

Equality and Human Rights Committee

Human Rights Inquiry

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1. What are the human rights challenges facing Scotland?

1.1 Civil, political, economic, social and cultural rights are ‘universal, indivisible and interdependent and interrelated.’² This means that fulfilment and enjoyment of one right is dependent on fulfilment and full protection of the other. For example, the right to vote cannot be fully enjoyed unless a person is also able to enjoy the right to education, the right to protest and the right to freedom of conscience and freedom of religion or belief. The right to life for example, cannot be fully enjoyed, unless there is also adequate protection of the right to health, which is equally dependent on the right to adequate and safe housing and the right to freedom from poverty (through fair conditions of employment or the right to a minimum level of social security) and so on. The principle of indivisibility is a helpful way of viewing the human rights family as a whole. One of the major challenges facing Scotland, and the rest of the UK, is that the legal system only provides for a select number of rights – largely civil and political (CP) rights, and not economic, social and cultural (ESC) rights, under the current legislative frameworks. This is out of step with constitutional arrangements comparatively speaking (see table of constitutions protecting CPESC rights below at Annex A. and an SHRC Explainer on ESC rights at Annex B appended to this submission.). This creates potential accountability gaps in ensuring access to justice for those rights not currently protected under the Scotland Act 1998, the Human Rights Act 1998, the European Communities Act 1972 or the common law.

1.2 ESC rights largely relate to areas such as health, education, housing and an adequate standard of living each of which engage with devolved areas. They also relate to areas engaging across the reserved v devolved divide such as employment and social security. This is not dissimilar to the division of power across CP rights, the implementation of which rests with both the UK and Scottish Parliaments under the terms of Human Rights Act 1998 and the Scotland Act 1998. However, the implementation and observance of the full body of international human rights law is not captured under the UK domestic constitutional framework, or currently under the devolved framework, meaning domestic statutes and policies are not necessarily implemented or measured with full reference to international human rights law. As a result the Scottish Government and public bodies are not always under a statutory duty to take international human rights law into consideration when performing their functions.³

1.3 The UK at the national level has agreed to be bound by a number of international treaties that do not take on enforceable legal obligations unless incorporated into domestic law. The enforceability of the rights contained in international treaties varies across the UK jurisdictions meaning different rights and remedies exist for civil, political, economic,

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² UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para.5

³ Although not a statutory obligation the Scottish Ministers are under a duty to act in accordance with international law, including treaty obligations, under the Ministerial Code (2018), para.1.3

social and cultural rights depending on where you live. Some jurisdictions have more progressive measures than others⁴ and the devolved structures themselves create different frameworks for equality and human rights meaning there is no universal application or operation of a normative national standard for both equality law and human rights law (compare equality legislation in Northern Ireland with rest of GB or human rights legislative framework for devolved and reserved competence). This picture is further complicated by withdrawal from the EU a result of which will mean the irrevocable loss of rights and remedies.⁵ The Scottish Parliament could lead the way both across the UK and internationally in its approach to fostering a human rights culture across its remit that seeks to ensure rights and remedies are protected and enhanced in a post-Brexit landscape. In fact, clause 5(2)(b) of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill seeks to retain many of the rights and remedies in Scots law after withdrawal as would have been available before withdrawal, including the right of the courts to strike down legislation incompatible with the Charter and EU general principles. Nonetheless, other routes to remedy, such as access to the Court of Justice of the European Union remains uncertain and so supervision and reflection on the potential impact remains an ongoing necessity.

- 1.4 During these uncertain times it would be helpful if the Scottish Parliament continues to act as a legislature alive to the threat of the loss of rights and remedies as a result of potential constitutional change, while at the same time, be forward looking in terms of how to promote and enhance the enjoyment of human rights in the future such as under the current inquiry. The Equality and Human Rights Committee (EHRC) may wish to consider the development of new avenues/ routes to remedies for those who experience violations of their rights as part of this forward looking remit.
- 1.5 The observance and implementation of international obligations, including human rights obligations, falls within the competence of the Scottish Parliament.⁶ This includes implementing and observing those rights not currently protected under the European Convention of Human Rights (ECHR), EU law or the common law.
- 1.6 The Scottish Parliament may look to other international treaties⁷ in devolved areas and assess whether it can bridge the gap in human rights protections to help address the accountability gap. There are a number of different ways that this could be achieved, including by way of a Committee Bill under (Rule 9.15.2). The means through which 'incorporation' of rights could occur are numerous (constitutional text/ legislation/ common law/ international complaints mechanism etc.) and so too are the means through which the enforcement of rights can best be secured (through legislative, administrative, executive or judicial means for example). States all over the world have

⁴ Such as the Rights of Children and Young Persons (Wales) Measure 2011 or the Children and Young People (Scotland) Act 2014

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

⁶ Observance and implementation of international obligations an exception to the reserved matter of international relations/ foreign affairs, Schedule 5 para.7(1)-(2) Scotland Act 1998

⁷ The rights protected in international law fall under treaties that the state has ratified such as the International Covenant on Economic, Social and Cultural Rights 1966, UN General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; the Council of Europe, European Social Charter, 18 October 1961, ETS 35; European Social Charter (Revised) 1996 ETS 135; the Convention on the Rights of the Child 1989, UN General Assembly, resolution 44/25 of 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; the Convention on the Elimination of Discrimination Against Women 1979, UN General Assembly resolution 34/180 of 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; the Convention on the Elimination of Racial Discrimination 1965, United Nations General Assembly resolution 2106 (XX) of 21 December 1965 United Nations, Treaty Series, vol. 660, p. 195; and the Convention on the Rights of Persons with Disabilities 2006, United Nations General Assembly resolution A/RES/61/106 of 24 January 2007, 76th plenary meeting; issued in GAOR, 61st sess., Suppl. no. 49. "Annex: Convention on the Rights of Persons with Disabilities": p. 2-29

adopted different approaches to the protection and observance of human rights standards. There are examples of devolved legislatures where primary responsibility for the observance of international human rights law rests with the devolved legislature, such as in Switzerland, where international obligations are the responsibility of cantonal legislatures.⁸ In some instances the cantonal legislatures introduce more robust human rights mechanisms than at the confederal state level.⁹ If the Scottish Parliament is considering how best to secure human rights through a form of 'constitutionalisation' (in so far as it is possible to do so under the devolved framework) then it may wish to look to other countries for examples of best practice. Likewise, it may seek to take views from civil society and stakeholders in Scotland to ask what kind of arrangement would best work here. Ideally a constitutional process around human rights change should be predicated by a participative, informed and inclusive process – achieved through a format such as a national conversation or a constitutional convention process.

1.7 The EHRiC, in particular, may be interested in how it can enhance its role as a guarantor of human rights on behalf of the Scottish Parliament. For example, the Committee may be interested in following the example of the Finnish Constitutional Law Committee that adopts a role in pre-legislative scrutiny of legislation (called *ex ante* review) to ensure that it complies with human rights emanating from the constitution and international human rights law. This is a 'rights affirmative' pre-legislative process that ensures compliance with human rights, including ESC rights, from the outset. The Constitutional Law Committee adopts a depoliticised role by treating human rights as legal obligations. The Committee makes its decision on the compatibility of legislation after listening to constitutional and human rights experts. These decisions are not politically motivated but based on legal standards. The decisions of the Committee are binding on Parliament.

1.8 The EHRiC may also be interested in how best to deepen the review of human rights compatibility across parliament. The following paragraphs address this under the broad headings identified in the human rights inquiry call for evidence.

2. Participation and engagement

- **Can the Scottish Parliament empower people to make them more aware of their rights under domestic and international human rights law and to build a strong human rights culture in Scotland?**

2.1 One of the key areas where the EHRiC can protect and promote human rights is through raising awareness, education, capacity building and empowerment to create a sense of ownership around rights. This will require a great deal of commitment and resources if the Committee, and Parliament, is to help foster and cultivate a human rights culture in Scotland that is genuinely inclusive, informed and participative. Human rights education, awareness raising, training of professionals and dissemination of information about human rights monitoring processes all form part of the obligations on states under international law.¹⁰ For example, the UN Human Rights Committee has recommended that the UK introduce new awareness-raising campaigns aimed at promoting respect for human rights and tolerance for diversity.¹¹ The Scottish Parliament could encourage the

⁸ Article 3 Federal Constitution of the Swiss Confederation, The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation. This includes incorporation of international human rights standards.

⁹ For e.g. Geneva and Vaud.

¹⁰ See the concluding observations under the following treaty monitoring processes: CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child, para.49; CERD/C/GBR/CO/21-23 (CERD, 2016) Committee on the Elimination of Racial Discrimination para.50; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights, para.72; CCPR/C/GBR/CO/7 (CCPR, 2015) Human Rights Committee, para10(b)

¹¹ CCPR/C/GBR/CO/7 (CCPR, 2015) Human Rights Committee, para10(b)

Scottish Government to undertake an awareness-raising campaign in order to meet the state's international obligations in this respect within the jurisdiction of Scotland.

2.2 Education is therefore a significant component of building a strong human rights culture in Scotland that enables genuine participation and engagement. A first step would be to embed human rights across the existing outreach mechanisms in parliament. For example, the education resources to support the curriculum for primary and secondary school children should engage with human rights. Material on issues such as citizenship could be framed in relation to how people enjoy human rights and where possible the Parliament could provide resources to reflect this (if this is not already the case).

2.3 Beyond early years education the Committee could also encourage the development of a broader education campaign around human rights and what they mean in the context of everyday life for the people of Scotland. Such an awareness raising campaign should engage with existing rights and remedies already protected under Scots law as well as those rights without remedies that form part of the broader international human rights framework. Again, this is an important step to enable genuinely informed participation about whether strengthening human rights is something that the people of Scotland support. The Committee could initiate a coalition of partners in such a campaign, including the Government, the NHRIs and stakeholders from across civil society.

2.4 In addition, there should be a programme of education and awareness raising among professionals in public and private life. Crucially this is something that the EHRiC could help support among parliamentarians. Education on the broad spectrum of international human rights law should permeate the work of parliament so that decisions can be made on an informed basis about how the parliament's work impacts on the enjoyment of human rights.

2.5 Finally, the EHRiC may also wish to take up the opportunity to engage nationally and internationally with a network of relevant stakeholders who can help support the Parliament. For example, domestic engagement with the NHRIs and civil society as well as engagement with the regional (Council of Europe/ European Union) and international (United Nations) networks will help steer the Parliament in terms of the potential gaps and allow the opportunity to ensure best practice is captured under the relevant monitoring processes. Ideally the Committee and the Parliament should be playing as full a role as is possible in processes such as the Universal Periodic Review. The concluding observations, concerns and recommendations made at the international level should help guide the Scottish Parliament in its work and also act as an important 'accountability tool' when questioning the Scottish Government on human rights compliance.

3. Parliamentary procedure and process

- **Are there further steps the Scottish Parliament could take to ensure that people's human rights are being taken into consideration when the Scottish Government and public authorities are creating policies?**

3.1 The United Nations Office of the High Commissioner on Human Rights and the Inter-Parliamentary Union has recommended that '[h]uman rights should thoroughly permeate parliamentary activity'.¹² Ideally the EHRiC should work towards supporting the other Committees engage with international human right norms as part of their remit.

¹² United Nations Office of the High Commissioner. Inter-Parliamentary Union, Human Rights, Handbook for Parliamentarians No.26 p.111

3.2 Again, this will require an awareness raising campaign and educational resources to help support parliamentarians. It could also be supported through additional resources managed by the Committee, such as the assignment of 'Human Rights Rapporteurs' as suggested by the Scottish Human Rights Commission. I think this is a particularly innovative approach.

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

3.4 The Scottish Parliament can also take steps to ensure that the policies of the Scottish Government and local authorities take human rights into consideration. The most straightforward way of requiring this would be to set out what human rights considerations decision makers should take in a legislative scheme and statutory guidance that reflects best practice. As above, this is something that could be introduced as a Committee Bill.

4. Accountability

- **Could the Scottish Parliament do more to ensure that international human laws, for example, the United Nations Convention on the Rights of the Child (UNCRC) and other international human rights obligations are being followed in Scotland?**

4.1 One of the ways that the Scottish parliament could ensure that international human rights obligations, including UNCRC, are being followed in Scotland would be to introduce legislation that incorporates international human rights law into domestic law. It is primarily the responsibility of the legislature to set out the way in which human rights law should be protected, including what role the executive and judiciary should play. As per Lord Brodie, 'the Scottish Parliament has the power to legislate with the object of observing and implementing international obligations' if it so chooses to do so.¹³ There are a variety of different ways that this could occur such as through an overarching 'constitutional statute' or through legislation dealing with specific rights in specific areas. For example, housing legislation could reflect what is required of international human rights law to provide the right to adequate housing (Article 11 ICESCR) or the provision of health care could be benchmarked against the right to the highest attainable physical and mental health (Article 12 ICESCR). Alternatively, an overarching constitutional statute could be skeletal in nature and set out the steps to be taken by the parliament, executive and the judiciary to ensure accountability for international human rights law.

¹³ Lord Brodie Whaley & Anor v. Lord Advocate [2003] ScotCS 178 (20 June 2003), para.44 discussing the exception to the reservation in Schedule 5 para.7(1)-(2) Scotland Act 1998

- 4.2 Awareness of the nature of what these obligations mean in practice is critical to embracing how best they can be embedded in decision making processes. One of the key components to note is that human rights are not absolute and all encompassing all of the time. There is a sensible approach to human rights fulfilment meaning some rights must be immediately enforceable (such as minimum standards to ensure human dignity) as well as incremental steps that ensure progressive realisation. Rights must be balanced against each other and against available resources and this is taken into account in the assessment of whether states have taken the necessary steps to meet immediate and progressive obligations through the maximum available resources.
- 4.3 As part of the functioning of a democracy the Scottish Parliament sits within a constitutional framework where there is a division of power between the legislature, the executive and the judiciary. This is important to note because it is the responsibility of the legislature to hold the other arms of state to account. The Scottish Parliament should actively engage with the Scottish Government in asking how it is meeting its obligations in relation to human rights (both ECHR and beyond). At the same time, both the executive and legislature should be subject to scrutiny by the court in order to enable access to an effective remedy for a violation of a human right (as is the case in relation to ECHR and EU law). This is a constitutional framework in which there is an open dialogue between institutions. Rather than view the court as usurping the role of the legislature or executive under such a system it might be helpful to think of human rights adjudication as a form of institutional dialogue – where the court can supervise whether the legislature or executive is complying with whatever human rights framework the legislature sets out.¹⁴ In the same sense, dialogue on human rights compliance could also be undertaken between the devolved and UK legislatures/ executives as well as regionally and internationally with relevant institutions (as discussed above). A multi-institutional approach to human rights accountability allows institutions to develop safeguards and models of best practice to ensure human rights are being followed in practice and that remedies are available should other institutional mechanisms fail. The process of embedding human rights in a legal system as ‘obligations’ is sometimes rejected as affording too much power to the judiciary. There are a multitude of potential safeguards parliaments can introduce to ensure the balance of power between institutions is respected, including legislating for the types of judicial review and remedies that courts could offer under different circumstances (compare for example the difference between a declaration of incompatibility or an *ultra vires* remedy and the relation of each to parliamentary deference).

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¹⁴ This is dialogical or deliberative democracy theory in action – a theory of rights adjudication where all state organs share responsibility for human rights compatibility.

Annex A

Examples of Constitutions protecting ESC rights (in addition to CP rights)

Sample Constitutions that explicitly protect economic, social and cultural rights (Europe)
Albania 1998 (rev. 2016); Andorra 1993; Belgium 1831 (rev. 2014); Bosnia and Herzegovina 1995 (rev. 2009); Croatia 1991 (rev. 2013); Czech Republic 1993 (rev. 2013); Liechtenstein 1921 (rev. 2011); Macedonia (Republic of) 1991 (rev. 2011); Montenegro 2007 (rev. 2013); Poland 1997 (rev. 2009); Portugal 1976 (rev. 2005); Slovakia 1992 (rev. 2014)
Sample Constitutions that implicitly protect economic, social and cultural rights (Europe)
Andorra 1993; Belarus 1994 (rev. 2004); Belgium 1831 (rev. 2014); Bulgaria 1991 (rev. 2015); Croatia 1991 (rev. 2013); Finland 1999 (rev. 2011); Hungary 2011 (rev. 2016); Ireland 1937 (rev. 2015); Italy 1947 (rev. 2012); Latvia 1922 (reinst. 1991, rev. 2016); Luxembourg 1868 (rev. 2009); Moldova (Republic of) 1994 (rev. 2016); Montenegro 2007 (rev. 2013); Poland 1997 (rev. 2009); Portugal 1976 (rev. 2005); Romania 1991 (rev. 2003); Serbia 2006; Slovakia 1992 (rev. 2014); Spain 1978 (rev. 2011); Sweden 1974 (rev. 2012); Switzerland 1999 (rev. 2014); Ukraine 1996 (rev. 2014)
Sample Constitutions that explicitly protect economic, social and cultural rights (Global)
Albania 1998 (rev. 2016); Algeria 1989 (reinst. 1996, rev. 2016); Andorra 1993; Angola 2010; Argentina 1853 (reinst. 1983, rev. 1994); Armenia 1995 (rev. 2015); Belgium 1831 (rev. 2014); Bosnia and Herzegovina 1995 (rev. 2009); Burkina Faso 1991 (rev. 2012); Burundi 2005; Cambodia 1993 (rev. 2008); Cape Verde 1980 (rev. 1992); Central African Republic 2004 (rev. 2010); Central African Republic 2013; Chad 1996 (rev. 2005); Chile 1980 (rev. 2015); Congo (Democratic Republic of the) 2005 (rev. 2011); Côte d'Ivoire 2016; Croatia 1991 (rev. 2013); Czech Republic 1993 (rev. 2013); Ecuador 2008 (rev. 2015); Egypt 2014; El Salvador 1983 (rev. 2014); Equatorial Guinea 1991 (rev. 2012); Eritrea 1997; Ethiopia 1994; Gabon 1991 (rev. 2011); Guatemala 1985 (rev. 1993); Guinea-Bissau 1984 (rev. 1996); Guyana 1980 (rev. 2016); Iran (Islamic Republic of) 1979 (rev. 1989); Iraq 2005; Lesotho 1993 (rev. 2011); Liechtenstein 1921 (rev. 2011); Macedonia (Republic of) 1991 (rev. 2011); Madagascar 2010; Mali 1992; Marshall Islands 1979 (rev. 1995); Mexico 1917 (rev. 2015); Mongolia 1992 (rev. 2001); Montenegro 2007 (rev. 2013); Morocco 2011; Mozambique 2004 (rev. 2007); Nepal 2006 (rev. 2012); Nepal 2015 (rev. 2016); Nicaragua 1987 (rev. 2014); Niger 2010; Paraguay 1992 (rev. 2011); Peru 1993 (rev. 2009); Philippines 1987; Poland 1997 (rev. 2009); Portugal 1976 (rev. 2005); Sao Tome and Principe 1975 (rev. 1990); Senegal 2001 (rev. 2009); Singapore 1963 (rev. 2010); Slovakia 1992 (rev. 2014); Suriname 1987 (rev. 1992); Swaziland 2005; Timor-Leste 2002; Turkey 1982 (rev. 2011); Turkmenistan 2008; Uganda 1995 (rev. 2005); Uzbekistan 1992 (rev. 2011); Yemen 1991 (rev. 2015)



Economic, Social and Cultural Rights in Scotland

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

Foreword from the Scottish Human Rights Commission

For International Human Rights Day 2015 and to mark Scotland's National Action Plan's (SNAP) second anniversary the Commission is delighted to be publishing this paper, authored by Dr Katie Boyle, examining the legal status of economic, social and cultural rights in Scotland both now and options for the future.

At a time when Scotland is alive with debate about how to realise the ideals of social justice it is timely to consider how we might give further and better effect to internationally recognised human rights, in particular economic, social and cultural rights (ESC rights) to build a Scotland where everyone can live a life of human dignity.

The Commission, as part of its contribution to SNAP, has over recent months published a series of papers relating to the realisation of ESC rights including recommendations on how ESC rights could practically be mainstreamed into policy and practice including through impact assessment, human rights budgeting and human rights monitoring. Ultimately however, for ESC rights to be enforceable by individuals experiencing their violation they require to be incorporated into domestic law as recommended by the United Nations treaty monitoring bodies.

This paper provides background analysis to the SNAP Innovation Forum "Putting the Justice into Social Justice How international human rights can deliver progressive change for Scotland" on 9 December 2015. We hope it will inform a healthy debate about the status of international human rights in our domestic legal order and serve as a useful comparator to other jurisdictions where they enjoy a greater level of protection for the benefit of all of us both individually and as a society.

We are grateful to Dr Katie Boyle for her work in producing the following paper as an important contribution to this agenda.



Professor Alan Miller

Chair, Scottish Human Rights Commission

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1. Executive Summary

This briefing paper examines the status of economic, social and cultural (ESC) rights in Scotland. The purpose of the paper is to provide a clear explanation of what we mean by ‘ESC’ rights, how they are currently protected in Scotland and how they might be protected in the future. ESC rights are rights that relate to housing, education, employment, standard of living and health. They are rights that enhance the lived experience of everyone and support our fundamental right to dignity. They also more broadly protect vulnerable groups such as children, the elderly, the disabled, the unemployed and minority communities. ESC rights are internationally legally binding standards that are not currently provided for in the UK or Scotland in a full and comprehensive way.

The paper identifies that ESC rights are open to a degree of legal protection through existing legal mechanisms in Scotland. This means that individuals can seek a remedy for a violation of an ESC right through various routes:

- Through a **wider dynamic interpretation of civil and political rights** (for example, by seeking to extend the right to life to the

right to adequate health, or the right to private and family life to the right to adequate housing and so on).

- Through the operation of **existing legislative frameworks** which seek to provide for ESC rights (such as legislation relating to housing, education or the national minimum wage for example).
- Through the application of **EU law** that directly enforces an ESC right (for example, the right to equal pay for equal work).
- Through existing **equality legislation** which extends some protection to socio-economic issues (for example through the public sector equality duty, s.149 of the Equality Act 2010).

Each of these mechanisms provide a possible avenue to protect ESC rights, however, these routes are also limited. They do not comprehensively address ESC rights according to their status in international law. 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 International Covenant on Economic, Social and Cultural Rights (ICESCR).

It is within the power of the Scottish Parliament to observe and implement international obligations¹ and so options for future implementation of ESC rights can be explored within the current devolved constitutional framework. The paper identifies existing options for ESC enforcement and potential models for future implementation or incorporation, these include:

- Introducing a **socio-economic equality duty** (such as section 1 of the Equality Act 2010 - due regard to socio-economic status, which is in the process of being devolved to the Scottish Parliament in the Scotland Bill 2015-16).
- Creating a comprehensive **constitutional framework** for the protection of ESC rights. Various models are explored in the paper such as a Scottish Bill/ Charter of Rights introduced by either the UK or Scottish Parliament.
- Introducing **constitutional safeguards** such as pre-legislative scrutiny of ESC rights by a newly established **Human Rights Committee** in the Scottish Parliament and allowing **ex post judicial review** of legislation by the courts.

It should be noted from the outset that 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 paper contribute to an already existing body of practice and explore potential future developments.

Historically, ESC rights have been viewed with suspicion, as explained in the first section of this paper. There are many legitimate and strong arguments which 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.² 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. ESC rights are now widely accepted as international legal standards as

opposed to political aspirations. This does not mean that there is no place for deference to parliament³ but rather, the question is to what extent or in what circumstances deference should be preferred over alternative remedies. This report is timely in this respect as countries around the world are constitutionalising and mainstreaming ESC rights. Scotland and the UK are on the precipice of potential change to the existing human rights framework. This paper aims to contribute to the discussion on any potential changes in relation to human rights protection so that future developments are made on an informed basis and in a legitimate and democratic way.

2. Why should we consider protecting ESC rights?

The discussion on the future of ESC rights protection in Scotland follows on from the wider ongoing conversation in Scotland in relation to how Scotland is governed. Following a thorough and deliberative referendum process on independence many groups, communities, political parties and wider civil society have been considering how Scotland can best be governed and what kind of Scotland people would like to live in. This conversation did not just focus on a yes v no debate but facilitated discussion on many different aspects of public life in Scottish society, including human rights. As part of this conversation the important relationship we share as individuals in a society and how we are governed by a state exercising power on our behalf is undergoing scrutiny and faces potential change.

As part of the referendum process the SHRC set out the importance of human rights protection in Scotland's future¹, including proposing changes to better protect all human rights for all people as Scotland moves through continuing constitutional change. This paper sets out potential roadmaps in order to realise this objective by clearly setting out avenues to better protect ESC rights in a more fair and equal Scotland. This is an important contribution, as the paper explains, as without such protection the people living within Scotland do not receive adequate legal protection for violations of ESC rights.

Following the independence referendum, the Smith Commission recommended devolution of the socio-economic equality duty and under the heading for Equalities, the Commission states that the Scottish Parliament can legislate for socio-economic rights in devolved areas.⁴ Following this, the Scotland Office has issued a white paper on future devolution.⁵ Now, the proposed Scotland Bill 2015 which is currently passing through the UK Parliament, 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.⁶ If commenced, this equality duty would mean Scotland is the part of the UK to protect against discrimination based on socio-economic status. It is vital that these constitutional changes are considered in the wider context of ESC rights.

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 rights⁷, rights relating to pensions⁸, rights which protect an adequate standard of living⁹, rights relating to healthcare¹⁰ and rights relating to education,¹¹ among others. It would ensure that vulnerable and marginalised groups, including children, the elderly, the disabled and the unemployed receive protection in the progressive realisation of their rights. ESC rights enforcement assist in the alleviation of poverty.¹² There is significant scope to mainstream ESC rights as part of an approach to policy formation and the wider decision making process in the same way that the ECHR features.

These discussions become all the more pertinent in situations of financial crises when austerity measures can often impact the most vulnerable without any proper review of the ESC violations that may occur. An ESC rights affirmative framework helps to mainstream ESC rights in decision making processes so that emergency budgets, such as that introduced by the UK Government in July 2015¹³ or welfare reform such as the introduction of the 'bedroom tax', are more carefully considered in light of international obligations. A more robust and transparent legal framework for the protection of ESC rights would help support policy teams make decisions that comply with international standards. It would also ensure that decision making is formed around international best practice and place Scotland at the forefront and cutting edge leading the way in how best to mainstream ESC rights in a democratic and legitimate way.

Incorporating ESC rights into Scots law 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 the 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 paper seeks to inform the debate in order to support informed and inclusive deliberation of the options on the future implementation of ESC rights.

The paper should also be viewed within the current climate of potential constitutional change in relation to human rights protection at the UK level and the potential implications of this at the devolved level. The UK Government is currently finalising proposals to repeal the Human Rights Act 1998 and replace this with a UK Bill of Rights. The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) into the domestic framework. The consequences of the policy to amend the domestic incorporation of the ECHR at the UK level is yet unclear. This is particularly problematic when considering that the ECHR takes on constitutional status in the devolved jurisdictions – the devolved framework cannot be amended without significant barriers at the devolved level – both in terms of constitutional and democratic legitimacy. This paper goes beyond the discussion on a UK Bill of Rights and considers alternative human rights structures for Scotland beyond the ECHR model. In this sense the paper considers how to extend human rights protection to ESC rights in order to complement the ECHR

structure. If implemented Scotland would be setting an example of international best practice by providing for the comprehensive protection of civil, political, economic, social and cultural rights.

3. What are ESC rights?

Following on from the Second World War nations throughout the world sought to declare a commitment to dignity and human rights. This culminated in the Universal Declaration of Human Rights in 1948 followed by two subsequent Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties are known collectively as the International Bill of Rights.¹⁴ The international human rights structure comprises of civil, political, economic, social and cultural rights as established in the International Bill of Rights. Civil and political rights include rights such as the right to a fair trial or the right to vote. Economic, social and cultural rights include rights such as the right to education, the right to fair employment conditions, the right to adequate housing and the right to the highest attainable standard of healthcare. It was intended that the each of the rights (civil, political, economic, social and cultural) would be implemented concurrently and according to the principle of indivisibility.¹⁵ Subsequent international treaties at both the international and regional level have confirmed the legally binding status of these rights and their indivisible nature.¹⁶

3.1 The principle of indivisibility

The principle of indivisibility is an important aspect of the purpose and function of human rights and means that the fulfilment and enjoyment of one right is dependent on the protection and fulfilment of another.¹⁷ That is to say for example that the right to life is dependent on the right to adequate health care, the right to an adequate standard of living and the right to adequate housing. Likewise, full enjoyment of the right to vote and the right to political participation is dependent on exercise of the right to education and the right to freedom of expression, the right to protest or the right to collectively bargain. The full enjoyment of civil and political (CP) rights was therefore dependent on the protection and fulfilment of ESC rights – the preparatory work to the international treaties reveals that protecting civil and political rights and not economic social and cultural rights was considered an “anachronism in the twentieth century to provide for the protection of one without the other.”¹⁸

3.2 The legal status of ESC and the ‘justiciability’ of rights

Historically, the legal status of ESC rights has been misunderstood.¹⁹ This was based on confusion about how ESC rights should be implemented.²⁰ As a result, subsequent measures to protect human rights, both at the regional and domestic level have erroneously focussed on CP rights and relegated ESC rights to aspirational rights, political goals or issues that depend solely on the legislature to accommodate.²¹ It has long been understood that CP rights are enforceable in the court, meaning they are ‘justiciable’.²² Now the literature and international best

practice acknowledge that ESC are binding international legal standards. 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.

The violation of an ESC right was originally not explicitly open to judicial remedies in international law.²³ The Committee on Economic, Social and Cultural Rights (the body responsible for overseeing implementation of the ICESCR) has now called for justiciable remedies²⁴ for violations of ESC rights to be made available.²⁵ 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.²⁶ This means that states are under an obligation to explore how best to protect ESC rights within their own domestic framework.

The UK is under such an obligation. The UK signed ICESCR on 16 September 1968 and ratified the Covenant on 20 May 1976.²⁷ 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.'²⁸

It is now more commonly accepted in the literature and in practice that ESC rights can be judicially enforceable, or, that they ought to be - whereby effective remedies should be available for violations of ESC rights in the same way they are available for CP rights.²⁹ Outstanding questions now relate as to how best to deliver justiciable remedies, or,

through what mechanisms might ESC rights be best protected within a particular constitutional framework in a viable and legitimate way.

3.3 Progressive realisation of ESC rights

The nature of ESC rights requires states to respect, protect and fulfil these rights in order to progressively achieve them to the maximum available resources.³⁰ Some rights require to be protected and are non-derogable, meaning that there is a 'minimum core'. Other rights require progressive realisation through various degrees of enforcement.³¹ It is also possible to place limitations on some rights in the same way interference with CP rights can be justified in certain circumstances. Incorporation of the rights therefore requires fulfilment to different degrees and there is scope to balance fulfilment of a right against other countervailing factors. For example, ESC rights implementation does not mean granting everyone immediately the right to the highest attainable standard of health, or granting everyone the right to a privately owned dwelling house and so on. There is a sensible and balanced approach to ESC implementation which allows for the balancing of rights (including competing rights) and which takes account of the allocation of limited resources.

3.4 Justiciable and legally enforceable ESC rights in Scotland

The UK is under an obligation to comply with ICESCR. Likewise, under devolution there is a duty to comply with international law. The question that follows is whether or how Scotland can fulfil international obligations in relation to ESC rights. The post-referendum, post-Smith and post-

general election 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.³² 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.

4. How can ESC rights be protected in Scotland?

4.1 ESC rights through judicial incorporation

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 (Grundgesetz), together with Article 9 of the ICESCR (the right to social security), included a stand-alone right to a minimum level of subsistence below which no person should fall.³³ In Latvia, the court intervened when the state sought to reduce the state pension by up to 70% in order to meet requirements of loans with the International Monetary Fund (IMF) and the EU.³⁴ The court 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.³⁵ In a Scottish case at the House of Lords it was considered the right to life could be relevant in situations where the quality of housing or accommodation was so bad that it imperilled the life of residents.³⁶ This

is indicative of the potential for consideration of ESC rights as part of the common law.

4.2 ESC rights through the dynamic interpretation of CP rights

The European Court of Human Rights (ECtHR) has held that there are socio-economic dimensions to civil and political rights³⁷ and has extended CP rights in the ECHR to encompass related ESC rights.³⁸ For example, the ECtHR has extended Article 8 (Right to respect for private and family life) to encompass the right to adequate housing respecting cultural dimensions in the case of nomadic travellers (*Yordanova case*)³⁹ and, more broadly, protection from unlawful eviction.⁴⁰ In *Yordanova* the ECtHR specifically referred to various international standards⁴¹, 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.⁴²

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.⁴³ Likewise, in a case based on Article 3 ECHR (prohibition of torture and inhumane and degrading treatment), 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 as to amount to inhuman and degrading treatment.⁴⁴

4.3 ESC rights under the rubric of equality provisions

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.⁴⁵ 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.⁴⁶ 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 outcome – this delineates along a legal distinction between procedural protection and substantive protection).

The above 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 but 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 although the legislative provisions were incompatible with the UN Convention on the Rights of the Child.⁴⁷

4.4 The socio-economic equality duty

The Smith Recommendations have also led to a potential amendment to the devolved competence of the Scottish Parliament under the Equality of Opportunity reservation.⁴⁸ Under the proposed amendment⁴⁹ the Scottish Parliament would be able to legislate for socio-economic inequality. This would make it possible to introduce a procedural safeguard for ESC rights by addressing socio-economic disadvantage. The explanatory notes to the Equality Act 2010 provide that the socio-economic equality provision (which was never commenced by the newly elected UK Coalition Government in 2010⁵⁰) 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.⁵¹ Following an amendment to the reservation on Equality of Opportunity the Scottish Parliament could become the first part of the UK to address socio-economic disadvantage directly and explicitly through equality legislation.⁵² 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.⁵³ 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. Nonetheless, it would make a significant difference in the consideration of ESC rights at a deeper level than currently exists.

4.5 ESC rights implementation through legislation dealing with ESC issues

Another option for the immediate implementation of ESC rights is to rely on already existing legislative provisions relating to ESC issues. For example, where either the Scottish Parliament or Westminster create a legislative system to better protect ESC rights.⁵⁴ 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, there is a risk that legislation will not meet international standards. For example, on an independent examination of the UK national minimum wage the European Social Committee determined it unfit for purpose and 'manifestly unfair' in achieving the aim of raising workers out of poverty.⁵⁵

4.6 ESC rights under EU law

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.⁵⁶ 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 30⁵⁷ does not exempt the UK from existing obligations under the Charter.⁵⁸ There are a number of different ways that EU law extends protection to ESC rights. For example, in the context of employment, it was EU law that first ensured equal pay for equal work.⁵⁹ The Charter of Fundamental Rights

is an example of a regional treaty which much more closely reflects the principle of indivisibility (CP and ESC rights). However, the extent to which the Charter will go in distinguishing between legal rights and principles is still unclear.

4.7 Constitutional approaches to ESC incorporation

Countries 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 constitutional terms when dealing with ESC rights.⁶⁰ 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),⁶¹ another would be to introduce forms of procedural protection such as a duty to have due regard to ICESCR.⁶²

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.⁶³ Some rights are afforded non-derogable status⁶⁴, such as rights relating to children.⁶⁵ 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.⁶⁶ There is a general limitation clause under section 36 whereby rights may be limited if reasonable and justifiable in an open and democratic society.⁶⁷ The following sections consider the how ESC rights can be constitutionalised and what options are open to Scotland.

5. Constitutional Models and ESC rights

The following tables compare the way in which ESC rights are dealt with in different constitutional settlements. By comparison, we can see that ESC rights protection in Scotland is very weak risking a democratic deficit in terms of international human rights standards that the state is bound to comply with.

Table 1. South Africa

Constitutional Framework	South Africa
Constitutional Status	In South Africa the constitution explicitly protects ESC rights.
Parliament and Executive	If parliament, the executive or any public body fails to comply with the constitution the court can declare the act or omission unlawful.
Court and ESC adjudication	The Supreme Court in South Africa has adopted an incremental approach to ESC rights adjudication where a number of seminal cases have improved the protection of ESC rights without a flood gate effect or a complete transformation of the way resources are allocated.
Outcome for ESC protection	Positive ESC enforcement Some commentators are critical that the South African approach does not go far enough in the protection of ESC

	<p>rights. However, others have commended the incremental and tentative approach of the judiciary as an appropriate and democratic approach.</p> <p>Either way, ESC rights receive specific and explicit protection in a constitutionally sound and democratic way in accordance with the rule of law. This type of constitutional arrangement is becoming more popular as democracies revisit their constitutional arrangements. Other countries such as New Zealand and Ireland are considering incorporating ESC rights in their constitutional arrangements.</p>
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Table 2. Finland

Constitutional Framework	Finland⁶⁸
Constitutional Status	In Finland the Constitution requires Parliament to legislate to protect socio-economic rights. The Constitution lists the rights and it is for Parliament to decide how to protect them in various legislative frameworks.
Parliament and Executive	<p>Parliament is responsible for legislating for the socio-economic rights protected in the Constitution</p> <p>In order to ensure that the passage of legislation complies with human rights, including ESC rights, there is a human rights Committee that reviews and evaluates the legislation before it is passed. This is called ex ante review.</p> <p>The human rights Committee makes its decision on the compatibility of legislation after listening to constitutional and human rights experts. These decisions are not politically motivated but based on legal standards. The decisions of the Committee are binding on Parliament.</p>
Court and ESC	If Parliament does not enact adequate legislation or enacts laws that contravene the Constitution then the court can

adjudication	intervene and declare this unconstitutional. This is ex post judicial review of legislation.
Outcome for ESC protection	<p>Positive ESC enforcement</p> <p>This system supports a human rights affirmative framework where compliance with human rights, including ESC rights, is compliance with the rule of law. This is not a political choice but a legal obligation.</p>

Table 3. UK

Constitutional Framework	UK
Constitutional Status	ESC rights are not protected in the uncodified UK constitution.
Parliament and Executive	<p>In the UK Parliament there is no obligation to comply with ESC rights as part of the legislative process, only CP rights protected through the Human Rights Act 1998. Legislation sometimes provides for ESC rights, however, there is no requirement that this legislation meets the international standard.</p> <p>There is a mechanism to review human rights compatibility before legislation is passed. This is performed by the Joint Committee on Human Rights (JCHR). The decisions of the Committee are not binding on Parliament. Statements of compatibility required by the Human Right Act relate only to ECHR CP rights and are not binding upon the Parliament or the courts.</p> <p>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. The consequent adjudication in the Supreme Court revealed similar concerns. Neither the JCHR nor the court were</p>

	<p>able to oblige Parliament to revisit a more proportionate means of achieving welfare reform in accordance with international ESC standards.</p> <p>The Ministerial Code explicitly placed Ministers under an obligation to comply with international law, however, this explicit obligation has recently been amended, potentially undermining the status of international law in the performance of Ministerial obligations.</p>
Court and ESC adjudication	<p>There is no option for ex post review of legislation by the court to ensure compatibility with ESC rights.</p> <p>The court can adjudicate ESC rights but only under the rubric of something else, such as CP rights or equality legislation. This means that ESC rights protection is limited.</p>
Outcome for ESC protection	<p>Weak enforcement of ESC rights.</p> <p>ESC rights are treated as political objectives rather than international legal standards.</p> <p>ESC rights do not receive legal protection.</p>

Table 4. Scotland

Constitutional Framework	Scotland
Constitutional Status	<p>In Scotland there is a rights affirmative constitutional framework that means those rights that are contained in the ECHR receive constitutional protection.</p> <p>However, this framework does not extend to ESC rights.</p> <p>The reserved v devolved framework means that the Scottish Parliament is limited by what legislation it can pass, and so any incorporation of ESC rights would need to</p>

	comply with devolved competency requirements.
Parliament and Executive	<p>It is unlawful for the Scottish Parliament to act incompatibly with ECHR rights. This legal protection does not extend to ESC rights.</p> <p>There is no obligation on the Scottish Parliament to ensure that legislation complies with ESC rights, unless ESC rights are protected under the rubric of something else (such as ECHR rights).</p> <p>There is limited ex ante review of human rights in Scotland, other than non-disclosed assessments by the Executive and the Presiding Officer of the Scottish Parliament before legislation is passed. There is a requirement for the relevant Minister and the Presiding Officer to make a statement of compatibility in relation to each bill being considered. However these limited reviews do not take ESC rights into consideration.</p> <p>There is no Committee in the Scottish Parliament which systematically reviews compatibility with human rights, including ESC rights, before the passage of legislation.</p> <p>Scottish Ministers are under an obligation to comply with the ECHR, EU law and international law, which includes ESC rights.</p> <p>The Secretary of State for Scotland is under an obligation to comply with international law, which includes ESC rights.</p>
Court and ESC adjudication	There is a form of ex post review of legislation by the judiciary, but again this is limited to ECHR compatibility and does not extend to ESC rights.
Outcome for ESC protection	<p>Weak enforcement of ESC rights.</p> <p>ESC rights are treated as political objectives rather than international legal standards.</p> <p>ESC rights do not receive legal protection.</p>

5.7 Adopting a constitutional model for ESC rights in Scotland

The following table outlines potential models of ESC constitutionalisation in Scotland. 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.⁶⁹ 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 repeal or amendment; such is the nature of an uncodified constitution. It is important to note, therefore, that any such mechanism does not entrench ESC 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.⁷⁰

Table 5. Models of Constitutionalisation for ESC in Scotland

Constitutional Model for ESC rights	Details	Barriers to adopting this route	Constitutional Safeguards	Outcome
MODEL A UK	UK Parliament	Requires political support	This framework is how the	Positive ESC enforcement

Parliament legislative framework based on Scotland Act structure	could extend scope of section 29 of Scotland Act 1998 to include rights enshrined in the International Covenant of Economic, Social and Cultural Rights (ICESCR)	by majority of UK Parliament	ECHR is currently protected in Scotland. The judiciary are tasked with the responsibility to review compatibility and can declare unlawful legislation ultra vires.	Human rights affirmative framework providing ESC rights with constitutional status in Scotland. Under this model the judiciary play a substantive role in scrutinising compatibility.
MODEL B Scottish Parliament legislative framework full incorporation (Scottish Bill/ Charter of Rights)	Scottish Parliament imposes 'self-regulatory' legislation, which incorporates ICESCR or imposes domestically drafted form of ESC rights	This would need to comply with the current reserved v devolved framework and so consideration of reserved areas such as Equality of Opportunity would need to be considered in terms of devolved competence	Scottish Parliament Committee could be created to consider ESC rights before passage of subsequent legislation and court could declare incompatible legislation as ultra vires.	Positive enforcement of ESC with various options for constitutional safeguards.
MODEL C UK/	Either UK or Scottish	This would need to comply	This option includes an	This is a less robust

<p>Scottish Parliament legislative framework based on Human Rights Act structure</p>	<p>Parliament could adopt a similar structure to Human Rights Act that extends to ESC/ ICESCR</p>	<p>with the current reserved v devolved framework. It is beyond the competence of the SP to amend the HRA.</p>	<p>interpretative clause; a duty on public bodies to comply and courts can issue declaration of incompatibility</p>	<p>constitutional framework in terms of judicial overview. Declarations of incompatibility are not binding on Parliament and do not affect the application of the law. There is a strong element of deference to the legislature.</p>
<p>MODEL D UK/Scottish Parliament legislative framework based on duty to have due regard to ICESCR</p>	<p>Similar to the Equality Act 2010 public sector equality duty or the duty imposed by the Welsh Assembly to have due regard to the UN Convention on the Rights of the Child</p>	<p>This would need to comply with the current reserved v devolved framework.</p>	<p>This option requires that the judiciary play a supervisory role in ensuring compliance with the duty to have due regard.</p>	<p>Weaker type of enforcement Procedural protection of ESC rights</p>

6. Exploring Constitutional Safeguards

As with any proposed constitutional or legislative change which alters the way human rights are protected, it is important to consider the potential risks and how to ensure constitutional safeguards are in place. Before the introduction of the Human Rights Act 1998 there was widespread concern that granting the judiciary power on the adjudication of human rights would result in a breach of the separation of powers. It was argued that this would lack democratic legitimacy and that deference to parliament was the most appropriate place in the determination of human right issues.⁷¹

Similar 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, 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.⁷² 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 of determining ESC compatibility.

A number of constitutional safeguards to the implementation of ESC rights are considered here:

6.1 Innovative Judicial Remedies

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

“Courts are... generally acutely conscious of the limitations of their competence, of the democratic legitimacy which attends policymaking by Parliament and by an executive accountable to Parliament, and of the subsidiary and limited role which the Courts may accordingly properly play in checking executive and legislative action. It does not follow that the Courts can or should play no role. We might not wish the Courts to decide which is the best means of securing progressive implementation of economic or social rights; but we might, at the same time, decide that it would be useful to allow them, for example, to adjudicate on whether the government has addressed itself to the question of how best to secure that progressive implementation, and whether or not, in doing so, it has discriminated in a manner incompatible with the Covenant. The question of whether the Courts should be given that role - or any other role in relation to economic and social rights - seems to me, ultimately, to be a political or constitutional question, not a conceptual one.”⁷³

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.⁷⁴

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.⁷⁵ This places the remedy back in the hands of the other branches of state and grants the court a supervisory role.⁷⁶ 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.⁷⁷ 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.

In a robust constitutional model 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.⁷⁸

6.2 Protecting the separation of powers

Rather than view the adjudication of ESC rights as a threat to the separation of powers the constitution could reflect a multi-institutional system where compatibility with ESC rights is shared between the

legislature, the executive and the judiciary – where one holds another to account and the judiciary acts as a means of last resort.

There are a variety of institutional safeguards employed throughout the world in order to ensure balance in the separation of powers when determining human rights, including ESC rights. For example, the Constitution of Argentina permits the executive to derogate from fundamental rights if there is a two thirds majority in both houses of parliament. In Canada the courts have the power to strike down unconstitutional legislation, including legislation that contravenes human rights.⁷⁹ However, parliament has the power to override compliance with the constitutional Charter of Fundamental Rights and Freedoms⁸⁰ (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.⁸¹ 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.

6.3 Pre-legislative scrutiny by a Constitutional Committee in Parliament (ex ante review)

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 to initiate a Human Rights Committee which considers ESC compatibility before legislation is enacted. Any member of the Scottish Parliament can propose the establishment of a committee⁸² and 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.⁸³

6.4 Avoiding the ‘floodgate’ scenario

Whilst it is important to ensure 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 of a test case and sist (temporarily delay) all other cases which are directly affected by the outcome.⁸⁴ 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.

7. Conclusion

This paper has identified a number of routes through which ESC rights could be incorporated and implemented in Scotland in a legitimate and viable manner. Existing mechanisms for the better protection of ESC rights include implementation through the common law; expansion through the dynamic interpretation of CP rights; protection under the aegis of equality legislation; implementation through legislative frameworks; or protection under EU law. These mechanisms are available for immediate use, however, the paper also identifies that there are various limits to these particular avenues meaning that full implementation of ESC rights is not yet available.

This means that there is an ESC rights protection deficit in Scotland – this gap could be addressed through a number of other avenues for future implementation. The paper identifies that ESC rights could be

better protected by commencing the socio-economic equality duty under the Equality Act 2010, which is in the process of being devolved to Scotland. The second option identifies potential constitutional models that could be adopted in Scotland. The constitutional models include full ESC incorporation and partial incorporation. These models can be supported through a number of constitutional safeguards which ensure a fair, transparent and constitutionally democratic approach to ESC rights. Safeguards can be adopted to assuage any concerns over the separation of powers, interference in policy related areas or budget allocation in terms of limited resources.

Clearly there is much for consideration in terms of the future direction of human rights and ESC rights in Scotland. This paper offers options for existing and future implementation of ESC rights for the particular circumstances of Scotland's unique constitutional framework. The options are here to help inform debate so that constitutional change in terms of how we are governed and what kind of society we live in is informed by evidence and best practice. The better protection of ESC rights through one or multiple of the routes identified in this paper will facilitate a move towards a more fair and equal Scotland that is transitioning towards an example of international best practice.

¹ Paragraph 7(2)(a) of Schedule 5

² 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

³ Leaving parliament to make decisions in this area as opposed to the judiciary

⁴ The Smith Commission Report, para.60, https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

⁵ The Scotland Office, 'Scotland in the United Kingdom: An enduring settlement' (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf. Clause 24 amends the reservation to Equal Opportunities in Schedule 5 of the Scotland Act 1998 to include section 1 of the Equality Act 2010 as following within the competence of the Scottish Parliament – this provision of the Equality Act 2010 has never been commenced in respect of Scotland or the rest of the UK.

⁶ HC Bill 48, section 32, Scotland Bill 2015-2016

⁷ Article 6 ICESCR

⁸ Article 9 ICESCR

⁹ Article 11 ICESCR

¹⁰ Article 12 ICESCR

¹¹ Article 10 ICESCR and partial protection in Article 2 Protocol 1 ECHR

¹² See Scottish Human Rights Commission, A Human Rights Based Approach to Tackling Poverty, September ottishhumanrights.com/news/latestnews/landreforms submissionfeb15

¹³ <https://www.gov.uk/government/publications/summer-budget-2015/summer-budget-2015>

¹⁴ The International Bill of Rights comprises of the Universal Declaration of Human Rights 1948 , GA Res 217 A (III) of 10 December 1948, the International Covenant on Civil and Political Rights GA Res 2200A (XXI) of 16 December 1966 and the International Covenant on Economic, Social and Cultural Rights UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 993, GA Res. 2200A (XXI), 3 Jan. 1976

¹⁵ 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.' Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on its Development*, (Clarendon Press OUP 1995), 9

¹⁶ ESC rights protected in international law fall under treaties that the state has ratified such as the International Covenant on Economic, Social and Cultural Rights 1966, UN General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; the European Social Charter (Revised) 1996, Council of Europe, ETS 163; the Convention on the Rights of the Child 1989, UN General Assembly, resolution 44/25 of 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; the Convention on the Elimination of Discrimination Against Women 1979, UN General Assembly resolution 34/180 of 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; the Convention on the Elimination of Racial Discrimination 1965, United Nations General Assembly resolution 2106 (XX) of 21 December 1965 United Nations, Treaty Series, vol. 660, p. 195; and the Convention on the Rights of Persons with Disabilities 2006, United Nations General Assembly resolution A/RES/61/106 of 24 January 2007, 76th plenary meeting; issued in GAOR, 61st sess., Suppl. no. 49. "Annex: Convention on the Rights of Persons with Disabilities": p. 2-29. Economic, social and cultural rights are sometimes referred to as simply social and economic rights, or socio-economic rights.

¹⁷ For a discussion on the history of the principle of indivisibility see Daniel Whelan, *The Indivisibility of Human Rights, A History*, (University of Pennsylvania Press, 2010).

¹⁸ E/CN.4/529 Memorandum of Secretary General, Commission on Human Rights, Seventh Session, Agenda item 3, 29 March 1951

¹⁹ See Craven

²⁰ For discussions on the misconceptions surrounding the dichotomy of human rights based on a positive v negative antinomy see and Ida Koch, 'Dichotomies, Trichotomies or Waves of Duties' (2005) 5 Human Rights Law Review 1 and for a discussion of how the dichotomy and method of implementation resulted in a misconception surrounding the status of ESC rights see Mónica FERIA TINTA, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions', (2007) 29 Human Rights Quarterly 431. TINTA argues that the dichotomy was based on a 'legal fiction', at 432

²¹ See Craven

²² 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

²³ Article 2(1) ICESCR. See also TINTA 433. This assertion is supported elsewhere in the literature – see for example Varun Gauri and Daniel Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2010) and Lanse Minkler (ed.), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2013)

²⁴ 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.

²⁵ 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

²⁶ General Comment No. 9 *ibid*

²⁷ *ibid*

²⁸ 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

²⁹ See Tinta, see also General Comment No 9, see also Anashri Pillay, 'Economic and Social Rights Adjudication: developing principles of judicial restraint in South Africa and the United Kingdom' (2013) Public Law 599. Pillay contends that 'the weight of academic, judicial and political opinion has moved away from justiciability to a consideration of the most effective judicial approaches to [ESC] rights' p.599

³⁰ There are various ways of viewing the different degrees of protection for ESC rights from negative (immediately enforceable) v positive (requiring action); procedural v substantive; Nolan et al identify degrees of enforcement through a multitude of varying degrees – from respect, to protect, to fulfill, consideration of progressive realisation and finally non-retrogressive measures, Nolan et al *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Human Rights Consortium March 2007). 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 379. John Ruggie developed a respect, protect, fulfill, remedy analogy, Human Rights Council, John Ruggie 'Respect, Protect and Remedy: A Framework for Business and Human Rights' 7 April 2008, A/HRC/8/5. Each of the degrees of enforcement move from partial protection to full protection. This axis of protection is equally applicable to civil and political rights.

³¹ Ibid

³² Katie Boyle & Stephen Tierney 'Yes or no, 2014's Scotland referendum carries significant constitutional implications', Democratic Audit Blog, London School of Economics, 8 November 2013

³³ 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 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

³⁴ JUDGMENT on behalf of the Republic of Latvia in Riga, on 21 December 2009, in the case No. 2009-43-01

³⁵ 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.

³⁶ *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] WLR (D) 65, per Lord Rodger (para 69): "if the Council had allowed their housing stock to fall into disrepair, so that tenants were at risk of suffering life-threatening injuries or of becoming seriously ill, the Council could have been in breach of article 2." See Scottish Human Rights Commission, *A Human Rights Based Approach to Tackling Poverty*, September 2015

³⁷ *Airey v. Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, para 26

³⁸ 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

³⁹ *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.’

⁴⁰ *Yordanova and Others v Bulgaria*, Application no. 25446/06, 12 April 2012

⁴¹ 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.

⁴² *Yordanova*, para.83. For a discussion on the case and the court’s approach to interpretation using international ESC standards see Adélaïde Rémiche, ‘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

⁴³ 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

⁴⁴ *Limbuela* 2005 UKHL 66

⁴⁵ 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.; *Awas 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)

⁴⁶ 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.”

⁴⁷ 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 ECHR, *R(on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16

⁴⁸ Reservation L2 Schedule 5 of the Scotland Act 1998

⁴⁹ The Scotland Office, ‘Scotland in the United Kingdom: An enduring settlement’ (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf. Clause 24 amends the reservation to Equal Opportunities in Schedule 5 of the Scotland Act 1998 to include the subject of section 1 of the Equality Act 2010 as following within the competence of the Scottish Parliament. Section 1 imposes a duty to have due regard to exercising duties in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.

⁵⁰ 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>

⁵¹ Explanatory Notes to the Equality Act 2010, available at <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/1/1>, accessed 10 September 2013, para.23. 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.'

⁵² 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).

⁵³ 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). 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 level of education; level of literacy; homelessness; geographical location; source of income; level of income; type of work or profession; and employment status.

⁵⁴ 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 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

⁵⁵ 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

⁵⁶ 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 10th Birthday?’ [2011] 24 European Union Studies Association Review 5

⁵⁷ 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

⁵⁸ 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

⁵⁹ See *Defrenne II* – Case 43/75 (1976) ECR455- equal pay for equal work – A157 (ex A141 EC) Treaty on the Functioning of the European Union, Consolidated Version of the Treaty on the Functioning of the European Union art. 157, 2008 O.J. C 115/47

⁶⁰ 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, 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.

⁶¹ The Constitution of Argentina directly implements 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)

⁶² 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

⁶³ 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).

⁶⁴ i.e the rights are absolute and interference in any form cannot be justified

⁶⁵ 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

⁶⁶ 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)

⁶⁷ 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)

⁶⁸ See Kaarlo Tuori for a discussion of the Finnish system, Rights, Democracy and Local Self Governance: Social Rights in the Constitution of Finland <http://www.juridicainternational.eu/?id=12700>

⁶⁹ 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

⁷⁰ 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

⁷¹ See for example, Richard Edwards, 'Judicial Deference under the Human Rights Act' [2002] 65 Modern Law Review 859, 859

⁷² See for example the judicial recognition of an immediately enforceable right to highest attainable health in Brazil that resulted in more inequity in health provision, favouring the wealthy and further marginalising the poor, Octavio Luiz Motto Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 Health and Human Rights: an International Journal 33

⁷³ James Wolffe, ECONOMIC AND SOCIAL RIGHTS IN SCOTLAND: LESSONS FROM THE PAST; OPTIONS FOR THE FUTURE, A lecture for International Human Rights Day 2014 by W. James Wolffe QC, Dean of the Faculty of Advocates, Edinburgh School of Law, December 2014

⁷⁴ See King for discussions on the different theoretical approaches that can legitimise judicial determination of ESC rights such as incrementalism, deference and prioritisation

⁷⁵ See Ann Blyberg, Human Rights Budgeting and Budget Analysis, Scottish Human Rights Commission, November 2015

⁷⁶ 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, University of the Western Cape (2008)

⁷⁷ As currently operates under section 29 of the Scotland Act in relation to ECHR rights

⁷⁸ See for example the use of budgetary analysis identified by Nolan et. al, *Human rights and public finance: budgets and the promotion of economic and social rights*, (Hart 2013)

⁷⁹ 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

⁸⁰ under section 33 of the Constitution Act

⁸¹ 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/>)

⁸² Rule 6.1 of the Scottish Parliament Standing Orders
<http://www.scottish.parliament.uk/parliamentarybusiness/26518.aspx>

⁸³ Rule 6.2 – committees can consider international treaties in relation to matters that fall within the committee's competence (matters within its remit)

⁸⁴ For example this approach was employed whilst awaiting determination in the case of *Eba v Advocate General for Scotland* 2011 SLT 768