstreaming ESC rights. Scotland (and the wider UK) is on the precipice of potential change to the existing human rights framework. This article, therefore, aims

to contribute to the discussion on any potential changes in relation to ESC rights protection so that future developments are made on an informed basis and in a legitimate and democratic way. In this respect the article identifies and develops routes to remedy for violations of ESC rights in Scotland within the particular devolved framework and existing human rights commitments.

The ‘Getting it right’ report provides the critical data in identifying the gaps in ESC rights protection that this article seeks to address. The mapping exercise undertaken prior to the publication of the report allowed an opportunity to highlight gaps that might otherwise have gone unnoticed. For example, relying on case law under the ECHR system would not satisfactorily account for all the different types of ESC rights violations suffered by people in Scotland because the treaty is not designed to capture these rights. Similarly, international monitoring and reporting procedures might not always capture the data which relates to the most vulnerable and disenfranchised if they have not had an opportunity to engage with the reporting process – meaning gaps remain hidden and unidentified. In this sense the mapping of rights under the SHRC project facilitated a bottom-up approach to inform the macro level rather than the inverse. Lessons can be learned from this methodology when states seek to identify and map the substantive nature of rights enjoyment, or lack thereof, in a more robust manner. Building up capacity for rights holders, civil society and government to be involved in shaping of the national action plan created a sense of ownership and awareness over the standards required to comply with international law<sup>2</sup> and is undoubtedly an example of best practice in terms of realising a human rights based approach.

The report created an evidence base which included the mapping of the existing legal framework and identifies a legal deficit in that most treaties that the UK has ratified have not been incorporated into domestic law.<sup>3</sup> When the UK does not meet these international standards there is no legal accountability mechanism to hold the government or legislature to account. The report highlighted in particular that,

‘Although the scoping project notes a few examples of putting rights into practice, it suggests inconsistency in a number of areas, even where laws and policies are largely rights based. Indeed, in general terms, it is noted that the influence of human rights is felt most strongly on our laws and institutions and its influence decreases the closer to real life we look. The result is unacceptable outcomes for some individuals, particularly the most marginalised.’<sup>4</sup>

The mapping exercise revealed that gaps in human rights protection extended to areas including education, health, employment, social security, and standard of living with each of these areas indicating a high prevalence of socio-economic rights violation. For example, the report highlighted that patterns of illness are inequitably spread across the socio-economic spectrum with those living in poverty more likely to die early and to suffer from a range of health problems.<sup>5</sup> It also referenced research indicating a significant gender pay gap in Scotland. In addition it was noted that although fair pay is a productive way to assist individuals and families to combat poverty, including potential gender based pay discrimination, there is no domestic mechanism to ensure fair pay across the board. In fact the legislative mechanism regarding a minimum wage has been deemed ‘manifestly unfair’ by the European Social Committee in several concluding observations.<sup>6</sup>

Other jurisdictions can learn from the mapping process undertaken in the Scottish context in order to build the evidence base needed to demonstrate where existing structural mechanisms do not suffice. This article seeks to address the gaps where the structure and processes are insufficient for ensuring human rights outcomes lead to compliance with ESC rights. The questions that remain unanswered in the literature relate to the mechanisms through which justiciability can be legitimately achieved for different constitutional frameworks rather than whether the rights are justiciable in and of themselves. The intended contribution of this paper is to map out the mechanisms for ESC justiciability in Scotland that are required to address the gaps uncovered in the mapping exercise. These mechanisms can act as useful points of reference for other jurisdictions seeking to fill the same type of lacunae in the legal structures and processes to fully account for ESC violations. There is no ‘one size fits all’ approach to ESC justiciability and so, critically, an analysis of a myriad different mechanisms provides important lessons for both Scotland and internationally as practical solutions are sought to address different types of ESC gaps for different types of vulnerable groups.

### **The Human Rights framework in Scotland**

Human rights protection in Scotland operates under two separate legislative regimes – one of which is imposed at the devolved level through the Scotland Act 1998 and the second of which applies across the UK, the Human Rights Act 1998. There is, therefore, a system of human rights protection for devolved matters and a separate system for reserved matters.

Primarily, the constitutional arrangement under devolution means that the European Convention of Human Rights (ECHR) takes on a constitutional status under the Scotland Act 1998 in relation to devolved matters (section 29). This means that the Scottish Parliament must comply with the ECHR in relation to the passage of legislation and that Ministers in Government must comply with the ECHR in performance of their duties (section 57). To contravene the ECHR is to act unlawfully, rendering the action, omission or piece of legislation *ultra vires* (invalid and of no legal effect). This is a 'rights-affirmative' framework where the presumption is in favour of compliance and the failure to do so renders the act, omission or legislative provision unlawful. The ECHR predominantly protects civil and political rights as opposed to ESC rights.

The Human Rights Act 1998, on the other hand, enshrines the ECHR at a national UK level, through the duty on public bodies to comply with Convention rights (Section 6) and the duty on courts to interpret legislation in compliance with ECHR in so far as it is possible to do so (Section 3). Section 2 of the Act requires the courts to have regard to the jurisprudence of the ECtHR when considering human rights compatibility. Should the courts consider Westminster legislation to contravene the ECHR without the possibility of interpreting it otherwise then the courts must issue a declaration of incompatibility (section 4) – this is different to the effect of the *ultra vires* remedy and the declaration has no legal effect on the application of the incompatible legislation. This framework is less robust than the devolved framework and ultimately Parliament in Westminster supersedes judicial declarations of incompatibility in accordance with the doctrine of parliamentary supremacy.

The future of the Human Rights Act 1998 is currently in the balance with a Conservative commitment to repeal the Act and remove the obligation to comply with the ECHR to the same degree as currently exists. The previous Conservative Government outlined its commitment to replacing the Human Rights Act 1998 with a new and revised UK Bill of Rights on its re-election in 2015. Prior to the 2017 general election and in the aftermath of the terrorist attacks in Manchester and London, the Prime Minister noted that she was prepared to change human rights laws should they prevent the government from dealing effectively with the terrorist threat.<sup>7</sup> Whatever form any eventual proposals may take, it will be difficult to deliver change to the existing arrangements in the devolved jurisdictions.<sup>8</sup> First, because the existing framework in the devolved jurisdictions is so heavily dependent on a 'rights-affirmative' ECHR constitutional framework, meaning repeal of the Human Rights Act would not completely remove from ECHR compliance obligations in each of the jurisdictions.<sup>9</sup> Second, even if the proposals were to go as far as to amend the existing devolved legislation to concurrently repeal the Human Rights Act and the relevant devolved legislative provisions so as to remove the ECHR from the constitutional framework altogether, Westminster would face difficulties in the political passage of such changes in Scotland (reaching a potential political impasse if the Scottish Parliament refuses to grant a Legislative Consent Memorandum and the UK Parliament faced with breaking a constitutional convention to proceed with the changes). In Northern Ireland any amendment to the ECHR framework risks acting contrary to an internationally binding agreement with the Republic of Ireland in connection with human rights.<sup>10</sup> Third, since 2009 the Treaty of Lisbon incorporated fundamental rights into the EU legal order. The EU Charter of Fundamental Rights and ongoing discussions over the EU's accession to the ECHR would mean that the ECHR framework would continue to apply across the UK (in



relation to EU matters), unless and until such time as a potential exit from the EU has been negotiated. As has been noted in the Miller jurisprudence, some rights and remedies enjoyed as part of EU membership – including socio-economic rights – will be irrevocably lost on the UK's departure from the European Union.<sup>11</sup> Whilst the Government White Paper promises to retain some EU derived rights, such as labour rights, it does not explain how this will be achieved and/ or how these rights could be protected from erosion under future administrations.<sup>12</sup> This becomes all the more problematic when contextualised within the devolved administrations as each jurisdiction has different devolved powers connected with existing EU competencies. It is not yet clear how the transfer of power will be managed in such a way as to create a harmonised approach to human rights across the UK, if at all, in a post-Brexit landscape.

These developments can be compared to the trajectory of human rights protection envisaged in the lead up to the Scottish independence referendum.<sup>13</sup> The Scottish Government's proposals for the future protection of human rights in Scotland were set out in the event of a 'yes' vote in the independence referendum.<sup>14</sup> The objectives of the Government in Scotland had been to seek to further enshrine and extend the protection of human rights in the Scottish constitutional framework in the interim written constitution (pulling reserved matters within the ECHR rights-affirmative framework).<sup>15</sup> Granted, this did not come to pass. Nonetheless, there is an important opportunity to revisit what constitutional arrangement for human rights should or could be adopted in Scotland as a continuing part of the UK. This is part of an ongoing conversation on Scotland's constitutional future. Following the recommendations of the Smith Report the Scotland Act 2016 includes further devolution in the area of socio-economic inequality with an amendment to the

devolved competence of the Scottish Parliament with more powers on socio-economic rights.<sup>16</sup> A new Equality and Human Rights Committee has been established and the First Minister has declared a commitment to consideration of ESC rights in Scotland's future constitutional framework.

This article seeks to examine the options for the future protection of economic, social and cultural rights in Scotland. This is contextualised in the ongoing discussion on the future protection of human rights under the ECHR framework, but, importantly, the contribution of this article identifies potential routes to remedy for economic, social and cultural rights under existing arrangements and explores legitimate and viable constitutional developments for the protection of socio-economic rights as an option for future constitutional development. Given that the ECHR is just one of many international human rights treaties that the UK has ratified, a full and comprehensive consideration of the options means stepping out of the ECHR focussed constitutional regime that incorporates mostly civil and political rights in Scotland and the UK, and exploring the constitutionalisation or implementation of economic, social and cultural rights beyond the ECHR framework. This is examined in the context of the particular circumstances of Scotland as a devolved entity within a wider UK state and takes account of the unique constitutional framework. The following sections provide a brief explanation of ESC rights and the concept of remedies in international human rights law, and then explores how ESC rights operate in practice elsewhere. The article then turns to addressing the options available to Scotland in seeking to further secure the protection of ESC rights and, finally, explores the potential benefits and risks faced by incorporating economic, social and cultural rights into the Scottish constitutional framework.

## **What are economic, social and cultural rights?**

Following 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 and the International Covenant on Economic, Social and Cultural Rights.<sup>17</sup> These treaties are known collectively as the International Bill of Rights. It was intended that each category of rights would be implemented concurrently and according to the principle of indivisibility.<sup>18</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>19</sup> 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>20</sup> The full enjoyment of CP rights was therefore dependent on the protection and fulfilment of ESC rights – the preparatory work to the international treaties reveals that in terms of both categories of rights, it was considered an ‘anachronism in the twentieth century to provide for the protection of one without the other.’<sup>21</sup>

However, historically, the legal status of ESC rights has been misunderstood.<sup>22</sup> This was based on confusion about how ESC rights should be implemented.<sup>23</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 that depend solely on the will/ability of the legislature to accommodate. 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 with these rights. It has long been understood that CP rights are ‘justiciable’.<sup>24</sup> The violation of an ESC right was originally not explicitly open to judicial remedies in international law<sup>25</sup> but the Committee on Economic, Social and Cultural Rights (the body responsible for overseeing implementation of the ICESCR) has called for justiciable remedies<sup>26</sup> for violations of ESC rights to be made available.<sup>27</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>28</sup>

The UK signed the ICESCR<sup>29</sup> on 16 September 1968 and ratified the Covenant on 20 May 1976. On the matter of justiciability, the Committee has called on the UK to ensure that ICESCR ‘is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights.’<sup>30</sup> It should be noted that, in the same way that CP rights are not all absolute, neither are ESC rights. The nature of ESC rights require states to respect, protect and fulfil these rights in order to progressively achieve them to the maximum available resources.<sup>31</sup> However, it is possible to place limitations on the rights in the same way interference with CP rights can be justified in certain circumstances (with the exception of non-derogable rights). Incorporation of the rights therefore requires fulfilment to different degrees and there is scope to balance fulfilment with a right against other countervailing factors. A sensible and balanced approach to ESC implementation allows for the balancing of rights (including competing rights) and takes account of the allocation of limited resources.

It is now more commonly accepted in the literature and in practice that ESC rights can or ought to be judicially enforceable.<sup>32</sup> Outstanding questions now relate to how best to deliver justiciable remedies, or, through what mechanisms might ESC rights be best protected within a particular constitutional framework in a viable and legitimate way.

The same can be asked of what place or status ESC rights hold or should hold in Scotland. The post- independence referendum and post-EU referendum landscape has provided a critical opportunity to deliberate on these issues, in particular given the fragile future of the existing human rights domestic framework. Any change to the constitutional framework should happen on a deliberative and informed basis.<sup>33</sup> Critically, this requires an exploration of the viable options open for consideration in order to ensure a robust system coupled with safeguards for the particular circumstances of Scotland should there be impetus to better secure ESC rights protection (or not).

A legitimate and viable constitutionalisation requires consideration of the concerns raised in connection with the constitutionalisation of ESC rights and granting the judiciary power to adjudicate and provide remedies for violations of ESC rights.<sup>34</sup> Issues relating to democratic legitimacy; polycentricity; expertise; and budgetary allocation need to be addressed. They do not, however, exclude the viability of ESC rights and ESC adjudication in practice and nor should they be relied on as reasons for an outright rejection of the legitimacy of justiciable ESC rights.<sup>35</sup> Even in situations where deference to parliament might be the most appropriate solution the judiciary can intervene in more nuanced ways to ensure parliament addresses ESC violations (as discussed below). The following sections consider how the concept of

remedies has been addressed in international human rights law, how ESC rights are protected elsewhere, what mechanisms would be open to Scotland, and finally, how to balance the benefits and risks associated with making ESC rights fully justiciable in any future developments.

### **The Concept of a ‘Remedy’ in International Human Rights Law**

Before turning to address the protection of ESC rights in other jurisdictions, this section provides a brief overview of how the concept of remedies has been articulated in international human rights law. The notion of a *right* to a remedy emanates from Article 8 of the Universal Declaration of Human Rights, which states that ‘[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’<sup>36</sup> The UDHR, as noted earlier, did not distinguish between civil and political rights and economic, social, and cultural rights – this bifurcation was to occur later with the enactment of the two covenants – and thus Article 8 can be considered as applying to *all* fundamental rights.

Two separate concepts are inherent in the idea of remedies: ‘[i]n the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant.’<sup>37</sup> In considering the purpose of remedies we can identify those that are applicable to both of these concepts. Shelton, for example, emphasises the potential for remedies to provide compensatory or remedial justice; to

play a part in condemnation of the violation or retribution; as a form of deterrence; and as playing a part in restorative justice or reconciliation.<sup>38</sup>

The importance of a coherent structure to enable both the existence of and access to remedies for violations of human rights law was underscored in 2005 with the adoption of the UN 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.<sup>39</sup> The Basic Principles and Guidelines illustrate the wide range of remedies possibly available in international human rights law, and include cessation of continuing violations; restitution to the extent possible; compensation for physical or mental harm, lost opportunities, moral damage, and consequential costs; rehabilitation through medical, psychological, legal, or social services; measures of satisfaction, including verification and public disclosure of the truth, recovery of the remains of deceased victims, public apologies, judicial and administrative sanctions against perpetrators, commemorations and tributes to the victims; and guarantees of non-repetition, including institutional reforms of military and security forces and the judiciary, trainings, codes of conduct, and reviewing and reforming legislation.<sup>40</sup> Remedies, of course, can take many forms but the importance of a *legal* remedy for violations of human rights is emphasised by Shelton: '[m]ost legal systems today recognize the importance of safeguarding the rights of access to independent bodies that can afford a fair hearing to claimants who assert an arguable claim that their rights have been infringed. Indeed, many writers include the element of enforceability in their definition of legal rights, because the notion of rights entails a correlative duty on the part of others to act or refrain from acting for the benefit of the rights-holder. Unless a duty is somehow enforced, it risks being seen as a voluntary obligation that can be fulfilled

or ignored at will.’<sup>41</sup> This question of enforceability is of particular relevance to the debate on ESC rights.

In the Scottish context it is the remedies provided by the ECHR (and Human Rights Act) that are arguably most relevant to the current discussion. Article 13 of the ECHR was modelled on Article 8 UDHR and outlines the right to an effective remedy. It provides: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’ The ‘Guide to good practice in respect of domestic remedies,’ published by the Council of Europe in 2013, emphasises the fundamental importance of Article 13 underlying the Convention’s human rights protection system and notes that Convention requires that a remedy ‘be such as to allow the competent domestic authorities both to deal with the substance of the relevant Convention complaint and to grant appropriate relief.’<sup>42</sup> The jurisprudence of the Court has confirmed that a remedy will only be considered ‘effective’ (for the purposes of Article 13) if it is available and sufficient and it must be sufficiently certain both in theory and in practice.<sup>43</sup> A remedy must be effective in practice as well as in law<sup>44</sup>, having regard to the individual circumstances of the case. The Convention system does not prescribe any particular form of remedy and, as the good practice guide highlights, States parties to the Convention have a margin of discretion in how to comply with their obligation.<sup>45</sup> However, ‘the nature of the right at stake has implications for the type of remedy the State is required to provide’<sup>46</sup> and although the Convention deals almost exclusively with CP rights, arguments in relation to ESC rights have arisen in connection with several Convention rights, as discussed below. Article 13 is also central to the co-operative relationship between national legal systems and that of the



Convention, one of the main aims of which is to encourage remedies before domestic legal authorities so that it is not necessary to resort to the Strasbourg machinery.<sup>47</sup>

This is all the more relevant in the current context of hostility to the Strasbourg court amongst some quarters of the UK political and judicial establishment.

### **Justiciability of ESC Rights and Remedies for their violation**

The general arguments in repudiation of the justiciability of ESC rights are numerous but generally centre on four main themes: a democratic deficit; the judiciary interfering in the policy matters of the state impinges on the separation of powers; the judiciary lacks the expertise to decide such matters and it is beyond the institutional capacity of the Courts; and lastly, accountability can be secured through other institutional alternatives, such as administrative bodies (specialised tribunals, ombudsmen, and alternative dispute resolution). Each of these arguments raise serious issues in relation to the legitimacy and competency of the judiciary deciding cases brought in terms of violations of economic, social and cultural rights.

In response to these arguments Nolan *et al* have argued that the rejection of justiciable ESC rights is no longer viable on the basis that the judiciary already has a role in holding elected representatives accountable:

‘[T]he judiciary has an important role to play in enhancing democratic governance by reviewing governments’ decisions for compliance with fundamental rights[...]The democratic legitimacy of such review is derived from the need to ensure that the rights of minorities or of politically powerless groups are not violated by majoritarian decision-making. Decisions about social and economic programmes or policies may have fiscal consequences in areas that were historically defended as the preserve of elected branches of government, but they are also those in which the most disadvantaged and politically marginalised groups will often have the most at

stake in terms of personal security and dignity. Seen in this light, judicial review of government actions by courts to ensure that human rights are not violated would seem to be as legitimate in the socio-economic realm as in other areas of governmental action.’<sup>48</sup>

In fact, viewed within the misconception surrounding the dichotomy of rights it is arguable that the repudiation of ESC justiciability is based on a false premise from the outset. For example, it has been posited that misconceptions around the status of ESC rights and separation into binary categories has ‘sprang from a legal fiction’<sup>49</sup> This would certainly reflect the misconception emanating from the point of bifurcation as discussed above. The gap identified here reflects the observations of leading academics and practitioners that it is the outstanding questions relating to legitimate legal mechanisms (forms of applicability and delivery), as opposed to the legality of justiciability *per se*, that remain unaddressed.

Tinta proposes that, rather than subjugate ESC rights to a lower status because of weak applicability or delivery measures, practitioners must explore the underdeveloped justiciability of ESC rights.<sup>50</sup> On discussing remedies in international law Higgins has clarified that ‘problems about delivery leave [one’s] rights a right none the less’<sup>51</sup> and Tinta, building on Higgins’ proposal, identifies that delivery of substantive ESC protection must be sought through a ‘myriad of forms’.<sup>52</sup> In this sense, the absence of substantive justiciable mechanisms does not negate the existence of the right. This means that in terms of ESC rights the outstanding question comes down to how to provide an effective remedy in law within legitimate justiciable parameters.

The concept of remedies for rights violations is very much interlinked with that of justiciability. As noted earlier, the idea that ESC rights are not justiciable has now been debunked, both in theory and in practice and only appears today ‘as a quiet echo from the past.’<sup>53</sup> As the following section illustrates, domestic justiciability has been embraced in numerous jurisdictions that have taken on the challenge of enforcing ESC rights, which as Roach highlights, does involve a re-think of our traditional concepts of remedies: ‘[t]he challenge of enforcing ESC rights may require some re-thinking of the traditional idea that remedies must be immediate and track the contours of the right and the violation, and that the courts can order one shot remedies that achieve corrective justice.’<sup>54</sup> The response of the Scottish government to the issues highlighted by the CESCR correctly outlines that important aspects of the Covenant already find expression in the law of Scotland<sup>55</sup>; the examples discussed in the following section indicate that the crucial next step must be the implementation of legally enforceable remedies for violations of these rights.

### **How are ESC rights protected elsewhere?**

Recently we have seen examples of the judiciary in different countries establishing ESC rights as part of existing constitutional and legislative structures through an evolving approach to international human rights law. For example, in Germany the judiciary held that the Basic Law, together with Article 9 ICESCR (the right to social security), included a stand-alone right to a minimum level of subsistence below which no person should fall.<sup>56</sup> In Latvia, the courts intervened when the state sought to reduce the state pension by up to 70% in order to meet requirements of loans with the IMF and the EU.<sup>57</sup> The courts held that the reduction in state pension was

unconstitutional and contrary to Article 9 ICESCR and that the provisions of the loan should not supersede fundamental human rights.<sup>58</sup> The European Court of Human Rights has held that there are socio-economic dimensions to civil and political rights<sup>59</sup> and has extended CP rights in the ECHR to encompass related ESC rights.<sup>60</sup> For example, the court has extended Article 8 to encompass the right to adequate housing respecting cultural dimensions in the case of nomadic travellers<sup>61</sup> and, more broadly, protection from unlawful eviction.<sup>62</sup> In the case of *Yordanova*<sup>63</sup> the ECtHR specifically referred to various international standards<sup>64</sup>, including the standard set by ICESCR in connection with the right to adequate housing and the corollary positive duties incumbent on the state to respect this right.<sup>65</sup>

In the UK the judiciary has relied on ESC rights in holding that the rights of the child should be of paramount importance when considering immigration matters.<sup>66</sup>

Likewise, in a case based on Article 3 ECHR, the House of Lords held that there must be a minimum level of subsistence available to support asylum seekers in the UK who fall below a threshold of destitution, such as to amount to inhuman and degrading treatment.<sup>67</sup> Socio-economic rights are also subject to adjudication and potential protection under the aegis of equality legislation. There are both domestic and international examples of litigation based on non-discrimination that has inadvertently secured the protection of socio-economic rights.<sup>68</sup> Under the Equality Act 2010 the court can declare a budgetary decision unlawful if, for example, a public body has failed to have due regard to the potential adverse impact on a group that share a protected characteristic.<sup>69</sup> Public bodies are required to conduct equality impact assessments to ensure the least disproportionate measure is used to secure any changes to the allocation of resources. This directly engages with socio-economic rights and provides a form of procedural protection in their implementation (i.e. that

there is an obligation to have due regard to equality of opportunity as opposed to an obligation to ensure equality of opportunity).

These cases are examples of the judiciary implementing ESC rights through the rubric of CP rights, through equality legislation, or through direct incorporation of international standards as part of the common law. However, these developments do not reflect a move towards full incorporation or protection of ESC rights, they are simply examples of where the protection of ESC rights has been partially extended by the judiciary. This approach, while tentatively applied in the UK in some cases, risks breaching the principle of parliamentary supremacy. This is evident, for example, in the recent Supreme Court case determining the legality of the cap on housing benefits where the court, divided on whether international human rights should place limitations on the legislature without having been incorporated into UK law, narrowly rejected the applicants' case even though the legislative provisions were incompatible with the UN Convention on the Rights of the Child.<sup>70</sup>

Some states have sought to introduce more clear and transparent multi-institutional approaches to ESC rights by clearly setting out the expectations of the legislature, government and judiciary in explicit terms when dealing with ESC rights.<sup>71</sup> Again, this does not necessarily mean full incorporation, for example, but can mean protecting ESC rights to varying degrees (often along the respect, protect, fulfil axis). One example would be to use a 'rights-affirmative' framework, with an option for parliamentary derogation (retaining parliamentary sovereignty),<sup>72</sup> another would be to introduce forms of procedural protection such as a duty to have due regard to the ICESCR.<sup>73</sup> The South African model is often referred to as the archetypal example of ESC constitutionalisation. This model employs a mixture of substantive rights

recognition, together with safeguards and limitation clauses contained in the Constitution. Rights are afforded protection to different degrees along the respect, protect, promote, fulfil axis. Some ‘negative’ rights enjoy immediate protection such as the right not to be evicted without fair procedure.<sup>74</sup> Some rights are afforded non-derogable status<sup>75</sup>, such as rights relating to children.<sup>76</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>77</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>78</sup>

In Finland, a hybrid constitutional model is in place with safeguards ensured through *ex ante* parliamentary scrutiny<sup>79</sup> of potential legislation and *ex post* judicial review of enacted legislation<sup>80</sup> as a means of last resort.<sup>81</sup> The Finnish Constitution obligates the parliament to legislate for ESC rights so there is a presumption in favour of Parliament deciding how best to provide for ESC rights. The Constitutional Law Committee of Parliament in Finland conducts a thorough review of legislation prior to enactment to ensure legal compliance with human rights.<sup>82</sup> The decision of the Committee on the compatibility of legislation with constitutional rights, including ESC rights, is binding on Parliament.<sup>83</sup> In Sweden a similar pre-enactment review process is in place. Thomas Bull has argued 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>84</sup> The court, however, is required as a means of last resort to ensure executive and legislative compliance.

This approach is not too far removed from the role played by the Joint Committee on Human Rights (JCHR) in the Westminster Parliament.<sup>85</sup> However, ESC rights are not granted constitutional status in the uncodified UK Constitution. The recommendations of the JCHR are not binding on the UK Parliament and any *ex ante* review of legislation does not impact on the passing of legislation, other than as a means of informing the process.<sup>86</sup> For example, in the passing of the Welfare Reform Act 2012 the JCHR raised significant concerns about the impact on vulnerable groups, disproportionate discrimination and the infringement of ESC rights.<sup>87</sup> The consequent adjudication in the Supreme Court revealed similar concerns.<sup>88</sup> Neither the JCHR nor the court were able to oblige Parliament to revisit a more proportionate means of achieving welfare reform in accordance with international ESC standards. In Scotland, an Equality and Human Rights Committee has recently been established – however there is currently no specific focus for the Committee to consider compliance with ESC rights as part of its remit. This means that currently there is no mechanism for *ex ante* or *ex post* review of ESC rights compatibility of Acts of the Scottish Parliament. In other words, ESC compatibility is not regularly assessed as part of the legislation process in Scotland.

### **How could ESC rights be better protected in Scotland?**

Currently there are a number of options available for the immediate protection of ESC rights in Scotland. These include using the continuing development of adjudication extending CP rights to ESC rights as discussed above. For example, practitioners can explore options to extend the protection of ESC rights under the relevant ECHR provisions such as Article 8 (right to private and family life), Article 2 (the right to life), or Article 3 (freedom from inhumane and degrading treatment)

and so on.<sup>89</sup> This approach depends very much on the dynamic or evolutive interpretation of CP rights – and whilst a useful tool to practitioners seeking to better protect ESC rights, it is limited due to the nature of the approach being founded in a treaty focussing on CP rights (the ECHR).<sup>90</sup> This means rights relating to education, standard of living, employment and health, will not be granted the same degree of protection as envisaged in treaties such as ICESCR or the European Social Charter.

Another option for the immediate implementation of ESC rights is to rely on already existing legislative provisions relating to ESC issues – where either the Scottish Parliament or Westminster have created a legislative system to better protect ESC rights without necessarily relying on international standards.<sup>91</sup> 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 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>92</sup> The European Social Committee is responsible for oversight of the European Social Charter (the Council of Europe regional treaty dealing with ESC rights). There is no Council of Europe court that deals with violations of ESC rights in the same way as the ECtHR and in any event the UK is not party to the existing collective complaints mechanism.<sup>93</sup> Without scrutiny of compliance with international standards by a parliamentary committee or a court there is a risk that domestic legislation will fall short of implementing rights according to international standards.



Another route to a remedy for a violation of ESC rights is to use the EU legal framework that gives direct effect to fundamental rights when implementing EU law.<sup>94</sup> The UK sought to limit the justiciability of ESC rights contained in the Charter of Fundamental Rights, however, the Court of Justice of the European Union has held that Protocol 30<sup>95</sup> does not exempt the UK from existing obligations under the Charter.<sup>96</sup> There is scope to further explore where the Charter can protect socio-economic rights in Scotland when connected to the implementation of EU law, although this is of course now subject to any changes to the UK's relationship with the EU as a result of the referendum decision of 23 June 2016 to leave the EU.<sup>97</sup>

It is within the power of the Scottish Parliament to observe and implement international obligations<sup>98</sup> and so options for future implementation of ESC rights can be explored within the current devolved constitutional framework. There is already precedent for Scotland 'going further' than the Westminster Parliament in subscribing to international commitments, one such example being the enactment of the International Criminal Court (Scotland) Act 2001, which brought provisions of the Rome Statute 1998 into Scottish law.

### ***Future options***

In December 2014 James Wolffe, previously Dean of the Faculty of Advocates and now Lord Advocate, considered a number of potential constitutional arrangements should Scotland choose to implement ESC rights in the future.<sup>99</sup> First, Wolffe suggests the option of using the existing Scotland Act 1998 framework and extending constitutional status to ESC rights in Scotland in the same way that the

ECHR is currently protected through a section 29 type of clause.<sup>100</sup> This could be achieved through an amendment to the Scotland Act itself, which would require the passage of legislation at Westminster.<sup>101</sup> Or, it could be a ‘self-regulatory’ Act introduced in the Scottish Parliament where the Scottish Parliament limits its own power.<sup>102</sup> A second option would be to use the Human Rights Act 1998 structure, which encompasses different implementation mechanisms, including an interpretative clause; a duty imposed on public bodies to comply; and an option for the courts to make declarations of incompatibility.<sup>103</sup> Again, it is beyond the competence of the Scottish Parliament to amend the Human Rights Act itself,<sup>104</sup> but the devolved legislature could pass secondary legislation of a similar structure relating to the ICESCR as opposed to the ECHR.<sup>105</sup> The third option proposed by Wolffe is to implement ESC rights by imposing a duty to have due regard to the rights contained in an international treaty such as the ICESCR, similar to the approach of the Welsh Assembly when implementing a procedural duty to consider the United Nations Convention on the Rights of the Child in 2011, and once again, it would be within the power of the Scottish Parliament in connection with the observance or implementation of international obligations.<sup>106</sup>

Any one of these options could grant ESC rights a form of constitutional status through a Scottish Bill of Rights or Charter of Rights introduced by an Act of the Scottish Parliament.<sup>107</sup> In fact, it would be open to the Scottish Parliament to legislate to meet international ESC standards in devolved areas within the Parliament’s competence through specific legislation designed to address ESC rights. In the same way that devolved legislation is subject to repeal (by the Parliament itself) or challenge (by private legal persons or the Advocate General) each of these legislative options would also be open to change, such is the nature of an uncoded

constitution. It is important to note, therefore, that any such mechanism does not entrench ESC rights *per se*, but would constitutionalise the rights in so far as it is possible to do so in a system that respects parliamentary supremacy. That is to say that it is open to both the Scottish Parliament and the UK Parliament to introduce ‘self-regulatory’ legislation that imposes limits on the legislature to comply with international human rights standards, as is already the case.<sup>108</sup>

Another option for Scotland would be for the Scottish Parliament to use its new powers under the Scotland Act 2026. Section 38 of the Scotland Act 2016 devolves competence to the Scottish Parliament to introduce a socio-economic equality duty in Scotland by commencing section 1 of the Equality Act 2010 in Scotland. The explanatory notes to the Equality Act 2010 provide that the socio-economic equality provision (which was never commenced in any part of the UK by the then newly-elected UK Coalition Government in 2010<sup>109</sup>) places an obligation on public bodies to consider the impact of decisions on disadvantaged socio-economic groups. The purpose of the provision was to reduce inequalities in education, health, housing, crime rates or other matters associated with socio-economic disadvantage.<sup>110</sup>

Following amendment to the reservation the Scottish Parliament could become the first part of the UK to address socio-economic disadvantage directly and explicitly through equality legislation.<sup>111</sup> This would make it possible to introduce a procedural safeguard for ESC rights by addressing socio-economic disadvantage. In the same way that the Equality Act 2010 operates, it would only be within the power of the Scottish Parliament to introduce a procedural duty to have ‘due regard’ to addressing socio-economic disadvantage as opposed to imposing a duty to achieve equality of outcome.<sup>112</sup> In terms of ESC protection, this is a weaker form of remedy, than say, for example, for incorporation of ICESCR and substantive protection of ESC rights.

Of course, an examination of these types of mechanisms can help set out potential options for other jurisdictions. As noted above, in discussing the implementation of ESC rights both Tinta and Higgins have separately highlighted the need to explore a ‘myriad’ of forms.<sup>113</sup> There is no ‘one size fits all’ approach in the pursuit of ESC protection or justiciability and so the exploration of better protection mechanisms is about knowledge sharing and capacity building between different jurisdictions. In the same way that Scotland can learn lessons from other jurisdictions so too can lessons be learned from Scotland’s experience – in particular in relation to the mapping of gaps and the identification of the structures required for a particular constitutional framework. This process in and of itself offers crucial lessons comparatively speaking.

### ***Benefits and Risks***

As with any proposed constitutional or legislative change that alters the way human rights are protected, it is important to consider the potential risks as well as the potential benefits. Before the introduction of the Human Rights Act 1998 there was widespread concern that granting the judiciary power relating to the adjudication of human rights would interfere with the separation of power. It was argued that this would lack democratic legitimacy and that deference to parliament was the most appropriate principle in the determination of human rights issues.<sup>114</sup> These same concerns are raised in connection with affording the judiciary the power to determine ESC rights in areas of complex policy, which directly engages the allocation of state resources. Of course, there is still room for deference 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. 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>115</sup> And so, it would be inappropriate to afford unelected judges a monopoly on decisions regarding polycentric issues with far reaching budgetary implications. However, that does not preclude the judiciary from having any role whatsoever in the process. As Wolffe notes, the question of whether the court should be given a role in assessing compliance with ESC rights is ‘a political or constitutional question, not a conceptual one.’<sup>116</sup>

We propose that courts can employ a variety of different types of judicial review in the determination of ESC rights: reasonableness, legality, proportionality, procedural fairness, and even anxious scrutiny. Courts are also well equipped to develop innovative remedies in order to identify the most appropriate way of determining a case.<sup>117</sup> One such option is a structural interdict, where following a review of legislation a court can issue a structural order for parliament, the government or a public body to revisit a legislative provision, decision or policy within a particular timeframe and with particular instructions to help ensure compatibility – this could be, for example, an instruction to ensure that a particular type of procedure is followed such as a budgetary analysis that takes ESC rights into consideration. This places the remedy back in the hands of the other branches of state and grants the court a supervisory role.<sup>118</sup> Likewise, there is scope for declaratory orders (like a declaration of incompatibility) or *ultra vires* remedies – where an action or piece of legislation can be declared unlawful.<sup>119</sup> The particular structure or framework is open

to deliberation – as is the degree of protection to be afforded to ESC rights – whether that be procedural, substantive or a mixture of both.

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 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 a two-thirds majority in both houses of parliament consent to so doing. In Canada the courts have the power to strike down unconstitutional legislation, including legislation that contravenes human rights.<sup>120</sup> However, parliament has the power to override compliance with the constitutional Charter of Fundamental Rights and Freedoms<sup>121</sup> (the ‘notwithstanding’ clause). This effectively places the final say on human rights compliance back in the hands of the legislature; at the same time, the use of the clause may risk 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. 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>122</sup> Each of these examples are by no means ideal – but certainly they are indicative of attempts to balance responsibility for human rights compliance between the different arms of the state.

Another key example cited above was the use of pre-legislative scrutiny. *Ex-ante* review of legislation is an excellent way of ensuring that ESC rights are considered during the drafting process. In Finland the constitution protects ESC rights but leaves it to Parliament to legislate for the substantive fulfilment of the rights. The compatibility of the legislation is reviewed by an independent parliamentary committee during the passage of a Bill and the courts only intervene to review compliance as a means of last resort. This would be an option open to Scotland and certainly it would be within the power of the Scottish Parliament Equality and Human Rights Committee to include within its remit consideration of ESC compatibility before legislation is enacted. It is within the competent function of committees to consider international treaties such as a Human Rights Committee responsible for considering whether legislation complies with international human rights law.<sup>123</sup>

In any event – judicial remedies should be a means of last resort. There are a variety of ways to mainstream ESC rights within the decision-making process without the need to rely on courts as a first port of call.<sup>124</sup> Furthermore, there are ways in which safeguards can ensure that, whilst it is important that individuals have access to justice, there are a number of ways to avoid a ‘floodgate’ scenario. One such mechanism is to ensure that judicial review is an option only after all other routes to remedy have been exhausted – such as through engagement with grievance procedures, internal complaint mechanisms, with the relevant public ombudsman, and so on. In the same way that CP rights are mainstreamed in Scotland it is unlikely a flood of ESC cases would arise if ESC rights are also mainstreamed in the decision-making process. There are a variety of other mechanisms used by the judicial system to ensure that similar cases do not flood the system, one such

mechanism is to allow for the conclusion for a test case and *sist* (temporarily delay) all other cases that are directly affected by the outcome.<sup>125</sup> This allows for a jurisdictional judicial approach to control a number of similar cases and is well within the capability of the judicial structure to administer.

## ***Conclusion***

As identified above, the benefits of implementing 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>126</sup>, rights relating to pensions<sup>127</sup>, rights which protect an adequate standard of living<sup>128</sup>, rights relating to healthcare<sup>129</sup> and rights relating to education,<sup>130</sup> amongst 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 and the alleviation of poverty in a majoritarian political system that can marginalise minorities.<sup>131</sup> It would also mean that there is an opportunity to mainstream ESC rights when considering issues that are not currently protected by the ECHR – such as balancing the right to property<sup>132</sup> with the wider public interest in fulfilling ESC rights as part of the ongoing Land Reform proposals in Scotland.<sup>133</sup> Likewise, it would mean that the human rights framework in Scotland would be amongst one of the leading constitutional settlements globally in the protection of ESC rights in accordance with international law. Should there be impetus to further develop ESC rights protection it can be achieved in a way that suits the particular constitutional circumstances of Scotland with appropriate safeguards and in accordance with the rule of law. This would place Scotland on the world stage as a leader in the field of human rights,



equality, inclusion and fairness. Ultimately, although ESC rights are internationally recognised legal standards (as opposed to political aspirations) any change to the existing domestic legal arrangements requires political impetus and the support of the electorate. This article seeks to inform the debate in order to support informed and inclusive deliberation of the options on the future implementation of ESC rights.

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<sup>1</sup> This being the case in international law. A blanket refusal to acknowledge the justiciable nature of ESC rights is considered arbitrary by the Committee on Economic, Social and Cultural Rights, 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>2</sup> Getting it right, An Overview of Human Rights in Scotland, Scottish Human Rights Commission, 2012, 38

<sup>3</sup> Ibid, 36.

<sup>4</sup> Ibid, 12

<sup>5</sup> Ibid, 96

<sup>6</sup> Ibid, 45 SHRC

<sup>7</sup> On 18 May 2016 the Queen's Speech included an indication that proposals for a British bill of Rights would be brought forward within the parliamentary year. Available at:

<https://www.gov.uk/government/speeches/queens-speech-2016>. This did not happen, however, and at the time of writing, with the Conservatives failing to secure a majority in the general election of 2017, it seems unlikely this will be prioritised. For detail on Theresa May's comments re the Human Rights Act and the terrorist threat, see Rowena Mason and Vikram Dodd 'May: I'll rip up human rights laws that impede new terror legislation' *The Guardian* 6 June 2017.

<sup>8</sup> See Aileen McHarg, 'Will devolution scupper Conservative plans for a "British" Bill of Rights?' 2 October 2014, <http://ukhumanrightsblog.com/2014/10/02/will-devolution-scupper-conservative-plans-for-a-british-bill-of-rights/>. See also Mark Elliot, 'Could the devolved nations block repeal of the Human Rights Act and enactment of a new British Bill of Rights', 12 May 2015, <http://publiclawforeveryone.com/2015/05/12/could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights/>

<sup>9</sup> The obligations under the devolved legislation would continue to apply.

<sup>10</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), Belfast, 10 April 1998, Registration No. 1.36776 UNTS 2114, Treaty series No.50 (2000) Cm4705

<sup>11</sup> R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, para.78.

<sup>12</sup> Department for Exiting the European Union, Legislating for the United Kingdom's withdrawal from the European Union,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf), para.2.25 states 'The Government's intention is that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK. Many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law.'

<sup>13</sup> The Scottish Government, The Scottish Independence Bill: A Consultation on an Interim Constitution for Scotland (2014), [https://consult.scotland.gov.uk/elections-and-constitutional-development-division/scottish-independence-bill/supporting\\_documents/00452762.pdf](https://consult.scotland.gov.uk/elections-and-constitutional-development-division/scottish-independence-bill/supporting_documents/00452762.pdf)

<sup>14</sup> For a full discussion on this see Katie Boyle and Stephen Tierney, 'Human Rights in Transition, the Proposed Interim Constitution for Scotland' (2014), available at

<http://ukconstitutionallaw.org/2014/08/01/katie-boyle-and-stephen-tierney-human-rights-in-transition-the-proposed-interim-constitution-for-scotland/>

<sup>15</sup> Interim Constitution, clause 26 and p.41.

<sup>16</sup> Section 38 Scotland Act 2016.

<sup>17</sup> The International Bill of Rights comprises 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>18</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. As Craven submits, 'The fact of separation has since been used as evidence of the inherent opposition of the two categories of rights. In particular, it has led to a perpetuation of excessively monolithic views as to the nature, history, and philosophical conception of each group of rights and has contributed to the idea that economic, social and cultural rights are in reality a distinct and separate group of human rights. Of greater concern, however, is that despite the clear intention not to imply any notion of relative value by the act of separating the Covenants, it has nevertheless reinforced claims as to the hierarchical ascendancy of civil and political rights. Although within the UN there is now almost universal acceptance of the theoretical 'indivisible and interdependent' nature of the two sets of rights, the reality in practice is that economic, social, and cultural rights remain largely ignored.' See Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on its Development*, (Oxford: Clarendon Press, 1995), 9.

<sup>19</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, 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": 2-29. Economic, social and cultural rights are sometimes referred to as simply social and economic rights, or socio-economic rights.

<sup>20</sup> For a discussion on the history of the principle of indivisibility see Daniel Whelan, *The Indivisibility of Human Rights, A History*, (Philadelphia: University of Pennsylvania Press, 2010).

<sup>21</sup> E/CN.4/529 Memorandum of Secretary General, Commission on Human Rights, Seventh Session, Agenda item 3, 29 March 1951.

<sup>22</sup> See Craven (n.18).

<sup>23</sup> For discussions on the misconceptions surrounding the dichotomy of human rights based on a positive v negative antinomy see 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', *Human Rights Quarterly* 29 (2007): 431. Tinta argues that the dichotomy was based on a 'legal fiction', at 432.

<sup>24</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>25</sup> Article 2(1) ICESCR. See also Tinta, (n.23), 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: Cambridge University Press, 2010) and Lanse Minkler (ed.) *The State of Economic and Social Human Rights: A Global Overview* (Cambridge: Cambridge University Press, 2013)

<sup>26</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>27</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>28</sup> General Comment No. 9, *ibid*.

<sup>29</sup> *Ibid*.

<sup>30</sup> Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories, 12 June 2009, E/C.12/GBR/CO/5, at para 13.

- <sup>31</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., See Aoife Nolan, Bruce Porter, and Malcolm Langford et al *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Belfast: Human Rights Consortium, March 2007), available at <http://socialrightscura.ca/documents/publications/BP-justiciability-belfast.pdf>. Courtis 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 Courtis, ‘Standards to make ESC rights justiciable: A Summary Explanation’ [2009] 2 *Erasmus Law Review* 2 (2009): 379. John Ruggie developed a respect, protect, fulfil, remedy analogy; see, 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>32</sup> See Tinta (n.23), see also General Comment No 9, and Anashri Pillay, ‘Economic and Social Rights Adjudication: developing principles of judicial restraint in South Africa and the United Kingdom’ *Public Law* (2013): 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’ 599.
- <sup>33</sup> Stephen Tierney and Katie Boyle, Yes or no Scotland’s referendum carries constitutional implications, Democratic Audit, 8 November 2013, available at <http://www.democraticaudit.com/?p=1734>
- <sup>34</sup> For a full rebuttal of the arguments against ESC justiciability relating to institutional capacity, competence and the appropriate separation of powers in relation to the allocation of limited resources see Nolan *et al.* (n.31) For a discussion on the role of judges in determining human rights see Colin Harvey, ‘Talking about human rights’ *European Human Rights Law Review* (2004): 500; see also Jeff King, *Judging Social Rights*, (Cambridge: Cambridge University Press, 2012) for a critical appraisal of the theoretical underpinnings of ESC constitutionalisation within legitimate parameters.
- <sup>35</sup> As noted earlier, a blanket refusal to acknowledge the justiciable nature of ESC rights is considered arbitrary by the Committee on Economic, Social and Cultural Rights. See note 1 above.
- <sup>36</sup> Universal Declaration of Human Rights, UN General Assembly Resolution 217(A)III, 10 December 1948.
- <sup>37</sup> Dinah Shelton, *Remedies in International Human Rights Law*, (2<sup>nd</sup> edn Oxford: OUP, 2005) 7 (footnotes omitted).
- <sup>38</sup> *Ibid*, 10-15.
- <sup>39</sup> G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).
- <sup>40</sup> G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005), paras. 19-23.
- <sup>41</sup> Shelton (n.37) 8.
- <sup>42</sup> ‘Guide to good practice in respect of domestic remedies’, adopted by the Committee of Ministers on 18 September 2013, at 7 and 12. Available at <https://edoc.coe.int/en/european-convention-on-human-rights/6608-guide-to-good-practice-in-respect-of-domestic-remedies.html>
- <sup>43</sup> *McFarlane v. Ireland*, App. No. 31333/06, 10 September 2010, paragraph 114; *Riccardi Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment of 29 March 2006, paragraph 38.
- <sup>44</sup> *El-Masri v. “the former Yugoslav Republic of Macedonia”*, App. No. 39630/09, 13 December 2012, paragraph 255; *Kudla v. Poland*, App. No. 30210/96, judgment of 26 October 2000, paragraph 152.
- <sup>45</sup> ‘Guide to good practice’ (n.42).
- <sup>46</sup> *Ibid*, per *Budayeva and Others v. Russia*, App. No. 15339/02 etc., judgment of 20 March 2008, paragraphs 190-191.
- <sup>47</sup> The notion of subsidiarity has been highlighted in the Interlaken, Izmir, and Brighton Declarations.
- <sup>48</sup> Nolan *et al* (n.31), 15, para.2.2.
- <sup>49</sup> Mónica Ferial Tinta, (n.23) 432.
- <sup>50</sup> Tinta (n.23) 432
- <sup>51</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994). See also Tinta (n.23) 432.
- <sup>52</sup> Tinta, *ibid*.
- <sup>53</sup> See Martin Scheinin ‘Justiciability and Indivisibility of Human Rights’ in *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, eds. John Squires, Malcolm Langford, and Bret Thiele (Kensington NSW: University of New South Wales Press, 2005) 17-26, at 17. Scheinin notes that “[t]he old counter-argument related to the alleged ‘different nature’ of these rights, as compared to more traditional human rights generally described as civil and political rights, is perhaps not yet dead and buried but nevertheless appears today as a quiet echo from the past. The shift

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[is] towards a general recognition of the principle of the justiciability of ESC rights – which is something far less than asserting that ESC rights are generally justiciable...”

<sup>54</sup> Kent Roach “Crafting Remedies for Violations of Economic, Social and Cultural Rights” in Squires *et al*, eds. (n.57) 111-126, at 111.

<sup>55</sup> International Covenant on Civil and Political Rights, Scottish Government Response to List of Issues, March 2016. Available at <http://www.gov.scot/Resource/0049/00497944.pdf>

<sup>56</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>57</sup> Judgment on behalf of the Republic of Latvia in Riga, on 21 December 2009, in the case No. 2009-43-01

<sup>58</sup> Citing Article 109 of the Latvian Constitution and Article 9 of the International Covenant on Economic, Social and Cultural Rights, Latvia’s Constitutional Court indeed found the law to be a violation of an individual’s right to an adequate pension as a fundamental aspect of the right to social security.

<sup>59</sup> *Airey v. Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, para 26.

<sup>60</sup> See for example the discussions in the admissibility decision of *Watts v UK*, ECtHR, 4 May 2010, Application no. 53586/09 - the Court indicated that inherent within the right to life, and the right to respect of private and family life, are implicit positive obligations on the State to ensure that the related ESC rights are protected.

<sup>61</sup> *Connors v. United Kingdom*, European Court of Human Rights, Application no. 66746/01, 27 May 2004, para. 95. The Court noted that, ‘the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a ‘pressing social need’ or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.’

<sup>62</sup> *Yordanova and Others v Bulgaria*, Application no. 25446/06, 12 April 2012.

<sup>63</sup> *Ibid*.

<sup>64</sup> The ECtHR referenced “relevant international material” including the European Social Charter; a decision of the European Committee of Social Rights (*European Roma Rights Centre v Bulgaria* Complaint No 31/2005, 25 May 2005); the UN International Covenant on Economic, Social and Cultural Rights; and the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22.

<sup>65</sup> *Yordanova*, para.83. For a discussion on the case and the court’s approach to interpretation using international ESC standards see Adélaïde Remiche, ‘Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One’s Home’ (2012) 12 *Human Rights Law Review* 787.

<sup>66</sup> The rights of the child to be considered of paramount importance in the consideration of immigration matters with reference to UNCRC, *ZH Tanzania v SSHD* [2011] UKSC

<sup>67</sup> *Limbuela* 2005 UKHL 66.

<sup>68</sup> Domestic examples include *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. International examples include *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R.; *Awasi Tingi v Nicaragua* Inter-Am Ct HR, August 31 2001; *Shelter Corporation v. Ontario Human Rights Commission* (2001) 143 OAC 54; also *Klickovic Pasalic and Karanovic v Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Sprska*, CH/02/8923, CH/02/8924, CH/02/9364, 10 January 2003; *Khosa v Minister of Social Development*, 2004 (6) SA 505 (CC).

<sup>69</sup> The Explanatory Notes to the Equality Act 2010 explain how this might work in practice: “A local council fails to give due regard to the requirements of the public sector equality duty when deciding to stop funding a local women’s refuge. An individual would not be able to sue the local council as a result and claim compensation. She would need to consider whether to pursue judicial review proceedings.”

<sup>70</sup> The court was narrowly split 3:2. Lord Kerr, Lord Carnwath and Lady Hale all agreed the Regulations breached the UNCRC, however, Lord Carnwath agreed with Lords Reed and Hughes that

there had been no breach of Article 14 read with Article 1 Protocol 1 ECHR, *R(on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16

<sup>71</sup> For a full discussion on different models of ESC constitutionalisation see Katie Boyle, 'Economic, Social and Cultural Rights in Ireland: Models of Constitutionalisation', *Irish Community Development Law Journal* 1 (2014): 33, available at <https://www.tcd.ie/Education/assets/documents/NCLMC-E-Journal-Issue-1-Volume-3%20%28June%202014%29%20FINAL.pdf>. On a search conducted of 189 constitutions on [www.constitute.org](http://www.constitute.org), 60 refer to 'economic, social and cultural' protection. Some constitutions regard ESC rights as non-justiciable principles (such as Ireland, India and Sweden). In some cases the judiciary have developed justiciable rights through a wide interpretative analysis (such as in Canada through equality provisions, or in India through dynamic interpretation of CP rights). Other constitutions have directly enforceable ESC rights protection (such as in South Africa and in Finland). More recently some countries are in the process of considering affording ESC rights justiciable constitutional status including Ireland and New Zealand. For a discussion on other legal mechanisms that can lead to ESC justiciability see Katie Boyle, 'Economic, Social and Cultural Rights in Northern Ireland: Legitimate and Viable Justiciability Mechanisms for a Conflicted Democracy', in Alice Divers and Jacinta Miller eds. *Justiciability of Human Rights in Domestic Jurisdictions*, (Springer International: 2015) 173-175.

<sup>72</sup> The Constitution of Argentina directly implements the ICESCR in addition to other constitutional rights, 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), Article 75 of the Constitution of Argentina 1853 (reinst. 1938, rev. 1994).

<sup>73</sup> The latter is similar 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.

<sup>74</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>75</sup> I.e the rights are absolute and interference in any form cannot be justified.

<sup>76</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>77</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>78</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>79</sup> Scrutiny before enactment.

<sup>80</sup> Review after enactment.

<sup>81</sup> Kaarlo Tuori, 'Judicial Constitutional Review as a Last Resort', in Tom Campbell, KD Ewing and Adam Tomkins, eds. *The Legal Protection of Human Rights: Sceptical Essays*, (Oxford: Oxford University Press, 2011) 365-392.

<sup>82</sup> *ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Thomas Bull, 'Preview the Swedish Way - The Law Council' in Campbell *et al*, eds., (n.86) 393-420, 393.

<sup>85</sup> For a discussion on the role of the Joint Committee on Human Rights in the UK Parliament see Murray Hunt, 'Enhancing Parliament's role in relation to economic and social rights' *European Human Rights Law Review* 3 (2010): 242. See also David Feldman, 'Can and Should Parliament Protect Human Rights?' *European Public Law* 10 (2004): 635, at 642. This is also reflected in the Cabinet Office's Guide to Making Legislation (May 2009) which advises departments that: 'The JCHR may also ask about



compliance with any international human rights instrument which the United Kingdom has ratified; it does not regard itself as limited to the ECHR' at para.12.32.

<sup>86</sup> Commentators have gone so far as to describe the work of the Committee as a 'thorn in the side of the legislature'. See Colin Murray's discussion on this in 'The UK Parliament's Joint Committee on Human Rights: Life from Beyond the (Political) Grave?', Human Rights in Ireland, 5 July 2010, available at <http://humanrights.ie/civil-liberties/the-uk-parliaments-jointcommittee-on-human-rights-life-from-beyond-the-political-grave/>

<sup>87</sup> House of Lords, House of Commons, Joint Committee on Human Rights Report, Legislative Scrutiny of Welfare Reform Bill, 12 December 2011, HL233, HC 1704, <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/233/233.pdf>

<sup>88</sup> See dissenting opinions the benefit cap case in *R(on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16.

<sup>89</sup> For example, see the *Yordonova* or *Watts* cases.

<sup>90</sup> Williams argues that the disparate ECHR framework which fails to reflect the coherence of indivisible rights can be ameliorated by the judiciary but never fully resolved: Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: confronting a heresy' *European Journal of International Law* 24 (2013):1157, 1172.

<sup>91</sup> This is the basis upon which the UK system currently operates and is cited as the most appropriate way of securing ESC rights by successive UK governments. For example, see the UK's submission on ICESCR, UN Committee on Economic, Social and Cultural Rights (CESCR), Implementation of the International Covenant on Economic, Social and Cultural Rights : 5th periodic reports submitted by states parties under articles 16 and 17 of the Covenant: United Kingdom of Great Britain and Northern Ireland, 31 January 2008, E/C.12/GBR/5, para.73-74 .

<sup>92</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>93</sup> There is a collective complaint system but the UK has not signed up to it. The Additional Protocol providing for a system of Collective Complaints to the European Social Committee entered into force in 1998. Additional Protocol to the European Social Charter or the Additional Protocol Providing for a System of Collective Complaints, Council of Europe, 9 November 1995, ETS 158.

<sup>94</sup> The EU Charter of Fundamental Rights is based on an indivisible model (ie recognition that CP, ESC rights are indivisible), however there are uncertainties associated with the rights v principle distinction in the Charter and the attempt by the UK Government to limit the justiciability of ESC rights under the operation of Protocol 30. Nonetheless, the jurisprudence on the Charter has extended the protection of ESC rights under an indivisible interpretation of CP rights. See, for example, the following cases: *J. Mc. B. v L. E., Case C-400/10 5 October 2010* (father's rights of custody relating to family rights [Art 7] and the best interests of the child [Art 24.2]); *M. M. v Minister for Justice, Equality and Law Reform, C-277/11, 22 November 2012* (greater procedural protection for those seeking asylum [Art 41 Right to good administration]); Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* *ibid* (held: Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 falls within the scope of EU law and indivisible approach to those seeking asylum in EU, removal to another member state and the right to freedom from inhuman and degrading treatment [Art 3 ECHR and Art 4 EU Charter]), 'Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.' At para.106. EU fundamental rights also extend the protection of ESC rights under Article 21 of the Charter in relation to non-discrimination. For example, there is a series of case law dealing with equal treatment of migrants (discrimination on grounds of nationality within freedom of movement and EU citizenship framework) and access to social protections. See: *Martinez Salla*, Case C-85/96 (child raising allowance); *Grzelczyk* Case C-184/99 (student social assistance); *Trojani* Case C-456/02 (access to minimum social assistance); and *Förster* Case C-158/07 (student maintenance grant). More recently there has been the development of ESC protection under the rubric of EU citizenship and the protection of fundamental rights in relation to reunification of the family – see: *Zambrano* Case C-34/09; *McCarthy* Case C-434/09; and *Dereci* Case C-256/11. It is important to note that the rights v principles distinction is not yet resolved and directly justiciable ESC rights under the Charter have not yet been extended beyond the rights already recognised in EU law prior to the adoption of the Lisbon Treaty. See Barnard for a discussion on this: Catherine Barnard, 'The EU Charter of Fundamental Rights: Happy 10<sup>th</sup> Birthday?' *European Union Studies Association Review* 24 (2011): 5.

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<sup>95</sup> Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the European Union to Poland and to the United Kingdom annexed to the TEU and the TFEU

<sup>96</sup> Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, judgment of 21 December 2011, ‘Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions,’ at para.120.

<sup>97</sup> At the time of writing the implications of the ‘Brexit’ decision are still unclear. For an interesting (and pessimistic) overview of what the decision means for human rights protection see Stephen Hopgood, ‘Brexit and human rights: winter is coming’ *Open Democracy*, 29 June 2016.

<sup>98</sup> Paragraph 7(2)(a) of Schedule 5 Scotland Act 1998

<sup>99</sup> 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, available at <http://www.scottishhumanrights.com/media/1469/wolffe2014lecture.pdf>

<sup>100</sup> Ibid.

<sup>101</sup> The Scotland Act 1998 is the subject of reservation under the terms of the Act.

<sup>102</sup> This is within the legislative competence of the Scottish Parliament under Paragraph 7(2)(a) of the Scotland Act 1998 with a view to implementing international obligations. Arguably, there is a potential challenge to the Scottish Parliament’s devolved competence on implementing ICESCR directly in so far as it relates to the reserved matter of Equality of Opportunity (Reservation L2 Schedule 5). However, where such disputes arise the courts have regard to the nature and purpose of the legislation to determine whether the Act is outwith competence, meaning a presumption in favour of legislation that would seek to implement international obligations.

<sup>103</sup> Ibid.

<sup>104</sup> Reserved under Schedule 4 of the Scotland Act 1998.

<sup>105</sup> Again, this would fall within the competence of the Scottish Parliament under Paragraph 7(2)(a).

<sup>106</sup> Children and Young Persons (Wales) Measure 2011.

<sup>107</sup> It is worth considering the ongoing indigenous Bill of Rights movement in Northern Ireland that recommended the inclusion of ESC rights. Political impasse in Northern Ireland has stalled the indigenous Bill of Rights process. The UN Committee on Economic, Social and Cultural Rights has commended the ‘draft Bill of Rights for Northern Ireland, which includes economic, social and cultural rights which are justiciable, and calls for its enactment without delay’, Consideration of reports submitted by states parties in accordance with articles 16 and 17 of the Covenant: concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories, 12 June 2009, E/C.12/GBR/CO/5, para.10.

<sup>108</sup> Examples of self-regulatory constitutional legislation already exist in the form of constitutional statutes such as defined by Lord Justice Laws in *Thoburn v Sunderland City Council* [2002] QB 151. For example, section 2 of the European Communities Act 1972 gives the courts power to strike down legislation incompatible with EU law - *Factortame (No 2)* [1991] 1 AC 603, 658 – 659.

<sup>109</sup> Amelia Gentleman, *Theresa May scraps legal requirement to reduce inequality*, *The Guardian*, 17 November 2010, available at <http://www.guardian.co.uk/society/2010/nov/17/theresa-may-scraps-legal-requirement-inequality>

<sup>110</sup> Explanatory Notes to the Equality Act 2010, available at

<http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/1/1> The explanatory notes also offer example scenarios in how the application of this provision was envisaged: ‘The Department of Health decides to improve the provision of primary care services. They find evidence that people suffering socio-economic disadvantage are less likely to access such services during working hours, due to their conditions of employment. The Department therefore advises that such services should be available at other times of the day.’

<sup>111</sup> Section 1 of the Act has never been commenced in England or Wales and Northern Ireland operates under a separate equality framework to the rest of the UK (see section 75 of the Northern Ireland Act 1998 – which does not cover socio-economic inequality as a protected characteristic).

<sup>112</sup> For an excellent discussion on the different ways of addressing socio-economic disadvantage through equality legislation see Shane Kilcommins et al ‘Extending the Scope of Employment Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination’, Report Commissioned by the Department of Justice, Equality and Reform (Government of Ireland, 2004), available at <http://www.inis.gov.ie/en/JELR/Discrimination.pdf/Files/Discrimination.pdf>. Kilcommins et al contribute significantly to a greater understanding of the indicators that can be assessed in establishing socio-economic status/disadvantage. They propose a definition that takes into account

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level of education; level of literacy; homelessness; geographical location; source of income; level of income; type of work or profession; and employment status.

<sup>113</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994).

<sup>114</sup> See, for example, Richard Edwards, 'Judicial Deference under the Human Rights Act' *Modern Law Review* 65 (2002): 859, 859.

<sup>115</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?' *Health and Human Rights: an International Journal* 11 (2009): 33.

<sup>116</sup> Wolffe (n.99).

<sup>117</sup> See King (n.34) for discussions on the different theoretical approaches that can legitimise judicial determination of ESC rights such as incrementalism, deference and prioritisation.

<sup>118</sup> For some interesting proposals on the use of structural interdicts in South Africa see Christopher Mbazira, 'You are the "weakest link" in realising socio-economic rights: Goodbye, Strategies for effective implementation of court orders in South Africa', Socio-Economic Rights Project, Community Law Centre Research Series 3, University of the Western Cape (2008).

<sup>119</sup> As currently operates under section 29 of the Scotland Act in relation to ECHR rights.

<sup>120</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>121</sup> Under section 33 of the Constitution Act.

<sup>122</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>123</sup> Rule 6.2 – committees can consider international treaties in relation to matters that fall within the committee's competence (matters within its remit).

<sup>124</sup> See for example the use of budgetary analysis identified in Aoife Nolan, Rory O'Connell, and Colin Harvey, eds., *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*, (Oxford: Hart Publishing, 2013).

<sup>125</sup> For example this approach was employed whilst awaiting determination in the case of *Eba v Advocate General for Scotland* 2011 SLT 768.

<sup>126</sup> Article 6 ICESCR.

<sup>127</sup> Article 9 ICESCR.

<sup>128</sup> Article 11 ICESCR.

<sup>129</sup> Article 12 ICESCR.

<sup>130</sup> Article 10 ICESCR.

<sup>131</sup> See King (n.34) 157.

<sup>132</sup> Article 2 Protocol 1 ECHR.

<sup>133</sup> For an in depth discussion on this see The Scottish Human Rights Commission, Consultation Submission – Future of Land Reform in Scotland, February 2015, available at: <http://www.scottishhumanrights.com/news/latestnews/landreformsubmissionfeb15>