

Economic and Social Rights Law

Incorporation, Justiciability and
Principles of Adjudication

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Chapter 1 Principles of ESR Adjudication

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1 Principles of ESR Adjudication

The book examines the potential models of incorporation (ways of embedding rights into domestic law) for economic and social rights (ESR) at the national and devolved (subnational) level and the justiciability mechanisms (adjudication by a court) that enable access to effective remedies in court for violations of ESR. In so doing, the book develops principles of ESR adjudication (the building blocks of good practice) and categorises justiciability mechanisms for ESR enforcement at both the national and devolved level.

The book is written with a view to empowering rights-holders and those who support them by setting out routes to remedy for violations of rights and also exploring options for long-term structural change. It is therefore also designed to provide decision makers and those exercising state power with feasible options for progressive human rights reform. It contributes to the academic discourse whilst also engaging with the practicalities of access to justice. The research tells us that there is a significant legal accountability gap in the protection of ESR across the UK jurisdictions and much of the international framework is ignored or rejected unless incorporated.¹ Human rights are conceptually framed in a way that excludes the operation and enforceability of ESR. Indeed, the national political discourse around social rights is dominated by existing domestic human rights structures and our existing domestic human rights structures marginalise ESR to the sidelines² – such as forming aspects of civil and political rights, or featuring as part of formal equality.³ This book re-conceptualises human rights in the UK by bringing in both the devolved and international perspectives. By doing so it becomes clear that the human rights story in the

1 Katie Boyle, *Models of Incorporation and Justiciability for ESC Rights*, Scottish Human Rights Commission (2018), available at www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf

2 For a discussion on this see Paul Hunt, *Social Rights Are Human Rights BUT THE UK SYSTEM IS RIGGED*, Centre for Welfare Reform (2017) available at www.centreforwelfarereform.org/uploads/attachment/584/social-rights-are-human-rights.pdf

3 Katie Boyle and Edel Hughes, 'Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights' (2018) 22 *International Journal of Human Rights* 43–69; Katie Boyle, 'The Future of Economic, Social and Cultural Rights in Scotland: Prospects for Meaningful Enforcement' (2019) 23 *Edinburgh Law Review* 110–116.

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UK is much broader and much more complex than would first appear. The book makes a contribution to the UK discourse but also provides incorporation models, justiciability mechanisms and principles of adjudication that can apply elsewhere, contributing to the wealth of discourse internationally on best practice for the protection of ESR.

There are two key narratives on ESR at play and each one is engaged throughout the book. The first of which has for some time accepted the legally enforceable status of ESR and has been developing in both discourse and practice in international law and comparatively. The devolved dialogue in Scotland, Wales and in Northern Ireland (during the Bill of Rights process) is now more broadly engaged with the first of these narratives. The second narrative, and the more prominent in the UK national discourse, is that ESR are non-justiciable, cannot legitimately be enforced by a court, contravene parliamentary supremacy and are aspirational in nature. These competing narratives are difficult to reconcile, which in turn frustrates the process of making a contribution to the discourse that is sufficiently advanced to build on the existing research on the former narrative without being completely at odds with the discourse surrounding the latter. This frustration engages with wider debates about political v legal constitutionalism and the fact that different models co-exist concurrently across the UK constitutional framework (with the devolved jurisdictions pertaining to a stronger form of legal constitutionalism).

This introductory chapter contextualises the book in terms of the theory of rights and the status of ESR in the literature and discourse. It deals with arguments for and against the status of ESR as legal rights and so begins by addressing the critical arguments against the exploration of ESR as legally binding rights that can be enforced in court (that they are ‘justiciable’). The book is premised on the basis that rights are legally binding and justiciable if the application of the law renders them so (following the positivist approach). This examination is also placed in wider social, economic and cultural contexts in which the questions around justiciability are framed. Critically, the research proposes principles of adjudication that address the critiques of ESR as justiciable rights drawing on constitutional and deliberative democracy theory.

The book proposes the circumstances in which ESR justiciability can be made legitimately possible. As a precursor to this argument, however, it is necessary to briefly address the reasons why ESR should receive any protection at all or whether it is appropriate that they are defended and enforced through the court. The theoretical framework in which the book is based rests on the premise that substantively securing ESR is a good thing for the UK and its constituent parts, and a good thing for society more generally. This position is based on certain assumptions drawn from moral and legal philosophical considerations. It is also based on a theoretical framework in the normative sense drawn from international standards and binding legal obligations sourced from the international legal position.⁴ It is not proposed that models of incorporation or justiciability are the only means in which to secure ESR. Rather it is

⁴ International law or international standards can act as a frame of reference for understanding the rule of law value formation in liberal democracies.

proposed that rendering the rights justiciable offers a more comprehensive system of protection that can support other institutional mechanisms as, at the very least, a means of last resort when other mechanisms fail.⁵

Theoretical Objections to ESR

The philosophical account of human rights in both theory and practice traditionally follows a minimalist approach. Generally, this understanding of rights can be explained in terms of right-holders (rights are held by everyone and are universal) claiming rights against addressees (the state and private persons) on the basis of urgent and specific claims of minimum (and progressive) standards that are based on normative values with or without legal recognition.⁶ King asserts that there is ‘near consensus’ amongst philosophers of human rights that ESR are ‘real’ human rights.⁷ Nonetheless, the principal arguments identified in a review of the sceptical perspective (those views that are not within the ‘near consensus’ category) reveal legitimate concerns in relation to the validity of ESR as viable human right claims in a theoretical and philosophical sense.⁸

- 5 This is supported by the obligation to provide an effective remedy for a violation of an ESR in accordance with international law, discussed in detail in Chapter 2.
- 6 James W. Nickel, *Making Sense of Human Rights* (2nd ed., Oxford: Blackwell Press, 2007), 9–10. See also, Jeff King, *Judging Social Rights* (Cambridge University Press, 2012), 17–58; Henry Shue, *Basic Rights and Subsistence, Affluence and US Foreign Policy* (2nd ed., Princeton University Press, 1980); Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315; James Griffin, *On Human Rights* (Oxford University Press, 2008); Charles R Beitz, *The Idea of Human Rights* (Oxford University Press, 2009); Marie-Bénédicte Dembour, ‘What Are Human Rights? Four Schools of Thoughts’ (2010) 32 *Human Rights Quarterly* 1. By moral considerations the book is referring to rights developed through a sense of political morality such as social human rights or citizenship rights that might not necessarily have legal standing. By legal rights the book is referring to rights that are afforded legal status in international law, legislation or constitutions. This distinction reflects that posited by King, at 19.
- 7 King, *ibid.* at 22. King states, ‘there has been a traditional resistance among philosophers to consider social rights real human rights ... however, [t]hese objections have now been dispatched convincingly by what is emerging as a near consensus view among philosophers of human rights that social rights are very much a species of human rights, largely for similar reasons accepted by international lawyers and the UN system much earlier.’ See also Michael Freeman, ‘Conclusion: Reflections on the Theory and Practice of Economic and Social Rights’, in Lanse Minkler (ed.) *The State of Economic and Social Rights* (Cambridge University Press, 2013) 365–386.
- 8 King and Freeman both systematically repudiate and countenance the arguments posed by human rights sceptics regarding the existence or legitimacy of ESR. For a substantive analysis of the sceptical arguments see the relevant chapters in King *ibid.* and Freeman, *ibid.* In brief, they principally address the sceptical approach to enforceable human rights, in particular social rights, as asserted by Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1969); Onora O’Neill, ‘The Dark Side of Human Rights’ (2005) 81 *International Affairs* 427; James Nickel, ‘How Human Rights Generate Duties to Provide and Protect’ (1993) 15 *Human Rights Quarterly* 77; John Rawls, *The Law of Peoples*, (Cambridge, MA: Harvard University Press, 1991) *inter alia*.

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The literature for decades has engaged with dialectic philosophical trajectories entailing the ebb and flow of ESR as legal rights proper. Cranston rejects ESR because they cannot be universal in the same way as civil and political rights. Employee rights, he declares, are not universal because not all humans are employees – how then can this be a universal category? Likewise, Cranston argues that they do not hold the same moral urgency as civil and political rights (CPR), comparing for example the right to paid annual leave compared with the right not to be tortured – ESR and CPR are not on an equal footing.⁹ Donnelly rejects these arguments and countenances that not all CPR are universal (such as the right to vote) and some ESR do hold moral urgency (such as the right to food).¹⁰ O’Neill has argued that ESR are not feasible as legally enforceable rights. Drawing on Kant’s distinction between perfect obligations and imperfect obligations, O’Neill questions how can right-holders claim obligations to meet claims that have not been allocated to specific obligation-bearers? For example, the right to food entails an imperfect duty dependent on charity or beneficence and the hungry cannot identify who exactly is responsible for feeding them. O’Neill has argued that to proclaim human rights without taking seriously who has to do what to fulfil them is morally irresponsible.¹¹ Sen has rejected this position in that all human rights can entail aspects of imperfect obligations – this does not mean they are not genuine rights.¹² Thomas Pogge argues that O’Neill is mistaken in assuming a requirement to identify a duty-bearer in order to substantiate a genuine right using the end of slavery as an example of an imperfect obligation with no specific duty-bearer but a right to freedom from slavery is a right nonetheless.¹³ Nickel, less dismissive than Cranston or O’Neill, highlights problems of applicability – human rights can only require burdens that are feasible and feasibility is difficult to estimate. ESR, Nickel argues, require institutional mechanisms of implementation.¹⁴ Rawls distinguishes ESR from ‘human rights proper’ and questions how can ESR be human rights proper when they require specific institutions?¹⁵ This approach is embedded in natural law theory that rights are natural and cannot presuppose specific kinds of institutions, otherwise, they are not rights.¹⁶ This contrasts with Nickel’s argument that institutions do not provide the justification of, but

9 See Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1969).

10 Jack Donnelly, *Universal Rights in Theory and Practice* (2nd ed., Ithaca, NY: Cornell University Press, 2003).

11 Onora O’Neill, n 8.

12 Amartya Sen, ‘Human Rights and the Limits of the Law’ (2006) 27 *Cardozo Law Review* 2913.

13 Thomas Pogge, ‘O’Neill on Rights and Duties’ (1992) 43 *Grazer Philosophische Studien* 233.

14 James Nickel, ‘How Human Rights Generate Duties to Provide and Protect’ (1993) 15 *Human Rights Quarterly* 77.

15 John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1991).

16 John Locke, *Two Treatises of Government* [1689], ed. P. Laslett (Cambridge University Press, 1988).

rather the means of, implementing human rights.¹⁷ Some of these competing theories are evident in recent debates about the democratic legitimacy of relying on adjudication to support ESR enforcement. Gearty and Mantouvalou (discussed further below) debate the legalisation and judicial enforcement of rights. Whilst Gearty highlights the insufficiency of relying on adjudication to fulfil ESR Mantouvalou highlights the importance of embracing it as one means, out of a variety of pathways, required to secure ESR.¹⁸

These arguments can be categorised into four overarching theoretical objections that require consideration when examining the issue of ESR as legitimate and legally enforceable rights. First, who is responsible for fulfilling ESR, or, who are the duty-bearers as opposed to the rights-holders?¹⁹ Second, through what means can ESR be legitimately enforced, or, what institutional mechanisms are necessary for their fulfilment?²⁰ Third, who should bear the cost of supporting these institutional mechanisms? In relation to justiciable ESR mechanisms in the UK for example, the burden of paying the considerable cost of fair access to legal justice as it currently stands (in both civil and criminal matters) is a highly contested political issue across the various jurisdictions²¹ and the subject of recent case law.²² And the fourth objection, engages with arguments surrounding ‘impossibility’, i.e. that one ESR right may be conceptually, or empirically, incompatible with another.²³

Addressing the Theoretical Objections

In relation to the first objection, Freeman responds with a positivist answer that states have been identified as the primary bearer of responsibility for ESR in international law.²⁴ Gauri and Brinks identify a triangular relationship between the

17 James Nickel, ‘How Human Rights Generate Duties to Provide and Protect’ (1993) 15 *Human Rights Quarterly* 77.

18 Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart, 2011).

19 Onora O’Neill, ‘The Dark Side of Human Rights’ (2005) 81 *International Affairs* 427.

20 Freeman, n 7 at 375, ‘the most searching questions raised for defenders of economic and social human rights by these [sceptical] philosophers are, firstly, O’Neill’s requirement that we need to specify who is obliged to what in order to fulfill the rights, and, secondly, Nickel’s demand that, for any human rights to be plausible, we must show that their fulfilment is feasible.’

21 Owen Bowcott and Nicola Brown, ‘More than Thousand Lawyers Protest Outside Parliament at Legal Aid Cuts’, *The Guardian*, 7 March 2014, www.theguardian.com/law/2014/mar/07/lawyers-protest-parliament-legal-aid-cuts; Chris Kilpatrick, ‘Lawyers Slam David Ford’s Plans to Cut Legal Aid Budget’, *The Belfast Telegraph*, 3 March 2014, www.belfasttelegraph.co.uk/news/local-national/northern-ireland/lawyers-slam-david-fords-plan-to-cut-legal-aid-budget-30056365.html; BBC ‘Scottish Legal Aid Reform Passed’, 29 January 2013, available at www.bbc.com/news/uk-scotland-21245700

22 Unison case the court examined the social minimum with reference to finding the cost of tribunal fees unlawful R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51.

23 On the problem of ‘impossibility’ in the theory of rights see Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).

24 Freeman, n 7 at 386.

state, the providers and the recipients of ESR.²⁵ The state (sitting at the top of the triangular hierarchy) owes duties to the recipients of ESR through provision or the allocation of resources, and fulfils duties via the providers through the regulation of how ESR require to be addressed. The providers then owe private obligations to the recipients through a horizontal application of ESR under the regulatory framework put in place by the state. Providers can be either private authorities or public bodies depending on how the regulatory framework is managed.²⁶ The state is primarily responsible as the duty-bearer (Freeman) and the operation of a triangular relationship – where private providers can also be engaged in the fulfilment of (and responsible for) duties under the regulatory framework, facilitates a better understanding of who is responsible for what at any one time (Gauri and Brinks). The state may delegate its responsibility elsewhere by placing obligations on other actors and affording such actors authority and responsibility to fulfil those obligations. Whilst other actors may be held to account for failure to comply with those obligations (under a regulatory framework), the state remains the duty-bearer throughout. In other words, it cannot completely displace its obligations even if it has explicitly delegated that responsibility elsewhere.

In relation to the second objection, there are various different institutional avenues through which the enforcement of ESR can be realised. In the welfare state, for example, there are numerous institutional safeguards to ensure the proper provision of welfare under the relevant welfare legislation. ESR enforcement can also be achieved through the avenues of political representation, complaints to the ombudsman or through processes such as internal complaint systems, proactive engagement from the regulatory and inspectorate regime,²⁷ or in tribunal decision-making.²⁸ These implementation avenues are extremely

25 Varun Gauri and Daniel M. Brinks, 'Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights', in Gauri and Brinks (eds.), *Courting Social Justice, Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008), 11.

26 For example, consider how public authority obligations in relation to health or social care may be provided by private bodies – the regulatory framework ought to encompass the private obligations owed by the providers to the recipients of health or social care, even although the duties are performed by private bodies that sit outside of the normal vertical relationship between state and individual in the provision of rights. In the context of the book, the justiciable mechanisms proposed identify the state as the primary bearer of responsibility and the individual recipient as the primary holder of the right, however, private obligations are also assessed in terms of third party providers where the state has outsourced the obligation.

27 David Barrett, 'The Regulatory Space of Equality and Human Rights Law in Britain: The Role of the Equality and Human Rights Commission' (2019) 39(2) *Legal Studies* 247–265.

28 King, n 6 at 85–95. See also for example some of the more recent developments in this area in relation to mainstreaming ESR through budgetary analysis. See Aoife Nolan et al., *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart, 2013); Rory O'Connell et al., *Applying an International Human Rights Framework to State Budget allocations: Rights and Resources* (Routledge, 2016). This is a multifaceted approach to ESR compatibility and a critical contribution that facilitates a move towards substantive change – within the context of this book it is argued that mechanisms such as this ought to

important in the realisation of ESR. This book is largely concerned with the role of the court and the justiciable enforcement of ESR. However, it is important to note that adjudication is not the first and last answer to ESR enforcement or implementation. The court ought to be available as a means of last resort if all other institutional safeguards fail. The role that the court can play as an important institutional actor is explored in more detail below in tandem with a discussion on the legitimacy of justiciability (i.e. addressing concerns relating to institutional capacity, competence, the separation of powers, the allocation of limited resources and the indeterminacy of ESR). Essentially the research demonstrates that compliance with ESR requires the possibility of judicial supervision in order to hold other branches of the state to account – the court being the only institutional body capable of being sufficiently independent to provide the proper review and scrutiny of the actions of the legislature and the executive. The court therefore is indispensable to human rights protections in a functioning democracy but should ideally be a means of last resort.

The third objection relates to access to justice and raises obstacles that are difficult to overcome without a change in the political decisions to reduce the allocation of funds to support legal aid across the UK. The literature demonstrates that a gap in legal aid funding does not necessarily negate ESR being addressed in court as financial and legal support can be sourced from charitable interventions and public interest litigation by rights-orientated lawyers.²⁹ Nonetheless, the reduction in the availability of legal aid poses several risks to ESR adjudication. First, there is the danger that judicial decisions might redirect state resources on a disproportionate basis towards those who are able to fund litigation – exacerbating potential inequalities.³⁰ Second, the cases that are supported by charitable interventions are dependent on the interests of third parties – meaning the prioritisation of some ESR issues over others with the potential to render the most pressing concerns of the most marginalised furthest from the deliberative court room.³¹ The objection to ESR on the ground that the litigation would be too costly equally impacts on CPR, which

be in place before any question of justiciability is engaged with. However, where for example, a procedural requirement is introduced to comply with ESR through budget analysis and this is not adhered to the court would be an appropriate forum to remedy the failure – such as is evident in the framework of the procedural duties under the Equality Act 2010.

29 See, for example, the different approaches employed in India, South Africa, Nigeria and Brazil in Gauri and Brinks (eds.), *Courting Social Justice* (n 25). Public interest litigation is not frequently employed in the UK context. This could be because there was until recent times a relatively robust and comprehensive legal aid system in place. However, there is also different rules relating to standing across the various jurisdictions of the UK (see Chapter 5) – public interest litigation was historically illegal in the UK context and, although the English courts began to hear interest group cases, this did not necessarily trickle down to devolved jurisdictions. For a discussion on the historical reluctance and a more recent leniency (in England) see Carol Harlow, 'Public Law and Popular Justice' (2002) 65 *The Modern Law Review* 1.

30 Gauri and Brinks, *ibid.* at 22.

31 *Ibid.*

are also resource intensive within the judicial system. So this objection relates to the question of whether there is an obligation to enable effective remedies for violations of human rights.

The objection alone does not render ESR outside the realm of legitimate and enforceable rights – it comes down to the same arguments posed by Nickel in response to sceptical arguments on the substance of human rights protection – whether states should facilitate the development of appropriate institutional mechanisms to ensure the implementation of human rights obligations. Without the appropriate provision of legal aid, human rights protection and access to justice, are in a very perilous position, however, it does not render the rights any less real. If anything, the duty to provide an effective remedy encompasses a right to facilitate access to justice, forming an ESR right in itself. There have been significant steps taken by the judiciary in recognition of the right to access justice.³² Most notably in the recent *UNISON* case that declared prohibitively expensive tribunal fees as unlawful because the fees impeded the constitutional and common law right to access justice.³³

The fourth theoretical objection is based on the argument that ESR compete against each other or are inherently incompatible based on issues of impossibility. This objection, similar to that above, impacts on CPR as well as ESR and raises problems for the most uncontroversial human rights.³⁴ It is not unusual for a court, or other organ of the state, to assess conflicting rights and determine which should take priority in any given situation – for example, the right to freedom of speech of one person may impact on the right to privacy of another and vice-versa. This objection can be addressed through a flexible concept of the principle of indivisibility and applies to ESR in the same manner as that of CPR. This book orientates arguments in favour of substantive rights-based justiciable models. However, it is critical to acknowledge within any substantive system there can be appropriate limitations and safeguards to ensure the appropriate balance between rights can be secured, as can limitations on rights be employed through many of the same mechanisms applied to CPR. It is not proposed that all ESR are absolute and non-derogable. For example, the normative theoretical framework sourced in international law recognises progressive realisation subject to maximum available resources, together with absolute minimum core rights – this reflects Koch's sliding slope of enforcement discussed below in Chapter 2.

In addition to the arguments addressing the sceptical philosophical and theoretical objections, there are also a variety of normative theories that positively support the claims of urgency and priority that ESR demand as legitimate and enforceable human rights. The principle theoretical arguments that justify the protection of human rights (including ESR) are based on the following concepts: that human beings are entitled to a life of dignity and wellbeing

32 *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51, para.66–87.

33 *Ibid.*

34 Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994); Gauri and Brinks, n 25.

(that each person is entitled to minimum standards/threshold of human rights protection)³⁵; that human beings are entitled to autonomy (that human rights afford the individual freedom and that the protection of CP and ESR forms an important part of self-determination)³⁶; and human beings are entitled to social and political participation in society (that meaningful participation in democracy is dependent on substantive access to at least minimum criteria in CP and ESR protection).³⁷

This reasoning aligns with the emerging ‘anti-poverty’ stream of liberal constitutionalism.³⁸ The concept that, at the very least, a minimum of ESR protection (as well as CPR) is required in order to fulfil the basic functions of autonomy and that ignoring the socio-economic dimension of citizenship undermines a fully functioning democracy. Indeed, some argue that the human rights framework itself not gone far enough to address systemic inequality and that states

35 Ibid. See also Gauri and Brinks, n 25 – ‘a life that achieves the full promise of human dignity requires, among other things, escape from premature death, the resources to withstand debilitating disease, the ability to read and write, and, in general, opportunities and freedoms unavailable in the midst of extreme poverty and deprivation.’

36 Ibid., 23–24. See also: Cécile Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press, 2001), Chapter 1; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), Chapters 14 and 15. Raz theorises that autonomy (or normative agency) is a prerequisite of freedom and that the exercise of autonomy is dependent on the self-fulfilling creation of an autonomous individual, an ‘agent’, where the agent’s activities are not burdened by worries of mere survival. An autonomy supporting environment requires that agents have capacity, a range of valuable options and are free from coercion and manipulation. See also John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 2001). Rawls theory, based on liberal egalitarianism, supports freedom through meaningful choices about the life one chooses to lead – this requires having the capacity to understand political complexities (supported through education) and having health and income security to plan out a meaningful life. This can be supported by constitutionally guaranteeing legally enforceable minimum criteria, John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 227–228. This position somewhat differs from the distinction previously asserted by Rawls in relation to ‘human rights proper’ (n 15) – Rawls’ theory develops towards a more substantive based recognition that minimum criteria are essential to social and political participation.

37 King, n 7 at 23. See also arguments supported in theories of social citizenship, civic republicanism and deliberative democracy – ESR are instrumental in, and support, meaningful participation in political decision making. Frank I. Michelman, ‘Welfare Rights in a Constitutional Democracy’ (1979) 3 *Washington University Law Quarterly* 659; Fabre, *ibid.*, 121–124; David Miller, ‘A Human Right to Democracy?’ CSSJ Working Papers Series, SJ032 April 2015.

38 See O’Cinneide on the lack of a social dimension in liberal constitutionalism and the emerging anti-poverty dimension in mainstream liberal political theory and Michelman in Colm O’Cinneide ‘The constitutionalisation of economic and social rights’ and Frank I. Michelman on antipoverty liberalism as an emerging conceptualisation of social democracy, ‘Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocal Perturbations in Liberal and Democratic Constitutional Visions’ in García et al. (eds.), *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge, 2015), 261–262 and 279–280.

must move beyond minimum criteria if substantive equality is to be achieved.³⁹ The international human rights framework offers a helpful framework for moving beyond social minimum thresholds. A foundation of ESR protection recognising minimum and progressive thresholds is required to guide the legislature and executive as to human rights compliance. Likewise, both the legislature and the judiciary can build upon this foundation to give greater substance and meaning to rights as epistemic communities responsible for their substantive interpretation.⁴⁰

The adjudication of ESR and the measurement of its success is incredibly complex. There are so many different factors to consider such as accessibility, standing, the degree of protection of the right in law (the domestic law may not in any way meet the standards required in international law for example), the type of review the court might employ, what kind of remedies are available and the degree of compliance post-judgment. There are many problems that social rights adjudication in practice will encounter across these many different factors. For example, Landau provides the example of the development of the *tutela* device under the Colombian constitution as a means of protecting a vital minimum for the most vulnerable to its subsequent misuse serving the health needs of the middle classes.⁴¹ In Brazil, similarly, the allocation of funds in society moved from the poorest to the wealthy when the jurisprudence of the Brazilian courts recognised an immediately enforceable right to the highest attainable health causing greater health inequities as the more privileged and wealthy sought rights enforcement through the court.⁴² In India and South Africa, social rights adjudication has engaged with a wide plethora of social rights. However as noted by Kaletski et al., although India and South Africa have strong legal guarantees to the right to food for example, both countries continue to exhibit exceptionally high rates of malnutrition.⁴³ In fact, in South Africa, where the Constitutional Court has intervened to protect social rights, critics have questioned the genuinely transformative nature of the remedies employed and argued that the jurisprudence has undermined the norm-based

39 Samuel Moyn, *Not Enough, Human Rights in an Unequal World* (Harvard University Press, 2018). Moyn's account, whilst helpful in elucidating some of the pitfalls of inadequate legal structures largely concerned with civil and political rights, is misplaced in its understanding of the economic and social rights dimension of the international legal framework and its potential if properly implemented. For a critique see Gráinne de Búrca, 'Shaming Human Rights' (16 August 2018), Forthcoming, *International Journal of Constitutional Law*; NYU School of Law, Public Law Research Paper No. 18-47, available at SSRN: <https://ssrn.com/abstract=3233063> or <http://dx.doi.org/10.2139/ssrn.3233063>

40 Katharine Young, *Constituting Social Rights* (Oxford University Press, 2012), 8.

41 David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 189.

42 Octavio Luiz Motta Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 *Health and Human Rights: An International Journal* 33.

43 Elizabeth Kaletski, Lanse Minkler, Nishith Prakash and Susan Randolph, 'Does Constitutionalizing Economic and Social Rights Promote Their Fulfillment?' (2016) 15(4) *Journal of Human Rights* 433-453 at 456.

foundationalist nature of the Constitution.⁴⁴ These issues give rise to problems for social rights adjudication in terms of its democratic legitimacy. At the same time, they by no means undermine it as a means of rights enforcement completely.

The Critiques of ESR Adjudication

To date, the analysis of social rights adjudication has focussed to a large degree on the taxonomy of obligations along the respect-protect-fulfil axis.⁴⁵ As the analysis of jurisprudence develops according to the taxonomy of obligations and across jurisdictions so too does the broader understanding of social rights adjudication and new categories and principles emerge.⁴⁶ Principles of good practice in ESR jurisprudence can mitigate potential problems building on a theoretical framework for 'democratic legitimacy' in social rights adjudication.⁴⁷ Whilst the focus of this book is developing good practice in the context of the UK, the principles of adjudication can act as an assessment framework on a cross-constitutional comparative basis.

Categorising justiciability mechanisms in the book offers new perspectives on the type of enforcement available for ESR whether that be through explicit justiciability enabling provisions or adjudication that occurs under the rubric of something else. In this sense, we can measure both the degree of protection (a taxonomy of obligations) as well as the mechanism through which the rights can be enforced (a taxonomy of justiciability mechanisms). As part of this taxonomy of justiciability mechanisms consideration should also be given to: the sources of law from which social rights adjudication derives, i.e. the means of incorporation (constitutional/legislative/international/common law etc.); the mechanism under which the action can be taken (is it a constitutional

44 See, for example, Marius Pieterse, 'Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services' (2006) 22 *South African Journal on Human Rights* 473; Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South African's Transformative Constitution' (2007) 23 *South African Journal of Human Rights* 335; and Christopher Mbazira, 'From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa' (2008) 24 *South African Journal of Human Rights* 1.

45 Malcolm Langford, 'The Justiciability of Social Rights, From Practice to Theory' in M. Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008), 12.

46 Langford, *ibid.* at 13. For example, Nolan et al. identify degrees of enforcement through the tripartite theory to 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 ESR Justiciable: A Summary Explanation' (2009) 2 *Erasmus Law Review* 379.

47 King, n 7.

provision? Or under equality law? Or under the rubric of civil and political rights?); the degree of accessibility (relating to standing/legal aid/victimhood); the type of review (what kind of judicial scrutiny is employed? Is it a weak or strong review?); to what degree is the right enforced (is the duty procedural or substantive? respect-protect-fulfil?); what kind of remedy is available (is it declaratory? Ultra vires? Structural? Supervisory? Participatory?); in what kind of body does the adjudication occur (quasi-court? International court? Domestic constitutional court? – are the decisions binding?); and to what degree is there compliance with the judgment (enforceability post-judgment? Long-term material or symbolic impact?).⁴⁸

In this sense, the way through which social rights can be adjudicated upon can be assessed across the ‘adjudication journey’ rather than focussing solely on the outcome of judgments. In so doing it is important to contextualise existing jurisprudence within the broader building blocks of ESR adjudication allowing the reader to reflect on the types of cases that do not, or cannot, reach the court room as well as the processes and outcomes associated with the cases that do.

As part of this reflection, principles emerge to counteract some of the long-held and more recently asserted criticisms of social rights adjudication.

Criticism of ESR jurisprudence comes in two distinct waves. The first wave of criticism can be understood as the critique applied before judicially enforceable ESR are introduced in any particular setting – i.e. the very repudiation of ESR as justiciable from the outset. This first critical wave can be sub-categorised as the ‘**anti-democratic critique**’; the ‘**indeterminacy critique**’ and the ‘**incapacity critique**’. The second critical wave rejects the justiciability of ESR in a post-adjudication setting and rather than repudiate the justiciable nature of ESR highlights the risks and inefficiencies of relying on ESR adjudication based on the dangers of the court becoming an exercise of elite-driven power. The second critical wave critique is sub-categorised as the **pro-hegemonic critique**. Both critical waves are discussed below.

The first wave **anti-democratic critique** questions whether the court can legitimately interfere in resource dependent policy areas usurping the power of the legislature or executive. So the argument goes, parliament provides sufficient accountability in ensuring the executive abides by human rights obligations at the domestic and international level. Resource allocation by definition ‘implicates the interests of nearly everyone [as] we nearly all pay in and take out of the public system’⁴⁹ and so the most appropriate decision maker in relation to resource allocation is the representative legislature.⁵⁰ The judiciary interfering in the policy matters of the state impinges on the separation of powers and the

48 Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017).

49 King, n 7 at 5.

50 This argument is also closely related to that of polycentricity whereby a holistic understanding of policy implications cannot be something that the judiciary can review on a case-by-case

judiciary should not be able to veto parliamentary decisions. As articulated by Gerard Hogan J.:

if social and economic rights are made justiciable and are vindicated by the courts, the result will tend to distort the traditional balance of the separation of powers between the judiciary and other branches of government in that more power will flow to the judiciary.⁵¹

However, CPR are also resource dependent and at times also require the court to intervene as an accountability mechanism. When the court intervenes in civil and political rights determination it does so as an important accountability check on the executive or legislature rather than as a means of usurping the power of other branches of government. One way in which this can occur is to use different types of remedies – some of which may afford larger degrees of deference back to decision makers depending on the circumstances. The court as an intervener in the enforcement of ESR is therefore an important part of a multi-institutional dialogue ensuring accountability rather than a transfer of political power to the judiciary. Ultimately, in a system of parliamentary supremacy, the final decision rests with the central legislature.

A response to anti-democratic critique embraces the democratic legitimacy of courts embracing their role as an important **accountability mechanism**⁵² in a multi-institutional dialogue, or *oinlogue*,⁵³ given that there are multiple actors *in colloquium* at the same time. King highlights the importance of ESR to social citizenship, and a social minimum, enforceable by the courts as part of a deliberative democracy framework.⁵⁴ O’Cinneide similarly identifies strands of constitutional theory that require the legal enforcement of ESR. The first of these strands is a ‘legitimation-worthy’ constitutional order⁵⁵ whereby ESR support autonomous participation in society. The second strand identifies that there should be a social dimension, or ‘social principle’ embedded in the rule of law through a constitutionalisation of ESR. This would open the door to help ensure ESR are prioritised when weighted against other competing interests.⁵⁶ The third identifies that legal enforcement of ESR corresponds with democratic

basis. The legislature and executive are the appropriate bodies to deal with those issues that require consideration of a vast number of interconnected variables. *Ibid.*, 5–6.

51 Gerard Hogan, ‘Judicial Review and Social and Economic Rights’ in William Binchy and Jeremy Sarkin (eds.), *Human Rights, the Citizen and the State: South African and Irish Approaches* (Dublin: Roundhall, Sweet & Maxwell, 2001), 8.

52 Nolan et al., n 46, 15, para.2.2.

53 Rawls, ‘Reply to Habermas’ (1995) *Journal of Philosophy* 132, 140 as discussed in Rory O’Connell, *Legal Theory in the Crucible of Constitutional Justice* (Dartmouth: Ashgate, 2000).

54 King, n 7 at 27.

55 Frank I. Michelman, ‘Socioeconomic Rights in Constitutional Law: Explaining America Away’ (2008) 6(3&4) *International Journal of Comparative Constitutional Law* 663–686 at 675.

56 O’Cinneide, n 38 at 270.

principles by ensuring that the politically marginalised groups have a legal mechanism through which their distributive justice claims can be communicated in a manner that compels governments and other duty-bearers to respond to their claims through deliberative (judicial) processes.⁵⁷ The principles of deliberative democracy developed here relating to accessibility, participation, deliberation and counter-majoritarianism therefore form important responses to the democratic legitimacy critique in the context of social rights adjudication.

The **indeterminacy critique** of ESR adjudication tells us that ESR are too vague and that their substantive interpretation should not be left to judges. This too is a legitimate concern, however, it is not insurmountable. In the same way that civil and political rights require interpretation, so too do ESR – and in a similar vein, courts can play an important role in giving substance to ESR in the same way that they do with CP rights.⁵⁸ This does not require the court to usurp the role of the legislature or executive. If the legislature gives clear instructions to the court on how to interpret rights it can assist in the court fulfilling its role as a guarantor of rights and thus avoiding abdication of this important judicial function.

A response to the indeterminacy critique identifies the role the court must embrace as a body responsible for giving meaning to rights. Young tells us social rights adjudication is nothing more than finding consensus between epistemic communities – including the judiciary – around the meaning of rights.⁵⁹ It is in the dialogue between epistemic communities (legislative, executive, judicial) that social rights adjudication can help give meaning to rights, a role that Michelman argues courts should not abdicate.⁶⁰ Rather than completely abdicate its role the court must strike the right balance so that it does not ‘debase dangerously the entire currency of rights and the rule of law’ by failing to engage with the ESR.⁶¹ The principle of deliberation, between institutions and actors at the local, national and supranational level can help the court interpret the substance of ESR by deriving meaning from a number of interpretative sources.

O’Cinneide highlights the importance of embracing both the **procedural and substantive aspects** of this role. Otherwise, the court risks embracing only a hollow form of ESR adjudication that abdicates on enforcing substantive rights when needed:

At the end of the day, the legitimacy of SER review will depend on the extent to which it succeeds in giving substance to SER whilst integrating their protection into the wider framework of constitutional values...It is only through a close, passionate and reasoned engagement with the

57 Ibid.; see also Kathrine G. Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012), 193 and Gauri and Brinks, n 25.

58 Young, *ibid.* at 30.

59 Young, *ibid.* at 8.

60 Michelman, n 55 at 683.

61 *Ibid.*

normative substance of these rights that socially engaged constitutionalism can take root in national legal systems and avoid the hollowed-out fate of its social democratic predecessor.⁶²

There is an important component of social rights adjudication that departs from traditional understandings of deliberative democracy in its narrower interpretation. A broader conceptualisation recognises that fairness must account for both procedural and substantive justice – moving from a thin-to-thick conceptualisation of justice. The process principles of accessibility, participation, deliberation and counter-majoritarianism require the court to play a role in giving meaning to rights through legitimate and fair processes. This manifests itself in adjudication that reviews the procedural fairness of decision-making – was it reasonable?/was it proportionate?/has the duty-bearer complied with fair process? On the other hand, there is also a call within deliberative democracy theory itself,⁶³ and within the wider social rights discourse,⁶⁴ that the court when called upon may be required to enforce a substantive threshold (moving from procedural to substantive enforcement). Liebenberg highlights that ‘[d]espite its pervasiveness in social rights adjudication, the relationship between participatory [as a component of procedural] justice and the substantive dimensions of social rights remains unsettled’.⁶⁵ In terms of the principle of fairness, the book proposes both procedural and substantive concepts of fairness must be considered as part of the remit of courts. It may not always be necessary, or appropriate, for the court to enforce a substantive threshold. On the other hand, the more serious the violation, the more necessary for a substantive ‘thicker’ concept of justice to be developed and enforced. The example seen in the *Hartz IV* case where the judiciary found the process in calculating social security entitlement flawed as well as the substantive level of social security offered highlights the potential of the court to review and determine the procedural fairness of a decision as well as the substantive fairness of the outcome.⁶⁶

62 O’Cinneide, n 38 at 274.

63 i.e. provision of the social minimum as the substantive threshold required to participate in society. See the extensive literature cited in King at 26–27. See also Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds.), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013), 105.

64 See Anashri Pillay, ‘Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement’ (2012) 10(3) *International Journal of Constitutional Law* 732–755; O’Cinneide, n 38 at 274; Langford (2008) n 45, Boyle (this volume); Sandra Fredman, ‘Procedure or Principle: The Role of Adjudication in Achieving the Right to Education’ (2015) 7 *Constitutional Court Review* 165–199; David Bilchitz, ‘Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?’ (2015) 5 *Constitutional Court Review* 297.

65 Sandra Liebenberg, ‘Participatory Justice in Social Rights Adjudication’, (2018) 18(4) *Human Rights Law Review* 623–649.

66 BVerfGE 125, 175 (*Hartz IV*), the German Constitutional Court considered the decision making process to be flawed and that the substantive outcome resulted in a violation of the

Third, **the capacity critique** tells us that courts do not have the capacity to deal with ESR, that there would be a flood of litigation and that judges do not have the expertise to determine the substance ESR or their complex relationship with other areas of governance. The judiciary simply lacks the expertise to decide such matters and it is beyond the institutional capacity of the courts. When the UK Human Rights Act was introduced Edwards firmly rejected the competency of the judiciary in adjudicating on human rights issues calling instead for the principle of due deference to parliament to be firmly established.⁶⁷ On socio-economic issues arising in human rights cases he argued that:

the judiciary are institutionally incompetent to deal with the socio-economic issues that frequently arise in these cases. Not only is adjudication an inappropriate process for assessing complex issues of policy, but the courts also lack the resources and the judiciary the training and expertise to adequately weigh the issues.⁶⁸

However, courts can also help support their capacity by seeking expertise on ESR where needed, including the appointment of *amicus curiae* (a ‘friend of the court’) if required. In the same way the court can draw on expertise in relation to CP or constitutional matters it can also refer to various sources of law, comparative case law, international guidance as well as domestic experts in order to assist in capacity building when adjudicating ESR. When ESR engage with far-reaching policy considerations the court can ask the legislature or executive to justify its approach, in the same way that it does so in relation to CP rights. The complexity of adjudication in the area of human rights cuts across all different types of rights – it is not unique to the ESR domain. It is important to remember that CPR as well as ESR have core components that may be non-derogable as well as components subject to limitation if justifiable. A more nuanced understanding of the nature of ESR helps contextualise the different ways in which the court can appropriately review ESR compatibility in a democratically legitimate way. A response to this critique would be embed a **theory of justification** to questions of capacity in whatever approach is taken at any time. This approach is facilitated by the principles of deliberation and participation by encouraging engagement with the relevant stakeholders and expertise to inform judicial decision-making.

The second wave of ESR adjudication criticism can be categorised as an ad hoc critique – that adjudication of ESR does not work in practice based on examples of failed attempts. This critique identifies that courts may be inappropriate forums for resolving disputes around ESR and can be distilled as the

right to dignity meaning the decision maker had to revisit both process and substantive outcome of the decision. This is discussed in more detail in Chapter 4.

67 Richard Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65 *Modern Law Review* 859, 859.

68 *Ibid.*

pro-hegemonic critique. The court itself embodies an elite-driven exercise of power that reinforces existing inequalities. The second wave critique claims that social rights adjudication does not help the most vulnerable and does not work in practice.⁶⁹ For example, in Brazil an overwhelming number of cases have been filed relating to access to healthcare.⁷⁰ Of these cases, over 90% are individuals going to courts for specific benefits, rather than collective suits asking for structural change.⁷¹ Ferraz carried out extensive empirical research with lawyers in Brazil that investigated the reasons for the high number of individual cases seeking individual court orders on access to healthcare.⁷² The research suggests that although there are no formal barriers to collective suits lawyers are reluctant to pursue a holistic collective case because the court will be resistant to these types of claims. In a civil law jurisdiction this has meant that those who have been able to afford to raise individual cases have had their right to healthcare secured to the detriment of those who cannot afford (or do not know about) judicial enforcement of ESR.⁷³ As a result, there has been an increase in health inequities in Brazil.

Gearty makes persuasive arguments against relying on the judicial enforcement of socio-economic rights, the first three of which relate to the first wave of ESR critiques (i.e. that they afford too much power to the courts and so are undemocratic; that they are too vaguely expressed; and the courts are not the correct forum for determining resource allocation and prioritisation – again relating to polycentricity).⁷⁴ In addition to this he makes a further case against legalisation by arguing that individual test cases in adversarial proceedings are not equipped to deal with plight of ‘thousands of invisible claimants’; that the inappropriateness of the adversarial model to the resolution of broadly framed issues of social rights; that judicialisation offers no follow-up procedure to check whether the decision of the court has been implemented; that seeking ‘quick-fixes’ through the courts wastes the resources of organisations and institutions seeking to advance social rights when they should be focussing on political change; and finally that there is a danger in empowering a privileged judiciary who will seek to retain the status quo (and concern that the powerful will seek to assert their own social rights as an indirect means of resisting the social rights of others relating to the pro-hegemonic critique).⁷⁵

69 See, for example, the key findings by Ferraz, n 42; Octavio Luiz Motta Ferraz, ‘Harming the Poor Through Social Rights Litigation: Lessons from Brazil’ (2011) 89 *Texas Law Review* 1643; and Landau, n 41 where the court becomes a pro-majoritarian actor upholding the rights of the wealthy to the detriment of the poorer when adjudicating ESR.

70 See Landau, n 41 and Ferraz, n 42.

71 Landau, *Ibid.*

72 Ferraz, n 42.

73 Landau, n 41 and Ferraz, n 69.

74 Joint Committee of Human Rights, ‘A Bill of Rights for the UK?’ (Twenty-ninth Report of Session 2007–2008, HL 165, HC 150) para.167.

75 Gearty and Mantouvalou, n 18; Gearty at 56–64.

A response to this critique recognises that the court can also act as an important accountability mechanism and ‘institutional voice’ for those who are politically disenfranchised.⁷⁶ In fact, the courts should take steps to embrace **counter-majoritarian** adjudication.⁷⁷ The legal constitutionalisation and adjudication of rights can help support pathways to social justice, among other avenues.⁷⁸ In addition, it must be noted that the end result of other avenues may indeed lead to legalisation of ESR – for example, where civil society pressure coalescing with political impetus results in human rights reform that embeds ESR as legal rights (such as evident in Scotland and Wales discussed in Chapter 6). How then should the different branches of power respond to this change? More appropriate remedies are required to help the court embrace this role such as the deployment of structural remedies when systemic issues arise.⁷⁹ In a broader social context questions must also be asked about the appointment of judges and the makeup of the judiciary more closely reflecting the diversity of society.⁸⁰

The first and second waves of criticism highlights important issues that require to be addressed, however, these concerns are not insurmountable barriers and should not result in the outright rejection of ESR justiciability or judicial enforcement. Holding firmly to the ESR critiques as evidence of the non-justiciability of rights is now an outdated position.⁸¹ ESR adjudication happens and it can happen in a legitimate way. As such it has become increasingly clear that the outright repudiation of ESR justiciability is based on a false premise from the outset. It has been posited that ‘much of the doctrinaire debate about economic, social, and cultural rights throughout the second half of the last century sprang from a legal fiction: that of the separation of human rights into two distinct sets’.⁸² This dichotomy and misunderstanding on the legal status of ESR is discussed in more detail in Chapter 2. Importantly, the research tells us

76 King, n 7; O’Cinneide, n 38; Nolan et al., n 46; Mantouvalou, *ibid.*

77 Landau, n 41.

78 Mantouvalou, n 75 and Paul O’Connell, ‘Human Rights: Contesting the Displacement Thesis’ (2018) 69(1) *Northern Ireland Legal Quarterly* 19–35.

79 Landau, n 41 and César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial, the Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2015).

80 For a discussion on the potential of judicial diversity and the associated extensive literature see Rosemary Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-making’ (2015) 68(1) *Current Legal Problems* 119–141.

81 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.

82 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, 432.

Table 1.1 First Wave and Second Wave Critiques and Responses

FIRST WAVE <i>Pre-jurisprudence criticism</i>	RESPONSE (safeguards or emerging principles – developing theory addressing concerns)	SECOND WAVE <i>Post-jurisprudence criticism</i>
Anti-democratic critique		
ESR entail imperfect obligations (O’Neill 2005)	All rights are imperfect (Sen 2006)	
ESR have no clear duty-bearer (O’Neill 2005)	Does not make it any less of a right (Pogge 1992) Using Gauri and Brink’s (2008) triangulation method horizontality helps identify appropriate duty-bearer with state primarily responsible	
ESR are positive and resource dependent	Civil and political rights are resource dependent (Fredman 2010) and contain positive duties (Nolan et al. 2007)	
Breaches separation of powers (Hogan 2001)	Accountability between arms of state – required as part of a multi-institutional approach (King 2012) (Boyle, this volume) There is space for democratic dialogue between institutions (Nolan et al. 2007) Must counteract pro-majoritarian tendency of democracy and protect minority rights (Langford 2009)	
They are not universal and have no moral urgency (Cranston 1969)	There can be a strong emphasis on deference to executive and legislature as part of JR process (Young 2012) (King 2012)	
They are not universal and have no moral urgency (Cranston 1969)	Not all CPR are universal (the right to vote) and some ESR do hold moral urgency (the right to food) (Donnelly 2003)	
They are not human rights proper and not required as prerequisite in deliberative democracy (Rawls 1991)	They can constitute what is required for minimum participation in deliberative democracy (Miller 2015)	

(Continued)

Table 1.1 (Cont.)

FIRST WAVE <i>Pre-jurisprudence criticism</i>	RESPONSE (safeguards or emerging principles – developing theory addressing concerns)	SECOND WAVE <i>Post-jurisprudence criticism</i>
Rights are natural and cannot presuppose specific kinds of institutions (Rawls 1991/Locke 1988)	They are prerequisite to facilitate autonomy (Alexy 2002) How can ESR be human rights proper when they require specific institutions? Institutions do not provide the justification of, but rather the means of, implementing human rights (Nickel 1993)	
Polycentric – courts cannot impinge on matters of complex social policy across multiple resource intensive areas (Hogan 2001)	States compelled to justify – accountability model with contextually appropriate remedies (Langford 2008) Judicial incrementalism and reasonableness review can facilitate dealing with complex polycentric issues (King 2012)	
	Adjudication act as important lens to highlight blind spots of a majoritarian system (King 2012)	
	Adjudication can deal with systemic policy problems and transform individual cases into collective case such as ‘unconstitutional state of affairs’ in Colombia (Landau 2012) (Garavito and Franco 2015)	
Indeterminacy critique ESR are too vague and lack specific content (Cranston 1969) (Feinberg 1973) (O’Neill 2005)	All rights can be vague – courts must give meaning to rights (Langford 2009) (Young 2012) Some ESR are precise and some CPR are vague (Nolan et al. 2007) Courts should not abdicate their role in giving meaning to rights (Michelman 2008)	
	Impose corresponding Hohfeldian duties upon the state and other state actors (O’Cinneide 2015)	

(Continued)

Table 1.1 (Cont.)

FIRST WAVE <i>Pre-jurisprudence criticism</i>	RESPONSE (safeguards or emerging principles – developing theory addressing concerns)	SECOND WAVE <i>Post-jurisprudence criticism</i>
Incapacity critique There are insufficient mechanisms to facilitate applicability (Nickel 1993)	More mechanisms must be developed to implement (Nickel 1993)	
Judges should not usurp role of other branches of the state	Judges should not abdicate their role to give meaning to rights (Michelman 2015)	
Potential snowball effect – the floodgate scenario	Manage cases through administrative mechanisms such as collective case or through use of ‘test and sist’ or collective cases (Boyle and Hughes 2018) (Garavito and Franco 2015)	
Impossibility (rights clash and impossible to implement them on equal footing) (Steiner 1994)	Rights clash all the time and not all rights are non-derogable (Boyle, this volume) All rights adjudication requires balancing act (Langford 2008) (Alexy 2002)	
Court lacks specialist knowledge	Courts can ask the experts (Nolan et al. 2007) Expertise can assist adjudication (King 2012)	SECOND WAVE Pro-hegemonic critique Social rights adjudication does not help the most vulnerable and does not work in practice
	Constitutionalisation and adjudication can help support pathways to social justice (Mantouvalou 2011)	Politics is more appropriate route to social justice (Gearty 2011)
	Legislation alone has blind spots (King 2012)	
	Not all actors have means of political representation (Nolan et al 2007)	
	More appropriate remedies are required and courts must engage with procedural and substantive components of ESR	Weak review does not help poorest (Landau 2012)

(Continued)

Table 1.1 (Cont.)

FIRST WAVE <i>Pre-jurisprudence criticism</i>	RESPONSE (safeguards or emerging principles – developing theory addressing concerns)	SECOND WAVE <i>Post-jurisprudence criticism</i>
	enforcement (O’Cinneide 2015) Pillay 2012) (Fredman 2015)	
	Structural interdicts and positive enforcement of rights when appropriate (Landau 2012)	
	Access to justice must be accessible and affordable (Boyle, this volume)	Courts tend to act as pro-majoritarian actors favouring wealthier classes (Landau 2012) (Ferraz 2009)
	Courts must defend those who are most disadvantaged and politically marginalised (Nolan et al. 2007)	
	Courts need to develop counter-majoritarian judicial approach including the use of structural interdicts to deal with systemic issues (Landau 2012) (Boyle, this volume)	
	Institutional capacity of courts revisited – tendency to deal with individual instead of collective. In Brazil the civil law jurisdiction created a disproportionate tendency towards individual claims without precedent or collective systemic response (Landau 2012)	Social rights adjudication is causing health inequities in Brazil (Ferraz 2009)

that is not ‘whether’ but ‘how’ to judicially enforce ESR that is the question that remains to be addressed.⁸³

Principles of ESR Adjudication

Clearly, there are aspects of ESR justiciability that are problematic. How then, can ESR justiciability occur in a democratically legitimate way and what are the

83 Mark Tushnet, ‘A Response to David Landau’ (2013) *Opinio Juris*, available at http://opiniojuris.org/2012/01/23/hilj_tushnet-responds-to-landau/As; O’Cinneide (2015) also points out – the questions of whether and how to enforce ESR are closely linked n 38 at 273.

basic principles of ESR adjudication that require to be taken into account when considering the role of the court as a guarantor of ESR?

One possibility relies on the distinction between weak and strong forms of judicial review, discussed by Tushnet.⁸⁴ Weak-form systems of judicial review hold out the ‘promise of reducing the tension between judicial review and democratic self-governance’ by ensuring deference to the other branches of government on issues engaging with ESR.⁸⁵ Weaker review includes mechanisms such as reasonableness review⁸⁶; an interpretative mandate⁸⁷; non-binding declarations of incompatibility⁸⁸ and a ‘dialogic’ mode of review.⁸⁹ Strong-review systems on the other hand see a more intense tension between judicial enforcement of constitutional limitations and democratic self-government.⁹⁰ A strong-review approach means judicially enforceable constitutional provisions even in cases where there is reasonable disagreement about interpretation.⁹¹ A strong-review approach recognises ESR as justiciable, immediately enforceable and on a par with CPR.⁹² Under Tushnet’s weak v strong form judicial review courts can either lean towards usurping the elected branches of government thus risking the democratic legitimacy of their role, or, they can lean towards rejecting the justiciability of ESR all together abdicating their democratically legitimate role of giving meaning to rights and holding the other branches of government accountable.⁹³ Tushnet suggests that courts must adopt and adapt to a more nuanced form of weak review for ESR therefore overcoming the democratic legitimacy critique by applying tentative weak-form remedies before engaging in stronger interventions where necessary.⁹⁴

Garavito and Franco develop Tushnet’s dyad by introducing an intermediate category: a ‘moderate rights’ approach.⁹⁵ Under a moderate-rights approach the court can recognise the reviewability, justiciability and enforceability of ESR but strike the appropriate ‘democratic legitimacy’ balance by issuing moderate remedies when a violation occurs. They argue that strong remedies require precise,

84 Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Oxford: Princeton University Press, 2008), 23.

85 Ibid.

86 Ibid.

87 Including the interpretative approach used under section 3 of the Human Rights Act 1998, Tushnet, *ibid.* at 25.

88 Including the declaration under section 4 of the Human Rights Act 1998, Tushnet, *ibid.* at 29.

89 including constitutional provisions such as the override (section 1) and notwithstanding (section 33) clauses in the Canadian constitution, Tushnet, *ibid.* at 31.

90 Tushnet, *ibid.* at 22.

91 This is particularly apparent in the US constitutional setting where under a strong-review model there is little recourse when the courts interpret the Constitution reasonably but in the reasonable alternative view of a majority (of people), mistakenly. Tushnet, *ibid.* at 2922.

92 Garavito and Franco, n 79 at 10.

93 Sandra Liebenberg and Katherine Young, ‘Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?’ 237–258 at 239; and O’Cinneide, n 38 at 274; and Frank I. Michelman, at 287 in Helena Garcia et al., n 38.

94 Tushnet, n 84 at 238.

95 Garavito and Franco, n 79 at 10.

outcome-orientated orders whereas weak remedies tend to leave implementation back in the hands of government agencies.⁹⁶ Moderate remedies on the other hand, can outline procedures and broad goals, as well as criteria and deadlines for assessing progress whilst at the same time leave decisions on means and policies to government.⁹⁷ This approach can see the deployment of multiple forms of remedies at once including the various models developed by Landau: individual-level affirmative relief, negative injunctions, weak-form review, to structural injunctions.⁹⁸ A multidimensional approach to remedies in and of themselves may help provide some answers to the challenges faced by relying on a weak-form model of review that enters into inter-institutional dialogue without providing any substantive underpinning to ESR. This approach is discussed below as the hybrid approach (employing both procedural and substantive elements).

Young develops a typology of review employed by courts when assessing ESR claims: deferential review (placing the decision back onto the elected branches); managerial review (where the court assumes direct responsibility for the substantive component of ESR adjudication); peremptory review (where the court registers its superiority in demanding and controlling an immediate response); experimentalist review (where the court encourages a participative element by including relevant stakeholders in seeking a solution) and conversational review (where the court engages in interbranch dialogue to resolve the determination of ESR).⁹⁹ The typology of review does not in itself identify a preferential approach in terms of the strength or weakness of any one mechanism. Rather, as Young highlights, the judicial review deployed when approaching how to enforce any one right in the particular circumstances at hand is multidimensional.¹⁰⁰ The typology of review is there as a heuristic device for understanding the variety of approaches the court may take at any one time. The various approaches available to the court therefore align with a flexible approach to both degree of review as well as to the type of remedy employed. In a similar sense, the principles of adjudication here can be engaged to different degrees depending on the circumstances. Rather than set thresholds they highlight significant points for consideration on the adjudication journey (like building blocks for ESR that can be deployed in different ways to different degrees).

At the national level in the UK human rights adjudication falls within the weak-form review model. Yet at the same time, at the devolved level a strong-form human rights review prevails. Declarations of incompatibility under the Human Rights Act 1998 can be contrasted with ultra vires remedies and strike down powers of the court under each of the devolved frameworks. Rather than align the UK or human rights adjudication under a strong or weak form of adjudication it is clear that both strong and weak review co-exist, with different remedies and forms of compliance engaged

96 Ibid.

97 Ibid.

98 Landau, n 41.

99 Young, n 57 at 142.

100 Young, *ibid.* at 143.

in some form or another at any one time. At times it may be necessary for a court to adopt a strong review and remedy with an outcome-orientated order. At other times it may be more appropriate for a court to adopt a deferential approach and refer the matter back to the legislature/executive. Despite the insistent reluctance of the UK to accept the justiciability of ESR the judicial framework is very well placed to take steps to develop an innovative approach to remedies for ESR violations and as discussed in Chapter 5 adjudication of ESR already occurs every day in practice across the UK but it is piecemeal, incremental and often under the rubric of something else.¹⁰¹

The principles of adjudication developed here are not proposed on the basis of strength or weakness. Nor are they proposed as a measurement tool as such or purely heuristic. They are proposed as principles of good practice that counteract the multiple critiques of social rights discussed above, whilst at the same time requiring a degree of flexibility in their application at any given time. They are principally derived from deliberative democracy theory and form part of a multi-institutional theoretical framework where responsibility for ESR, and human rights more broadly, are the responsibility of the legislature, executive and judiciary where each must pertain to a substantive normative standard (either set out in the constitution or derived from international law). In this sense, the judiciary must be equipped with flexible principles to respond to its constitutional role as a deliberative accountability mechanism. For example, whilst at times a substantive peremptory review might be called for and a strong form of remedy deployed, at other times a deferential approach will be required and a conversational or participative experimentalist review should be undertaken. The principles capture the ‘adjudication journey’ and can be **flexibly** deployed under weak, moderate or strong interventionist approaches by the court, and at times an innovative approach will be required where multiple remedies are issued to deal with different aspects of a case.

The following principles of good practice are therefore intended for consideration across the ESR adjudication journey as important building blocks to be deployed using flexibility to respond to the particular circumstances:

Principle of Accessibility

The first principle is based on accessibility and requires questioning whether access to justice affordable/accessible? Are there barriers to accessing justice because of legal aid or standing? This could include consideration of whether the standing test should be expanded for public interest litigation¹⁰² and for collective cases in addition to whether the legal aid rules have been sufficiently adapted to account for ESR cases. Likewise, enabling access to that structure is paramount for the proper administration of justice. Problems relating to legal aid are significant in the UK context. For example, in England and Wales the introduction of the Legal Aid,

101 Boyle and Hughes, n 3.

102 See *Christian Institute v Others* [2015] CSIH 64, para.43–44 – standing established on EU law grounds but not under s100 of Scotland Act as charities could not meet victim test.

Sentencing and Punishment of Offenders Act 2012 ('LASPO') in April 2013 has seen the provision of legal aid decimated. The legislation removed access to legal aid significantly in social welfare areas and only facilitated potential support for breach of a Convention right.¹⁰³ This has serious implications for access to justice and the principle of accessibility in relation to social rights jurisprudence. The Legal Aid Board has, for example, refused legal aid to homeless people to challenge the criminalisation of homelessness and in response has defended its actions by indicating that such litigation could be funded through 'crowd fund sources'.¹⁰⁴

Importantly, access to justice consists of both procedural and substantive claims. Whilst the literature often identifies problems around legal aid, standing and representation there is more scope to reflect on how our substantive conception of justice impacts on accessibility (if for example, civil claims engaging with ESR are not taken sufficiently serious).¹⁰⁵ The principles developed here move beyond a mapping of access to justice to include a substantive component that reflects on how a 'fairer distribution of rights' may be primary to justice.¹⁰⁶ In other words, in addition to procedural access to justice the principle of accessibility read together with the other principles must also revisit the structure and substance of the definition of 'justice' in and of itself in any particular setting. A broader conceptualisation and legal structure that includes ESR will be better prepared for addressing violations and enabling effective remedies.

Principle of Participation

Does adjudication facilitate the participation of those most impacted, especially the most marginalised? Are multi-party and structural cases facilitated when dealing with systemic problems? Do courts have the institutional capacity and procedures to respond to systemic societal problems? Are rights-holders able to participate in legal processes in which they are engaged and are they able to meaningfully engage in the outcome of those processes (including the remedies offered)? This principle is closely linked with the deliberative quality of adjudication and the counter-majoritarian principle in enabling the court to act as an institutional voice for the marginalised. As

103 Public Law Project, Top Legal Aid and Access to Justice Cases. Available at <https://publiclawproject.org.uk/wp-content/uploads/2018/08/Top-legal-aid-and-access-to-justice-cases-of-recent-years.pdf>

104 Sarah Marsh and Patrick Greenfield, 'Legal Aid Agency Taken to Court for Refusing to Help Rough Sleepers', *The Guardian*, 23 October 2018, available at www.theguardian.com/society/2018/oct/23/legal-aid-agency-taken-to-court-for-refusing-to-help-rough-sleepers

105 See, for example, the claims and counter-claims to Lord Sumption's remarks around civil legal aid as a non-essential component of justice, Mark Elliot, 'Civil Legal Aid as a Constitutional Imperative: A Response to Lord Sumption', *Public Law for Everyone*, 28 November 2018, available at <https://publiclawforeveryone.com/2018/11/28/civil-legal-aid-as-a-constitutional-imperative-a-response-to-lord-sumption/>

106 Roderick MacDonald, 'Access to Civil Justice' in Peter Cane and Herbert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), 492–521 at 502.

highlighted by Liebenberg, participation in decisions is an important aspect of the maxim *audi alteram partem* (hear the other side).¹⁰⁷ It recognises the importance of ensuring people have an opportunity to participate in decisions that will affect them and an opportunity to influence the outcome of those decisions.¹⁰⁸ The UN Special Rapporteur (UNSR) on Housing includes participation as a key principle that must be enabled to ensure access to justice is secured. As part of this principle, the UNSR highlights the importance of participation ‘in all stages of rights claims and in the implementation of remedies’.¹⁰⁹ In other words, all decisions around ESR should include rights-holders, including the designing and implementing of strategies and programmes. Where genuine participation has not occurred then the court must intervene to facilitate meaningful engagement with both the legal process as well as the remedies offered.¹¹⁰ Genuine participation requires proactive steps to ensure systemic barriers are removed whether they be physical, economic, social or cultural.¹¹¹ Further, different persons will have different needs and so participation should reflect those requirements with particular regard to barriers faced by women, children, disabled persons, racial and ethnic minorities, migrants, among other minority groups.

Whilst participation is a key component of access to justice it is not sufficient on its own to ensure substantive enforcement of rights. Participation and meaningful engagement in the adjudication process in South Africa, for example, has come under criticism for failing to give substance to rights.¹¹² The principle of fairness goes some way to address this gap by encouraging participation through fair processes, as well as substantive enforcement through stronger review and remedies where appropriate (in those cases demanding stronger intervention). Ultimately, the principle of participation is about facilitating access to procedural as well as substantive justice.

Principle of Deliberation

Does the court engage in dialogic methods? Is there deliberation between institutions/across jurisdictions/with key stakeholders? Does the court seek to ensure its practice is informed, inclusive, participatory and transformative or exercising deference where appropriate? There is a substantial body of literature that encourages ‘dialogue’

107 Liebenberg, n 65.

108 Ibid., citing Hoexter, *Administrative Law in South Africa* (2nd ed., 2012) 363.

109 UN Special Rapporteur, 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.

110 Sandra Liebenberg, ‘Remedial Principles and Meaningful Engagement in Education Rights Disputes’ (2016) 19 *Potchefstroom Electronic Law Journal* 1–43 at 5–6.

111 Ibid., para.49. See also General Recommendation No. 33 (2015) on women’s access to justice, para. 3; and Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights, paras. 21 and 38.

112 Anashri Pillay, ‘Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement’ (2012) 10(3) *International Journal of Constitutional Law* 732–755.

between the legislature and executive.¹¹³ Indeed, the literature indicates that the UK already operates within a dialogic model through the existing human rights framework. As alluded to in *Miller* and argued by Eleftheriadis, the UK constitution is a ‘matter of law, open to legal deliberation and reasoning to be determined by the legislature, the executive and the courts working together’.¹¹⁴ By way of example, when the court issues a declaration of incompatibility under section 4 of the Human Rights Act it is inviting the legislature to revisit an incompatible provision in a deferential way and under a dialogic model. Deliberative adjudication can include weak-form judicial review when appropriate where courts may take a deferential approach and refer a matter back to the legislature¹¹⁵ and strong review, where appropriate, that can include substantive review and outcome-oriented orders, including the use of specific implement.

Deliberation should occur horizontally across institutions and vertically between the local and supranational level. This approach engages with the principles of participation when facilitating deliberation of those impacted by court decisions. For example, a form of deliberation might include facilitating the role of an intervener, where a human rights institution might intervene on behalf of a group impacted. Likewise public interest litigation can fulfil the role of a bottom-up approach to deliberation where systemic issues are brought before the court by key interest groups. Deliberation can include an upwards form of dialogue with supranational and international actors, including in dialogue with UN bodies (and in response to their outputs) and regional and international courts (and in response to their judgments) and an internal and local form of dialogue with domestic and devolved institutions. It does not imply a direct line of communication but a dialectic and dialogic engagement that is alive to the continuous development of social rights adjudication. In its simplest form, this would see the court using other forms of social rights determination as interpretative sources to help inform its own approach where appropriate.

Principle of Fairness (Process and Substance)

Does adjudication ensure compliance with fair procedures? Does adjudication move beyond procedural review where appropriate? Is adjudication informed by substantive standards (with reference to international human rights law)? Are courts giving meaning to rights? Does the substance of the decision respect the dignity of the applicant? Are remedies employed to ensure substantive change for violations of ESR, or, alternatively, is the deference to parliament/executive on the substance justified? A critique of

113 For discussion see, Sandra Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote’ in Murray Hunt et al. (eds.), *Parliaments and Human Rights: Redressing the Democratic Deficit* 152–156 (Hart Publishing, 2015), 296–297; Alison Young, *Democratic Dialogue* (Oxford University Press, 2017); Murray Hunt, ‘Reshaping Constitutionalism’ in John Morison et al. (eds.), *Judges, Transitions and Human Rights* (Oxford University Press, 2007), 468 at 470.

114 Pavlos Eleftheriadis, ‘Two Doctrines of the Unwritten Constitution’ (2017) 13 *European Constitutional Law Review* 525–550 at 549.

115 Tushnet, n 84 at 23.

‘democratic experimentalism’ highlights the normative weakness of relying on process of deliberation and participation alone in the determination of rights.¹¹⁶ Courts must also abide by substantive and normative benchmarks, whether domestically or internationally conceived, in the determination of rights. This could include the development of judicial review that considers whether the decision itself is fair based on an independent examination of the evidence. Whilst this type of review is in its infancy¹¹⁷ there is potential for courts to develop review that takes into consideration the fairness of substantive outcomes in terms of rights compliance. In other words, over and above reviewing the decision-making process or the power (*vires*) to make the decision, is the outcome itself compliant with ESR? Courts may therefore adopt a hybrid approach that looks at the fairness of process and the substance of the decision/outcome.

Sometimes it may be that a violation of a right requires an outcome-orientated substantive remedy and a deferential remedy for different parts of the same judgment. For example, a violation of the right to adequate housing might require an order compelling a government body to provide adequate housing for a litigant, whilst at the same time issuing a deferential declaration regarding the reasonableness of the government’s overarching housing strategy and a supervisory order which allows the court to revisit the reasonableness of the policy at a future date – giving the government an opportunity to revisit the flawed housing strategy. This hybrid approach was evident in the *Hartz IV* litigation when the German Constitutional Court declared a social security policy unfit for purpose (unreasonable) and also issued a substantive decision on what was required to make it reasonable (that the policy should ensure a social minimum that protects human dignity).¹¹⁸ A mixture of different types of review and remedies can be used under a ‘hybrid’ form of social rights adjudication.

Expanding Grounds for Review

ESR can be adjudicated upon each of the grounds of review in the same way as CP rights. Grounds of review tend to be classified under a threefold division:¹¹⁹ **illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness)**. Depending on whether the ground is procedural (procedural

116 Sandra Leibenberg and Katherine G. Young, ‘Adjudication Social and Economic Rights, Can Democratic Experimentalism Help?’ in Helena Alviar García et al. (eds.), *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge, 2015), 237–257 at 248.

117 For a discussion of the development of evidence-based judicial review in cases engaging with systemic unfairness see Joe Tomlinson and Katy Sheridan, ‘Judicial Review, Evidence, and Systemic Unfairness in the UK’ IACL-AIDC Blog (3 September 2018) available at <https://blog-iacl-aidc.org/blog/2018/9/3/judicial-review-evidence-and-systemic-unfairness-in-the-uk>. Courts may well start to develop substantive-based review of outcomes moving beyond an assessment of *vires* in and of itself. See, for example, the court’s approach to tribunal fees in which they considered evidence on what constituted a social minimum based on criteria set by academics and the *Joseph Rowntree Foundation: R (UNISON) v Lord Chancellor* [2017] UKSC 51.

118 *Hartz IV*, n 66.

119 *Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case)* [1985] AC 374, [1985] ICR 14.

Table 1.2 Grounds of Review

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

impropriety) or substantive (unlawful/unreasonable) will determine what type of review the court will apply. The grounds for review are not intended to be exhaustive or mutually exclusive.¹²⁰ This means, for example that a case could be examined on the grounds that it is potentially unlawful, unreasonable and unfair, as well as on other potential grounds that might emerge in the future.

Intensity of Review

Depending on the grounds for review the court can employ different types of review in the determination of ESR including reasonableness, proportionality, procedural fairness and even anxious scrutiny. Each of the types of review can vary in intensity. Likewise, sometimes various forms of review can be used at the same time, including both procedural and substantive aspects. There is scope for the court to continue to develop the intensity of review in different types of cases. Courts could, for example, develop review techniques that also examine the fairness of the outcome of a decision and its compatibility with rights similar to the approach adopted in the *Hartz IV* case in Germany.¹²¹ This type of review, whilst in its infancy in the UK, is evident in cases such as *UNISON*,¹²² where the court considered evidence on what constituted a social minimum when considering the fairness of tribunal fees, or in the case of *RF* where the court considered the lack of empirical evidence to justify a policy unlawful.¹²³ This type of review is categorised below as substantive fairness.¹²⁴

120 *Wheeler v Leicester City Council* [1985] UKHL 6 (25 July 1985).

121 *Hartz IV*, n 66.

122 *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

123 *RF v Secretary of State for Work And Pensions* [2017] EWHC 3375 (Admin).

124 See Joe Tomlinson and Katy Sheridan, 'Judicial Review, Evidence, and Systemic Unfairness in the UK' IACL-AIDC Blog n 116.

Table 1.3 Intensity of Review

<i>Intensity of review</i>	<i>Definition – what must the judiciary ask itself?</i>
Reasonableness	Was the decision-making process reasonable and rational? If not, would no other sensible person applying logic have arrived at the same outcome? (This is the UK threshold; more expansive forms of reasonableness are discussed below)
Proportionality	In the context of human rights, was the decision the most proportionate way to achieve a legitimate aim when balancing out the alternatives and taking into account the necessity of the action?
Procedural Fairness	Did the decision-making process follow due process, was it fair? Were all of the decision-making procedures followed correctly?
Anxious Scrutiny ¹²⁵	In the context of fundamental rights decisions, does the particular area and severity of the decision merit the judiciary taking a closer look at the substantive and procedural aspects of the case?
Substantive Fairness ¹²⁶	Over and above whether the process was fair, was the decision itself fair based on an independent examination of the evidence? Whilst this type of review is in its infancy ¹²⁷ there is potential for courts to develop review that takes into consideration the fairness of substantive outcomes in terms of rights compliance. In other words, over and above reviewing the decision-making process or the power (<i>vires</i>) to make the decision, is the outcome itself compliant with ESR?

In relation to ESR it is particularly important to be aware of the difference between different types of review such as procedural review or more substantive

125 Anxious scrutiny is employed in asylum cases where the court has held that only the highest standards of fairness will suffice, *Secretary of State for the Home Department v. Sittampalam Thirukumar, Jordan Benjamin, Raja Cumarasuriya and Navaratnam Pathmakumar*, [1989] Imm AR 402, United Kingdom: Court of Appeal (England and Wales), 9 March 1989; *Kerrouche v Secretary of State for the Home Department* [1997] Imm. A.R. 610. In the case of *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* 2015 UKSC 19, the court noted that the tests of anxious scrutiny and proportionality may produce very similar results (the tests are not the same but when engaging with fundamental rights the tests may reach the same outcome).

126 As per Lord Steyn, ‘the rule of law in its wider sense has procedural and substantive effect’ *Secretary of State for the Home Department, Ex Parte Pierson, R v.* [1997] UKHL 37. Whilst in this case the issue in question was the *vires* of the decision of the Home Secretary to retrospectively increase a tariff (a power the court decided he did not have) there is potential scope for the court to move beyond this assessment to consider the substantive outcome of decisions (and whether the decision itself is fair – or complies with ESR). In other words, the courts may begin to develop review of the outcome of the decision based on an independent examination of the evidence. See FN below and the UNISON case where the court examined evidence in establishing what constituted a social minimum, *R (UNISON) v Lord Chancellor* [2017] UKSC 51. This type of review would be required to assess components of ESC compatibility, particularly on an assessment of the minimum core. The *Hartz IV* case is a comparative example where the court assesses both the procedure and the substantive outcome of the decision.

127 For a discussion of the development of evidence-based judicial review in cases engaging with systemic unfairness see J Tomlinson and K Sheridan, n 116. Courts may well start to develop

review assessing the reasonableness of a decision, proportionality analysis or establishing the substantive fairness of a decision. For example, if an applicant claims that the decision maker has failed to comply with due process, they can seek a remedy on the grounds of procedural impropriety. This type of action could include whether or not a decision maker has had regard to all relevant factors. For example, if a decision maker is under a statutory duty to have due regard to an outcome this is a right to a process (similar to the approach under section 149 of the Equality Act or the Children and Young Persons (Wales) Measure 2011 implementing UNCRC as a relevant factor in decision-making). If the decision maker has had due regard as part of the decision-making process then the requirement (the duty) will be fulfilled even if this results in no substantive change to the outcome in favour of the rights-holder.¹²⁸ The duty is concerned with the lawfulness of the process and not the lawfulness or the adequacy of the outcome.¹²⁹

Reasonableness review can take on different connotations depending on the jurisdiction. In the UK an applicant can seek judicial review on grounds of reasonableness and the court will assess the applicant's case based on whether or not the policy or decision relating to the provision of the right is 'reasonable'. The threshold for unreasonableness is high in jurisprudence across the UK. Based on the well-developed *Wednesbury* reasonableness test an action (or omission) must be 'so outrageous and in defiance of logic...that no sensible person who had applied his mind to the question ... could have arrived at it'.¹³⁰ This degree of review means that the onus of proving 'unreasonableness' rests with the applicant and that the court requires a high degree of 'irrationality' to find a matter unreasonable. Whilst this works well in relation to some areas of human rights law it may not be suitable or appropriate for all alleged human rights violations. For example, there is a difference in challenging whether or not a long-term policy is fit for purpose or the immediate need of someone who is living in absolute destitution. The latter may compel a more interventionist approach than the former.

An expanded form of reasonableness review has been the type of review employed in South Africa.¹³¹ In the context of ESR, it has been understood as a right to a reasonable policy (p) to access a right (x).¹³² In other words, the court assesses the policy or strategy seeking to achieve the right [p(x)] rather

substantive-based review of outcomes moving beyond an assessment of vires in and of itself. See, for example, the court's approach to tribunal fees in which they considered evidence on what constituted a social minimum based on criteria set by academics and the Joseph Rowntree Foundation: *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

128 There is no jurisprudence on the Welsh Measure, however, the court's approach to the due regard duty is evident in a number of cases under the Equality Act 2010 (discussed in Chapter 5).

129 *MA & Ors, R (on the application of) v The Secretary of State for Work and Pensions* [2014] EWCA Civ 13 (21 February 2014) para.92.

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

131 For example, see the reasonableness test as applied in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

132 Amartya Sen, 'The Right Not to be Hungry' in Philip Alston et al. (eds.), *The Right to Food* (The Hague: Martinus Nijhoff, 1984), 70.

than outcome [(x)]. In the case of *Grootboom*, the court assessed the reasonableness of the housing policy in South Africa and determined that the state had not gone far enough in providing housing for those in desperate need thus acting unreasonably.¹³³ The outcome was that the state was required to revisit its housing strategy (this did not provide an immediately enforceable right to housing for Mrs Grootboom). Sometimes remedies may have no immediate material impact that results in transformative change for a particular applicant, but the longer-term symbolism of the court's interjection will create the space for broader societal change and there are still substantive components to this approach (i.e. the longer-term outcome of a revised housing strategy).¹³⁴

This broader approach to reasonableness facilitates a more substantive, or thicker, conception of justice than purely procedural review. South African jurisprudence has developed reasonable review that encompasses substantive standards. These standards include reviewing the reasonableness of state action by assessing whether the approach adopted to realise ESR is coherent, balanced, flexible, comprehensive, workable and non-discriminatory¹³⁵ as well as whether there has been meaningful engagement in the decision-making process.¹³⁶ In addition, it compels states to adopt measures that have taken into account the most marginalised groups and prioritise grave situations or situations of serious risk (invoking theories of prioritisation).¹³⁷ Importantly, the UK test of *Wednesbury* reasonableness falls significantly short of these broader substantive 'reasonable' standards as conceived of in the South African approach.

The development of proportionality analysis has been an important development in UK jurisprudence in the wake of the European Convention on Human Rights (ECHR) litigation and arguably now performs a role as both a common law ground of review¹³⁸ as well as potentially imposing a greater intensity of review when it is invoked.¹³⁹ Once a prima facie breach of a right has been found, proportionality, in its most widely conceived theoretical exposition¹⁴⁰ asks whether the infringement pursues a legitimate aim?; second, was the measure necessary (was there no alternative, less restrictive approach)?; third, on balance, do the benefits outweigh the costs

133 *Grootboom*, n 131.

134 Garavito and Franco, n 79 at 19–21.

135 Katharine G. Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki Jackson and Mark Tushnet (eds.), *Proportionality, New Frontiers and New Challenges* (Cambridge University Press, 2017), 248–273 at 254.

136 Anashri Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10(3) *International Journal of Constitutional Law* 732–755.

137 Young, n 135at 269.

138 Meaning it can be applied in cases engaging with fundamental rights beyond ECHR jurisprudence.

139 See *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

140 The UK approach is still rather reticent to the broadest interpretation of proportionality. See obiter dicta *Pham* *ibid.* as per Lord Mance para.95–97.

imposed on the rights-holder?¹⁴¹ Nonetheless, even with more substantive review on the grounds of reasonableness or proportionality the violation of a right might not necessarily be addressed. This relates to the fact that not all rights are immediately enforceable (they are derogable) and the enforcement of rights of different persons will no doubt require a balancing act. The question remains, are there some circumstances where a more interventionist approach around substantive enforcement might be required – such as for example, when the violation breaches the dignity of the applicant,¹⁴² where the breach causes conditions to fall below a minimum core/social minimum,¹⁴³ or where there is a breach of a peremptory threshold as set out in statute (see the discussion below).

A more interventionist approach might rest on a challenge to the standard of provision of an ESR on the grounds that it is manifestly unfair based on one of the grounds identified (dignity/minimum/peremptory). So rather than focussing purely on procedural justice, reasonableness or proportionality, asking the court to assess the fairness of the actual substantive outcome. In the *Hartz IV* case, the German Constitutional Court assessed whether the substantive outcome of a policy as well as the process leading to the outcome was substantively fair.¹⁴⁴ The court adopted a hybrid approach to judicial review where they assessed the decision-making process as well as the fairness of the outcome. The court found that the process was flawed, and that the outcome of that process was unfair. The more substantive degree of review meant that the public body had to revisit the process as well as the outcome in order to comply with the court's decision. This is a more absolutist approach.

In terms of developing ESR adjudication courts in the UK will require to move beyond the traditional reasonableness review and develop other means of assessing human rights compliance. For example, this could manifest as a more thorough form of reasonableness review beyond 'irrationality' to encompass more substantive elements, including aspects of proportionality. Based on the South African approach the UN CESCR has for example developed reasonableness as a test that takes into consideration the following factors:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- Whether resource allocation is in accordance with international human rights standards.

141 Young, n 135 at 257. See also Alexy (the original proponent of the proportionality model of review). Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002).

142 As seen in Colombian jurisprudence around *mínimo vital* – discussed in more detail in Chapter 4.

143 *Ibid.*, see also the example of German jurisprudence including *Hartz IV*, n 66.

144 *Hartz IV*, *ibid.*

- Whether the State party adopts the option that least restricts Covenant rights.
- Whether the steps were taken within a reasonable timeframe.
- Whether the precarious situation of disadvantaged and marginalised individuals or groups has been addressed.
- Whether policies have prioritised grave situations or situations of risk.
- Whether decision-making is transparent and participatory.¹⁴⁵

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

The process v substance dimension of social rights adjudication remains to a large degree unsettled in the literature and practice. Here I propose that there are two approaches where the substance of rights must feature more prominently in the adjudication of the court. The first approach is when the violation is so obvious and severe as to directly impact on the applicant's dignity and meaningful enjoyment of the minimum level of rights, the *dignity or social minimum threshold*.¹⁴⁶ In this instance, the court must intervene with a substantive enforcement and outcome-orientated order. The second approach is for the court to be more proactive in responding to instructions placed upon the decision maker by the legislature, *the preemptory threshold*. For example, if the legislature instructs the decision maker to have 'due regard' to an outcome, or to implement a policy that seeks to achieve the outcome, then the preemptory threshold is not met as no substantive outcome is anticipated or guaranteed. Whereas, if the legislature instructs the decision maker to establish and meet a person's need in the provision of a right then the preemptory threshold is met because the legislature anticipated and guaranteed a substantive outcome. When the assessment of need is carried out this should materialise, or crystallise, into a duty to fulfil or realise

145 Bruce Porter, Rethinking Progressive Realisation, Social Rights Advocacy Centre (2015) at 6 and United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007); 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; UNSR on Housing, Access to Justice Report, n 109, para.25–27.

146 See Fredman, n 64 . For a discussion on human dignity as a principle of human rights adjudication see Conor Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2005).

the particular right meaning a substantive outcome is enforceable by the court.¹⁴⁷ In other words, the court should be prepared to enforce a substantive outcome when the decision maker fails to follow the instructions placed upon it by the legislature to do so.

Counter-majoritarian Principle

Is adjudication elite-driven? Has the court taken steps to review the holistic implications? Has the court considered whether the judgment will further marginalise vulnerable groups? If ESR are engaged, is the person/group impacted by the violation excluded from influencing change in a pro-majoritarian political system?

Table 1.4 Classification of Innovative Approach to Procedural v Substantive Remedies¹⁴⁸

<i>Type of right</i>	<i>Weak Right to a fair process (for ex. due regard)</i>	<i>Moderate Right to a policy (not necessarily a substantive outcome)</i>	<i>Strong Right to an outcome</i>
Nature of duty (or obligation)	Duty-bearer must implement process (for ex. have due regard as part of decision-making process)	Duty-bearer must implement policy to realise right (for ex. establish national strategy to fulfil a right)	Duty-bearer must realise right – through process or policy or other means – resulting in a substantive outcome
Intensity of review	Due process (Procedural fairness)	Reasonableness/Proportionality (Irrationality +)	Illegality (Substantive fairness)
What the courts might consider	Process-based – was the process followed? Deference to Parliament/Government to remedy incompatible legislation/action/omission	Was the policy reasonable? Was the interference proportionate? Decisions on means and policies left to government	Was the decision fair? (vires and substance) Apply a threshold to measure compliance

(Continued)

147 See the judicial commentary on crystallisation of duties in *McGregor v South Lanarkshire Council* 2001 SC 502. Examples of statutory needs assessment can be found in s37(1) of the Children and Families Act or s12A Social Care (Scotland) Act 1968.

148 This table is developed from the remedy typology developed by Tushnet n 84 and expanded upon by Garavito and Franco, n 79 at 10. See Chapters 4, 5 and 6 for further discussions on the cases mentioned.

Table 1.4 (Cont.)

<i>Type of right</i>	<i>Weak Right to a fair process (for ex. due regard)</i>	<i>Moderate Right to a policy (not necessarily a substantive outcome)</i>	<i>Strong Right to an outcome</i>
Type of remedy	Revisit the process	Revisit the policy	Revisit the outcome
Type of Enforcement	Deference to Parliament/Government to remedy incompatible legislation/action/omission Compliance left to discretion of decision makers	Court can outline procedures and broad goals Criteria and deadlines for assessing progress Decisions on means and policies left to government	Ultra vires declarations/ Outcome-orientated orders, including outcome-orientated structural interdicts in multi-party cases
Examples in practice ¹⁴⁹	Due regard duty under the Equality Act 2010 – PSED requires that the decision maker has due regard to equality of outcomes but does not include duty to ensure equality of outcomes Declaration of incompatibility – <i>Hirst</i> case (no change in law – parliament could choose to ignore)	Ultra vires declaration in <i>Napier</i> (damages awarded which led to Scottish Government addressing the issue in a substantive sense – a broad goal had been inadvertently set – the symbolic nature of the deferential judgment resulted in material change) Reasonableness judgment in <i>Grootboom</i> (right to a reasonable housing strategy not an immediate right to a house)	Statutory framework where assessment of needs crystallises into duty to provide (see s37 (1) of the Children and Families Act 2014 or s12A Social Care (Scotland) Act 1968) <i>Hartz IV</i> (hybrid remedy – right to a reasonable process and the right to an outcome to meet threshold of dignity) Structural interdict Colombia (<i>T025</i> structural interdict including revised policy/budget and outcome for internally displaced persons) Structural interdict in Argentina (<i>Agüero</i> – budget, plan, outcome for housing)
Type of Defence	We took it into consideration	Our existing policy is reasonable and/or proportionate	We do not have enough resources to achieve x ¹⁵⁰

149 The cases mentioned here are discussed in more detail in Chapter 4, 5 and 6.

150 This defence may not be insufficient in terms of fulfilling a statutory obligation see, for example, *MacGregor v South Lanarkshire Council* 2001 SC 502 and *R v Gloucestershire County Council (Ex p Barry)* [1997] AC 584.

Where persons or groups are politically marginalised Landau has argued that the court can become an important institutional voice for those who cannot seek recourse through pro-majoritarian politics.¹⁵¹ Deliberative models of adjudication must take into account the potential unequal bargaining power of participants. The danger is that the inherent inequality between the parties in ESR adjudication can undermine inclusive deliberation unless genuine agency is facilitated for the marginalised.¹⁵² For example, costly litigation can exclude those who cannot afford litigation and adversarial litigation can exacerbate structural inequalities. This can create a ‘disenfranchisement effect’ where the experience of poverty prohibits genuine participation in deliberative processes, including adjudication.¹⁵³ The danger of the court acting as a pro-hegemonic exercise of power can be balanced through facilitating structural remedies to deal with systemic problems.¹⁵⁴ This will only work if other principles are adhered to, including the need to ensure access to justice is affordable and accessible.

The Colombian Constitutional Court has heard and decided ‘structural’ cases where it considers whether an ‘unconstitutional set of affairs’ requires to be remedied.¹⁵⁵ Usually this will involve multiple applicants (collective cases) and will allow the court to review whether the state can remedy a systemic problem engaging multiple stakeholders and multiple defendants.

These types of structural cases tend to:

- (1) affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
- (2) implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations; and
- (3) involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.¹⁵⁶

If structural issues arise in relation to ESR it would not be beyond the reach of the legislature, executive and judiciary to work together to remedy the matter.¹⁵⁷

151 Landau, n 41. See also Mantouvalou in Gearty and Mantouvalou n 75.

152 Leidenberg and Young, n 93 at 251.

153 Ibid.

154 Landau, n 41.

155 For an in-depth discussion on this see César Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’ (2011) 89 *Texas Law Review* 1669–1698.

156 Ibid. at 1671.

157 Such as the response by the executive and legislature to introduce emergency legislation to deal with the fall out of systemic human rights violations following the Cadder judgment. See *Cadder v Her Majesty’s Advocate* (Scotland) [2010] UKSC 43 (26 October 2010) and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

For example, if a systemic problem arises in relation to human rights protection then there could be a role for the court to supervise whether the legislature and/or executive could take steps to remedy this through a form of structural injunction. Landau argues that addressing violations of social rights through a structural approach to remedies facilitates a form of social rights adjudication that positively impacts on the lives of poorer citizens and prioritises the most vulnerable.¹⁵⁸

Remedial Principle

Are the remedies appropriate and are they effective? Are they procedural or substantive in nature? Are they deferential where appropriate and outcome-orientated where appropriate? Are they participative and are there sufficient monitoring mechanisms to ensure compliance? Are structural remedies used where appropriate?¹⁵⁹ The approach to remedies requires a much broader and deeper understanding as to how the court can respond in a dialogic manner whilst also protecting the most vulnerable and those most in need with outcome-orientated orders when appropriate. Garavito claims that this approach to adjudication works best when courts clearly affirm the justiciability of the right in question (strong rights); leave the policy decisions to the elected branches of power whilst laying out a clear roadmap for measuring progress (moderate remedies); and actively monitor the implementation of the court's orders through participatory mechanisms like public hearings, progress reports and follow-up decisions (strong monitoring).¹⁶⁰

In addition, courts must also balance this principle with the principle of substantive fairness and intervene with stronger outcome-orientated remedies where appropriate (employing the social minimum or peremptory thresholds). A flexible approach to adjudication and to the principles of adjudication enables courts to weigh up the most appropriate remedy in any given context. This means developing remedies to meet the most urgent of needs in serious violations as well as remedies that respond to broader claims around progressive realisation, revenue generation and allocation, as well as national strategies to fulfil rights.

Ultimately courts should have a constellation of remedies readily available to them. What is remedially appropriate in any given case will be dependent on a number of factors (number of applicants, degree of interference with the right, complexity of resource allocation, number of defendants, fairness of the outcome and so on). The overriding principle must be that the remedy adopted in any given case is 'effective in protecting and vindicating

158 Landau, n 41 at 189–247. See also Mantouvalou in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart, 2011).

159 For a discussion on the different types of remedies available for social rights see Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds.), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) and Boyle, n 1.

160 Rodríguez-Garavito, n 138 at 1692.

the rights at issue and responsive to the circumstances at hand'.¹⁶¹ As Porter identifies:

there is no universally preferred social rights remedial and enforcement strategy. Social rights claimants do not always aspire to achieve broader structural change or transformative effect. If a claimant requires only a correction to an existing entitlement system in order to secure housing, food or healthcare, perhaps qualifying for an already existing benefit, the most effective and appropriate remedy may be one of immediate application, applying to a single entitlement, identifying a single respondent government [agency]. In other cases [...] claimants may undertake litigation with clearly transformative aims, identifying multiple entitlements and respondents and demanding the implementation of ongoing strategies with meaningful engagement and stakeholders. It is important to ensure that range of remedial and enforcement strategies are employed and effective enforcement is in place in all cases.¹⁶²

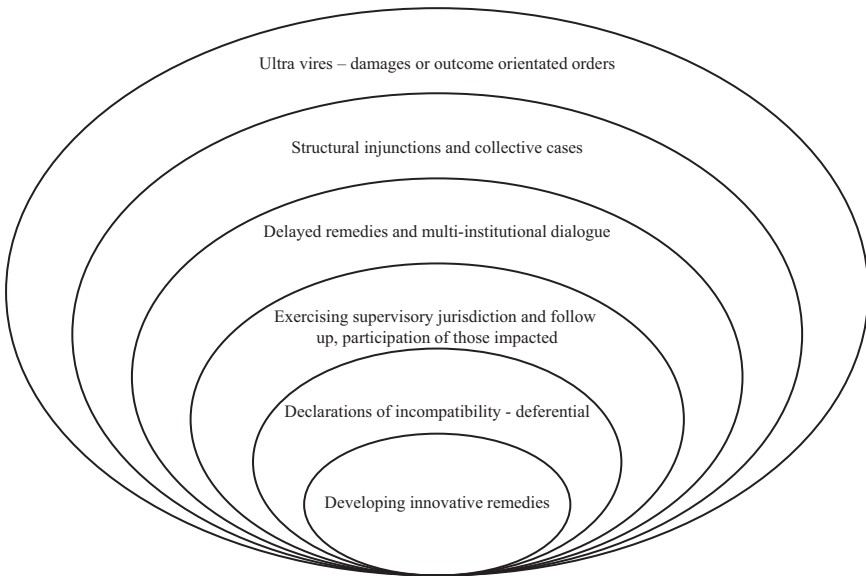


Figure 1.1 Developing Innovative Remedies

161 Bruce Porter, 'Canada: Systemic Claims and Remedial Diversity', in Malcolm Langford et al. (eds.), n 48 201–254 at 204.

162 *Ibid.*, 205–206.

The legal definition of what constitutes an effective remedy in international law is discussed in the next chapter.

Some Key Definitions

For the purposes of the book, it may be helpful to clarify some key definitions. The rights referred to as ‘economic and social rights’ (or ESR) refer to the broad category of rights enunciated in international law such as the right to education, the right to the enjoyment of the highest attainable standard of physical and mental health, labour rights, the right to an adequate standard of living, the right to adequate housing, the right to social security, amongst others.¹⁶³ The definition of incorporation adopted is the domestication of international norms coupled with access to an effective remedy for a violation. Sometimes incorporation can be direct – such as through direct reference to an international treaty.¹⁶⁴ Sometimes incorporation can be indirect, such as through the constitutionalisation or legalisation of a right mirroring an international normative standard implicitly but not explicitly. And sometimes incorporation of a right can be sectoral, where for example the right to adequate housing is

163 Examples of economic rights include labour rights, examples of social rights include the right to education, the right to adequate housing, the right to health, the right to freedom from destitution and so on. ESR more broadly protect vulnerable groups such as those with disabilities, children, the elderly, minority communities or those who are unemployed. The rights protected in international law fall under treaties such as the International Covenant on Economic, Social and Cultural Rights 1966, UN General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3; the European Social Charter (Revised) 1996, Council of Europe, ETS 163; the Convention on the Rights of the Child 1989, UN General Assembly, resolution 44/25 of 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3; the Convention on the Elimination of Discrimination Against Women 1979, UN General Assembly resolution 34/180 of 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; the Convention on the Elimination of Racial Discrimination 1965, United Nations General Assembly resolution 2106 (XX) of 21 December 1965 United Nations, Treaty Series, vol. 660, p. 195; and the Convention on the Rights of Persons with Disabilities 2006, United Nations General Assembly resolution A/RES/61/106 of 24 January 2007, 76th plenary meeting; issued in GAOR, 61st sess., Suppl. no. 49. ‘Annex: Convention on the Rights of Persons with Disabilities’: pp. 2–29. ‘Economic, social and cultural rights’ sometimes referred to as simply ‘economic and social rights’ (as they are in this book), or socio-economic rights. Cultural rights, *per se*, can engage with a very different normative and conceptual debates relating to minority rights, rights to cultural identity, the meaning of ‘culture’, multicultural citizenship and so forth (see, for example, Siobhán Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism*, (Hart 2006) . It is not within the ambit of this book to draw on this wider engagement in the literature relating to cultural rights. However, the book recognises the indivisibility of all rights and that, whilst sub-categories may exist and are important to recognise, the categorisation of ‘economic, social and cultural rights’ can be synonymous with ‘economic and social rights’, ‘socio-economic rights’ or simply ‘social rights’.

164 See, for example, the constitution of Argentina (Article 25) or the Norwegian Human Rights Act 1999.

provided for under housing legislation, or the right to social security under social security legislation. Essentially domestic incorporation of international norms, be that direct, implicit or sectoral, should be both derived from and inspired by the international legal framework and should at all times be coupled with an effective remedy for a violation of a right.¹⁶⁵ Forms of legal integration that do not facilitate access to a remedy for a violation of a right cannot amount to incorporation but should be defined as a means of implementation, rather than incorporation.

The term justiciability refers to the adjudication of a right by a court.¹⁶⁶ It is important to note that justiciability does not necessarily mean, or equate to, full compliance or enforcement of a right. Some justiciability mechanisms may be weaker than others depending upon how the right, and associated duties, are formulated in law and how willing the court is to engage with enforcement in any given context. Nonetheless, as discussed in more detail in Chapter 2, justiciability can be either (or both) a means of implementation along a scale of enforcement and an important accountability mechanism that ensures either partial or full compliance. Justiciability itself can therefore be measured on a scale between weak enforcement and strong enforcement. The book looks at different models of incorporation and justiciability across this spectrum contextualised within the principles of adjudication discussed above.

165 Katie Boyle, *Models of Incorporation and Justiciability of Economic, Social and Cultural Rights*, Scottish Human Rights Commission, (2018) at 14. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19. Para.77–80; UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution/adopted by the General Assembly*, 21 March 2006, A/RES/60/147. See also UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para.4.

166 See, for example, the definition provided by Dennis and Stewart, ‘Among scholars and non-governmental advocates, the term ‘justiciability’ seems to be used most often to refer merely to the existence of a mechanism or procedure to resolve alleged violation of the rights in question. In this view, rights (or disputes about rights) are justiciable when there is a mechanism capable of adjudicating them, and non-justiciable when one is lacking.’ Michael Dennis and David Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ (2004) 98 *The American Journal of International Law* 462; or by Arambulo, ‘Justiciability of a human rights means that a court of law or another type of supervisory body deems the right concerned to be amenable to judicial scrutiny’, Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Hart Intersentia, 1999), 16–18; or by Craven, ‘[T]he justiciability of a particular issue depends, not on the quality of the decision, but rather on the authority of the body to make the decision.’, Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on Its Development* (Clarendon Press and OUP, 1995), 102.

Structure of the Book

This book is divided into six chapters, each focussing on aspect of how ESR can be better embedded in our legal systems in a way that can facilitate an approach to ESR adjudication based on flexible principles of good practice derived from deliberative democracy theory. As this chapter highlights, ESR and their judicial enforcement remain contested in the UK discourse, and yet the discourse and practice has moved on both internationally and comparatively, meaning an ESR accountability gap has emerged. The principles of adjudication set out in this chapter seek to contribute to the international discourse whilst offering a new lens through which to view ESR in the UK context specifically. They address the first and second critical waves of ESR justiciability (i.e. the anti-democratic critique; the indeterminacy critique; the capacity critique; and the pro-hegemonic critique). The principles include: the accessibility principle; the participation principle; the principle of deliberation; the principle of fairness; the counter-majoritarian principle and the remedial principle. They frame the discussion throughout the following five chapters.

The second chapter looks at the status of ESR in international law arguing that recourse to an effective (judicial) remedy now forms part of state obligations to progressively realise ESR. Chapter 2 revisits the original separation of human rights that occurred during the development of the International Bill of Rights and explains how this bifurcation of rights into different categories (civil and political v economic, social and cultural) has been misunderstood resulting in a false dichotomy of rights. The legal position now acknowledges that access to justice in and of itself is a right, and this includes the need to develop effective remedies for violations of all human rights. Responding to this need requires innovation and imagination if legal systems are to be properly equipped to ensure access to effective remedies.

The third chapter focusses on the regional human rights frameworks as they apply regionally and in the UK. In particular the chapter sets out how EU law and the treaties associated with the Council of Europe, in particular the ECHR, form important pillars of the UK constitution. Both of these regional systems protect ESR to different degrees, and both of the European frameworks are at risk of being lost as part of regressive human rights reform in the domestic sphere. This chapter sets out the particular risks to human rights as a result of Brexit and the UK's fluctuating position in relation to retaining or repealing the Human Rights Act 1998 (thus risking the status of the ECHR and protection of human rights in domestic law). It also sets out the potential of regional mechanisms not yet fully explored, including the revised European Social Charter and the work of the European Committee of Social Rights.

Chapter 4 addresses the constitutional resistance to human rights in the UK and places this discussion within a wider comparative context drawing from models of constitutionalism that favour both parliamentary and judicial supremacy. The chapter explains that the UK exists in a state of flux between different models of constitutionalism (legal v political; framework v process)

and that the devolved lens completely reframes the way in which rights can be understood as forming a substantive component of the rule of law. Chapter 4 looks at different models of constitutionalism and how states seek to holistically (or not) address human rights, including ESR, in their constitutional arrangements.

The fifth chapter sets out the ways in which ESR adjudication occurs. The ‘justiciability mechanisms’ are framed as models and assessed with reference to the principles of adjudication. The justiciability mechanisms include the type of adjudication that already occurs (under the statutory framework broadly speaking; under equality law; through the dynamic interpretation of CPR; and as part of common law incorporation of international human rights law) as well as future mechanisms – i.e. how the justiciability of ESR might occur in the future (recourse to an international or regional ESR complaints mechanism; and/or a renewed constitutional framework through an Economic and Social Rights Act or codified constitution).

This chapter explores the definition of ‘incorporation’ proposing that incorporation can take on many different forms, crucially however, it requires the creation of rights coupled with effective remedies meaning weaker models of implementation, whilst helpful, are not the same as incorporation of rights. Justiciability can at times be a means of implementation (it can facilitate the enforcement of rights) without necessarily ensuring full compliance. It also has the potential to be an accountability mechanism – the stronger the model of incorporation, the more scope there is for accountability. The book orientates models of justiciability and incorporation towards a multi-institutional constitutional model. This model is the best means of ensuring access to justice for ESR (and CPR) and recognises that the legislature, executive and judiciary each have a role to play in upholding human rights.

The sixth chapter sets out the means through which ESR are developing in the devolved frameworks of Wales, Northern Ireland and Scotland. The book highlights that there is no universal human rights and equality framework that applies across the UK and that the trajectories of the devolved regions have completely transformed the way in which human rights are framed. Chapter 6 highlights the significant steps already taken by the devolved legislatures with respect to implementing and observing international human rights law such as through the Children and Young Persons (Wales) Measure 2011; the Social Security (Scotland) Act 2018; the recommendations of the Northern Ireland Human Rights Commission for a (now suspended) Bill of Rights for Northern Ireland; and the recommendations of the First Minister’s Advisory Group on Human Rights Leadership in Scotland on the incorporation of economic, social, cultural and environmental rights into Scots law.

Overall, the book seeks to offer ways forward for ESR according to the principles of adjudication and the particular justiciability mechanisms available under different forms of incorporation (constitutionalisation) of rights. In particular it gives practical examples of how the legislature, executive and judiciary can act as

guarantors of rights and proposes that the court must act as an accountability mechanism, and a means of last resort, should other institutional mechanisms fail. In so doing, it seeks to propel the national discourse beyond discussions around regressive human rights reform and presents pathways to better protect ESR both within the UK and beyond.