

The Right to Food in the UK – An Explainer

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Access to Justice For Social Rights
Addressing The Accountability Gap

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4.1 Introduction / Background

This briefing document has been prepared for the Nuffield Foundation project on 'Access to Justice for Social Rights: Addressing the Accountability Gap', led by Dr. Katie Boyle. It forms the fourth part of four briefings that explore and explain the international legal obligation to provide the rights to food, housing, and social security. This briefing explains what the right to food means in terms of international law and how this can be understood at the domestic level at both national and devolved level. It explains **what** the right to food means, **why** the devolved regions and the UK both have an obligation to provide the right and **why** it is important to do so, and **how** this could be best realised within the context at the national level and each devolved nation. In particular, the report looks at different means of legal incorporation with practice from around the world taken into account. This means exploring the ways that we can implement and enforce the right in our own domestic laws. In other words, how can the UK best protect the right to food? The importance of ensuring a human rights-based approach to

food should not be underestimated. It is a key component of international human rights law, and in particular, economic, social and cultural (ESC) rights as provided for by the International Covenant on Economic, Social and Cultural Rights (ICESCR). ESC rights cover housing, employment, health care, education, and the right to an adequate standard of living to name but a few. They more broadly protect marginalised groups such as those living in poverty, women, children, the elderly, disabled persons, migrants and so on. ESC rights are also often overlooked in the UK's legal systems, including at the devolved level, and require further exploration within this context to ensure ESC rights are properly implemented into domestic law, with effective remedies made available via the courts.

The right to adequate food is protected by a range of legal treaties at both the international and regional level. The UK is under an obligation to comply with various treaties (international agreements) that the State has agreed to be bound by. The following table shows what kind of treaty provisions exist and whether the UK is under a binding obligation to comply with them:

Treaty/ provision	Status in UK, Scots, & NI law	Is it binding?
Article 11 ICESCR right to an adequate standard of living	Signed and ratified – not incorporated	Yes
General comment No.12 The right to adequate food (art.11)	Interpretative in terms of fulfilling right to food under Article 11 ICESCR	Yes
Optional Protocol to ICESCR	Not signed or ratified	No – this means there is no access to the international complaint mechanism

Article 24 and Article 27 of the Convention on the Rights of the Child	Signed and ratified	Yes
Article 12 and 14 of the Convention on the Elimination of All Forms of Discrimination Against Women	Signed and ratified	Yes
Article 9 and Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families together with General Comment No.2 and General Comment and Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration	Signed and ratified	Yes
Article 28 of the Convention of the Rights of Persons with Disabilities	Signed and ratified	Yes
Article 13 right to social and medical assistance European Social Charter (ETS No. 35), adopted in 1961	Signed and ratified	Yes
Article 13 right to social and medical assistance Revised European Social Charter (ETS No.163), adopted in 1996	Signed but not ratified	No (however same right is covered by earlier treaty)
Additional Protocol to the European Social Charter Providing for a System of Collective Complaints	Not signed or ratified	No – this means there is no regional complaint mechanism

4.2 What is the Right to Food?

The right to adequate food (Art. 11 ICESCR), provides for the “right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right.” In addition, article 11(2) provides that States Parties recognise the “fundamental right of everyone to be free from hunger.” Moreover, it sets out that States shall take measures to improve methods of food production, conservation, and distribution. Inherently interconnected with the right to adequate health and the right to an adequate standard of living, the right to food seeks to ensure freedom from hunger for all and obligates States party to the ICESCR to ensure food is available, accessible both physically and financially, as well as nutritionally adequate. Further, the UN Committee on Economic, Social and Cultural Rights (CESCR), the body responsible for overseeing compliance with the ICESCR, provides helpful explainers as to the right to food. These are called ‘General Comments’ and they demonstrate how a country should comply with its international legal obligations. General Comment 12

provides a comprehensive overview what is required to respect, protect, and fulfil the right to adequate food. General Comment 12 defines the right to food as being met when ‘every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement’.¹ Similarly, the UN Special Rapporteur on the Right to Food has defined the right as having ‘regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures physical and mental, individual and collective, fulfilling and dignified life free of fear’.² Additionally, the CESCR highlights ‘the right to adequate food indivisibly links to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights’, further elaborating that it is inclusive and must not be interpreted in a narrow or restrictive sense.³ For example, equating it with a ‘minimum package of calories, proteins and other specific nutrients’.⁴ A key term used when analysing the right to food is food security, which exists when all people, at all times, have physical and economic access to sufficient, safe

and nutritious food to meet their dietary needs necessary for an active and healthy life.⁵ The following framework provides a summary of key areas of the right and the obligations it involves:

- **Availability:** General Comment 12 suggests availability ‘refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand’.⁶ It therefore ‘requires on the one hand that food should be available from natural resources either through the production of food, by cultivating land or animal husbandry, or through other ways of obtaining food, such as fishing, hunting or gathering. On the other hand, it means that food should be available for sale in markets and shops.’⁷ The Food and Agriculture Organisation (FAO) have taken this further and elucidated the need for, at a national level, the facilitation of stable and sustainable food supplies. Sustainability is now a key feature of the right to food and has been further cemented by the Sustainable Development Goals (SDG2).⁸ Stretching the definition to encompassing a State’s overall agricultural production and its place in global food markets.⁹
- **Accessibility (physical & economic):** The accessibility of food captures both physical and economic accessibility of food. The Committee have provided, ‘economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.’¹⁰ Whilst ‘physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals’.¹¹
- **Adequacy:** Explicitly mentioned within ICESCR, the adequacy of food has been slowly unpicked and is commonly understood as: ‘Food must satisfy dietary needs, taking into account the individual’s age, living conditions, health,

occupation, sex, etc. For example, if children’s food does not contain the nutrients necessary for their physical and mental development, it is not adequate. Food that is energy-dense and low-nutrient, which can contribute to obesity and other illnesses, could be another example of inadequate food. Food should be safe for human consumption and free from adverse substances, such as contaminants from industrial or agricultural processes, including residues from pesticides, hormones, or veterinary drugs. Adequate food should also be culturally acceptable. For example, aid containing food that is religious or cultural taboo for the recipients or inconsistent with their eating habits would not be culturally acceptable.’¹² From here, the adequacy of food can be broken down into three key components. Each providing their own layer of protection.

1. Adequate food must satisfy dietary requirements.
2. Adequate food must be safe for human consumption.
3. Adequate food should be culturally appropriate.

4.3 Key International Obligations

In relation to securing the content of the right to food, the ICESCR elaborates key obligations for States to move toward the full realisation of the right. The full suite of obligations are covered in more detail in Briefing One.

The obligation to progressively realise the right to food requires the UK to

- Take steps to realise the right through concrete strategies.
- Respect, protect and fulfil the right.
- Gather and deploy the maximum available resources to realise the right in a way that is effective, efficient, adequate and equitable.
- Ensure non-discrimination in realisation of the right.

- Provide an immediately realisable minimum core of the right.
- Refrain from retrogressive steps (i.e. no backsliding on rights) unless exceptional circumstances only justified if the step is reasonable, proportionate, non-discriminatory, temporary, that it does not breach the minimum core obligation and that all other potential alternatives were considered.¹³
- Any limitation on the enjoyment of a right can only be justified according to principles of legality, legitimacy and proportionality.
- Provide access to an effective remedy if a violation of the right occurs.

The following section further explains how these key obligations operate in relation to the right to food specifically.

4.3.1 Progressive Realisation of the Right to Food

The progressive realisation of the right to food means the State ensuring they have a 'roadmap' in place towards the full realisation of the right to food immediately, as well as demonstrating they are making every possible effort, using the maximum extent of their available resources (i.e. the amount of revenue the State generates), to better respect, protect and fulfil the right to food. The State must take steps to refrain from acting in a way that would undermine the right to adequate food – i.e. take any action that results in reducing the right (the duty to **RESPECT**); the State must also take action to prevent others from interfering with enjoyment of the right, including private third parties that may be responsible for administering access / delivering the right to food (the duty to **PROTECT**); and the State must facilitate, promote and provide the right to food by taking the necessary steps to ensure the right can be enjoyed by all to the maximum of its available resources (the duty to **FULFIL**). States should avoid measures which reduce access to or delivery of the right to food (non-regression). This means States cannot allow the existing level of fulfilment of the right to food to deteriorate. Any violation (breach) of the right can only be justified in the most exceptional of circumstances and States must be able to explain that the action was reasonable, proportionate, non-discriminatory, and that all other potential alternatives were considered before the retrogressive

step was taken. There is therefore a duty on both the UK and each devolved jurisdiction to generate sufficient revenue to ensure that the right to food is available, accessible, and adequate, which includes the need to ensure sustainability of food systems. The UN Food and Agriculture Organisation (FAO) have also presented 19 voluntary guiding principles to aid States in relation to progressively realising the right to food.¹⁴ These, since their inception in 2004, have been elaborated on in detail but as a brief overview, the guidelines are laid out as:

1. Democracy, good governance, human rights, and the rule of law.
2. Economic development policies.
3. Strategies.
4. Market Systems.
5. Institutions.
6. Stakeholders.
7. Legal framework.
8. Access to recourse and assets.
9. Food safety and consumer protection.
10. Nutrition.
11. Education and awareness raising.
12. National financial resources.
13. Support for vulnerable groups.
14. Safety nets.
15. International food aid.
16. Natural and human-made disasters.
17. Monitoring, indicators, and benchmarks.
18. National human rights institutions.
19. International dimension.¹⁵

In accordance with article 2(1) of the ICESCR and the obligation to progressively realise the right to adequate food, State parties must ensure they take effective measures within their maximum available resources to fully realise the right for all persons without any discrimination.¹⁶ In relation to food, the UK must use the maximum resources available to it to ensure the right to food is realised for all. Evidently linked to budgetary decision-making, the duty requires the UK government to adequately generate, allocate, and spend resources to its maximum extent. This for example, as raised by a previous special rapporteur to the UN on the right to food, requires States to consider their taxation system to ensure enough funds are raised to adequately resource food policies.¹⁷ Importantly, States should also consider their natural capital in relation in maximising resources to ensure sustainable delivery of natural resources such as food systems.¹⁸ Further, if the right to food is not

being realised, the duty to ensure MAR provides an extra-justificatory burden upon the State to demonstrate why the resources are unavailable.

Over and above the duty to respect, protect and fulfil, or to progressively realise the right to adequate food, there is an additional requirement that all States must provide with immediate effect. This is called a minimum core obligation with the intention of ensuring a minimum level of realisation for the right to food. In other words, it is a non-negotiable, applying in times of 'natural or disaster',¹⁹ absolute right to a basic level that the State has a duty to provide immediately. The minimum core means providing a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, food, water and sanitation, adequate housing stuffs, and the most basic forms of education.²⁰ With regard to the right to food, States have a core obligation to take all necessary action to 'mitigate and alleviate hunger'.²¹ If the State fails to meet these obligations owing to resource constraints, the State must demonstrate every possible effort has been made to use all available resources to satisfy the minimum core has been satisfied.

Non-discrimination is another immediate obligation upon States regarding ESC rights. States must 'immediately prohibit any discrimination in access to food and related resources on the basis of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth, disability or other status, and adopt measures to eradicate discrimination on these grounds'.²² Discrimination within this formulation, means any distinction, exclusion or restriction made on the basis of various ground which has the purpose or effect of nullifying or impairing the equal enjoyment or exercise of human rights and fundamental freedoms.²³ Moreover, any discrimination in access to food, as well as to the means of obtaining food, constitutes a violation of the right to food.

4.4 The UK Human Rights Framework and the Right to Food

The UK does not have a codified constitution with human rights protected through a number of different statutes taking on a 'constitutional' status including the Human Rights Act 1998, the Scotland Act 1998 and the Equality Act 2010.

None of these statutes incorporate the right to food as determined by international law. Unless legislation governing food systems is designed in a way that complies with international human rights law there is a potential accountability gap leaving people to continue to experience violations of the right without recourse to a remedy. The proposed new statutory framework for human rights in Scotland, that includes the right to food, could potentially transform this framework in Scotland (whilst recognising that food provision also intersects with reserved areas, including employment law and significant aspects of social security provision). The UK context is considered first with the legislative schemes for each devolved nations explored in more detail below.

The UK has partially incorporated the European Convention of Human Rights (ECHR) into domestic law through the Human Rights Act 1998 as well as each of the devolved statutes. Section 29(d) of the Scotland Act limits the competence of the Scottish Parliament in so far as any Act passed that is incompatible with ECHR rights or retained EU law is not law (the courts can declare said Acts void with immediate effect). Section 101 of the Scotland Act compels the reading of Acts of the Scottish Parliament to be read as narrowly as is required to be within devolved competence and any act by the Scottish Ministers is deemed *ultra vires* (unlawful) if it is in breach of ECHR (section 57). Similar provisions constitute the devolved settlements in Northern Ireland²⁴ and Wales.²⁵

However, the ECHR does not protect the right to food, meaning, whilst public authorities in the UK are required to act consistently with the ECHR rights domestically incorporated by the HRA, there is not equivalent duty to act consistently with the right to food. Instead, the UK government, through 'periodic reports' have highlighted their intention to secure the right to food via the welfare State.²⁶ This remains the current Government position though the impact of the COVID-19 pandemic has raised questions over the Governments approach and need to place the right to food in UK legislation.²⁷

The ECHR, rather than providing specific protection for the right to food as framed by the ICESCR, has instead utilised an 'evolutive' interpretation of civil and political rights. In particular, the provision of food comes up predominantly under three articles of the ECHR. Namely, the right to life (Art 2),

the right to be free from torture and degrading or inhuman treatment (Art 3), and finally via the right to freedom of thought, conscience, and religion (Art 9). It is however important to note, the European Court of Human Rights (ECtHR) does not raise the right to food specifically in their judgments, instead raising it alongside other essentials necessary for people to survive.

The ECtHR has highlighted the importance of the provision of food under Article 2 of the ECHR, the right to life. For example, the ECtHR in the case of *Nencheva and others v Bulgaria*²⁸ held the State of Bulgaria had failed to protect the life of vulnerable children placed in a home for the severely physical and mentally disabled young persons and therefore under the State's responsibility. Fifteen vulnerable children lost their lives due to the lack of adequate food, heat, and medical care in the home, leading the Court found a violation of Article 2. The State, according to the Court, did not take the necessary measures within the scope of their powers to aid the facility. The positive duty upon States to provide adequate food for citizens under their duty of care is most often where consideration of 'appropriate food' is raised within the ECtHR.²⁹

Claims under Article 3 of the ECHR too have raised how the lack of food provision, alongside other essentials whilst in the care of the State, can lead to violation of Art 3.³⁰ This is often related to poor conditions when an individual is detained by the State: *'[t]he evidence shows that Mr Ilascu was also deprived of food as a punishment and that in any event, given the restrictions on receiving parcels, even the food he received from outside was often unfit for consumption... The Court concludes that the death sentence imposed on the applicant coupled with the conditions he was living in and the treatment he suffered during his detention after ratification, account being taken of the state he was in after spending several years in those conditions before ratification, were particularly serious and cruel and must accordingly be considered acts of torture within the meaning of Article 3 of the Convention'*.³¹

The provision of adequate food has been raised on the basis of religious grounds before the ECtHR, leading the court to find a violation of Article 9 of the ECHR. In *Vartic*,³² Romania argued that dietary requirements were not protected as a manifestation of thought, conscience, and belief, and that even if they were and they had been breached, there

was no significant disadvantage to the applicant. The ECtHR disagreed with this view surmising it was breach of Art 9. As in *Jacobski*,³³ the court found that it would not be unduly disruptive or burdensome to provide food that was suitable, particularly given that the prison offered various other special meals. The prisons authority had therefore breached the rights of the prisoner by failing to provide access to appropriate food.

Finally, there is the European Social Charter. It does not specifically recognise the right to food but highlights its protection through the right to social security and social welfare. Through ratifying the Charter, the UK is bound to recognise 'the right of workers to remuneration such as giving them and their families a decent standard of living'.³⁴

4.4.2 Is the UK Complying with the Right to Food?

Currently, due to the lack of domestic legal protection for the right to food, alongside rising food insecurity and food bank usage, and a failure to fully implement the UK right to food strategy,³⁵ it has been widely argued the UK is not complying with the right to adequate food.³⁶ This is emphasised by the fact UK food banks in the last 10 years have grown from less than 30 to now well over 2000 food banks in use.³⁷ The need for food charity is widespread across all four nations of the UK.³⁸ While Scotland and Wales have acted within their devolved competencies to mitigate the worst effects of austerity policy, food bank usage has continued to grow exponentially.³⁹ Other issues with the food system range from the existence of 'food deserts' where there is lack of access to nutritional food to issues within sustainability of food production and a reliance within the UK on food imports and international trade.⁴⁰

To provide more context, the UK's approach to the right to food has been increasingly raised and criticised by the UN treaty monitoring and reporting as well as by United Nations Special Rapporteurs. In their concluding observations in 2016, the CESCR raised their concerns 'about the lack adequate measures adopted by the State party to address the increasing levels of food insecurity, malnutrition, including obesity, and the lack of adequate measures to reduce the reliance of food banks'.⁴¹ Further concerns were raised by the Special Rapporteur for Extreme Poverty in 2019

with the report illuminating ‘a shocking increase in the number of food banks and major increase in homelessness’ across the UK.⁴² The report brought to light the inadequacy of the UK’s social security system to meet the needs of people who are food insecure. This has been echoed by a range of reports.⁴³ Further still, the Special Rapporteur on the Right to Food wrote a letter to the UK government concerning ‘the deepening level of food insecurity among low-income households, particularly families with children, and the lack of comprehensive measures to ensure their access to adequate food’.⁴⁴ Evidently, there is strong international concern the UK is not complying with the right to food as laid out by international human rights law.

Beyond the UN monitoring system for ESC rights, which clearly indicates a violation of the right to food in all but explicit text, many NGOs, charities, and academics working on food poverty have keenly brought to light the structural failures of the UK government to introduce protection for those who are food insecure and thus satisfy the right to adequate food.⁴⁵ Rising costs of living coupled with real terms decrease in welfare payments has led many across the UK to fall into food insecurity and this has only been exacerbated by the COVID-19 pandemic. As of July 2020, 1.5 million households in the UK reported being food insecure within the last week and 2.7 million households across England and Wales have reported food insecurity in the last year.⁴⁶ This is rising. Additionally, 86% of those who are food insecure report also being in receipt of social security payments, undermining the government position of meeting the right to food through a comprehensive welfare system.⁴⁷ There is a growing movement throughout the UK focused on reducing food insecurity and implementing the recommendations from the independent National Food Strategy.⁴⁸ This movement involves a wide range of actors, from NGOs and charitable bodies to celebrity figures, who have campaigned to shine a spotlight on growing child food poverty in the UK.⁴⁹

The National Food Strategy includes an ambitious programme of work including escaping the junk food cycle, protecting the NHS, reducing diet-related inequality, improving our use of land, and creating a long-term shift in our food culture.⁵⁰ Creating a national food strategy aligns with the UK’s obligation to take concrete steps to develop a national strategy to provide for the right to food. Whilst this is a welcome development, the strategy

does not make any direct link with the right to food, what this means in terms of international obligations, or how food insecurity is linked to intersectional, structural human rights issues. As with negative benefits narratives in the UK, there remains a strong attitudinal barrier to viewing ESC rights as realisable human rights. For example, the report recognised that poverty causes high levels of stress, sleeplessness and cognitive overload meaning that people in poverty do not have the cognitive bandwidth to make food decisions in their long-term interests.⁵¹ There is an implicit assumption that poor diet is a lifestyle choice, albeit one in which circumstances push people towards that choice. However, recent data suggests that there is no element of choice in affordability for healthy diet options – in other words, food insecurity and poor diet are inevitable structural failures. The ‘life-style choice’ assumption fails to account for data suggesting the disproportionate impact of food insecurity and affordability of food for poorer households. The strategy does not account for the astronomical rise in cost of living for those who experience poverty (including food poverty) leaving the means of measuring the cost of living has not sufficiently deployed disaggregated data to understand how poorer households (each of which can comprise of different marginalised groups impacted in different ways, and with different needs) can be hit harder.

This gap recently came to light as part of a national campaign calling on the government to recognise that rising inflation is having a disproportionate impact on people in poorer households.⁵² Jack Monroe, a poverty food campaigner, highlighted that *“[i]n 2012, 10 stock cubes from Sainsbury’s Basics range were 10p. In 2022, those same stock cubes are 39p, but only available in chicken or beef. The cheapest vegetable stock cubes are, inexplicably, £1 for 10. Last year the Smart Price pasta in my local Asda was 29p for 500g. Today it is unavailable, so the cheapest bag is 70p; a 141% price rise for the same product in more colourful packaging.”*⁵³ The Office for National Statistics has responded accepting that it must do more to capture the impact of price increases on different income groups.⁵⁴ If the national strategy had adopted a human rights based approach from the outset this gap would have been addressed as part of the obligation to ensure non-discrimination in the realisation of the right. The international legal framework provides an invaluable tool in shaping national policy when there is a will to

address food insecurity. Similar benefits of such approach would include no backsliding on progress, ensuring any reliance on private providers in food provision (including free school meals) would require meeting human rights standards and that resources are used in a way that is effective, efficient, adequate, and equitable. The human rights framework provides a skeletal structure against which any strategy should be measured.

4.5 What steps can the UK take to comply with the right to food?

The most comprehensive step that can be taken at the UK level is to incorporate the right to food into domestic law. Incorporation of international law into domestic law means embedding legal standards as set out in international law and making them enforceable at the domestic level.⁵⁵ Direct incorporation of international treaties into domestic law is what is required within the UK constitution if international law is to acquire binding status domestically. However, it is worth noting that the concept of incorporation can be much further reaching than a direct reference to an international instrument. Incorporation can take many different forms and here we use the broadest definition of what that might mean. In other words, incorporation is referred to as a means of internalising international law into domestic law, whether explicit or implicit, whether directly or indirectly, or whether through means of an ‘incorporating provision’ or by means of growing a domestic based constitutional model inspired by and derived from international human rights law. Constitutions all over the world internalise international human rights standards without necessarily directly referencing the treaty. The wider definition of incorporation recognises that fact and includes a domestication of treaty provisions in a way that is completely contextualised within the specific constitutional setting it springs from. Compliance with international human rights treaties can therefore occur through domestic internalisation of international norms by way of a variety of means.⁵⁶ Constitutional theory tells us the most appropriate way to incorporate and enforce ESC rights is through a multi-institutional approach where obligations and expectations are placed on the legislative, executive and judicial branches through an overarching constitutional framework.⁵⁷ Ultimately, the most robust form of incorporation

is to grant a direct or indirect form of domestic recognition to international human rights law that is enforceable and coupled with effective remedies.⁵⁸

The United Nations human rights monitoring bodies have advised that the fulfilment of human rights requires States to act at the domestic level to create the necessary legal structures, processes, and substantive outcomes for human rights protection. Several UN Committees have recommended that the UK both incorporates international human rights law and ensures effective justiciable remedies are made available for non-compliance.⁵⁹ For example, the Committee on the Rights of the Child suggests that fulfilment of international obligations should be secured through incorporation of international obligations⁶⁰ and by ensuring effective remedies, including justiciable remedies are made available domestically.⁶¹ The UN CESCR has called for justiciable remedies for violations of economic and social rights.⁶² The CESCR also indicates that a blanket refusal to recognise the justiciable nature of ESC rights is considered arbitrary and that, ideally, ESC rights should be protected in the same way as civil and political rights within the domestic legal order.⁶³ This could mean, for example, expanding the scope of rights protection under the Human Rights Act, the devolved statutes, the common law and specific policy based legislation to including specific legislation comprehensively setting out what the right to food would mean in a UK context (a sectoral approach). A national Food Bill would offer an opportunity to either directly or indirectly incorporate the right to food into national legislation. Given the devolved nature of the area, incorporation at the devolved level also falls within the competence of each of the devolved legislatures.

In relation specifically to the right to food the UN Committee has further recommended that the UK government:

“develop a comprehensive national strategy for the protection and promotion of the right to adequate food in order to address food insecurity in all jurisdictions of the State party and to promote healthier diets. This should include policies in support of breastfeeding in accordance with the resolutions of the World Health Assembly, including breastfeeding breaks or breastfeeding facilities in educational institutions and workplaces. The Committee also recommends that the State party introduce higher taxes on junk foods and sugary drinks and consider adopting

*strict regulations on the marketing of such products, while ensuring improved access to healthy diets. The Committee refers the State party to its general comment No. 12 (1999) on the right to adequate food and the Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security adopted by the Food and Agriculture Organization of the United Nations as well as to the International Code of Marketing of Breast-milk Substitutes”.*⁶⁴

As above, whilst the UK has developed a comprehensive food strategy, it has not delivered this with reference or substantive standards based on international human rights law. Food insecurity in the UK has risen since the report.⁶⁵

The CESCR also urged the UK to restore the link between the rates of state benefits and the costs of living and guarantee that “all social benefits provide a level of benefit sufficient to ensure an adequate standard of living, including access to health care, adequate housing and food”.⁶⁶ The UN Committee on the Rights of the Child has recommended that the State regularly monitor and assess the effectiveness of policies and programmes on child food security and nutrition, including school meal programmes and food banks, and programmes addressing infants and young children as well as to systematically collect data on food security and nutrition for children.⁶⁷

4.6 How Can the UK’s Devolved Nations Comply with the Right to Adequate Food?

The UK has a unique constitutional framework. It is made up of four separate nations and three legal jurisdictions. Where the UK Parliament retains reserved powers over areas such as foreign policy and government borrowing, under the terms of devolution, certain policy areas are devolved to the Scottish Parliament, the Northern Irish Assembly, and the Welsh Senedd. The right to food engages with areas across both reserved and devolved competence. For example, key social security measures may be largely reserved, however, the areas of agriculture, food, health, and education are all devolved. There is significant scope at the devolved level to incorporate the right to food in so far as this is possible within devolved competence and thus is it pertinent to

consider the actions taken and options available to the devolved nations within the UK.

The devolved legislatures across the UK have already taken significant steps to either implement or incorporate international human rights obligations into domestic devolved law under the devolved competence to ‘observe and implement international obligations’.⁶⁸ In Scotland the First Ministers Advisory Group⁶⁹ and the National Taskforce⁷⁰ for Human Rights Leadership has recommended a Human Rights Act for Scotland that incorporates economic, social, cultural and environmental rights via a number of international treaties. The Welsh Senedd has set out plans to follow suit.⁷¹ In 2021, the Scottish Parliament unanimously passed the UNCRC Incorporation (Scotland) Bill incorporating the UN Convention on the Rights of the Child into devolved Scottish law. The UK government challenged the legislation in the Supreme Court, however, although the court decided that the Bill requires technical changes relating to devolved competence,⁷² there is no “issue with the Scottish Parliament’s decision to incorporate the UNCRC” into devolved law. In Northern Ireland the Ad Hoc Committee on a Bill of Rights is revisiting the peace agreement commitment to design a Bill of Rights for the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission’s proposals, following a ten-year participatory process, recommended the incorporation of economic, social, cultural, and environmental rights as part of this renewed framework building on ECHR protections.⁷³

There is scope for incorporation of the right to food under each of the devolved jurisdictions in the UK within devolved competence.

4.6.1 How Can Scotland Comply with the Right to Food?

In 2015 Scotland passed The Food (Scotland) Act focused on protecting consumers from risks associated with the consumption of some foods, to improve the extent to which members of the public have diets which are conducive to good health, and to protect general other interests in relation to food.⁷⁴ The legislation certainly acts to improve food systems in the UK and therefore the adequacy of food, but there is little in the 2015 Act which aims to tackle food poverty and food

insecurity in Scotland. Nor does it incorporate the right to food into domestic law or provide access to effective remedies for violations of the right.

While it can be argued Scotland has attempted to offset some of the damaging welfare policies introduced by the UK government through their own social security mechanisms,⁷⁵ Scotland too is yet to fully realise the right to food. In 2014, the Scottish programme for government committed to introducing a Good Food Nation Bill, aimed at creating the legislative framework to further the right to adequate food in Scotland. This was reaffirmed in 2019 with the results of the government consultation being shared recently in October 2021. A key response to government is the need to enshrine the right to food in law.⁷⁶ Scotland through the Good Food Nation Bill has the opportunity to incorporate the right to food into Scots law, place regulations on businesses to ensure a fair role within food production and distribution and create an independent board for the oversight for realising the right to food.⁷⁷ The Good Food Nation Bill has been heavily discussed in Scotland and has been widely reported on as a progressive step towards complying with the right to adequate food. Of course, more can be done and civil society organisations in Scotland will need to continue to work to ensure the government's commitment to a Good Food Nation Bill is met. It represents a chance for Scotland to break the food poverty cycle and introduce explicit and direct domestic legal protections for the right to food in Scotland. It must ensure there is a devolved framework which can guarantee the availability, accessibility, and adequacy of food for everyone in Scotland.

Over and above this sectoral legislation, there is a broader commitment to incorporate a number of further international treaties in Scotland.⁷⁸ This process of incorporation would include direct incorporation of the right to food under Article 11 ICESCR, as well as the relevant provisions under other international treaties (including UNCRC, UNCRPD and CEDAW). The broad-based approach to human rights incorporation under the proposed Human Rights Act for Scotland could work in tandem with sectoral incorporation via a Good Food Bill. Indeed, the recommendations of the First Minister's Advisory Group on Human Rights Leadership and the National Taskforce for Human Rights Leadership both recognise the

need for further elaboration beyond the treaties themselves to ensure domestic incorporation occurs alongside participatory processes and accompanying supporting legislation and guidance that gives further meaning and content to the rights as set out in international human rights law. These processes help to demonstrate how international human rights framework provides a skeletal decision-making framework with substantive standards, whilst domestic application of the treaty allows for a very context specific interpretation in terms of realisation of the right. In other words, the international human rights framework does not usurp the national approach – both should work in tandem together.

4.6.2 How Can Wales Comply with the Right to Food?

Food poverty and insecurity exists across the UK and the situation in Wales is no different. Support has been made available via the Welsh government,⁷⁹ but the funds have only been able to offset some of the most damaging consequences of the COVID-19 pandemic. They do not offer any long-term structural solution to the issues of food poverty and insecurity in Wales. In relation to the wider UK and Scotland, the right to food in Wales is a prominent issue but does not tend to deploy human rights-based language. Where food charities exist and provide an essential safety net in relation to food as well as research for improvement of the food system,⁸⁰ there is not the same focus nor obvious campaigning on the need to legislate for the human right to food in a devolved context. With that said, the need for a nation-wide food strategy has been raised consistently throughout the civic sector in Wales, leading to a recent debate in the Senedd, with commitments made in late 2021 to introduce a Food (Wales) Bill. Enacting a nation-wide food strategy would provide an opportunity to ensure human rights-based approaches are embedded within decision-making and further move through the journey to incorporation of the right. The Bill itself does not discuss incorporation of human rights, which could place a binding legal duty on Welsh government to respect, protect, and fulfil the right to food, but it does provide a positive step in the journey to incorporation of the right. Wales currently uses the 'due-regard' mechanism to embed international human rights standards. While this has a positive effect on areas such as improving the visibility of specific rights within the

process of decision-making, it fails to provide strong accountability for or legal enforcement of rights.⁸¹ In respect of the right to food, current conversations on enhancing the protection of food systems in Wales must take account of international human rights law and lead to a duty to comply with the right over having due regard for them. This would strengthen domestic protection, allowing the judiciary, and other more immediate accountability mechanisms, to play a role in ensuring effective remedies are available. As above, the Welsh Senedd has set out plans for a broader incorporation programme in Wales,⁸² meaning there is scope to incorporate the right in an overarching Human Rights Act as well as through more detailed sectoral legislation.

4.6.3 How Can Northern Ireland Comply with the Right to Food?

Food poverty is prevalent throughout the population in Northern Ireland and food insecurity features prominently as part of emerging strategies, including the anti-poverty strategy and the food strategy (both of which refer to international human rights obligations and in the latter explicitly to the right to food).⁸³ Despite these positive developments there is no mechanism as yet that directly or indirectly incorporates the right to food.

The Northern Ireland Food Strategy Consultation was recently concluded by the Department of Agriculture, Environment and Rural Affairs.⁸⁴ The consultation includes the right to food as part of the 'decision making principles' providing 'everyone in society has the right to adequate, available and accessible, safe and nutritious food'.⁸⁵ Whilst this is a positive step, this would not give rise to a legally enforceable obligation. Other recommendations have been made in relation to the right to food. In 2009, after a ten year consultation period, the Northern Ireland Human Rights Commission recommended the incorporation of economic, social, cultural, and environmental rights including the right to an adequate standard of living.⁸⁶ In 2021, polling conducted by the Human Rights Consortium suggests that there continues to be significant support in the population (86%) for a NI Bill of Rights that includes the right to food.⁸⁷ In the New Decade New Approach Deal the priorities of the restored Executive included bringing about an Anti-Poverty strategy (which is a legal requirement under section 28E of the Northern Ireland Act 1998).⁸⁸

The recommendations of the Anti-Poverty Strategy Expert Advisory Panel includes calling on the Assembly to pass an Anti-Poverty Act that enshrines a legal duty to ensure that children are well-nourished and free from food insecurity.⁸⁹ The report recognises that there requires to be a concerted effort to eradicate destitution, hunger and severe poverty, including homelessness. In relation to food insecurity the report identifies *"hunger cannot be sustainably solved with the distribution of food parcels or emergency food aid. Food poverty can only be solved by a social security system which provides people with enough money to buy the food and essentials the need, by access to secure work, and wages that match the cost of living."*⁹⁰ The Expert Advisory Panel recommendations conclude that the strategy should be based on the social and economic rights set out in a number of international treaties, including ICESCR, UNCERD, CEDAW, UNCRC and UNCRPD.⁹¹ For NI to comply with the right to food, some form of direct, indirect or sectoral incorporation would be possible via a Bill passed by the NI Assembly. Importantly, whether the route is direct, indirect, or sectoral there should be a remedy available for an effective remedy for a violation.

4.7 Models for Incorporation / Justiciability of the Right to Food: Lessons from International best Practice

The right to food is a binding on States that have ratified the relevant treaties and States must take steps to make the treaties applicable at the domestic level.⁹² For this right to give rise to domestic legal protection and essentially be effective for individuals in the UK, Parliament must adopt national legislation which reflects the right to food in such a way as to make it applicable, known as incorporation. Often this is carried out through a State's constitution but there remain other methods for incorporating ESC rights.⁹³ Due to the UK being a dualist legal State, domestic legislation must be passed before international human rights obligations form part of domestic law. This section aims to highlight how different States across the globe have achieved the right to food in a domestic context, in the hope of demonstrating potential avenues for the UK and the devolved nations to adopt the right to food domestically. From implicit protection via the

constitution as takes place in India, or explicit constitutional protection in South Africa, there are different models of incorporation around the world. Practice differs widely, reflecting the wide array of mechanisms available to States to provide legal protection. What remains key, is some level of enforcement and the ability to access an effective remedy for a violation of the right. Ultimately, it is for States themselves to create and uphold the domestic legal structures and mechanisms required to adjudicate economic and social rights violations.

4.7.1 India⁹⁴

The right to food in India has long been an example used to highlight how domestic protection of ESC rights takes place. For many years after its independence, India's vast food insecurity resulted in millions of deaths due to starvation and endemic malnutrition, especially among children. Much of this happened due to natural disasters like droughts and persistently weak logistical network to distribute buffer stocks of food.⁹⁵ The lack of a political will, the absence of a rights-based infrastructure for food security realisation, and a diffuse network of social movements contributed to the problem. Further, the Indian constitution does not expressly recognise the fundamental right to food. However, cases which have been brought to the Supreme Court alleging a serious violation of the right, have been heard and remedied on the broader grounds of the 'right to life and liberty' contained in the Indian constitution (Article 21).⁹⁶ The premise and the court's reasoning is relatively straightforward and is linked to the interconnectedness and indivisibility of human rights. Without access to basic food and nutrition, people cannot survive and thus the most flagrant breaches of the right to food would too be a breach of the constitutional rights to life and liberty.⁹⁷ While a few important cases made their way to the Supreme Court in India before the 2000s, reiterating the court's view the right to food is inherently provided protection via the right to life,⁹⁸ in 2001 the Supreme Court heard the landmark case *People's Union for Civil Liberties (PUCL)*.⁹⁹ Again, the court explicitly referring to Article 21 of the Constitution and with reference to the judicially unenforceable Directive Principle of State Policy concerning nutrition, contained in Article 47, the Supreme Court established a constitutional right to food and determined a basic nutritional floor for the people of India.¹⁰⁰ Moreover, the court brought

to light the State failure to implement food schemes and adequate distribution, leading to cases of starvation and severe food insecurity within parts of the population. Prior to the case, these food security schemes had been largely discretionary, but the case provided a platform for a range of social movements to coalesce around political momentum and public anger, and could translate social demands into legal ones by employing a grammar of rights. Since *PUCL*, there have been a range of successful challenges and remedies made available through interim orders produced by the courts. These orders have successfully set up Child Development Schemes, Meal Schemes in schools, and a public distribution system in which the government is obligated to provide grains to the most impoverished in society.¹⁰¹ The *PUCL* case also helped foster the political and social conditions for the enactment of The Mahatma Gandhi National Rural Employment Guarantee Act 2005 and the National Food Security Act 2013 "presented major developments in the livelihood and food security regimes in India, and a leap forward for legislated social rights."¹⁰² During the Covid-19 pandemic, the Supreme Court directed the federal and various State governments to ensure strict compliance with the provisions of the food security law.¹⁰³ The judgment also represents a form of dialogic judicial review that required various levels of government to engage with one another to ensure access to food for millions of eligible beneficiaries who had been left vulnerable to food insecurity due to the national lockdown. These examples serve to highlight how the constitution, whether explicitly recognised or implicitly recognised through the broadening of other human rights, can be used to bring domestic protection and access to remedies for the right to adequate food.

4.7.2 South Africa

Where India provides an example of implicit protection of the right to food in the constitution, South Africa demonstrates explicit protection. Section 27 of the South African constitution provides 'everyone has the right to have access to sufficient food and water', and further, 'The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'¹⁰⁴ Directly echoing the language of the ICESCR, there is strong and explicit protection for the right to food. This too has been protected by the

courts. In the case *Kenneth George & Others*,¹⁰⁵ fishing communities who had lost their access to the sea following the enactment of a law on limiting marine resources appealed to the High Court alleging a violation of the obligation to respect the right to food. Their argument centred on the grounds that the adoption of the law by the government represented a regressive measure in the fulfilment of the right to food and was therefore a violation of the right to food. In agreement, the court ordered that access to the sea be restored for local fishing communities and that a new law be drafted with participation from the traditional fishing communities it effected.¹⁰⁶ Thus providing explicit protection for the rights of the fishing communities and their need to access food.

More recently, South Africa's explicit constitutional protection of the right to food has been used by the courts to provide a right to nutrition and basic education. In *Equal Education & Others v Minister of Basic Education*,¹⁰⁷ the governing bodies of two public schools sought an order directing the government of South Africa to resume the National School Nutrition Programme. This programme feeds approximately 9.6 million children in SA school daily.¹⁰⁸ Further, they sought for the court to issue a structural interdict to ensure compliance with the court. A key argument in the case was the inability of children to take part in their education due to low energy levels caused by food insecurity. Relying on sections 29(1)(a) the right to basic education, section 28(1)(c) children's right to basic nutrition, and finally section 27(1)(b) the right to have access to food within the South African constitution, the applicants successfully challenged government policy in the courts to ensure basic constitutional social rights were realised. Powerfully, in the judgement the court held: "Hunger is not an issue of charity, but one of justice".¹⁰⁹ This case serves to example how explicit protection of social rights within a State's constitution can serve to provide a strong level of protection against damaging government decision making.

4.7.3 Latin America

According to the special rapporteur for food, Hilal Elver, Latin America is a region of the world which 'has made the most progress in terms of developing legal frameworks that promote the right to food'.¹¹⁰ This is due to the fact many States in the region

have provided the right to food with either explicit recognition under the Constitution, such as, Brazil, Bolivia, and Ecuador,¹¹¹ or have established the right to food for a particularly vulnerable group within their population such as children in Colombia and Guatemala, and indigenous groups in Argentina.¹¹² The case of *Ombudsman v the State and the Province of Chaco on behalf of Toba Indigenous People* brings to light how the Argentinian Supreme Court acts to protect the right to food. The case centred upon the fact the indigenous Toba populations were not being provided with their constitutional rights due to a lack of access to food, clean drinking water, and essential healthcare. Eleven deaths were directly connected to malnutrition caused by the food crisis.¹¹³ Citing international human rights law, the Supreme Court attributed the "food and health crisis" within the Toba indigenous communities to the government's failure to implement the obligations contained in international treaties.¹¹⁴ In the judgement, the Supreme Court summoned the State and Province of Chaco to provide a report within 30 days to the court exemplifying the immediate actions taken to relieve hunger in the area.¹¹⁵ In addition to the emergency measures, the Supreme Court affirmed the need to implement structural measures to fulfil the right to food of indigenous communities in Chaco Province.

The Colombian constitutional court has also acted to protect the right to food for displaced persons. While the Colombian Constitution only explicitly recognises the right to food for children, it has proved uphold the right to adequate food through recognition of its interdependence of these rights with civil and political rights as well as the protection of vulnerable groups.¹¹⁶ The widely cited case of *Abel Antonio Jaramillo y otros* highlights this approach.¹¹⁷ The case included 1,150 families, all of whom had been subjected to very poor living conditions for years and had unsuccessfully sought support from the Colombian agencies with responsibility for displaced peoples. Based on the rights recognised in the Constitution, interpreted in the light of the ICESCR, the general recommendations of the CESCR, and the guiding principles on displaced persons, the Court concluded that the situation constituted a violation, among others, of the right to life, the right to essential minimum needs, and the right to special protection for elderly persons, women heads of households, and children.¹¹⁸ The

Court provided a sweeping judgement in which it illustrated structural problems with how authority's dealt with the right of displaced peoples and ordered the distribution of food assistance.¹¹⁹

4.8 Conclusion

Since the CESCR's report in 2016 on ESC rights in the UK, food poverty and insecurity has increased, and is increasingly met via food charity. Food charity or food aid has become ubiquitous in society,¹²⁰ used by those who have been left vulnerable by the widespread welfare reforms of the last 10 years, further austerity, and the grave toll of a pandemic. Often overlooked, the right to food provides a very clear example of the fact human rights violations are commonplace in rich, developed nations. Throughout the pandemic there have been growing calls for legislation to protect the right to food, with campaigns for the provision of free school meals playing a key role in heightening awareness of the extent of the problem throughout society. Currently, there are no mechanisms available to people, either structurally or individually, to challenge UK government decision-making in relation to people's right to food. Despite promising conversations and growing political recognition for the extent of the issue, there remains no domestic legislation to embed the right to food in practice.

The examples provided by this briefing can act as guidance as to the mechanisms available to the UK and its devolved nations to further respect, protect, and fulfil the right to adequate food. From implicit protection in India, to more explicit constitutional models from South Africa and Latin America, comparative examples provide useful guides for the different mechanisms available to States to remedy a violation of the right to food. To comply with the right to food, the UK could incorporate the right coupled with an effective remedy for a violation. Incorporation can take many forms, and there is ample opportunity for international human rights law to inform domestic strategies to address food insecurity and poverty.

Endnotes

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- 24 See Northern Ireland Act 1998, s.6(1)(c) (legislative competence); s.24(1)(c) (Ministerial competence); s.83 (interpretation of Acts of the Assembly).
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