

THE FUTURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN
SCOTLAND: PROSPECTS FOR MEANINGFUL ENFORCEMENT

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‘I am keen to see Scotland advance incorporation and justiciability of rights because it is the best way to realise economic, social and cultural rights for all, especially those most in need of protection by the state... These rights are everyday rights that are essential for people to live in dignity in everyday life. If Scotland wishes to honour its social justice commitments, it should pursue the incorporation debate without losing momentum and make economic, social and cultural rights justiciable in Scotland’s courts. In the present context of Brexit, every day matters and every argument counts.’²

Virginia Brás Gomes, 21 May 2018, Edinburgh

Chair of the United Nations Committee of Economic, Social and Cultural Rights

INTRODUCTION

The area of economic, social and cultural (ESC) rights law is often misunderstood and under-utilised in the public law domain across the UK’s legal jurisdictions.³ Whilst public law engages with ESC rights across areas such as health, social care, education, social security, housing and social services it does not traditionally embrace broader conceptual frameworks that encompass the full international human rights framework. When socio-economic rights are addressed in the public law sphere they tend to feature under the aegis of something else.⁴ In other words, our discourse around social rights is dominated by existing domestic human rights structures and our existing domestic human rights structures marginalise social rights to the side lines – such as forming aspects of civil and political rights, or featuring as part of formal equality.⁵ This pre-disposition is to be expected. Why would public law lawyers concern themselves with the full breadth of economic, social and cultural rights if the domestic system has not incorporated them? Why would they seek to invoke international instruments in court to be told that they hold no force unless incorporated into domestic law?⁶

From an international law perspective, this presents an accountability gap in terms of state compliance with international human rights law.⁷ The under-utilised nature of the international legal framework means misconceptions around the legality and enforceability of ESC rights has emerged, including the rejection of the justiciability of ESC rights as a matter

² Virginia Bras Gomez quoted in the National: ‘Call for Scots Law to Incorporate Social and Economic Rights’, the National 21 May 2018, <http://www.thenational.scot/news/16238234.call-for-scots-law-to-incorporate-social-and-economic-rights/>

³ 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 <https://www.centreforwelfarereform.org/uploads/attachment/584/social-rights-are-human-rights.pdf>

⁴ Katie Boyle and Edel Hughes, *Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights*, (2018) *International Journal of Human Rights* Vol 22. 43-69

⁵ Boyle and Hughes, *ibid*

⁶ Lord Hodge, *Moohan & Anor v The Lord Advocate* [2014] UKSC 67 (17 December 2014), para.30

⁷ Treaty bodies recommending incorporation: CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture; CRC/C/GBR/CO/4 (CRC, 2008) Committee on the Rights of the Child. Treaty bodies recommending justiciable enforcement and effective remedies: CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights; E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights

of course.⁸ This position is outdated domestically, comparatively and internationally.⁹ Other countries embrace the incorporation and justiciability of ESC rights across areas of governance including in the development of ex ante review through parliamentary scrutiny¹⁰ and through ex post judicial review.¹¹ Over and above this, UK courts often engage in adjudicating ESC rights.¹² At times the jurisprudence directly references international human rights law as an interpretative source, and at other times ESC rights jurisprudence is based entirely on domestic statutes or the common law.¹³ In cases such as *ZH Tanzania*¹⁴, *McLaughlin*¹⁵, *Calver*¹⁶ and *Heesom*¹⁷ we can see the emergence of the domestic interpretation of the European Convention of Human Rights (ECHR) with reference to international human rights treaties including the UN Convention on the Rights of the Child (UNCRC) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In the *UNISON* case the court assessed what constituted a social minimum in the context of assessing the lawfulness of tribunal fees.¹⁸ The justiciability of economic, social and cultural rights across the different UK jurisdictions can no longer be called into question since, on a positive application of the law, it is something that occurs in the everyday practice of court adjudication.¹⁹ Of course, the questions that remain outstanding are not whether ESC rights are justiciable but relate to how to adjudicate the rights in a constitutionally appropriate way in any given context.²⁰ More research is therefore required on how best to approach the incorporation and justiciability of ESC rights in domestic law in Scotland.

⁸ See Mathew Craven, 'in the majority of states, economic, social and cultural rights are almost entirely absent from the common discourse on human rights.... [N]ational courts have relied upon the oversimplified characterization of economic and social rights as 'non-justiciable' rights with the result that they have rarely given them full effect. In turn, the lack of national case law directly related to economic, social, and cultural rights has itself perpetuated the idea that those rights are not capable of judicial enforcement.' Mathew Craven, *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on its Development*, (Clarendon Press OUP 1995), 28

⁹ Katie Boyle, *Models of Incorporation and Justiciability of Economic, Social and Cultural Rights*, Scottish Human Rights Commission (2018)

¹⁰ The Finish Constitutional Law Committee for example.

¹¹ Such as case law emanating from South Africa, Germany, Colombia, India, Argentina, among others. For a discussion of the breadth and depth of global comparative ESC case law see Malcolm Langford (ed.), *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law*, (CUP 2008)

¹² Boyle and Hughes

¹³ *R (UNISON) v Lord Chancellor* [2017] UKSC 51R (*UNISON v Lord Chancellor* [2017] UKSC 51

¹⁴ *ZH Tanzania v SSHD* [2011] UKSC 4

¹⁵ *McLaughlin, Re Judicial Review (Northern Ireland) (Rev 1)* [2018] UKSC 48 (30 August 2018). See also *H (H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2013] 1 AC 838, *Stevens v Secretary of Communities and Local Government* [2013] JPL 1383, approved in *Collins v Secretary of State for Communities and Local Government* [2013] PTSR 1594

¹⁶ *Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2)* [2012] EWHC 1172 (Admin) (03 May 2012), Mr Justice Beatson at para.41

¹⁷ *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin) (15 May 2014)

¹⁸ The court 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 51R (*UNISON v Lord Chancellor* [2017] UKSC 51

¹⁹ Katie Boyle, *Justiciability Mechanisms for Economic, Social and Cultural Rights in Northern Ireland, the United Kingdom and Beyond*, 'Justiciability of Human Rights Law in Domestic Jurisdictions' Eds. A. Divers, J. Miller (Springer International, 2015)

²⁰ As Wolffe identifies: 'The question of whether the Courts should be given that role - or any other role in relation to economic and social rights - seems to me, ultimately, to be a political or constitutional question, not a conceptual one.' James Wolffe, *ECONOMIC AND SOCIAL RIGHTS IN SCOTLAND: LESSONS FROM THE PAST; OPTIONS FOR THE FUTURE*, A lecture for International Human Rights Day 2014 by W. James Wolffe QC, Dean of the Faculty of Advocates, Edinburgh School of Law, December 2014

WHAT IS MEANT BY INCORPORATION AND JUSTICIABILITY?

Incorporation of international human rights law in a dualist state can take many different forms.²¹ It can be understood as means of internalising international law either directly, indirectly or on a sector by sector basis.²² Another approach is to identify the gateway, or 'port' through which international law becomes domestically binding.²³ For example, is the international obligation imported via the constitution, legislation, the common law, or through opening a channel to an international complaints mechanism?²⁴ Social rights and constitutional theory tells us that incorporation of ESC rights can, or ought to, occur across different branches of government: legislative, executive, judicial and constitutional in a multi-institutional approach to ESC enforcement.²⁵ Regardless of the approach taken the key component that determines the difference between softer mechanisms of 'implementation' and stronger forms of 'incorporation' is that incorporation ought to ensure access to a remedy for a violation. 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.²⁶

Likewise, justiciability of ESC rights can take on many different forms. ESC rights, when not directly incorporated, are normally adjudicated upon under the rubric of something else. In the UK this jurisprudence is evident in the interpretation of equality obligations²⁷, in the determination and enforcement of civil and political rights²⁸, in the application of EU law²⁹, in the interpretation of domestic legislation providing for social rights³⁰ and in the

²¹ Boyle and Hughes. See also Rosalynd Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1994)

²² Kasey McCall-Smith, Incorporating International Human Rights in a Devolved Context, *European Futures*, 17 September 2018 <http://www.europeanfutures.ed.ac.uk/article-7114>

²³ Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006)

²⁴ Boyle and Hughes

²⁵ Jeff King, *Judging Social Rights* (Cambridge University Press 2011)

²⁶ Katie Boyle, Models of Incorporation and Justiciability of Economic, Social and Cultural Rights, Scottish Human Rights Commission, (2018) p.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.

²⁷ *Harjula v London Borough Council supra Harjula v London Borough Council* [2011] EWHC 151 (QB); *on the Application of W,M,G & H v Birmingham City Council*, [2011] EWHC 1147 Admin.

²⁸ *Watts v UK*, ECtHR, 4 May 2010, Application no. 53586/09; *Yordanova and Others v Bulgaria*, Application no. 25446/06, 12 April 2012. See also Ingrid Leitjen, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press, 2018)

²⁹ *J. Mc. B. v L. E.*, Case C-400/10 5 October 2010 (father's rights of custody relating to family rights [Art 7] and the best interests of the child [Art 24.2]); *M. M. v Minister for Justice, Equality and Law Reform*, C-277/11, 22 November 2012 (greater procedural protection for those seeking asylum [Art 41 Right to good administration]); *Joined Cases C-411/10 and C-493/10 N.S. and M.E.* *ibid* (held: Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 falls within the scope of EU law and indivisible approach to those seeking asylum in EU, removal to another member state and the right to freedom from inhuman and degrading treatment [Art 3 ECHR and Art 4 EU Charter])

³⁰ Emanating from obligations under statutory legislation. *MacGregor v South Lanarkshire Council* 2001 SC 502 and *R v Gloucestershire County Council (Ex p Barry)* [1997] AC 584

development of the common law.³¹ These approaches tend to be piecemeal, in other words, there is no overarching holistic conceptualisation, theoretical or normative framework to act as the backdrop against which ESC adjudication occurs in Scotland or the UK. Once again, this presents an accountability gap for the state in terms of complying with international human rights law.

INCORPORATION AND JUSTICIABILITY AS MEANINGFUL ENFORCEMENT?

There is an emerging ‘anti-poverty’ stream of liberal constitutionalism that calls for substantive recognition of ESC rights in domestic constitutions.³² The concept is that, at the very least, a minimum of ESC protection (as well as civil and political) 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. The legalisation of ESC rights 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.³³

The benefits of incorporating ESC rights are self-evident in many respects - it means that individuals will have better access to rights directly relating to their conditions of living. This includes the better protection of employment rights³⁴, rights relating to pensions³⁵, rights which protect an adequate standard of living (including access to adequate housing and food)³⁶, rights relating to health and healthcare³⁷ and rights relating to education,³⁸ among others.

In Scotland progressive political will manifests itself in a commitment to building an ‘inclusive, fair, prosperous, innovative country, ready and willing to embrace the future.’³⁹ If the political impetus is there to establish Scotland as a ‘leader in human rights, including economic, social and environmental rights’⁴⁰ then this commitment will require the adoption and adaption of the necessary constitutional building blocks to create a renewed legal system to better protect rights. As noted by Courtis, the judicial enforcement of social rights, as with any set of rights, ‘requires the development of standards and criteria and a new litigation

³¹ *McLaughlin* et al listed above.

³² 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, ‘Constitutionally binding social and economic rights as a compelling idea: reciprocating perturbations in liberal and democratic constitutional visions’ in García et al. (eds.) *Social and Economic Rights in Theory and Practice, Critical Inquiries* (Routledge 2015) pp.261-262

³³ Katharine Young, *Constituting Social Rights* (OUP 2012), p.8

³⁴ Article 6 ICESCR

³⁵ Article 9 ICESCR

³⁶ Article 11 ICESCR

³⁷ Article 12 ICESCR

³⁸ Article 10 ICESCR and partial protection in Article 2 Protocol 1 ECHR

³⁹ See Programme for Government 2017-2018, <https://news.gov.scot/speeches-and-briefings/2017-18-programme-for-government>

⁴⁰ *ibid*

culture and practice, without which any application of abstract legal concepts is impossible.⁴¹

In the context of devolution the UN Committee on the Rights of the Child suggests that any process of devolution must ensure that devolved authorities have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of international human rights law.⁴² The UN Special Rapporteur on Adequate Housing has called for increased engagement in complying with ESC rights at the devolved level and highlighted that the effective application of rights at the local and subnational levels is critical for enhanced accountability.⁴³ In this sense, Scotland could take the lead in meeting the state's international obligations in devolved areas. Internationally, this would be considered best practice at the subnational level.⁴⁴

HOW CAN SCOTLAND MEANINGFULLY INCORPORATE ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

Any system of incorporation of rights must take into consideration the very real and legitimate concerns that can arise in the legalisation of social and economic rights. This is particularly important when incorporating and making justiciable rights that can cause a rupture, or disturbance, in our administrative, public and constitutional traditions. Incorporation and justiciability mechanisms can counter concerns around democratic legitimacy through well-conceived and constitutionally appropriate models of incorporation and adjudication. Social rights and constitutional theory tells us that incorporation of ESC rights ought to occur across different branches of government: legislative, executive, judicial and constitutional in a multi-institutional approach to ESC enforcement.⁴⁵

(1) Enhanced Role For The Legislature

In Scotland, this could see an enhanced roll of the legislature. The remit of the Equality and Human Rights Committee (EHRC) could be expanded to include pre-legislative scrutiny of legislation to determine compliance with ESC rights. Lessons can be learned from other jurisdictions, such as the operation of the Finish Constitutional Law Committee (FCLC), the Committee that scrutinises legislation for compliance with the Finish constitution, including the rights to health, housing and education.⁴⁶

⁴¹ Curtis, C. Argentina, Some Promising Signs in in M. Langford (Ed) *Social Rights Jurisprudence*, Emerging Trends in International and Comparative Law Langford, p.181

⁴² UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.41

⁴³ UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 22 December 2014, A/HRC/28/62, para.43

⁴⁴ *Ibid.* Comparatively speaking it would not be unusual, subnational systems for human rights protection exist in Canada, Argentina and Switzerland for example.

⁴⁵ King (2011), 43-56

⁴⁶ Section 74 Constitution of Finland 1999, available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>

Over and above enhanced legislative scrutiny the Scottish Parliament could also take steps to legislate for economic, social and cultural rights through one of the incorporation routes discussed above. Essentially this option can take many different forms but for incorporation to be meaningful it must be accompanied with effective remedies should a violation of a right occur.

(2) Enhanced Role for the Executive

ESC rights could be streamlined as part of everyday decision making in the same way that the executive is under a duty to comply with civil and political rights.⁴⁷ This could be achieved through an Act of the Scottish Parliament to create obligations on the executive to comply with international ESC rights norms (either directly or domestically conceived).⁴⁸ This could include an enhanced roll for the regulatory framework meaning devolved inspectorates in housing, health, education and so on would require to assess compliance with reference to international human rights standards creating more immediate accountability mechanisms than a court or tribunal. It is within this regulatory space that the everyday accountability of rights can occur.⁴⁹

(3) Enhanced Role For The Court

This brings us to the development of judicial review of ESC rights compliance under a potentially renewed constitutional framework. The roll of the court should be a means of last resort when all other mechanisms fail.⁵⁰ Scotland could take into consideration the following structural justiciability ‘building blocks’ in the development of social rights adjudication:

- Accessible

Is access to justice affordable/ accessible? Are there barriers to accessing justice because of legal aid or standing? In Scotland, this could include consideration of whether the standing test should be expanded for public interest litigation⁵¹ and whether the legal aid rules have been sufficiently adapted to account for ESC rights cases.⁵²

- Participative

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? In Scotland, this could include the development of multi-party actions

⁴⁷ Section 29 Scotland Act 1998 and Human Rights Act 1998

⁴⁸ A duty similar to section 6 of the Human Rights Act 1998.

⁴⁹ David Barrett, *The Regulatory Space of Equality and Human Rights Law in Britain: The Role of the Equality and Human Rights Commission*, Legal Studies (forthcoming). See also, First Minister’s Advisory Group on Human Rights Leadership, *Recommendations* (2018)

⁵⁰ Judicial review already operates under this approach in relation to the requirement to exhaust all other remedies before review of civil and political rights compliance.

⁵¹ See *Christian Institute v Others* [2015] CSIH 64 – para.43-44 – standing established on EU law grounds but not under s100 of Scotland Act because charities could not meet victim test.

⁵² Legal Aid (Scotland) Act 1986 section 14(1) should reflect the particular outcomes associated with

under the Rule 2.2⁵³ and the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. In particular, the development of structural remedies should be considered when dealing with multi-party actions.

- Procedural and substantive review

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 ESC rights or, alternatively, is the deference to parliament/ executive on the substance justified? In Scotland, 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 infancy⁵⁴ 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 ESC rights?

- Deliberative

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? In Scotland, this could include weak-form judicial review when appropriate where courts may take a deferential approach and refer a matter back to the legislature⁵⁵ and strong-review, where appropriate, that can include substantive review and outcome oriented orders, including the use of specific implement.

- Counter majoritarian

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? Landau for example, argues that the court can become an important institutional voice for the marginalised.⁵⁶ 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.⁵⁷

⁵³ See Rule of Court 2.2 available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10>

⁵⁴ For a discussion of the development of evidence based judicial review in cases engaging with systemic unfairness see J Tomlinson and K 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.

⁵⁵ Mark Tushnet, 'Weak Courts, Strong Rights' Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press, Oxford, 2008), p.23

⁵⁶ David Landau, The Reality of Social Rights Enforcement, Harvard Journal (2012) 53 Harvard International Law Journal 189-247. See also Mantouvalou in Conor Gearty & Virginia Mantouvalou, *Debating Social Rights*, (Hart 2011)

⁵⁷ Landau, *ibid*

- Remedial

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?⁵⁸

Reflecting on the above ‘building blocks’ can help create constitutionally appropriate adjudication models and counteract the main criticisms of social rights adjudication. This can help assist the court in embracing and embodying its role as an important accountability mechanism in the enforcement of ESC rights.

CONCLUSION

Establishing an enhanced human rights framework at the devolved level presents an opportunity to make an outward looking statement to the global community.⁵⁹ Scotland can be an international leader in relation to human rights with a view to directly improving the everyday experience of the people who live here. This requires innovation, adaptability and an openness to exploring how best to embed a more expansive human rights culture across governance structures and the operation of public law. At the end of the day, it is for the people of Scotland, through their representatives, to decide how best Scotland is governed. Incorporation and justiciability of ESC rights presents many different pathways for Scotland to explore in realising its ambitions.

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⁵⁸ For a discussion on the different types of remedies available for social rights see César Rodríguez-Garavito, Julieta Rossi (eds.) *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017) and Katie Boyle, *Incorporation and Justiciability of Economic, Social and Cultural Rights*, (2018)

⁵⁹ Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *Fordham Law Review* (2008) 411-438 p.420