

## **Ad Hoc Bill Committee on a Bill of Rights**

### **Written Evidence**

#### **Comparative International and Devolved Best Practice**

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#### **Introduction**

This paper seeks to address some of the legal issues regarding a Bill of Rights for Northern Ireland, it does so with a view to identifying potential concerns/barriers and proposing ways forward for creating a model that embodies best practice internationally and comparatively whilst contextualising the approach within the unique devolved constitutional framework of Northern Ireland. The paper is set out in a question/ answer format for ease of reference:

- 1. Can the Northern Ireland Assembly implement a Bill of Rights?**
- 2. Does Northern Ireland already have sufficient human rights protection under the ECHR?**
- 3. Why implement a Bill of Rights for Northern Ireland?**
- 4. Would implementing a Bill of Rights in Northern Ireland place it out of step with the rest of the UK?**
- 5. What can Northern Ireland learn from international best practice?**
  - a. Enhanced role for the Assembly**
  - b. Enhanced role for the Executive**
  - c. Enhanced role for the Court**
- 6. How can a Northern Ireland Bill of Rights embody international best practice?**
- 7. Constitutional Safeguards**
- 8. Recommendations for a Bill of Rights for Northern Ireland**

## 1. Can Northern Ireland Assembly implement a Bill of Rights?

1.1 Yes, the Northern Ireland Assembly has the devolved legislative power to observe and implement international obligations, including the implementation of a Bill of Rights for Northern Ireland. However, an Act of the Northern Ireland Assembly which implements a Bill of Rights will not be able to go as far as Westminster legislation. This is because areas such as equality provisions, pensions, immigration and social security remain at least partially beyond the competence of the Northern Ireland Assembly as excepted or reserved matters.<sup>1</sup> Further to this, Westminster legislation can take on a form of entrenchment similar to the status of the Northern Ireland Act 1998. It is not clear how far the NI Assembly can legislate in a way that binds itself as a form of 'self-regulatory' legislation.<sup>2</sup>

1.2 As with devolution in Scotland and Wales, the Northern Ireland constitutional framework is restricted in terms of legal competence along a 'reserved v devolved' division of power. In Northern Ireland, this framework constitutes three categories: excepted matters which are beyond the competence of the Northern Ireland Assembly (NIA), reserved matters, which are beyond the competence of the Northern Ireland Assembly unless later transferred<sup>3</sup>, and transferred matters which fall within the competence of the Northern Ireland Assembly as devolved matters. The Northern Ireland Assembly cannot legislate in relation to reserved or excepted matters<sup>4</sup> and cannot modify entrenched Acts listed under section 7 of the Northern Ireland Act, including the Human Rights Act 1998. The Northern Ireland Act 1998 requires compliance with the European Convention of Human Rights (ECHR) and retained EU law granting rights derived from these frameworks a form of constitutional status within the devolved settlement. Section 83 of the Northern Ireland Act compels the reading of Acts of the Northern Ireland Assembly to be read as narrowly as is required to be within devolved competence and any act, or subordinate legislation, introduced by Ministers of the Assembly is deemed *ultra vires* if it is in breach of the ECHR (section 24(1)(c)) or, in the case of subordinate legislation, encroaches on entrenched Acts (section 24(1)(e)). Similar provisions constitute the devolved settlements in Scotland<sup>5</sup> and Wales.<sup>6</sup>

1.3 'Observing and implementing international obligations' falls within the devolved competence of the Northern Ireland Assembly.<sup>7</sup> The Northern Ireland Assembly can introduce legislation that implements international obligations, including incorporating international human rights standards into the devolved framework of governance subject

to the limitations discussed above. Indeed, the Northern Ireland Assembly has already taken steps to demonstrate leadership in observing and implementing international human rights obligations. For example, under the Commissioner for Older People Act (NI) 2011 the Commissioner must 'have regard to the United Nations Principles for Older Persons adopted by the General Assembly of the United Nations on 16 December 1991'.<sup>8</sup> And under the Commissioner for Children and Young People (NI) Order 2003 the Commissioner must have regard to the UN Convention on the Rights of the Child in exercising his/her functions.<sup>9</sup> These are examples of legislative steps that encourage compliance with international human rights obligations beyond those contained in the ECHR (although they do not go so far as to amount to incorporation). Similar legislative commitments have been passed in Scotland<sup>10</sup> and Wales<sup>11</sup>.

1.4 The Northern Ireland Assembly can pass legislation that implements and observes international human rights law through a Bill of Rights for Northern Ireland. However, it is important to note that the Assembly would be restricted in terms of the reach of this legislation. For example, it would be beyond the competence to enact legislation that modifies entrenched enactments or that would modify the operation of section 75 of the Northern Ireland Act (the equality provision). It would not, for example, be possible to amend section 75 to include socio-economic status as a grounds for discrimination. It would also be beyond the competence of the Northern Ireland Assembly to encroach on those excepted matters under Schedule 2 of the NI Act 1998, such as matters relating to social security contributions, pensions or immigration. This limits the scope of the reach of any devolved Bill of Rights in providing for rights supplementary to the ECHR, including the full breadth of economic and social rights. Likewise, the NI Assembly cannot 'entrench' legislation in the same way as Westminster can enact a Bill of Rights subject to the same status as ECHR rights under the Northern Ireland Act 1998. The extent to which the NI Assembly can bind itself will be somewhat tested by the UNCRC Incorporation (Scotland) Bill which seeks to afford the judiciary strike down powers should legislation be deemed incompatible with the UNCRC.

1.5 The most robust form of 'incorporation' (embedding human rights into the domestic framework) is through legislation enacted by the UK Parliament that would entrench a Bill of Rights in the same way that the ECHR is an entrenched part of devolved law under the Northern Ireland Act 1998. This is the approach committed to in the 1998 peace agreement.<sup>12</sup>

1.6 One means through which a balance could be struck would be to embed a Bill of Rights through UK Parliament legislation which requires the content and substance of the rights to be enhanced and developed through NI Assembly legislation (akin to the Finnish constitutional provisions discussed below and similar to the approach adopted in Scotland).

## **2. Does Northern Ireland already have sufficient human rights protection under the ECHR?**

2.1 No, the ECHR does not reflect the full body of international human rights that the UK has agreed to be bound by and this creates a legal deficit, or an accountability gap, for Northern Ireland.

2.2 It is important to note that the ECHR is largely a civil and political (CP) rights instrument. Historical misunderstandings surrounding the implementation of international human rights law saw economic, social and cultural (ESC) rights relegated to a lower status than that of CP rights. More recently however, that division has been addressed in the literature and practice as a 'legal fiction' meaning civil, political, economic, social and cultural rights should be treated as equally important.<sup>13</sup> In addition to this, environmental rights are also now recognised as a component of the international human rights framework.<sup>14</sup> The equal treatment of all human rights is now evident at the international level<sup>15</sup>, comparatively speaking<sup>16</sup> as well as in the other devolved regions<sup>17</sup> where the devolved legislatures have attempted to address the gap. Economic, social, cultural and environmental (ESCE) rights largely relate to areas such as health, education, housing and an adequate standard of living as well as the environment, each of which engage with devolved areas. They also relate to areas engaging across the reserved v devolved divide such as immigration, pensions, equality law and social security contributions. This is not dissimilar to the division of power across CP rights, the implementation of which rests with both the UK and the Northern Ireland Assembly under the terms of Human Rights Act 1998 and the Northern Ireland Act 1998. However, the implementation and observance of the full body of international human rights law is not captured under the UK domestic constitutional framework, or currently under the devolved framework, meaning domestic statutes and policies are not necessarily implemented or measured with full reference to international human rights law. As a result the Northern Ireland executive and public bodies are not always under a statutory duty to take international human rights law into consideration when performing their functions. This presents as a significant accountability gap in Northern Ireland. In other words, when violations of

rights that are not covered by the ECHR occur there is no recourse to a legal remedy for that violation.

2.3 In international law civil, political, economic, social, cultural and environmental rights are 'universal, indivisible and interdependent and interrelated.'<sup>18</sup> This means that fulfilment and enjoyment of one right is dependent on fulfilment and full protection of the other. For example, the right to vote cannot be fully enjoyed unless a person is also able to enjoy the right to education, the right to protest and the right to freedom of conscience and freedom of religion or belief. The right to life for example, cannot be fully enjoyed, unless there is also adequate protection of the right to health, which is equally dependent on the right to adequate and safe housing and the right to freedom from poverty (through fair conditions of employment and the right to a minimum level of social security) and the right to a healthy environment and so on. The principle of indivisibility is a helpful way of viewing the human rights family as a whole. One of the major challenges facing Northern Ireland, and the rest of the UK, is that the legal system only provides for a select number of rights – largely civil and political CP rights and not ESCE rights, under the current legislative frameworks. This is out of step with constitutional arrangements comparatively speaking in Europe, across the world, and even between the different devolved jurisdictions.<sup>19</sup> Indeed, it is an obligation of international human rights law to ensure rights holders have access to an effective legal remedy when their civil, political, economic, social, cultural or environmental rights are violated.<sup>20</sup>

2.4 Northern Ireland is also subject to a number of domestic gaps in the protection of rights compared to the rest of GB. For example, equality law is not as extensive in Northern Ireland as it is in the rest of the UK. The Equality Commission Northern Ireland has highlighted the gaps in relation to race equality legislation, disability legislation, and age discrimination legislation relating to the provision of goods and services.<sup>21</sup> Further, in Wales and Scotland the UK Parliament has devolved competence to commence section 1 of the Equality Act 2010 in the respective jurisdictions. The Equality Act does not extend to Northern Ireland, and section 1 was never commenced on a GB wide basis. In Scotland, section 1 of the Equality Act has been implemented under the Fairer Scotland Duty, a duty that requires public bodies to have due regard to equality of outcome for those from socio-economically disadvantaged backgrounds.<sup>22</sup> There is no equivalent provision in Northern Ireland legislation.

2.5 A Bill of Rights is one mechanism that could serve as an accountability framework for Northern Ireland across a broader spectrum of rights, in accordance with international

best practice. Indeed, it is international best practice to seek to protect ESCE rights in the same way that CP rights are protected.<sup>23</sup> This should include consideration of the rights of specific groups, including children, women, the elderly, LGBTI rights, the rights of migrants and any other minority group. The UN has sought to encourage that devolved legislatures take the necessary steps to ensure compliance with international human rights law within their spheres of competence.<sup>24</sup> In some countries, for example, in Switzerland, it is the responsibility of the cantonal (devolved) legislatures to implement international law.<sup>25</sup>

### **3. Should Northern Ireland implement a Bill of Rights?**

3.1 This is a question for the people of Northern Ireland and clearly consensus building is key to progress. It is within the power of the Northern Ireland Assembly to pass legislation which implements international human rights law through a Bill of Rights. It is also possible to request that the UK Parliament enact a Bill of Rights for Northern Ireland as envisaged by the peace agreements.<sup>26</sup> Another way of viewing this is that it is a requirement of the UK and Irish Governments to help build consensus in considering a Bill of Rights. Implementing a Bill of Rights that incorporates stronger legal remedies for violations of international human rights law and other supplementary rights to those currently protected will place Northern Ireland alongside leading developments in Scotland and Wales. It is a means through which to create an accountability framework against which decisions of the executive and legislature can be subject to scrutiny and it allows the people of Northern Ireland to hold decision makers to account according to international and domestically developed standards.

3.2 It is important to note that although the UK has signed up to and ratified international instruments protecting human rights, those treaties will not be domestically enforceable unless they are 'incorporated' into domestic law (this means embedding them into the domestic legal framework). For example, in the case of *JR 47's Application*<sup>27</sup> the High Court in Northern Ireland held that the applicant could not rely upon the UN Convention on the Rights of Persons with Disabilities in determining a right to independent living because the Convention had not been incorporated into domestic law.<sup>28</sup> McClocksey J held that the basis for this was that the accession or ratification of an international treaty is an act of the executive government and not of the legislature and so while it remains unincorporated, the UNCRPD cannot be the source of rights or obligations in domestic law.<sup>29</sup>

3.3 It is considered best practice that devolved legislatures embrace responsibility for protecting human rights within their spheres of competence. For example, the UN Committee on the Rights of the Child suggests that fulfilment of international obligations should be secured through incorporation of international obligations<sup>30</sup> and by ensuring effective remedies, including justiciable remedies are made available domestically.<sup>31</sup> In the context of devolution the Committee further suggests that any process of devolution must ensure that devolved authorities have the necessary financial, human and other resources effectively to discharge responsibilities for the implementation of international human rights law.<sup>32</sup> The welfare mitigation measures in Northern Ireland could be utilised, or even enhanced, to ensure that the executive and the Assembly have sufficient resources to meet the state's international obligations. The UN Special Rapporteur on Adequate Housing has called for increased engagement in complying with the full spectrum of rights at the devolved level and highlighted that the effective application of rights at the local and subnational levels is critical for enhanced accountability at the devolved level.<sup>33</sup>

3.4 The benefits of implementing a Bill of Rights are self-evident in many respects - it means that individuals would have better access to rights directly relating to their conditions of living. This includes the better protection of employment rights<sup>34</sup>, rights relating to pensions<sup>35</sup>, rights which protect an adequate standard of living (including access to adequate housing and food)<sup>36</sup>, rights relating to health and healthcare<sup>37</sup> and rights relating to education,<sup>38</sup> among others. It would ensure that vulnerable and marginalised groups, including children, the elderly, the disabled and the unemployed receive protection in the progressive realisation of their rights. Embedding ESCE rights into the domestic framework can help in the alleviation of the causes and consequences of poverty.<sup>39</sup>

3.5 The onset of COVID has without doubt brought to the fore the importance of the right to healthcare, the right to social security, the right to adequate housing, the right not to be evicted, the right to education and the right to a healthy environment – the better protection of these rights has become more evident as a public health issue. There is a significant accountability gap for those experiencing violations of ESCE (beyond ECHR) in Northern Ireland and the UK more widely. This is because domestic law does not currently protect the full body of international human rights law and as a result people are left without access to remedies when a violation of their right occurs. A Bill of Rights is one means through which to bridge this accountability gap.

#### **4. Will implementing a Bill of Rights in Northern Ireland place it out of step with the rest of the UK?**

4.1 No, it would place Northern Ireland back in step with the devolved regions in Scotland and Wales. Whilst at the national level there is no equivalent Bill of Rights that reaches beyond ECHR rights, both Scotland and Wales have taken significant steps in building on human rights protections within their spheres of competence. In Scotland there are three important developments that the Committee may wish to consider. The first is that the First Minister's Advisory Group on Human Rights Leadership has recommended a new human rights framework for Scotland that includes and builds upon the incorporation of international human rights law by providing for economic, social, cultural and environmental rights, as well as rights of different protected groups including the rights of women, children, the elderly, LGBT rights and the rights of disabled persons.<sup>40</sup> Similar to the devolved settlement in Northern Ireland, the Scottish Parliament cannot legislate in relation to reserved matters meaning areas such as employment law, immigration, social security and equality are at least partially reserved and thus cannot form part of the statutory devolved framework. The recommendations of the First Minister's Advisory Group are now being implemented by a National Task Force in order to support capacity building before the framework is introduced.<sup>41</sup> Second, the Scottish Parliament has already passed legislation which recognises the right to social security as a human right essential to the realisation of other rights (although the powers of the Scottish Parliament are limited in terms of what social security it can provide).<sup>42</sup> Third, in September 2020 the Scottish Government introduced to the Scottish Parliament the UNCRC Incorporation Bill to give effect to the UN Convention of the Rights of the Child, making this international treaty part of domestic law that is subject to judicial enforcement.<sup>43</sup> The Bill seeks to make it unlawful for public authorities to act incompatibly with the incorporated UNCRC requirements, giving children, young people and their representatives the power to go to court to enforce their rights. This is a highly significant development as it is the first devolved Bill which gives the court the ability to strike down legislation (retrospectively) which is incompatible with the UNCRC (in limited circumstances).<sup>44</sup>

4.2 In Wales, the Welsh Assembly has passed the Rights of the Children and Young Persons (Wales) Measure which integrates the UNCRC into Welsh decision making processes. In addition the Well-being of Future Generations (Wales) Act 2015 encourages the consideration of how to improve social, economic, environmental and cultural well-being as part of decision making processes. There are also plans underway to consider the incorporation of the right to adequate housing in Wales.<sup>45</sup> Both Scotland



and Wales have developed innovative approaches to addressing the international human rights gap within their spheres of competence. The developments in Scotland and Wales were influenced by the progress previously made in Northern Ireland in relation to the Bill of Rights process. The work undertaken in Northern Ireland was instrumental in the development of the models of incorporation now being considered in Scotland.<sup>46</sup>

4.3 It is important to note that there is no universal application of human rights and equality law across the UK. The UK at the national level has agreed to be bound by a number of international treaties that do not take on enforceable legal obligations unless incorporated into domestic law. The enforceability of the rights contained in international treaties varies across the UK jurisdictions meaning different rights and remedies exist for civil, political, economic, social, cultural and environmental (CPESE) rights depending on where you live. Some jurisdictions have more progressive measures than others.<sup>47</sup> The devolved structures themselves create different frameworks for equality and human rights meaning there is no universal application or operation of a normative national standard for both equality law and human rights law (for example, equality legislation is different to rest of GB and the human rights legislative framework differs depending on whether at devolved or national level, i.e Northern Ireland Act 1998 offers more robust protection for ECHR than the Human Rights Act 1998). This picture is further complicated by withdrawal from the EU a result of which may mean the irrevocable loss of rights and remedies for both Northern Ireland<sup>48</sup> and the UK.<sup>49</sup>

4.4 During these uncertain times the Northern Ireland Assembly may wish to act as a legislature alive to the threat of the loss of rights and remedies as a result of potential constitutional change, while at the same time, be forward looking in terms of how to promote and enhance the enjoyment of human rights in the future such as under the current inquiry of the Ad Hoc Committee. The Committee may wish to consider the development of new avenues/ routes to remedies for those who experience violations of their rights as part of this forward looking remit, including of course, domestic implementation of a Bill of Rights for Northern Ireland.

## **5. What can Northern Ireland learn from international best practice?**

5.1 There is no one constitutional model that can act as a panacea and it is important to manage expectations on what a Bill of Rights can achieve. Likewise, it is unrealistic to expect that any model adopted by Northern Ireland, or any other constituent part of the UK, will be perfect. Rather, political representatives and legislative drafters can reflect on

lessons from elsewhere and try to find the right balance for their own particular constitutional setting. Notwithstanding, there is no doubt that international and comparative experience demonstrate the potential reach of ESCE rights when the rights are given legal standing in domestic settings in accordance with their status in international law (either through direct incorporation of treaties or through constitutional provisions reflecting international legal standards).<sup>50</sup>

5.2 Innovation and leadership is therefore key in order to further progress in the development of a Bill of Rights. In Northern Ireland, this also requires consensus building and education and awareness raising on what functions a Bill of Rights might perform as well as capacity building to support the operationalisation of a new human rights framework. Key to this process should be an understanding that a Bill of Rights can act as an important accountability mechanism for decision making enabling access to remedies when things go wrong. In other words, a Bill of Rights creates a framework for decision making.

5.3 Constitutional theory and practice suggests that when creating a new human rights framework it should be embedded across the different arms of state, meaning that the executive, the legislature and the judiciary each act as guarantors of human rights, and each hold the other to account. This framework is called a 'multi-institutional' approach.<sup>51</sup> In Northern Ireland it would mean the creation of new duties for the Northern Ireland Assembly, new duties for the public sector and private sector when exercising public functions, and new duties for the courts. The most robust models ensure that compliance with human rights is evenly spread across the state. Comparative best practice also suggests that proposed changes to the constitutional framework should be built on processes that are inclusive, participative, informed and deliberative.

#### **a. Enhancing the role of the NI Assembly as a guarantor of human rights**

5.4 The United Nations Office of the High Commissioner on Human Rights and the Inter-Parliamentary Union has recommended that '[h]uman rights should thoroughly permeate parliamentary activity'.<sup>52</sup> The Committee may wish to consider how best to embed a Bill of Rights into the work of the NI Assembly.

5.5 There are both domestic and international examples of best practice in this regard. In Finland, the constitution includes civil, political, economic, social and cultural rights including, the right to education<sup>53</sup> the right to language and culture<sup>54</sup> the right to work<sup>55</sup>

and the right to social security.<sup>56</sup> Each of these constitutional provisions place a duty on the legislature to enact further legislation to fulfil the rights (something that a NI Bill of Rights could also adopt as more cognisant with parliamentary supremacy). In addition, the legislature is supported in decision making by a Constitutional Law Committee which provides advice on whether legislation passing through parliament complies with the constitution. This is called pre-legislative scrutiny, or *ex-ante* review.

5.6 The Finnish Constitutional Law Committee consists of Members of Parliament, however, its decisions are largely based on the deliberations of constitutional experts from whom the committee seeks evidence.<sup>57</sup> The reports of the Committee tend to be legally, rather than politically, focused.<sup>58</sup> By way of convention the Parliament complies with decisions of the Committee on the compatibility of legislation with constitutional rights.<sup>59</sup> The *ex ante* (pre-legislative) review of a Bill secures a strong degree of constitutional compatibility from the outset following which, the court is authorised to remedy any conflict with the Constitution on a case by case basis if a contradiction arises.<sup>60</sup>

5.7 In the UK Parliament there is *ex ante* review of legislation performed by the Joint Committee on Human Rights, however, consideration of international human rights or rights beyond the ECHR, is not a prerequisite of pre-legislative scrutiny nor are the recommendations of the Joint Committee binding on Parliament.<sup>61</sup> Likewise 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 the broader spectrum of international human rights. In Scotland, an Equality and Human Rights Committee (EHRiC) has recently extended its remit to include human rights review and in 2018 made recommendations to broaden its remit significantly as a parliamentary guarantor of human rights.<sup>62</sup> The recommendations include:

- a role for the Scottish Parliament as guarantor of human rights in both pre and post- legislative scrutiny of Acts engaging with human rights and equality;<sup>63</sup>
- engagement with international treaty monitoring mechanisms (UPR +)<sup>64</sup>;
- the expansion of human rights scrutiny across the parliamentary remit through deployment of 'human rights champions' who provide advice in order to mainstream human rights in decision making processes.<sup>65</sup>
- a 'pilot systematic human rights scrutiny of Government Bills with a dedicated legal adviser'<sup>66</sup>
- enhanced disclosure of the Presiding Officer's statement on legislative competence.<sup>67</sup>

5.8 In Northern Ireland there is no Committee whose remit is to perform *ex ante* review of legislation to ensure compliance with human rights or equality. It is an option under the Standing Orders to establish an Ad Hoc Committee on Conformity with Equality Requirements that could perform a pre-legislative scrutiny role.<sup>68</sup> The Standing Orders provide that such a Committee can report on whether a Bill or proposal for legislation is in conformity with equality requirements including rights under the ECHR or any Northern Ireland Bill of Rights.<sup>69</sup> The Ad Hoc Committee on a Bill of Rights may wish to consider how to embed human rights compliance into decision making across the work of the Assembly, including a dedicated Equality and Human Rights Committee, through the deployment of human rights and equality considerations across parliamentary business, and through enhanced pre-legislative scrutiny by both Ministers (on statements of legislative competence) and Committee deliberation.

#### **b. Enhancing the role of the NI executive as a guarantor of human rights**

5.9 Under the Scottish proposals for human rights reform there was a recognition by the First Minister's Advisory Group on Human Rights Leadership that there needs to be 'everyday accountability' for human rights compliance and that it is in the space of practical implementation and everyday practice that rights either stand or fall.<sup>70</sup> The research demonstrates that administrative decision making should form the first resort for human rights compliance. Within this administrative space also includes an enhanced roll for regulators, meaning devolved inspectorates in housing, health and education should be in place and should assess compliance with international human rights standards, creating more immediate accountability mechanisms than a court or tribunal.<sup>71</sup> It is within this regulatory space that the everyday accountability of rights can occur.<sup>72</sup> Barret and others have argued that sector specific enforcement can be greatly enhanced when bodies, such as the national equality and human rights institutions occupy more immediate enforcement space than that occupied by the court.<sup>73</sup>

5.10 In Northern Ireland this would see the executive continue to strive to improve the everyday lives of the people living in Northern Ireland. Indeed, the New Decade New Approach deal includes an ambitious strategic vision focussed on improving lives<sup>74</sup> through a human rights based approach that includes commitments to the right to health, the right to education, the right to an adequate standard of living, the right to reparations for institutional abuse, and the right to participation in decision making.<sup>75</sup> The restored executive has committed to bring about positive changes in areas that impact greatly on

peoples lives such as 'the economy, overcrowded hospitals, struggling schools, housing stress, welfare concerns and mental health.'<sup>76</sup> These commitments engage directly with the full suite of international human rights law.

5.11 The function of a Bill of Rights is to provide an accountability framework for these decisions to be made – using normative standards to help guide decision makers, and providing accountability and access to effective remedies when violations of rights occur.

**c. Enhancing the role of the court as a guarantor of human rights (as a means of last resort)**

5.12 Many countries deploy human rights protection by constitutionalising rights and affording the court the option to review and assess compliance with those rights. A Bill of Rights is a form of constitutionalisation. Indeed, the UK Parliament has passed legislation which affords the court this role in relation to ECHR rights under the Human Rights Act 1998 and the Northern Ireland Act 1998. In addition to civil and political rights other countries also afford constitutional status to economic, social, cultural and environmental rights. A helpful way to understand this role is to view the court as an accountability mechanism of last resort if all other institutional safeguards fail. For example, the German constitution recognises the right to human dignity<sup>77</sup> and in the case of *Hartz IV* the court deemed social security provision insufficient to ensure human dignity. The court required the state to revisit the process for establishing provision as well as increasing the minimum level of provision.<sup>78</sup> This concept of dignity recognises that no one should fall into destitution, and that no one should be left without the basic essentials in life. The approach of an absolute minimum guarantee is evident in the constitutions and court adjudication of Germany ('*Existenzminimum*')<sup>79</sup>, Switzerland ('*conditions minimales d'existence*'),<sup>80</sup> Colombia (*minimo vital*) and Brazil ('*mínimo existencial*')<sup>81</sup>.

5.13 In South Africa the constitution recognises the rights to housing, healthcare, food water and social security.<sup>82</sup> In the case of *Grootboom* the court found that the right to adequate housing was breached when the state had not introduced a reasonable housing strategy to fulfil the right.<sup>83</sup> In Colombia, the constitution recognises the rights to health, housing, work and education, among others. The Constitution also protects vulnerable and disadvantaged groups within society with particular measures for children, women, the elderly and persons with disabilities. In Colombia, adjudication includes the use of the *tutela* device, which enables a person to file a writ of protection

before any court or tribunal for the immediate protection of her or his ‘fundamental constitutional rights.’ All decisions by ordinary judges on a writ of protection are sent to the Constitutional Court and are susceptible to review. Magistrates in the Constitutional Court can review *tutelas*, and where appropriate, will group cases together in order to address systemic problems such as for example if an issue emerges that applies to a large group of vulnerable people the cases will be merged together and the court will issue a collective remedy.<sup>84</sup>

5.14 One of the key areas requiring further development in relation to the role of the court is consideration and development of what constitutes an **effective remedy as part of a renewed focus on Access to Justice**. Research suggests adopting principles of best practice for human rights adjudication under a Bill of Rights which include the principles of accessibility, participation, deliberation, fairness, counter-majoritarian adjudication and the principle of an effective remedy. Effective remedies can include, amongst other things: restitution, compensation, rehabilitation, satisfaction, effective measures to ensure cessation of the violation and guarantees of non-repetition. Specific remedies beyond compensation include: public apologies, public and administrative sanctions for wrongdoing, instructing that human rights education be undertaken, ensuring a transparent and accurate account of the violation, reviewing or disapplying incompatible laws or policies, use of delayed remedies to facilitate compliance, including rights holders as participants in development of remedies and supervising compliance post-judgment.<sup>85</sup> This wider understanding of remedies can help address misconceptions around the role of court adjudication, in the sense that it need not necessarily be primarily about compensation for a wrong, but about addressing the violation itself by ceasing the wrong and/or compelling the duty bearer to review its approach. Emphasis should also be placed on the fact that the court can employ either weak form review or strong form review, the latter being more deferential to parliament. Having a constellation of remedies available for the court to deploy can help the court ensure it strikes the right balance in terms of overview and intervention (see constitutional safeguards below).

5.15 When engaging with economic, social, cultural and environmental rights the research suggests that the use of collective litigation and structural remedies is important in some cases. This would mean enhancing rules around standing, facilitating group proceedings as well as public interest litigation and interventions from third parties. It also requires the court to adapt to new ways of issuing remedies for a violation of a right, including structural injunctions that include multiple litigants as well as multiple respondents, particularly important for social rights adjudication. This type of adjudication can help

when many rights holders are facing the same systemic issue and can challenge the duty bearer collectively. For example, this would mean that if systemic issues arise in relation to areas such as housing, health, education, social security and so on, that rights holders would be able to challenge those issues collectively as a group to remedy the systemic problem.

5.16 The Ad Hoc Committee may wish to reflect further on the access to justice issues raised by the implementation of a Bill of Rights, including what constitutes an ‘effective remedy’ when a violation of a right occurs and what measures would be required to support access to justice.

## 6. Can a Northern Ireland Bill of Rights embody international best practice?

6.1 Yes. The 2008 Northern Ireland Human Rights Commission’s recommendations for a Bill of Rights included recommendations for *ex ante* pre-legislative scrutiny of legislation, for the deployment of duties on public and private bodies to comply with a Bill of Rights, together with an enhanced role for the court acting as an accountability mechanism of last resort.<sup>86</sup> The proposals of the NIHRC are in keeping with comparative and international best practice and so are useful as a baseline from which to build. This is also the model being followed in Scotland, albeit within the confines of devolution.

6.2 Further evidence will be required in terms of considering whether further supplementary rights to those in the table identified below merit further consideration. For example, enhanced equality provisions (in keeping with rest of GB and further substantive equality measures); the rights of particular groups, including children, women, persons with disabilities, on race and rights for older persons and for LGBTI communities. Further regard should also be given to a right to freedom from poverty and social exclusion,<sup>87</sup> and to freedom from destitution.<sup>88</sup> Finally, the Bill of Rights could include the right to an effective remedy, reflecting the more expansive meaning under international law.<sup>89</sup>

6.3 The following table breaks down the NIHRC proposed Bill of Rights.

### NIHRC Proposed Bill of Rights<sup>90</sup>

Preamble	Underpinned by CPESC rights, dignity and commitment to peace
Human rights – including supplementary rights and for	Right to life and right to an effective investigation Freedom from torture

the particular circumstances of Northern Ireland	<p>Freedom from slavery</p> <p>Right to liberty and security</p> <p>Fair trial and no punishment without law</p> <p>Right to private and family life</p> <p>Freedom of thought, conscience and religion</p> <p>Freedom of expression</p> <p>Freedom of assembly and association</p> <p>Right to marriage and civil partnership</p> <p>Democratic Rights</p> <p>Property Rights</p> <p>Education Rights</p> <p>Freedom of Movement</p> <p>Freedom from violence, exploitation and harassment</p> <p>The right to identity and culture</p> <p>Language rights</p> <p>Rights of victims</p> <p>Right to civil and administrative justice</p> <p>Right to health</p> <p>Right to adequate standard of living</p> <p>Right to accommodation</p> <p>Environmental rights</p> <p>Social Security Rights</p> <p>Children's Rights</p>
Duties	Duty for public authorities, or any person or body performing public functions to comply with the Bill
Duties	Duty to pay due regard to the Bill and respect, protect, promote and fulfil rights
Duties	Minimum core and progressive realisation of rights
Remedies	Declarations of incompatibility for incompatible Westminster legislation and strike down powers for incompatible devolved legislation
Remedies	Courts must grant an effective remedy and for this purpose may grant such relief or remedy, including compensation, or make such order, as they consider just and appropriate
Pre-legislative scrutiny	Northern Ireland Assembly should establish Standing Committee on Human Rights and Equality, with a mandate to examine and report on all human rights and equality issues coming within the competence of the Northern Ireland Assembly, including the compatibility of bills within relevant human rights standards; and the Committee should be empowered to conduct inquiries into human rights issues
Review	Northern Ireland Human Rights Commission should monitor compliance with the Bill
Interpretation	<p>Must strive to achieve the purpose of the Bill</p> <p>Due regard to relevant international human rights law</p> <p>May consider comparative case law</p>



Interpretation	In so far as it is possible to do so primary and subordinate legislation should be read as compatible with human rights in Act
Entrenchment	Entrenched in Westminster legislation and amendable only with cross-community approval in Northern Ireland
Limitations	Subject only to reasonable limits which are prescribed by law to the extent that the limits are necessary in a society based on the values of human dignity, democracy, liberty and equality, taking account of all relevant factors
Derogation	In times of emergency but not applicable to non-derogable rights
Standing	Sufficient interest test
Legal aid	Sufficient support through legal aid to ensure access to justice

## 7. Constitutional safeguards<sup>91</sup>

7.1 There are some common misconceptions about the feasibility of enforcing economic, social and cultural rights by judicial means that will be helpful to reflect upon in order to facilitate an informed discussion in terms of future options for Northern Ireland. These misconceptions tend to feature very legitimate concerns about the viability or legitimacy of the judiciary impeding on decisions that should be kept within the realm of the legislature or the executive. These critiques, which are extremely important to address, can be mitigated and overcome in well-conceived and constitutionally appropriate models.

7.2 The **anti-democratic critique** of ESC adjudication questions whether the court can legitimately interfere in resource dependent policy areas usurping the power of the legislature or executive. However, civil and political rights are also resource dependent and at times also require the court to intervene as an accountability mechanism. When the court intervenes in civil and political rights determination it does so as an important accountability check on the executive or legislature rather than as a means of usurping the power of other branches of government. One way in which this can occur is to use different types of remedies – some of which may afford larger degrees of deference back to decision makers depending on the circumstances. The court as an intervener in the enforcement of ESC rights is therefore an important part of a multi-institutional dialogue ensuring accountability rather than a transfer of political power to the judiciary.

7.3 The **indeterminacy critique** of ESC adjudication tells us that ESC rights are too vague and that their substantive interpretation should not be left to judges or to unelected UN Committees rather than elected officials. In the same way that CP rights require interpretation so too do ESC rights – and in a similar vein, courts can play an important role in giving substance and meaning to ESC rights in the same way that they do with CP rights. This does not require the court to usurp the role of the legislature or executive. If the legislature gives clear instructions to the court on how to interpret rights it can assist in the court fulfilling its role as a guarantor of rights and thus avoiding abdication of this important judicial function. In the determination of CP rights domestic courts can refer to, and are sometimes obliged to consider (or keep pace with), a supranational court, such as the European Court of Human Rights.<sup>92</sup> A concern that sometimes emerges by those rejecting ESC justiciability is that, in the determination of ESC rights, there is no international or regional body of jurisprudence to assist in the interpretation of rights. However, this is based on a misconception. ESC rights are adjudicated upon and are increasingly well defined in international, regional and domestic law.<sup>93</sup> There are regional mechanisms, such as the Collective Complaints Procedure under the Committee of Social Rights responsible for interpreting state obligations under the European Social Charter and the Optional Protocol to ICESCR providing a complaints mechanism function for the Committee on Economic, Social and Cultural Rights. Whilst the UK has not signed up to these regional or international complaints mechanisms (the latter of which is still in its infancy) the cases emerging from the treaty bodies can act as helpful sources of interpretation. Other regional systems, such as the Inter-American Court of Human Rights has developed adjudication on ESC rights and its jurisprudence can act as an interpretative tool.<sup>94</sup> Likewise, other sources of interpretation can include General Comments from UN treaty bodies, treaty body decisions and recommendations and jurisprudence from other jurisdictions, such as those discussed above.

7.4 Third, the **capacity critique** tells us that courts do not have the capacity to deal with ESC rights, that there would be a flood of litigation and that judges do not have the expertise to determine the substance ESC rights or their complex relationship with other areas of governance. Again, in the same way that CP rights are subject to adjudication similar rules can apply in relation to ESC rights. For example, floods of cases can be avoided through collective litigation or the use of test cases.

7.5 Most importantly, in the same way CP rights are protected, adjudication can be a means of last resort only available after all other remedies have been exhausted. Courts can also help support their capacity by seeking expertise on ESC rights where needed,

including the appointment of *amicus curiae* (a 'friend of the court') or through key third party interventions if required. As above, in the same way the court can draw on expertise in relation to CP or constitutional matters it can also refer to various sources of domestic and international law, comparative case law, international guidance as well as domestic experts in order to assist in capacity building when adjudicating ESC rights. When ESC rights engage with far reaching policy considerations the court can ask the legislature or executive to justify its approach, in the same way that it does so in relation to CP rights.

7.6 The complexity of adjudication in the area of human rights cuts across all different types of rights – it is not unique to the ESC rights domain. It is important to remember that some CP as well as ESC rights have core components that are non-derogable as well as components subject to limitation if justifiable. A more nuanced understanding of the nature of ESC rights helps contextualise the different ways in which the court can appropriately review ESC compatibility in a democratically legitimate way and only in limited circumstances. In this sense, the critiques of ESC adjudication are important matters to address when considering how best to accommodate ESC justiciability within any given constitutional context. However, importantly, these concerns are not insurmountable barriers and should not result in the outright rejection of ESC justiciability or judicial enforcement. As Wolffe identifies: “*The question of whether the Courts should be given that role - or any other role in relation to economic and social rights - seems to me, ultimately, to be a political or constitutional question, not a conceptual one.*”<sup>95</sup>

7.7 So what constitutional safeguards can be deployed to ensure the right balance? As with any proposed constitutional or legislative change which alters the way human rights are protected, it is important to consider how to ensure constitutional safeguards are in place. In the UK the enforcement of human rights by the courts has traditionally been a source of contention. There is a concern that court adjudication on rights undermines the separation of powers. It is argued that judicial enforcement of rights lacks democratic legitimacy and that deference to parliament is the most appropriate approach in the determination of human right issues.<sup>96</sup>

7.8 It is acknowledged these concerns can become heightened in connection with affording the judiciary the power to determine ESC rights in areas of complex policy that directly engage the allocation of state resources. Of course, it is a legitimate concern that judicial supremacy could usurp the role of the legislature in determining matters relating to the allocation of limited resources across different socio-economic areas<sup>97</sup> and a well-

conceived system will address this from the outset. The judiciary must be able to hold the legislature and executive to account, including in the determination of rights. This is of particular importance if the legislature has taken steps to create obligations to fulfil rights and to instruct the judiciary, as well as other public bodies, to comply with them. And so, while it may be inappropriate to afford unelected judges a monopoly on decisions regarding wide reaching policy areas with far reaching budgetary implications that does not preclude the judiciary from having any role whatsoever in the process of determining ESC compatibility.

7.9 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 and judicial.<sup>98</sup> It is for this reason that is helpful to reflect on the responsibilities of the legislature, executive and judiciary in a multi-institutional approach to human rights protection. In the end, if a state is serious about genuine enforcement and enjoyment of human rights then it must take steps to ensure effective judicial remedies are available, at least as a means of last resort, if the other institutional mechanisms fail to comply with international human rights standards.

7.10 Rather than view the adjudication of ESC rights as a threat to the separation of powers the constitution could reflect a multi-institutional system where compatibility with ESC rights is shared between the legislature, the executive and the judiciary – where one holds another to account and the judiciary acts as a means of last resort. There are different ways of balancing the separation of powers between institutions in any given constitution. Northern Ireland could reflect upon the most appropriate approach in a devolved constitutional setting. The devolved framework already provides a form of constitutional status to ECHR rights and according to the UN Committee on ESC Rights countries should implement ESC rights in the same way that they do so with CP rights. In Northern Ireland this would mean affording ESC rights a similar constitutional footing within devolved competency.

7.11 There are a variety of institutional safeguards employed throughout the world in order to ensure balance in the separation of powers when determining human rights, including ESC rights. For example, the Constitution of Argentina permits the executive to derogate from fundamental rights if there is a two thirds majority in both houses of parliament. In Canada the courts have the power to strike down unconstitutional legislation, including legislation that contravenes human rights.<sup>99</sup> However, parliament has the power to

override compliance with the constitutional Charter of Fundamental Rights and Freedoms<sup>100</sup> (the ‘notwithstanding’ clause). This places the final say on human rights compliance back in the hands of the legislature; at the same time, the use of the clause risks strong political opposition. At the very least, it places compliance as the default position and derogation from rights as a secondary position that can only occur in a transparent and explicit declaration following a parliamentary vote. As a result it has very rarely been used in practice in Canada and is viewed as controversial power only to be deployed in times of emergency.

7.12 The Canadian courts have also employed mechanisms such as delayed remedies to allow the legislature time to comply with judgments when violations of rights have been identified.<sup>101</sup> The delayed remedy is a mechanism through which the court can afford the other arms of state time to make the necessary changes to ensure human rights compatibility. For example in Canada the Supreme Court has previously suspended the declaration of invalidity under section 52(1) of Canada’s Constitution Act 1982 for one year to allow Parliament sufficient time to avoid an eventual regulatory void.<sup>102</sup>

7.13 This approach to delayed remedies has been applied in the Scottish context. For example, in 2013 the Supreme Court held that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with the ECHR (A1P1).<sup>103</sup> Rather than strike down the legislation, the Court used section 102 of the Scotland Act 1998 and suspended the effect of its decision for 12 months, allowing the Scottish Ministers time to ensure compatibility and to leave the means through which to make the matter compatible as one to be determined by Scottish Ministers (facilitating deference to the executive). This innovative approach to remedies is also available under the Northern Ireland Act 1998.<sup>104</sup>

## **8. Recommendations**

8.1 The Ad Hoc Committee could use the NIHRC Bill of Rights recommendations as a starting point, and ensure that any proposals build on these recommendations rather than diminish them. This approach could be considered as a ‘no detriment’ approach, meaning the Committee enhances the existing recommendations to further develop the scope and content of any Bill of Rights. Further attention, for example, should be given to enhanced equality provisions (in keeping with rest of GB or further substantive equality measures); the rights of particular groups, including children, women, persons with disabilities, on race and rights for older persons and for LGBTI communities. Further

regard should also be given to a right to freedom from poverty and social exclusion and to freedom from destitution. Finally, the Bill of Rights could include the right to an effective remedy, reflecting the more expansive meaning under international law as a means of supporting access to justice.

8.2 The Ad Hoc Committee should weigh up the benefits and potential pitfalls of Westminster v NI Assembly legislation implementing a Bill of Rights. The former can include a wider range of rights and remedies (as it would be a form of entrenchment) but the latter, whilst being more restricted in scope, may provide more room for consensus building and cross-party support in the Assembly, rather than requiring majority support in Westminster. Again, wherever possible a 'no detriment' approach should be used in order to build on the NIHRC recommendations, rather than to diminish them. One means through which a balance could be struck would be to embed a Bill of Rights through UK Parliament legislation which requires the content and substance of the rights to be enhanced and developed through NI Assembly legislation (akin to the Finnish constitutional provisions).

8.3 A Bill of Rights for Northern Ireland should include an enhanced role for the legislature, executive and the judiciary. This should include more robust pre-legislative scrutiny of human rights, enhancing the role of regulators in the protection of human rights, ensuring that both public and private bodies are under a duty to comply with a Bill of Rights and that ultimately, the court can act as an accountability for any violation of the Bill of Rights.

8.4 It would be helpful to further reflect on how courts, tribunals and ombudsmen can act as accountability mechanisms, including how best to ensure access to justice for any violation of a right contained in the Bill of Rights (with the court operating as a means of last resort). This requires exploration of what constitutes an 'effective remedy' for the violation of a right, as well as new ways of adjudicating rights through group proceedings for collective cases and the use of structural remedies where appropriate (i.e. remedies that address systemic issues faced by a large group of people). A review of access to justice measures under a Bill of Rights should form an essential component of future work. This is to ensure that any Bill of Rights that is introduced is based on best practice in terms of compliance, enforcement and access to effective remedies.

8.5 Consensus and capacity building is key to enable progress on a Bill of Rights. The process should be fair, inclusive, informed and deliberative. Capacity building should include human rights education and the opportunity to hear from rights holders and from

decision makers. Whilst there are concerns and barriers in terms of progress, these concerns, from a legal and constitutional standpoint, are not insurmountable. Careful and innovative thinking can facilitate a Bill of Rights that can serve all of the people of Northern Ireland.

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<sup>1</sup> Schedules 2 and 3 of the Northern Ireland Act

<sup>2</sup> For a discussion on modification of entrenched enactments see judgment by the Supreme Court EU Continuity Bill case [2018] UKSC 64 (13 December 2018) para.50-51 ‘the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.’

<sup>3</sup> Reserved areas can become transferred matters under a section 4 Order

<sup>4</sup> Section 6 and Schedules 2 and 3 of the Northern Ireland Act 1998

<sup>5</sup> See Scotland Act 1998, s.29 (legislative competence); s.57 (Ministerial competence); s.101 (interpretation of Acts of the Assembly)

<sup>6</sup> See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly)

<sup>7</sup> Schedule 2 para.3(c) Northern Ireland Act 1998: implementation of international obligations is an exception to the excepted ‘international relations’ matter and not listed as a reserved matter under Schedule 3, meaning it constitutes a transferred matter under section 4(1).

<sup>8</sup> Section 2(3)

<sup>9</sup> section 6(3)(b)

<sup>10</sup> The Children and Young People (Scotland) Act 2014 (2014 Act) requires specified public authorities, including all local authorities and health boards, to report every 3 years on the steps they have taken to secure better or further effect of the UN Convention on the Rights of the Child.

<sup>11</sup> the Rights of Children and Young Persons (Wales) Measure 2011 imposes a duty on Welsh Ministers to have due regard to the UN Convention on the Rights of the Child (UNCRC) in performance of their functions

<sup>12</sup> The Belfast Agreement 1998 / The Good Friday Agreement 1998, annexed to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), Belfast, 10 April 1998, Registration No. 1.36776 UNTS 2114, Treaty series No.50 (2000) Cm 4705. Referred to as the ‘peace agreement’ or the ‘multi-party peace agreement’.

<sup>13</sup> Mónica Feria Tinta, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ (2007) 29 Human Rights Quarterly 431. Tinta explains that that much of the historic debate throughout the second half of the last century ‘sprang from a legal fiction: that of the separation of human rights into two distinct sets.’ p.432

<sup>14</sup> John H. Knox (Special Rapporteur on Human Rights and the Environment), Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) para.11

<sup>15</sup> The UN treats CPESC rights as of equal standing and equal value. See UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (‘Limburg Principles’), 8 January 1987, E/CN.4/1987/17; The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691; and 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.

<sup>16</sup> Other countries constitutions include economic, social and cultural rights on the same footing as civil and political. See for example, South Africa, Finland and Colombia.

<sup>17</sup> Both Scotland and Wales have introduced legislation to observe and implement international human rights law. In Scotland there is a process of incorporation for both international treaties as well as a renewed constitutional framework embedding economic, social, cultural and environmental rights.

<sup>18</sup> UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, para.5

<sup>19</sup> For a discussion on this see Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights (Scottish Human Rights Commission 2018) available at [https://www.scottishhumanrights.com/media/1809/models\\_of\\_incorporation\\_escr\\_vfinal\\_nov18.pdf](https://www.scottishhumanrights.com/media/1809/models_of_incorporation_escr_vfinal_nov18.pdf)

<sup>20</sup> See for example The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly, 691, para.23; 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.

<sup>21</sup> See the discussion paper on Gaps in equality law between Great Britain and Northern Ireland, Equality Commission for Northern Ireland, March 2014, available at <http://www.equalityni.org/ECNI/media/ECNI/Consultation%20Responses/2014/Gaps-in-Equality-Law-in-GB-and-NI-March-2014.pdf> at 1

<sup>22</sup> <https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/pages/2/>

<sup>23</sup> 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

<sup>24</sup> Discussed under the following question

<sup>25</sup> Article 3 Federal Constitution of the Swiss Confederation, The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation. This includes incorporation of international human rights standards. Indeed in some cases the cantonal legislatures go further than at the confederate state level such as in Vaud and Geneva.

<sup>26</sup> The Belfast Agreement 1998 / The Good Friday Agreement 1998, annexed to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes), Belfast, 10 April 1998, Registration No. 1.36776 UNTS 2114, Treaty series No.50 (2000) Cm 4705. Referred to as the 'peace agreement' or the 'multi-party peace agreement'. Other agreements relating to peace in Northern Ireland both preceded and succeeded the 1998 Agreement, including the St Andrews Agreement 2007 that sought to restore the power sharing arrangement in a devolved Northern Ireland Assembly.

<sup>27</sup> *JR 47's Application* [2011] NIQB 42

<sup>28</sup> *JR 47's Application* *ibid* para.23-24. McCloskey J relied on the well recited case law pertaining to the dualist theory of international law. Relying on *the International Tin Council* case [1987] 1 CH 419; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 692; *R-v- Lyons* [2003]; *Briggs v Baptiste* [2000] 2 AC 40; *Thomas v Baptiste* [2000] 2 AC 1.

<sup>29</sup> *JR 47's Application* *ibid* para.23-24.

<sup>30</sup> *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

<sup>31</sup> [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

<sup>32</sup> UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para.41

<sup>33</sup> UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 22 December 2014, A/HRC/28/62, para.43

<sup>34</sup> Article 6 ICESCR

<sup>35</sup> Article 9 ICESCR

<sup>36</sup> Article 11 ICESCR

<sup>37</sup> Article 12 ICESCR

<sup>38</sup> Article 10 ICESCR and partial protection in Article 2 Protocol 1 ECHR

<sup>39</sup> See Scottish Human Rights Commission, A Human Rights Based Approach to Tackling Poverty, [scottishhumanrights.com/news/latestnews/landreforms submissionfeb15](http://scottishhumanrights.com/news/latestnews/landreforms submissionfeb15)

<sup>40</sup> First Minister's Advisory Group on Human Rights Leadership <https://humanrightsleadership.scot/>

<sup>41</sup> National Task Force on Human Rights Leadership <https://www.gov.scot/groups/national-taskforce-for-human-rights-leadership/>

<sup>42</sup> Social Security (Scotland) Act 2018 ss.1(b) and 22(5)(d)

<sup>43</sup> <https://beta.parliament.scot/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill>

<sup>44</sup> Clause 20 of the draft UNCRC Incorporation (Scotland) Bill 2020

<sup>45</sup> Simon Hoffman, The right to adequate housing in Wales, Feasibility Report, (2019) available at <https://www.taipawb.org/wp-content/uploads/2019/06/RightToHousing-ExecSummary-ENG.pdf>

<sup>46</sup> Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) p.184

<sup>47</sup> Such as the [Rights of Children and Young Persons \(Wales\) Measure 2011](#) or the Children and Young People (Scotland) Act 2014 integrating UNCRC into devolved decision making

<sup>48</sup> The Northern Ireland Protocol committed to 'no diminution of rights for Northern Ireland' however, the UK Government has since indicated it would be willing to unilaterally withdraw from this commitment by passing domestic legislation running contrary to the agreement (although no proposed text has been disclosed), see Financial Times, *UK plan to undermine withdrawal treaty puts Brexit talks at risk* available at <https://www.ft.com/content/9906e0d4-0c29-4f5f-9cb0-130c75a2f7a7>

<sup>49</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para.78.

<sup>50</sup> Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020)

<sup>51</sup> Jeff King, *Judging Social Rights* (Cambridge University Press 2011)

<sup>52</sup> United Nations Office of the High Commissioner. Inter-Parliamentary Union, Human Rights, Handbook for Parliamentarians No.26 p.111

<sup>53</sup> Section 16

<sup>54</sup> Section 17

<sup>55</sup> Section 18

<sup>56</sup> Section 19

<sup>57</sup> Kaarlo Tuori, Chapter 18, Judicial Constitutional Review as a Last Resort, 365-392 in Tom Campbell et al (eds), *The Legal Protection of Human Rights: Sceptical Essays*, (Oxford University Press 2011)

<sup>58</sup> *ibid*

<sup>59</sup> *ibid*

<sup>60</sup> The primacy of the Constitution is protected under section 106 which stipulates that 'if in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution'. However, Tuori also points out that, similar to the operation of the section 33 Canadian declaration (the 'notwithstanding' clause), the Finnish Parliament can enact a 'statute of exception' whereby a bill which the Committee has found to be unconstitutional can still be enacted under the qualified procedure required for amending the Constitution, Tuori *ibid* 381

<sup>61</sup> For a discussion on this see Katie Boyle, *Economic and Social Rights Law* (Routledge 2020) p.116

<sup>62</sup> Human Rights and the Scottish Parliament Inquiry 2018

<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/106453.aspx>



<sup>63</sup> Scottish Parliament Equality and Human Rights Committee (SP EHRiC), Getting Rights Right: Human Rights and the Scottish Parliament, November 2018, available at <https://sp-bpr-en-prod-cdnp.azureedge.net/published/EHRiC/2018/11/26/Getting-Rights-Right--Human-Rights-and-the-Scottish-Parliament-3/EHRiCS052018R6Rev.pdf> Recommendations 19, 22, 31 and 32

<sup>64</sup> *ibid* SP EHRiC Report Recommendation 11 *inter alia*

<sup>65</sup> *ibid* SP EHRiC Report Recommendation 37

<sup>66</sup> *ibid* SP EHRiC Report Recommendation 29

<sup>67</sup> *ibid* SP EHRiC Report Recommendation 23

<sup>68</sup> Standing Order 60 and Standing Order 35 available at <http://www.niassembly.gov.uk/assembly-business/standing-orders/standing-orders/#a60>

<sup>69</sup> Standing Order 60 para.1

<sup>70</sup> Alan Miller, Recommendations for a new human rights framework to improve people's lives, Report to the First Minister, First Minister Advisory Group on Human Rights Leadership, December 2018, available at <http://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-post-10th-December-update.pdf> (FMAG Report) at 25

<sup>71</sup> Miller, FMAG Report, at 40-41

<sup>72</sup> *Ibid*

<sup>73</sup> See David Barrett, 'The Regulatory Space of Equality and Human Rights Law in Britain: The Role of the Equality and Human Rights Commission', *Legal Studies* (2019) published online 25 January 2019.

<sup>74</sup> New Decade, New Approach Deal (January 2020) available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856998/2020-01-08\\_a\\_new\\_decade\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf) p.14

<sup>75</sup> *Ibid* Part 1 Priorities of the Restored Executive pp.6-10

<sup>76</sup> *Ibid* p.6

<sup>77</sup> Article 1

<sup>78</sup> BVerfGE 125, 175 (Hartz IV)

<sup>79</sup> The German Basic Law guarantees an 'Existenzminimum' which means the right to a minimum subsistence level.

<sup>80</sup> 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.

<sup>81</sup> 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.

<sup>82</sup> Section 23 deals with labour relations; section 24 provides for environmental rights; section 26 provides for the right to adequate housing; section 27 provides for the right of access to health care, food, water and social security; and section 28 provides absolute rights in relation to children; section 29 provides for a right to education; section 30 protects the right to language and culture; section 31 provides for the right to enjoy and maintain cultural, linguistic and religious community membership

<sup>83</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

<sup>84</sup> See for example, case T-025/04

<sup>85</sup> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

<sup>86</sup> Northern Ireland Human Rights Commission, Bill of Rights for Northern Ireland, Advice for the Secretary of State (2008) <http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>

<sup>87</sup> Article 30 European Social Charter (Revised) 1996. The UK has not ratified the Revised Charter.

<sup>88</sup> McKeever et al, *Destitution and Paths to Justice*, Final Report (2018) available at [file:///C:/Users/Laptop/Downloads/Destitution\\_Report\\_Final\\_Full\\_.pdf](file:///C:/Users/Laptop/Downloads/Destitution_Report_Final_Full_.pdf)

<sup>89</sup> This would require building on the scope and meaning of Art 8 UDHR, Art 13 ECHR, Art 48 EU Charter of Fundamental Rights. See also 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.

<sup>90</sup> This is a summary of the Bill as presented in *A Bill of Rights for Northern Ireland, Advice to the Secretary of State for Northern Ireland*, Northern Ireland Human Rights Commission, 10 December 2008

<sup>91</sup> This section is directly developed from section 13 of the 2018 SHRC paper: K. Boyle, Models and Incorporation of Economic, Social and Cultural Rights (SHRC 2018)

<sup>92</sup> For example, consider the operation of the Ullah principle and section 2 of the Human Rights Act 1998

<sup>93</sup> <https://www.escri-net.org/caselaw>

<sup>94</sup> [http://www.oas.org/en/iachr/decisions/cases\\_reports.asp](http://www.oas.org/en/iachr/decisions/cases_reports.asp)

<sup>95</sup> James Wolfe, ECONOMIC AND SOCIAL RIGHTS IN SCOTLAND: LESSONS FROM THE PAST; OPTIONS FOR THE FUTURE, A lecture for International Human Rights Day 2014 by W. James Wolfe QC, Dean of the Faculty of Advocates, Edinburgh School of Law, December 2014

<sup>96</sup> See for example, Richard Edwards, 'Judicial Deference under the Human Rights Act' [2002] 65 *Modern Law Review* 859, 859

<sup>97</sup> See for example the judicial recognition of an immediately enforceable right to highest attainable health in Brazil that resulted in more inequity in health provision, favouring the wealthy and further marginalising the poor, Octavio Luiz Motto Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 *Health and Human Rights: an International Journal* 33

<sup>98</sup> Magdalena Sepúlveda, Colombia, The Constitutional Court's Role in Addressing Social Injustice, in M. Langford (Ed) *Social Rights Jurisprudence*, Emerging Trends in International and Comparative Law, p.162

<sup>99</sup> The Charter of Fundamental Rights and Freedoms forms part of the Constitution Act 1982 granting the Charter constitutional status and part of the primacy of constitutional law. The primacy of the Constitution is guaranteed in section 52 of the Constitution Act 1982. ESC rights have been recognised under the rubric of equality under the Charter – see *Eldridge v British Columbia (Attorney General)* [1997] 2 SCR 624

<sup>100</sup> under section 33 of the Constitution Act

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<sup>101</sup> See for example the delayed remedy employed in *Canada (Attorney General) v Bedford* 2013 SCC 72 in which the Supreme Court suspended the declaration of invalidity under section 52(1) of Canada's Constitution Act 1982 for one year to allow Parliament sufficient time to avoid an eventual regulatory void. This case concerned the legality of prohibitions on sex workers that the court found violated the safety and security of prostitutes – the difficulty with the delayed remedy route places those at risk to remain in a state of violation during the interim period in which the declaration of invalidity is suspended. For a discussion on this case and the constitutional impact of delayed remedies see : Robert Leckey, ' Suspended Declarations of Invalidity and the Rule of Law' U.K. Const. L. Blog (12th March 2014) (available at <http://ukconstitutionallaw.org/>)

<sup>102</sup> *Canada (Attorney General) v Bedford* 2013 SCC 72. The *Bedford* case was concerned the legality of prohibitions on sex workers that the court found violated the safety and security of prostitutes – the difficulty with the delayed remedy route places those at risk to remain in a state of violation during the interim period in which the declaration of invalidity is suspended

<sup>103</sup> *Salvesen v Riddell* 2013 SC UKSC 236

<sup>104</sup> Section 81(2)