

SUBMISSION FROM JUST FAIR ON A BILL OF RIGHTS FOR THE UK

Introduction

Just Fair is an NGO and registered charity working for increased recognition of economic, social and cultural rights in the UK. For more information, please go to www.just-fair.co.uk.

This submission will consist of four parts and focuses on what we believe any future UK Bill of Rights should contain. First, we address the enforcement of economic, social and cultural rights (ESCR) in the UK under the law as it currently stands. Second, we consider a number of common misunderstandings about the impact of enshrining justiciable ESCR. Part three highlights a number of possible approaches to the inclusion of ESCR in a Bill of Rights for the UK. Finally, we outline possible models of justiciable ESCR.

It is important to make it clear from the outset that nothing in this submission should be taken to undermine the protection of human rights under the Human Rights Act (HRA) 1998 as currently enacted. While we strongly advocate the domestic legal incorporation of ESCR, the HRA plays a fundamental role in ensuring the protection of human rights in the UK. This submission is thus very much from the perspective of 'HRA Plus'. In particular, we strongly submit that there is no case for a weakening of the enforcement mechanisms in the HRA. Nor should anything in this submission be taken to undermine or negatively impact upon the Northern Ireland Bill of Rights process which is much further evolved than the UK Bill of Rights one.

1. The UK and ESCR - the current position

In contrast with an increasing number of other countries, the UK does not afford domestic recognition to economic and social rights. This is despite having ratified the majority of the relevant international conventions, particularly the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the 1961 European Social Charter. Each of these instruments imposes a range of legal obligations of both an immediate and progressive nature, including a general umbrella requirement that states progressively realise ESCR to the maximum extent. This is most celebratedly delineated in Article 2(1) ICESCR:

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in

the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹

Progressive realisation will be discussed further below in part 3. With regard to the second key element of Article 2(1), the requirement that the state use the maximum of the resources available to it, 'this obligation requires states to use all the resources which can be expended for a particular purpose without sacrificing other, essential services ... this duty entails a prioritisation of resources: in times of resource constraints, the most vulnerable and disadvantaged members of society have to be prioritised' (Nolan and Dutschke 2010, 282).

There are currently a number of ways in which ESCR are, or may be, enforced through domestic law in the UK. They may be enforced through:

- the judicial enforcement of statutory ESCR-related entitlements. For instance, education rights have been enforced in the context of the Education Acts (see, e.g., *R v. East Sussex County Council ex parte Tandy* [1998] 2 All ER 769);
- the employment of the public sector equality duties in the Equality Act 2010 (Fredman 2010, 312-314);
- traditional judicial review influenced by the HRA (see, e.g., Palmer 2007);
- the tribunals service: ESCR in the UK are not always enforced by judges. For instance, we see the right to social security, including child-related social security being administered by tribunals. The same is true with regard to aspects of ESCR related to special educational needs and disability.

It might be argued that, given these avenues and the existence of a wide-ranging welfare state, the UK does not require explicit legal protection of ESCR. This is at best debatable - the UN Committee on Economic, Social and Cultural Rights (ComESCR) has, for example, been critical of the UK's record in numerous respects (see, e.g., ComESCR 2009).² Even if some of these rights are currently adequately

¹ See also Article 4 CRC and the statements of the European Committee on Social Rights in *Autisme-Europe v France*, Complaint No. 13/2002 (7 November 2003) that 'when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources' (para 53).

² The CESCR's Concluding Observations of 2009 express concern, *inter alia*, about the UK's

respected they are no less worthy of legal protection – the UK has long since legislated against arbitrary detention but nobody argues we should dispose with the right not be imprisoned without trial.

Furthermore, even with these mechanisms, the enforceability of ESCR in the UK is very limited in scope. We differ greatly from other European countries where ESCR are much more embedded than in the UK and enforced through a range of administrative and legal structures (for instance, Scandinavia or Germany. For more, see O’Cinneide 2011). We also differ from countries which explicitly enshrine ESCR in domestic law, whether in legislation or constitutional instruments. The significance of such ‘legalisation’ of ESCR – and of their inclusion in domestic UK law – is that it makes it clear that these rights are binding on all branches of government and must be taken into account and implemented through law and policy and budget-making at all levels of government.

We would argue that these rights should be enforceable by the courts; parliamentary sovereignty would be retained and therefore the judiciary’s construal and application of these rights (and indeed any human rights) can be kept under close supervision by the elected branches of government. Incorporating socio-economic rights would not undermine the primary role of Parliament. As with most rights (Article 3 ECHR is a notable exception) socio-economic rights are not absolute but qualified, their content being informed by judicial recognition of the competing interests and complex causalities in play and the need for proper deference to the will of elected representatives. Experience from other jurisdictions suggests that incorporation rarely if ever results in the judiciary usurping the legislature’s role but instead engenders between them a healthy and mutually beneficial dialogue.

There is strong evidence that human rights, including ESCR rights, are popular with the public. For example research conducted for the London School of Economics (Vizard 2010) found 90 per cent public support for rights to health and education, 80 per cent support for the right to be looked after by the State if you cannot look after

failure to adopt a national human rights plan of action which includes specific programmes regarding the realisation of ESCR; and the low level of awareness of ESCR not only among the public but also particularly among judges, public officials, police and law enforcement officials, medical practitioners and other health care-related professionals. Among the specific areas of concern are widespread poverty and fuel poverty, especially among children; disproportionately high unemployment rates among ethnic minority communities; the wage gap between men and women; unsafe working conditions and low wages of some groups of migrant workers; the low level of support and difficult access to health care for rejected asylum-seekers; and the shortage of adequate stopping sites for Roma/Gypsies and Irish Travellers. This list is not exhaustive but provides examples of the types of areas of concern raised by the committee of independent experts that monitors implementation of ICESCR.

yourself and 70 per cent support for the right to a job. Successive polls in Northern Ireland show strong cross-community support for the inclusion of socio-economic rights in a Bill of Rights reflecting the particular circumstances of Northern Ireland (Northern Ireland Human Rights Commission 2004).

2. Some common misunderstandings about the impact of enacting justiciable ESCR

Legitimacy: judicial usurping of the legislator's role

As referred to above, enforceable ESCR would not have the drastic constitutional implications that some opponents claim. It is frequently argued that only parliamentarians should have the authority to decide how, and according to which principles, resources should be distributed and, as incorporation would see that power transferred to the courts, it is illegitimate.

However this objection is entirely illusory – there are no concrete examples to support it. In those countries where ESCR have been incorporated the courts have not set about devising social welfare programmes or otherwise “legislated by the back door”. Rather, the safety net of enforceability has meant – and, in the UK context, would mean - that where legislators fail to foresee every eventuality, the courts can ensure no individual suffers whilst waiting for necessary statutory amendments to close the gaps. Furthermore, where government ministers or local governments get their decision-making wrong, they can be held to meaningful account before the courts. This is precisely what the courts already do in various domains covered by the HRA, including where positive duties are concerned. But when it comes to social welfare the safety net is itself full of holes: the right to be free from inhuman or degrading treatment (Article 3 ECHR) will shield you from the most desperate levels of destitution but only by guaranteeing absolutely minimal provision. The current lack of statutory provision for ESCR means that there is currently no direct redress or remedy available to those whose rights are violated.

Similarly, the claim that the judicial enforcement of ESCR is illegitimate because such rights concern the distribution of resources is derived from an inaccurate distinction between ESCR on the one hand and other human rights and common law conventions on the other. Fair trials, free media and Article 2 ECHR-based inquiries into deaths in custody, for example, all require considerable state expenditure. The truth, as the President of the Supreme Court, Lord Phillips, acknowledges, is that "there's always a bit of a grey area between the province of the courts and the province of Parliament".

Competence: the judges are capable

Another frequently raised criticism is that our judges simply do not have the expertise to make the judgements that enforceable ESCR would entail. In fact the courts are well equipped to judge the quality of laws according to a broad range of principles and entitlements. The canons of administrative law have long since required the courts to scrutinize the exercise of executive power against principles of the common law and specific provisions found in primary legislation. Often primary legislation bestows wide powers on secretaries of state and when asked the courts must examine whether the exercise of those powers is *vires* and in accordance with the fundamental purpose of the overarching legislation. Courts in the UK frequently deal with complex financial and scientific information in the context of tax, medical law and other cases. There is no reason to assume that they would be unable to process the information entailed in a case involving ESCR. Indeed, comparative experience demonstrates that courts have been able to deal ably and effectively with ESCR (see, e.g., Langford 2008; Coomans 2008).

Furthermore, in recent times Parliament has enacted the equality duties (now consolidated in the Equality Act 2010), the Human Rights Act 1998 and the Child Poverty Act 2010 all of which although “ordinary acts of parliament” set parameters and objectives for future legislation and executive decision making. Thus, the addition of socio-economic rights would not require judges to enter entirely unfamiliar territory.

3. Three approaches to ESCR in Bill of Rights based on comparative models

There are a number of approaches that might be adopted to the legal incorporation of ESCR in a UK Bill of Rights. The three principal approaches are:

1. Inclusion of justiciable ESCR (see, e.g., South Africa, Brazil, Kenya, Finland, Argentina, Ecuador and a number of United States state constitutions);
2. Inclusion of non-justiciable ESCR or directive principles of social policy (see, e.g., India, Bangladesh, Ghana); or
3. Inclusion of initially non-justiciable ESCR which become enforceable before the courts after a period of time (see, the decision of the Indian Supreme Court in *Unni Krishnan, JP and others v State of Andhra Pradesh and others* 1993 AIR 217, in which the Indian Supreme Court held that the passage of 44 years since the enactment of the Indian Constitution had effectively converted the non-justiciable right to education of children under 14 contemplated under

the Directive Principles chapter into a fundamental right enforceable under the law).

These models are not mutually exclusive. For instance, many constitutional models contain both justiciable ESCR and directive principles dealing with other aspects of such rights (e.g., Ireland, Namibia, and Malawi).

Advantages of approach 1:

- The imposition of broad obligations on government to give effect to ESCR in its law- and policy-making.
- Provision of a remedy to claimants whose ESCR are not being given effect to.
- Makes it clear that ESCR and CPR are of equal status and importance.

Concerns:

- Alleged judicial usurping of Parliament's role (for more on this, see above)

Advantages of approach 2:

- Provides a guiding framework with government whilst not limiting government decision-making powers.
- May serve as a useful aid in judicial interpretation of enforceable rights such as the right to life or the right to family life, etc.

Concerns:

- Due to their non-enforceable nature, governments are not obliged to give effect to Directive Principles and may ignore them (as has frequently been the experience in countries with Directive Principles), thus rendering them less effective.
- The risk that no effective remedy will be available to those whose ESCR are violated.

Advantages of approach 3:

- Gives elected branches of government time to conform ('breathing space') prior to being held judicially accountable.

Concerns:

- Risk of lack of effective recourse for current victims of ESCR violations.
- Difficulty of determining appropriate time limit.

Given the importance of ensuring effective mainstreaming of ESCR into UK law and policy and the need to ensure accountability for the satisfaction of those rights, we would argue that the Commission should adopt approach 1.

4. Models of Justiciable ESCR

If approach 1 is adopted, there are further options available as to **how** to incorporate justiciable ESCR into a Bill of Rights. We discuss these below.

A. Model A is one under which ESCR protection is subject to progressive realisation and the maximum available resources. However where there are egregious breaches for particular individuals or groups their ESCR should be realised immediately (e.g., vulnerable groups such as children or people with disabilities). This is the approach that has been adopted with regard to the constitutional protection of ESCR by the Colombian Constitutional Court.

B. Model B is one under which ESCR generally are to be progressively realised subject to the state's maximum available resources but in which specific obligations are identified that are not subject to progressive realisation; for instance, the right to primary education or the right to emergency medical treatment. A version of this model is used in some of the ESCR provisions in the South African Bill of Rights where the state's obligation is to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of those rights. (Under the same instrument, certain ESCR are immediately realisable, for instance the right to basic education (*Governing Body of the Juma Masjid Primary School & Others v Essay NO and Others* (CCT 29/10) [2011] ZACC 13). A similar approach is taken in the context of the Kenyan constitutions (see Articles 43, 20(5) and 21)).

The adoption of a model like the South African one was the recommendation of the Joint Committee of Human Rights (JCHR 2009), albeit that that body did not address the immediately enforceable provisions of that instrument.

C. Model C is to render all ESCR subject to progressive realisation and the extent of the state's maximum available resources with no mention of immediate obligations at all.

Progressive realisation

While we feel that either model A or B would be preferable in terms of ensuring the protection of the rights of the most vulnerable in all circumstances, all three models include the notion of progressive realisation which we regard as a fundamental element of any model for a Bill of Rights.

What progressive realisation **does**:

- affords government flexibility in relation to the fulfilment of ESCR;

- acknowledges that government may not be able to give full effect to ESCR immediately;
- imposes an obligation on government to move as expeditiously and effectively as possible towards the goal of realization of ESCR
- prohibits any deliberately retrogressive measures (i.e. 'steps backwards' in the realization of ESCR) except in very limited circumstances. In effect, it creates a 'ratchet effect': it requires a continuous improvement of conditions over time without backward movement of any kind (Craven 1995, 131) other than with compelling justification.³ The ComESCR (1990, para. 12) underlines the fact that 'even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes'.

What progressive realisation does **not** do:

- require government to give effect to all ESCR obligations immediately;
- require a new judicial layer over and above government, testing, questioning and steering its policies. As with all rights, judicial action is limited to evaluating government compliance in particular cases brought before them. As such, the courts play a reactive, rather than a proactive role.
- bring about a radical or unique change in the world of human rights. As stated above, at the international level, progressive realisation forms part of the ESCR standards sets out in ICESCR and the CRC, as well as being a feature of the decision-making of the European Committee of Social Rights (i.e., European human rights law). It has also been adopted by the African Commission on Human and People's Rights (see *Purohit and Moore v Gambia*, Communication No. 241/200. Decided at 33rd Ordinary Session of the African Commission (15-29 May 2003)) and the Inter-American Court of Human Rights (which refers to it as 'progressive development'). At the domestic level, the jurisprudence of the South African Constitutional Court is the best known.

³ The ComESCR, in its General Comment on the nature of States parties' obligations, says that 'deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources' (ComESCR 1990, para. 9). In addition, the Committee's General Comment on the right to education (ComESCR 1999: para. 55) states that there is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. States bear the burden of proof if any deliberately retrogressive measures are taken; the State party also has the burden of proving that they have been introduced after the most careful consideration of all alternatives. Similar statements are made in the ComESCR's General Comments on the right to the highest attainable standard of health (ComESCR 2000, para. 32) and the right to water (ComESCR 2002, para. 19).

It is important to note that the UK's international human rights obligations do include a limited number of immediate ESCR obligations. However, **most of these obligations are either reflected in existing UK law or the UK conforms with them already.** Such obligations include:

- non-discrimination in enjoyment of economic and social rights;
- the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in ICESCR;
- fair wages and equal remuneration for work of equal value without distinction of any kind (Article 7(a)(1) ICESCR);
- trade union rights (Article 8) ICESCR;
- special measures of protection and assistance should be taken on behalf of all children and young persons. (Article 10(3)) ICESCR
- obligation to provide free and compulsory primary education to all (Art.13(2)(a) ICESCR);
- the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities (Article 13(3)) ICESCR;
- the liberty of individuals and bodies to establish and direct educational institutions (Article 13(4)) ICESCR;
- 'obligation to take steps' in terms of Article 2(1) ICESCR. These steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. (ComESCR 1990);
- minimum core obligation: "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party ... Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant"(ComESCR 1990, para. 10).

This obligation has in essence already been recognised as being inherent in Article 3 ECHR. The House of Lords confirmed in *R (Limbuella) v. Secretary of State for the Home Department* [2005] UKHL 66 that foreign nationals who were denied the right to work or welfare benefits and were otherwise destitute were entitled to a minimum level of subsistence in order to avoid inhuman or degrading

treatment. This obligation is unlikely to be an issue in the UK given the living conditions of the vast majority of UK inhabitants.

Conclusion:

There is a tendency when discussing ESCR in the UK to assume that, if these were domestically incorporated, this would lead to a flood of cases in which people would sue to be provided directly with ESCR-related goods and services immediately. This is not borne out by experience in the vast majority of jurisdictions in which enforceable ESCR form part of the legal framework, including Argentina, South Africa, India, Hungary, Finland and Spain (for more, see e.g., Gauri and Brinks 2008; Langford 2008, Coomans 2006). As Porter and Nolan have noted, ‘the evolving jurisprudence on social and economic rights has made it clear that, where courts are given the mandate to adjudicate social and economic rights, they are capable of fulfilling this mandate competently, without intruding on the legislative domain’ (Porter & Nolan 2006).

Crucially, when we talk about ESCR in the UK, there is an overwhelming tendency to focus on the courts; what is vital is to remember is that ESCR – and human rights protections generally - are not primarily or even mostly about courts. Rather they serve as binding mandates for the executive and legislature which have the power, the principal duty and the democratic legitimacy to give effect to rights in the UK. Human rights are not simply about minimum standards but above all human dignity. They comprise a holistic framework of the key constituents for human flourishing. Understood in this way, they are inspirational. A human rights narrative founded on only a partial replication of this framework is bound to produce distorted results and public unease. It is thus vital that ESCR be included in any future Bill of Rights for the UK.

Sources:

ComESCR, *General Comment No. 3 on the Nature of States Parties’ Obligations*, UN Doc E/1991/23 (1990)

ComESCR, *General Comment No. 13 on the right to education*, U.N.Doc. E/C. 12/1999/10 (1999)

ComESCR, *General Comment No. 14 on the right to the highest attainable standard of health* E/C.12/2000/4 (2000)

ComESCR, *General Comment No. 15 on the right to water (Article 11 and 12)* U.N.Doc E/C.12/2002/11 (2002)

ComESCR, *Concluding Observations: United Kingdom and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, UN Doc E/C.12/GBR/CO/5 (2009)

Coomans, F. (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen/Oxford, Intersentia, 2006)

Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford, Oxford University Press, 1995)

Fredman, S., 'New horizons: incorporating socio-economic rights in a British Bill of Rights' (2010) *Public Law* 297

Gauri, V., & Brinks, D., (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge, Cambridge University Press, 2008).

Nolan, A. & Dutschke, M., 'Article 2(1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) *European Human Rights Law Review* 3: 280

Northern Ireland Human Rights Commission, *Views on a Bill of Rights for Northern Ireland: Results from a 2004 Opinion Survey* (Belfast: NIHRC, 2004)

O'Conneide, C., 'The Potential of the Law to Challenge ESR Violations in a Time of Austerity', presentation at SLSA Workshop on 'Economic and Social Rights in a Time of Austerity', organised by Durham Law School/Oxford Faculty of Laws, 1 July 2011: www.esrinatimeofausterity.com

Palmer, E., *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing, 2007)

Vizard, P. *What do the public think about economic and social rights?* CASE Research Report 61 (London, Centre for Analysis of Social Exclusion, LSE, 2010): <http://sticerd.lse.ac.uk/dps/case/cr/CASEREport61.pdf>