

The Right to Social Security in the UK – An Explainer

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Access to Justice For Social Rights
Addressing The Accountability Gap

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2.1 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 second part of four briefings that explore and explain the international legal obligation to provide the rights to food, housing, and social security. This briefing provides an overview of the right to social security in the UK, with further information directly relating to its three devolved nations. Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, prevents social exclusion, and promotes social inclusion.¹ It is a key component of international human rights law generally, but in particular, for economic, social and cultural (ESC) rights. ESC rights cover rights relating housing, employment, health care, education, and an adequate standard of living. They more broadly protect marginalised and vulnerable groups such as those living in poverty, women, disabled persons, children, the elderly, migrants and so on. ESC rights are also often overlooked in the UK’s legal systems and so require further exploration to ensure they are properly accounted for and implemented into domestic law.

The right to social security is protected in international and regional law. The UK is under an obligation to comply with various treaties (international agreements) that it has signed up to as a State. Recently the UK parliament devolved new powers to Scotland in social security via the Scotland Act 2016 and subsequent Social Security (Scotland) Act 2018. This means that there are binding obligations on the UK and Scotland to provide social security in a way that is human rights compatible. The social security framework for Northern Ireland (NI) and Wales remains largely a UK national level responsibility, though there have recently been renewed calls to review the social security system in Wales and its administration.² NI do have powers over social security payments, however as an important limitation, under section 87 of the Northern Ireland Act 1998, NI maintains ‘parity’ with social security, child maintenance, and pensions systems in the UK.³ The following table shows what kind of treaty provisions exist and whether the UK, and the devolved jurisdictions, are under a binding obligation to comply with them:

Treaty/ provision	Status in UK	Is it binding?
Article 9 ICESCR right to social security	Signed and ratified	Yes
Article 11 ICESCR right to an adequate standard of living	Signed and ratified	Yes
UN General Comment 19 on right to social security	Interpretative in terms of fulfilling right to social security under Article 9 ICESCR	Yes
Optional Protocol to ICESCR	Not signed or ratified	No – this means there is no access to the international complaint mechanism
Art 22 UDHR right to social security	Universally applicable	Yes

Articles 26 of the Convention on the Rights of the Child	Signed and ratified	Yes
Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination	Signed and ratified	Yes
Articles 11 & 14 of the Convention on the Elimination of All Forms of Discrimination Against Women	Signed and ratified	Yes
ILO Convention on Social Minimum - C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102)	Accepted parts II-V, VII and X	Yes (parts signed up to)
ILO C118 - Equality of Treatment (Social Security) Convention, 1962 (No. 118)	Not ratified	No
ILO C121 - Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121)	Not ratified	No
ILO Convention No. 128 (Invalidity, Old-Age and Survivors' Benefits, 1967) (No.128)	Not ratified	No
ILO Convention No. 130 (Medical Care and Sickness Benefits, 1969 (No.130)	Not ratified	No
ILO C168 - Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)	Not ratified	No
Article 12 European Social Charter (ETS No. 35), adopted in 1961	Signed and ratified	Yes
Article 12 Revised European Social Charter (ETS No.163), adopted in 1996	Not signed or 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
The European Code of Social Security (1964, ETS No. 48), Parts II,III,IV&V	Signed and ratified	Yes

2.2 What is the Right to Social Security?

The UN Committee on Economic, Social and Cultural Rights (CESCR), the body responsible for overseeing compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR), provides helpful explainers and guidance, called 'General Comments' that demonstrate how a country can comply with its international obligations in relation to specific rights. Article 9 of ICESCR requires the UK to recognise the right of everyone to social security. General Comment No. 19 gives a comprehensive overview of what is required to respect, protect, and fulfil the right

to social security.⁴ The following headings give a summary of the right and what exactly it involves:

- **Availability:** The right to social security requires that the State introduce a scheme, or a variety of schemes, which are available and in place to ensure that benefits are provided for the relevant social risks that people face in their everyday lives. This includes protection in the areas of (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; or (c) insufficient family support, particularly for children and adult dependents.

- **Adequacy:** The right to social security must include the distribution of benefits, whether in cash or in kind, which are adequate in amount and duration in order that everyone may realise their rights to family protection and assistance, an adequate standard of living and adequate access to health care. This means that the level at which benefits are set should be enough to ensure a life of dignity.
- **Affordability:** If a social security scheme requires people to make financial contributions, then those contributions should be communicated to people in advance of a scheme being set up. The direct and indirect costs and charges associated with making contributions must be affordable for all and must not compromise the enjoyment of other rights – such as access to housing, food, health care or education. Normally there will always be a need to have a non-contributory scheme so that those who cannot generate income through employment will still have access to a social security system to protect them.
- **Accessibility:** All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalised groups, without discrimination on any of the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status, sexual orientation, and civil, political, social, or other status. Social security services must allow for physical access for those that require it. They should not be provided in a way that excludes certain groups.

2.3 Key International Obligations in Relation to the Right to Social Security

In relation to securing the content of the right to social security, the ICESCR contains several explicit international obligations binding on the UK to progressively realise the right through a range of differing practice. The obligations are covered in more detail in Briefing One.

The obligation to progressively realise the right to social security 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 in demonstrably exceptional circumstances.
- Ensure 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 explains further how these key obligations operate in relation to the right to social security specifically.

2.3.1 Progressive Realisation of the Right to Social Security

The nature of the obligation requires that States take steps to respect, protect, and fulfil the right to social security. This means States should progressively improve the social security system to the maximum of their available resources (i.e. the amount of revenue the State generates). The State must take steps to refrain from acting in a way that would undermine the right to social security – 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 social security (the duty to **PROTECT**); and the State must facilitate,

promote, and provide the right to social security 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 (non-regression). 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. There is therefore a duty on both the UK, as well as the devolved nations, to generate sufficient revenue to ensure that the right to social security is available and to take steps to consistently improve access, affordability, adequacy and availability to the right to social security. In addition, it is also important to note that States that have agreed to provide the right to social security have also agreed to provide an effective remedy if there is a failure to meet the obligation. This can be through administrative measures but includes facilitating access to a legal remedy in court if necessary.⁵

In accordance with article 2(1) of the ICESCR and the obligations to progressively realise the right to social security, States parties must ensure they take effective measures within their maximum available resources to fully realise the right of all persons without any discrimination.⁶ In relation to social security, the UK must use the maximum resources available to it to ensure the right to social security is realised for all. Evidently linked to budgetary decision-making, the duty requires the UK government to adequately generate, allocate, and spend resources to the maximum extent. Meaning, where social security is not being progressively realised or if there are retrogressive steps (backsliding on protection) without justification, this conflicts with the obligations under the ICESCR. If a regressive budgetary decision is made in relation to social security, the duty ensures there is an increased justificatory burden upon the State to explain its decision to reduce funding.

Over and above the duty to respect, protect and fulfil, or to progressively realise, the right to social security there is an additional requirement that all States must provide with immediate effect. This is called a minimum core. This can be understood as a non-negotiable absolute right to a basic level of subsistence below which no person should fall. The minimum core means providing

a minimum essential level of social security to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.⁷

Access and delivery of social security should not exclude groups, particularly those who are marginalised and possibly 'hidden' from the system. Before designing and implementing an inclusive right to social security decision makers should explore and understand what groups experience disadvantage and exclusion and what their needs and vulnerabilities are⁸ This means generating disaggregated data across various characteristics including gender, age, geographic location, ethnicity, health status, economic status etc. It is important that a reliable evidence base is developed to ensure that those who may be hard to reach are not denied access to the system. As noted by Supúlveda, 'a deeper evidence base can improve the understanding of how programmes can best address structural and societal power imbalances, while also encouraging greater equity and empowerment for society's most disadvantaged members.'⁹

2.4 The UK Human Rights Framework and the Right to Social Security

The UK does not have a codified constitution. Instead, human rights are 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 incorporates the right to social security as determined by international law. Unless social security legislation is designed in a way that complies with international human rights law, there remains a potential accountability gap that means people continue to experience violations of the right without recourse to a remedy. In a challenge to the 2-child benefit cap, the court has held that unincorporated treaties, including ICESCR and UNCRC, do not form part of the UK's domestic law meaning these rights are not being enforced at the domestic level.¹⁰

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 Ireland¹¹ and Wales.¹²

The ECHR does not protect the right to social security. When social security measures are insufficient the ECHR may be engaged if the measurements in place, or lack thereof, are considered to amount to inhumane or degrading treatment (Article 3 ECHR).¹³ Likewise, the ECHR can also be engaged if there is a serious procedural problem – for example, if the State has failed to comply with the right to a fair hearing on determining social security rights, but only in very limited circumstances.¹⁴ The right to private and family life (Article 8) does not impose a positive obligation to have in place a programme of social security support.¹⁵ The court has declined protection on the grounds of forced labour (Article 4) in the context of ‘work for your benefit’ programmes.¹⁶ The court has also refused to recognise that the right to social security amounts to a property right, (Article 1 Protocol 1).¹⁷ Nonetheless, when welfare benefits fall within the ‘ambit’ of a Convention right the ECHR may offer a form of protection if there is alleged discrimination under Article 14 (non-discrimination).¹⁸ When such cases have been raised in the UK, the courts will consider whether the alleged discrimination (difference in treatment) is ‘manifestly without reasonable foundation’.¹⁹ There are examples of both successful²⁰ and unsuccessful²¹ challenges to the social security regime using Article 8 or A1P1 together with Article 14. It should be noted it is a very limited approach and does not provide a standalone substantive right to social security. Although courts can sometimes interpret civil and political rights in a way that expands the protection of ESC rights, there are inherent limitations to this approach. The ECHR framework, for example, is not designed to protect ESC rights, including the right to social security, and for this reason it makes it difficult for any court to justify expanding the limited reach of the treaty other than in very minimal ways.²² This presents as a human rights accountability gap across the UK.

2.4.1 Is the UK Complying with the Right to Social Security?

As part of the UK’s international obligations the State undergoes a number of treaties monitoring exercises in which the UK must justify its approach to different rights, including the right to social security. The UK has for a long time provided welfare and benefits through several different statutory schemes and when asked about implementing the right to social security the UK refers to the broad base of welfare-based legislation,²³ including the comprehensive social security scheme that is currently available. However, providing a scheme is not enough in and of itself to ensure compliance with the obligation. As explored above, the right to social security requires that any scheme provided is available, accessible, affordable, and adequate. States must respect, protect, and fulfil the right alongside ensuring an absolute minimum core of protection. The CESCR has consistently raised concerns that the UK is not complying with the right to social security. In the last review by the CESCR, it raised concerns in relation to:

“[t]he various changes in the entitlements to, and cuts in, social benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2016, such as the reduction of the household benefit cap, the removal of the spare-room subsidy (bedroom tax), the four- year freeze on certain benefits and the reduction in child tax credits. The Committee is particularly concerned about the adverse impact of these changes and cuts on the enjoyment of the rights to social security and to an adequate standard of living by disadvantaged and marginalized individuals and groups, including women, children, persons with disabilities, low-income families and families with two or more children. The Committee is also concerned about the extent to which the State party has made use of sanctions in relation to social security benefits and the absence of due process and access to justice for those affected by the use of sanctions.”²⁴

In addition, the European Committee on Social Rights has concluded that the UK is not in conformity with the right to social security as required by the European Social Charter. The European Social Charter requires States to establish, maintain and progressively improve their social security system.²⁵ The Committee concluded in January 2018 that the level of Statutory Sick Pay

and long-term incapacity benefits are inadequate as well as the minimum levels of employment support allowance and unemployment benefits.²⁶

The data under the Nuffield Foundation Access to Justice for Social Rights project suggests that the practical implications of the lack of ESC rights protections manifests in a “litany of social rights violations across multiple areas”²⁷ including the provision of punitive social security measures, the removal of free school meals for children during Covid,²⁸ the proliferation of food banks,²⁹ the removal of the £20 Universal Credit (UC) uplift,³⁰ the imposition of the benefit cap in housing and social welfare provision, the two child social security limit, the debt crisis for those below the poverty line, the increased outsourcing of public services without regulation of human rights compliance, the outsourcing of government functions and digitisation of decision making around benefit entitlement, the risk to life by way of destitution³¹ and the crippling impact of austerity. There is sufficient evidence to suggest that even if there are examples of good practice in social security provision, the UK is not meeting its international obligation to provide for the right to social security in a manner compliant with international human rights.

2.4.2 What steps can the UK take to comply with the right to social security?

The most comprehensive step that can be taken at the UK level is to incorporate the right to social security 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.³² 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.³³ 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.³⁴ 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.³⁵

The UN human rights monitoring bodies have advised that the fulfilment of human rights requires States to take action at the domestic level in order 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.³⁶ For example, the Committee on the Rights of the Child suggests that fulfilment of international obligations should be secured through incorporation of international obligations³⁷ and by ensuring effective remedies, including justiciable remedies are made available domestically.³⁸ The UN CESCR has called for justiciable remedies for violations of economic and social rights.³⁹ The Committee also indicates that a blanket refusal to recognise the justiciable nature of ESC rights is considered arbitrary and that, ideally, ESC rights should be protected in the same way as civil and political rights within the domestic legal order.⁴⁰ 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 social security would mean in a UK context (a sectoral approach).

The CESCRs concluding observations on the UK outlined some steps it can take to ensure closer compliance with the right to social security. For example, in relation to working conditions in the UK, the CESCR provided: ‘Ensure that the labour and social security rights of persons in part-time work, precarious self-employment, temporary employment and “zero-hour contracts” are fully guaranteed in law and in practice.’⁴¹ More specifically in relation to social security, the CESCR called upon the UK to:

- Review the entitlement conditions and reverse the cuts in social security benefits introduced by the Welfare Reform Act 2012 and the Welfare Reform and Work Act 2015.
- 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.
- Review the use of sanctions in relation to social security benefits and ensure that they are used proportionately and are subject to prompt and independent dispute resolution mechanisms.
- Provide in its next report disaggregated data on the impact of the reforms to social security on women, children, persons with disabilities, low-income families, and families with two or more children.⁴²

2.5 How can the UK’s Devolved Nations Comply with the Right to Social Security?

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. Where responsibility for social security policy remains primarily at the UK level through payments such as Universal Credit, new powers have recently been gained by Scottish Parliament, and there are increasingly discussions

in Wales as to the need for further devolution in relation to social security. The devolved jurisdictions regularly deploy ‘mitigation measures’ to counteract some of the most severe austerity cuts. For example, whilst those who have had their claim for asylum refused in England are no longer eligible for support (no recourse to public funds), in Scotland additional mitigation measures are taken to ensure that everyone, including those whose immigration status is precarious, can access health care on the same basis. The Scottish Government has stepped in to ensure that the bedroom tax is not applicable in Scotland through the deployment of discretionary housing payments and that the benefit cap is mitigated through measures such as the Scottish Child Payment. Likewise, in Northern Ireland, additional mitigation social security packages have been introduced to alleviate the severity of UK austerity policies, such as the bedroom tax and benefit cap. Similar calls for devolved social security in Wales are now taking place. These mitigation measures have not bucked the poverty trend with poverty in Scotland, Wales and England increasing year on year since 2016 (Northern Ireland has seen a slight decrease overall).⁴³ Research indicates that austerity has resulted in 50,000 more deaths in the past 5 years⁴⁴ and that there is a growing chasm in life expectancy for those from poorer socio-economic demographics.⁴⁵

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’.⁴⁶ In Scotland the First Ministers Advisory Group⁴⁷ and the National Taskforce⁴⁸ 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.⁴⁹ 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,⁵⁰ 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.⁵¹ In assessing the ability of each devolved government to act, each have options available to further incorporate the right to social security and provide a rights-based approach to its provision.

2.5.1 How Can Scotland Comply with the Right to Social Security?

Under the terms of devolution, the Scottish Parliament has the devolved competence to implement international obligations in devolved areas.⁵² Under the initial terms of devolution much of the social security system remained a reserved matter meaning that responsibility for legislating for and implementing the right remained with Westminster. In 2016 the UK Parliament partially devolved responsibility for social security to the Scottish Parliament in areas including housing, fuel, food, and disability benefits.⁵³ The Scottish Parliament has now passed the Social Security (Scotland) Act 2018. The Act provides for a number of Social Security principles, one of which recognises that 'social security is itself a human right and essential to the realisation of other human rights'.⁵⁴ The Scottish Government has committed to 'delivering a rights based approach to social security'.⁵⁵

During the passage of the legislation, the Scottish Government introduced amendments to create a Commission for Social Security with human rights oversight and a duty to produce reports on the compatibility of social security legislation with international human rights.⁵⁶ In addition, there have been positive developments to create a participatory process on how best to implement the new social security powers where 'lived experience' panels are informing the process.⁵⁷ These are all positive aspects of how the newly devolved powers are being implemented. However, although committing to a human rights-based

approach, there is nothing in the legislation that gives a statutory footing to the right to social security with reference to international law as a benchmark. There is more scope to use the full breadth of devolved competence to ensure that the right to social security is given a statutory footing in those areas that fall within the powers of the Scottish Parliament. Nonetheless, there are limitations in how far devolution can go when the social security system is only partially devolved. To address this limitation, there are calls for a fully devolved social security system that can ensure a fully integrated, operational human rights framework. This must include the right to social security as a standalone substantive right.⁵⁸

2.5.2 How Can Wales Comply with the Right to Social Security?

Under the terms of devolution, the Welsh Senedd only has partial powers over the provision of social security. As Wales does not have the same devolved powers as Scotland, its options are more limited in relation to meeting the right to social security. There are areas where powers have been devolved such as the Council Tax Benefit and their importance should not be 'underestimated'.⁵⁹ Many of the devolved social security payments are used to offset the damage done by the welfare reforms of the UK government. Since the Silk Commission, tasked with reviewing constitutional arrangements in Wales, recommended to not further devolve powers over social security, Wales remains largely tied to the UK governments approach to social security.⁶⁰ However, this does not negate the fact actions are available to better deliver the right to social security for people in Wales. There has been increasing calls for devolution of social security powers to the Senedd with several recent reports offering recommendations for improving the system.⁶¹ Further yet, the impact of the Covid-19 pandemic has raised concerns over the administration of social security in Wales, with the Welsh Affairs Committee at UK government actively engaging with and questioning its effectiveness.⁶² Wales, of the four nations within the UK, has the highest percentage of the population claiming out of work benefits.⁶³ Analysis has also brought to light the welfare reforms introduced by the UK government have disproportionately hit Welsh households.⁶⁴

Where further devolution would provide Wales with the opportunity to build a more ‘compassionate’ social security system, and recommendations have been made to consider further devolution for winter fuel and cold weather payments for example, devolution in and of itself is not enough to ensure the right to social security.⁶⁵ Delivering the human right to social security requires a holistic approach and culture change with regards to ‘benefits’ narratives. More specifically, research carried out on the administration of social security in Wales has highlighted key areas for reform. These include but are not limited to:

- Taking a more effective and consistent approach to administering benefits.
- Providing alternative or enhanced support to people.
- Increasing take-up of benefits.
- Providing alternative or enhanced training to those administering benefits.
- Topping up existing benefits.
- Redesigning existing benefits or creating new benefits.⁶⁶

Alongside other ESC rights in Wales, there remains an ‘implementation gap’ for the right to social security. As Hoffman et al have brought to light in their exploration of furthering rights in Wales,

*‘it is well-established in the literature that there is a persistent ‘implementation gap’ between the aspirations of equality and human rights legislation and policy in Wales, and the lived reality of individuals, social groups and communities’.*⁶⁷

For Wales to comply with the right to social security, the implementation gap described by Hoffman et al, must be addressed in line with the powers available to the Welsh Senedd, including consideration of legal incorporation in Wales.⁶⁸ What this means in practice, is moving beyond due-regard clauses, as we have seen with recent sectoral incorporation of specific rights, to a duty to comply with specific ESC rights and effective remedies made available for a violation.

2.5.3 How can Northern Ireland Comply with the Right to Social Security?

While social security in NI is a fully devolved area of competence, established as far back as 1920, practice in relation to social security provision has mirrored the approach of the UK government due to a reliance on welfare ‘subventions’.⁶⁹ In effect, NI retains parity with the UK social security system. This has been implicitly recognised via section 87 of the Northern Ireland Act 1998,⁷⁰ which requires NI ministers consult with UK ministers on the co-ordination of policy to ensure social security does not differ operationally between the UK and NI. Importantly, arguments show the extent to which NI is ‘dependent on financial subventions from the UK government’⁷¹ ultimately reduces the choice of the NI assembly to introduce progressive changes to its social security system. While divergence in practice does exist, the dependence upon UK resources ultimately underlines NI’s limited ability to develop and implement a rights-based approach to social security. Despite this, divergence of practice did increase for several years after 2010, due to disagreement over the austere welfare reforms introduced in 2012 by the then Coalition Government in the UK. NI parties raised concerns consistently in regard to the welfare reform programme leading to a ‘political impasse’ in which the legislation required to implement the same changes in NI was stalled for years.⁷² In the end, the Northern Ireland (Welfare Reform) Act 2015 was passed by the UK parliament leading to the UK government passing the Welfare Reform (NI) Order 2015 to ensure parity in NI with the government’s welfare agenda (removing the NI Assembly from the process). Almost all decisions on welfare in NI have followed UK government decision-making, meaning many of the issues raised above for the UK are relevant to NI. As explored by Birrell and Heenan, the principle of parity has meant many of the opportunities to develop separate policies and practice for social security have been missed.⁷³

Some differences continue to exist. However, much of their purpose is to mitigate post 2010 welfare reforms. As McKeever explains, the

‘agreed variations provide temporary, transitional protection, alongside some softening of the hardest edges of reform, with policy divergence

*focused on mitigating the impact of the social sector size criteria (“bedroom tax”) and providing additional support for carers and the disabled’.*⁷⁴

The mitigation package cost over £500 million to the NI government over the four years period of 2016-2020 and yet, whilst trying to mitigate the worst of UK austerity policy, it has done little to further realise and comply with the right to social security as laid out by the ICESCR. An exhaustive account of the variations in policy and practice can be found in a House of Commons briefing,⁷⁵ but to provide an insight into their limited powers over social security provision, the measure included:

- Highest level of sanction set at 18 months rather than 3 years.
- A one-year supplementary payment, and exemption from the Benefit Cap, for carers who lose Carer’s Allowance when the person they care for does not mitigate successfully from DLA to PIP.
- One-year supplementary payment for claimants who lose entitlement to ESA.
- Discretionary support scheme for Universal Credit claimants and the development of the Universal credit ‘Contingency Fund’.
- Twice monthly payments of Universal Credit as the default.
- Payments of Universal Credit made direct to Landlords.

There is a continuing concern over the impact of welfare reform on the people in NI, with poverty and destitution often raised with direct reference to the changes made. For NI to be able to comply with the right to social security, the principle of parity should be revisited. With the UK’s recent reforms and new approach to social security being consistently criticised from the human rights perspective, NI should seek to maximise the devolved powers it has to ensure the availability, accessibility, adequacy, and importantly in NI’s context, the affordability of social security provision, to move past the approach of ‘parity’ and begin the journey to full realisation of the right.

2.6 Models of Justiciability / Incorporation for the Right to Social Security: Lessons from International Practice

International human rights standards can be incorporated (translated) into domestic law through many different models some of which are explored here. The UK can learn lessons from these comparative models that offer insights into how to address the right to social security. Some countries have directly incorporated ESC rights, including the right to social security, into their constitution.⁷⁶ Other countries have also developed their own understanding of a constitutional right to a social minimum reflecting the concept of the minimum core – i.e. a social floor that ensures no one falls into destitution. This is very important in the context of social security because it helps demonstrate whether a social security system is fit for purpose. According to arguments in constitutional theory, a minimum level of subsistence is a constitutional essential for the functioning of a democracy.⁷⁷ This is premised on the idea that people need to be able to access basic essentials in order to participate in society and facilitate genuine autonomy.⁷⁸ Often the threshold for assessing compliance with a minimum level is based on the concept of human dignity. The approach of an absolute minimum guarantee is evident, for example, in the constitutions of Germany (*‘existenz minimum’*),⁷⁹ Belgium (*‘minimex’*),⁸⁰ Switzerland (*‘conditions minimales d’existence’*),⁸¹ and Brazil (*‘mínimo existencial’*).⁸² There is no such constitutional guarantee to a basic minimum in the UK or through any of the devolved administrations currently.

The models of incorporation differ across countries and so too do the mechanisms which ensure access to an effective remedy. This means we see a broad range of constitutional guarantees coupled with a wide variety of different approaches adopted by courts in protecting those constitutional guarantees. The approaches courts take are important because it gives us insight into the different types of ‘justiciability’ available (adjudication by a court). Justiciability mechanisms can offer different degrees of enforcement – sometimes courts are very reluctant to interfere with guaranteeing the right to social security (they are deferential to parliament/government) and other times the court will take

significant steps in protecting the right (they uphold the constitution and act as the guarantor of the right). Each of these approaches is discussed below. Ultimately it is for each State to create the legal structures and implementation mechanisms to effectively provide for human rights. At a basic level however, it is important to remember that normally there requires to be some form of legal structure in place, a process that leads to a human rights' compatible outcome and an effective remedy available should the structure or process fall short.

2.6.1 Finland

Together with a number of other ESC rights, the right to social security is explicitly protected in the Finnish Constitution. Section 19 provides that *'those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care. Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.'*⁸³ Under the Finnish constitution there is a process of pre-legislative scrutiny that ensures any legislation passed by Parliament is fully compatible with constitutional rights, including the right to social security. This is a 'rights-affirmative' constitutional framework that operates on a presumption in favour of human rights compatibility rather than an ad hoc approach.⁸⁴ This constitutional model imposes a duty on the legislature to introduce legislation to fulfil the right. There is only a limited role for the court which can review legislation if it is found that it does not comply with the right to social security or if the pre-legislative process has not been complied with.⁸⁵ The pre-legislative scrutiny process involves a Constitutional Committee that provides an active supervisory role in relation to all legislation engaging with economic and social rights, as well as other human rights, to ensure that it is human rights compatible before the legislation is enacted. The Finnish Constitutional Law Committee makes its decision on the compatibility of legislation after listening to constitutional and human rights experts. These decisions are not politically motivated but based on legal standards. The decisions of the Committee are not binding on Parliament but are considered to carry sufficient weight that by convention Parliament complies with them.

In the UK parliament the Joint Committee on Human Rights (JCHR) can assess proposed legislation for its compatibility with human rights.⁸⁶ Within the UK Parliamentary system the JCHR may consider the compatibility of legislation with international human rights, including ESC rights, along the respect, protect, fulfil axis.⁸⁷ The JCHR scrutinises legislation before enactment in terms of human rights compatibility and may make recommendations to parliament on its conclusions. The recommendations of the JCHR are not binding on the legislature and so the work of the committee acts as a review system differing from the Finnish model. What is more, there is no constitutional footing for ESC rights, meaning the assessment of legislative provisions against compatibility with ICESCR for example is informative, but by no means necessarily persuasive, given the constitutional reluctance to acknowledge ESC rights as legal rights. Because the recommendations of the JCHR are not binding on the UK Parliament any *ex ante* review (pre-legislative scrutiny) of legislation does not impact on the passing of legislation, other than as a means of informing the process. For example, in the passing of the Welfare Reform Act 2012 the JCHR raised significant concerns about the impact on vulnerable groups, disproportionate discrimination and the infringement of ESC rights.⁸⁸ The consequent adjudication in the Supreme Court revealed similar concerns.⁸⁹ Neither the JCHR nor the court were able to oblige Parliament to revisit a more proportionate means of achieving welfare reform in accordance with international ESC rights.

It is also worth noting that the JCHR's role is limited to Acts of the UK Parliament. There is limited monitoring of secondary legislation in the devolved legislatures in this respect. In Wales, the Equality, Local Government and Communities Committee includes a commitment to scrutinise, inter alia, equality and human rights but without explicit mention of ESC rights. In Scotland, the Equalities, Human Rights and Civil Justice Committee (EHRCJC) has recently extended its remit to include human rights review – however there is currently no specific focus for the Committee to consider compliance with ESCR as a matter of course. In 2018 the EHRCJC took significant steps to consider how to enhance the parliament's role as a guarantor of human rights.⁹⁰ There is no Committee in the Northern Ireland Assembly with a specific duty to review compliance with

human rights. Paragraph 11 of Strand One of the Belfast (Good Friday) Agreement provides that the Assembly could appoint a special Committee ‘to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights’.⁹¹ This special type of Ad Hoc Committee has only been established once during the lifetime of the Northern Ireland Assembly in connection with the passage of the Westminster based Welfare Reform Bill.⁹² Without specific committees to consider compatibility with ESCR on an ongoing basis each of the devolved legislatures operate without robust ESC rights constitutional safeguards in place. There is no mechanism for *ex ante* or *ex post* review of ESC rights compatibility of devolved legislation as a matter of course, although in Scotland proposals for a new Human Rights Act that incorporates economic, social, cultural and environmental rights would change this position.

In Scotland, adopting the Finnish model could be translated into a prominent role for the recently revised remit of the Equalities, Human Rights and Civil Justice Committee. In Northern Ireland it would be possible for the Assembly to create a Committee that acts as a pre-legislative scrutiny mechanism in the assessment of human rights, including ESCR.⁹³ This is something that has been recommended by the Northern Ireland Human Rights Commission.⁹⁴ There is also scope in Wales to introduce more robust procedures around *ex ante* review of human rights as part of the work of the Welsh Senedd. This role could be performed within the existing remit of the Equality, Local Government and Communities Committee but would require additional resources to ensure that human rights scrutiny is embedded across the Assembly.⁹⁵

2.6.2 Germany

The German constitution recognises the right to human dignity.⁹⁶ Whilst there is no specific or explicit guarantee to social security the courts have interpreted the right to human dignity as requiring a minimum level of social security. In the *Hartz IV* case, the German constitutional court found that there is a ‘fundamental right to the guarantee of a subsistence minimum that is in line with human dignity.’⁹⁷ This is an example of ‘human dignity’ providing the threshold for assessing compliance with the right to social security. The court declared the social security system unlawful when it failed to

comply with the right to human dignity and when the means of calculating minimum subsistence (existenzminimum) were fundamentally flawed. The court found that ‘*It is the socio-economic right of every needy person to be provided, via statutory law, with material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural, and political life.*’⁹⁸

The *Hartz IV* case in Germany has provided a transformative and innovative approach to the right to social security that sets out a substantive standard as well as a procedural right. The court directly referenced Germany’s obligation to comply with Article 9 ICESCR when assessing the minimum subsistence in a subsequent case dealing with asylum seekers.⁹⁹ This could be compared with the weaker constitutional approach where justiciability assesses whether the legislature has provided a statutory scheme for social security rather than supervise the threshold met or the means of calculating a minimum level.¹⁰⁰ In Hungary for example, the court has adjudicated on the right to social security but only so far as to determine whether a system has been implemented rather than examine the adequacy of the system itself.¹⁰¹ This approach is more closely aligned with the UK, Wales, NI and potentially Scotland – where even if the legislative scheme is available, accessible and affordable – it may not necessarily be benchmarked against an appropriate threshold or standard in terms of its adequacy. The *Hartz IV* decision stresses that there is a fundamental guarantee to a constitutional minimum that covers the material conditions that are indispensable for a person’s physical existence (for example, housing, food, and clothing), for a minimum participation in human interaction (for example, telephone costs), and for a minimum participation in social, cultural, and political life (for example, membership in sport clubs, and going to the cinema).¹⁰² In the *Hartz IV* case the court was criticised as placing unrealistic expectations on the legislature and executive to consistently and continuously set a human dignity threshold that can fluctuate depending on prevailing circumstances.¹⁰³ As Bittner clarifies, this can also provide a positive degree of flexibility in terms of the duty imposed – the constitutional requirement translates one aspect of human dignity into an exercise of calculating an appropriate subsistence rate in a fair way.¹⁰⁴ It is impossible to define an absolute level because the development of society and both the economic and living conditions have

to be taken into account (including an economic downturn).¹⁰⁵ The flexibility of the duty therefore still leaves a great deal of control within the hands of the State who can set the amount so long as the methods used to calculate are sound. Accountability in a judicial context would therefore mean the State would be required to justify its approach rather than the court usurping the role of the legislature in determining social entitlements.

In the UK there is currently no mechanism to review or enforce the right to social security as a human right. The provision of the social security system lies squarely within the sphere of legislative and executive control. The role of the court is minimal with challenges either relying on an ECHR ground (such as A8/A1P1/14) or seeking to declare legislative or executive action as 'irrational'. For example, in the recent *Pantellerisco* case the applicant challenged the application of the benefit cap (the cap was applied because she was paid every 4 weeks instead of on a monthly basis). The High Court agreed with Ms Pantellerisco that this policy was absurd and declared it irrational (unreasonable) and therefore unlawful.¹⁰⁶

However, Ms Pantellerisco subsequently lost her case when the Court of Appeal overturned the judgment of Garnham J.¹⁰⁷ The court, relying on the *SC*¹⁰⁸ case, stated that intensity of review on the grounds of irrationality (unreasonableness) should be restricted in cases concerning economic and social policy, meaning such cases are not open to challenge on the grounds of irrationality "short of the extremes of bad faith, improper motive or manifest absurdity".¹⁰⁹ This is an extremely high threshold, and demonstrates a reluctance of the court to interfere on economic and social policy areas despite violations of social rights.¹¹⁰ On this basis the Court of Appeal took a deferential approach in *Pantellerisco* relying on evidence provided by DWP that the department operates a "test and learn philosophy" suggesting that steps to correct the legislative scheme could be taken as part of the test and learn approach – i.e. that a remedy via executive or legislative avenues would be more appropriate.¹¹¹

Lord Underhill in delivering the judgment concluded that it is not the role of the court to judge the extraordinary complexity of a system that involves a range of practical and political

assessments even when "some features of such a system produce hard, even very hard results, in some individual cases".¹¹² One mechanism through which accountability could be strengthened in the UK would be for the court to play a more active role in assessing compliance with economic and social rights, including the right to social security. Much like other countries, this would require a more intense form of judicial review using stronger tests of reasonableness¹¹³ and proportionality than the very limited test of irrationality set out in *Pantellerisco* and *SC*. One important point to note here is that increasing intensity of review does not by extension lead to the court usurping the role of the legislature or executive. For example, in other constitutional settlements that balance is struck by using more deferential remedies.¹¹⁴ In other words, the court can play an important accountability mechanism in scrutinising the actions of the legislature or executive (through more intense review and according to substantive standards) whilst still retaining a deferential approach to remedies (ultimately relaying the remedy back to the original decision-maker).

In Scotland, the *Hartz IV* adjudication helps to demonstrate how the determination of entitlement (section 19 of the Social Security (Scotland) Act) could be measured against human rights standards to ensure that the level of subsistence available is compatible with human rights and human dignity. In the first instance this would place a duty on the State, or anybody acting on its behalf, to implement a process for defining entitlement in a human rights compatible way (a procedural duty) as well as ensuring that this process should result in an outcome meaning that no person faces living in destitution (a substantive duty). This could also involve providing the courts with a role to supervise whether the legislature and/ or executive are enacting a social security scheme that employs a methodological approach that ensures minimum levels of subsistence across the devolved areas. The Scottish Social Security Commission could play an important role in assessing this – however, if the legislature fails to respond to the Commission's recommendations, then, to ensure accountability, a remedy could be made available by the court. For example, if the Scottish social security scheme used incorrect data or a flawed methodology to calculate entitlement there should be a remedy available to the applicant to challenge this and the court could

order that the method be corrected/ improved. This is a remedy which results in the right to a process for determining a substantive threshold. The adjudication in Germany maintained a strong deferential role to parliament and a wide margin of appreciation in terms of how best to approach and deliver the social security scheme.¹¹⁵ Rather than view the court as usurping the role of the legislature it might be helpful to think of adjudication as an institutional dialogue – where the court can order the legislature or executive to ‘rethink’ a flawed policy without necessarily declaring it void.¹¹⁶

2.6.3 Colombia

The Colombian Constitutional Court has heard and decided ‘structural’¹¹⁷ cases where it considers whether an ‘unconstitutional set of affairs’ requires to be remedied.¹¹⁸ Usually this will involve multiple applicants (collective cases) and will allow the court to review whether the State can remedy a systemic problem. For example, since 1997 the Constitutional Court has handed down decisions including noncompliance with the State’s obligation to affiliate numerous public officials to the social security system,¹¹⁹ massive prison overcrowding,¹²⁰ lack of protection for human rights defenders,¹²¹ and failures in the health care system.¹²² In 2004 the court combined 1150 tutela cases of internally displaced people (IDP) and issued a structural remedy¹²³ in three parts:

“First, it mandated that the government formulate a coherent plan of action to tackle the IDPs’ humanitarian emergency and to overcome the unconstitutional state of affairs. Second, it ordered the administration to calculate the budget that was needed to implement such a plan of action and to explore all possible avenues to actually invest the amount calculated on programs for IDPs. Third, it instructed the government to guarantee the protection of at least the survival-level content (mínimo vital) of the most basic rights—food, education, health care, land, and housing. All of these orders were directed to all relevant public agencies, including national governmental entities and local authorities.”¹²⁴

In Colombia there is a similar type of threshold recognised by the court and an innovative form of remedy available to those who are in desperate need. The Colombian Constitution recognises the right to social security as an inalienable and irrevocable right of all individuals.¹²⁵ The Court has

held that, in exceptional circumstances, the right to social security is an immediately applicable and enforceable right. The test developed by the Court to assess this depends upon whether the individual is in a state of manifest vulnerability because of his economic, physical, or mental situation; (b) there is not possibility for the individual or family to take action to remedy the situation (c) the State has the possibility to remedy or mitigate the condition and the (d) State’s inaction or omission will affect the individual’s ability to enjoy minimum conditions of a dignified life.¹²⁶

The *tutela* device¹²⁷ is a fast-track remedial process whereby applicants can seek to enforce constitutional rights, including ESC rights, if they require immediate protection – such as in the case of the exceptional circumstance listed above. In the context of social security, the Colombian Constitutional Court has developed the concept of *mínimo vital* (based on the German *existenz minimum*). Although the *mínimo vital* is not explicitly mentioned in the constitution it has been interpreted (teleologically and dynamically) as implicit to the right to life, the right to health, the right to work and the right to social security.¹²⁸ As explained by Sepúlveda, ‘in cases of extreme urgency in which the basic subsistence of the individual and her family is in jeopardy, it is possible to file a writ of protection [*accion tutela*] as a fast-track emergency measure for the enforcement of ESC rights.’¹²⁹

In Colombia the court has been criticised for breaching the separation of powers by making orders which have an impact for allocation of public resources.¹³⁰ On the other hand, the court has been applauded for assuming its role as ‘the guardian of the constitution.’¹³¹ As Sepúlveda notes, one of the unique approaches of the court and the use of the *tutela* has been to have a safety mechanism for the most vulnerable and the most disadvantaged groups facing absolute destitution (prioritisation theory). So, whilst there is an expectation that recipients should in the first-place access benefits and challenge decisions through other administrative means the *tutela* device is there as a fast-track process for those in desperate need. This has resulted in under-represented groups having a means through which to promote their interests through institutional channels and has encouraged decision-makers to take ESC rights seriously and to prioritise them politically – hence avoiding the need to use *tutela* by mainstreaming the requirements

for a social minimum as part of everyday policy development and the decision-making process.¹³²

Similarly, it is important to bear in mind that litigation is not the only way to advance or protect social rights, nor is it always the most effective strategy. A court's role, while necessary, is also limited – the 'effective protection of ESC rights should be a holistic enterprise' – executive, legislative, judicial.¹³³ Nonetheless, if a State is serious about genuine enforcement and enjoyment of human rights then it must take steps to ensure effective remedies are available, at least as a means of last resort, if other institutional mechanisms fail to comply with international human rights standards.

The courts have intervened to ensure that those in desperate need have access to a remedy as quickly as possible. For example, an elderly man living in absolute poverty requested that the State provide him with economic assistance so that he could undergo an eye operation that would allow him to recover his sight. The court found that the legislature had not complied with its duty to adopt a law to address the situation of such persons and ordered the social security system to provide the treatment.¹³⁴ In another case a poor elderly man who had not received a State subsidy was given access to a remedy because when he had initially applied he had been told the wrong information from the relevant administrative authority about the procedures necessary to obtain his benefit.¹³⁵ The *tutela* device cannot be used if there are other procedures available to remedy the situation – it is essentially a last resort in the case of absolute emergencies. For example, if the minimum conditions for a dignified life of a mother and new-born depends on the payment of maternity benefits this right becomes a fundamental right that is immediately enforceable under the *tutela* device.¹³⁶ However, if the need is not immediate and there are other means of seeking a remedy then the *tutela* will not be necessary.

In the UK, this could be rolled out in the tribunal system as a route to accessing a remedy should other initial appeal mechanisms fail. It could require tribunals to play a role in interpreting what is required to meet a minimum according to international human rights law rather than solely rely on the domestic statutory regime for a definition (because the statutory regime may result

in entitlements that do not meet the basic needs for human dignity). On the other hand, it could require the tribunal to consider whether a policy or a means of calculating entitlement is sufficiently robust to ensure human rights compatibility. Ultimately, recourse to a court should be available as a means of last resort. Research suggests that there is much more scope to explore how to manage systemic cases that arise in both tribunal and court settings where many people are impacted by the same rights-violating policy or unlawful decision-making process. Both tribunals and courts require to better adapt to forms of systemic issues and structural responses in order to move beyond individual relief and to stem the flow of cases that are all engaging with the same issue. Both public interest litigation and collective cases (group proceedings/class actions) can play a fundamental role in this, however, at the moment these types of actions are under-explored and under-utilised in the court system and not possible within the tribunal system.

2.6.4 Argentina

The Argentinian Constitution was amended in 1994 and a number of international treaties were explicitly incorporated into the Constitution, including the International Covenant on Economic, Social and Cultural Rights. The distribution of powers in Argentina is separated into both federal and provincial autonomy. In addition to the changes to the national constitution there were also several changes at the provincial level with individual States adopting constitutional amendments with better protection for economic and social rights. One of the difficulties faced in Argentina was coherently delineating the distribution of responsibilities between the federal and provincial level. For example, sometimes disparities can exist between federal and provincial responsibilities as well as between public and private responsibilities in areas that engage with human rights.¹³⁷ This is also something worthy of consideration in the Scottish context in terms of the division between reserved and devolved, and between public and private provision of social security measures. In Argentina, social security is administered through a federal pay as you go system and a privately run individual capitalisation system. In Scotland, some social security powers are reserved, and some are devolved. Balancing the division of powers, responsibilities, and duties between national and subnational, and between public and

private can create a very complex framework.¹³⁸

The courts have also intervened in Argentina to ensure that right to social security complies with international human rights law. For example, the Supreme Court in Argentina declared that a clause of the Social Security Solidarity Act was unconstitutional¹³⁹ – the court found that the government had acted unreasonably by enacting a legal measure that would deliberately delay social security payments and that the principles of due process applied to social security – the litigants were entitled to a speedy trial, legal certainty, and foreseeability. The Court drew on the constitutional principles and Art 25 of the American Convention on Human Rights (the right to judicial protection). This is a procedural right to remedy when there is a breach of fair process.

In the case of Argentina, the enforcement of economic and social rights required the development of new standards and criteria and a new type of litigation culture and practice in order to develop a judicial approach to the new norms that were introduced under the constitution – including the direct incorporation of international standards. One litigation mechanism to which the court responded to was when claimants faced urgent situations.¹⁴⁰ Another effective judicial mechanism was facilitating collective complaints (class actions) or responding to several individual claims dealing with the same issue as a means of managing a response to situations of desperation.¹⁴¹

2.7 Conclusion

To conclude, the right to social security acts as a safety net for those most vulnerable in society. It is a necessity within any functioning democracy, serving to ensure people who are vulnerable do not fall into destitution and absolute poverty. The UK's social security system for many years was entirely centralised, until devolution. Since there has been partial devolution of social security powers to the Scottish Parliament, Northern Irish Assembly, and Welsh Senedd, though to differing degrees. The UK's approach is currently unfit for purpose, with various reports, Committees, and commentators recognising the need for a seismic shift in how social security is delivered throughout both the UK and its devolved administrations. Sadly, evidence suggests many of the further powers available to the devolved nations are utilised to firefight and offset the damage caused by the widespread reforms to welfare brought in by the UK government.

In order to comply with the right to social security, the UK could incorporate the right. As the examples taken from Argentina, Colombia, Germany, and Finland provide, there is widespread practice in relation to incorporation of the right to social security and ESC rights more generally. Scotland, in particular, is showing signs of moving in this direction, with Wales and NI beginning to assess their options in relation to improving social security delivery.

Endnotes

- 1 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. Hereinafter General Comment 19.
- 2 Emma Taylor-Collins and Dan Bristow, 'Administering Social Security in Wales' (2020) Wales Centre for Public Policy.
- 3 Andrew Mackley, 'Social security powers in the UK' (2020) House of Commons Briefing Paper. Available at: <<https://researchbriefings.files.parliament.uk/documents/CBP-9048/CBP-9048.pdf>>
- 4 General Comment 19.
- 5 General Comment 19 [paras.77-80].
- 6 General Comment 19 [paras 29-31].
- 7 General Comment 19 [Para.59(a)].
- 8 Magdalena Sepúlveda, 'Ensuring inclusion and combatting discrimination in social protection' (2017) 70 International Social Security Review 4.
- 9 Ibid [p.36].
- 10 *SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26 (9 July 2021) [para.77]
- 11 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).
- 12 See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly).
- 13 *Limbuela v Secretary of State for the Home Department* (2006) 1 AC 396.
- 14 *R (Reilly and Wilson) v Secretary of State for Work and Pensions* (2013) UKSC 68. See also art 6 can be applied to disputes over disability pensions resulting from industrial accidents (Schuller Zraggen), disability allowances (Salesi v Italy 1993) and annuities in respect of war injuries in *Kerojarvi v Finland* (1995) ECHR 27, 17506/90.
- 15 *PETROVIC v. AUSTRIA - 20458/92* [1998] ECHR 21 (27 March 1998), [para.26].
- 16 The court found that the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations (SI 2011/917) did not breach Article 4 ECHR. See *R (on the application of Reilly and Hewstone) v Secretary of State for Work and Pensions* (2016) EWHC Civ 413.
- 17 *R (Reilly and Wilson) v Secretary of State for Work and Pensions* (2013) UKSC 68.
- 18 *Adami v Malta* 44 EHRR 3, para 17
- 19 *STEC AND OTHERS v. THE UNITED KINGDOM - 65731/01 ; 65900/01* [2006] ECHR 393 (12 April 2006)
- 20 *McLaughlin, Re Judicial Review (Northern Ireland)* (Rev 1) [2018] UKSC 48 (30 August 2018)
- 21 *SC, CB and 8 children, R. (on the application of) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26 (9 July 2021); *DA & Ors, R (on the application of) v Secretary of State for Work and Pensions* [2019] UKSC 21 (15 May 2019); *SG & Ors, R (on the application of) v Secretary of State for Work and Pensions* (SSWP) [2015] UKSC 16 (18 March 2015).
- 22 Andrew Williams, 'The European Convention on Human Rights, the EU and the UK: confronting a heresy' (2013) 24 European Journal of International Law pp.1157-1185, [p.1173].
- 23 See the UK Common Core Document, HRI/CORE/GBR/2014 and Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights UN Doc E/C.12/GBR/CO/6, [para.122-123].
- 24 Committee on Economic, Social and Cultural Rights Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/6 (CESCR, 2016), [para.40].
- 25 European Social Charter 1961 Article 12(1)-(3).
- 26 European Committee on Social Rights, CR_XXI-2_GBR Conclusions January 2018.
- 27 Katie Boyle et al, *The Practitioner Perspective on Access to Justice for Social Rights: Addressing the Accountability Gap* (2022).
- 28 The reliance on public figures such as Marcus Rashford to address this gap served to demonstrate the absence of a right to food, or the prohibition of retrogressive measures. Compare for example, the South African Constitutional Court's ability to respond in *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306
- 29 Again, as a breach of the right to food, with no routes to an effective remedy for a violation of the right.
- 30 The UN Special Rapporteur on Poverty flagged this as breach of international human rights law. See Patrick Butler 'Unconscionable' universal credit cut breaks human rights law, says UN envoy' 16 September 2021 The Guardian. Available at <<https://www.theguardian.com/society/2021/sep/16/unconscionable-universal-credit-cut-breaks-human-rights-law-says-un-envoy>>
- 31
- 32 Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (2020) [p.181].
- 33 Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002). Faculty Scholarship Series. (1961) Paper 839.
- 34 Jeff King, *Judging Social Rights* (CUP 2011) [pp.41-57].
- 35 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.
- 36 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
- 37 UN General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the child, (2003), CRC/GC/2003/5, para 20; Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom (2002), CRC/C/15/Add.188, paras 8 and 9 and Concluding Observations of the United Nations Committee on the Rights of the Child on the United Kingdom (2008), CRC/C/GBR/CO/4 , para 7; CAT/C/GBR/CO/5 (CAT, 2013) Committee against Torture, para.7; CEDAW/C/UK/CO/6 (CEDAW, 2009) Committee on the Elimination of Discrimination against Women; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13
- 38 E/C.12/GBR/CO/6 (CESCR, 2016) Committee on Economic, Social and Cultural Rights, para.5; CRC/C/GBR/CO/5 (CRC, 2016) Committee on the Rights of the Child para.7
- 39 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; E/C.12/GBR/CO/5 (CESCR, 2009) Committee on Economic, Social and Cultural Rights para.13
- 40 General Comment No. 9, ibid.
- 41 Committee on Economic, Social and Cultural Rights Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/6 (CESCR, 2016) [para 32].
- 42 UN CESCR, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, 14 July 2016 para.41
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- 47 First Minister's Advisory Group on Human Rights Leadership (Edinburgh, 2018). Available here: <<https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf>>
- 48 National Taskforce for Human Rights Leadership Report (Edinburgh 2021). Available at <<https://www.gov.scot/publications/national-taskforce-human-rights-leadership-report/documents/>>
- 49 Welsh Senedd 'Where next for human rights in Wales?' 10 December 2021. Available at: <<https://research.senedd.wales/research-articles/where-next-for-human-rights-in-wales/>>; See also Simon Hoffman, Sarah Nason, Rosie Beacock, & Ele Hicks (with contribution from Rhian Croke) 'Strengthening and advancing equality and human rights in Wales' (2021) Welsh Government Social Research Number 54/2021.

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- 51 Northern Ireland Human Rights Commission, Bill of Rights for Northern Ireland, Advice for the Secretary of State (2008). Available at: <<http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>> at 170>
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- 53 Scotland Act 2016 Part 3.
- 54 Section 1(b) of the Social Security (Scotland) Act 2018 as introduced.
- 55 Social Security (Scotland) Bill Policy Memorandum, [para.334]. Available at <[http://www.parliament.scot/Social%20Security%20\(Scotland\)%20Bill/SPBill-18PMS052017.pdf](http://www.parliament.scot/Social%20Security%20(Scotland)%20Bill/SPBill-18PMS052017.pdf)>
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- 57 Scottish Government Social Security, Engagement on Social Security. Available at <<http://www.gov.scot/Topics/People/fairerscotland/Social-Security/Experience-Panels>>
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- 59 Joseph Rowntree Foundation, 'Briefing: Poverty in Wales 2020'. Available at <https://www.jrf.org.uk/sites/default/files/jrf/poverty_in_wales_2020_0.pdf>
- 60 The Silk Commission, 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' (2014) Commission on Devolution in Wales.
- 61 Equality, Local Government and Communities Committee, 'Benefits in Wales: options for better delivery' (2019) National Assembly for Wales.
- 62 Welsh Affairs Committee 'MPs to consider benefits system in Wales as COVID-19 support schemes draw to a close' (2021) UK Parliament News. Available at: <<https://committees.parliament.uk/committee/162/welsh-affairs-committee/news/155872/mps-to-consider-benefits-system-in-wales-as-covid19-support-schemes-draw-to-a-close/>>
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- 64 Ibid.
- 65 Equality, Local Government and Communities Committee, 'Benefits in Wales: options for better delivery' (2019) National Assembly for Wales.
- 66 Emma Taylor-Collins and Dan Bristow, 'Administering Social Security in Wales' (2020) Wales Centre for Public Policy [p. 11].
- 67 Simon Hoffman, Sarah Nason, Rosie Beacock, & Ele Hicks (with contribution from Rhian Croke) 'Strengthening and advancing equality and human rights in Wales' (2021) Welsh Government Social Research Number 54/2021 [p.37].
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- 69 Grainne McKeever, 'Social security devolution: Northern Ireland and Scotland' (2017) Ulster University Briefing Paper.
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- 72 Andrew Mackley, 'Social security powers in the UK' (2020) House of Commons Briefing Paper. Available at: <<https://researchbriefings.files.parliament.uk/documents/CBP-9048/CBP-9048.pdf>>
- 73 Derek Birrell & Deirdre Heenan, 'Devolution and social security: the anomaly of Northern Ireland' (2010) 18 Journal of Poverty and Social Justice 3 [pp.281-293].
- 74 Grainne McKeever, 'Social security devolution: Northern Ireland and Scotland' (2017) Ulster University Briefing Paper [p.2].
- 75 Andrew Mackley, 'Social security powers in the UK' (2020) House of Commons Briefing Paper. Available at: <<https://researchbriefings.files.parliament.uk/documents/CBP-9048/CBP-9048.pdf>>
- 76 Each of the following countries explicitly recognise 'economic, social and cultural rights' in their constitutional text: Argentina 1853 (reinstated. 1983, rev. 1994), Angola (2010), Macedonia 1991 (rev 2011), Bosnia-Herzegovina 1995 (rev. 2009), Cape Verde 1980 (rev. 1992), Croatia 1991 (rev. 2013), Czech Republic 1993 (rev. 2002), Democratic Republic of the Congo 2005 (rev. 2011), East Timor 2002, Eritrea 1997, Ethiopia 1994, Iran 1979 (rev. 1989), Macedonia 1991 (rev. 2011), Montenegro 2007; Mozambique 2004 (rev. 2007); Nepal 2006 (rev. 2010); Nicaragua 1987 (rev. 2005); Portugal 1976 (rev. 2005); Rwanda 2003 (rev. 2010); Sao Tome and Principe 1975 (rev. 1990); Slovakia 1992 (rev. 2001); Surinam 1987 (rev. 1992). On a search conducted of 189 constitutions on www.constitute.org, 60 refer to 'economic, social and cultural' protection. Some constitutions regard ESC rights as non-justiciable principles (such as Ireland, India, Germany, and Sweden). In some cases, the judiciary have developed justiciable rights through a wide interpretative analysis (such as in Canada through equality provisions, or in India through dynamic interpretation of CP rights). Other constitutions have directly enforceable ESC rights protection (such as in South Africa and in Finland). More recently some countries are in the process of considering affording ESC rights justiciable through processes of incorporation including Scotland and Wales.
- 77 John Rawls, *Political Liberalism* (2005) Columbia University Press.
- 78 Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (OUP 2002); Kai Moller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights' (2009) 29 Oxford Journal of Legal Studies 4 [pp.757-86].
- 79 The German Basic Law guarantees an "Existenzminimum" which means the right to a minimum subsistence level. It is similar to the minimum core provision derived from ICESCR. See BVerfGE 125, 175 (Hartz IV), the court held that the "right to the enjoyment of a minimum subsistence level" is not simply another facet of the right to human dignity, but a stand-alone right of autonomous value, at par.133.
- 80 See *Trojani* Case C-456/02 (an EU case guaranteeing access to minimum social assistance under the free movement of workers).
- 81 Similarly, the Swiss Federal Court has found that an implied constitutional right to a 'minimum level of subsistence (*conditions minimales d'existence*)', both for Swiss nationals and foreigners, could be enforced by the Swiss Courts. See Swiss Federal Court, *V. v. Einwohnergemeine X und Regierungsrat des Kanton Bern*, BGE/ATF 121I 367, October 27, 1995.
- 82 See Brazilian Federal Supreme Court (*Supremo Tribunal Federal*), RE 436996/SP (opinion written by Judge Celso de Mello), October 26, 2005. The court found that the inefficiency of public managed funds in implementation the constitutional minimum to provide for the needy cannot and should not impede execution of the obligation. This case dealt specifically with the right to education.
- 83 Constitution of Finland, S.19.
- 84 For a discussion on this see Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020)
- 85 For a discussion of the Finnish system, see Kaarlo Tuori, 'Rights, Democracy and Local Self Governance: Social Rights in the Constitution of Finland' (2007) *Juridica International* [pp.70-73].
- 86 For a discussion on the role of the Joint Committee on Human Rights in the UK Parliament see Murray Hunt, 'Enhancing Parliament's role in relation to economic and social rights' (2010) 3 *European Human Rights Law Review* 242. See also David Feldman, 'Can and Should Parliament Protect Human Rights?' (2004) 10 *European Public Law* 635 at 642. This is also reflected in the Cabinet Office's Guide to Making Legislation (May 2009) which advises departments that: 'The JCHR may also ask about compliance with any international human rights instrument which the United Kingdom has ratified; it does not regard itself as limited to the ECHR' [para.12.32].
- 87 Hunt *ibid* 242.
- 88 House of Lords, House of Commons, Joint Committee on Human Rights Report, Legislative Scrutiny of Welfare Reform Bill, 12 December 2011, HL233, HC 1704, <http://www.publications.parliament.uk/pa/jt/201012/jtselect/jtrights/233/233.pdf>
- 89 See dissenting opinions the benefit cap case in *R(on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16.
- 90 Human Rights and the Scottish Parliament Inquiry 2018. Available at: <<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106453.aspx>>; and the recommendations of the Committee, EHRiC, 'Getting Rights Right: Human Rights and the Scottish Parliament', Scottish Parliament November 2018. Available at <<https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>>.
- 91 The procedure for setting up and operating such a special Committee (an Ad Hoc Committee on Conformity with Equality Requirements) is provided for by Standing Order 35.
- 92 The Ad-Hoc Committee found that there were no specific breaches of equality or human rights. The report of the committee was not approved by the Assembly following a debate on the committee's findings. See: Report on whether the Provisions of the Welfare Reform Bill are in Conformity with the Requirements for Equality and Observance of Human Rights, 21 January 2013. Available at: <<http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-welfare-reform-committee/report/nia921115.pdf>>
- 93 Standing Order 53(1).
- 94 Northern Ireland Human Rights Commission, Bill of Rights for Northern Ireland, Advice for the Secretary of State (2008). Available at: <<http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>>
- 95 See for example the recommendations made to the Scottish Parliament Equality and Human Rights Committee (EHRiC) on enhancing *ex ante* review of legislation and introducing human rights rapporteurs across the parliament's work. Available at <http://www.parliament.scot/S5_Equal_Opps/Submission_from_Dr_Katie_Boyle.pdf>; and the report of EHRiC, 'Getting Rights Right: Human Rights and the Scottish Parliament', Scottish Parliament November 2018. Available at: <<https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf>>
- 96 Article 1, Germany: Basic Law for the Federal Republic of Germany [Germany], 23 May 1949.

- 97 BVerfGE 125, 175 (Hartz IV), the court held that the “right to the enjoyment of a minimum subsistence level” is not simply another facet of the right to human dignity, but a stand-alone right of autonomous value, at par.133. See Trilsch, Mirjal, ‘Constitutional protection of social rights through the backdoor: What does the « Social state » principle, the right to human dignity and the right to equality have to offer?’. Available at: <<http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws4/w4-trilsch.pdf>>. See also BVerfGE 132 where in 2012 the court went beyond the procedural protection in the previous case and recognised a substantive element to an adequate level of subsistence for asylum seekers relying on Article 9 ICESCR.
- 98 Claudia Bittner, ‘Casenote – Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court’s Judgment of 9 February 2010’ (2011) 12 (11) German Law Journal 1941–1960 [p.1950].
- 99 BVerfGE 132
- 100 Hartz IV, BVERFGE 125, 175
- 101 772/B/1990/AB:ABH 1990 and Decision 26/1993(IV.29)ab:abh 1993, 196; MK 5651/1993 as discussed in Malcolm Langford, Hungary Social Rights or Market Redivivus? in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (CUP 2008) at [p.256].
- 102 Claudia Bittner, ‘Casenote – Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court’s Judgment of 9 February 2010’ (2011) 12 German Law Journal 11, pp.1941–1960 [p.1952].
- 103 Ibid [p.1958].
- 104 Ibid [p.1959].
- 105 Ibid.
- 106 R (*Pantellerisco and others*) v SSWP [2020] EWHC 1944 (Admin)
- 107 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ 1454
- 108 R (SC) v Secretary of State for Work and Pensions [2021] UKSC 26, [2021] 3 WLR 428
- 109 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ 1454 para.58 referring to Lord Reed in SC [ibid] who cites Lord Bridge in R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council [1991] 1 AC 521.
- 110 It should be noted that Lord Underhill in an earlier case noted that the threshold is not insuperable: “The threshold for establishing irrationality is very high, but it is not insuperable. This case is, in my judgment, one of the rare instances where the SSWP’s refusal to put in place a solution to this very specific problem is so irrational that I have concluded that the threshold is met because no reasonable SSWP would have struck the balance in that way.” SSWP v Johnson & Ors [2020] EWCA Civ 778 (22 June 2020) [para.107].
- 111 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ 1454 [para 90].
- 112 R (*Pantellerisco and others*) v SSWP [2021] EWCA Civ
- 113 The UK’s *Wednesbury* reasonableness test is not sufficient to meet the test of reasonableness in international human rights law, which goes much further in its assessment of ESCR compliance. For a discussion on the ‘proportionality-inflected’ broader reasonableness review adopted by the UN CESCR see Sandra Liebenberg, ‘Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol’ (2020) 42 Human Rights Quarterly, pp. 48–84 [p.72].
- 114 South Africa for example uses intense scrutiny to review compliance with the constitution but can offer more deferential remedies returning the decision-making component of relief back to the decision-maker.
- 115 BVerfGE 132, Para. 64: “The fundamental right to the guarantee of a dignified minimum existence emerges from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law. Article 1.1 of the Basic Law establishes this right as a human right. The principle of the social welfare state contained in Article 20.1 of the Basic Law mandates the legislature to guarantee a dignified minimum existence. In light of the unavoidable value judgments needed to determine the amount of what guarantees the physical and social existence of a human being, the legislature enjoys a margin of appreciation. This fundamental right is in essence not disposable and must be honoured as an enforceable claim to benefits, yet it needs to be shaped in detail and regularly updated by the legislature which has to orient the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life regarding the concrete needs of those concerned. In doing so, the legislature has room to shape the issue.” Judgment available here: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/07/ls20120718_1bv1001010en.html>
- 116 This is dialogical or deliberative democracy theory in action – a theory of rights adjudication where all state organs share responsibility for human rights compatibility.
- 117 Garavito defines structural remedies as cases that “(1) affect a large number of people who allege a violation of their rights, either directly or through organizations 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.” César Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’ (2011) 89 Texas Law Review 1669–1698 [p.1671].
- 118 For an in-depth discussion on this see César Rodríguez-Garavito, *Ibid*.
- 119 T.C.C., febrero 2, 2000, Sentencia SU-090/00 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/2000/SU090-00.htm>; C.C., julio 27, 1999, Sentencia T-535/99 (slip op. at 5), available at <http://www.corteconstitucional.gov.co/relatoria/1999/T-535-99.htm>; C.C., marzo 5, 1998, Sentencia T-068/98 (slip op. at 1–2), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-068-98.htm>; C.C., noviembre 6, 1997, Sentencia SU-559/97, (slip op. at 1–2), available at <http://www.corteconstitucional.gov.co/relatoria/1997/SU559-97.htm>.
- 120 T.C.C., abril 28, 1998, Sentencia T-153/98 (slip op. at 1), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T153-98.htm>.
- 121 T.C.C., octubre 20, 1998, Sentencia T-590/98 (slip op. at 4). Available at: <<http://www.corteconstitucional.gov.co/relatoria/1998/T-590-98.htm>>.
- 122 T.C.C., julio 31, 2008, Sentencia T-760/08 (slip op.). Available at: <<http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>>
- 123 T-025 2004
- 124 César Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’ (2011) 89 Texas Law Review [p.1682].
- 125 Article 48, Constitución Política de Colombia [Colombia], 27 October 1991.
- 126 T-33/92
- 127 Article 86, Constitución Política de Colombia [Colombia], 27 October 1991.
- 128 Magdalena Sepúlveda, ‘Colombia, The Constitutional Court’s Role in Addressing Social Injustice’, in M. Langford (eds) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) Cambridge University press [pp.144–162].
- 129 Ibid [p.150].
- 130 Ibid [p.160].
- 131 Ibid.
- 132 Rodrigo Uprimny, ‘Las transformaciones de la administración de justicia en Colombia’ [The Transformation of the Administration of Justice in Colombia] in Boaventura de Sousa and Villegas, *El caleidoscopio de las justicias en Colombia* [The Kaleidoscope of Justice in Colombia] (Bogotá: Siglo del Hombre Editores, 2001)
- 133 Magdalena Sepúlveda, ‘Colombia, The Constitutional Court’s Role in Addressing Social Injustice’, in Malcolm Langford (eds) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) pp.144–162 [p.162].
- 134 T-533/92
- 135 T-149/02
- 136 Magdalena Sepúlveda, ‘Colombia, The Constitutional Court’s Role in Addressing Social Injustice’, in Malcolm Langford (eds) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) [pp.144–162]; See also T-568/96 – T-707/02
- 137 Christian Curtis, ‘Argentina, Some Promising Signs’, in Malcolm Langford (eds) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) pp.163–181 [p.165].
- 138 Ibid.
- 139 *Itzcovich, Mabel v ANSeS s/ reajustes varios*, Supreme Court of Argentina, 17 May 2005, reaffirmed on 28 July 2005 FN.34. See C Curtis, ‘Argentina, Some Promising Signs’, in M. Langford (eds) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) Cambridge University press pp.163–181 at [p.170].
- 140 Ibid.
- 141 Ibid.

The Access to Justice for Social Rights: Addressing the Accountability Gap project explores the barriers faced by rights holders in accessing justice for violations of social rights across the UK. The project seeks to better understand the existing gaps between social rights in international human rights law, and the practice, policy and legal frameworks across the UK at the domestic level. It aims to propose substantive legal solutions – embedding good practice early on in decision making as well as proposing new legal structures and developing our understanding of effective remedies (proposing substantive change to the conception of ‘justice’ as well as the means of accessing it).

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