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Subnational incorporation of economic, social and cultural rights – can devolution become a vehicle for progressive human rights reform?

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ABSTRACT

Devolution acts as both a foundation and a potential vehicle for progressive human rights reform. This article examines progress within the current Scottish framework, including the incorporation of international treaties, as recommended by the National Taskforce for Human Rights Leadership. The particular nature of devolution provides the opportunity to close the accountability gap in the protection of economic, social and cultural rights which operate in devolved areas, including the right to health, the right to housing and the right to an adequate standard of living. This reform brings opportunities to embrace normative international standards that facilitate incorporation such as multi-institutional accountability, proportionality-inflected reasonableness review, dignity and collective justice, as well as substantive equality measures. Progress to date is examined against the risks posed to human rights by the erosion of devolution through a number of United Kingdom(UK)-led strategies, particularly in response to Brexit-related policy gaps. Although devolution can act as an important anchor on national reform, mitigating threats to backsliding on rights at the national level, increasing centralisation can make this difficult to realise in practice. The potential opportunities offered by enhanced devolution could provide a fully integrated human rights framework incorporating social and economic policy areas such as employment, social security, immigration and equality. However, given current constitutional arrangements, devolution's promise as a force for human rights progress is limited. The article concludes with a reframing of human rights which reflects the more complex picture painted by diverging trajectories in each of the UK jurisdictions.

Keywords: Scotland; human rights; devolution; incorporation; UN treaties.

* Any views and opinions expressed or errors in this article are solely those of the authors.

INTRODUCTION

There is an accountability gap in the protection of international human rights law in the United Kingdom (UK).[1] This accountability gap, it is argued, emerges as a result of the UK's failure to incorporate its international obligations into domestic law.[2] Successive UK governments argue that the implementation of the state's international obligations is achieved through legislation and administrative measures, which in turn ensures fulfilment of its obligations.[3] In response, United Nations (UN) treaty bodies urge more is required to comply with international law – in particular to ensure that effective remedies are available for a violation of a right. By way of example, the UN Committee on Economic, Social and Cultural Rights (CESCR) has called on the UK

> to ensure that the covenant 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 [and] that … the state party is under a legal obligation to comply with and to give [the treaty] full effect in its domestic legal order.[4]

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1 Paul Hunt, 'How to advance social rights without jeopardising the Human Rights Act 1998' (2019) 90(3) Political Quarterly 393–401; Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) 146–147; Katie Boyle, Diana Camps, Kirstie English and Jo Ferrie, *The Practitioner Perspective on Access to Justice for Violations of Social Rights: Addressing the Accountability Gap* (Nuffield Foundation 2022).

2 Several international treaty bodies have called upon the UK to incorporate its international human rights obligations into domestic law: UN Committee on the Elimination of Discrimination against Women (CEDAW) CEDAW/C/UK/CO/6 (2009); UN Committee against Torture (CAT) CAT/C/GBR/CO/5 (CAT 2013); UN Committee on the Rights of the Child (CRC) CRC/C/GBR/CO/4 (CRC 2008). Treaty bodies recommending justiciable enforcement and effective remedies: UN CRC, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/5 (CRC 2016); UN CESCR, Concluding Observations, United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/5 (CESCR 2009); UN CESCR, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/6 (CESCR 2016); CESCR, Concluding Observations of the UN CESCR's 42nd session, 4–22 May 2009, consideration of reports submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependencies, 12 June 2009, E/C.12/GBR/CO/5, paras 3 and 13; UN CESCR, Concluding observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, E/C.12/GBR/CO/6, para 5.

3 UN CESCR Consideration of reports submitted by states parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Sixth Periodic Reports of states parties due in 2014 E/C.12/GBR/6 25 September 2014, para 11.

4 CESCR 2016 (n 2 above) para 3.

This article accepts the position, based on international human rights law, that the UK is under an obligation to provide effective remedies for violations of the international human rights treaties it has agreed to be bound by.[5] A failure to do so is a further breach of international law and represents a domestic accountability gap.[6] We are interested in how this gap manifests and to what extent it is possible to address it at the subnational level, looking specifically at the case of Scotland in the context of the incorporation of economic, social and cultural rights (ESCR).[7]

The article addresses the incorporation of international human rights and devolution in four sections. The first sets the scene by articulating the role of human rights within the current devolution frameworks. It provides a brief overview of the progress made thus far in Scotland in relation to the planned incorporation into Scots law of a number of international human rights treaties as recommended by the National Taskforce for Human Rights Leadership (NTF). The second section examines how incorporation may occur, with a particular focus on the opportunity to embrace a range of normative standards that facilitate incorporation such as multi-institutional accountability, proportionality-inflected reasonableness review, dignity and collective justice, as well as substantive equality measures. We do not rehearse arguments about whether incorporation is something that the Scottish Parliament ought to do (subnational enforcement of international human rights law is encouraged by the international legal community[8] and is a long-standing policy objective of the devolved government),[9] but rather examine how subnational incorporation is occurring and what opportunities and challenges it may face. The third section considers the threats posed to human rights by the erosion of devolution through UK-led strategies, particularly in response to

5 Dinah Shelton, *Remedies in International Human Rights Law* 2nd edn (Oxford University Press 2006) 104–174; UN CESCR, *General Comment No 19: The right to social security* (art 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para 77–80; UN General Assembly, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law: resolution/Adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN CESCR, General Comment No 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para 4.

6 Shelton (n 5 above).

7 As discussed below, the incorporation agenda extends to environmental rights and access to justice, as well as the rights of specific groups.

8 See, for example, UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 22 December 2014, A/HRC/28/62 on local and subnational implementation of ESCR.

9 Scottish Government, 'New Human Rights Bill' (12 March 2021).

policy gaps resulting from Brexit. It is argued that devolution can act as an important anchor on national reform, mitigating threats to backslide on rights at the national level. In this respect, it is important to note it is beyond the scope of the article to substantively examine the arguments for and against progressive human rights change at the devolved level, such as examining whether the proposals themselves present as a threat to devolution. The article operates on the basis that the UK has already agreed to be bound by a number of international obligations and that progressive reform at the devolved level to observe these obligations is both within devolved competence and aligns with a teleological position on human rights reform – ie that observance of the full international legal framework is, and should already be, taking place. The fourth section considers the potential opportunities that would arise if devolution was further enhanced in policy areas such as employment, equality and immigration. A critical assessment offers insights into the potential reach as well as the limitations of devolution as a force for positive human rights progress. The article concludes with a reframing of human rights in the UK to reflect the more complex picture painted by diverging human rights trajectories in each of the UK jurisdictions.

HUMAN RIGHTS WITHIN THE CURRENT DEVOLUTION FRAMEWORKS

In contextualising any analysis of human rights progress and the potential opportunities and threats offered by enhanced devolution, it is important to note just how integral human rights are to the devolved frameworks. In Scotland, Northern Ireland and Wales the devolved statutes grant European Convention on Human Rights (ECHR) rights a form of constitutional status by which the courts,[10] the legislature[11] and the executive[12] must each comply with human rights – a failure to do so renders any act or omission *ultra vires* and unlawful (courts can declare such acts, including devolved legislation, as null and void with immediate effect). This foundational constitutional framework is thus more akin to legal constitutionalism than the political constitutional model prevailing at the UK national level.[13]

The UK's devolved legislatures have already taken significant steps to go further than ECHR rights by embedding international human

10 HRA 1998, s 6; SA 1998, ss 29 and 98; Northern Ireland Act (NIA) 1998, ss 6 and 79; Government of Wales Act (GOWA) 2006, ss 94 and 149.

11 SA 1998, s 29; NIA 1998, s 6; GOWA 2006, s 94.

12 SA 1998, s 57; NIA 1998, s 24; GOWA 2006, s 81.

13 Boyle, *Economic and Social Rights Law* (n 1 above) 10–109.

rights obligations into domestic devolved law under the devolved competence to 'observe and implement international obligations'. In Scotland the First Minister's Advisory Group (FMAG)[14] and the NTF[15] have recommended a Human Rights Act for Scotland that incorporates economic, social, cultural and environmental rights via a number of international treaties (discussed further below). The Welsh Senedd has set out plans to follow suit.[16] In 2021, the Scottish Parliament unanimously passed legislation[17] incorporating the UN Convention on the Rights of the Child (UNCRC) into devolved Scottish law. The UK Government challenged the legislation in the Supreme Court and, although the court decided that the Bill requires technical changes relating to devolved competence,[18] there is no 'issue with the Scottish Parliament's decision to incorporate the UNCRC' into devolved law.[19] In Northern Ireland the Ad Hoc Committee on a Bill of Rights[20] recently revisited the peace agreement commitment to design a Bill of Rights for the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission's proposals, following a 10-year participatory process, recommended the incorporation of ESCR as part of this renewed framework, building on ECHR protections.[21] In June 2021 the Ad Hoc Committee with cross-party representation supported a Bill of Rights in principle, however, the Democratic Unionist Party (DUP) later published a position paper disagreeing with this decision.[22] Each of the devolved jurisdictions is directly engaged in processes of incorporation of ESCR, albeit in Northern Ireland this

14 First Minister's Advisory Group on Human Rights Leadership, Recommendations for a New Human Rights Framework to Improve People's Lives (FMAG 2018).

15 National Taskforce for Human Rights Leadership Report (NTF 2021).

16 Senedd Cymru/Welsh Parliament, 'Where next for human rights in Wales?' (10 December 2021); see also Simon Hoffman, Sarah Nason, Rosie Beacock and Ele Hicks (with contribution from Rhian Croke), 'Strengthening and advancing equality and human rights in Wales' Social Research Report No 54/2021 (Welsh Government 2021).

17 The UNCRC Incorporation (Scotland) Bill.

18 Removing provisions relating to obligations placed on the UK Parliament and UK Ministers. The Scottish Government has responded to the court's judgment, see 'Protecting children's rights' (Scottish Government 24 May 2022). On UNCRC incorporation, see Kasey McCall-Smith this volume.

19 See Katie Boyle, 'Constitutional Changes in Scotland – I: Incorporation of International Treaties, Devolution and Effective Accountability' (*Oxford Human Rights Hub* 30 March 2021).

20 Northern Ireland Assembly, Report of the Ad Hoc Committee on a Bill of Rights 156/17-22 (Ad Hoc Committee for a Bill of Rights 4 February 2022).

21 Northern Ireland Human Rights Commission, A Bill of Rights for Northern Ireland: Advice for the Secretary of State (10 December 2008) 170.

22 Ibid para 13.

process has now stalled due to political impasse following elections to the Northern Ireland Assembly.[23]

In the meantime, Scotland and Wales continue to press ahead with incorporation plans. Our particular focus draws attention to the Scottish incorporation experience. By way of brief background, the 2017–2018 Scottish Programme for Government indicated a commitment to consider 'how we can go further to embed human, social, cultural and economic rights including the UN Convention on the Rights of the Child' into domestic law.[24] In December 2018 the FMAG recommended a new Act of the Scottish Parliament to incorporate ESCR into the devolved governance of Scotland as well as specific group rights, including those belonging to children, women, persons with disabilities, on race and rights for older persons and for LGBTQI communities.[25] The recommendations also propose that Scotland undergoes a lengthy participative process to deliberate on how best to contextualise the human rights norms derived from international law into areas of devolved governance.[26] The Scottish Government established the NTF to implement the FMAG's recommendations. The NTF recommended incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of Persons with Disabilities, the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Elimination of Racial Discrimination in a multi-treaty Bill, together with additional rights on the environment, equality, older persons and LGBTQI communities, and access to justice. Its evidence base included a broad participative process with civil society and rights holders in Scotland[27] that has called for better accountability as intrinsic to the 'purposes and opportunities' of the new framework.

This is a step-change in human rights reform in Scotland, and devolution has been the key enabler in taking a distinct and progressive approach.

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23 Following elections to the Northern Ireland Assembly in May 2022, at which Sinn Féin won the most seats for the first time, the DUP has refused to vote for a new Speaker with the effect that the Assembly is unable to operate. The DUP's refusal has been attributed to outstanding issues related to the Northern Irish Protocol which forms part of the UK's Brexit agreement with the EU.

24 'A Nation with Ambition: The Government's Programme for Scotland 2017–2018' (Scottish Government 5 September 2017).

25 FMAG (n 14 above) 7.

26 Ibid 39.

27 All our Rights in Law: Views from the Wider Public, A Report to the National Taskforce on Human Rights Leadership (Human Rights Consortium and Scottish Human Rights Commission 2021).

SCOTLAND'S PROGRESS

Multi-institutional incorporation model

The model of incorporation proposed is one in which the Parliament, the Government, the entire administrative decision-making sphere, non-judicial complaints mechanisms and the judiciary must all act as guarantors of human rights in a multi-institutional approach.[28] The test of whether the domestication of the treaties amounts to full incorporation relies on whether an effective remedy is available for a violation.[29] The NTF and the FMAG both recommended that the court must act as a means of last resort. This commitment is further supported by a strong focus on pre-legislative scrutiny,[30] seeking to create a rights-affirmative framework[31] through subsequent legislation.

Importantly, the NTF recommendations propose domestication of a range of international norms and comparative best practice that extends beyond the Scotland Act/Human Rights Act model. This includes embedding progressive realisation of ESCR and the associated obligations to provide a minimum core, deploying the maximum available resources, progression towards substantive equality, expanding the intensity of review in assessing compliance with rights, limiting retrogressive measures and providing effective remedies, including access to collective justice. Participatory approaches to rights elaboration and the facilitation of multi-institutional accountability avenues have been recommended. At the time of writing, it is not yet clear exactly how or whether these commitments will manifest on the face of the Bill.

Here we consider some of the novel ways in which the Scottish proposals seek to advance compliance with rights within the limitations of devolved competence.

Beyond the fourth branch

The multi-institutional approach is based on the premise that the three branches of state – legislative, executive and judicial – must all act as guarantors of human rights. As well as proposing a more prominent role for pre-legislative scrutiny by the Scottish Parliament, executive

28 FMAG (n 14 above). For a discussion on the comparative and potential Scotland-specific multi-institutional (or inter-institutional) model of incorporation, see Manuel Cepeda, Kate O'Regan and Martin Scheinin, The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership (Bonavero Reports 28 January 2021).

29 Boyle, *Economic and Social Rights Law* (n 1 above) 41.

30 Recommendation 14.

31 Boyle, *Economic and Social Rights Law* (n 1 above) 115.

implementation and monitoring mechanisms and an indispensable accountability role for the court, the recommendations go further and suggest that everyday accountability should occur in the administrative sphere. In this respect the Scottish proposals seek to create a space for everyday implementation 'close to home'.[32] This is where regulators, inspectorates, ombudsmen tribunals and local complaints mechanisms can bring justice closer to individuals. Other democratic accountability mechanisms such as an enhanced role for the national Human Rights Commission are also proposed. This approach is explored in recent scholarship supporting a 'fourth branch' of accountability, otherwise known as the integrity branch, or regulatory branch, which is constituted from the administrative state by 'institutions for protecting democracy'.[33] Referencing the South African Constitution, Tushnet highlights the role of the Human Rights Commission, the public prosecutor, the auditor-general and the Electoral Commission.[34] This multi-institutional approach features significantly in the FMAG and NTF recommendations:

> a multi-institutional approach is about sharing human rights leadership and responsibility among parliament, government at all levels, and the courts, as well as our justice system more broadly. Such an approach also recognises the roles of regulators, the ombudsman, inspectorates and national human rights institutions in providing access to remedy and accountability for rights violations. In this way, the sum is greater than any of the parts, there is no reliance upon a single institution and a broader human rights culture can be developed. Very importantly, this approach also increases the extent to which the public can participate in law, policy and decision-making at all levels. It is public participation which is the best guarantor of human rights.[35]

The multi-institutional approach advocated by the NTF, which goes further than the fourth branch in amplifying the role of civil society and in recognising public participation as 'the best guarantor of rights',[36] is manifested in several different ways in its recommendations. First, there is a recommendation to ensure participation of communities in the making of decisions that affect them.[37] Likewise, as part of the implementation of the new framework, genuine inclusive and

32 Eleanor Roosevelt, 'Speech introducing the UDHR to the General Assembly of the United Nations' (1948) as cited in FMAG (n 14 above).

33 Mark Tushnet, *The Fourth Branch* (Cambridge University Press 2021). See also Bruce Ackerman, 'The new separation of powers' (2000) 113 Harvard Law Review 633; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2019) 194–197.

34 Tushnet (n 33 above) 1.

35 NTF (n 15 above) 19.

36 Ibid.

37 Recommendation 15.

intersectional public participation is seen as a key enabler of success[38] and would include elaborating on the meaning and content of rights in different sectors and contexts.[39] An explicit right to participation, drawn from the principles of international human rights law, is also recommended.[40]

Public and civil society participation are pillars of the multi-institutional framework, key to embedding and cultivating a human rights culture and adopting a human rights-based approach to implementation. International examples show that countries which have improved human rights protections have benefited from a strong, engaged, organised and informed civil society sector.[41] Civil society encourages progress by enabling discourses that make injustices public.[42] In the Scottish context, civil society can position itself at the vanguard of progressive change in deploying and consolidating resources across the spectrum to encourage a positive culture change by 'producing and providing information, educating the public and others, proposing public policies and taking legal action'.[43]

Progressive realisation and minimum core obligations

The UK's international obligations under the ICESCR require the state to take steps to achieve progressively the rights contained in the treaty.[44] Progressive realisation is an obligation that has been further defined over subsequent years by the CESCR.[45] It constitutes a number of integral components including the obligations to take steps to realise rights through concrete strategies; to respect, protect and fulfil rights; to gather and deploy the maximum available resources to realise rights in a way that is effective, efficient, adequate and equitable; to ensure non-discrimination in realisation of the right; to provide an immediately realisable minimum core of rights; to refrain from retrogressive steps; to ensure that any limitation on the enjoyment of a

38 NTF (n 15 above) 44 implementation requirements; policy objectives 27/28: public participation in the development of the framework and 29: explicit right to participation.

39 Recommendation 13 provides that 'there be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights, and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right'.

40 Recommendation 29.

41 See, for example, the discussion in pt 2 of Oscar Vilhena Viera and A Scott Dupree, 'Reflections on civil society and human rights' (2004) 1 SUR International Journal on Human Rights 47.

42 Ibid 57.

43 Ibid 58.

44 Art 2(1), International Covenant on Economic, Social and Cultural Rights 1966.

45 See, in particular, General Comment No 9 (n 5 above).

right can only be justified according to principles of legality, legitimacy and proportionality; and to provide access to an effective remedy if a violation of a right occurs (using reasonableness as a test to assess compliance – discussed below).

The obligation to progressively realise ICESCR is an obligation directed to the state party, the UK, and so subnational incorporation will require to contend with how to achieve this obligation without full autonomy over each of the integral components listed above. For example, without full fiscal autonomy the commitment to deploy the maximum available resources to fulfil a right will require an interpretation that works in a devolved context. Likewise, as discussed below, when an obligation engages with reserved areas of law (such as the international obligation to ensure non-discrimination and the reserved area of equality law) accountability gaps may continue to arise. As discussed below, we consider how further enhanced devolution may help to support a more comprehensive framework for the full incorporation of ESCR.

Recommendation 13 of the NTF suggests that 'there be a participatory process to define the core minimum obligations of incorporated economic, social and cultural rights, and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right'. This approach facilitates a model of incorporation that seeks to address a key critique of ESCR – that the rights can be vague or indeterminate.[46] A participatory model would enable a relative interpretation that is benchmarked against international standards whilst also enabling the fruition of subnational and participatory input to how the rights should be interpreted substantively. Ultimately, and because incorporation is occurring at the subnational level, this is a novel approach comparatively, however, it is not entirely unique. ESCR provision is often allocated to local or subnational levels for implementation under the principle of subsidiarity.[47] The UN Special Rapporteur has noted, therefore, the importance of ensuring that progressive realisation obligations apply across multiple-levels of government and has highlighted comparative practice across the globe where accountability has been levelled at the local and subnational level when progressive realisation has not occurred.[48] Ultimately, the obligations under international law rest with the state, and it is the state that remains responsible for their implementation (whether that be at local, subnational or national level).

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46 Boyle, *Economic and Social Rights Law* (n 1 above) 14.
47 Report of UN Special Rapporteur (n 8 above).
48 Ibid.

From irrationality to proportionality-inflected reasonableness

Enabling effective remedies for violations of ESCR in the UK requires that the intensity of review (the court's ability to investigate and assess the violation) is applied in a more expansive way – ie that standards for reasonableness are enhanced. There are typically three grounds of judicial review in the constituent parts of the UK: illegality, irrationality and procedural impropriety. The courts deploy varying intensity of review depending on circumstances, and there are two possible tests of irrationality deployed by UK courts in the assessment of human rights compliance: the domestic common law test of irrationality and the ECHR test of manifestly without reasonable foundation.[49] Initially, these tests were distinct, however, recent domestic jurisprudence suggests their alignment, which restricts intensity of review when dealing with matters of economic and social policy. This presents as a significant hurdle to adequate scrutiny of human rights by hindering the justiciability of ESCR in a way that might undermine a multi-institutional framework in which the court provides an important accountability mechanism.

The domestic common law test for irrationality (unreasonableness) is based on the well-developed *Wednesbury* reasonableness test where an action (or omission) must be 'so outrageous and in defiance of logic … that no sensible person who had applied his mind to the question … could have arrived at it'.[50] The test developed in ECHR jurisprudence relates to whether an act or omission is 'manifestly without reasonable foundation'. The latter forms part of a proportionality assessment when considering whether or not there has been a difference in treatment under article 14 ECHR (freedom from discrimination). A difference in treatment is considered to have no objective and reasonable justification if it does not pursue a legitimate aim or there is no reasonable relationship of proportionality.[51] There is a margin

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49 In some instances the more intense test of anxious scrutiny is applied in relation to fundamental rights (concerning civil and political rights). Anxious scrutiny relates to a closer form of scrutiny engaging with fundamental rights such as those covered by the ECHR. The courts apply anxious scrutiny when examining whether a government minister acted in a *Wednesbury* unreasonable fashion if the decision impinges on fundamental rights: *R v Home Secretary, ex parte Bugdaycay* [1987] 1 AC 514; *R v SSHD, ex parte Brind* [1991] 1 AC 696. However, for the purposes of this discussion we are focused on the tests typically applied when engaging with economic and social policy.

50 *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374.

51 *Stec and others v the United Kingdom* – 65731/01; 65900/01 [2006] ECHR 393 (12 April 2006) para 51.

of appreciation provided to states in determining whether a difference in treatment is proportionate. Initially, the European Court of Human Rights had encouraged a strong intensity of review where interference with the right(s) would require 'very weighty reasons'.[52] However, a wider margin of appreciation is granted to states in areas of economic and social policy, and the intensity of review is restricted to whether the decision was 'manifestly without reasonable foundation'.[53]

In *SC*,[54] the Supreme Court was tasked with assessing whether the policy to place a benefit cap on families with two or more children was manifestly without reasonable foundation. The court recognised that the two-child limit policy gave rise to a difference in treatment between children living in households with more than two children, compared to those with fewer, and that the policy had a disproportionate impact on women. Nonetheless, it decided the two-child limit had an objective and reasonable justification – it sought to pursue the legitimate aim of 'protecting the economic wellbeing of the country … to achieve savings in public expenditure and thus contribute to reducing the fiscal deficit'.[55] The policy was not considered unlawful, notwithstanding the disproportionate impact on women and children from larger families. In the leading judgment, Lord Reed sought to reconcile ECHR proportionality and domestic jurisprudence on irrationality in relation to matters of economic and social policy. Under both tests he suggests the courts are required to exercise deference to the political process. Indeed, the test applied in *SC* sets a higher threshold than manifestly without reasonable foundation. Drawing on the domestic test of irrationality in areas of economic and social policy, the court suggests that such decisions should 'not be open to challenge short of the extremes of bad faith, improper motive or manifest absurdity'.[56] This test has now been applied as part of common law domestic tests of irrationality[57] in areas of economic and social policy setting a particularly high threshold.

The Scottish model envisages a more prominent role for the court that requires intensity of review to be revisited. This was highlighted by the NTF in calling for,

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52 Ibid para 52.

53 Ibid.

54 *R (on the application of SC, CB and 8 children) v Secretary of State for Work and Pensions and others* [2021] UKSC 26, [2022] AC 223.

55 Ibid, para 190–193.

56 *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 597; *SC* (n 54 above) para 146.

57 *Secretary of State for Work And Pensions v Johnson & others* [2020] EWCA Civ 778 (22 June 2020) and *R (Pantellerisco and others) v SSWP* [2020] EWHC 1944 (Admin); *R (Pantellerisco and others) v SSWP* [2021] EWCA Civ 1454.

> a standard of review which takes into account international human rights law standards and best comparative practices in determining the reasonableness of a particular measure. For such purposes, the administrative and judicial bodies could, for example, take into account if the measures taken by the duty-bearer ensure the minimum levels necessary for a person to live a dignified life, if the measures taken were deliberate, concrete and targeted towards the fulfilment of the rights in the framework and if the measures taken were coordinated, coherent and comprehensive, among other criteria.[58]

This recommendation responds to a concern that domestic tests of irrationality and reasonableness fall short of international standards. Reasonableness would require to be interpreted more widely than irrationality,[59] lowering the bar for findings of incompatibility and aligning with jurisprudence in South Africa,[60] as well as the reasonableness test under the ICESCR Optional Protocol.[61] Liebenberg describes the approach adopted by the CESCR as 'proportionality-inflected reasonableness'.[62] On the continuum of the reasonableness standard,[63] ranging between weak reasonableness (aimed at excluding only manifestly unfair or irrational consequences) to strong reasonableness (incorporating a proportionality analysis), the Committee's analysis is based on the latter.[64] Such an approach would orientate Scottish ESCR jurisprudence towards a more proactive and intense analysis of measures than is currently available, aligning with international normative standards in assessments of human rights compliance.

The proposed Scottish legislation has not yet been published, and so at the time of writing it is not yet known how this will manifest on the

58 NTF (n 15 above) 50.

59 Katie Boyle, *Models of Incorporation and Justiciability for Economic, Social and Cultural Rights* (Scottish Human Rights Commission 2018).

60 *Government of the Republic of South Africa and others v Grootboom and others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

61 ICESCR Optional Protocol, art 8(4).

62 Sandra Liebenberg, 'Between sovereignty and accountability: the emerging jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42(1) Human Rights Quarterly 48–84; based on the blended type of proportionality inquiry developed by Katharine G Young, 'Proportionality, reasonableness, and economic and social rights' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017) 248, 268–271.

63 See Wojciech Sadurski, 'Reasonableness and value pluralism in law and politics' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds), *Reasonableness and Law* (Springer 2009) 129, 131–134.

64 See *Rodríguez v Spain*, Communication No 1/2013: views adopted by the Committee at its fifty-seventh session, UN CESCR, UN Doc E/C.12/57/D/1/2013 (2016) 8.4.

face of the Bill. As above, the recommendation of the NTF is to align with proportionality-inflected reasonableness used both comparatively and at the international level. It may be that this is achieved by outlining on the face of the Bill the different types of relevant considerations that a decision-maker should take into account (aligning with domestic administrative law). The broader reasonableness test includes considerations such as whether steps taken to deliver rights are deliberate, concrete and targeted, whether resource allocation is in accordance with international human rights standards, whether the approach adopted is the option that least restricts rights, whether steps taken were within a reasonable timeframe, whether precarious situations experienced by disadvantaged and marginalised groups have been addressed and whether the decision-making was transparent and participatory.[65] For example, in the case of *Ben Djaza and Bellili v Spain* the Committee assessed measures taken by the state in relation to a family who became homeless after an eviction. The reasonableness standard was deployed and required the state to make 'all possible effort, using all available resources, to realise, as a matter of urgency, the right to housing of persons who, like the authors, are in a situation of dire need'.[66] Both individual and structural factors were relevant (ie dealing with the particular circumstances of the family in question as well as the broader policies to realise the right to housing). As a remedy the state was required to engage in genuine consultation with the family to ensure access to adequate accommodation (individual remedy) and to develop a comprehensive plan with necessary resources, indicators, timeframes and evaluation criteria for the progressive realisation of the right to housing for people on a low-income (collective/structural remedy).[67]

65 Bruce Porter, 'Rethinking progressive realisation' (Social Rights Advocacy Centre 2015) 6; and UN CESCR, *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, UN CESCR, thirty-eighth session, UN Doc E/C.12/2007/1 (2007); Malcolm Langford, 'Closing the gap? – An introduction to the optional protocol to the International Covenant on Economic, Social And Cultural Rights' (2009) 27(1) Nordic Journal of Human Rights 2; General comment No 3 (1990) on the nature of states parties' obligations, para 2; UN Special Rapporteur on Housing, Access to justice for the right to housing, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to nondiscrimination in this context, 15 January 2019, A/HRC/40/61, paras 25–29.

66 E/C.12/61/D/5/2015, para 17.5.

67 Ibid para 21.

Dignity as a bridge

The NTF recommends that the new framework should place human dignity as the value which underpins all human rights forming a purposive foundation for interpretation[68] and aligning with constitutions and jurisprudence in, *inter alia*, South Africa,[69] Germany[70] and Colombia.[71] A reliance on dignity risks engaging the indeterminacy critique that the concept of dignity and related rights is too vague and therefore difficult to enforce.[72] However, recent qualitative research with Scottish practitioners suggests that dignity's use as a concept and language tool can provide an important bridge or gateway for users to what is often perceived as a very legalistic human rights framework.[73] Although steps are required to address the indeterminacy of 'dignity' as a concept, it is a term that is instinctive and plays a fundamental role in the interpretation of rights. The NTF recommendations envisage dignity as a key value and purposive and interpretative tool for defining the content of rights, for example, by providing a threshold in determining a social minimum, or minimum core entitlement. Whilst tests of reasonableness (discussed above) may provide appropriate thresholds for progressive realisation, dignity can act as a foundational minimum below which no person should fall, thus giving rise to a threshold where substantive enforcement of rights are expected. Dignity is not an unfamiliar legal concept within a regional human rights context,[74] and, as a result, courts in Scotland are already capable of enforcing substantive standards in the context of ECHR and European Union (EU) jurisprudence where the dignity

68 Recommendations Nos 9 and 10.

69 Mahlangu and another v Minister of Labour and Others (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).

70 Ingrid Leitjen, 'The German right to an *Existenzminimum*, human dignity, and the possibility of minimum core socioeconomic rights protection' (2019) 16(1) German Law Journal 23.

71 Colombian Constitutional Court, Decision T-025 of 2004.

72 For a discussion of the indeterminacy critique, see Boyle, *Economic and Social Rights Law* (n 1 above) 14, 19–22.

73 Elaine Webster, 'I Know It When I See It': Can Talking about 'Dignity' Support the Growth of a Human Rights Culture? (Human Rights Consortium 2022) 8.

74 Elaine Webster, 'The Underpinning Concept of "Human Dignity"', Academic Advisory Panel (June 2020) 8.

threshold may feature as a substantive enforceable minimum.[75] The Scottish proposal to use dignity as a purposive and interpretive tool could, thus, expand its use.

Substantive equality

The reservation of equal opportunities under the Scotland Act (SA) 1998[76] means that England, Wales and Scotland share a common equality framework.[77] The approach required under the Equality Act 2010 is based largely on the achievement of formal equality, which depends on a narrow interpretation of equal treatment so that 'like should be treated alike'.[78] The alternative approach – substantive equality – depends on a broader, more contextual understanding of existing disadvantage with a focus on outcomes and intervention seen as a necessary means to achieving equality in certain circumstances. It is this broader understanding of equality that underpins the international human rights framework.

A helpful example of a more substantive approach is found in the explanatory notes to section 1 of the Equality Act 2010 (which has not been commenced in England but has been commenced under devolved law in Scotland and Wales, discussed below). Section 1 of the Act provided that a public authority must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic

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75 In the context of art 3 and freedom from degrading and inhumane treatment, see *Napier, Re Petition for Judicial Review* [2004] Scot CS 100 (26 April 2004); in relation to art 4 ECHR and art 1, EU Charter of Fundamental Rights, see *Opinion of Lord Armstrong in the Petition JB (AP) for Judicial Review of a Decision of the Secretary of State* [2014] ScotCS CSOH_126 (14 August 2014); in relation to the precedent set down by *Limbuela, R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 (3 November 2005), see *Nyamayaro, (First) Natasha Tariro Nyamayaro and (Second) Olayinka Oluremi Ok against the Advocate General and the Commission for Equality and Human Rights* [2019] ScotCS CSIH_29 (7 May 2019).

76 'Equal opportunities', and therefore equality law, is a reserved matter subject to certain limited exceptions (SA 1998, sch 5 L2, as amended by s 37 of the Scotland Act 2016). The relevant legislation, the Equality Act 2010, is an Act of the Westminster Parliament and a protected enactment. There is some limited Scottish provision, where there is interplay with Scottish devolved legislation, in particular in education and housing, where legislative consent motions have been required.

77 Northern Ireland has its own regime as equality law is devolved under the Northern Ireland Act 1998.

78 This is the Aristotelian or formal equality principle which decrees that two people with equal status in at least one normatively relevant respect must be treated equally in this respect: Aristotle, *Nicomachean Ethics*, V.3. 1131a10–b15.

disadvantage. The explanatory notes 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.[79]

The purpose of the provision was to reduce inequalities of outcome in education, health, housing, crime rates or other matters associated with socio-economic disadvantage.[80] Under international human rights law, substantive equality is envisaged along a similar outcome-based conceptualisation.[81] MacKinnon, for example, proposes a social hierarchy approach that addresses systemic and structural inequality beyond the paradigm of equal opportunity for substantive equality to be achieved.[82] And Fredman argues that addressing poverty must feature as a component of substantive equality in a multidimensional framework that recognises and addresses the distributional, recognitional, structural and exclusive wrongs experienced by disadvantaged groups.[83]

Despite the common equality framework, regional variations, differences in lived experience and the divergent policy landscape can give rise to gaps in effective rights protection within Scotland,[84] which can be addressed or mitigated by the Scottish Government in certain respects.[85] Improved access to justice for all and the need for a better understanding of the causes and effects of intersectional

79 Explanatory Notes to the Equality Act 2010, para 23.

80 Ibid.

81 The international legal framework requires states to take positive steps to address the substantive inequality between different groups. This requires steps to achieve equality of outcome as opposed to equality of opportunity. For a discussion on substantive equality, see Sandra Fredman, 'Substantive equality revisited' (2016) 14(3) International Journal of Constitutional Law 712–738; and Catharine A MacKinnon, 'Substantive equality revisited: a reply to Sandra Fredman' (2016) 14(3) International Journal of Constitutional Law 739–746.

82 MacKinnon (n 81 above) 740.

83 Fredman (n 81 above) 738.

84 For examples, see Committee on the Elimination of Discrimination, Concluding Observations on the Twenty-first to Twenty-third Periodic Reports of United Kingdom of Great Britain and Northern Ireland CERD/C/GBR/CO/21-23 (CERD 2016); Equality and Human Rights Commission, 'Is Scotland Fairer?' (25 October 2018); Scottish Human Rights Commission, Submission to the United Nation's Committee on the Elimination of All Forms of Discrimination Against Women (2018).

85 See Nicole Busby, *CEDAW*, and Nicole Busby and Kasey McCall-Smith, *UN Treaties* (Academic Advisory Panel to the National Taskforce for Human Rights Leadership 2021).

discrimination are recurring themes in reviews of equality and human rights legislation in Scotland and beyond.[86]

Furthermore, the incorporation process offers scope for improvements in the application and interpretation of existing equality law. The reserved and somewhat restrictive equality framework applies in the devolved policy landscape with some, albeit limited, opportunities to take a more substantive approach in line with its international human rights obligations. Where the Equality Act 2010 does apply directly, the Scottish-specific duties under the public sector equality duty[87] and the socio-economic duty[88] (enacted as the Fairer Scotland Duty)[89] enable public service providers in Scotland to take a more outcomes-focused approach which has perhaps been missing to date.[90] The post-incorporation landscape envisaged by the NTF thus has the potential to catalyse the existing equality duties as well as to provide an opportunity to test the boundaries of some existing provisions of the Equality Act 2010[91] and to fully explore the exceptions to the reservation of equal opportunities under the Scotland Act.[92] In other words, the exceptions to the reservation of equal opportunities open the door to treat the formal equality framework as a floor (as opposed to a ceiling) upon which further enhanced equality measures can be built. If utilised to its full extent to aid the realisation of human rights, incorporation could lead over time to profound and progressive change in equality law by elevating social and economic rights beyond the restrictive formal approach towards a more substantive formulation capable of achieving socially just outcomes.

Collective justice

Effective access to justice for ESCR requires recognition that violations are often clustered in nature,[93] so that violation of one right can impact

86 Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019).

87 Equality Act 2010, s 149; Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 No 162. The Scottish Government has recently conducted a public consultation exercise with a view to improving the regime surrounding the Scottish-specific duties. See Scottish Government, 'Public Sector Equality Duty Review'.

88 Equality Act 2010, s 1.

89 By the Equality Act 2010 (Scotland) Regulations 2018.

90 See Equality and Human Rights Commission, Effectiveness of the PSED Specific Duties in Scotland (20 September 2018) 51.

91 For example, the positive action provisions (ss 158 and 159, Equality Act 2010) discussed in Busby (n 85 above) 6.

92 See, in particular, the second exception added by the Scotland Act 2016 (amended sch 5, L2).

93 Luke Clements, *Clustered Injustice and the Level Green* (Legal Action Group 2020); Boyle et al (n 1 above).

on the enjoyment of others, and that they are often systemic, affecting multiple people or groups rather than one individual. Traditional 'single issue' lawyering is ill-equipped to deal with such multiple synchronous clustering of legal problems,[94] and the individualised and siloed legal system can be unresponsive to systemic violations.[95] A renewed access to justice framework therefore requires a shift away from such individualisation. The NTF proposes enhanced access to justice mechanisms to overcome traditional barriers relating to costs, standing,[96] legal advice and advocacy, and goes further in aligning with international human rights law by recommending that remedies are accessible, affordable, timely and effective.[97] Regulators, inspectorates, ombudsmen and complaint-handlers should systematically embed human rights standards or approaches into their ways of working as part of everyday accountability.[98] When other mechanisms fail, the judiciary should issue appropriate and effective orders to deal with violations, including guarantees of non-repetition.[99]

The NTF recognises that further work on access to justice is required, suggesting that the framework could provide for the full range of appropriate remedies under international law, including targeted remedies such as structural interdicts.[100] Related language on the use of structural remedies for systemic issues draws on different framings of individual versus collective/[101]systemic/[102]structural relief; specific versus general measures;[103] and simple versus complex remedies.[104] The use of the term structural orders covers the broad field of remedial responses including a complex aggregate of remedies

94 Clements (n 93 above).

95 Ibid 2.

96 Policy Objective 23 suggests standing should be based on sufficient interest, rather than victimhood, and should extend to collective standing and third-party standing in public interest litigation.

97 Recommendation 21.

98 Policy Objective 22.

99 Policy Objective 25.

100 Recommendation 25.

101 Also, in relation to class action, multi-party proceedings and group proceedings.

102 'Systemic' and 'structural' can be used interchangeably in the literature and in practice. See further Kent Roach, *Remedies for Human Rights Violations* (Cambridge University Press 2021); and for national examples of interchangeable use of the term structural remedies, see the South African Constitutional Court and Kenyan Constitutional Court which have issued 'structural remedies' which are framed in similar terms: *Mahlangu and another v Minister of Labour and others* [2020] ZACC 24; *Equal Education and others v Minister of Basic Education and other*s (22588/2020) [2020] ZAGPPHC 306; and *Mitu-Bell Welfare Society v Kenya Airports Authority*, SC Petition 3 of 2018

103 Roach (n 102 above) 77.

104 Ibid.

(interim, delayed, declaratory and mandatory orders), and offers individual and systemic/structural relief involving both individual or collective cases where there may be multiple defendants and the court may perform a supervisory role post-judgment. Structural orders, which may help to ensure effective remedies are available for violations of human rights, are one tool of many and so should be viewed as part of a range of remedies across a spectrum (deferential to interventionist) available to the judiciary. The more flexible the remedial framework is the better-placed the judiciary will be to respond appropriately to ensure the deployment of effective remedies in line with international human rights law.

The existing system within the UK is well placed for development in this respect as available judicial remedies already enable wide-reaching responses to violations of human rights.[105] Existing remedies could be combined in some cases to deploy structural interdicts in response to systemic issues.[106] Such an approach would align with social rights jurisprudence in South Africa,[107] Kenya,[108] Colombia,[109] the United States[110] and Canada[111] among others and has been recommended by the Academic Advisory Panel,[112] the Scottish Human Rights Commission[113] and the Bonavero Institute of Human Rights.[114]

105 Remedies in England and Wales include mandatory orders, quashing orders, prohibitory orders and damages in human rights cases. Remedies in Scotland include reduction, declarator, suspension and interdict, specific performance or specific implement, liberation, interim orders or damages. Remedies in Northern Ireland include quashing orders, mandatory orders, prohibitory orders, declarations, injunctions or damages.

106 Katie Boyle, Access to Remedy – Systemic Issues and Structural Orders (Academic Advisory Panel 30 November 2020).

107 *Equal Education and others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP) (17 July 2020).

108 Petition No 3 of 2018. For a discussion of this recent case, see Victoria Miyandazi, 'Setting the record straight on socio-economic rights adjudication: Kenya Supreme Court's judgment in the Mitu-Bell case' (*Oxford Human Rights Hub* 1 February 2021).

109 Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (Oxford University Press 2017) ch 6 on social rights.

110 Katharine Young, 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) 8(3) International Journal of Constitutional Law 385.

111 Kent Roach, *Constitutional Remedies in Canada* 2nd edn (Canada Law Book 2013).

112 Boyle, *Access to Remedy* (n 106).

113 Boyle, *Models of Incorporation and Justiciability* (n 59), and Scottish Human Rights Commission, *Adequate and Effective Remedies for Economic, Social and Cultural Rights: Background Briefing Paper for the National Taskforce on Human Rights Leadership* (December 2020).

114 Cepeda et al (n 28 above).

THREATS TO PROGRESS

Despite the potential opportunities that exist for Scotland to align its human rights framework with international law, the erosion of devolution raises a number of threats. Such erosion is occurring by way of a number of UK-led strategies, particularly in response to policy gaps resulting from Brexit. This section considers these threats concluding that, although devolution provides an important anchor and can mitigate threats to rights at the national level, increasing centralisation is making this more and more difficult in practice.

First, there is a real risk to the operation of devolved 'consent' in the context of the UK Parliament legislating in devolved matters. The 'Sewel Convention', originally a parliamentary convention[115] and subsequently a legislative provision,[116] means that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature. However, the convention has become the subject of controversy in recent years following a number of occasions when the UK Parliament passed legislation despite devolved legislatures withholding consent.[117] This position was exacerbated in the aftermath of the Brexit referendum, when the UK Parliament passed the EU Withdrawal Act 2018 without consent from the Scottish Parliament[118] and the European Union Withdrawal Agreement Act 2020 without consent from all three devolved legislatures. In 2017, the Supreme Court had held that 'policing the scope and manner of [the Sewel Convention's] operation does not lie within the constitutional remit of the judiciary'.[119] Thus, despite being embedded in legislation, there is no recourse to a remedy in court should the UK Parliament proceed without consent in legislating in either reserved or devolved areas in Scotland, making the consent mechanism more procedural than substantive in nature.

Second, in the wake of Brexit there has been a process of recentralising power, including in devolved areas. The recentralisation of certain powers, evidenced by the provisions of the Internal Market Act 2020, poses a threat to current devolution and human rights in

115 Lord Sewel indicated in the House of Lords during the passage of the Scotland Bill (HL Deb 21 July 1998, vol 592, col 791) that 'we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'.

116 See Scotland Act 2016, s 2, and Wales Act 2017, s 2.

117 The Welsh Senedd voted against giving consent to the Police Reform and Social Responsibility Bill in 2011; the Scottish Parliament withheld consent on aspects of the Welfare Reform Bill 2011; the Northern Ireland Assembly withheld consent on the Enterprise Bill 2015.

118 The Welsh Senedd also withheld consent initially but later conceded.

119 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 (24 January 2017) para 151.

two respects. The UK Government's adoption of certain minimum human rights standards with application across the UK could lead to a downward trajectory in the devolved nations' progress – a levelling down of rights. Further, the loss of autonomy on fiscal matters may directly and negatively impact on the resources required to deliver overlapping rights in health, education, housing and so on. It directly impacts on the allocation of funding for the fulfilment of ESCR, a key component of the international human rights framework that requires resources to be deployed for the enjoyment of those rights to the maximum available. Under the provisions of the Internal Market Act 2020 the UK Parliament has granted UK ministers the power to take budgetary decisions on devolved matters thereby bypassing the Scottish Parliament.[120] Such powers include the provision and operation of infrastructure in Scotland in relation to water, rail services, health care, education, court services and housing, all of which are currently under devolved administration.[121] The centralisation of decision-making regarding the prioritisation of funding in devolved policy areas[122] enables the UK Government to exercise unilateral control over the Shared Prosperity Fund, the UK's replacement for the European Structural Funds.[123] Scotland and Wales's devolved administrations have opposed this shift in decision-making on the grounds that it goes against 'promises repeatedly made that Brexit would not mean any loss of funding and that the devolution settlement would be respected'.[124]

Third, the UK Government's approach has potentially further exacerbated structural inequality, again creating a ripple effect in the enjoyment of ESCR in devolved areas such as health and food. The UK Government did not produce a full equalities impact assessment of Brexit which would have provided a review of its predicted legal and socio-economic effects on different groups of people across the UK. An independent report commissioned by the Scottish Government in 2020[125] identified 137 potential social impacts in Scotland, including

120 Scottish Government, *After Brexit: The UK Internal Market Act and Devolution* (Scottish Government 2021).

121 Internal Market Act 2020, s 50.

122 Equality Act 2010, pt 6. For a detailed analysis of the potential impact of the centralisation of previously devolved funding, see Jess Sargeant and Alex Stojanovic, *The United Kingdom Internal Market Act 2020* (Institute for Government 2021) 23–24.

123 Which, according to reports, were worth approximately £2.1 billion per year split across regional development, agriculture and social funding: see Philip Brien, *The Shared Prosperity Fund* (House of Commons Library 2021) 29.

124 See the Welsh Government's Joint Press Release with the Scottish Government (24 November 2020).

125 Eve Hepburn, *Brexit: Social and Equality Impacts* (Scottish Government 2020).

in respect of the Equality Act 2010's 'protected characteristics'[126] as well as those with other personal characteristics who may face social exclusion or discrimination. Impacts include the loss of legal rights, employment protections, funding opportunities, healthcare rights and impacts on food, fuel and medicines. Although the loss of certain rights and services may have an apparently neutral application, such losses are distinct in terms of how they happen, whom they affect, or both.[127]

Fourth, the UK Government has introduced a proposed 'Bill of Rights' to replace the Human Rights Act 1998 (HRA) a result of which will mean the diminution of rights and remedies at the national and subnational level. The Bill was introduced to Parliament on 22 June 2022 and has, at the time of writing, not yet had its second reading with no date currently scheduled. The Bill of Rights (and the associated agenda on administrative law reform) is regressive human rights reform – where existing rights are diminished rather than progressed. The legislation includes more stringent rules on standing and attempts to undermine the positive obligations that form part of ECHR compliance, leading in some cases to further limitations on economic and social rights protections. As discussed below, there are increasing national trends that overlook the complexities of devolution as the UK Government presses ahead with reform, whether by design or a lack of awareness of the potential seismic changes at the devolved level. For example, the draft legislation[128] contains a clause which will remove the interpretive obligation provided by section 3 of the HRA. Section 3 requires that all primary and secondary legislation should be read, in so far as it is possible to do so, as compatible with the ECHR. It has been deemed an obligation of 'an unusual and far-reaching character'.[129] Devolved legislation is secondary legislation under the HRA. There is no analogous replacement of section 3 within the Bill of Rights, and there has been no consideration of how this change might interact with the devolved interpretative obligations.[130] Section 101 of the SA 1998, by way of example, requires the court to read legislation as narrowly as is required to be within competence of the Scottish Parliament if such a reading is possible. Both section 3 and section 101 are interpretative obligations, and both require devolved legislation (in relevant circumstances and where possible) to be read as compatible with ECHR. Section 3 is a direct ECHR interpretation clause

126 Equality Act 2010, s 4, lists the protected characteristics as age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

127 Hepburn (n 125 above) 5.

128 The Bill of Rights Bill was introduced to the House of Commons on 22 June 2022.

129 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, Lord Nicholls at para 30.

130 See SA, s 101; NIA, s 83; GOWA, s 154.

whereas section 101 is an ECHR interpretative clause via section 29 of the Scotland Act, which provides that anything incompatible with the ECHR is beyond devolved competence.

One potential consequence of this change may be that the UK Parliament, uninhibited by section 3 of the HRA 1998, may make legislation in devolved areas of law that directly infringes ECHR rights without interpretative remedies available to the court, something that would be beyond the competence of the Scottish Parliament to do under section 29, and something that the courts could remedy via the devolved interpretative clause should the circumstances arise. Likewise, the Bill proposes extending the scope of declarations of incompatibility to apply to secondary legislation[131] (noting again that devolved statutes are considered secondary legislation under the HRA 1998) without recognising the potential impact of this at the devolved level where strike-down powers are already available for incompatible devolved legislation. At the very least, this creates an anomaly for the judiciary where a declaration of incompatibility remedy would be available for incompatible legislation, which under the SA 1998 would be deemed *ultra vires* and 'not law'. Devolution and the devolved frameworks are an afterthought, rather than an integral part of this national reform.

The erosion of devolution and the devolved settlements has contributed to disquiet around the constitutional settlement. A previous UK government advisor has warned against the onset of 'know your place unionism'[132] and, following the 2021 election of a pro-independence majority in the Scottish Parliament, the Prime Minister called for a summit on the future of the UK.[133] The success of the intervention on intergovernmental relations in the post-Brexit landscape is yet to be determined. There is an underlying tension as to the constitutional future of devolved jurisdictions within the UK with devolved governments often pulling in different directions. This tension can be illustrated in the context of human rights with regressive trajectories at the national level in stark contrast to the more progressive examples of reform in the devolved jurisdictions.

131 Bill of Rights Bill, cl 10(1)(b)(i).

132 Neil Mackay, 'Exclusive interview with former intelligence chief: "Boris and Tory government are gaslighting Scots over indyref2"' *Herald Scotland* (Glasgow 2 May 2021).

133 Christopher Hope, 'Boris Johnson asks Nicola Sturgeon to a "save the Union" summit' *The Telegraph* (London 8 May 2021).

(RE)IMAGINING ENHANCED DEVOLUTION

The changes imposed on Scotland by Brexit and the UK Government's handling of it have reignited calls for Scottish independence: the Scottish Government has published a draft Referendum Bill.[134] Since taking office First Minister Humza Yousaf has indicated a more cautious approach to the calling of another referendum than his predecessor, preferring to wait until there is a 'consistent majority' in favour of independence and seeking consent from the UK Parliament to do so (implying use of a section 30 order discussed below).[135] Whether a referendum would deliver independence and what the effect on Scotland's human rights framework would be are difficult to gauge. There are currently no proposals to extend Scotland's devolution settlement. Indeed, since taking office, Prime Minister Rishi Sunak has criticised the Scottish Parliament for not using existing powers enough, indicating no further devolution should occur.[136] Nonetheless, given the renewed focus on independence, it is at least possible that the extension of powers in policy areas with a direct link to human rights protections might be considered. In the next section, the potential scope for human rights progression under enhanced devolution arrangements is considered. The process for requesting an amendment to the current settlement is set out in the SA 1998, whereby a section 30 order can be made which grants legislative authority on a temporary or permanent basis to the Scottish Parliament in a specified area. Section 30 orders can be initiated either by the Scottish or UK Governments but require approval by the House of Commons, the House of Lords and the Scottish Parliament before becoming law.[137] In the current context, this seems unlikely but, given the sensitive constitutional issues at stake and the UK Government's desire to protect the Union, it is possible that circumstances may change.[138] If such a request *was* made and approved, the most obvious areas of focus for enhanced rights protections would surely be in respect of those groups and individuals

134 Scottish Government, 'Scottish independence' (22 March 2021).

135 Chris Mason and Nick Eardley, 'SNP plays longer game in bid for Scottish independence' (*BBC News* 29 April 2023)

136 Severin Carrell, 'Conservatives will not devolve more powers to Scotland, Rishi Sunak says' (*The Guardian* 23 April 2023).

137 There are equivalent provisions in the GOWA 2006 and NIA 1998.

138 Following the previous Scottish Independence Referendum, the Smith Commission recommended the further devolution of equal opportunities to Scotland, specifically that: 'The powers of the Scottish Parliament will include but not be limited to the introduction of gender quotas in respect of public bodies in Scotland. The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas.' See Smith Commission, Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament (2014) para 60.

who fall between the current structural gaps resulting from the uneven matching of reserved and devolved powers. Examples include asylum seekers; the victims of trafficking; those workers who, because of a lack of employment status and/or their engagement in precarious forms of work, are not able to enjoy the full protection available to those with employment security; and, cutting across all of these groups, individuals and groups experiencing extreme poverty.[139]

Employment law has long been the subject of calls for greater devolved powers.[140] In the post-Brexit environment, such a move would facilitate the Scottish Parliament's objectives of non-regression and keeping pace with the EU's social policy agenda as the minimum standards guaranteed by EU law become vulnerable to change.[141] Despite the UK Government's announcement in 2019 that protection for EU workers' rights would be included in an Employment Bill,[142] no such Bill has yet been published. Scotland's ability to act independently is limited to the promotion of support for employment with attention focused in recent years on the promotion of fair working practices through the Fair Work Action Plan,[143] aimed at the achievement of a range of policy initiatives including employer accreditation schemes on the living wage,[144] carer support,[145] and facilitating the return of women workers to the labour market.[146] In the context of incorporation, the devolution of employment law to Scotland would certainly open up a myriad of legislative interventions capable of bringing improvements for those experiencing disadvantage. However, given the direct relationship between economic policy and employment law, further powers in this respect would seem to be very unlikely. Equality law and immigration and asylum law are two areas which have also been the subject of calls for greater powers for Scotland.[147] Both have the

139 See Professor Philip Alston (United Nations Special Rapporteur on extreme poverty and human rights), Statement on Visit to the United Kingdom (UN 2018).

140 Most recently, in June 2021, the Social Justice Secretary Shona Robison called on the opposition parties in Holyrood to support her bid for the full devolution of employment law as a means of tackling child poverty and building a fairer and more equal country. See Devolution of Employment Powers to Tackle Poverty: Letter to Party Leader (Fairer Scotland 6 June 2021).

141 Michael Ford QC, Workers' Rights from Europe: The Impact of Brexit (TUC 2016).

142 See the Queen's Speech (Prime Minister's Office 2019) 43.

143 Scottish Government, Fair Work: Action Plan (Scottish Government 2021).

144 Poverty Alliance, 'The real Living Wage for the real cost of living' (Living Wage Scotland).

145 Carer Positive, 'Carer Positive Employer in Scotland'.

146 Employability in Scotland, 'Women in the Economy'.

147 See, for example, the First Minister's National Advisory Council on Women and Girls, Report and Recommendations (2020) Recommendation 1, 11.

potential to make a significant contribution to the better realisation of human rights in Scotland.

Equality law

The UK Government has already devolved aspects of equality law, including devolving the competence to implement the socio-economic equality duty under section 1 of the Equality Act 2010, to the Scottish Parliament and Welsh Senedd (equality law is already largely devolved in Northern Ireland). Further devolution of equality law would enable the Scottish Parliament to implement fully the changes necessary for Scotland to fulfil its international obligations.[148] The necessary shift from a formal to substantive approach to equality required if the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (UNCRPD) and the Convention of the Elimination of all forms of Racial Discrimination (UNCERD) are to be fully implemented would bring about alignment of domestic law with the international human rights framework, enabling substantial progress in the realisation of the rights of women, disabled people and in relation to race and ethnicity. In addition, the NTF's recommendations[149] include a right for older people to lead a life of dignity and independence and to take part in social and cultural life, as provided for by the EU Charter of Fundamental Rights,[150] and an equality clause that would provide for the protection and promotion of the full and equal enjoyment of rights of LGBTQI people.[151] The devolution of equality law would enable these rights to be given meaningful effect, so as to ensure, as far as possible, equality of outcome for all protected groups.

The full devolution of equality law would make it possible to extend the relatively narrow range of categories deemed as protected characteristics under the Equality Act 2010.[152] An obvious choice for inclusion would be socio-economic status. The Equality Act 2010 does provide for a socio-economic duty which requires public bodies to adopt transparent and effective measures to address the inequalities that result from differences in occupation, education, place of residence

148 See Nicole Busby, 'The Essential Features of an Equality Clause and the Potential Incorporation of CEDAW', and Nicole Busby and Kasey McCall-Smith, 'Incorporation of the CERD and CRPD and Equivalent Rights Provision for LGBTI Communities and Older Persons' (Academic Advisory Panel Papers for the National Taskforce for Human Rights Leadership).

149 NTF Report (n 15 above).

150 Ibid Recommendation 6.

151 Ibid Recommendation 7.

152 See Busby (n 148 above).

or social class.[153] The competence to enact this duty was transferred under the Scotland Act 2016. This duty was thereafter enacted by the Scottish Parliament as the Fairer Scotland Duty in 2018[154] and came into effect in Wales on 31 March 2021.[155] The UK Government has no plans to introduce the duty in England. The Equality and Human Rights Commission has conducted an evaluation of the socio-economic duty in Scotland and Wales[156] which found that, although some early positive signs could be deduced in relation to its influence over decision-making, its full impact in relation to setting or tackling specific priorities had not yet been felt.[157] Providing real and measurable improvements to people's lives was considered a longer-term aspiration for the duty in both Scotland and Wales.[158] The duty falls far short of a legal right not to be discriminated against on the grounds of socio-economic status or social class, a right that is recognised by the constitutional provisions of some jurisdictions[159] and has been the subject of proposals for reform in others.[160] Importantly, the extension of the framework to explicitly include socio-economic status would bring domestic law into line with the provision of the ICESCR.[161]

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153 Equality Act 2010, s 1, which provides: 'An authority ... must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.'

154 The Equality Act 2010 (Commencement No 13) (Scotland) Order 2017. For the associated guidance, see 'Fairer Scotland Duty: interim guidance for public bodies'.

155 Equality Act 2010 (Authorities subject to a duty regarding Socio-economic Inequalities) (Wales) Regulations 2021. For an overview of the duty, see 'Socio-economic duty: an overview'.

156 Equality and Human Rights Commission, Evaluating the Socio-Economic Duty in Scotland and Wales (2 March 2021).

157 Ibid 8.

158 Ibid.

159 Examples include South Africa and India.

160 Irish Equality (Miscellaneous Provisions) Bill 2021, currently before Dáil Éireann, second stage, contains a definition of a disadvantaged socio-economic status ground.

161 The UN CESCR has noted: 'While welcoming the adoption of the Equality Act 2010, the Committee is concerned that some of its provisions, particularly those relevant for enhancing the protection of economic, social and cultural rights without discrimination, are not yet in force, such as the duty of public authorities to consider socioeconomic disadvantage in decision-making processes and the prohibition of intersectional discrimination. The Committee also regrets that, despite its previous recommendation, the Equality Act 2010 is not applicable in Northern Ireland and does not explicitly include all prohibited grounds of discrimination, such as national or social origin (art. 2(2)).' See CESCR 2016 (n 2 above).

Immigration and asylum law

Nationality, immigration and asylum are reserved matters,[162] although the devolved administrations are responsible for related policies which assist and support migrant integration in the host nation including ensuring access to essential services such as healthcare, housing and education. Approaches to migrant integration in England and the devolved nations have increasingly diverged. Since the early 2000s the UK Government's Department for Communities and Local Government, which has responsibility for migrant integration in England, has adopted 'community cohesion'[163] in place of a multicultural understanding of integration.[164] This shift followed an independent review which concluded that tensions between different communities could be overcome through an emphasis on British citizenship and core British values.[165] Community cohesion has been articulated as representing a 'clear sense of shared aspirations and values, which focuses on what we have in common rather than our differences'.[166]

In contrast, the multicultural approach which celebrates difference and diversity has underpinned the Scottish Government's migrant integration policy since the early days of devolution when demographic concerns relating to Scotland's population led to the adoption of a broadly consensual position among Scotland's political parties that migration provides 'an important economic and cultural resource for Scotland'.[167] The 'One Scotland, Many Cultures' campaign, launched by the Scottish Executive in 2002 and renamed 'One Scotland' in 2005,[168] places multiculturalism at its centre. The Scottish Government has called for further devolution of immigration and asylum law,[169] albeit with much of the discussion to date focusing on an economic rationale,

162 Scotland Act 1998, sch 5, pt II, s B6.

163 See Department for Communities and Local Government, 'Creating the conditions for integration' (21 February 2012).

164 Derek McGhee, *The End of Multiculturalism? Terrorism, Integration and Human Rights* (Open University Press 2005).

165 Ted Cantle, *Community Cohesion: Report of the Independent Review Team* (Home Office 2001).

166 David Cameron, 'Prime Minister's speech to Conservative party members on the government's immigration policy' *The Guardian* (London 14 April 2011).

167 Eve Hepburn, Migrant Integration in Scotland: Challenges and Opportunities (Iriss 2020); see further Eve Hepburn and Michael Rosie, 'Immigration, nationalism and political parties in Scotland' in E Hepburn and R Zapata-Barrero (eds), *The Politics of Immigration in Multilevel States: Governance and Political Parties* (Palgrave Macmillan 2014).

168 Scottish Government, One Scotland.

169 Scottish Government, Scotland's Population Needs and Migration Policy: Discussion Paper on Evidence, Policy and Powers for the Scottish Parliament (2018).

rather than on the specific needs of new migrant populations.[170] Although Scotland does not have an integration policy relevant to all migrant groups, it does have separate policy strands which are intended to promote a welcoming and inclusive environment including the 'Stay in Scotland Toolkit' aimed at EU migrants, launched in 2019 in response to Brexit,[171] and the New Scots Refugee Integration Strategy,[172] which offers support including access to public services to asylum seekers from the first day of entry into Scotland. Some of the UK Government's provisions which restrict access to social rights have not been applied in Scotland, so that, for example, access to free English for Speakers of Other Languages classes for those in the asylum system and to further education, although restricted, remain in place.[173] The Scottish Government has also made clear its intention to change the law so that asylum seekers can obtain a work permit.[174] This is currently prohibited under UK law and any such change would be difficult to achieve under current devolution arrangements by which decisions about levels of migration, nationality status and resulting rights are managed by the UK Government's Home Office.

In July 2021 the UK Government introduced the Nationality and Borders Bill to the House of Commons, heralded as 'the cornerstone of the government's New Plan for Immigration, delivering the most comprehensive reform in decades to fix the broken asylum system'.[175] Both the Scottish and Welsh legislatures withheld consent in the passing of the Bill. Despite ongoing concerns that a number of the measures were likely to interfere with areas of devolved policy[176] and that some of the provisions are incompatible with international law and likely to damage access to justice,[177] the Nationality and Borders Act 2022 received royal assent and became law on 28 April 2022. Examples of where the new legislation impinges on areas of devolved policy include the arrangements regarding the identification,

170 Silvia Galandini, Gareth Mulvey and Laurence Lessard-Phillips, 'Stuck between mainstreaming and localism: views on the practice of migrant integration in a devolved policy framework' (2019) 20 Journal of International Migration and Integration 685, 689.

171 Scottish Government, 'EU citizens staying in Scotland: support and toolkit for EU citizens, their employers and landlords' (17 August 2019).

172 Scottish Government, 'New Scots: refugee integration strategy 2018 to 2022' (10 January 2018).

173 Ibid.

174 Ibid.

175 Home Office, 'Nationality and Borders Bill' (6 July 2021).

176 Jen Ang, 'Legal opinion: what does the Nationality and Borders Bill mean for devolution in Scotland?' (*Justright Scotland* 30 November 2021).

177 See commentary by the Law Society, 'Nationality and Borders Act' (24 February 2023).

support and safeguarding of vulnerable groups, including survivors of gender-based violence and of trafficking and exploitation,[178] families who are destitute and homeless and unaccompanied children arriving in Scotland. UK strategy designed to 'take back control' of Britain's borders looks increasingly at odds with Scotland's vision of itself as an inclusive and welcoming place – a vision that could only be fully realised with enhanced devolved powers in relation to migration and asylum policy.

Although it is tempting to speculate about the difference that further devolved powers in specific policy areas would make to the full realisation of human rights in Scotland, the piecemeal and isolated development of domestic rights cannot be fully effective as the demarcations that characterise law and policymaking are rarely, if ever, reflected in the complex reality of lived experience. A fully operational human rights framework will require the devolution of a range of social and economic policy areas, including integration of employment, equality and immigration and asylum law and policy, alongside a fully devolved social security system.

CONCLUSIONS

The devolved trajectory sheds light on the inconsistencies between national and subnational framings of rights and in particular ESCR. Once enacted, the Scottish framework will (in so far as it is possible to do so) enable ESCR justiciability in line with international and comparative best practice supported by a multi-institutional framework that seeks to ensure accountability across the institutions of government through everyday accountability mechanisms. Despite the increasing resistance at national level, devolution has created a constitutional framework for the ECHR as a minimum level of human rights protection that anchors the rest of the UK to normative standards. In the context of human rights progression, devolution has also provided clear opportunities to build on this foundation and close the UK's accountability gap in ESCR protection at the subnational level. There are now several examples of progress in the protection of such rights at the devolved level, including direct incorporation of international treaties.

Scotland's incorporation agenda provides an opportunity to embed international normative standards across a range of ESCR. However, it is not without its limitations. Devolution is complex. It does not apply universally across each devolved jurisdiction, meaning that in practice three very different forms of devolution operate simultaneously

178 An area in which Scotland has its own legislation in place in the form of the Human Trafficking and Exploitation (Scotland) Act 2015.

across the UK's devolved nations. Furthermore, in each jurisdiction there is further complexity in relation to what constitutes a devolved, transferred, excepted or reserved matter (the latter of which takes on a different meaning in Northern Ireland). This creates a complex web for the individual or organisation trying to navigate intertwined and yet separate devolved legal jurisdictions. However, despite the divergence that devolution brings, it can also inspire and lead unified action across the devolved nations, particularly in relation to any perceived or actual threat to, or destabilisation of, the current guarantees in relation to the protection of international human rights standards by the UK Government or Westminster Parliament. This is because the legislatures in each of the devolved jurisdictions have legislative competence to observe and implement international human rights obligations. Devolved ambitions to align with international normative standards can be seen to have had an ongoing stabilising effect on ensuring that the guarantees relating to international human rights standards, with which the UK has after all agreed to comply, are maintained. This is an outcome with positive discernible benefits for all those protected by human rights within the UK.

As well as providing an important human rights anchor on national reform, devolution also plays a key role in enabling deeper conversations on the UK's human rights landscape. The diverging trajectories, whilst on the one hand problematic, as people living in different parts of the UK enjoy different levels of protection, also offer the opportunity for devolved jurisdictions to demonstrate the various ways in which human rights progress can be achieved in a teleological framing of rights protection. However, the sub-divisions and silos that characterise law and policy-making frameworks rarely reflect the realities of people's lived experience. If it is to be fully integrated and truly effective, Scotland's future human rights framework will require a restructuring of the existing law and policy frameworks relevant to ESCR, something that will be difficult under the existing allocation of competences. For the implementation and observance of international human rights standards, including ESCR, further devolution of a range of social and economic policy areas may indeed be required to close the accountability gap at the subnational level where such observance is not forthcoming at the national level.