

## Academic Advisory Panel Briefing Paper

### Access to Justice for Economic, Social, Cultural and Environmental Rights Principles of Adjudication

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This briefing paper sets out some initial points for discussion for the Access to Justice Roundtable organised by the National Task Force for Human Rights Leadership on 1 September 2020. It is a synopsis of existing research and potential gaps that help signpost some of the key issues faced when enabling access to justice for economic, social, cultural and environmental (ESCE) rights. It is not intended to be exhaustive and further points of discussion should be encouraged as part of the workshop.

#### Introduction

Comparative international experience tells us that access to justice for economic, social, cultural, and environmental (ESCE) rights requires a degree of disruption to the legal system. Enabling access to justice for ESCE rights therefore 'requires the development of standards and criteria and a new litigation culture and practice, without which any application of abstract legal concepts is impossible.'<sup>1</sup> Of course, as part of any review of access to justice equality of access to the law is paramount.<sup>2</sup> However, at the same time there must be a renewed focus on 'ensuring fairness and contributing to social justice'<sup>3</sup> as well as a renewed understanding of the potential scope of both the rights and the remedies available to bring about social change.<sup>4</sup> This requires stakeholders to take a step back from the existing system, to learn from experiences of ESCE adjudication elsewhere, and to ask what change is possible to enhance the existing framework (please see **Annex A** attached to email for a detailed description of the "building blocks" of ESCE adjudication in an excerpt of the **SHRC paper on Models of Incorporation and Justiciability for ESC Rights**).

Ultimately, access to justice recommendations should go beyond questions around how to enable equal access to the legal system and must make the bridge to reflect and consider how to enable equal access to effective remedies. Enabling access to an effective remedy for a violation of ESCE rights is a requirement of international law.<sup>5</sup> In considering recommendations for reform, stakeholders should reflect on best practice and the changes required across the adjudication journey to achieve this

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<sup>1</sup> Christian Curtis, 'Argentina, Some Promising Signs' in M. Langford (Ed) *Social Rights Jurisprudence, Emerging Trends in International and Comparative Law* at 181

<sup>2</sup> Martin Evans [Rethinking Legal Aid an Independent Strategic Review](#) (2018)

<sup>3</sup> Evans *ibid* p. 14

<sup>4</sup> Evans *ibid* p. 14

<sup>5</sup> See Katie Boyle, *Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) pp. 65-76

aim.<sup>6</sup> The following 'principles of adjudication'<sup>7</sup> provide a framework for discussion towards progressive change as part of the new statutory framework for human rights in Scotland. Participants may be particularly interested in considering and developing recommendations around **structural remedies to address systemic cases** as well as what an '**effective remedy**' would look like for a violation of an ESCE right.

The key principles of access to justice focus on: **accessibility; participation; fairness; deliberation; counter-majoritarian adjudication; and the effective remedy principle.**

### ***Principle of Accessibility***

*Everyone should have the right to access the legal system.*

- Is standing sufficiently broad? (consider, for example, whether 'sufficient interest'<sup>8</sup> restricts public interest litigation/ consider restrictive 'victimhood' test/ should rules on standing be adapted/expanded? What recommendations, if any?)<sup>9</sup>
- Is the legal aid system sufficient to support litigation in ESCE adjudication? Does SLAB restrict access to legal aid for civil claims? If so, would this impact ESCE SLAB claims? How could this be addressed?
- Is access to justice affordable? Are there cost implications which would prevent access to effective remedies for violations of ESCE rights? If so what recommendations for reform?
- Is legal aid available for group or multi-party actions?<sup>10</sup>
- Are there other issues regarding accessibility? Are particular groups excluded?

### ***Principle of Participation***

*Everyone should have a right to participate in the decisions that impact them, including in court proceedings and remedies.*

- Does adjudication facilitate the participation of those most impacted, especially the most marginalised? How can participation in the court process be facilitated?
- What role can advocacy play in supporting litigants?
- What about participation of litigants in person? Are there barriers? Is there equality in access?

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<sup>6</sup> Please see Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights, (Scottish Human Rights Commission 2018), in particular pp. 31-42 at Annex A

<sup>7</sup> See Katie Boyle, Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication (Routledge: New York 2020)

<sup>8</sup> *Axa General Insurance Ltd v the Lord Advocate* [2011] UKSC 46 and section 89/27B(2)(a) of the Court Reform (Scotland) Act 2014

<sup>9</sup> For a full discussion on issues faced in relation to standing in Scots law please see Douglas Jack and Chris McCorkindale, Standing in Scots Public Law Litigation (Scottish Human Rights Consortium 2020)

<sup>10</sup> Martin Evans [Rethinking Legal Aid an Independent Strategic Review](#) (2018)

- Does the digital divide/ language barriers prohibit participation in court processes? How can this be improved?
- Are multi-party and structural cases facilitated when dealing with systemic problems? Other countries allow for collective litigation when it becomes clear many people are facing the same human rights violation<sup>11</sup>. 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.
- Structural cases tend to:
  - affect a large number of people who allege a violation of their rights, either directly or through organisations that litigate the cause;
  - implicate multiple government agencies/ local authorities/ private bodies found to be responsible for pervasive public policy failures that contribute to such rights violations; and
  - involve structural injunctive remedies, i.e., enforcement orders whereby courts instruct various government agencies to take coordinated actions to protect the entire affected population and not just the specific complainants in the case.<sup>12</sup>

Should the Scottish justice system support litigation around structural cases (multiple applicants/ multiple defenders/ complex legal remedies)?

- Do courts have the institutional capacity and procedures to respond to systemic societal problems through structural cases? In Scotland, could this include the development of group proceedings under the Rule 2.2<sup>13</sup> or the new rules for group proceedings<sup>14</sup> developed under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018?

### ***Principle of Fairness (procedural and substantive review)***

*Everyone has the right to fair process as well as the right to expect the enforcement of substantive outcomes in the enjoyment of ESCE rights. Courts require to adapt new methods of review to adjust to ESCE rights adjudication.*

- What grounds of review and intensity of review is appropriate for ESCE rights?
- For example, reasonableness as a test is more expansive in international law than in domestic law – how can this be accommodated, if at all?
- How can ESCE adjudication move beyond procedural review and enforce substantive standards where appropriate?

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<sup>11</sup> See, for example, the *tutela* system in Colombia

<sup>12</sup> César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America', (2011) 89 Texas Law Review 1669-1698 at 1671

<sup>13</sup> See Rule of Court 2.2 available at <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/rules-of-court/court-of-session/chap02.pdf?sfvrsn=10>

<sup>14</sup> New group proceeding rules commenced on 31 July 2020 <https://www.legislation.gov.uk/ssi/2020/208/contents/made>

- An essential feature of the new statutory framework is that courts and tribunals must have regard to international law (including the UN treaties, treaty body decisions, General Comments and recommendations) and may have regard to comparative law when interpreting rights.<sup>15</sup> How should this work in practice?
- How can courts give meaning to ESCE rights? There is no equivalent jurisprudence for ESCE rights akin to ECHR rights under ECtHR. Should courts adopt jurisprudence from (a) other jurisdictions? (b) international (quasi-)courts? (c) European Social Committee? (d) UN Committee on Economic, Social and Cultural Rights?
- Can courts enforce substantive thresholds in a way that the outcome of the case respects the dignity of the applicant? Can courts enforce a minimum threshold based on dignity/ freedom from destitution? How can courts go beyond the threshold of Art 3 ECHR in enforcing substantive standards?

### ***Principle of Deliberation***

*The court is an important accountability mechanism in a multi-institutional framework. This means it should be involved in dialogue with the parliament and government, in addition to other domestic and international stakeholders such as ombudsmen, international courts and UN Committees as well as rights holders themselves.*

- How can the court engage in dialogue? Is there deliberation between institutions/ across jurisdictions/ with key stakeholders? Can the court seek to ensure its practice is informed, inclusive, participatory and transformative or exercising deference where appropriate?
- In Scotland, this could include weak-form judicial review when appropriate where courts may take a deferential approach and refer a matter back to the legislature<sup>16</sup> and strong-review, where appropriate, that can include substantive review and outcome oriented orders, including the use of specific implement. How should this operate in practice?

### ***Counter-majoritarian Principle***

*It is important that ESCE adjudication does not end up exacerbating existing structural inequalities where litigation ends up benefiting those who are already better off, for example those who can more readily pursue claims in the courts.*

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<sup>15</sup> First Minister's Advisory Group on Human Rights Leadership, "Recommendations for a new human rights framework to improve peoples' lives" available at <https://humanrightsladership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> P.59

<sup>16</sup> Mark Tushnet, 'Weak Courts, Strong Rights' Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press, Oxford, 2008), p.23

- How can the system prevent elite-driven litigation? Can the court take steps to review the holistic implications of its decision in relation to marginalised groups?
- Is it possible for the court to be an institutional voice for the marginalised?<sup>17</sup>
- Is public interest litigation an appropriate means through which to address ESCE rights? Is there a danger of overlooking the most ignored most marginalised? Does PIL rely on organisations (often charities) who must bear the costs making it prohibitively expensive?
- How can a new litigation system ensure that adjudication does not end up prioritising the rich over the poor? (i.e. a pro-hegemonic exercise of power). For example, in Brazil the court prioritised the needs of the wealthy in accessing the right to highest attainable standard of health to the detriment of the poorest and most marginalised members of society. How can this type of adjudication be avoided? Can the socio-economic equality duty help the court exercise its functions 'in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'?<sup>18</sup>

### ***Remedial Principle (access to an effective remedy)***

*Everyone has the right to an effective remedy for a violation of an ESCE right.*

- What would remedies look like under a new statutory framework? What does an effective remedy mean in Scotland for a violation of an ESCE right?
- In international law, 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.
- Can courts deploy different remedies to address different aspects of the violation?
- Are the remedies appropriate and are they effective?

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<sup>17</sup> David Landau, The Reality of Social Rights Enforcement, Harvard Journal (2012) 53 Harvard International Law Journal 189-247. See also Mantouvalou in Conor Gearty & Virginia Mantouvalou, *Debating Social Rights*, (Hart 2011)

<sup>18</sup> Section 1 Equality Act 2010

- Are they procedural or substantive in nature?
- Are remedies deferential where appropriate and outcome orientated where appropriate?
- Are remedies participative and are there sufficient monitoring mechanisms to ensure compliance?
- Are structural remedies used where appropriate when dealing with systemic issues?<sup>19</sup>

### Recent Developments to be aware of include:

- New Scottish Civil Justice Council rules on group proceedings available at: <https://www.legislation.gov.uk/ssi/2020/208/contents/made>
- UK wide review of Judicial Review (includes Prof Alan Page) [Terms of Reference for the Independent Review of Administrative Law](https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review) <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>

### Recent Literature Relevant to Access to Justice

Bach Commission Report, the Right to Justice: [http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)

Katie Boyle, [Models of Incorporation and Justiciability for Economic, Social and Cultural Rights](#) (Scottish Human Rights Commission 2018)

Katie Boyle, [Economic and Social Rights Law, Incorporation, Justiciability and Principles of Adjudication](#) (Routledge 2020)

Douglas Jack and Chris McCorkindale, [Standing in Scots Public Law Litigation](#) (Scottish Human Rights Consortium 2020)

Martin Evans [Rethinking Legal Aid an Independent Strategic Review](#) (2018)

Lisa VanHala and Jacqui Kinghan, [Using the Law to Address Unfair Systems](#), (Baring Foundation 2019)

For more detailed discussion of above see **Annex A** attached to email on Building Blocks of Justiciability from SHRC paper “Models of Incorporation and Justiciability for ESC Rights” (2018)

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<sup>19</sup> For a discussion on the different types of remedies available for social rights see César Rodríguez-Garavito, Julieta Rossi (eds.) *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017) and Katie Boyle, *Models of Incorporation and Justiciability of Economic, Social and Cultural Rights* (SHRC 2018)