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# Towards Fiscal Justice

## Adopting a Socio-Legal Approach to Explore the Potential of and for Human Rights Budgeting in Scotland

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Submitted in the fulfilment of the requirements of the Degree of Doctorate in Philosophy.

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## Abstract

*The Scottish Government has committed to addressing the ongoing accountability gap for human rights in Scotland by introducing new legislation to domestically enshrine a range of international human rights currently unrecognised and unprotected in national law. This includes economic, social, and cultural rights, which have historically been misconceived as merely programmatic or aspirational. This legislative move represents a significant advancement for Scotland, reaffirming its commitment to the rights articulated by the Universal Declaration of Human Rights. However, the true impact of this legislative change on the lives of people in Scotland will hinge not only on their legal entrenchment but also on the resources made available for their implementation. The realisation of economic, social, and cultural human rights has long been recognised as contingent upon the resources available to the state. Consequently, a state's public budget emerges as a crucial instrument in effectuating these rights. In recent years, the relationship between human rights and public budgets has garnered renewed attention from the international human rights community. Over the past decade, new contributions have emerged in literature and practice, emphasising the importance of human rights budgeting and budget analysis. This thesis leverages these developments to advocate for using human rights budgeting as a vital tool for assessing the progressive realisation of economic, social, and cultural rights and for shaping budgetary practices and processes in Scotland. The thesis adopts a socio-legal approach to explore the challenges to and potential for economic, social and cultural rights to begin shaping budgetary processes in Scotland. The thesis provides a deep dive into the potential of the minimum core doctrine to set national priorities and incorporates insights from practitioners in fiscal practices and human rights organisations. By integrating new empirical perspectives into the existing discourse on human rights budgeting, this thesis proposes a more pragmatic and actionable framework for Scotland. It argues for clearer, minimum core priorities to be set for fiscal decision-makers, longer-term planning through multi-year budgets, a focus upon rights outcomes over policy inputs and for a more progressive approach to resource mobilisation. Finally, the thesis concludes with thirty recommendations which aim to guide decision-making processes toward the development of human rights-compatible budgets, thereby facilitating the effective realisation of economic, social, and cultural rights within the Scottish context.*

### Acknowledgements

*Firstly, I would like to thank my three supervisors, Katie, Jo and Ali, for their guidance, empathy, encouragement, and patience. Without your valuable comments, steadfast support, and consistent opening of doors, this research nor the opportunities it has given rise to would not have been possible. I look forward to the many more collaborations we may share in shaping a more just future for Scotland and further afield. I would also like to extend my thanks to the many colleagues I have had the pleasure of working with over the past four years. The lessons we learned and shared have greatly impacted me and this research. The need to move from theory to practice will continue to shape my approach to working in human rights for the years to come.*

*To those in my personal life, my close family and friends, I have kept what is left of my sanity only with the uplift of your collective spirits. To Irene, John, Kyle and Alyssa for your unconditional support... To Rose, my partner, for putting up with this process and standing by me with nothing but love and inspiration to offer.... And to the Fifers, Glasgow Gang and all others who lifted my head in times of need. You provided the necessary reminder to enjoy the world even in the endeavour to understand and change it. Thank you all for being my bedrock for and in search of a 'good life'.*

*In memory of Joan Flegg and Betty Orr.*

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Declaration

“I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.”

Printed Name: Aidan Flegg

X

A i d a n F l e g g

Signature: \_\_\_\_\_



### List of Abbreviations

<b>CEDAW</b>	Convention on the Elimination of Discrimination Against Women
<b>CESCR</b>	Committee on Economic, Social and Cultural Rights
<b>CESR</b>	Center for Economic and Social Rights
<b>COSLA</b>	Convention of Scottish Local Authorities
<b>CPR</b>	Civil and Political Rights
<b>CRC</b>	Committee on the Rights of the Child
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>ECHR</b>	European Convention on Human Rights
<b>EFSBS</b>	Equality and Fairer Scotland Budget Statement
<b>ESCR</b>	Economic, Social and Cultural Rights
<b>FMAG</b>	First Ministers Advisory Group
<b>GC</b>	General Comment
<b>GDP</b>	Gross Domestic Product
<b>GIFT</b>	Global Initiative on Fiscal Transparency
<b>HRB</b>	Human Rights Budgeting
<b>HRBWG</b>	Human Rights Budgeting Working Group
<b>HRC</b>	Human Rights Council
<b>IHRL</b>	International Human Rights Law
<b>IBP</b>	International Budget Partnership
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IFS</b>	Institute for Fiscal Studies
<b>IMF</b>	International Monetary fund
<b>LA</b>	Local Authority
<b>MAR</b>	Maximum Available Resources
<b>MCOS</b>	Minimum Core Obligations
<b>MTFS</b>	Medium-Term Financial Strategy
<b>NGOS</b>	Non-Governmental Organisations
<b>NPF</b>	National Performance Framework
<b>OBS</b>	Open Budget Survey
<b>OECD</b>	Organisation for Economic Co-Operation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>PANEL PRINCIPLES</b>	Participation, Accountability, Non-Discrimination, Empowerment, Legality
<b>PAR</b>	Participatory Action Research
<b>PB</b>	Participatory budgeting
<b>PFG</b>	Programme for Government
<b>PPT</b>	Proportional Property Tax
<b>RPF</b>	Respect, Protect, Fulfil
<b>RSR</b>	Resource Spending Review
<b>SAI</b>	Supreme Audit Institutions

<b>SFC</b>	Scottish Fiscal Commission
<b>SERF INDEX</b>	Social Economic Rights Fulfilment Index
<b>SHRC</b>	Scottish Human Rights Commission
<b>SNAP</b>	Scottish National Action Plan for Human Rights
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UK</b>	United Kingdom
<b>UNCRC</b>	United Nations Convention on the Rights of the Child

## **Chapter 1**

### **From Aspiration to Realisation: Resourcing Economic, Social and Cultural Human Rights in Scotland**

Economic, social, and cultural human rights (“ESCR”) have long suffered from an “accountability gap” in the United Kingdom (“UK”).<sup>1</sup> Created and sustained by successive UK Governments’ failure to incorporate the full scope of their international human rights obligations into their domestic legal framework, ESCR still fail to receive the same legal protection as civil and political human rights (“CPR”).<sup>2</sup> Currently, the UK Human Rights Act 1998 protects only the rights entrenched in the European Convention on Human Rights (“ECHR”), which are predominantly CPR.<sup>3</sup> Despite ratifying the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) in 1976, the same year it came into force, the UK has failed to take meaningful measures to recognise these as domestically enforceable and, consequently, justiciable human rights.<sup>4</sup> Reinforcing this assertion, as recently as 2016 (in the UK’s last Concluding Observation specifically on ESCR), the UN Committee on Economic, Social and Cultural Rights (“CESCR”) called upon the UK to ‘fully incorporate the Covenant rights into its domestic legal order and ensure that victims of violations of [ESCR] have full access to effective legal remedies’.<sup>5</sup> It is a call echoed by other treaty monitoring bodies through the UN human rights system.<sup>6</sup> In light of this lack of progress, the UK’s devolved nations have sought to become a ‘vehicle for progressive human rights reform,’ with actions taken to expand rights protection in Scotland, Wales, and Northern Ireland to a certain extent.<sup>7</sup> To provide some brief, albeit necessary context, building upon the momentum already gathered by children’s rights advocates pushing for the incorporation of the UN Convention on the

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<sup>1</sup> Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (1<sup>st</sup> edn, Routledge, 2020); see also, Katie Boyle, Diana Camps, Kirstie English and Jo Ferrie ‘The Practitioner Perspective on Access to Justice for Social rights: Addressing the Accountability Gap’ (Nuffield Foundation 2022); and finally, Paul Hunt ‘Social Rights Are Human Rights: But the UK System is Rigged’ (2017) Centre for Welfare Reform.

<sup>2</sup> Katie Boyle & Nicole Busby, ‘Subnational incorporation of economic, social and cultural rights – can devolution become a vehicle for progressive human rights reform?’ (2023) 74(1) Northern Ireland Legal Quarterly 63.

<sup>3</sup> Aspects of, inter alia, trade union rights, as well as the right to education and many social security benefits, are also protected by the European Convention. For more details, see Colm O’Cinneide ‘Human Rights and the UK Constitution’ (2012) British Academy Policy Centre.

<sup>4</sup> Boyle (n 1).

<sup>5</sup> UN Committee on Economic Social and Cultural Rights (CESCR), Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland E/C.12/GBR/CO/6 at para 5 (CESCR 2016).

<sup>6</sup> See, for example, UN Committee on the Rights of the Child (CRC) CRC/C/GBR/CO/4 (CRC 2008); and CRC, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland CRC/C/GBR/CO/5 (CRC 2016).

<sup>7</sup> Boyle & Busby (n 2).

Rights of the Child (“UNCRC”), as had already been achieved in Wales (procedurally),<sup>8</sup> Scotland’s First Minister (of the time) established an Advisory Group on Human Rights Leadership (“FMAG”) in 2018.<sup>9</sup> The FMAG gathered expert views and evidence throughout Scotland and abroad and espoused a set of recommendations for the First Minister and Scottish Government in December of the same year.<sup>10</sup> The group’s central recommendation was to establish a new Act of the Scottish Parliament to incorporate ESCR into Scots law alongside specific groups’ rights, such as those for children, persons with disabilities, women, ethnic minority groups, older persons, and LGBTQI communities.<sup>11</sup> Furthermore, the FMAG recommended establishing a more comprehensive participatory process to deliberate upon how best to give effect to such rights within Scotland’s domestic legal system.<sup>12</sup>

The recommendations acted as the basis for the establishment of the National Taskforce for Human Rights Leadership (“Taskforce”) which, having gathered further evidence including from those with lived experience of potential human rights violations in Scotland, set out thirty ambitious recommendations to shape the development of Scotland’s new human rights legislation.<sup>13</sup> Echoing the FMAG calls on ESCR, the Taskforce called for the incorporation of ESCR into Scots law and recommended ‘that there be a participatory process to define the core minimum obligations of incorporated [ESCR], and an explicit duty of progressive realisation to support the effective implementation of the framework, which takes into account the content of each right’.<sup>14</sup> This core recommendation was accompanied by others on progressing substantive equality, including the right to a healthy environment within the framework, overhauling access to justice through changes to standing and expanding the intensity of review in the adjudication of rights.<sup>15</sup> Further, the Taskforce sought to ensure the framework would be founded on the inherent principle of human dignity.<sup>16</sup> The recommendations were accepted in full, and work remains underway on new human rights legislation for Scotland, with the Scottish Government having indicated its preferred approach within a consultation launched in

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<sup>8</sup> Simon Hoffman, ‘Incorporating the CRC in Wales’ in Ursula Kilkelly, Laura Lundy & Bronagh Byrne, *Incorporating the UN Convention on the Rights of the Child into National Law* (Cambridge University Press 2021).

<sup>9</sup> Information on the First Minister’s Advisory Group on Human Rights Leadership is available at <<https://humanrightsleadership.scot/>> (accessed 23/07/24).

<sup>10</sup> First Minister’s Advisory Group on Human Rights Leadership ‘Recommendations for a new human rights framework to improve people’s lives: Report to the First Minister’ (2018) Scottish Government, First Minister’s Advisory Group.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> National Taskforce for Human Rights ‘Leadership Report’ (2021) Scottish Government.

<sup>14</sup> Ibid, Recommendation 13.

<sup>15</sup> Ibid, Recommendations 2, 8, 21, 23, and 24.

<sup>16</sup> Ibid, Recommendation 9.

June 2023.<sup>17</sup> The consultation broadly reflected the Taskforce’s recommendations while noting areas of particular challenge concerning reserved areas of law and, significantly, setting out a direct approach to incorporating the ICESCR and three other international human rights treaties.<sup>18</sup> When drafting this thesis, the human rights bill had not yet entered the Scottish parliament, meaning its proposals could not be thoroughly scrutinised. Alongside this journey towards ambitious new human rights legislation, as already mentioned, a longer-term campaign for the incorporation of children’s rights in Scotland was coming to fruition with the Scottish Parliament unanimously passing the UNCRC (Incorporation) (Scotland) Act (“UNCRC Act”) in 2021 which, following a period of reconsideration due to a successful challenge in the UK’s Supreme Court (a point which will be returned to in concluding this chapter), was given Royal Assent at the beginning of 2024.<sup>19</sup>

Scotland’s recent commitments to further entrenching international human rights into domestic law are to be lauded. It presents an all too rare instance of attempted progress towards the values and principles espoused by the Universal Declaration of Human Rights (“UDHR”) in 1948.<sup>20</sup> Dignity, equality, and freedom for all.<sup>21</sup> However, it must also be recognised and understood that these political commitments are being made within the context of more than a decade of fiscal consolidation, driven by austerity policy, and the ongoing recovery of society from the onset of a devastating global health pandemic in COVID-19.<sup>22</sup> The results of which have left public resources in Scotland at breaking point.<sup>23</sup> The current enacted budget was passed within one of the most challenging fiscal backdrops in the history of devolution. In setting out the budget, Scotland’s finance minister tempered expectations by stating in unequivocal terms that this would be the ‘toughest ever’ spending plan.<sup>24</sup> The UK’s pain from slow growth and stubbornly high inflation means that, as a leading economic institute in Scotland has outlined, ‘the story of the Scottish economy in the last 24 months has been one of

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<sup>17</sup> Scottish Government, ‘A Human Rights Bill for Scotland: Consultation’ (2023) Scottish Government.

<sup>18</sup> The Taskforce also recommended incorporating the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities (CRPD), and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

<sup>19</sup> UNCRC (Incorporation) (Scotland) Act 2024; For an overview of this part of the journey, see Kasey McCall Smith, ‘The devil is in the details: entrenching human rights protections’ (2023) 74(1) Northern Ireland Legal Quarterly 95.

<sup>20</sup> UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948.

<sup>21</sup> Carla Ferstman and Tony Gray’s *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance* (Routledge 2018).

<sup>22</sup> Human Rights Watch ‘Human Rights Dimensions of COVID-19 Response’ (March 19, 2020) Human Rights Watch.

<sup>23</sup> Ross Burnside et al. ‘Scottish budget 2024-25: in the bleak midwinter’ (2023) Financial Scrutiny Unit, SPICe Research, Scottish Parliament.

<sup>24</sup> Hamish Morrison ‘Scottish Budget: Shona Robison to deliver ‘toughest ever’ spending plan’ (19 December 2023) The National. Available at: <<https://www.thenational.scot/news/23998507.scottish-budget-shona-robison-deliver-toughest-ever-spending-plan/>> (accessed 23/07/24).

essentially flat-lining’.<sup>25</sup> Increasing costs of purchases, higher-than-planned wage increases, and labour unrest are putting public services – already struggling – under severe pressure. Reports suggest Scotland faces up to a ‘£1.5 billion budget gap’ amid already struggling public service delivery.<sup>26</sup> Analysis from the Institute for Fiscal Studies (“IFS”) provides that in the medium term, despite rises in taxation from the Scottish Government in recent years, the total budget reduction is still due to be around 2%.<sup>27</sup> Moreover, the IFS go on to demonstrate the impact this could potentially have suggesting ‘if health spending were increased by 2.9% a year in real terms each year between 2023–24 and 2027–28 (the increase planned for 2023–24 and roughly in line with estimates of what might be needed in the long term) and spending on the net zero, energy and transport portfolio were increased by 4% a year (slightly less than planned, on average, in the Resource Spending Review), the amount available for all other service areas would fall by around 6% between 2023–24 and 2024–25, and by 13% by 2027–28. Without the forecast improvement in the net income tax position, the implied falls would be almost 10% and 19%, respectively, for those two years.’<sup>28</sup> Scotland’s current and forecasted future fiscal challenges raise a significant question for ESCR incorporation and implementation: To what extent does the incorporation of the ICESCR in Scotland have implications for the use of resources, overall fiscal decision-making and, consequently, Scotland’s public budgets? This broad, overarching question immediately gives rise to further, more acute lines of questioning on the extent to which the obligations of ESCR law are understood to apply to public budgets and fiscal decision-making. Moreover, with the new human rights framework to explicitly include the obligation of progressive realisation, as articulated by Article 2(1) of the ICESCR, and encompass minimum core obligations (“MCOs”), what do these obligations mean in practice and how are they to be implemented by fiscal decision-makers (duty-bearers) at both the national and local levels?

It is well evidenced and understood that upholding and realising human rights requires public resources.<sup>29</sup> Whether this be capital resources allocated to building a state’s basic infrastructure for energy, education, prisons and hospitals, resources made available to deliver associated public services, or budgetary allocations for public institutions, processes, parliamentary

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<sup>25</sup> Fraser of Allander Institute ‘Scotland’s Budget Report 2023’ (2023) University of Strathclyde at 10.

<sup>26</sup> Fraser of Allander Institute ‘£1.5bn headache for the Deputy First Minister next week at the Scottish Budget’ (December 15, 2023). Available at: <<https://fraserofallander.org/1-5bn-headache-for-the-deputy-first-minister-next-week-at-the-scottish-budget/>> (accessed 18/07/24).

<sup>27</sup> Bee Boileau et al. ‘Scottish Budget 2023-24: further analysis’ (2023) Institute for Fiscal Studies.

<sup>28</sup> Ibid at 9.

<sup>29</sup> Adam Chilton and Mila Versteeg ‘Rights without Resources: The Impact of Constitutional Social Rights on Social Spending’ (2017) 60(4) *The Journal of Law and Economics* 713; see also Adam Chilton and Mila Versteeg ‘Do Constitutional Rights Make a Difference?’ (2016) 60(3) *American Journal of Political Science* 575.

elections, general administration, and business regulation. Moreover, resources strike at the heart of services that enable access to justice, such as providing free legal aid or combatting corruption within political and legal systems.<sup>30</sup> With so much within a state dependent on the resources allocated, their importance to respecting, protecting, and fulfilling rights and, thus, budgetary processes in public decision-making cannot be underestimated nor ignored. Advocated throughout this work is the notion that monitoring how states generate, allocate, and spend their resources should be a central line of enquiry for any researcher interested in tackling the significant issues of our time. From climate action to social inequality and injustice, how states choose to use their resources will significantly impact what can be achieved immediately and progressively over time. Nolan has surmised: ‘Budgets are a key sign of a government’s values. So, if human rights are not in there, what’s being said is that they are not a value worth counting’.<sup>31</sup> It is a view further bolstered by Alston, who asserts that ‘fiscal policy is not just a dry and dull set of statistics but instead holds the key to understanding the deepest values of a society, and potentially even the interactions among societies’.<sup>32</sup> The public budget’s importance to human rights and broader public development has been well understood for decades, but what has been lacking is both a well-understood, clear framework from which to make rights-respecting decisions on public resource distribution and a well-practised toolkit from which to hold states to account for failing to direct appropriate resource, whether financial or otherwise, towards the realisation of people’s ESCR.<sup>33</sup> The issue remains that ‘though there has been no shortage of goodwill, little has been achieved since to clarify which obligations the Covenant imposes on States in the adoption and implementation of public budgets.’<sup>34</sup>

Compounding this line of questioning, the work of Chilton and Versteeg has worryingly uncovered through extensive empirical research over the last decade that ‘little is known about whether these rights change how government provide social-rights-related goods and services to their citizens’.<sup>35</sup> Moreover, their sobering work on social rights and government spending has gone on to establish that despite increasing legal recognition of social rights around the

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<sup>30</sup> Amnesty International UK ‘Cuts That Hurt: The impact of legal aid cuts in England on access to justice’ (2016) Amnesty International UK.

<sup>31</sup> Aoife Nolan ‘Human Rights Budget Work, SNAP Innovation Forum’ (2014) Scottish Human Rights Commission. Available at: <http://www.scottishhumanrights.com/media/1177/reportmarch2015reportwordinnovationforumtranscript.doc> (accessed 18<sup>th</sup> June 2024).

<sup>32</sup> Philip Alston, ‘Introduction: Fiscal Policy as Human Rights Policy’ in Philip Alston and Nikki Reisch *Tax, Inequality, and Human Rights* (OUP 2019) at 1.

<sup>33</sup> Olivier De Schutter ‘The rights-based welfare state: Public budgets and economic and social rights’ (2018) Friedrich Ebert Stiftung.

<sup>34</sup> *Ibid* at 10.

<sup>35</sup> Chilton and Versteeg ‘Rights Without Resources’ (n 29) at 715.

world, whether through constitutions or other models of incorporation into domestic legal frameworks, social rights recognition is ‘not associated with an increase in government spending in these areas’.<sup>36</sup> Their work presents an uncomfortable reality. Too rarely have states been willing to ‘put their money where their mouth is’ and take fiscal action to support their human rights commitments.<sup>37</sup> Too often, human rights have failed to entrench ‘a vision for a public finance system capable of producing fiscal justice, increasing equity and advancing rights’.<sup>38</sup> Such assertions strongly reflect that successful implementation of and accountability for ESCR realisation intrinsically requires and supports a framework to monitor the use and distribution of a state's limited resources.<sup>39</sup> Advocates for and defenders of ESCR globally must continue to grapple with and break down the, at times, impenetrable walls of public budget decision-making because it presents one of the most powerful tools from which to monitor a state's commitment to ESCR obligations. As supporting evidence to the Taskforce by Oxford University's Bonavero Institute made explicitly clear within its ‘five principles that a government needs to bear in mind when seeking to provide for domestic protection and fulfilment of international human rights obligations beyond their legislative restatement... governments need to provide an effective process for monitoring the implementation of rights and for monitoring budgetary allocations to the fulfilment of rights’.<sup>40</sup> This gap in Scotland's current approach and understanding forms the basis for this research and drives its lines of inquiry.

This first introductory chapter establishes the context of Scotland's commitment to recognising ESCR and highlights the importance of public resources in their realisation. It underscores the gap between legal entrenchment and actual implementation, emphasising the need for adequate resource allocation to achieve these rights. The chapter concludes that embedding human rights into public budgets is crucial for their effective realisation. It stresses the necessity of monitoring fiscal practices to ensure compliance with international human rights standards. Chapter 2 moves on to outline the project's methodology. From the evolution of its research questions to justify the need for an interdisciplinary approach which draws upon legal theory,

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<sup>36</sup> Ibid.

<sup>37</sup> Helena Hofbauer, Ann Blyberg and Warren Krafchik ‘Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights’ (2004) Fundar, IBP & IHRIP at 1.

<sup>38</sup> Anja Rudiger ‘A Framework for Fiscal Justice: How Human Rights Can Change Public Finance’ in Gillian MacNaughton, Diane Frey and Catherine Porter *Human Rights and Economic Inequalities* (Cambridge University Press 2021) at 143.

<sup>39</sup> Ann Blyberg ‘The Case of the Misallocated Allocation’ (2009) *Sur International Journal on Human Rights* 11; See also, Jim Shultz ‘Using Public Budgets as a Tool to Advance Economic, Social and Cultural Rights’ (2002) Fundar Centro de Analisis; And Hofbauer, Blyberg & Krafchik (n 37).

<sup>40</sup> Manuel Cepeda, Kate O'Regan and Martin Scheinin ‘The Development and Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership’ (2021) Bonavero Institute of Human Rights at 5.



political philosophy, and fiscal accounting, the chapter not only covers the basic methods adopted to carry out socio-legal research, in which empirical evidence builds new contributions to the doctrinal findings but also presents an approach in which the views of practitioners and project participants are central to the research's design and drive its conclusions through the use of an engaged approach to knowledge production. For ESCR to progress beyond the confines and echo chamber of legal discourse to provide meaningful progress to the lives of those who need it most, knowledge exchanges and collaboration with those working daily on their fulfilment will be essential. Chapter 3 seeks to provide more details on the emergence and practice of Human Rights Budgeting ("HRB") as a framework for carrying out a budget process and a monitoring tool through budget analysis. It concludes that public budgets must be designed to reflect human rights obligations, ensuring that resources are mobilised, allocated, and spent in a manner that prioritises ESCR and enables rights-based budget analysis. In doing so, the chapter also underscores the role of HRB in holding states accountable. Chapter 3 thus seeks to capture and contribute to the emerging theory and practices of HRB under ESCR law, serve as a broad literature review, and be used as a basis for further practical steps throughout the rest of the thesis's empirical analysis and findings.

This review of HRB literature uncovered a need for a deeper dive into the meaning, design, and application of the minimum core doctrine in ESCR law, with its application to budgets identified as a clear gap within the literature on overall ESCR and public budgets. Indeed, it is an area that leading scholars have called for 'further inquiry'.<sup>41</sup> Chapter 4 first illuminates the theoretical exploration of the minimum core doctrine, assessing the historical and contemporary objections to their place in the ESCR framework. It seeks to establish that a universal, survivalist minimum core can exist in tandem with states adopting a domestic core minimum threshold for ESCR within the state's national context, resource capacity, and prevailing culture. Constructing a relative, domestically justiciable core minimum using the building blocks set out via the CESC's guiding materials presents a route to establishing national priorities, which, in turn, can be utilised to ensure guarantees and the prioritisation of resource use to uphold those democratically agreed material priorities and protect against the most severe of cuts to social spending. Chapter 5, having recognised the importance of both good conduct as well as achieving specified results, moves forward to consider in depth 'principles for practice' which can help to guide fiscal decision-making in Scotland. The

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<sup>41</sup> Rory O'Connell et al. *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014) at 85.

chapter illustrates recent frameworks developed by international institutions by unpacking the principles of transparency, participation, and accountability, often raised through rights-based and accounting literature. It aims to highlight the process principles outlined throughout the ESCR literature on state budgets that can be provided with direction by ongoing projects from international organisations such as the International Budget Partnership (“IBP”).

Within Chapters 6 and 7, the thesis provides more insight into the data gathered and analysed within the project. Aiming to capture and present the views of practitioners working in public finance as well as human rights in Scotland, Chapter 6 provides an acute focus on issues relevant to the overall Scottish fiscal landscape, contributing four identified areas for action, whilst Chapter 7 ‘thinks down the system’ and focuses solely on issues raised by local government finance chiefs on the challenges they currently face. In particular, Chapter 7 demonstrates the minimum core doctrine’s role in ensuring protection for the most marginalised and disadvantaged in society during extreme fiscal challenge and restraint. Through engaging and analysing the data generated, a new context is provided for the obligations of ESCR, and practices are identified in which HRB can be progressed as a framework in both theory and, crucially, practice. Chapter 8, as the concluding chapter, provides practical recommendations for embedding ESCR through the public budget cycle in Scotland. It concludes that while there is a growing awareness of HRB, a comprehensive framework for integrating it into the state’s budgetary cycle is still needed. The chapter emphasises the importance of supporting legislative measures with continuous monitoring, building rights-based considerations and analysis into existing fiscal mechanisms and procedures, and collaboration between various stakeholders to ensure the effective realisation of human rights through fiscal policies. The thesis concludes that a human rights-based approach to budgeting is essential for the effective realisation of ESCR in Scotland. It highlights the need for comprehensive frameworks, procedural fairness, and multi-institutional accountability to ensure that public resources are allocated in a manner that prioritises human rights. The research provides practical recommendations for integrating HRB into Scotland’s fiscal practices, emphasising the importance of collaboration, training, and continuous monitoring to move toward fiscal justice.

Before moving into the following sections of this introductory chapter on the place of ESCR in international human rights law (“IHRL”), it is necessary to summarise a few assertions upon which this research is predicated. Firstly, in utilising the term resources, this thesis refers to using financial resources within states distributed through public budgets. This is primarily due

to this being the main focus of the CESCR in monitoring ESCR realisation, with analysis demonstrating that the CESCR predominantly focuses on six interrelated understandings of fiscal resources.<sup>42</sup> Broadly, these are government expenditure, government revenue, development assistance, debt and deficit financing, monetary policy, and financial regulation.<sup>43</sup> Other types of resources exist, including natural, technological, social and human resources, and the emerging field of well-being economics presents numerous excellent avenues of research into how these resources can be used to benefit societal development.<sup>44</sup> The intersections between these further types of resources and the ESCR framework, of which there will undoubtedly be numerous, are beyond the scope of this particular research despite presenting extensive (and potentially significant) avenues for further in-depth research.<sup>45</sup> Thus, unless otherwise specified, the term resources throughout the thesis refers to financial resources.

Concerning the ESCR framework and the thesis's positivist legal underpinnings, more specifically, as is inferred throughout this introductory chapter, this research understands and purports that ESCR are legal rights enforceable through courts of law.<sup>46</sup> Research consistently demonstrates the ability of legal systems and courts to address ESCR, including by providing effective remedies when violated. Contrary assertions to this ESCR understanding are arguably often rooted in political needs rather than legal theory and reasoning. Additionally, in adopting a similar line of argument to Alston, who argues that the excessive criminalisation of human rights law 'involves a relentless narrowing of the vision, the aspirations, and ultimately the meaning of human rights', this research is predicated upon the conviction that furthering IHRL requires a swathe of legal and non-legal measures for successful implementation.<sup>47</sup> Equal focus must be paid to the role and ability of the courts and broader justice system to advance human rights standards alongside the role and centrality of more comprehensive human rights practice and social movements to build a human-rights-based culture. Numerous avenues exist to advance the principles and standards of IHRL.<sup>48</sup> More specific to the minimum core doctrine,

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<sup>42</sup> Radhika Balakrishnan, James Heintz and Diane Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (Routledge, 2016).

<sup>43</sup> *Ibid* at 23.

<sup>44</sup> Rodrigo Uprimny, Sergio Chaparro Hernandez and Andres Castro Araujo, 'Bridging the Gap: The Evolving Doctrine on ESCR and 'Maximum Available Resources' as found in Katherine Young, *The Future of Economic and Social Rights* (Cambridge University Press 2019); See also generally Joseph Stiglitz, Amartye Sen and Jean-Paul Fitoussi 'Report by the Commission on the Measurement of Economic Performance and Social Progress' (2009) European Commission.

<sup>45</sup> De Schutter (n 33).

<sup>46</sup> Jeff King *Judging Social Rights* (Cambridge University Press 2012); Boyle (n 1).

<sup>47</sup> Philip Alston, 'Criminalizing Human Rights' 15(3) *Journal of Human Rights Practice* 660 at 673; For a further, more critical view on the judicialisation of human rights, see John Tasioulas 'Saving Human Rights from Human Rights Law' (2021) 51 *Vanderbilt Law Review* 1167.

<sup>48</sup> Committee on the Rights of the Child General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, 27 November 2003.

the research again adopts a positivist stance that explores the doctrine and its potential to constitutionalise a social minimum and establish clear, legally based priorities from which to plan budgetary allocations are normative aims worthy of exploration.<sup>49</sup> While the doctrine may not be established within the legally binding text of the ICESCR itself, its prevalence throughout the framework and, as asserted throughout this work, centrality to the ESCR project in the face of fiscal consolidation reiterates the need for ESCR scholars and practitioners to provide the doctrine with determinable content to act as identified and shared national priorities.<sup>50</sup>

### 1.1 On the Bifurcation and Subsequent Indivisibility of International Human Rights Law

Understanding ESCR law often begins with acknowledging the consequences of the bifurcation of IHRL. In 1948, the UDHR was adopted with the world recovering from the atrocities of World War Two. One of the centrepieces of this remarkable achievement was the fundamental unity of a declaration enumerating CPR together with ESCR. Following the UDHR were two international Covenants, split into the International Covenant on Civil and Political Rights (“ICCPR”) on one hand and the ICESCR on the other. These three documents form what was coined the International Bill of Human Rights and provide much of the basis for international human rights norms and obligations. Whereas the UDHR focused on rights holders, the Covenants concentrated on enumerating state parties’ duties and obligations, and the interpretation of the Bill of Rights has shaped much of human rights legal discourse,<sup>51</sup> specifically, the Covenants formulation and eventual split.<sup>52</sup> In drafting the Covenants, the dominant view established the two sets of rights as sufficiently distinct, carved apart by post-war politics and the dichotomy between liberalism and communism, to justify separate treatment.<sup>53</sup> Reflecting the dominant strains of post-war economic and political philosophy, where CPR were generally viewed as giving rise to negative obligations requiring states to refrain from interfering with their enjoyment, ESCR were viewed as burdensome, requiring

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<sup>49</sup> David Bilchitz, ‘What is the relationship between minimum thresholds and distributive justice?’ in Toomas Kotkas, Ingrid Leitjen, and Frans Pennings *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Hart Publishing, 2019).

<sup>50</sup> See exploration of the status of General Comments in Matyas Bodig ‘Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights’ in Stephanie Lagoutte et al. *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press, 2016).

<sup>51</sup> See discussion in Manfred Nowak ‘Social rights in international law: categorization versus indivisibility’ in Christina Binder et al. *Research Handbook on International Law and Social Rights* (Elgar, 2020).

<sup>52</sup> Ibid.

<sup>53</sup> Daniel Whelan and Jack Donnelly ‘The West, Economic Right, and the Global Human Rights Regime: Setting the Record Straight’ (2007) *Human Rights Quarterly* 908; see also Alex Kirkup & Tony Evans ‘The Myth of Western Opposition to Economic, Social and Cultural Rights? A reply to Whelan and Donnelly’ (2009) 31(1) *Human Rights Quarterly* 221; and Susan Kang ‘The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly’ (2009) 31(4) *Human Rights Quarterly* 1006.

states to adopt positive measures for their realisation and mobilise the resources to do so.<sup>54</sup> As De Schutter outlines in exploring the historical distinction, the ICCPR, in contrast with the ICESCR ‘[provides] states with primarily negative obligations which are determinate enough, and inexpensive enough, to justify monitoring through independent experts, and the imposition of requirements that each state guarantees access to effective remedies, preferably judicial in nature, against instances of violation.’<sup>55</sup> It is a general misconception that set the basis for the coming decades as the Covenants were implemented with different doctrines, obligations and complaint mechanisms.<sup>56</sup>

In contrast to the ICCPR, which prescribes the obligation to respect and ensure all CPR as an immediate obligation, Article 2(1) of the ICESCR requires the rights of the covenant to be progressively realised, meaning states are to move as efficiently and expeditiously as possible toward the full realisation of ESCR.<sup>57</sup> This was an attempt to understand and capture that the extent to which rights present in the Covenant (such as the right to health, food, housing, and social security) can be realised are subject to a state’s resources and, ultimately, stage of economic development.<sup>58</sup> They were provided with different monitoring mechanisms alongside the variance of the Covenants’ implementation methods.<sup>59</sup> Where the ICCPR established the Human Rights Committee (“HRC”), a body of independent experts with the power to assess the reports submitted by states and had an Optional Protocol authorising the HRC to receive individual communications and express their views on gross violations of the Covenant, no such system was established for the ICESCR. The ICESCR established the UN’s Economic and Social Council, which was responsible for interpreting the Covenant’s text, issuing guidance for states, and handling a limited state reporting procedure.<sup>60</sup> Even when this was reformed in 1986 to the CESC, new powers did not extend to hearing individual complaints, leaving ESCR without a critical means of embedding meaningful, legal accountability. It took a further 22 years before these powers would be elaborated in an

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<sup>54</sup> Dinah Shelton and Ariel Gould ‘Positive and Negative Obligations’ in Dinah Shelton *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

<sup>55</sup> Olivier De Schutter *Economic, Social and Cultural Rights as Human Rights* (2<sup>nd</sup> edn, Cambridge University Press 2014) at xv.

<sup>56</sup> Asbjørn Eide ‘Economic, Social and Cultural Rights as Human Rights’ in Asbjørn Eide, Catarina Krause & Allan Rosas, *Economic, Social and Cultural Rights: A Textbook* (2<sup>nd</sup> edn, Dordrecht: Martinus Nijhoff) at 15.

<sup>57</sup> Daniel Whelan, ‘The Two Covenants and the Evolution of Human Rights’ in Anja Mihr & Mark Gibney *The SAGE Handbook of Human Rights, Volume 1* (SAGE publication, 2014) at 6.

<sup>58</sup> Ibid.

<sup>59</sup> Ida Koch *Human Rights as Indivisible Rights* (Brill Nijhoff, 2009).

<sup>60</sup> See Zdzisław (Dzidek) Kędzia ‘Social rights protection under the ICESCR and its Optional Protocol – the role of the Committee on Economic, Social and Cultural Rights’ in Christina Binder et al. *Research Handbook on International Law and Social Rights* (Elgar, 2020); and Nigel Rodley ‘The Role and Impact of Treaty Bodies’ in Dinah Shelton (n 54).

Optional Protocol to the ICESCR, which was adopted by the UN General Assembly in 2008 and entered into force in 2013.<sup>61</sup> A text the UK is yet to ratify.

Taking such starkly different approaches created a hierarchy of legal rights and established a pervasive view that ESCRs were of lesser status.<sup>62</sup> Many adopted the understanding that the general protection of ESCR was an inherently secondary obligation compared to those contained within the ICCPR. This view has since been extensively challenged, with Boyle recently opining that upon assessing the text of the founding UDHR, greater status could be seen for ESCR over its undermining of them.<sup>63</sup> Today, thanks to the proponents, advocates, and scholars of ESCR who have spent half a century combatting and reframing the narrative, all human rights have been officially recognised as indivisible, interrelated, and interdependent.<sup>64</sup> The theoretical line once drawn firmly between CPR and ESCR was rejected by the IHRL community, in principle placing the Covenants and their legal obligations on an equal footing. Today, many mainstream human rights textbooks will teach ‘there is no strict dividing line between [CPR] on the one hand and [ESCR] on the other.’<sup>65</sup> By once again bringing together the framework, as envisaged by the UDHR, it represented a growing acknowledgement (certainly within the international human rights community) that states cannot respect people’s CPR without fulfilling their ESCR.<sup>66</sup> In other words, a person suffering from starvation or lack access to primary education or essential healthcare is unlikely to be able to exercise their CPR in a dignified manner. Despite being consistently and demonstrably evidenced as a false narrative weaved by states wary of ESCR implementation it became a deeply embedded and accepted understanding of ESCR. A view that continues to permeate through the UK and other states across the world.<sup>67</sup> As Boyle et al. identify in a recent exploration of legal practitioners’ views on social rights in the UK, ‘many of the remnants of this legal fiction are often invisible and structural in the UK’s legal, constitutional framing of rights and thus play out in the

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<sup>61</sup> UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117.

<sup>62</sup> De Schutter (n 55).

<sup>63</sup> For a discussion challenging this view, see Jack Donnelly ‘Third Generation Rights’ in Catherine Brölmann, René Lefebvre & Marjoleine Zieck *Peoples and Minorities in International Law* (Brill 1993) at 119. See also analysis in Boyle (n 1).

<sup>64</sup> See UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23,

<sup>65</sup> Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran *International Human Rights Law* (Oxford University Press, 2014) at 145. See also generally, Sandra Fredman ‘New Horizons: Incorporating Socio-Economic Rights in a British Bill of Rights’ (2010) Public Law 301.

<sup>66</sup> Ben Saul, *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires, Volume I* (Oxford University Press, 2016).

<sup>67</sup> Mónica Feria Tinta, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights 2007) 29 Human Rights Quarterly 431 at 432; see also Sally-Anne Way, ‘The Myth and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 United States Suggestions for Articles to Be Incorporated in an International Bill of Rights’, (2014) 36 Human Rights Quarterly 869; Whelan & Donnelly (n 53); Daniel Whelan, *Indivisible Human Rights* (University of Pennsylvania Press 2010); Mathew Craven *The International Covenant on Economic, Social, and Cultural Rights, A Perspective on its Development* (Clarendon Press, Oxford University Press 1995).

everyday setting of individual lived experience manifesting as challenges in securing social rights justice'.<sup>68</sup> Or, as Leckie more potently provides, 'no other treaty has been violated in as obdurate or as frequent a way as the ICESCR'.<sup>69</sup>

## 1.2 Economic, Social and Cultural Rights as Legal Rights

In dealing with ESCR and their corresponding legal obligations, it is best to recognise two differing, though interconnected, means of outlining state obligations. First, there are the general obligations of IHRL for states to respect, protect, and fulfil ("RPF") all human rights, and second, the specific obligations espoused within the ICESCR.<sup>70</sup> To begin with the general obligations, the tripartite typology of RPF drastically altered the rhetoric surrounding ESCR and laid the foundations for further critical work on realising ESCR as fundamental, legal human rights. Eide, in 1981, building upon the work of the philosopher Henry Shue and attempting to shed the 'negative' and 'positive' formulations of rights prevalent at the time,<sup>71</sup> concluded that an 'effective guarantee of human rights required that the individual be protected from interference by the state in the exercise of certain freedoms; that the state protect the individual from interference by other actors, whose conduct the state is in a position of control; and that the state provide certain public goods that would be undersupplied if their provision were left to market mechanisms'.<sup>72</sup> By concentrating on a state's obligations over the concept of people's individual rights, Eide made it increasingly possible to move ESCR from being 'promotional' aspirations to determinate human rights requiring both negative and positive actions for their effective realisation.<sup>73</sup> In more practical terms, this classification provides non-governmental organisations, human rights stakeholders, and human rights defenders with a legal framework and rhetoric to hold states accountable for their failure to move expeditiously towards the full realisation of the Covenant. This classification and tripartite approach to obligations gradually gained broad acceptance and has become pervasive throughout IHRL.<sup>74</sup>

Today, the typology is axiomatic with human rights law. Further, it can be a valuable tool when engaging with those working outside the confines and complexities of IHRL, such as local

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<sup>68</sup> Boyle et al. (n 1) at 20.

<sup>69</sup> Scott Leckie, 'Another Step Towards Indivisibility' (1998) 20(1) Human Rights Quarterly 81 at 84.

<sup>70</sup> Veronika Bilková 'The nature of social rights as obligations of international law: resource availability, progressive realization and the obligations to respect, protect, fulfil' in Christina Binder et al *Research Handbook on International Law and Social Rights* (Elgar, 2020)

<sup>71</sup> David Karp 'What is the responsibility to respect human rights? Reconsidering the 'respect, protect, and fulfil' framework' (2019) 12(1) International Theory 83.

<sup>72</sup> Asbjørn Eide 'Realisation of Social and Economic Rights: The minimum threshold approach' (1989) 10(1) Human Rights Law Journal 36 at 41.

<sup>73</sup> Ibid.

<sup>74</sup> International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997.

government or businesses seeking to comply with ESCR standards, as it can provide a clear, approachable framework for understanding what is expected of them. Unpacking the tripartite typology, as Koch expertly carried out, there is a need to view their functioning as ‘waves of duties’ of which some rights require more action on the negative, respect end of the spectrum, and others require more positive and resource intensive action to fulfil.<sup>75</sup> To respect ESCR, the State must take steps to refrain from acting in a way that would undermine the right. This could be, for example, taking action which would actively reduce the enjoyment of ESCR, such as unjustifiably closing down already established and in-use cultural spaces or educational facilities. To protect ESCR, the state must prevent and react to any harm caused to ESCR by third parties. In practice, this is often played out in terms of protection against harmful practices in the private sector (though not solely), such as protecting against unlawful evictions by private landlords or ensuring adequate care within privately run health and social care systems. The duty to protect is about safeguarding from harm and is central to ESCR realisation, with so many public services in states having moved to rely on public-private partnerships.<sup>76</sup> Finally, there is the need to fulfil ESCR, which can be viewed more on the positive end of the ‘wave’ in that it requires the state to take steps and adopt ‘enabling strategies’ to ensure that the measures being taken are sufficient to realise the right for every individual in the shortest possible time.<sup>77</sup> To fulfil their obligations in practice, state parties must adopt procedures, action plans, and wider national strategies to realise ESCR. This can also be better understood and further broken down into the need to facilitate, promote, and provide ESCR through adopting appropriate steps for their realisation.<sup>78</sup>

Beyond the general obligations of IHRL to respect, protect, and fulfil ESCR, there are also the specific obligations espoused by the ICESCR. They provide a more detailed approach to what is expected of states to comply with ESCR law. Art 2(1) establishes the nature of the ICESCR’s specific obligations, while Art 2(2) establishes the principle of non-discrimination within their realisation. Art 2(1) of the ICESCR stipulates state parties must ‘take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realisation of the rights

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<sup>75</sup> Ida Koch ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5(1) Human Rights Law Review 81.

<sup>76</sup> Mirielle de Koning ‘Public-private partnerships in education assessed through the lens of human rights’ in Gita Steiner-Khamisi and Alexandra Draxler *The State, Business and Education* (Elgar 2018).

<sup>77</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23 at para 14.

<sup>78</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 12: The Right to Adequate Food (Art 11) (12 May 1999) UN Doc E/C.12/1999/5 at para 15; CESCR General Comment No. 13, The Right to Education at para 50.



recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.<sup>79</sup> It implies a specific and ongoing obligation for State parties to be as expeditious and effective as possible in achieving the full realisation of the Covenant.<sup>80</sup> Progressive realisation was justified at the time as a 'necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights'.<sup>81</sup> It intentionally recognised a degree of subjectivity, entailing that obligations are not uniform and cannot be met equally by all State parties. The level of 'flexibility' endowed upon the states parties did, on the other hand, provide a 'loophole large enough in practical terms to nullify the Covenants guarantees' with 'the possibility that States will claim a lack of resources as the reason they have not met their obligations'.<sup>82</sup> A possibility that has defined much of their history. Over the years, a range of general comments from the CESCR have been issued, accompanied by the work of ESCR scholars, to aid in interpreting and monitoring progressive realisation.<sup>83</sup> Drawing from the work of Boyle, a leading ESCR scholar who has spent years researching the meaning and intent of Article 2(1), 'progressive realisation can be understood as constituting a multitude of interlinked obligations which work in tandem to ensure ESCR are gradually realised over time'.<sup>84</sup> Indeed, it is only by viewing and understanding the many facets and sub-duties of progressive realisation that the obligation becomes a practical tool for holding states to account.

Beginning with the language explicit in Article 2(1), there is a need to 'take steps' towards realising the rights. This can be understood as an immediate duty upon states, irrespective of levels of resources available, to adopt legislation and put in place plans, strategies, programmes, or policies which will give effect to ESCR.<sup>85</sup> For example, adopting national strategies and policies in ESCR areas. Furthermore, the steps taken must be deliberate, concrete, and targeted.<sup>86</sup> In essence, the duty to take steps represents an obligation of conduct by requiring duty bearers to have a reasonable plan to move expeditiously and effectively towards realising the rights. Further contained in Art 2(1) is the duty to use the maximum available resources

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<sup>79</sup> Article 2(1) UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p 3.

<sup>80</sup> Cepeda, O'Regan & Scheinin (n 40).

<sup>81</sup> Leckie (n 69); CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant), 14 December 1990, E/1991/23 at para 9.

<sup>82</sup> Audrey Chapman *Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) at 4.

<sup>83</sup> See CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.

<sup>84</sup> Aidan Flegg and Katie Boyle 'Briefing 1: Economic, Social and Cultural Rights: International Legal obligations – An Explainer' (2022) Nuffield Foundation at 2; See also Boyle (n 1).

<sup>85</sup> Cepeda, O'Regan and Schienin (n 40).

<sup>86</sup> Ibid.

(“MAR”) to realise ESCR. The MAR duty becomes central and is, alongside the other sub-duties of progressive realisation, the subject of a much more detailed analysis in Chapter 3. For its introduction here, MAR can be understood as the need to gather and deploy the greatest resources available to the state to move as expeditiously and effectively as possible towards the full realisation of the right. This is not to be mischaracterised as requiring all a state’s resources. The duty, in practice, takes account of the balances which need to be struck in the governance of a modern state. Public resources must be available for other essential government roles, with defence and domestic security or international aid and diplomacy as clear examples.<sup>87</sup> As will be explored in detail, meeting the MAR duty requires an assessment of the reasonableness of the state’s approach to its overall use of resources, from their mobilisation through taxation or international borrowing and assistance to its effective and efficient use within the state.<sup>88</sup> Where the state demonstrably fails to use its available resources for ESCR realisation, it would be incumbent upon the state party to demonstrate its reasons for not doing so.<sup>89</sup> Otherwise, it may violate Article 2(1) ICESCR. The duty of progressive realisation implicitly imposes further sub-duties not contained within the text of Article 2(1) itself. For example, the corresponding prohibition on retrogressive measures. Regressive steps regarding ESCRs contradict the progressive realisation principle and violate these rights unless they have been duly justified and weighted against the enjoyment of other ESCRs. This means that ‘where the government cut existing benefits, increase the prices of government goods and services, or removes legislative protections’, it may amount to a retrogressive measure.<sup>90</sup> O’Connell et al. argue that this principle should be judged and applied to deliberate steps backwards regarding allocating resources within the national budget.<sup>91</sup> A point which will be returned to in detail. Finally, Boyle, drawing from the foundational Latin legal maxim ‘ubi jus ibi remedium’, argues for recognising a further and previously much-overlooked sub-duty of progressive realisation. Effective remedies for violations of ESCR must be provided by facilitating access to a legal remedy where necessary.<sup>92</sup>

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<sup>87</sup> Sigrun Skogly ‘The Requirements of Using the ‘Maximum of Available Resources’ for Human Rights Realisation: A Question of Quality as Well as Quantity?’ (2012) 12(3) Human Rights Law Review 393.

<sup>88</sup> Ibid.

<sup>89</sup> See Mark Heywood ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1(1) Journal of Human Rights Practice 14.

<sup>90</sup> O’Connell et al. (n 41) at 64.

<sup>91</sup> Ibid at 66.

<sup>92</sup> Boyle (n 1); See also generally Dinah Shelton *Remedies in International Human Rights Law* (3<sup>rd</sup> edn, Oxford University Press 2015).

Having entered into force in 1976, the ICESCR suffered a wave of criticism from the legal community.<sup>93</sup> Many commentators of the time questioned the rights enshrined within the Covenant, citing them as too broad and general, leading to vague or unspecified duties and duty bearers.<sup>94</sup> ESCR were to be coined ‘programmatic’ or ‘promotional’ rights without the legal enforceability and justiciability axiomatic with CPR.<sup>95</sup> Critics further raised concerns over the nature of state obligations without set targets, the lack of appropriate enforcement mechanisms, and little hope that these rights could gain an equal footing with CPR as determinate and justiciable.<sup>96</sup> It has taken years and a dedicated effort to dispel these notions. Scholars from across the world have combatted the challenges presented from both theoretical and practical perspectives. Where explanations are sought as to the determinacy of ESCR content, their inherent ‘impossibility’ (competing nature), and the ability of courts to determine violations, comparative practises from constitutional courts globally can be used to illustrate their willingness and ability to do so in jurisdictions when empowered in countries as vast and as different as Germany to South Africa and Finland to Colombia.<sup>97</sup> Where questions are raised about who is responsible for fulfilling rights when private actors are involved with service delivery, arguments have been devised to demonstrate that the state always retains its role as the primary duty bearer.<sup>98</sup> Where concerns are tabled against the legitimacy of ESCR enforcement, practical frameworks have been designed to illustrate how, within a multi-institutional approach utilising everything from local complaints mechanisms to inspectorates and Ombudsman, alongside the critical role of courts and tribunals, routes to effective remedies can be found.<sup>99</sup> Where expanding the role of courts to assess socio-economic decision-making is criticised as being anti-democratic, work is carried out to demonstrate the democratic balancing act ‘weak vs strong’ forms of review can yield deferential approaches to remedies shown to ensure compliance with ESCR law whilst retaining the ability of politically elected officials to choose how best to do so.<sup>100</sup> In summary, a galvanised and active ESCR movement over the last three decades has risen to the challenges lodged and provided a solid normative and practical basis to recognise ESCR as legal and justiciable but pervasively violated human

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<sup>93</sup> See discussion in Eide (n 56).

<sup>94</sup> Ibid. See also Onora O’Neill ‘The Dark Side of Human Rights’ 81(2) International Affairs 427.

<sup>95</sup> For a full discussion, see Ian Brownlie ‘Principles of Public International Law, (Oxford Clarendon Press, 1979).

<sup>96</sup> James Nickel ‘How Human Rights Generate Duties to Provide and Protect’ (1993) 15 Human Rights Quarterly 77.

<sup>97</sup> Bruce Porter ‘Justiciability of ESCR and The Right to Effective Remedies: Historic Challenges and New Opportunities’ (2008) Social Rights Advocacy Centre; and Cepeda, O’Regan and Schienin (n 40); King (n 46); Boyle (n 1).

<sup>98</sup> Varun Gauri and Daniel Brinks ‘Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights’, in Varun Gauri and Daniel Brinks *Courting Social Justice, Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) at 11.

<sup>99</sup> Boyle (n 1).

<sup>100</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Oxford, 2008) at 23.

rights. Further work, as always, will be crucial to their global acceptance and adjudication. However, the key point demonstrated over the last two to three decades of increased attention is that where issues arise, solutions are devised. This thesis attempts to contribute to such scholarship with new frontiers opening on the implications of ESCR obligations for social spending and, consequently, public budgets and fiscal decision-making. As De Schutter, a multiple UN Special Rapporteur in ESCR who has increasingly focused on progressive realisation and public budgets has provided: ‘Unless we define more precisely the implications of this vague wording allowing domestic actors and the CESCR to address issues of taxation and spending in the light of the Covenant requirements, we run the risk of this essential contribution of the Covenant remaining a dead letter: the duty of realisation, as a duty to design public budgets and to implement macroeconomic policies with a view to fulfil ESCR, will either be ignored entirely or considered in a purely ad hoc fashion, raising the suspicion that any such assessment will be biased and the debate politicised.’<sup>101</sup> Such a conviction permeates this research.

### 1.3 Introducing the ‘Morality of the Depths’: Minimum Core Obligations Under the ICESCR

Having explored the nature of ESCR and their corresponding obligations as they appear within the language of Article 2(1), it is now necessary to introduce the minimum core doctrine in more detail as a disputed area of the ESCR legal framework.<sup>102</sup> Indeed, its exploration has been a central aspect of undertaking this research project because it is a source of ongoing debate and yet a potentially significant development for the implementation and justiciability of ESCR regarding public budgets.<sup>103</sup> Here, the intention is to introduce the doctrine’s place within the international legal framework, glean its intention, and below, move on to introducing a myriad of theoretical contradictions and challenges they raise. Ten years after the ICESCR came into force, the indeterminacy of the rights it contained and the failure of the Covenant’s implementation to adequately tackle growing issues such as absolute poverty, among other apparent ESCR troubles, pushed a group of experts to convene in the province of Limburg. To

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<sup>101</sup> Olivier De Schutter ‘Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation’ in Katherine Young *The Future of Economic and Social Rights* (Cambridge University Press 2019) at 528.

<sup>102</sup> Martin Schenin ‘Core Rights and Obligations’ in Dinah Shelton *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

<sup>103</sup> David Landau ‘The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures’ in Aoife Nolan *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014); See also David Landau ‘The Colombian Model of Structural Socio-economic Rights Remedies: Lessons from and for Comparative Experience’ in Alejandro Linares Cantillo et al. *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press, 2021).

elaborate on state parties' obligations under the Covenant, the international community, in 1986, adopted the Limburg Principles.<sup>104</sup> The Limburg Principles marked a significant milestone in substantiating the interpretation of ESCR violations. They asserted that 'States Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all'.<sup>105</sup> Supporting their formulation, Philip Alston (previous UN Committee on Economic, Social and Cultural Rights Special Rapporteur) wrote in 1987, 'each right must... give rise to a minimum entitlement, in the absence of which a State party is in violation of its obligations.'<sup>106</sup> However, the principles were formulated broadly to facilitate their interpretation and application. They did not provide absolute clarity on what constituted a violation of ESCR nor explicitly specify the practices states must adopt to secure 'minimum subsistence' or define the exact parameters of a 'minimum entitlement'. As a result, interpretative flexibility persisted, and the formulation of the Limburg Principles did not significantly impact state practice as anticipated. Today, they are often referenced as context due to their serving as a catalyst for further action in defining the obligations within ICESCR, leading to the adoption of General Comment ("GC") 3 on the nature of the ICESCR's obligations.

GC 3 espouses that where 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 [then the State party] is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*'.<sup>107</sup> The adoption of GC 3, for the first time, saw the CESCR identify specific measures and standards expected of a state if they are to comply with their ESCR treaty obligations. By identifying practices such as the provision of basic shelter and 'essential primary healthcare', the CESCR began its path to identifying certain core content of ESCR, so critical to their realisation that without their being in place, the state could not be viewed as having complied with its obligations under IHRL. Tasioulas, in his recent contribution to the minimum core debate, describes GC 3 as still being the 'closest there is to a canonical formulation in the

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<sup>104</sup> Limburg Principles at UN Commission on Human Rights, note verbal 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, 1987/17.

<sup>105</sup> *Ibid.*

<sup>106</sup> Philip Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' (1987) 9(3) Human Rights Quarterly 332 at 352.

<sup>107</sup> CESCR, General Comment No. 3 (n 81) at Para 10.

international sphere of the concept of a minimum core obligation'.<sup>108</sup> The position of GC 3 was reasserted in the Maastricht Guidelines of 1997, which again envisaged a violations approach to implementing the rights of the Covenant by raising the need for a minimum core of ESCR to be recognised and realised immediately.<sup>109</sup> There is, however, a further aspect of the doctrine which has raised specific questions over its ability to be limited by a lack of resources.<sup>110</sup> In the case of a state's MCOs not being complied with, the state bears an increased justificatory burden to demonstrate that maximum effort has been made to use its limited resources to meet the most basic requirements of the Covenant. As elucidated by the CESCR, 'in order for a State party to be able to attribute its failure to meet at least its MCOs to a lack of available resource it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>111</sup> Further raising the notion that the realisation of ESCR, even at a minimum threshold, brings into question the overall use of resources within the state and, thus, budgetary decision-making. With the CESCR's attempt at outlining the 'core content' of ESCR, it naturally follows 'that the fulfilment of the corresponding obligations is neither costless – particularly not the duties corresponding to the 'basic needs' component, which requires States, for instance, to set up primary healthcare centres and to ensure that all have access to primary schools at a reasonable distance from the home – nor even finite.'<sup>112</sup> Moreover, the minimum core doctrine requires the mobilisation, allocation, and expenditure of public resources to realise and uphold any threshold set. It should, therefore, be included in any meaningful analysis of a state's approach to resourcing ESCR.

Since their inception, MCOs as an ESCR doctrine have been reiterated throughout the ESCR guidance provided by the CESCR.<sup>113</sup> Most prominently, this is carried out within GC 14 on the right to health, which not only reasserts the notion of 'core' elements of the right to health that must be satisfied with immediate effect but also goes so far as to outline what falls within the MCO of the right. For example, the CESCR outlines the expectation that at a very minimum, states ensure 'the rights of access to health facilities, goods and services on a non-discriminatory basis', 'ensure access to the minimum essential food, which is nutritionally

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<sup>108</sup> John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now' (2017) Nordic Trust Fund, World Bank Research Paper at 13.

<sup>109</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2000/13; see also discussion in Bílková (n 70).

<sup>110</sup> De Schutter (n 101).

<sup>111</sup> CESCR, General Comment No. 3 (n 81).

<sup>112</sup> De Schutter (n 33) at 16.

<sup>113</sup> See CESCR, General Comment No. 13 (n 78) at para 13.

adequate and safe, to ensure freedom from hunger to everyone’, ‘provide basic shelter’ and ‘essential drugs’ and adopt a national health strategy.<sup>114</sup> The formulation demonstrates their minimal nature, which has also been carried out for other ESCRs through subsequent general comments. Indeed, it is now possible to identify the core content, as envisaged by the CESCR, for each ESCR contained within the ICESCR, although to differing extents and details. Since the doctrine’s explicit recognition, the scholarly community has spent significant time and ink on unpacking the intention of the added doctrine. Upon reviewing the practice of the CESCR and the added scholarly commentary, it is possible to deduce the purpose of introducing the doctrine was two-fold. Firstly, it was necessary to recognise that for ESCR realisation to be violable, justiciable, and accountable, a minimal threshold for their functioning is required.<sup>115</sup> A minimum floor without which ESCR would remain impossibly indeterminate, overly flexible, and consequently aspirational.<sup>116</sup> As Chapman later reflected, ‘the language of progressive realisation is predicated on the assumption that states parties would take their obligations seriously and move steadily toward full implementation of the rights covered by the Covenant’.<sup>117</sup> If ESCR were to provide a legal framework that adequately reflected the overarching intentions of the UDHR and secure human dignity for all, Article 2(1) required an interpretation that provided more direct and identifiable protection for those most marginalised and disadvantaged worldwide.

Upon this reading, the doctrine is best viewed as a further sub-duty of progressive realisation, without which progressive realisation would be left as a race with no starting line from which to begin. The CESCR, via GC 3, outlined that MCOs were to delineate an inviolable ‘core’ for ESCR in which a state could be shown to be violating ESCR due to a lack of even the most basic elements of the rights being respected.<sup>118</sup> By agreeing on a line beneath which no citizen can fall, the MCO doctrine aimed to set ‘a limit to permissible trade-offs and compliance delays’ in realising ESCR and ensure ‘States party to the ICESCR could no longer rely upon the flexibility endowed by the interoperability of Article 2(1)’ with guidance provided as to what

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<sup>114</sup> CESCR, General Comment No. 14 (n 83) at para 43.

<sup>115</sup> See extensive arguments and debate on this question in David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, 2008).

<sup>116</sup> For an overview, see De Schutter (n 45); and Chapman (n 82); See also Bruce Porter ‘Rethinking progressive realization: how should it be implemented in Canada?’ (4 June 2015, Background Research Paper) Social Rights Advocacy Centre.

<sup>117</sup> Audrey Chapman, ‘A ‘Violations Approach’ for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18(1) Human Rights Quarterly 23 at 38.

<sup>118</sup> Esin Öricü, ‘The Core of Rights and Freedoms: The Limits of Limits’ in Tom Campbell et al. (eds.) *Human Rights: From Rhetoric to Reality* (Oxford: Basil Blackwell, Reference, 1986) at 52.

constituted in the eyes of the CESCR as a clear violation of ESCR law.<sup>119</sup> Beyond advancing the notion of violable ESCR and attempting to tighten the ESCR legal framework, the minimum core doctrine was introduced to identify specific, basic practices states could take to demonstrate their upholding and compliance with ESCR. In other words, what GC 3 provided on its surface is a tool for identifying a sub-set of demands within the total body of requirements imposed by the ICESCR. It could thus be used to determine further the essential content of ESCR, which would be of higher priority for states parties to the Covenant. As Coomans proposed, the minimum core content should embody ‘the intrinsic value of each human right...’ made up of elements essential for the very existence of that right as a human right.<sup>120</sup> Under this interpretation, MCOs are designed to build ESCR normative content and reinforce its moral grounding, value, legitimacy, and purpose within the IHRL framework.<sup>121</sup> The doctrine serves as a method of guidance and prioritisation within the multiplicity of international obligations for ESCR by outlining what must be satisfied first by a State and to what threshold. Indeed, Chapter 4 is dedicated to its defence in theory and practical implementation, with the potential to set national ‘core minimum’ priorities to guide budgetary decision-making.

The doctrine, however, is not without its challenges, and there remains a lot of work to be done to move to the stage where MCOs are an accepted and applicable aspect of enforcing ESCR at both the international and domestic levels.<sup>122</sup> There remains a wealth of debate over the soundness of its theoretical formulation and, importantly, approaches to its domestic application.<sup>123</sup> An ongoing theoretical debate has underscored the doctrine’s philosophical and legal complexity and the serious questions it poses about its yet-to-be-realised practical relevance in the real world. It is a contradiction that has played out through the last several decades, with the practices of the CESCR leaving an inconsistent and oscillating approach to

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<sup>119</sup> Tasioulas (n 108) at 15; and Aidan Flegg, ‘Minimum Core Obligation under the UN Convention on the Rights of the Child: A Scottish Perspective’ 25(1) *Edinburgh Law Review* 238.

<sup>120</sup> Fons Coomans ‘Exploring the Normative Content of the Right to Educational as Human Rights: Recent Approaches’ (2004) 50 *Persona y Derecho* 61 at 76.

<sup>121</sup> See Rolf Kunnenmann, ‘The Right to Adequate Food: Violations Related to its Minimum Core Content’ as found in Fons Coomans *Exploring the Core Content of Economic and Social Rights: South African and International Perspectives* (D Band & S Russell edn, 2002) at 71. See also Allen Buchanan ‘Why International Legal Human Rights’ at 244-262 as found in Rowan Cruft Matthew Liao, and Massimo Renzo *Philosophical Foundations of Human Rights* (Oxford University Press, 2015).

<sup>122</sup> Max Harris, ‘Downsizing rights: Why the ‘minimum core’ concept in International Human Rights Law should be abandoned’ (2014) 1 *Public Interest Law Journal of New Zealand* 32.

<sup>123</sup> See Katharine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33(1) *Yale Journal of International Law* 113; Erika De Wet *The Constitutional Enforceability of Economic and Social Rights: The Implications of the German Constitutional Model for South Africa* (Durban: Butterworths 1996); Mark Tushnet, ‘Social Welfare Rights and the Forms of Judicial Review’ (2003) 82(7) *Texas Law Review* 1895; David Bilchitz (n 115); Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008); and John Tobin *The Right to Health in International Law* (Oxford University Press, 2012).



their formulation and enforcement.<sup>124</sup> The CESCR's oscillating position on issues such as the derogability of MCOs, their determined content, or universal or relative applicability has left states bereft of meaningful direction with no internationally recognised consensus on implementing the core doctrine.<sup>125</sup> Providing further insight into some key areas of contention, Forman et al. explain that 'the core concept as defined does not resolve incommensurable conflicts between fixity and movement, actions and outcomes, and needs and resources'.<sup>126</sup> Moreover, despite consistently identifying and reaffirming the doctrine's existence in ESCR law, the lack of clarity provided by the CESCR has helped fuel a view that achieving a violations approach through the use of MCOs is not viable.<sup>127</sup> Nor have other UN Committees, despite recognising MCOs place within the ESCR framework as they apply to specific groups, provided the much-needed clarity as to their content and scope. Too often, the CESCR has failed to utilise the minimum core of rights to hold states accountable, even when states lack primary healthcare, suffer from starvation, or people lack access to adequate, safe drinking water.<sup>128</sup> This failure to associate State MCOs with grave violations of the ICESCR has led to substantial and needed criticism of the CESCR approach. Indeed, Young and others have gone so far as to call into question their place in the ESCR framework altogether in thorough and detailed explorations of potential approaches to determining their universal content.<sup>129</sup> Others, such as Tasioulas, have reignited the search for determined and violable content to be defined so that the doctrine can finally be utilised as it was designed.<sup>130</sup> This thesis adopts the view that their inherent indeterminacy should not distract or discourage ESCR advocates from the aim of providing their realisable content. In contrast, the current prevailing circumstances around ESCR realisation necessitate solving these seemingly irresolvable conflicts and providing them with such.<sup>131</sup> Achieving such a goal, as will be explored through this thesis not only opens the potential to protect ESCR against the very harshest of social spending cuts for those most vulnerable and marginalised in our societies, it potentially presents a range of practical benefits to the overall budgeting process designed for the fulfilment of ESCR in relation to resource

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<sup>124</sup> Boyle (n 1).

<sup>125</sup> CESCR General Comment No 14 (n 83); and General Comment No 19: The Right to Social Security (Art 9 of the Covenant), 4 February 2008, E/C 12/GC/19, para 59 & 60. For further evidence of the CESCR's oscillating position on the MCD, see CESCR, General Comment No 13 (n 78) at para 57; and General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art 15, para 1(c) of the Covenant), 12 January 2006, E/C 12/GC/17, para 41.

<sup>126</sup> Lisa Forman et al. 'Conceptualising MCOs under the right to health: How should we define and implement the 'morality of the depths' (2016) 20(4) The International Journal of Human Rights 531 at 536.

<sup>127</sup> Young (n 123); Harris (n 122).

<sup>128</sup> See CESCR General Comment No. 14 (n 83) at para 25.

<sup>129</sup> Young (n 123).

<sup>130</sup> Tasioulas (n 108).

<sup>131</sup> Flegg (n 119).

prioritisation and proportionate fiscal decision-making.<sup>132</sup> In unpacking the doctrine further, particularly concerning its implications for resource use, this thesis aims to make a key contribution to the overall ESCR legal landscape.

#### 1.4 Concluding Remarks: The Added Complexity and Limits of Devolution

This introductory chapter has set out to establish the prevailing human rights journey in Scotland and the many theoretical and practical questions the incorporation of ESCR into domestic law raises in relation to its overall use of resources. Indeed, suppose progressive realisation and minimum core are set to become domestic duties upon duty-bearers throughout Scotland. In that case, understanding their implications for resource-based decision-making will be critical to their overall successful implementation and useful for establishing accountability when violated. Before outlining the socio-legal and engaged approach to research production within the methodology below, it is necessary to raise some further context concerning Scotland's status as a devolved nation within the UK. Since 1998, Scotland has been a devolved nation within the wider state of the UK and consequently only has specific devolved powers governed by the Scotland Act 1998. For those not used to the concept of devolution, it can be understood as a form of subnational administration with specified powers provided to it by the sovereign state.<sup>133</sup> Devolved powers cover, inter alia, areas such as education and training, environment, health and social care, local government, elements of social security and, importantly, certain taxation powers.<sup>134</sup> Scotland's devolution agreement, therefore, provides powers over critical policy areas for the realisation of ESCR and, since its inception, has opened the door to Scotland often adopting different policies and practices to the UK government in devolved areas.<sup>135</sup> However, this apparent freedom granted by devolved decision-making must be viewed within the broader context of what remains reserved to the UK Government. These areas include the constitution, immigration, trade, foreign affairs, and many equal opportunities (equality law).<sup>136</sup> More critically, much of macroeconomic decision-making and general fiscal policy, such as international borrowing and key tax measures,

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<sup>132</sup> Landau (n 103).

<sup>133</sup> See generally, Mark Lazarowicz and Jean McFadden *The Scottish Parliament: Law and Practice* (Edinburgh University Press, 2018).

<sup>134</sup> For more detail, see Scottish Parliament 'Devolved and Reserved Powers'. Available at:

<https://www.parliament.scot/about/how-parliament-works/devolved-and-reserved-powers> (accessed 8<sup>th</sup> July 2024).

<sup>135</sup> For an overview, see Nicole Busby's 'Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland' (2021) Human Rights Consortium Scotland.

<sup>136</sup> For full insight into devolved and reserved areas for decision-making, see the Institute for Government 'Devolution for Scotland'. Available at: <https://www.instituteforgovernment.org.uk/our-work/topics/devolution/scotland> (accessed 13 June 2024).

remains reserved for the UK government.<sup>137</sup> In effect, it maintains control over many of the structural levers available to states, particularly those related to economic policy and, thus, financial resources. The devolution agreement remains complex, open to interpretation and was the product of the political climate of the UK in the late 1990s. A climate that has dramatically evolved over the last two decades.<sup>138</sup>

Without delving into all the intricacies of the devolution agreement, it is necessary to raise recent court cases dealing with interpreting the limits of devolution.<sup>139</sup> Despite being primarily focused on developing proactive steps through which to realise ESCR via public budgets in Scotland over the more reactive justiciability of the framework, the reason to raise these developments is twofold. Firstly, it is to recognise that under the Scotland Act 1998, it has been explicitly clarified that the Scottish Parliament can observe and implement international obligations in devolved areas, including via the incorporation of international human rights treaties into domestic law.<sup>140</sup> Lord Reed, in opining the decision of the Supreme Court in the challenge to the UNCRC Act, left this beyond legal doubt: ‘Neither reference takes issue with the Scottish Parliament’s decision to incorporate the UNCRC and the ECLSG. That is recognised to be a matter for the Scottish Parliament. The references reflect concerns that some of the provisions of the Bills would impinge on matters which lie outside the legislative competence of the Scottish Parliament.’<sup>141</sup> The latter part of Lord Reed’s findings raises a secondary consideration. While it is within the power of the Scottish Government to introduce legislation to incorporate international treaties to the Scottish Parliament, ‘the way Scottish Parliament does so must fall within the devolution settlement, as provided by the Scotland Act 1998, and as narrowly interpreted by the Supreme Court’.<sup>142</sup> An interpretation so narrow it effectively (and excessively in the eyes of some) limits the overall extent to which Scotland

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<sup>137</sup> Schedules 4 & 5 Scotland Act 1998.

<sup>138</sup> For more details on the relationship between the two administrations, see the Scottish Affairs Committee’s ‘The relationship between the UK and Scottish Governments’ (House of Commons, 2019). For more detail on recent constitutional changes in the UK, see Alison Young *Unchecked Power? How Recent Constitutional Reforms are Threatening UK Democracy* (Bristol University Press, 2023); and on constitutional dialogue in the UK, see Alison Young *Democratic Dialogue and the Constitution* (Oxford University Press 2017). See also, Aileen McHarg ‘Devolution in Scotland’ (2020) University of Strathclyde.

<sup>139</sup> Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill; Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42 [2021] 1 WLR 5106.

<sup>140</sup> Scotland Act 1998 Schedule 4 at para.7(2).

<sup>141</sup> Reference by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] UKSC 42, [2021] 1 WLR 5106 at para 6.

<sup>142</sup> Michelle Donnelly ‘Reconsideration of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill – time for a Scottish Children’s Code?’ (17 November 2023) University of Strathclyde.

can RPF the rights in practice.<sup>143</sup> As Donnelly establishes in a recent blog on the issue, ‘the major implication of the proposed amendments is to limit the coverage of the Bill and, by extension, weaken the scope of protection provided by its model of incorporation. Coverage is to be limited to Acts of the Scottish Parliament and will not extend to Acts of the UK Parliament which operate in areas of devolved competence.’<sup>144</sup> Inevitably, this affects and will affect various pieces of legislation, impacting the overall realisation and, ergo, justiciability of rights, whether the enacted UNCRC Act or the incoming Human Rights Bill enumerate them. From macroeconomic decision-making to localised service delivery, Scotland’s pursuit of complying with international human rights standards remains inherently (and seemingly increasingly) tied to the UK Government’s overall approach.

The acute challenges the Supreme Court’s findings present the effective implementation of ESCR in Scotland do, however, raise an integral point for moving forward and basis for this thesis. It presents a strong argument for Scotland to concentrate on non-legal measures of human rights implementation alongside legal incorporation and enforcement. The legal limits of devolution applicable to incorporating international human rights treaties do not extend to building a human rights-based culture nor extend to the manner in which Scotland’s public bodies choose to embed rights-based decision-making practices. Implementing rights requires a plethora of state action for their value to be felt throughout a society of rights-holders. From legal measures such as adopting new legislation to the more administrative processes required in the everyday running of a state, human rights are increasingly viewed as not just a moral nor even legal foundation for a just society’s development.<sup>145</sup> They can provide a framework designed to permeate through the very fabric and deliberation of everyday decision-making.<sup>146</sup> Achieving a human rights-based culture within both the public and private spheres in Scotland is not merely a role for legislation and law, nor the courts, which interpret and uphold it, for they can only react to and remedy their violation (often as an inaccessible means of last resort).<sup>147</sup> It is the job of decision-makers, the occupation of administrators, the very enterprise

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<sup>143</sup> Alan Miller ‘The Supreme Court’s judgment on the UNCRC (Incorporation) (Scotland) Bill – what will be the impact on Scotland’s human rights journey?’ (2022) University of Strathclyde. See also Kasey McCall-Smith ‘the devil is in the details: entrenching human rights protection in the UK’s devolved nations’ (2023) 74(1) Northern Ireland Legal Quarterly 95.

<sup>144</sup> Donnelly (n 142).

<sup>145</sup> Alston (n 47); For philosophical views on the nature of human rights see Joseph Raz ‘Human rights without foundations’ in John Tasioulas and Samantha Besson *The Philosophy of International Law* (Oxford University Press, 2010); and David Miller ‘Joseph Raz on human rights: a critical appraisal’ in Cruft, Liao and Renzo (n 121).

<sup>146</sup> Presented as ‘Human Rights-Based Approaches’, the human rights framework has become a tool to guide everyday decision-making. For example, in Scotland, see the work of the SHRC at <https://eqhria.scottishhumanrights.com/eqhriaaddvalpolicy.html>; See also Mashood Baderin and Robert McCoquordale *Economic, Social, and Cultural Rights in Action* (Oxford University Press 2007).

<sup>147</sup> Boyle et al. (n 1).

of business leaders, and a role for the everyday rightsholders who believe that human dignity is not just a value to be preached but a value to be lived, experienced, and shared by all. As a devolved nation, Scotland is inherently limited in how it can legally apply the international human rights framework to domestic legislation. No such limitation exists in utilising said framework as a basis for rights-based and proportionate decision-making in devolved areas, including its overall use of limited resources. Resourcing ESCR in Scotland through the paradigm of IHRL is not just a goal within Scotland's powers and grasp... it would help to reflect, and further, the history of social conscience and justice Scotland has, in moments of history, aspired to.

## **Chapter 2**

### **Methodology**

Methodology is ‘not some super-ordained set of logical procedure that can be applied haphazardly to any empirical problem.’ Instead, it constitutes ‘a whole range of strategies and procedures that include: developing a picture of an empirical world; asking questions about that world and turning these into researchable problems; [and] finding the best means of doing so’.<sup>148</sup> This chapter outlines the methodology and research design adopted for this project. From the evolving nature of its research questions to its engaged approach with fiscal and human rights practitioners, and interdisciplinary research design, this chapter aims to highlight an innovative and expansive approach to research production which marries the findings gleaned from a desk-based, primarily doctrinal review of the IHRL framework with empirical evidence built through engaging with fiscal and human rights practitioners in Scotland. The chapter begins by charting the roots of the research and its evolving nature, driven and deeply impacted by the opportunities to engage with and work on the ongoing pursuit of ESC rights incorporation in Scotland, and moves on to provide an in-depth explanation and justification of the increasing need for interdisciplinary research designs when researching contemporary issues within IHRL. The chapter continues by delving into the specific methods used, including the use of surveys, interviews, and a focus group to gather qualitative data exploring fiscal practices within Scotland. In doing so, it provides comment on the gulf that can too often exist between theory and practice and advocates the increasing need for engagement with those working in the public sector to embed these norms and practices. Finally, the chapter concludes with personal reflections of the researcher as a salient aspect of adopting an engaged, participatory approach with experts in the field.

First, however, it is pertinent to briefly comment and reflect upon this research as a continuation and furthering of a previous investigation into human rights budgeting initiated by the Scottish Human Rights Commission (“SHRC”) as it laid the roots from which the research questions formed. Within the broader context of Scotland’s pursuit of incorporating international human rights norms and standards into domestic law, in 2018 the SHRC launched a short, three-month research project focused on exploring the application of ESC rights law to public budgets to build upon the work previously carried out by Blyberg.<sup>149</sup> Having been hired as a researcher

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<sup>148</sup> Pertti Alasuutari, Julia Brannen, and Leonard Bickman, ‘Social Research in Changing Social Conditions’, in Pertti Alasuutari, Leonard Bickman, and Julia Brannen, *The SAGE Handbook of Social Research Methods* (London: SAGE Publications Ltd 2008) at 1.

<sup>149</sup> Ann Blyberg ‘HRB and Budget Analysis’ (2015) Scottish Human Rights Commission.

for the project by the SHRC, this initial dive into the intersection between fiscal processes and decision-making and the realisation of human rights acted as the basis through which the initial research questions were formed, and this overall PhD project was designed. The task within this exploratory research within the SHRC was to broadly explore:

- What links can be made between human rights and public budgets?
- Why should we be using HRB as a framework for decision-making?
- How can we begin to adopt HRB as a framework for decision-making in Scotland?

Being involved with the work of the SHRC, what became quickly and notably clear was that while the importance of public budgets to realising human rights has been evident since the very devising of the international legal framework, what has remained a significant challenge is closing the gap between theory and meaningful practice. For example, in attempting even basic rights-based budget analysis, barriers quickly arose with regard to the information that was publicly available and the troubling difficulty that was found in ‘following the money’.<sup>150</sup> Further issues were also uncovered such as a lack of a rights-based approach to implementing human rights budgets and engaging with those involved in fiscal practices. The SHRC published the resulting research in 2019 as a series of six briefing papers titled ‘Human Rights Budget Work: What, Why, How’.<sup>151</sup> It has recently been updated to include a seventh briefing on taxation.<sup>152</sup> The findings these outputs captures and limitations the investigation faced has directly driven the approach adopted here. As Clark has noted, good research often ‘is driven by impatience with bad answers to interesting questions’ and working on the SHRC’s exploration of human rights budgeting shaped a shared understanding that much more time, funds, and thought was needed to begin building rights-based budgetary practices in Scotland.<sup>153</sup> the ‘gaps’ and ‘problems’ identified presented the foundations for further research on the meaning of ESCR obligations as well as their implications for public finance.<sup>154</sup> It established the basis from which this research was built with the SHRC acting as a collaborative partner throughout the PhD project working actively with the researcher on turning the projects findings into meaningful policy and practice in Scotland.

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<sup>150</sup> SHRC ‘The Open Budget Survey 2019 Results for Scotland’s 2017/18 Budget’ (2020) Scottish Human Rights Commission, accessed here <<https://www.scottishhumanrights.com/media/2014/scotland-2019-obi-report-vfinal.pdf>> (accessed 22/07/24).

<sup>151</sup> SHRC ‘Human Rights Budget Work: What, Why, How?’ (2019) Scottish Human Rights Commission.

<sup>152</sup> SHRC ‘Briefing Paper 7: Human Rights and Taxation’ (2023) Scottish Human Rights Commission.

<sup>153</sup> William Clark ‘Asking Interesting Questions’ in Luigi Cutini & Robert Franzese *The Sage Handbook of Research Methods in Political Science and International Relations* (Sage Publications Ltd 2020) at 7.

<sup>154</sup> Jorgen Sandberg & Mats Alvesson ‘Ways of constructing research questions: Gap-spotting or problematization?’ (2011) 18(1) *Journal of Organization* 23; See also, William H Starbuck *The production of knowledge: The Challenge of Social Science Research* (Oxford University Press 2006).

## 2.1 The Evolving Nature of Research: Opportunities for Impact

This project's overarching aim was to provide a more detailed understanding of where apparent gaps in knowledge or practice had been identified and to produce further innovative questions that 'will open up new research problems, might resolve long-standing controversies, could provide an integration of different approaches, and might even turn conventional wisdom and assumptions upside down by challenging old beliefs'.<sup>155</sup> Broad questions were initially formed on the scope and application of IHRL obligations, their connections to and relevance for public budgets, and further questions on Scotland's specific barriers and opportunities to adopting rights-based budgeting as a framework for improved fiscal decision-making. These initial questions were inherently interdisciplinary, delving into law, philosophy, finance, and accounting, and ultimately viewed human rights as a legal framework and social construct to influence and guide practice.<sup>156</sup> Producing meaningful contributions required a dynamic approach to research design, as was considered during the planning stages of the project's first months, with engagement with experts at its heart.<sup>157</sup> However, a little over six months into beginning to study, a global pandemic hit and brought about a new way of life for nearly two years. It is difficult to quantify the impact of these more isolated years on the outputs here, but they are undoubtedly significant. The onset of COVID-19 and the 'lockdowns' that followed created specific challenges to overcome.<sup>158</sup> Primarily, it was necessary to reflect upon and mitigate issues arising in relation to data collection through in-person interviews with experts in the field. Due to COVID-19 travel restrictions and social distancing measures in place, any primary data collection with practitioners would need to be carried out via online video calls.<sup>159</sup> Further to this point, however, was the realisation that many government organisations, businesses, and public bodies alike were in crisis mode and merely attempting to put out the fires of that specific day, making their attention and engagement much more difficult to secure. Despite the restrictions we all endured, the project has still managed to be hugely influenced by the journey Scotland is on due to the unique opportunities for 'engaged research' through knowledge transfers on human rights within different groups and sectors, both governmental

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<sup>155</sup> Campbell et al. *What to Study: Generating and Developing Research Questions* (Sage Ltd 1982) as found in Sandberg and Alvesson (n 154) at 24.

<sup>156</sup> Cruft, Liao and Renzo (n 121).

<sup>157</sup> Lesley Tomaszewski, Jill Zaretsky & Elsa Gonzalez 'Planning Qualitative Research: Design and Decision-Making for New Researchers' (2020) 19 *International Journal of Qualitative Research* 1; See also, Douglas Vick 'Interdisciplinarity and the Discipline of Law' (2004) 31(2) *Journal of Law and Society*; And Mathias Siems 'The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert' (2009) 7(1) *Journal of Commonwealth Law and Legal Education* 5.

<sup>158</sup> For more detail, the inquiries can be viewed here: <<https://www.covid19inquiry.scot/>> & <https://covid19.public-inquiry.uk/>> (accessed 18/07/24).

<sup>159</sup> Scott Greenspan et al. 'Use of Video Conferencing to Facilitate Focus Groups for Qualitative Data Collection' 5(1) *American Journal of Qualitative Research* 85.



and non-governmental, and engaged individuals. None more so than the opportunities gained through the suspension of this study as it went into its final year.

Having opted to gain some governmental experience via a three-month internship focused on children's rights in Scotland, the internship snowballed into being invited to draft the Scottish Government's Children's Rights Scheme and guidance on children's rights budgeting.<sup>160</sup> This role eventually led to my acceptance as policy manager and overall senior advisor to Scotland's Human Rights Strategy and Legislation Unit, which was responsible for developing Scotland's Human Rights Bill. This role had a profound impact on the overall design of the study and its intended contributions. It brought the sheer scale of the challenges faced by the government to the fore and the widening chasm between human rights theory and practice into acute focus. In short, being catapulted into a central decision-making role shaped the study by pushing for a closer focus on embedding the theory of ESCR and HRB practically and pragmatically. Over developing a rights-based analysis of Scotland's public finances, attention turned to providing decision-makers with active steps to take to embed rights-based questions into overall fiscal decision-making. The extensive engagement this post afforded with rights holders, domestic and international rights advocates and organisations, national and local government officials, and Scottish Cabinet Ministers cannot be captured within the data used in this thesis. However, it is raised here due to its deep impact on the researcher's views and convictions. It all provided a unique opportunity to innovate and adopt a reflexive practice throughout the research, and particularly the write-up.<sup>161</sup> Thus, while setting the direction of travel, the project's initial questions 'evolved' over time to reflect areas of pressing need for further theoretical and legal foundations for use within Scotland's ongoing 'journey'.<sup>162</sup> They were significantly narrowed to:

- i. What synthesis can be built to provide an interdisciplinary understanding and justification for adopting the minimum core doctrine within ESCR?
- ii. What taxonomy should guide the domestic incorporation of the minimum core doctrine in Scotland, and what are the implications for public budgets?

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<sup>160</sup> See generally, Scottish Government 'Taking a children's human rights approach: guidance' (2024) Scottish Government. Available at < <https://www.gov.scot/publications/guidance-taking-childrens-human-rights-approach/pages/3/>> (accessed 30 June 2024).

<sup>161</sup> Igor Gontcharov, Karen Kobayashi & Amanda Grenier 'Knowledge mobilisation for an engaged researcher' as found in Andrew Sixsmith et al. *Knowledge, Innovation, and Impact: A Guide for the Engaged Health Researcher* (Springer 2020).

<sup>162</sup> John Cresswell & Cheryl Poth *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (Sage Ltd 2018).

- iii. What are the key obligations and principles of IHRL applicable to public budgets, and what is the potential for human rights budgeting in Scotland?
- iv. How can this be built into a framework and process for domestic practice through the budget cycle in Scotland, both at the national and local governmental levels?

The questions became inherently more practical than those initially set in the understanding that Scotland's current circumstances required meaningful steps to be laid out over being extensively, theoretically justified. This has driven the approach to data analysis and the setting out of more practical findings in Chapters 6, 7, and 8. It is hoped that in the future, upon the passing of the Human Rights Bill, a new human rights framework for Scotland will be in place, and specific approaches within the framework can be traced back to the proposals and findings of this thesis.

## 2.2 Capturing Practitioners' Voices: An Engaged Approach to Research Production

Participatory Action Research ("PAR") has been used for decades to thoroughly engage practitioners, activists, and decision-makers and build a more enhanced connection between the researcher and those involved in the research.<sup>163</sup> It formed a primary tenet of the original research design to get into the details of budgetary decision-making in Scotland and assess the potential for HRB techniques to be implemented and engaged. To do so would need to involve those actively engaged in making decisions throughout budgetary processes within duty-bearers in Scotland. PAR, ultimately, enables 'respect for people and for the knowledge and experience they bring to the research process, a belief in the ability of democratic processes to achieve positive social change, and a commitment to action'.<sup>164</sup> Equally, demonstrating the impact of your research has always represented a key consideration for those in the knowledge production industry.<sup>165</sup> From PAR methods popularised in the Americas to 'engaged research' or the increasingly popular 'activist research' recently explored specifically through human rights action, there has always been strong recognition of the need for research committed to

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<sup>163</sup> Robin McTaggart 'Participatory Action Research: issues in theory and practice' (1994) 2(3) *Educational Action Research* 313; See also, Sara Kindon, Rachel Pain & Mike Kesby *Participatory Action Research Approaches and Methods* (London: Routledge 2007); Finally, for use of PAR in legal research, see Emily Houh & Kristin Kalsem 'Its Critical: Legal Participatory Action Research' (2013) 19 *Michigan Journal of Race and Law* 287.

<sup>164</sup> Mary Brydon-Miller, Davydd Greenwood & Patricia Maguire 'Why Action Research?' (2003) 1(1) *Action Research* 9 at 15.

<sup>165</sup> Brendan McCormack 'Engaged Scholarship and research impact: integrating the doing and using of research in practice' (2011) 16(2) *Journal of Research Nursing* 111.

producing and sharing knowledge to play its essential role in social change and progress.<sup>166</sup> Each of these ‘frameworks’ has its specific lens. For example, activist scholarship is often focused on direct relationships with activist or community groups and producing reciprocal knowledge with specific groups to deliver research that can have a direct impact.<sup>167</sup> The literature also often argues for the adoption of critical lenses to viewing phenomena and is prominent through approaches such as critical race theory or feminist research design.<sup>168</sup> However, it would be a little too rich to justify the use of ‘activist’ scholarship here, having worked inside a government and being wary of Yennox and Lewis discussing the descent of human rights activism into ‘elitist’ institutions and movements.<sup>169</sup>

Engaged scholarship takes a step back from the need to be directly engaged in critical theory, pedagogy, or specific activist causes. More broadly, it is a method of capturing knowledge production and transfer between researchers and practitioners. Building since the 1990s and Boyer’s seminal work ‘Scholarship of Engagement’,<sup>170</sup> Van de Ven succinctly describes it as ‘a participative form of research for obtaining the advice and perspectives of key stakeholders (researchers, users, clients, sponsors, and practitioners) to understand a complex social problem. By exploiting differences in the kinds of knowledge that scholars and other stakeholders can bring forth on a problem... engaged scholarship produces knowledge that is more penetrating and insightful than when scholars or practitioners work on the problems alone.’<sup>171</sup> This description more adequately defines the approach taken here, focusing more on listening to and exchanging ideas with those equally committed to social change in Scotland instead of focusing on one particular activist group or critical lens from which to understand and approach a problem. While the literature on these approaches to knowledge production provides detailed and fiercely defended boundaries between them, Hale’s collection identifies that core to them all is being part of a ‘project of producing new knowledge, of integrating more abstract and universal sorts of knowledge with more concrete and particular sorts of knowledge, and of keeping action and all its possibilities at the centre of attention’.<sup>172</sup> Hale’s summation captures

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<sup>166</sup> Andrew Van de Ven *Engaged Scholarship: A Guide for Organisational and Social Research* (Oxford University Press 2007); and Charles Hale *Engaging Contradictions: Theory, Politics, and Methods of Activist Scholarship* (University of California Press Ltd 2008); Corinne Lennox & Yeşim Yildiz ‘Activist Scholarship in Human Rights’ (2019) 24(1) *International Journal of Human Rights*.

<sup>167</sup> Sharon Paynter ‘Tackling Wicked Problems Through Engaged Scholarship’ (2014) 7(1) *Journal of Community Engagement and Scholarship*; and Hale (n 166).

<sup>168</sup> Julia Rouse & Helen Woolnough ‘Engaged or Activist Scholarship? Feminist reflections on philosophy, accountability and transformational potential’ (2018) 36(4) *International Small Business Journal* 429.

<sup>169</sup> Lennox & Yildiz (n 166).

<sup>170</sup> Ernest Boyer ‘The Scholarship of Engagement’ (1996) 49(7) *Bulletin of the American Academy of Arts and Sciences* 18.

<sup>171</sup> Van de Ven (n 166) at ix.

<sup>172</sup> Hale (n 166) at xxv.

the nature of knowledge production as a shared endeavour, with PAR, activist, and engaged scholarship offering a methodological basis to critically evaluate and capture the influence of practitioners on this project and its contributions.

As Yennox and Lewis also identify, studying human rights lends itself particularly well to this approach to knowledge production. They provide: ‘Much of human rights activism and scholarship finds common ground in the international legal framework of human rights. This shared normative starting point is exceptional in scholarship more generally, which is to say that not many other disciplines can so clearly identify a well-defined link between their (principled) research aims and practitioners’ aims.<sup>173</sup> Human rights, by their very nature, whether viewed as positivist legal entitlements, a philosophical constructivist or moral ideology, or an expression of power relations within and between states, can attract those dissatisfied with the status quo of injustice for themselves and others. Human rights, as with law more generally, ‘although written in books, exists in constant and legitimate engagement with its world, social reality. Among academic subjects, law is uniquely alive in this way. It is words in power; its texts live in social space, ordering and reflecting structures of powers...’<sup>174</sup> Legal research must be encouraged to move beyond the confines of the positivist ‘black letter law’ methods so often relied upon and engage more thoroughly with the political and socio-economic conditions in which they exist and influence. To do so requires listening to, challenging, and reflecting upon the broad church of human rights perspectives, crossing theory and practice as well as the respective doubts and enthusiasm from practitioners expected to use or at least understand it as a framework for decision-making.

As the growing literature on activist and engaged scholarship keenly alludes to, there are significant limitations to approaching research in this way. They mainly arise when relying upon positivist legal arguments from international law and the need for objectivity and neutrality when producing new knowledge through the social sciences.<sup>175</sup> For example, collaborative approaches to knowledge production can allow for pre-held biases to strengthen their hold on the findings and potentially undermine the validity of the collected data. This is acknowledged and tabled critically as a relevant limitation to this work. In response, however, some would argue that the ‘neutral’ and ‘value-free’ research often ascribed to legal or even

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<sup>173</sup> Lennox & Yildiz (n 166) at 13.

<sup>174</sup> Catherine MacKinnon ‘Engaged Scholarship as Method and Vocation’ (2010) 22(2) *Yale Journal of Law and Feminism* 193 at 200.

<sup>175</sup> Joshua Mitchell ‘Activist Scholarship: A review of three recent works’ (2009) 36(4) *Social Justice* 98.

socio-legal research ‘has never had the purity its partisans ascribe to it’.<sup>176</sup> Researching the potential of human rights to affect fiscal decision-making already presents the pre-held bias that human rights should be pertinent to all areas of society and governance. A bias others may disagree vehemently with.<sup>177</sup> Moreover, we rarely (if ever) can escape the pre-held biases that form through each individual's experience and perception of the world and any (potential) pittance of loss in neutrality and objectivity through adopting an engaged approach is, for this project, arguably a sacrifice worth making. For practitioners to engage with the trust required to illicit previously unheard views, they need not to feel they are merely the object of research but that the research aims also to further their objectives. Empathy for the challenges faced by rights holders and those working within duty bearers and (knowingly or unknowingly) shaping the pursuit of social justice acts to develop trust between all parties and foster space for the honest and often challenging exchange of ideas. Hence, while the limitations of adopting this methodological approach to data gathering and analysis are recognised, they are not viewed as outweighing the benefits it has furnished this project.

### 2.3 Research Design: The Conceptual Need for Interdisciplinary Research

As outlined above, the researcher's lines of inquiry can be viewed within two broad themes.<sup>178</sup> First, to unpack the meaning and applicability of IHRL, particularly ESCR, to public budgets and as an interrelated second, to contribute to ESCR theory by developing a justification for and practical approach to embedding the minimum core doctrine in Scotland. While interconnected, with MCOs forming a potentially crucial foundation of the HRB framework, these questions are distinct in nature and require a plethora of research from differing disciplines to find progress. It would always require an interdisciplinary approach.<sup>179</sup> It offers a framework that attempts to capture the fragments of knowledge from different disciplines and perspectives focused on the same overarching problem or phenomena.<sup>180</sup> Human rights, by their very nature, are cross-cutting and borrow foundational concepts from a mix of disciplines such as natural and political philosophy, the social sciences, law, and today, increasingly economics.<sup>181</sup> Moreover, when removed from their purely legal footing, human rights can be

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<sup>176</sup> Anthony Bradney ‘Law as a Parasitic Discipline’ (1998) 25 *Journal of Law and Society* 71 at 72.

<sup>177</sup> Jens Theilin ‘The inflation of human rights: A Deconstruction’ (2021) 34(4) *Leiden Journal of International Law* 831.

<sup>178</sup> Wendy Schrama ‘How to carry out interdisciplinary legal research: Some experience with an interdisciplinary research method’ (2011) 7(1) *Utrecht Law Review* 147.

<sup>179</sup> Basarab Nicolescu ‘Multidisciplinarity, Interdisciplinarity, Indisciplinarity, and Transdisciplinarity: Similarities and Differences’ (2014) 2 *RCC Perspectives* 19; Siems (n 154).

<sup>180</sup> Vick (n 157).

<sup>181</sup> Gillian McNaughton & Diane Frey *Economic and Social Rights in a Neoliberal World* (Cambridge University Press 2018).

viewed as a reflection of and balance between our collective political realities and moral aspirations. Peck more eloquently explains: ‘Whilst legally substantiated within international treaties and documents, human rights research derives much of its meaning from its inseparability from human nature and the human condition. People, not laws sit at its heart.’<sup>182</sup> Research in human rights has increased exponentially alongside the proliferation of human rights treaties, regional systems, Non-Governmental Organisations (“NGOs”), and government frameworks with recognition often paid to the additionality of adopting an interdisciplinary approach.<sup>183</sup> As recently recognised by Langford: ‘While temporal disciplinary monopolies and methodological paradigm wars have marked the field, human rights research has gradually embraced the pluralistic turn... indeed, human rights constitutes a natural field for interdisciplinary endeavour and methodological heterogeneity. It is neither a discipline nor delimited by a single discipline... it is both a research subject (internally) determined and research object (externally observed).’<sup>184</sup> Drawing from previous work by Nissani, Langford explains that there are ‘particular reasons’ for this.<sup>185</sup> Firstly, he argues that interdisciplinary human rights research often provides the ‘most significant breakthroughs’.<sup>186</sup> As the world grows ever more complex, it becomes increasingly challenging to ignore the inherently interrelated nature of our natural and built environment, our society and its values, our development and laws, and our most fundamental needs and potential for flourishing as human beings. The proliferation of human rights across all sectors of society has led to the increasing awareness and justification of a methodological basis for applying interdisciplinarity within researching existing laws and contemporary legal concepts.<sup>187</sup> Its potential need is spreading. From the nexus between the impact of business on human rights<sup>188</sup> or human rights growing intersections with the protection of the environment and climate justice, examples are pervasive.<sup>189</sup> The dangers of this proliferation are well known and commented upon in

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<sup>182</sup> Thomas Peck ‘Interdisciplinary Methodological Approaches to Desk-Based Socio-legal Human Rights Research’ (2023) *Law & Method* at 3.

<sup>183</sup> Eva Brems ‘Methods in legal human rights research’ in Fons Coomans, Fred Grunfeld & Menno Kamminga *Methods of human rights research* (Intersentia 2009); and Malcolm Langford ‘Interdisciplinarity and multimethod research’ and found in Bard Andreassen, Hans Otto Sano & Siobhan McInerney-Lankford *Research methods in human rights: A handbook* (Edward Elgar Publishing 2017).

<sup>184</sup> *Ibid* Langford at 161-162.

<sup>185</sup> *Ibid* at 163; see also Moti Nissani, ‘Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research’ (1997) 34(2) *The Social Science Journal* 201.

<sup>186</sup> Langford (n 183).

<sup>187</sup> Peck (n 182).

<sup>188</sup> David Bilchitz ‘The necessity for a business and human rights treaty’ (2016) 1(2) *Business and Human Rights Journal* 203; and Lee McConnell ‘Assessing the feasibility of a ‘business and human rights’ treaty’ (2017) 66(1) *International and Comparative Law Quarterly* 143.

<sup>189</sup> For an overview, see the work of the UN Special Rapporteur on Human Rights and the Environment, accessible here: <https://www.ohchr.org/en/special-procedures/sr-environment> (04/07/2024).

academic literature, but it is a trend that seems unlikely to slow down.<sup>190</sup> As the human experience moves online into the digital sphere, it is easy to foresee a continued need to study human rights for collaboration between disciplines and sole researchers adopting interdisciplinary research designs.<sup>191</sup> Using such an approach to contribute to the burgeoning enquiries of human rights and fiscal decision-making is merely another intersection evidencing this viewpoint. This ties neatly in with Langford's secondary benefit of interdisciplinary research in human rights, suggesting the most 'burning questions in human rights cannot be answered within the confines of a single traditional method'.<sup>192</sup> By this, Langford raises: 'whether it is parsing the contested meanings of specific rights, determining the impact of the international rights regime, measuring the general realisation of rights, assessing the legitimacy of human rights policies, proving the existence of discrimination or engaging with the challenges of biotechnology, eclecticism is essential'.<sup>193</sup> This represents a more pertinent argument when assessing the approach adopted within this particular study. As discussed in Chapter 1, one of the core critiques labelled at ESCR, leading to the 'bifurcation' outlined, is their indeterminacy.<sup>194</sup> Consequently, it can be argued that ESCR, as legal rights, only begin to take pragmatic shape, both from the perspective of policy and justiciability, when explored and understood with the input of other disciplines. A prime example of this is the right to health and the social determinants of health.<sup>195</sup> Another is the understanding of the right to an adequate standard of living through the study of poverty and development.<sup>196</sup> When considering all the legally recognised ESCRs, research and frameworks from other relevant but distinct disciplines would support and bolster them all. The same argument extends to exploring the obligations of ESCR and their relation to fiscal decision-making. Understanding them more comprehensively required moving beyond their basis in doctrines of law and extending the research into fiscal and accounting practice.

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<sup>190</sup> There is a plethora of excellent research done based on proliferating human rights and the concerns attached to doing so. For a snapshot, see Carl Wellman (1998) *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Routledge 1998); or Kasie McCall-Smith 'The proliferation of Human Rights: Between Devotion and Calculation' in Jan Wouters et al. *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs* (Edward Elgar 2020); and Theilen (n 177).

<sup>191</sup> Philip Alston 'What the "digital welfare state" really means for human rights' (2020) Open Global Rights.

<sup>192</sup> Langford (n 183) at 164.

<sup>193</sup> Ibid.

<sup>194</sup> Boyle (n 1).

<sup>195</sup> Brigit Toebes & Karien Stronks 'Closing the Gap: A Human Rights Approach Towards Social Determinants of Health' (2016) 23(5) *European Journal of Health Law* 510; see also, Audrey Chapman 'The social determinants of health, health equity, and human rights' (2010) 12(2) *Health and Human Rights* 17.

<sup>196</sup> Hans-Otto Sano 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development' (2000) 22(3) *Human Rights Quarterly* 734; Stephen Marks 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137; and Amartya Sen 'Human Rights and Capabilities' (2005) 6(2) *Journal of Human Development*.

The first line of in-depth enquiry within the research was to review key ESCR literature to develop a clear understanding of the theory and practice of ESCR today. ESCR law is a burgeoning field of inquiry, with scholarship and case law diverse and widespread. Much could be drawn from desk-based research on ESCR and HRB. This further required literature, research, and adopted frameworks from finance and accounting to bolster the arguments made from a rights-based perspective. However, delving into ESCRs, particularly that of the minimum core doctrine, it became apparent that the leading literature could not itself rely entirely upon the doctrinal approach so often adopted in legal research and required expanding into more comprehensive political and moral philosophy. Raising such theoretical themes as basic human needs, minimal roles of the state, and the potential constitutional entrenchment of a social minimum within our societies, merely building a basis from which to argue and justify the place of the doctrine within ESCRs law required an assessment and appreciation of the very foundations of human rights as a moral, political, social, and legal entity.<sup>197</sup> To do so, it was necessary to wrestle with many of the heavyweight philosophical contributions focused on questioning and building the basis of human rights.<sup>198</sup> Alongside these foundations, ESCRs are concerned with the state's role in satisfying citizens' material needs and, consequently, the overall distribution of resources within a society. Distributive justice has long been a centrepiece of contemporary political philosophy, with the debates of Rawls and Nozick providing key, competing contributions in recent decades.<sup>199</sup> With 'justice as fairness' and the notion of the 'original position', as conceived by Rawls, underpinning the very formulation of the social minimum, understanding their basis was crucial.<sup>200</sup> Furthermore, studying ESCR explores the concept of basic needs with dignity from several perspectives. Dignity is an elusive yet powerful concept, with its very use in language having been found to help enable people to connect with the idea of and need for human rights.<sup>201</sup> Its use in law is common both within the language of international treaties as well as the legal interpretation within domestic courts.<sup>202</sup> However, its legal understanding is limited when situated in the broader context of satisfying people's most basic needs in practice. It is an underlying value in search of content

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<sup>197</sup> For differing perspectives, see Cruft, Liao and Renzo (n 121); See also Michael Freeman 'The Philosophical Foundations of Human Rights' (1994) 16 Human Rights Quarterly 491; and Jerome Shestack 'The Philosophical Foundations of Human Rights' in Robert McCorquodale *Human Rights* (Routledge 2003).

<sup>198</sup> Raz (n 145); Charles Beitz *The Idea of Human Rights* (Oxford University Press 2012); Jeremy Waldron *One Another's Equals: The Basis of Human Equality* (Harvard University Press, 2017).

<sup>199</sup> John Rawls *A Theory of Justice* (Cambridge, Belknap Harvard, 1999); Robert Nozick *Anarchy, State, and Utopia* (Blackwell 1974).

<sup>200</sup> Ibid Rawls; See also John Rawls *Political Liberalism Expanded Edition* (New York Columbia University Press, 2005).

<sup>201</sup> Elaine Webster 'I Know it When I See it: Can talking about 'dignity' support the growth of a human rights culture' (2022) University of Strathclyde.

<sup>202</sup> Christopher McCrudden, 'Human Dignity in Human Rights Interpretation' (2008) 19(4) European Journal for International Law 655.



that is much in the same manner as MCOs. Thus, the study draws further from contemporary developments of the capabilities approach within human development and its contributions to human rights theory.<sup>203</sup> The capabilities approach, pioneered by Sen and Nussbaum, clearly defends human rights law's place but exists in an entirely related but distinct area of expertise and study. It offers an interrelated (and more detailed) understanding of what is required, at minimum, for a person to live an adequate and fulfilling life. Sen's work further progressed the fast-growing criticisms of welfarism and utilitarianism by purporting that freedom to achieve wellbeing is a matter of what people can do and be, and thus the kind of life they are effectively able to lead: 'Can we possibly believe that he is doing well just because he is happy and satisfied? Can the living standard of a person be high if the life that he or she leads is full of deprivation?'<sup>204</sup> Drawn from an interwoven disciplinary web of philosophy, economics, and development studies, the capability approach can offer human rights direction regarding the outcomes they seek to achieve. ESCR realisation is provided further normative context and meaning when viewed through frameworks such as the capabilities approach. Capturing the profundity and extent of these arguments within the chapters below was not carried out as initially intended in this final thesis due to its redirecting to developing more practical steps for decision-makers in Scotland to adopt. Numerous drafted chapters were side-lined in pursuing a more practical approach. It is the hope this methods chapter offers these philosophical foundations and considerations to provide insight into how the researcher's views and findings, particularly on ESCR and MCOs, have evolved and developed into the writings below.

The research, through Chapters 6 and 7, moves on to the analysis of empirical evidence gathered through the project and thus draws from a socio-legal approach to bring to light issues of implementation, policy, and resource considerations. Socio-legal research, according to Peck, is a 'broad umbrella term, unconfined to a singular method or definition' but 'derives from the interaction between methodologies within the legal and sociological fields'.<sup>205</sup> It represents an attempt to see beyond the law and provide a 'real world' context in which its implementation, effectiveness, measurements, and overall impact upon society can also be considered. Where sociology is premised on the scientific analysis of power relations among human beings, it provides a theoretical discipline to consider human rights laws' impact upon

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<sup>203</sup> Martha Nussbaum 'Capabilities and Human Rights' (1997) 66(2); Sen (n 196); and Polly Vizard *Poverty and Human Rights: Sen's 'Capability Perspective' Explored* (Oxford University Press, 2006).

<sup>204</sup> Amartya Sen *The Standard of Living* (Cambridge University Press 1987) at 8; see also generally Amartya Sen *Development as Freedom* (Oxford University Press 1998).

<sup>205</sup> Peck (n 182) at 3.

our society and meaning for institutional actors.<sup>206</sup> Vick explores this regarding the work of Priest, stating: ‘The legal realists insisted instead that law, legal doctrine, and legal systems are to be understood as instruments of social policy, and that legal doctrine can only be justified if it has a beneficial social effect, it expresses important public values, or it otherwise serves something vaguely called ‘the public interest’.<sup>207</sup> By adopting this basic sociological lens, exploring MCOs and their use within the wider HRB framework takes new forms and presents practical policy steps in government decision-making. As Frezzo illuminates in his discussion on sociology’s interest in human rights: ‘the fashion in which rights claims, once filtered through political and legal systems, are implemented in the form of policies, laws and institutions’ as well as ‘how the enactment of new policies and laws at the level of the nation-state alters power relations among social actors, outcomes known as rights and effects’.<sup>208</sup> Frezzo here eloquently captures the idea that any new laws and policies will inevitably impact upon ‘social actors’ and public institutions. The socio-legal approach here refers to the empirical evidence gathered and how it can further comment upon the initial doctrinal and fiscal analysis. Using theory and arguments from foundational philosophy, entrenched legal norms, fiscal and accounting practice, and empirical evidence, this research attempts to produce original and innovative contributions to the research questions posed.

As with using an engaged approach, adopting an interdisciplinary approach to understanding, unpacking, and implementing laws can have significant limitations. Concerns are primarily raised within more traditional forms of legal scholarship, which aim to demonstrate the potential for diluting specific legal arguments and norms.<sup>209</sup> However, the potentially limited skills of legal researchers to successfully adopt a range of methodological techniques, including qualitative and quantitative data analysis, are also raised.<sup>210</sup> These are valid, and no doubt they are relevant critiques that can be tabled at this study. For example, it is impossible to capture the entirety of the legal debates on ESCR law, nor is it possible to comprehend all the different political philosophies relevant to questioning a state’s duties to its citizens. Where loose ends are inevitable, these can also be used as ‘gaps’ or ‘problems’ to develop the next set of research questions. Finally, it is important to reflect on the limitation that feels impossible to ignore within this study. Where philosophy, law, accounting, and sociological methods are all

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<sup>206</sup> Mark Frezzo (2015) *The Sociology of Human Rights* (Polity Press 2015).

<sup>207</sup> Vick (n 157) at 182; See also George Priest ‘The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Ideas: A Reply to Judge Edwards’ (1993) 91 *Michigan Law Review* at 1929-1931.

<sup>208</sup> Frezzo (n 206) at 13.

<sup>209</sup> Langford (n 183).

<sup>210</sup> *Ibid.*

explored explicitly throughout the study, there is a clear need for further expert economic analysis to be brought in. This is a challenge due to the seemingly cautious approach many economists take to opining on the implications of human rights within our societies.<sup>211</sup> However, having worked alongside economic experts, their interests, views, comments, and concerns would be a valuable addition to the already interdisciplinary offering within this research project.

## 2.4 The Methods

Having demonstrated the need for adopting a socio-legal, interdisciplinary approach and the attempt within this work to yield new ‘data’ on the concept and practicalities of HRB,<sup>212</sup> this section aims to provide detailed insight into using a mix of qualitative and legal research methods. Furthermore, this section will outline the use of thematic analysis to understand further the challenges and opportunities for adopting HRB in Scotland. As mentioned, the COVID-19 pandemic stifled all social and public societal interactions. Its impact is tricky to quantify, but from limited survey responses due to the daily ‘firefighting’ exercises of local authorities to potentially yielding different conversations and data due to being hosted on online platforms, it will have influenced the data collected.<sup>213</sup> This is not to suggest it has definitively been a limitation, as it could be entirely possible that the onset of a pandemic allowed for more open and ‘free-flowing’ conversation with practitioners who, seeing the widening gulf of inequality and extent of deprivation laid bare, were more ready to contemplate a change in approach to public service decision-making. It is merely to recognise that it was a factor beyond the researcher’s control and was not built into the overall analysis of the data collected beyond recognising the challenges it posed for public bodies to deliver crucial ESCR-related services in Scotland.

### 2.4.1 The Doctrinal Method

The research questions engage with legal norms and principles duly explored from the doctrinal perspective. With the project focused on expanding the understanding of ESCR law and

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<sup>211</sup> See discussion in Varun Gauri and Siri Gloppen ‘Human Rights Based Approaches to Development: Concepts, evidence, and policy’ 44(4) *Polity* 485; and Sheheryar Banuri, Stefan Dercon and Varun Gauri ‘Biased policy professionals’ 33(2) *The World Bank Economic Review* 310.

<sup>212</sup> Georgia Teare & Marijke Taks ‘Extending the scoping review framework: a guide for interdisciplinary researchers’ (2020) 23(3) *International Journal of Social Research Methodology* 311; see also, Des Gasper ‘Interdisciplinarity: Building Bridges and Nurturing a Complex Ecology of Ideas’ in Ananta Giri *Creative Social Research: Rethinking Theories and Methods* (London: Lexington Books 2004).

<sup>213</sup> John Oliffe, Mary Kelly & Wellam Yu Ko ‘Zoom Interviews: Benefits and Concessions’ (2021) 20 *International Journal of Qualitative Methods* 1; and Bojana Lobe, David Morgan & Kim Hoffman ‘A Systematic Comparison of In-Person and Video-Based Online Interviewing’ (2022) 21 *International Journal of Qualitative Methods* 1.

particularly MCOs beyond the confines of the law to justify their need further, it was first pertinent to establish the positivist legal position.<sup>214</sup> The doctrinal method has been the ‘dominant legal method’ in legal research for many years.<sup>215</sup> So much so, Hutchison argues, it is ‘unfortunately... often so implicit and so tacit that many working within the legal paradigm consider it unnecessary to verbalise the process.’<sup>216</sup> Many definitions of doctrinal research are dispersed throughout academic legal and interdisciplinary literature, but they can be synthesised to discover, formulate, and develop legal doctrines.<sup>217</sup> The law exists in a myriad of various rules, statutes, treaties, principles, norms, interpretative guidelines, customs, and potentially incoherent case law.<sup>218</sup> Often, one segment of law exists ‘as part of a larger system’ that is not always logical nor aligned with broader principles derived from the pursuit of justice.<sup>219</sup> This is perhaps even more relevant when delving into the entangled web of international law where its potentially competing and contrasting norms are often ‘captured in atypical forms of written sources such as reports, documents, explanations, protocols, and papers, and also have more unwritten and informal law than other areas of law’.<sup>220</sup> As Egan also describes: ‘The first factor that should ideally be contemplated by the doctrinal researcher in the field of international human rights concerns the nature of the body of law under consideration. IHRL consists of a range of conventions, procedures, and monitoring bodies that, individually and collectively, provide a means of holding governments accountable at the international level for treating their citizens.’<sup>221</sup> Law based on the ‘consent of states’ requires a ‘critical stance as to the nature of the body of law as an essentially decentralised system, in which legal obligations are not necessarily clear cut and in contrast to domestic law, by no means easily enforced’.<sup>222</sup> MCOs within the broader context of ESCRs represent the very embodiment of this problem. Established via authoritative guidance from the CESCR (over which disagreements continue as to the legal nature of the guidance), MCOs in IHRL can only be derived and researched through the materials in which they appear, primarily general

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<sup>214</sup> Paul Chynoweth's ‘Legal research’ is found in Andrew Knight and Les Ruddock's *Advanced Research Methods in the Built Environment* (Blackwell Publishing 2008).

<sup>215</sup> Terry Hutchison ‘The doctrinal method: incorporating interdisciplinary methods in reforming the law’ (2015) 8(3) *Erasmus Law Review* 130.

<sup>216</sup> Terry Hutchison and Nigel Duncan ‘Defining and Describing What we Do: Doctrinal Legal Research’ (2012) 17(1) *Dekin Law Review* 83 at 99.

<sup>217</sup> See P Ishawara Bhat ‘Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles’ in P Ishawara Bhat *Idea and Methods of Legal Research* (Oxford University Press 2020); Trischa Mann *Australian Law Dictionary* (Oxford University Press 2010) at 197.

<sup>218</sup> Mike McConville & Wing Hong Chui *Research Methods for Law* (Edinburgh University Press 2007).

<sup>219</sup> Hutchison & Duncan (n 216) at 84.

<sup>220</sup> Andria Naude Fourie ‘Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research’ (2015) 8(3) *Erasmus Law Review* 95 at 97.

<sup>221</sup> Suzanne Egan ‘The Doctrinal Approach in International Human Rights Scholarship’ in Suzanne Egan *Research Methods in Human Rights* (Routledge 2018) at 8.

<sup>222</sup> *Ibid.*

comments and recommendations, the occasional concluding observation, and academic commentary. Indeed, the very fact they are devised within the CESCR's general comments would, for many, raise questions as to its place as a legal doctrine in the first place.<sup>223</sup>

Due to its often 'black letter law' doctrinal approach, legal research is critiqued within methodological literature. There is a 'view that doctrinal analysis by its very nature is of limited value given its insular and self-referential nature.'<sup>224</sup> Egan goes on to argue this is 'because traditional doctrinal analysis works on the premise that law can only be understood from a close, 'objective' reading of authoritative texts' and that law can be viewed 'as an autonomous system which can only be understood from within the system itself'.<sup>225</sup> By this, Egan is commenting that the validity of doctrinal research is less or completely unaffected by the empirical world in which it exists. As Chynoweth agrees: 'Legal rules are normative in character as they dictate how individuals ought to behave. They make no attempt to either explain, predict, or even understand human behaviour. Their sole function is to prescribe it'.<sup>226</sup> Moreover, where 'some element of doctrinal analysis will be found in all but the most radical forms of legal research,' it can rarely provide a complete understanding of the law's purpose and role in shaping discourse.<sup>227</sup> This is why many researchers, and increasingly those in IHRL, are 'infusing' further evidence from qualitative methods to bolster their reasoning and recommendations.<sup>228</sup>

#### 2.4.2 Survey & Expert Interviews: Scotland's Local Chiefs of Finance

Qualitative data gathering and analysis is an altogether different approach. It relies upon the collection of empirical data as a basis for creating theories or means for testing them, with the validity of the research determined by the process and rigour of the investigation taken. Understanding the implications of desk-based research would inevitably be strengthened by engaging with those in public finance positions. For this, the first step was identifying and selecting the research sample that needed to be heard. Due to previous work of the SHRC, it was well-understood that fiscal decision-making processes were predominantly made behind closed doors, and deciphering the processes, issues, and challenges behind them would require

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<sup>223</sup> Kasey McCall-Smith 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer' in Logoutte et al. (n 50).

<sup>224</sup> Egan (n 221) at 11; and Lydia Nkansah & Victor Chimbwanda 'Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm' (2015) 3(1) Asian Journal of Legal Education 55.

<sup>225</sup> Ibid.

<sup>226</sup> Chynoweth (n 214) at 672.

<sup>227</sup> Ibid.

<sup>228</sup> Hutchison (n 215).

the input of specific decision-makers. Furthermore, as the project initially focused on the Scottish budget, early research indicated that while the Scottish budget remained integral to the overall funding of the system, much of the service delivery essential to the realisation of ESCR in Scotland was carried out at the local level, with human rights scholarship in Scotland often overlooking this fact. Local Authorities services, health boards, schools, and many other public bodies in Scotland all lie at the heart of delivering education, social care, healthcare, transport, waste management, and water services. Chapter 7, which focuses on Local Authority (“LA”) processes and challenges, explores them in more detail. They are central to ensuring rights outcomes are realised.<sup>229</sup> Previous work has already partly explored Scotland’s national budget and other formal groups such as the HRB Working Group (“HRBWG”) and, at the time, the Equalities Budget Advisory Group of the Scottish government. Scotland’s local governance structures and budgetary processes were identified as a clear gap in knowledge and a potentially impactful area in which to engage. What was unknown was how difficult this engagement would be to create.

Following informal discussions with the Convention of Scottish Local Authorities (“COSLA”), in March 2021, a survey was sent to all 32 LA chiefs of finance in Scotland.<sup>230</sup> Surveys are helpful in quantitative and qualitative data collection and have been used widely throughout research for decades.<sup>231</sup> However, depending on the responses received, they can also be used to spike interest and assess whether further engagement with an organisation or individual might be possible and prudent. This intention was demonstrated explicitly within the survey. Additionally, it contained appendices providing an overview of the research project, a summary of fundamental human rights principles and their relevance to LA budgets and raising the potential for further LA engagement. Twelve open-ended questions were used to gather qualitative data, which focused on three key areas of questioning. It began by inquiring about the budget process and sought to build an understanding of the operational practice in budget decision-making. Further, human rights as a broad concept were raised with questions about whether they were actively considered or discussed within current practice at the LA. The

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<sup>229</sup> See discussion of subnational obligations in Leilani Farha ‘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’ (2012) Human Rights Council A/HRC/28/62.

<sup>230</sup> Chaim Noy ‘Sampling knowledge: the hermeneutics of snowball sampling in qualitative research’ (2008) 11(4) *International Journal of Social Research Methodology* 327; and Mahin Naderifar, Hamideh Goli & Fereshteh Ghaljaie ‘Snowball Sampling: A Purposeful Method of Sampling in Qualitative Research’ (2017) 14(3) *Strides in Development Medical Education*.

<sup>231</sup> Virginia Braun et al. ‘The online survey as a qualitative research tool’ (2020) 24(6) *International Journal of Social Research Methodology* 641; and Juli Ponto ‘Understanding and Evaluating Social Research’ (2015) 6(2) *Journal of the Advanced Practitioner in Oncology* 168.

survey continued to dive into more detailed lines of questioning focusing on the generation, allocation, and expenditure at local authorities and attempted to bring in links to ESCR obligations, with a question relating to MCOs in Scotland to ‘minimum levels of essential services’ and questioning if these were a consideration within the budget process. The limitation of surveys as a sole method of data collection is that they do not often yield the most detailed qualitative data.<sup>232</sup> The challenge is to delve into the depth of detail required to handle complex questions, such as human rights and fiscal decision-making. This was felt acutely when devising the questionnaire, as it was difficult to digest the concepts from human rights law into accessible and meaningful questions. It provided a moment to reflect on the researcher’s epistemological assumptions and inherent biases and required careful drafting. These assumptions generally centred on the narrative that the local authorities would be difficult to engage with and protective over their management and approach to resources. An assumption which had built through many years of living in Scotland and engaging with local authorities on issues from bin collections to fixing potholes and turned out to be, within this context, entirely false. Designing the questionnaire itself re-emphasised the difficulty in translating rather grand and complex obligations of IHRL into digestible and meaningful questions for people who were unlikely to have ever encountered them before. The survey received five detailed responses from local authorities in Scotland, which were included within the overall thematic analysis conducted, and one which could not be considered valid and was not included in the analysis. This one response was deemed invalid due to the use of one-word answers which failed to engage with the questions asked nor provide any insight into the fiscal procedures adopted by the authority. Overall, a relatively poor return from the 32 approached but, when taken within the context of a pandemic, having any response was viewed as a positive. More importantly, however, four local finance chiefs responded they were open to more in-depth questioning via an interview process.

Four LA chiefs of finance were approached for interviews in the summer of 2021, with the semi-structured interviews taking place from October to December 2021. These have been anonymised to protect the views and challenges faced by specific local communities and are coded within the analysis as Chiefs A-D. The local authorities who took part were fortunately diverse, covering issues relevant specifically to cities in Scotland with denser populations and consequently larger budgets, to those in more sparsely populated and rural parts of Scotland,

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<sup>232</sup> Ibid Braun.

as well as LA's considered primarily affluent and those measured as more deprived.<sup>233</sup> This was important to ensure an accurate snapshot of the issues relevant to all 32 local authorities could be captured. This was strengthened by the fact that all 32 local finance chiefs meet quarterly, and the interviewees clarified that their views reflected those of the wider group across Scotland. The interviews, out of necessity and in line with the University of Glasgow's ethical requirements, were conducted over Microsoft Teams and yielded over nine hours of qualitative audio data to be transcribed. The researcher carried out the transcription process, and while frustratingly time-consuming, it enabled an immersive experience with the data in which the initial stages of analysis could begin with identifying key themes.<sup>234</sup> The interview questions built upon the themes drawn out of the analysis of survey responses, in which more specific questions could be asked about processes of decision-making as well as specific challenges raised through the survey. To provide insight, the questions were built around similar themes of fiscal decision-making processes, the current significant challenges, human rights principles such as participation and transparency, and finally, the ability to provide minimum essential service levels. Each interview ended with a discussion on the following steps to enable local authorities to use human rights further as a framework for improved decision-making. They were all wrapped up broadly in awareness-raising and capacity-building themes. As is common in qualitative interviewing, the interviews were semi-structured and open-ended to enable the 'lifeworld' of the practitioners being interviewed to come through.<sup>235</sup> The aim was to build a collaborative relationship and allow the interviewees to have input into the questioning. This was important because of the interviewees' expert positions and knowledge and to ensure the participants felt they could have their voices heard and direct the research outcomes.

The interviews yielded original and highly insightful data to begin analysing the core question of where there were opportunities for and challenges to adopting HRB in Scotland. Despite being focused on the local level, many of the issues raised throughout the interviews are more generally relevant to budgeting practice. The expert nature of the interviewees, the 'Chiefs', allowed for the capturing of data that did not just consider their work and wealth of experience

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<sup>233</sup> See the Scottish Index of Multiple Deprivation (2020). Available at <<https://simd.scot/#/simd2020/BTTTTT/9/-4.0000/55.9000/>> (accessed 3 July 2024).

<sup>234</sup> Because Microsoft Teams is an American software program, the transcription service provided by Microsoft could not accurately transcribe the interview data, with much of the content lost in the thickness of the Scottish accents of the LA chiefs.

<sup>235</sup> Thomas Groenewald 'A Phenomenological Research Design Illustrated' (2004) 3 International Journal of Qualitative Methods 42.



but the work of entire departments.<sup>236</sup> Views were shared on everything from the effectiveness of local taxation to austerity and the day-to-day delivery of core local services, dealings with local councillors, sharp-elbowed citizens, and the strenuous relationship between local and national government. The interviewees' in-depth, 'insider' knowledge and senior position provided several key advantages for this work.<sup>237</sup> Firstly, due to their senior position, each 'Chief' could provide detailed accounts of the daily micro-processes and everyday practice within each LA and provide detailed explanations of the longer-term challenges faced. This more detailed and personal experience of the issues could be captured and corroborated against the more macro views on the issues with local finances through, for example, reports from Audit Scotland or evidence provided by civic society to Parliamentary committees.<sup>238</sup> Secondly, and perhaps more importantly, the senior positions each interviewee provided 'tacit' buy-in of the organisation itself, with each interviewer giving specific thought to what would be needed by those within local government to engage more and implement human rights principles within their decision-making. Where 'outsider' expert knowledge is likely to be a more objective and neutral account, approaching those inside the institutions, when successful, provides a real opportunity to impact current and future practice. Reflecting on the interviews sometime later, the honest and earnest way the interviewees approached the interviews could not, regretfully, be captured adequately through the analysis below. Translating their genuine empathy for marginalised rights-holders and outright frustration with the last decade of fiscal consolidation was not commented upon in the overall written analysis. This could have been interpreted in many ways, but in the interviewer's view, it reflected a deep concern and frustration with the status quo and an openness to new practices.<sup>239</sup>

### 2.4.3 Expert Focus Group

In May 2022, an expert focus group was held, again on Microsoft Teams, comprising LA finance chiefs, representatives from COSLA, and academic and civic society experts in HRB from Scotland's HRBWG comprising of academics, the SHRC, and civic society representatives. The group was also fortunate to include an economist working at Parliament

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<sup>236</sup> For an overview of the advantages and limitations of using expert interviews in social research, see Christian von Soest 'Why do we speak to experts? Reviving the strength of the expert interview method' (2023) 21(1) Perspectives on Politics 277.

<sup>237</sup> Diana Fu and Erica Simmons 'Ethnographic Approaches to Contentious Politics: The What, How, and Why.' (2021) 54(10) Comparative Political Studies 1695.

<sup>238</sup> Audit Scotland 'Scotland's Public Finances: Challenges and Risks' (November 2022) available at <[https://audit.scot/uploads/docs/report/2022/briefing\\_221117\\_public\\_finances.pdf](https://audit.scot/uploads/docs/report/2022/briefing_221117_public_finances.pdf)> (accessed 18/07/24).

<sup>239</sup> Stefanie Doring 'The problem-centred expert interview'. Combining qualitative interviewing approaches for investigating implicit knowledge' (2020) 24(3) International Journal of Social Research Methodology 265.

on a briefing committee on the links between budgets and human rights at the national level. Thus, the group consisted of academic and practitioner experts on budgeting and human rights in Scotland, all with a specific interest in furthering their own and, consequently, our collective understanding of what human rights as a legal framework could offer fiscal decision-makers in Scotland.<sup>240</sup>

Table 1: Expert Focus Group Participants

<b><i>Participants</i></b>	<b><i>Organisation</i></b>
<i>Participant 1</i>	HRBWG
<i>Participant 2</i>	LA
<i>Participant 3</i>	HRBWG
<i>Participant 4</i>	COSLA
<i>Participant 5</i>	LA
<i>Participant 6</i>	COSLA
<i>Participant 7</i>	HRBWG
<i>Participant 8</i>	Parliamentary Researcher & Economist

The questions were again semi-structured and open-ended but provided a keener focus on potential next steps than on the challenges faced by LA budgets at the time. The survey and interviews focused on local government decision-making processes and probing for areas where human rights principles could be threaded through their practice. In contrast, the focus group provided a more detailed account of what was needed for progress. In a sense, the focus group represented a group interview with the researcher acting as a facilitator within the group discussion, being careful only to guide the conversation to ensure it stayed relevant to the key themes of the research. This also left it open to participants to ask questions of others in the group and challenge specific views.<sup>241</sup> The focus group's purpose was twofold. First, it was to enhance and build on the data collected through the survey and the expert interviews by bringing in 'outsider' expert voices into the research.<sup>242</sup> As noted above, it was felt the interviews did not adequately cover what might look like the 'next steps' to be taken, and the focus group provided a more particular focus on this question. Moreover, bringing these different perspectives, expertise, and interests deepened the collected data. The interviews had purposefully not been carried out in a way that challenged the expert 'chiefs' views to ensure

<sup>240</sup> Richard Kreuger *Focus Groups: A practical guide for applied research* (2<sup>nd</sup> Edn Newbury Park: Sage 1994).

<sup>241</sup> Diane Hughes & Kimberly DuMont 'Using Focus Groups to Facilitate Culturally Anchored Research' (1993) 21(6) American Journal of Community Psychology 775.

<sup>242</sup> See Morgan's discussion of using focus groups to build on interview data in David Morgan's *Focus Groups as Qualitative Research* (2<sup>nd</sup> edn, Sage 1997).

it was their account of the issues being captured. The questions posed were deliberately sympathetic to the turbulent times faced by public bodies in Scotland despite the many accounts of failures in governmental decision-making at the national and local levels. Hosting the expert focus group allowed the boundaries to be crossed and more challenging questions or views to be posed to the ‘chiefs’ and COSLA officials present. Secondly, driven by the aim of impact, bringing together these expert practitioner voices helped to further the rights budgeting network in Scotland and foster relationships beyond the confines of this project to work on issues in public resources Scotland was and is still facing. In terms of the aim of developing a fruitful knowledge exchange, the expert focus group was successful.

#### 2.4.4 Thematic Analysis

Having collected the data, analysis ensued. The approach taken to the data was not designed with a pre-determined intent to prove or disprove any particular hypothesis. It was more interested in developing a discovery process through exploratory and participatory methods. Notably, questions were raised about what type of analysis would yield the most significant insight into the potential for HRB at the local level in Scotland. Both discursive and thematic analysis were explored as options. Still, due to the nature of the data, it was decided to conduct a thematic analysis before considering a secondary analysis using a different analytical framework. Having adopted a deductive approach, searching for themes derived from the theory, the data was coded into overarching themes where keywords and phrases would be repeated within the data.<sup>243</sup> These themes were then broken down further into a secondary level where specific issues or challenges were consistently raised about the primary theme. These secondary themes were then also connected to key human rights obligations or principles to enable the researcher to begin making the connections for where human rights as a framework for decision-making was most pertinent to the issues discussed. The following table has been designed to give insight into the data’s thematic coding.

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<sup>243</sup> Jennifer Fereday and Eimeur Muir-Cochrane ‘Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development’ (2006) 5 International Journal of Qualitative Methods 80.

Table 2: Thematic Analysis Breakdown

<i>Theme</i>	<i>Theme Breakdown</i>	<i>Human Rights Obligations / Principles</i>
<b><i>Budgetary Process / Resource allocation</i></b>	Financial gaps / LA Strategies / Statutory Duties / Proposals / Councillors / Efficiencies & Cuts	Legality / Maximum Available Resources / Non-retrogression
<b><i>Significant Challenges Raised by LA</i></b>	Forward Planning / Centralisation / Austerity / Diversity and Demographics / Data	Progressive realisation / Non-Retrogression / Accountability / Empowerment
<b><i>Outcomes Over Inputs</i></b>	Performance / People's Outcomes	Progressive realisation
<b><i>Resource Generation</i></b>	Scottish Settlement / Local Taxes / Investments / Resource Sharing	Maximum Available Resources / Non-Discrimination
<b><i>Performance Review / Resource Expenditure</i></b>	Auditing / National Performance Framework / Impact Assessments	Accountability / Non-Discrimination / Legality
<b><i>Human Rights &amp; Poverty</i></b>	Deprivation / Free School Meals / Housing Stock / Poverty / Equality	Progressive Realisation / Minimum Core / Empowerment
<b><i>Participation</i></b>	1% Budgets / Accessibility / Community Empowerment	Participation / Empowerment / Non-discrimination
<b><i>Next Steps / Solutions</i></b>	Awareness Raising / Training & Capacity Building / Council Structure / Collaboration / Prevention	Progressive Realisation / Empowerment

Conducting a thematic analysis of the data provided the advantage of illuminating key themes within each set of data collected (survey, interviews, focus group) and where themes presented themselves across all three sets of data collected. Adopting thematic analysis has allowed for extracting core concepts and processes within budgetary decision-making and identifying

where significant challenges currently exist concerning LA financing. They could, in turn, be considered through the lens of human rights by applying and relating them to specific standards and principles of IHRL. Additionally, this helped narrow and produce further analysis on two core areas. First, identifying key areas of current processes that act as a barrier to adopting HRB, and second, where awareness raising would be best placed, and training is required to ensure the research furthers theory on rights-based budgeting. It achieves impact in practice through engaging with practitioners. Having coded and analysed the three sets of data collected, it was decided that while a discursive approach would have been both interesting to carry out and could have potentially deepened the overall analysis undertaken, there was more than enough to analyse already present within this study due to the original and expert nature of the data. Where discursive analysis is particularly effective at providing analysis of the ‘multiple layers’ of policy and empirically engaging ‘with policy in terms of both structure and agency’.<sup>244</sup> It felt like an extra and unnecessary step within an already extensive approach to research design within the time available. Despite being particularly adept at exploring power, discursive analysis can, in practice, be adversarial with expert participants.<sup>245</sup> Rather than holding a position of accountability that the Chiefs needed to defend, this work aimed to consider the complexity and challenges within their decision-making processes. Nevertheless, the research was informed by the critical nature of discourse analysis in trying, with the empirical work, to acquire an understanding that could impact and potentially change or alter the status quo. This is not to suggest that a discursive analysis of the collected data wouldn’t yield new and valuable insight, only that it would be a further step beyond the limited reach of this project.

#### 2.4.5 Limitations of the Data

Here, it is important to raise a key limitation with the use of expert voices within all the data collection methods in the study. The research has two distinct but overlapping topics: the justification and implementation of MCOs and the use of HRB in Scotland. Where the data collected provided deep insight into the latter of these two lines of enquiry, it was less effective at dealing with the intricate issue of implementing MCOs and the considerations this presents for public resourcing. Doctrinal, desk-based research presents more complex theoretical questions around the minimum core doctrine. However, this was not built on as effectively as hoped through the qualitative data methods. The data collected re-emphasised the gap between

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<sup>244</sup> Elisabeth Barakos and Johann Unger *Discursive approaches to language policy* (Palgrave Macmillan 2016) at 2.

<sup>245</sup> See Peter Dews ‘Power and Subjectivity in Foucault’ *New Left Review*.

theory and practice encountered throughout engagements across different government and non-government organisations in Scotland. Moving even expert practitioners to a place where they could comprehend, contemplate, and have elicit views on using ESCR law to set budget priorities was challenging. It is noticeable throughout the data collected, emphasising the challenges faced over the solutions HRB offers. Recognising this led to confronting another, and more uncomfortable, limitation with the data collected. While dealing with expert views from practitioners brought specific benefits, as detailed above, it left the data collected bereft of the voices of those least heard and likely most needing ESCR protection. Where the voices of those delivering the rights have been prioritised within this specific research, exploring ESCRs with a particular focus on MCOs in terms of pragmatic standards for Scotland requires hearing the voices of those most marginalised and disadvantaged in our communities. In short, the exclusive focus on gathering data from those in decision-making positions and other ‘experts’ meant that the research had failed to engage with the voices in our communities that are least heard and, consequently, are the target of the most urgent protection. Certainly, setting minimum core priorities in Scotland, as argued in Chapter 4, would require such input.

## 2.5 Concluding Remarks: Reflections on the Process

Starting an extensive PhD chapter on methods was never the most appealing prospect for a researcher who has received an LLB in Scots law and an LLM in IHRL before moving into Glasgow’s School of Social and Political Science. The traditional safety of briefly outlining a desk-based, doctrinal approach to legal research would be insufficient. Commonly, ‘reflexivity and reflexive practice, present within most social science disciplines, are notably absent from much of contemporary legal research.’<sup>246</sup> This is despite reflexivity being identified as a crucial strategy in knowledge production through its focus on rigour and ‘trustworthiness’.<sup>247</sup> Reflexivity can be surmised as the process of continual internal dialogue and critical self-evaluation of the researcher’s positionality as well as active acknowledgement and explicit recognition that this position may affect the research process and outcome.<sup>248</sup> In short, it aims to go beyond assessing oneself when conducting research to reflecting upon oneself as an object of the research as well as upon the tools and experience the researcher can bring to the research. Indeed, such a process is integral to a participatory and engaged approach to research

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<sup>246</sup> Peck (n 182) at 7.

<sup>247</sup> Loraine Blaxter, Christina Hughes and Tigt *How to Research* (Milton Keynes: Open University Press 2006); and Jennifer Mitchell et al. ‘Who do we think we are? Disrupting notions of quality in qualitative research’ (2018) 28(4) *Qualitative Health Research* 673.

<sup>248</sup> See discussion in Roni Berger ‘Now I see it, now I don’t: researcher’s position and reflexivity in qualitative research’ (2015) 15(2) *Qualitative Research* 219; and NE Simmonds ‘Reflexivity and the Idea of Law’ (201) 1 *Jurisprudence* 1.

design.<sup>249</sup> That said, I do not intend this section to become my therapist chair, in which I share all the previous life experiences that have fundamentally shaped my worldview. For this, it is adequate to provide that I am from a happy, supported, middle-class upbringing in Fife, Scotland. I am state-schooled and have ended up, having worked in numerous other industries and walks of life, in the role of (yet another ‘white male’)<sup>250</sup> working on IHRL following the realisation the law is both a tool used for oppression and control, as well as protection, community, fairness, and empowerment. I cannot change my upbringing, where I am from, my sex, or the colour of my skin. Indeed, all that meaningfully can be commented upon is the inherent advantages and opportunities my upbringing and characteristics have afforded me. These are advantages that, in my view, morally compel the need to empower others to share equally in those opportunities regardless of their views, beliefs, and capabilities.

Through this research process, there are two key areas of reflection to raise. The first concerns the project's research design and interdisciplinary approach. The second, encompasses further thoughts on the overall complexity of the task ahead. To begin with the project's design, there is no better way to test and understand the limitations you bring as a researcher than through conducting interdisciplinary research. It is challenging. There are well-versed complexities in marrying conceptual theories and epistemological foundations, navigating the use of different languages to explore the same phenomena, or integrating methodological lenses to view a problem.<sup>251</sup> Here, the greatest challenge has been confronting my own limitations as a researcher to do each discipline the justice it deserves. From foundational theories of social justice and deliberative democracy to human rights legal theory and adjudication to neo-classical economics and fiscal practice, the questions raised by this thesis require detailed commentary and cooperation to achieve meaningful progress from across academic disciplines and, more broadly, society itself. Upon reflection, it is a level of detail that could not be achieved through this singular project. My limitations in fiscal and accounting practice, understanding complex economic modelling, or grappling with the heavyweight history of political and moral philosophy are evident throughout. In many ways, it is a reflection that uncovered an underlying contribution to the thesis. A concerted call for increased collaboration. The fact that the findings of this research have been conducted within a PhD, despite utilising the views of others to support its arguments, undoubtedly limits the findings it could espouse.

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<sup>249</sup> Hale (n 166).

<sup>250</sup> Julia Emtseva ‘Practicing Reflexivity in International Law: Running a Never-Ending Race to Catch Up with the Western International Lawyers’ 23(5) *German Law Journal* 756.

<sup>251</sup> Sanne Taekema and Bart van Klink ‘On the Border: Limits and Possibilities of Interdisciplinary Research’ in Sanne Taekema and Bart van Klink *Law and Method* (Mohr Siebeck 2011); and Schrama (n 178).

For future research within this area, for which this thesis presents numerous important avenues, a broader set of expertise should be sought so that further consensus may be found and avenues for practice devised and implemented. This line of thinking builds into the secondary reflection above, illuminating the complexity of the challenges ahead. Through the thesis, recognition is paid to the relationship between the sovereign state, the devolved nation, and its local government institutions. Each has a role to play, and as resources and priorities shift down this vertical chain of responsibility, the challenge to understand the impact of budget formulation and budget analysis on rights-holders' outcomes exponentially increases. Progress will be iterative, and with this conviction, the recommendations for steps to take are offered. They by no means reflect the scale of change needed nor the shift in decision-making culture, which must be built collaboratively over the coming years.

On a more personal note, for those outside what has been described as the 'ivory towers' of academia, the aims of a life's work dedicated to research in the pursuit of knowledge production can be baffling.<sup>252</sup> I've had numerous friends, colleagues, and even close family question, albeit innocently and respectfully, the 'purpose of' and 'reason for' carrying out a PhD in human rights. Almost unconsciously, I would begin to narrate the project's intended outcomes or contributions to theory and fall back on fumbling rather general points on the inherent value of human rights or the centrality of education and effective pedagogy to social progress. While all objectively defensible, in the end, my response felt somewhat personally hollow. If not hollow for those posing the question, then for my views on and values within our world. It was internally challenging. Grappling with such a question required a healthy dose of reflexivity on the purpose and process of knowledge production and the opportunity to realise its overarching approach and drive to take on the project in the first place. It was not just to neutrally capture and comment upon legal norms or social phenomena in Scotland. The soul of this project has always been to understand and develop the tools necessary to challenge the status quo and pursue real social change.<sup>253</sup> With this constantly (if subconsciously) in mind, any opportunity for engagement with those working on human rights in Scotland and beyond that the research has presented has been seized upon. I have had the good fortune to work with and primarily learn from numerous inspiring practitioners, politicians, civil servants, academics, and

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<sup>252</sup> For example, see among many others U Baxi (2004) 'The Role of the University in the Human Rights Movement; An Inter-disciplinary Discussion held at Harvard Law School, September 1999' Harvard Law School: Human Rights Program; See also Brett Stockdill & Mary Danico 'The Ivory Tower Paradox: Higher Education as a Site of Oppression and Resistance' in Brett Stockdill & Mary Danico *Transforming the Ivory Tower: Challenging Racism, Sexism, and Homophobia in the Academy* (2012) University of Hawai Press; Carol Glasser & Arpan Roy 'The Ivory Trap: Bridging the Gap Between Activism and the Academy' (2014) 448 Counterpoints 89.

<sup>253</sup> Hale (n 166).



rightsholders, many of whom have spent decades working, teaching, campaigning, and advocating for a fairer, more just future. Having worked with public finance officials locally and nationally, collaborated with Scotland's NHRI in the search for impact, and been invited to develop a new human rights framework for Scotland within the halls of governmental decision-making, all have presented new paths to learning and exchanging ideas. I have had the opportunity to work on children's rights<sup>254</sup> and research access to justice through a fellowship culminating in publishing a book.<sup>255</sup> I have taught human rights and social science in universities, given talks in primary schools and numerous seminars to civic societies, and provided various training materials for organisations across Scotland and beyond. Within each opportunity and every organisation, the many brilliant and dedicated people within them have left their impressions and lessons as seeds of knowledge from which to nurture my own and grow. For this experience, I am earnestly grateful. The influence of exchanging ideas and building 'knowledge transfers' with Scotland's people, practitioners, and decision-makers cannot be understated.<sup>256</sup> There is an energy and purpose to be found in the shared pursuit of social change and justice.

Human rights are facing significant tests of resilience worldwide at both the domestic and international levels. Yet, in these moments of seeming despair, their proponent's and advocate's resolve must remain resolute. Large and small actions worldwide continue to serve as a reminder that progress is fragile but never futile. As a concluding thought, Gramsci once poetically inspired from the confines of a jail cell: 'The mode of being of the new intellectual can no longer consist in eloquence, which is an exterior and momentary move of feelings and passions, but in active participation in practical life, as constructor, organiser, "permanent persuader" and not just a simple orator'.<sup>257</sup> With the opportunities it has presented and the minor steps of progress it has achieved, I hope this research project represents my first strides towards being the 'permanent persuader' Gramsci, among others, urges us to be.

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<sup>254</sup> See A Flegg & J Ferrie (2021) 'Introduction to HRB' Together Scotland as found at <  
<https://www.togetherscotland.org.uk/media/2150/introduction-to-human-rights-budgeting.pdf>>

<sup>255</sup> Boyle et al (n 1).

<sup>256</sup> Van de Ven (n 166).

<sup>257</sup> Antonio Gramsci *Selection from the prison notebooks of Antonio Gramsci* (New York: International Publishers 1980) at 104.

## **Chapter 3**

### **Monitoring State Values: Reviewing the Emergence and Practice of Human Rights Budgeting & Budget Analysis**

The place of resources has a robust normative basis within the international human rights legal framework and, in recent years, has been consistently raised as an integral tool for realising and monitoring human rights.<sup>258</sup> The need for resources to be deployed has been prominently raised in the guidance provided to the Convention on the Elimination of Discrimination Against Women (“CEDAW”),<sup>259</sup> the ICCPR,<sup>260</sup> the ICESCR,<sup>261</sup> and the UNCRC.<sup>262</sup> Nor does this take into account the other numerous occasions ‘resources’, ‘finance’ or ‘budgetary’ decision-making has been raised at the regional level as a vital tool for the implementation and monitoring of human rights realisation, or the times it has been raised by other rights monitoring mechanisms such as UN treaty committees,<sup>263</sup> and UN Special Rapporteurs.<sup>264</sup> Broadly, the guidance and observations focus on assessing the extent to which a state's public budget and accompanying decision-making have taken account of its human rights obligations. In more detail, the human rights framework seeks to ensure state budgets are ‘progressive’, ‘appropriate’, ‘effective’, ‘adequate’, ‘non-discriminatory’, and ‘equitable’ for the advancement and realisation of people’s human rights.<sup>265</sup> Traditionally, public budgets were designed predominantly to monitor the government’s overall revenue and expenditures and prevent the state from building an unsustainable budget deficit (debt).<sup>266</sup> They were often narrowly construed and left to the realm of economists and fiscal experts, with few other disciplines ever daring to delve into their positions, processes, and complexities. However, a broader understanding of their functions and uses has developed through modernisation,

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<sup>258</sup> UN OHCHR ‘Realising Human Rights Through Government Budgets’ (2017) OHCHR & International Budget Partnership.

<sup>259</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1.

<sup>260</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992.

<sup>261</sup> CESCR General Comment No. 14 (n 83).

<sup>262</sup> CRC General Comment No. 5 (n 48).

<sup>263</sup> The CESCR has frequently questioned the use of state resources in their concluding observations upon states. Recent examples include concluding observations on Portugal E/C.12/PRT/CO/5 CESCR 2023; Panama E/C.12/PAN/CO/3 CESCR 2023; and Italy E/C.12/ITA/CO/6 CESCR 2022.

<sup>264</sup> UN Special Rapporteurs will frequently refer to budgetary measures within a state as potentially undermining or even potentially violating specific rights. For a very good example, see the special rapporteur on the right to housing on Nigeria in A/HRC/43/43/ADD.1.

<sup>265</sup> OHCHR (n 258).

<sup>266</sup> Anthony Makin *The Limits of Fiscal Policy* (Palgrave pivot, 2018); Diane Elson ‘The reduction of the UK budget deficit: a human rights perspective’ (2012) 26(2) *International Review of Applied Economics* 177.

leading to an interest from various perspectives and expertise.<sup>267</sup> Budgets are now understood to serve a range of purposes. They are complex, have several interconnected and, at times, competing functions, come in different forms, give rise to numerous processes, considerations, and political choices, and have varying levels of scrutiny from differing government and non-government institutions. Today, public budgets are better understood as ‘important political media, fundamental governance and management devices, central accountability channels, and important tools for providing an impulse to the economy and society.’<sup>268</sup> Blyberg, a leading contributor to the literature on HRB, agrees: ‘Governments’ budgets, while comprising technical processes, are also political documents. They are shaped by the political debates within a country and embody the values of the decision-makers and, ideally, the people of the country.’<sup>269</sup> To Blyberg and other advocates of the HRB approach, the budget is where governments announce their political priorities, not just in rhetoric but by sharing their costed financial plans to meet such priorities. As Dikono reflects in an early exploration of human rights and budget analysis: ‘The budget is a translation in financial terms of the action program of the state, coordinating planned expenditures with expected revenue collections and proposed borrowing operations—hence a national plan that cuts across departmental boundaries and ties together all plans and projects.’<sup>270</sup> In this sense, they have moved beyond being a mere fiscal tool to a central pillar of modern governance and democratic decision-making. It is ‘the lifeblood of the government, the financial reflection of what the government does or intends to do’, serving as multifaceted and often complex mechanisms focused on gathering, using, and managing a state’s financial resources and economic policy.<sup>271</sup>

Human rights advocates, from an international, regional, and increasingly domestic perspective have for this very reason taken a firm interest in their ability to impact the realisation and upholding of human rights standards in recent years.<sup>272</sup> The intersection of human rights principles with public budgeting practices represents a burgeoning field of inquiry within academic and advocacy circles. The literature surrounding human rights perspectives on public budgeting reflects a growing interest in leveraging IHRL to inform budgetary decision-making

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<sup>267</sup> Rudiger (n 38).

<sup>268</sup> See discussion of public budgets in Europe in Iris Saliterer, Mariafrancesca Sicilia, and Ileana Steccolini, ‘Public Budgets and Budgeting in Europe: State of the Art and Future Challenges’ as found in Edoardo Ongaro & Sandra van Thiel *The Palgrave Handbook of Public Administration and Management in Europe* (Palgrave Macmillan 2018).

<sup>269</sup> Blyberg (n 149) at 3.

<sup>270</sup> Maria Dikono ‘A Rights-Based Approach towards Budget Analysis’ (1999) Quezon City, Philippines: International Human Rights Internship Program at 6.

<sup>271</sup> Aaron Wildavsky *The Politics of the Budgetary Process* (Boston: MA: Little Brown, 1964) as found in Jaako Kuosmanen ‘Human Rights, Public Budgets and Epistemic Challenges’ (2016) 17 Human Rights Law Review 247 at 248.

<sup>272</sup> See the collection of contributions to the field in O’Connell et al (n 41).

processes and enable their use in monitoring and developing evidence on ESCR violations.<sup>273</sup> While initial explorations often focused on establishing the theoretical foundations of IHRL obligations and their nexus with public finances and budget analysis, recent scholarship and civic society contributions have increasingly emphasised the practical application of such principles within the budgetary context.<sup>274</sup> Through empirical analysis and case studies, scholars have underscored the importance of developing robust methodologies and practices to facilitate the integration of human rights principles into budgetary decision-making processes, thereby advancing the broader agenda of social justice and equitable resource distribution. This chapter aims to chart the trajectory of this evolving discourse, emphasising the growing awareness of the applicability of IHRL to budgetary and broader fiscal decision-making processes. Moreover, where Chapter 1 sought to outline the basic structure of ESCR law, this chapter extends the analysis to probe the practical implications of such norms and obligations within public resource allocation.

### 3.1 Reviewing the Emergence of Human Rights Budgeting and Budget Analysis

Despite being a concept formed in the latter part of the 1990s, reports, case studies, and general academic commentary on the relationship between human rights and public budgets, today broadly coined HRB, had been minimal when compared to core subjects and interests of human rights (certainly, until recently, considering the extent to which they intersect).<sup>275</sup> For example, while other frameworks, such as participatory budgeting (also first adopted in the 1990s), found widespread interest, understanding, and local and national practice, applying the international human rights framework to public budgets initially garnered less enthusiasm.<sup>276</sup> Though, this has dramatically changed in the last decade. Exploring the existing and emerging literature on HRB brings to light several critical understandings of human rights' role and uses in fiscal decision-making. HRB, as an umbrella term, is best understood as providing a framework of legal obligations, norms, and principles for practice to be applied within budgetary decision-

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<sup>273</sup> See, for example, Megan Manion et al. 'Budget Analysis as a Tool to Monitor Economic and Social Rights: Where the Rubber of International Commitment Meets the Road of Government Policy' (2017) 9(1) *Journal of Human Rights Practice* 146; De Schutter (n 101); Mira Dutschke et al. 'Budgeting for Social Housing in Northern Ireland: A Human Rights Analysis' Queens University Belfast Budget Analysis Project; Rory O'Connell, 'Human Rights and Fiscal Oversight: A Case Study of the Northern Ireland 2011-2015 Budget' (2017) 65(3) *Administration* 83; and Thandiwe Matthews and Daniel McLaren 'Budget Analysis for Advancing Socio-Economic Rights: Tools and methods used for formulating and analysing government budgeting for the progressive realisation of socio-economic rights' (2016) *Studies in Poverty and Inequality Institute & South African Human Rights Commission*.

<sup>274</sup> Center for Economic and Social Rights (CESR), 'The OPERA Framework: Assessing compliance with the obligation to fulfil economic, social and cultural rights' (2015) CESR; Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford University Press 2015).

<sup>275</sup> Diokno (n 270); Blyberg (n 39); Shultz (n 3); Hofbauer, Blyberg and Krafchik (n 37).

<sup>276</sup> Rudiger (n 38).

making, with ongoing monitoring and analysis as to their potential impact upon different groups of rights-holders within the state also carried out. It provides both an analytical framework from which to make decisions in a rights-compliant manner and an assessment of whether those decisions have had the intended impact on specific rights-based outcomes. Contemporary HRB approaches are best understood as providing both a decision-making framework for formulating, approving, and enacting a public budget (ex-ante) and an overall basis for human rights-based scrutiny and analysis of the decisions taken (ex-post). It serves as both a tool for fiscal decision-makers, governments, and wider public (and private) bodies to entrench human rights throughout fiscal decision-making and a scrutiny framework for those wishing to hold the state, or even specific public bodies within it, to account. As Blyberg succinctly surmises, ‘to better understand the implications of human rights law for governments’ budgets, it is helpful to think of two complementary processes: one, human rights budgeting; the other, human rights budget analysis’.<sup>277</sup>

Compiled by O’Connell et al. in 2014, there were fourteen ‘best known, most comprehensive and most influential English-language examples’ of ESCR budget analysis up until 2010.<sup>278</sup> Each study remains a beneficial contribution for any researcher, practitioner, or decision-maker seeking to analyse the budget through a human rights lens. They, too, are used throughout this thesis as evidence. However, as O’Connell et al. note, further work was needed to provide ‘more comprehensive definitions of ESCR principles such as those delineated in the context of the ICESCR’ and, in particular, ‘for their budgetary implications to be clarified’.<sup>279</sup> Their seminal work, alongside the collection of academic contributions drawn together by Nolan et al. collected, established and evidenced arguments for closer inspection of state budgets from the perspective of human rights.<sup>280</sup> The purpose of this section is to build upon their findings and provide an updated account of the developments which have led the UN Office of the High Commissioner on Human Rights (“OHCHR”) to publish a guide to budgeting for the realisation of human rights in 2017, recognising ‘a government’s budget is the most important economic policy and planning document and is an essential means by which to assess governments efforts for the realisation of human rights.’<sup>281</sup> Understanding the trajectory of HRB over the last decade, beginning with the prominent economic, political, and societal factors in play since

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<sup>277</sup> Blyberg (n 149) at 4.

<sup>278</sup> O’Connell et al. (n 41).

<sup>279</sup> Ibid at 59.

<sup>280</sup> Aoife Nolan, Rory O’Connell & Colin Harvey *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, 2014).

<sup>281</sup> OHCHR (n 258) at 7.

2008, is essential, as they have directly led to the enhanced focus of human rights scholars, institutions, and practitioners on budget processes, fiscal policy, and budget analysis.<sup>282</sup>

2008 is now synonymous with its chaotic financial crash and instigating a global economic crisis. Very few in the world have not been impacted by the economic events that unfolded, with financial institutions' irresponsible (criminal) practices leading to a public bailout for good or, more likely, for ill.<sup>283</sup> As the banks received whatever was necessary to stabilise the crumbling economic system and halt the global market free fall, in direct conflict with the prevailing neoliberal, non-interventionist free market ideologies of many governments at the time, plans were drawn to pay for it through fiscal austerity.<sup>284</sup> Sold at the time as an economic necessity, fiscal austerity became a global norm, with existing legal systems unable or unwilling to challenge such direction.<sup>285</sup> Commenting on this issue, Corkery and Saiz espouse: 'In the decade since the global financial crisis, in particular, the predominant fiscal policy doctrine worldwide has been that of austerity (or 'fiscal consolidation'), characterised by drastic cuts to social spending, decreased investment in public services and reduced social protection programs. Austerity policies, pushed dogmatically by some governments and international financial institutions against growing evidence that they are ineffective as well as inequitable, can be seen as the antithesis of progressive realisation, having resulted in a manifestly unjustified backsliding of ESCR enjoyment across all continents.'<sup>286</sup> They discuss the dual impact of governments globally tightening the public purse alongside the 'mounting exposure of how resources potentially available to the public coffers are pilfered in practice by wealthy individuals and powerful multinational corporations through mass-scale tax evasion

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<sup>282</sup> Kuosmanen (n 271); see also, collection of issues in Nolan (n 103); and Radhika Balakrishnan and James Heintz 'Economic policy and human rights' in Jackie Dugard et al. *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Elgar 2020).

<sup>283</sup> See the work of Isabel Ortiz and Matthew Cummins 'End Austerity: A Global Report on Budget Cuts and Harmful Social Reforms in 2022-25' (2022) Initiative for Policy Dialogue.

<sup>284</sup> CESR 'Human Rights and the Global Economic Crisis' (2011) CESR. Available at: <[https://www.cesr.org/sites/default/files/CESRHuman\\_Rights\\_and\\_the\\_Global\\_Economic\\_Crisis.pdf](https://www.cesr.org/sites/default/files/CESRHuman_Rights_and_the_Global_Economic_Crisis.pdf)> (accessed 23/07/24); and Ignacio Saiz 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1(2) *Journal of Human Rights Practice* 277; and Sally-Anne Way, Nicholas Lusiani and Ignacio Saiz 'Economic and Social Rights in the 'Great Recession': Towards a Human Rights-Centred Economic Policy in Times of Crisis' in Eibe Riedel, Gilles Giacca and Christophe Golay *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014).

<sup>285</sup> Colm O'Cinneide 'Austerity and the faded dream of a 'social Europe' in Nolan (n 101); see also Nicholas Lusiani and Sergio Chaparro, 'Assessing Austerity: Monitoring the Human Rights Impacts of Fiscal Consolidation' (CESR 2018); For a specific European viewpoint, see Margot Salomon 'Of Austerity, Human Rights and International Institutions' (2016) 21(4) *European Law Journal* 521.

<sup>286</sup> Alison Corkery & Ignacio Saiz 'Progressive realisation using maximum available resources: the accountability challenge' in Dugard (n 282) at 276.

and avoidance.’<sup>287</sup> Arguments remain over economic decision-making at the time.<sup>288</sup> However, many commentators now vehemently argue that austerity was not an economic necessity but an ideological choice driven by the free-market principles of neoclassical economics popularised by the economists Friedman and Hayek.<sup>289</sup> Rudiger supports such a view by raising: ‘the rise of the neoliberal public finance regime that prioritises macroeconomic stability and fiscal consolidation over distributional effects. The primary goals of the fiscal strategies promoted by this paradigm are debt and deficit reduction, risk reduction in financial markets and consistent GDP growth.’<sup>290</sup> In practice, these priorities have led to austerity-driven budgeting practices, characterised by cuts to public programs and services, the implementation of regressive taxation, and a widening influence of corporate interests on public fiscal decision-making.

Various studies from differing disciplines, as well as domestic and international human rights organisations, have well evidenced the harm austerity has caused. Its legacy in the UK and Scotland alone is truly harrowing and need not be reiterated here.<sup>291</sup> For this discussion, it is important to recognise that the devastating financial crash and the consequent bailout of the neoliberal economic system, upon which the global financial system was underpinned, primarily acted to once again direct the attention of proponents of human rights and broader issues of social justice to the entrenched injustices of our macroeconomic system.<sup>292</sup> Including its potential incompatibility with ratified human rights treaties and, crucially for this research, its impact on the state's ability to budget for the realisation of ESCR. O’Connell explores this subject in the aptly titled ‘The Death of Socio-economic Rights’, highlighting the severity of the impact the decision-making of the time had on ESCR realisation.<sup>293</sup> For example, since these events, the CESCR in overseeing ESCR compliance (which was slow and even arguably reluctant to recognise and condemn the damage of governmental economic decision-making initially) has acknowledged the significant and detrimental impact of the global financial crash

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<sup>287</sup> Ibid.

<sup>288</sup> Margot Salomon & Colin Arnott ‘Better Development Decision-making: Applying IHRL to Neoclassical Economics’ (2014) 32(1) *Nordic Journal of Human Rights* 44; See also Samuel Moyn ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’ (2014) 77(4) *Law and Contemporary Problems* 147; For a wider and more recent discussion on the existence of human rights within a neoliberal world, see MacNaughton & Frey (n 181).

<sup>289</sup> For a full discussion of the economic choices at the time and their impact on human rights realisations, see Balakrishnan & Heintz (n 282).

<sup>290</sup> Rudiger (n 38) at 144.

<sup>291</sup> Human Rights Watch, ‘Nothing Left in the Cupboards: Austerity, Welfare Cuts, and the Right to Food in the UK’ (2019) Human Rights Watch. Accessible here: <[https://www.hrw.org/sites/default/files/report\\_pdf/uk0519\\_web3.pdf](https://www.hrw.org/sites/default/files/report_pdf/uk0519_web3.pdf)> (accessed 19/07/24).

<sup>292</sup> Diane Desierto ‘Austerity Measures and International Economic, Social and Cultural Rights’ in Evan Criddle *Human Rights in Emergencies* (Cambridge University Press 2016).

<sup>293</sup> Paul O’Connell ‘The Death of Socio-Economic Rights’ (2011) 74(4) *The Modern Law Review* 532.

on the enjoyment of ESCR globally.<sup>294</sup> Further still, the CESCR now regularly raises the need for further resources to be available in their concluding observations on state parties demonstrating a less deferential approach than previously used to individual states' fiscal policies and budgetary decision-making.<sup>295</sup> Critically, austerity for many thrust into focus the notion that how states measure, mobilise, allocate, spend, and scrutinise resources had for too long been left to 'the arbitrary and capricious choices of States'.<sup>296</sup> In summary, the aftermath of the economic crash galvanised a whole new tranche of human rights academics and practitioners (among many other disciplines) to renew and refocus their energies on counteracting the growing issues of unjust resource distributions, tax regimes and evasion, and ever-increasing inequality in the hope of providing an antidote to the cruelty of the global economy's worst impacts.

Alongside the impetus austerity policies thrust into budget analysis, other practical factors have enabled human rights advocates to grapple with state budgets. For example, within more democratic states there had been an exponential increase in government information available for civil society organisations, lawyers, academics, and other interested parties to access and analyse.<sup>297</sup> While access to information and data remains a crucial barrier to conducting human rights budget analysis, significant strides have been made, allowing rights advocates to 'follow the money'.<sup>298</sup> Additionally, many developed economies underwent a period where there was an increase in decentralisation, moving toward local governance structures and the adoption of publicly available local budgets. This has allowed many more civic society groups, academics, and members of the public to feel better able to tackle budget issues because localised expenditures are generally more approachable, understandable, and more accessible to influence than the central national budget.<sup>299</sup> Moreover, through advancements in technology and the free flow of information, civic society, human rights practitioners, and academics can increasingly share their resources, experience, knowledge, and methodologies to break down significant barriers to achieving progressive causes through public budgets. Again, Scotland provides a prime and current example. There are currently different academic working

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<sup>294</sup> Nolan (n 103).

<sup>295</sup> For example, Portugal E/C.12/PRT/CO/5 CESCR 2023; Panama E/C.12/PAN/CO/3 CESCR 2023; Italy E/C.12/ITA/CO/6 CESCR 2022.

<sup>296</sup> De Schutter (n 33) at 5.

<sup>297</sup> Blyberg (n 149).

<sup>298</sup> Open Budget Survey 2019. Available at: < <https://www.internationalbudget.org/open-budget-survey/country-results/2019/united-kingdom>>; For an overview of the available information concerning Scotland's national budget, see SHRC 'Open Budget Survey 2019: Scotland' (2020) Scottish Human Rights Commission.

<sup>299</sup> Blyberg (n 39); see also Matthews and McLaren (n 273).



groups,<sup>300</sup> parliamentary committees,<sup>301</sup> government advisory groups,<sup>302</sup> and civic societies<sup>303</sup> exploring approaches and sharing expertise in recognition that our current fiscal practice is not delivering for those who need it most. Scotland's example demonstrates that where there is collaboration, pragmatic action can be taken, and progress made when actors from across a society work collaboratively for social change.

Over the last decade, there have been two key contributions from the UN system to build upon the fourteen notable publications covered by O'Connell et al. since their overview and analysis in 2014. An OHCHR report outlining the normative basis for human rights and the public budget is helpfully structured to demonstrate the pertinence of human rights to different aspects of the budget cycle (formulation, approval, execution, evaluation). It forms a key part of the analysis provided through Chapter 8.<sup>304</sup> Additionally, the Committee on the Rights of the Child ("CRC") has also released a general comment on 'public budgeting for the realisation of children's rights', providing detailed guidance on the principles of public budgeting for children's rights and measures states can take to make children visible within the budget process.<sup>305</sup> There has also been a tranche of academic studies published since 2014 that have delved deeper into the underlying theory of the importance of fiscal policy to human rights, as well as identified practical steps and principles to embed when adopting a rights-based approach to budgets. Key academic contributions utilised here include the work of Kuosmanen through Oxford University's hub on human rights and HRB policy,<sup>306</sup> Blyberg's analysis of article 2(1) and a recent further exploration by Corkery and Saiz,<sup>307</sup> the work of De Schutter on exploring 'the rights-based welfare state' and 'public budget analysis',<sup>308</sup> Renzio and Lakin's contribution on 'reframing public finance',<sup>309</sup> followed by Rudiger on the search for

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<sup>300</sup> Much of the work in Scotland is being driven by a group of interdisciplinary academics from differing institutions. The group is the HRB Working Group and has directly influenced the work of the SHRC and the Scottish Government.

<sup>301</sup> See the recent exploration of HRB principles by the Equality, Human Rights and Social Justice Committee in the Scottish Parliament. Available at <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/business-items/the-impact-of-human-rights-budgeting> (accessed 19/07/24).

<sup>302</sup> See the work of the Equality and Human Rights Budget Advisory Group (EHRBAG). Available at: <https://www.gov.scot/groups/equalitybudgetadvisorygroup/#:~:text=The%20Equality%20and%20Human%20Rights,rights%20aspects%20the%20group%20covers> (accessed 19/07/24).

<sup>303</sup> For example, the Wellbeing Economy Alliance is currently running the Love Letham project on children's well-being budgeting in Scotland. It is available at <https://weall.org/love-letham> (accessed 18/07/24).

<sup>304</sup> OHCHR (n 258).

<sup>305</sup> CRC, General Comment no. 19 (2016) 'on public budgeting for the realisation of children's rights', 20 July 2016 CRC/C/GC/19 at 7-9.

<sup>306</sup> Kuosmanen (n 271); and Jaako Kuosmanen 'Towards 'Human Rights Compatible' Public Budgets – an Account of Institutional Virtues' (2015) 64(3) Political Studies 683.

<sup>307</sup> Blyberg (n 149); and Blyberg (n 39).

<sup>308</sup> De Schutter (n 101); and De Schutter (n 33).

<sup>309</sup> Paolo de Renzio and Jason Lakin 'Reframing Justice, Democracy, and Human Rights in Government Budgets' (2019) International Budget Partnership.

‘fiscal justice’,<sup>310</sup> Alston & Reisch’s collection on ‘tax, inequality and human rights’,<sup>311</sup> and Manion et al.’s detailed work which also confirms the need to draw upon the experiences of expert interviews on budget analysis.<sup>312</sup> There are also the chilling empirical findings of Chilton and Versteeg concerning expenditures (or lack thereof) on social rights to contend with.<sup>313</sup> Furthermore, practical frameworks such as the Center for Economic and Social Rights (“CESR”) ‘Principles for Human Rights in Fiscal Policy’ and ‘OPERA’ framework alongside the ‘Social and Economic Rights Fulfilment Index’ (“SERF Index”) provide tools from which to begin carrying out budget analysis to measure the progressive realisation of ESCR within a state using a multitude of factors to build an overall assessment of the state’s compliance with international human rights standards.<sup>314</sup> Both the OPERA and SERF frameworks have been designed as a methodological basis for including the overall use of resources within the state to build accountability for a failure to deliver the progressive realisation of ESCR. They are particularly useful from a practice perspective.

In Scotland, more specifically, the SHRC has been working on this issue, and the Parliament recently explored HRB. There have also been reports on children’s rights budgeting and even Government guidance published on adopting a children’s rights-based approach to budgets.<sup>315</sup> Indeed, exhaustively capturing all of the development on public budgets and human rights, let alone the rest of the work across well-being, gender, and participatory budgeting, which make valuable and relevant contributions, would be a sizeable and timely endeavour. Nor does this even consider that the researcher is also limited in only being able to find and digest prominent English-language contributions. The following sections of this chapter are, therefore, an attempt to use these key outputs and contributions, among others, to digest the principles, obligations, and practices of ESCR and their extensive implications for public budgets.

### 3.2 The Obligation to Respect, Protect and Fulfil in Fiscal Decision-Making

To begin with the legal obligations of IHRL, as briefly introduced in Chapter 1, all states have a duty to RPF human rights under international law.<sup>316</sup> This ‘tripartite’ typology, first conceptualised by philosopher Shue and later refined by Eide, has been advocated for throughout human rights law and provides a valuable starting point for understanding how

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<sup>310</sup> Rudiger (n 38).

<sup>311</sup> Alston and Reisch (n 32).

<sup>312</sup> Manion et al. (n 273).

<sup>313</sup> Chilton and Versteeg (n 29).

<sup>314</sup> CESR (n 278); See also generally Fukuda-Parr, Lawson-Remer & Randolph (n 274).

<sup>315</sup> Scottish Government ‘Taking a children’s human rights approach: guidance’ (2024) Scottish Government. Available at <<https://www.gov.scot/publications/guidance-taking-childrens-human-rights-approach/>> (accessed 22/07/24).

<sup>316</sup> Manfred Nowak ‘Respect-Protect-Fulfil’ in Christin Binder et al. *Elgar Encyclopedia of Human Rights* (Elgar 2022).

international legal obligations are to be applied to fiscal decision-making and, consequently, public budgets.<sup>317</sup> To reiterate its basic premise, the taxonomy espouses that rightsholders be protected from interference by the State in the exercise of certain freedoms [respect]; that the State protect the individual from interference by other actors, whose conduct the State is in a position of control [protect]; and that the State provide certain public goods that would be undersupplied if their provision were left to market mechanisms [fulfil].<sup>318</sup> While it is often viewed through the prism of ‘negative’ and ‘positive’ duties upon states, as discussed, it is better understood as presenting ‘waves of duties’ which are progressively more burdensome and, often, resource intensive.<sup>319</sup> When applied to the notion of resources, as is carried out below, it is clear each wave can have consequences of the use of state resources and thus reinforces the foundational principles of indivisibility between rights as well as the understanding all human rights contain a measure of both positive and negative obligations. Veritably, ‘an advantage of basing an analysis on the tripartite level of obligations is that it illustrates the equal nature of all human rights, the interdependencies of all duties and the scope of a state’s duties’ and ‘because each ‘layer’ of obligations attracts relatively specific and identifiable budget obligations’.<sup>320</sup>

The RPF framework is, however, not without its challenges. Importantly, it does not provide an adequate substitute for the specificity of the ESCR obligations covered in the following section.<sup>321</sup> The OHCHR has, for example, opined that ‘for the purposes of budget analysis, such taxonomies do not necessarily reveal which obligations are subject to resource constraints and which are not’.<sup>322</sup> On the other hand, the report also recognises that the taxonomy has ‘helped the CESCR to structure its thinking and approach to monitoring the implementation of the ICESCR’ and that it can act as a useful initial framing point.<sup>323</sup> Further, it has been adopted by the UN throughout its human rights instruments and guidance and can, therefore, aid the understanding of what is required of a State to meet its obligations under international law.<sup>324</sup> More recently, it has been included within a review of human rights in fiscal policy as one of

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<sup>317</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton UP 1980); and Eide (n 72).

<sup>318</sup> De Schutter (n 55).

<sup>319</sup> Koch (n 59).

<sup>320</sup> O’Connell et al. (n 41) at 88.

<sup>321</sup> David Karp ‘What is the responsibility to respect human rights? Reconsidering the ‘respect, protect, and fulfil’ framework’ (2019) 12(1) *International Theory* 83.

<sup>322</sup> OHCHR (n 258) at 19.

<sup>323</sup> *Ibid.*

<sup>324</sup> For example, see CESCR General Comment No. 12 (n 78) at paragraph 15; CESCR General Comment No. 13 (n 78) at paras 46–47 and 50; CESCR General Comment No. 14 (n 83) at paras 33–37; UN Economic and Social Council, General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), E/C.12/2002/11 20 January 2003 at paras 20–29; CESCR, General Comment No. 19, The Right to Social Security, UN Doc E/C.12/GC/19 (2007) at paras 43–50.

fifteen principles as ‘the obligations to respect, protect and fulfil human rights demand a proactive role for the State to impose limits on the discretion of the State in relation to fiscal policy’ and is worthy of a brief exploration before delving into the details of specific ESCR law.<sup>325</sup>

### 3.2.1 The Duty to Respect

The obligation to respect all human rights is generally understood as requiring States to abstain from interfering with the existing enjoyment of a right by rights-holders. It is an immediate duty upon states, meaning it is not subject to the resources within the state. This requirement within the taxonomy is most associated with the ‘negative’ end of the obligation wave due to its generalisation of focusing on inaction over specific actions being taken.<sup>326</sup> However, as recognised by Magdalena Carmona, it also entails adopting positive measures and, hence, the allocation and expenditure of public resources.<sup>327</sup> This may, for example, be preventing ‘interference with the enjoyment of such rights by establishing appropriate institutions’ or ‘by providing for an effective system of administration of justice to conduct proper investigations and to provide a remedy and reparation to any violation by State agents’.<sup>328</sup> As mentioned, this could be the need for a state to establish or maintain institutions such as basic public services, regulatory bodies, or a justice system. It could even be the mere use of resources to train public officials and administrators in running the state. Koch argues that the interpretation of the duty to respect human rights extends to the view that the state is obliged to uphold the existing level of ESCR enjoyment.<sup>329</sup> In other words, maintaining the status quo of rights enjoyment inevitably creates a positive duty upon the state to mobilise and allocate sufficient resources to achieve this.<sup>330</sup> In their exploration of the framework, O’Connell et al. also identify the notion of restitution as relevant ‘because it is the manifestation of positive, resource-dependent obligations about the obligation to respect the existing enjoyment of rights’.<sup>331</sup> Using the decision of SERAC v Nigeria from the African Commission on Human and People’s Rights and the order to ensure adequate ‘compensation’ to the victims of the violation, they demonstrate that the duty to respect in IHRL has been interpreted as giving rise to the need to

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<sup>325</sup> CESR, ‘Principles for Human Rights in Fiscal Policy (2021) CESR at 18.

<sup>326</sup> Koch (n 59).

<sup>327</sup> María Magdalena Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

<sup>328</sup> International Commissions of Jurists (IJC) ‘State obligations stemming from international law’ (2003) IJC.

<sup>329</sup> Koch (n 59).

<sup>330</sup> Malcolm Langford and Aoife Nolan, *Litigating Economic, Social and Cultural Rights: A Legal Practitioners’ Guide* (COHRE Centre for Housing Rights and Evictions 2006) at 79.

<sup>331</sup> O’Connell et al. (n 41) at 90.

respect the existing enjoyment of rights and to provide a remedy when violated.<sup>332</sup> Where the provision of an effective remedy is required due to a state failing to respect individuals enjoyment of human rights, there is a clear positive obligation upon the state to ensure not only that resources are available to enable access to an effective remedy, which remains hugely challenging in many states (including the UK), but also that resources, whether financial or other, are made available for compensation and restitution.<sup>333</sup> Consequently, despite being associated with a negative obligation to refrain from interfering with the enjoyment of rights, when assessed in more depth, it is clear the duty to respect human rights also gives rise to the need to generate, allocate, and expend resources within a state and is relevant for any public budget process.

### 3.2.2 The Duty to Protect

Moving through the next wave, states are obligated to protect the enjoyment of human rights from non-state actor interference, including through ‘due-diligence’, whether a specific group of organisations within a state or the general privatisation of specific services undermining the enjoyment of ESCR.<sup>334</sup> The latter of these two receives the most attention when discussing the obligation to protect with many states, particularly in more affluent states, having adopted a policy of ‘market-friendly’ privatisation for many vital services central to upholding and realising ESCR.<sup>335</sup> Nolan captures this within a timely analysis of the use of privatisation to realise ESCR, stating: ‘Contracting out, public-private partnerships, and other approaches by which the private sector takes responsibility for, or supports the state in, delivering ESR-related goods and services are being advanced aggressively at both the national and supranational levels, with international financial institutions playing an especially influential role.’<sup>336</sup> It is within this context the obligation to protect ESCR can most easily be identified and explored. In a practical sense, the obligation to protect does not ban privatising services and infrastructure critical to delivering ESCR. Instead, it seeks to ensure that where privatisation does occur, it does not threaten the enjoyment of ESCR. This could be the privatisation of health and social

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<sup>332</sup> Communication Number 155/ SERAC v Nigeria 1996.

<sup>333</sup> Boyle (n 1); and Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-national and National Law* (Cambridge University Press 2021).

<sup>334</sup> Bjornstern Baade, ‘Due Diligence and the Duty to Protect Human Rights’ in Keike Krieger et al *Due Diligence in the International Legal Order* (Oxford University Press, 2020).

<sup>335</sup> See Paul O’Connell, ‘On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights’ (2007) 7(3) Human Rights Law Review 483; and Louise Bernier, ‘International Socio-Economic Human Rights: The Key to Global Health Improvement?’ (2010) 14 International Journal of Human Rights 246.

<sup>336</sup> Aoife Nolan, ‘Privatization and Economic and Social Rights’ (2018) 40 Human Rights Quarterly 815 at 815; See also David Birchall ‘Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in an Era of Marketisation’ (2022) 71(1) International and Comparative Law Quarterly 227.

care facilities as a direct example, or more indirect harm caused by business activity exposing people to dangerous conditions, exploitation in the workplace, or marginalisation through displacement.<sup>337</sup> With the advancement of privatisation throughout societies globally, states have an ever-increasing role to play in ensuring they protect the enjoyment of human rights.

This can be achieved in numerous ways, such as establishing and funding a National Human Rights Institution (“NHRI”), but is more often viewed as a need to establish and monitor appropriate institutions to carry out independent regulation of private services delivering essential public services. The CESCR has, through GC 15 on the right to water, outlined this facet of the obligation to protect very clearly by providing: ‘Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe, and acceptable water. To prevent such abuses, an effective regulatory system must be established in conformity with the Covenant and this general comment, which includes independent monitoring, genuine public participation, and the imposition of penalties for non-compliance.’<sup>338</sup> The approach from the CESCR was put into practice in Argentina with the constitutional court finding the state, as the primary duty bearer, had an obligation to ensure the existence of an adequate regulatory system to ensure the private water companies complied with the provisions of a minimum amount of fifty litres of water a day to residents within the area.<sup>339</sup> This interpretation of the obligation to protect, where regulation and adequate independent monitoring are required to create and maintain an economic, social and political environment conducive to the enjoyment and realisation of ESCR, directly gives rise to a positive obligation upon the state to ensure resources are made available each year to establish and maintain such an environment.

A further important example provided by De Schutter’s analysis of a rights-based welfare state is the positive obligation upon states to combat tax evasion by ‘dedicating sufficient personnel and resources’.<sup>340</sup> Building upon the opinion of Magdalena Sepulveda Carmona, who, in discussing the impact of tax abuse on the poorest in society, opined that ‘monitoring, preventing and punishing abuse is therefore essential in order to comply with human rights principles and improve the distributive effects of the tax system’, De Schutter’s analysis

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<sup>337</sup> See, for example, Bilchitz (n 188).

<sup>338</sup> CESCR General Comment No. 15: (n 324) at para 24.

<sup>339</sup> Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial First Instance Court). April 8, 2002, as found in Malcolm Langford et al., *Legal Resources for the Right to Water: International and National Standards* (COHRE 2003).

<sup>340</sup> De Schutter (n 33) at 34.

demonstrates the role of tax evasion in undermining the ability of states to both protect and fulfil human rights.<sup>341</sup> Noticeably, this understanding has been recently echoed by the CESCR in its concerns raised to Cambodia in its recent concluding observation, where it stated: ‘The Committee regrets not having received information from the State party on its taxation system and how resources are distributed for the protection and fulfilment of economic, social and cultural rights, especially to combat inequalities in their enjoyment’.<sup>342</sup> These sources help to establish that tax evasion is not only relevant to the ability of a state to mobilise sufficient resources to fulfil ESCR but can also be viewed as a failure of the state to take adequate measures to protect rights holders from interference with their rights from private entities such as accounting, banking, and legal firms facilitating such tax avoidance. Together with the examples provided above, the obligation to protect ESCR, when applied practically in full, presents an increasingly burdensome obligation upon the state to ensure resources are made available to guarantee the proliferation of privatisation throughout many societies and does not inevitably lead to a detrimental impact on their enjoyment of ESCR.

### 3.2.3 The Duty to Fulfil

Within the ESCR framework, the duty to fulfil is often equated to the need to take steps to progressively realise them to the maximum of the state’s available resources. However, Nolan challenges this view, asserting that it does not adequately capture the fact that progressive realisation has both immediate and progressive elements.<sup>343</sup> This understanding will be returned to, but for this discussion’s purposes, the duty is often viewed as both evidently positive and resource intensive. In other words, ‘fulfilling ESCR imposes a duty on states to adopt ‘enabling strategies’ to ensure that the measures being taken are sufficient to realise the right for every individual.’<sup>344</sup> This demonstrates the broad swathe of positive actions required by a state party, from facilitating rights realisation through establishing and funding key public services to promoting their realisation through implementation measures such as human rights education and awareness raising and ensuring ESCR are provided to those most marginalised and disadvantaged within society who cannot claim their rights within the system themselves.

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<sup>341</sup> Ibid; see also Alliance Sud, Centre for Economic and Social Rights, Global Justice Clinic of New York University School of Law, Public Eye and Tax Justice Network, Swiss Responsibility for the Extraterritorial Impacts of Tax Abuse on Women’s Rights (2 November 2016). Available at: [http://chrgj.org/wpcontent/uploads/2016/12/switzerland\\_cedaw\\_submission\\_2nov201628.pdf](http://chrgj.org/wpcontent/uploads/2016/12/switzerland_cedaw_submission_2nov201628.pdf). (accessed 22/07/24).

<sup>342</sup> Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on Cambodia E/C.12/KHM/CO/2 2023 at para 16.

<sup>343</sup> See discussion in Aoife Nolan, ‘Economic and Social Rights, Budgets and the Convention on the Rights of the Child’ (2013) 21(2) International Journal of Children’s Rights.

<sup>344</sup> See, for example, the approach of the CESCR in General Comment No. 4 (n 77) at para 14.

In short, it requires states ‘by implication to adopt appropriate administrative, budgetary, promotional and other measures towards the full realisation of [ESCR].’<sup>345</sup> This may involve developing legislation, policy, or national strategies to progress rights realisation or ensure equal or even equitable access to certain services, such as water.<sup>346</sup> These are resource-intensive and require an ongoing, long-term financial commitment from the state, giving rise to rights-based considerations of resource use and distribution between different services and priorities within a state.<sup>347</sup> Upon analysis of the guidance provided by the CESC, there is discretion in how the fulfilment of specific rights is implemented, with a deferential approach adopted to precisely the measures and, consequently, resource requirements required to be adopted by states in meeting the obligation to fulfil.<sup>348</sup> While it outlines clearly the need for some immediate measures such as to eliminate discrimination or to ‘take steps’ through, for example, the adoption of national strategies on health or education, the discretion provided by the CESC does present some challenges to identifying what represents the best use of resources for the fulfilment of ESCR. Therefore, the duty to fulfil is open to the same criticism tabled at Article 2(1) of the ICESCR. It inherently includes an ‘escape hatch’ which ‘risks granting government an excuse to defer their efforts to fulfil ESCR by citing economic constraints’.<sup>349</sup>

It remains a significant challenge, but some recent efforts have established clear links between the resources utilised within a state and the fulfilment of ESCR. For example, the SERF Index has been developed as a ‘rigorous tool for quantitative measurement and analysis regarding countries’ fulfilment of their economic and social rights - the right to food, the right to adequate shelter, the right to healthcare, the right to education, the right to decent work, the right to social security, and protection against discrimination.’<sup>350</sup> The SERF index is based on several specific outcome indicators focused on ESCR areas and assesses the overall performance of a state relative to the ‘available resources’ it has measured using data for Gross Domestic Product (“GDP”) per capita. It ‘examines available survey and administrative data to reveal trends in progress and regress over time, and as between countries. By combining the measurements of available GDP with other variables of capacity and obstacles, this approach analyses ‘progressive realization’ in quantitative, rather than conceptual, terms, and the consequence is

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<sup>345</sup> O’Connell et al. (n 41) at 98.

<sup>346</sup> General Comment No. 15 (n 324).

<sup>347</sup> See also Fukuda-Parr, Lawson-Remer, and Randolph (n 274).

<sup>348</sup> See for example, General Comment No. 12 (n 78).

<sup>349</sup> Corkery and Saiz (n 286) at 275.

<sup>350</sup> UCONN, ‘Social and Economic Rights Fulfillment Index’ as available at: <https://serfindex.uconn.edu/about-us/> (accessed 22/07/24).



to reprimand well-resourced but badly governed countries and celebrate those that do much more with less.’<sup>351</sup> The index is not perfect ‘in that it does not, so far, account for factors other than GDP that may explain differences in rights outcomes’ or ‘attempt to assess the extent to which countries ensure the procedural rights of non-discrimination, participation, and accountability’.<sup>352</sup> However, the index demonstrates strides forward in the face of the challenge of measuring the overall fulfilment of ESCR and, particularly, its implication for the use of fiscal resources within a State.

### 3.3 Public Budgeting Through the Lens of Article 2(1) of the ICESCR

Already established in Chapter 1 was the understanding that all human rights implementation will depend upon the use of public resources, raising the potential use of both general and specific obligations of IHRL for all rights to apply to carrying out rights-based budgeting or budget analysis. However, Art 2(1) of the ICESCR is most often relied upon within the literature as it gives rise to a more robust legal framework from which to analyse state duties in relation to resource use. Moreover, the expansive nature of the duties and their applicability, through intentional design, to public budgets and wider resource use means they are better placed to monitor the positive obligations placed upon the State by different human rights.<sup>353</sup> To reiterate, ESCR are to be progressed over time with a coinciding immediately enforceable minimum threshold to protect those most disadvantaged and marginalised in society.<sup>354</sup> This means that the continual nature of the ESCR obligations makes them more appropriate as a framework for making and analysing budgetary decisions, as the extent to which they progress can often be directly connected to the resourcing received.<sup>355</sup> For example, while the legal obligations of CPR would require an assessment of the resources made available for the justice system in its many facets, they would not necessarily require an assessment of whether the justice system, as a whole, was continually improving over time.<sup>356</sup> Standards are set within an overall justice system that the State is expected to respect and provide to all citizens equally (though it should also be recognised that as a state's population increases or merely the same

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<sup>351</sup> Katherine Young, ‘Waiting for Rights: Progressive Realisation and Lost Time’ as found in Katherine Young *The Future of Socio-Economic Rights* (Cambridge University Press 2019) at 668.

<sup>352</sup> Uprimny, Hernandez and Araujo (n 44) at 646; UCONN (n 350); See also Fukuda-Parr, Lawson-Remer, and Randolph (n 274) at 16.

<sup>353</sup> Judith Welling, ‘International Indicators and Economic, Social and Cultural Rights’ (2008) 30 Human Rights Quarterly.

<sup>354</sup> Corkery and Saiz (n 286).

<sup>355</sup> Aoife Nolan, Nicholas Lusiani and Christian Courtis, ‘Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic, Social and Cultural Rights’ in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014).

<sup>356</sup> HRC, General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014 at para 27.

population relies increasingly upon an effective justice system, guidance from the ICCPR makes clear it would be incumbent upon state parties to ensure more resources are made available for these purposes).<sup>357</sup> This point aside, CPR obligations do not provide the same breadth of considerations required to assess whether a state is using its resources as effectively as possible to meet rights standards and continually improve them over time.

Further assessment is then required within the full suite of ESCR obligations concerning the continuous improvement of the availability, accessibility, acceptability, and adequacy of healthcare services, for example.<sup>358</sup> The stronger emphasis on the state's need to positively take steps to fulfil ESCR and move as expeditiously and effectively towards their full realisation establishes a more expansive and continuous set of obligations in which fiscal decision-making, via yearly budget cycles, becomes of central importance.<sup>359</sup> Thus, compared with the requirements attached to ESCR, where it is established that the MAR should be utilised to improve and realise rights continuously over time, it is evident why rights scholars and practitioners alike have found the legal obligations of the ICESCR to provide a more effective framework from which to analyse state budgets.<sup>360</sup> It provides a method of assessing a state's current commitment to specific rights and its commitment to improving such services over time. This does not suggest limiting ourselves to using the ICESCR solely for HRB purposes.<sup>361</sup> To do so would risk losing and excluding the considerations and obligations of CPR, which can often be afforded far more stringent legal protection domestically (certainly in Scotland), but also further and potentially useful frameworks connected with the right to development and the right to social and substantive equality.<sup>362</sup> Human rights are interrelated, interdependent, and indivisible. Recognising that all rights rely upon public resources only reinforces that the IHRL framework should and can be used to build accountability concerning resource use.<sup>363</sup> It is merely to demonstrate that most HRB literature, including this thesis, is focused on the progressive realisation of ESCR and, consequently, concentrates more specifically on the

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<sup>357</sup> HRC, General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007 at para 27.

<sup>358</sup> General Comment No. 14 (n 83).

<sup>359</sup> CESCR General Comment No. 3 (n 107); see also Nolan, Lusiani and Courtis (n 355).

<sup>360</sup> O'Connell et al. (n 41).

<sup>361</sup> OHCHR (n 258) at 18.

<sup>362</sup> Sandra Fredman 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 (2) Human Rights Law Review 273; and Gillian MacNaughton 'Beyond a Minimum Threshold: The Right to Social Equality' in Lanser Minkler *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2013).

<sup>363</sup> Bruce Porter 'Interdependence of human rights' in Jackie Dugard et al. *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Elgar 2020).

accompanying obligations. Certainly, a further avenue for research would be a more thorough analysis of CPR's norms, obligation, and jurisprudence concerning resource use.

Article 2(1) of the ICESCR provides that each state party to the present Covenant: ‘undertakes to take steps, [. . .], especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’<sup>364</sup> Budgets, viewed through this lens, represent key legislative measures to be adopted by the state to give effect to ESCR. Moreover, the budget should be understood as the most critical and influential legislative measure a state can take to realise ESCR and falls directly under the scope of Art 2(1).<sup>365</sup> The introduction to this thesis provided a brief insight into the understanding that progressive realisation acts as an umbrella duty in which established sub-duties act to aid our analysis of whether a state is effectively progressively realising ESCR.<sup>366</sup> Each sub-duty, as already briefly explored, gives rise to a range of considerations that need to be taken by the state. When considering budgetary decision-making, each duty within the overall need to progressively realise ESCR gives rise to specific budgetary actions (conduct) in the pursuit of specific outcomes (results), and it is only through understanding, contemplating, and expanding upon the sub-duties of progressive realisation that a complete framework to formulate and analyse budgets becomes apparent.<sup>367</sup> Applying each in isolation from the other would leave significant gaps upon which duty bearers could quite reasonably justify their practices and decisions as rights-compliant despite a lack of progress concerning ESCR. Where the duty to ‘take steps’ provides the straightforward but immediate duty to implement basic steps for the realisation of ESCR, such as having a budget process and formulating a public budget in the first place, some duties outlined above, such as MAR, undoubtedly provide more stringent requirements upon fiscal decision-makers.<sup>368</sup> For this reason, a more in-depth analysis of certain, but not all, sub-duties is provided below.

### 3.3.1 Progressive Realisation & Non-Retrogression

Progressive realisation can be understood as the need for the state to move as effectively and expeditiously as possible towards the full realisation of ESCR.<sup>369</sup> As Nolan and Dutschke

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<sup>364</sup> CESCR Article 2(1) (n 79).

<sup>365</sup> Shultz (n 39) at 31.

<sup>366</sup> Boyle (n 1).

<sup>367</sup> Eide (n 72).

<sup>368</sup> Corkery & Saiz (n 286).

<sup>369</sup> CESCR General Comment No. 3 (n 366).

elaborate upon in their in-depth analysis of Art 2(1) of the ICESCR, this applies to achieving the right's full scope and normative content.<sup>370</sup> It has often suffered criticism due to its inherently flexible language. Indeed, a 'violations' approach or the 'outcomes' approach has been touted as more appropriate than the original wording of the ICESCR for progressing ESCR.<sup>371</sup> However, as De Schutter suggests, connecting the obligation to public budgets may allow 'what looks like an infirmity to become a powerful tool, allowing human rights bodies to scrutinise public budgets'.<sup>372</sup> Generally, progressive realisation requires 'that resources allocated to the realisation of ESCR should increase at a rate at least proportional to any overall increase in resources.'<sup>373</sup> Put more practically, as a state's economy grows, the public resources utilised for the realisation of ESCR are expected to increase.<sup>374</sup> Consequently, if a State's budgetary commitments to core public services essential to realising ESCR were decreasing during economic prosperity, this would strongly suggest the State is failing to uphold the obligation of progressive realisation. To present this in its most basic understanding, there are direct, practical instances of a state's commitment to progressive realisation through resource allocations, which can be found within a limited number of State constitutions. For example, Article 20 of the Transitional Provisions of the 2008 Constitution of Ecuador requires the general health budget, as the general funding for all health services in the country, must be increased annually by a percentage no less than 0.5% of GDP.<sup>375</sup> This explicit commitment to increase resources steadily presents a straightforward measure all states could take to explicitly demonstrate and reflect the progressive realisation of ESCR through resourcing. Moreover, this understanding is a helpful starting point and can be used to compel decision-makers to ensure budgetary allocations reflect economic upturns.

It does, however, also represent an oversimplification. One, because of a basic point around the inadequacy of GDP to measure the totality of resources within a state, which risks supporting the too often unchallenged line of thinking that the stagnation of GDP within a state will inevitably lead to a lack of investment in ESCR.<sup>376</sup> Other resources and measurements

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<sup>370</sup> Aoife Nolan and Mira Dutschke, 'Article 2(1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) *European Human Rights Law Review* 280.

<sup>371</sup> Chapman (n 117); and Sen (n 196).

<sup>372</sup> De Schutter (n 33) at 5.

<sup>373</sup> Blyberg (n 149) at 9.

<sup>374</sup> OHCHR, 'Building economies that place people's human rights at the center'. Available at:

<<https://www.ohchr.org/en/stories/2023/04/building-economies-place-peoples-human-rights-center>>; See generally the approach to economics and resources in Joseph Stiglitz, Amartya Sen, and Jean-Paul Fitoussi 'Report by the Commission on the Measurement of Economic Performance and Social Progress' (2009) Europa.

<sup>375</sup> O'Connell (n 41) at 68.

<sup>376</sup> Stiglitz, Sen, and Fitoussi (n 374).

exist and can be built into an analysis.<sup>377</sup> But more critically, ‘the obligation of progressive achievement does not simply require an increase in resources. Beyond that, it entails an increasingly effective use of the resources available, which must be optimally prioritised to fulfil the rights in ICESCR’.<sup>378</sup> Thus, when monitoring the progressive realisation of ESCR through the state’s budget, where increases in resources remain an important indicator of progression, the overall notion of optimisation and, eventually, the prioritisation of resources becomes central. Fredman, among many others, explains that ESCRs are often costly and likely present a set of ‘competing principles’ that states parties must consider when generating, allocating, and spending their resource.<sup>379</sup> Due to the often competing nature of ESCR raised by Steiner and briefly introduced as the ‘impossibility’ critique of ESCR, tough decisions are often presented through the formulation of a budget, and it is not always possible to provide public services essential to the realisation of ESCR with an increased allocation of resource.<sup>380</sup> The progressive realisation of ESCR in its totality, therefore, requires not only an assessment of whether resources for specific ESCR areas have increased over time in line with a state’s economic growth but also a further assessment of whether the resources available to the state are being proportionately and reasonably shared and allocated between different ESCR priorities.<sup>381</sup> This, in turn, raises a further crucial understanding. It is not just the overall mobilisation, allocation, and expenditure of resources central to monitoring progressive realisation. Just as important are the decision-making processes that govern them.

Unpacking this notion further leads to several key conclusions on the relationship between progressive realisation and public budgets. Analysing progressive realisation through budgetary measures first requires an assessment and analysis across the budget of areas that have seen either cash or real terms decreases in funding. This initial analysis should be able to consider more than single-year budgets and have access to longitudinal and disaggregated data, as argued further in Chapter 6, and allow for longer-term planning, monitoring, and assessments of resource allocations. This will help uncover potential areas of non-compliance and areas for further in-depth focus. However, it should be followed by a secondary assessment of the decision-making associated with specific allocations and the reasoning and proportionality applied when prioritising one area over another. For example, the competing

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<sup>377</sup> Skogly (n 87).

<sup>378</sup> O’Connell et al. (n 41) at 47; see also Asbjorn Eide, ‘Economic and Social Rights’ in Janusz Symonides (ed) *Human Rights: Concepts and Standards* (Ashgate 2000).

<sup>379</sup> Fredman (n 123).

<sup>380</sup> Hillel Steiner ‘An Essay on Rights’ (1996) 26(2) *Canadian Journal of Philosophy* 283. For a basic discussion of ‘impossibility’ as a critique of ESCR law, see Flegg & Boyle (n 84).

<sup>381</sup> Nolan & Dutschke (n 370).

priorities of healthcare and education or the uplift of social security payments against capital investments in a state's infrastructure are straightforward examples of this scenario. Each public service relies entirely upon the budget it receives from the sitting government, and difficult decisions are required regarding where state resources will be the most effective in moving towards the full realisation of the right. While healthcare and education in Scotland undoubtedly require a large influx of money to be fully realised for all, a decision-making process will be required to establish where limited money can be best spent and often discussed in accounting as the 'cost-effectiveness' of the decision.<sup>382</sup> Where one area of the budget receives a real-term cut whilst the other is provided with a cash injection, if decision-makers can transparently demonstrate 'reasonable' reasoning behind such a decision and the crucial need to prioritise one ESCR over another, it can still potentially satisfy Art 2(1) of the ICESCR.<sup>383</sup> Progressive realisation should be viewed as an obligation covering the totality of decisions within the state, not just whether specific budget allocations have seen an overall increase or decrease in funding. To do so risks oversimplifying the complexity of decisions being taken within fiscal decision-making and could cause reasonable, even good government decision-making to fall foul of the obligation.

King, in theoretically exploring this challenge in relation to polycentricity, explains that 'resource allocation and planning' exist in a complex web of 'interlocking relationships' where proportionate balances must be sought and elaborately argues that such a challenge should not act as an overall barrier to the adjudication or enjoyment of social rights.<sup>384</sup> In effect, King's work demonstrates the social rights framework's ability to account for inherently polycentric decision-making.<sup>385</sup> In short, scholars, practitioners, and decision-makers alike have moved on from reducing the complexity of our humanity and the societies in which it exists into 'simple systems'. They recognise and increasingly explore more complex frameworks and theories to understand the 'diversity of puzzles and problems facing humans interacting in contemporary societies'.<sup>386</sup> On the other hand, the challenge of polycentricity in resource allocation also demonstrates the potential problem of using the duty of progressive realisation in isolation from

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<sup>382</sup> Sara Davis 'Cost-Effectiveness and Human Rights' in Sara Davis *The Uncounted: Politics of Data in Global Health* (Cambridge University Press 2020); See also the challenges of social spending decision-making in Aoife Nolan 'Human rights and the cost-of-living crisis' (2023) 41(1) *Netherlands Quarterly of Human Rights* 3.

<sup>383</sup> Katherine Young 'Proportionality, Reasonableness, and Economic and Social Rights' in Vicki Jackson and Mark Tushnet *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017); See also Boyle (n 1); and Cass Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123; See also Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta, 2010).

<sup>384</sup> See Chapter 7 on 'Polycentricity' in King (n 46).

<sup>385</sup> *Ibid.*

<sup>386</sup> Elinor Ostrom 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' (2010) 2(2) *Transnational Corporations Review* 1 at 1.

other duties imposed by the ICESCR, such as non-retrogression or utilising the MAR to the state, when analysing public budgets from the ESCR perspective. In short, there is a need for a clear understanding of the duty of progressive realisation, including the test for the justifiable reasonableness of decision-making in failing to increase an area of budget allocation for ESCR.

Adding further clarity to this point is the ‘sub-duty’ of non-retrogression. GC 3 of the CESCR illuminates the duty by stating that ‘any deliberately retrogressive measures [in relation to the realisation of the rights under the ICESCR] 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 the context of the full use of the maximum available resources.’<sup>387</sup> This can be understood as the need to avoid adopting measures that will result in a step back in the level of protection accorded to the rights of the ICESCR, including the ‘unjustified reduction in public expenditures devoted to the implementation of [ESCR] in the absence of adequate compensatory measures aimed to protect the injured individuals’.<sup>388</sup> Non-retrogression thus aims to ensure that where those areas of a budget fail to receive further funding or are more severely being cut, the state can provide a clear justification for the reason to do so. Identifying clear areas of regression in fiscal terms is relatively straightforward, such as extensive budgetary cuts to a department, institution, policy, or service crucial to realising an or numerous ESCR, as the CESCR is happy to demonstrate within its concluding observations.<sup>389</sup> More challenging, however, is assessing the context of the decision in which this regressive approach was taken. Take, for example, the impact of austerity vis-à-vis the economic justifications for its imposition by a state. Where austerity practice clearly demonstrated an institutionally coordinated practice of regression across numerous, if not all, ESCR areas, States attempt to and could potentially justify this against the economic backdrop and circumstances in which austerity was adopted.<sup>390</sup> That is, if there was no developed and practised framework from which to assess the justification of regressive measures. States’ actions in actively reducing public expenditure on key ESCR areas such as healthcare, housing provision, education, and social security captured the attention of the CESCR, which adopted a formal statement entitled ‘Public debt, austerity measures and the ICESCR’.<sup>391</sup> In it, the CESCR highlighted the duty of

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<sup>387</sup> CESCR General Comment No. 3 (n 107) at para 9.

<sup>388</sup> Aoife Nolan, ‘Is the government’s austerity programme breaking human rights law?’ (2011) Open Democracy; O’Connell et al. (n 41); see also Carmona (n 327).

<sup>389</sup> CESCR, Conclusions and Recommendations of the Committee on Economic, Social and Cultural Rights, Colombia UN Doc E/C.12/1/Add.74 (2001) at paras 21-26.

<sup>390</sup> Nolan (n 103).

<sup>391</sup> CESCR Statement, Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights UN. Doc. E/C.12/2016/1 (24 June 2016) (CESCR Statement on public debt and austerity measures).

non-retrogression as applicable to public spending and reminded the States of their need to justify any budgetary cuts with suitable evidence in light of their ICESCR obligations.

To justify a regressive measure, the CESCR has demonstrated it would take into account (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) if the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realisation of the ESCR, an unreasonable impact on acquired ESCR or whether an individual or group is deprived of access to the minimum essential level of the ESCR; and (f) whether there was an independent review of the measures at the national level.<sup>392</sup> The duty of non-regression thus provides a powerful tool from which to hold states accountable for the impacts of budget cuts and their regressive impact on ESCR realisation.<sup>393</sup> Moreover, it presents a clear set of considerations for decision-makers to work through when assessing how to optimise resources in line with the need to realise ESCR progressively. In practice, the duty of non-retrogression, when applied to fiscal decision-making, is focused on identifying within the budget where cuts have been made to specific allocations or resources diverted elsewhere in the budget during its execution and ensuring the state or public body has an appropriate justification, as set out by the CESCR's test.<sup>394</sup> Finally, understanding non-regression requires a longer-term view of public spending. Yearly budget cycles can make this difficult as they are not always explicit within the budgetary documentation and data provided, where cuts have been made to specific allocations. For example, where there may seem to be gradual increases to budgetary allocation over several years, often when translated in 'real' spend, which takes account of other factors such as inflation, often those gradual increases turn out to be a 'real terms' decrease in actual spend. The IFS has demonstrated as such for Scotland's most recent budget, which explicitly states there has been a 2.2% real-term increase in public service spending. The independent fiscal analysis, however, demonstrates that Scotland's public service budget will see a 0.4% decrease due to numerous short-term and longer-term factors.<sup>395</sup> In summary, as with measuring the increase of allocations longitudinally, correctly assessing the non-regression of rights through

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<sup>392</sup> CESCR Comment No. 19 (n 324) at para 42.

<sup>393</sup> Sandra Liebenberg, 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic doctrine of non-retrogression' (2021) 37(2) South African Journal on Human Rights 181.

<sup>394</sup> Ibid.

<sup>395</sup> Boileau et al. (n 27).



budgetary allocations often requires delving deeper into the data and information provided by governments all too keen to obscure the reality of their public spending plans.

### 3.3.2 Maximum Available Resources (MAR)

Drawing from the language of Art 2(1), states parties to the Covenant are under a duty to use the maximum resources available to realise ESCR.<sup>396</sup> MAR, as a duty, is complex, and ongoing deliberations remain as to how it can best be measured, monitored, and used to hold states accountable for ESCR violations despite actions having been taken by the CESCR to provide a ‘robust and relatively established’ doctrine.<sup>397</sup> Even its very language is contradictory. As Robertson acknowledged three decades ago, ‘it is a difficult phrase – two warring adjectives describing an undefined noun. “Maximum” stands for idealism; “available” stands for reality. “Maximum” is the sword of human rights rhetoric; “available” is the wiggle room for the state’.<sup>398</sup> Without covering the historical development of MAR within the ICESCR framework, as Skogly has already expertly outlined,<sup>399</sup> initial understandings of the duty denote that it was designed, in the acknowledgement of needed discretion for states on allocating resources accordingly, to ensure that this does not extend to ‘absolute discretion in the allocation of funding’.<sup>400</sup> If this were the case, the ‘international treaty would be redundant’.<sup>401</sup> Moreover, the CESCR has denoted that even though the state retains a primary role ‘in formulating or adopting, funding and implementing laws and policies, there remains a margin of appreciation for each state to ‘determine the optimum use of its resources to adopt national policies and prioritise certain resource demands over others’, it recognises the duty of MAR as placing certain obligations and boundaries on this decision-making.<sup>402</sup> As a previous Special Rapporteur on Extreme Poverty, Carmona has explained, ‘States must devote the “maximum available resources” to ensure the progressive realisation of all economic, social, and cultural rights as expeditiously and effectively as possible, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession, or other factors. This principle should guide the State’s decisions and priorities in generating, mobilising, and

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<sup>396</sup> Can also derive this from Art 2(2) ICCPR, Article 4 CRC, & Article 4(2) CRPD.

<sup>397</sup> Uprimny, Hernandez and Araujo (n 44); and Corkery & Saiz (n 286).

<sup>398</sup> Robert Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realising Economic, Social, and Cultural Rights’ (1994) 16(4) Human Rights Quarterly 693 at 694.

<sup>399</sup> Skogly (n 87).

<sup>400</sup> O’Connell et al. (n 41) at 74.

<sup>401</sup> Ibid.

<sup>402</sup> CESCR, An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under and Optional Protocol to the Covenant, Statement, UN Doc E/C.12/2007/1, 21 September 2007) at paras 11 & 12.

allocating resources to permit the realisation of human rights'.<sup>403</sup> De Schutter concurs in providing the obligation on states to use the MAR, 'which means both mobilising sufficient resources and using such resources as effectively as possible in order to maximise the contribution of public investment to the fulfilment of economic, social, and cultural rights'.<sup>404</sup> This cannot be mistaken for the need to divert all a state's resources towards the realisation of ESCR. The CESCR has keenly demonstrated that it is interpreted to mean there is a need for ESCR to be given 'due priority' within the totality of a state's resources.<sup>405</sup> Analysis by Uprimny et al. also highlights the need to consider the duty of MAR as interconnected to the immediate obligation upon states in recognition that taking even the most minute targeted, deliberate, and concrete steps towards the realisation of ESCR will require public resources.<sup>406</sup> This understanding is further backed up by analysis of the minimum core doctrine (explored through Chapter 4), which gives rise to an immediate obligation for states parties to deliver a minimum threshold of ESCR realisation and ultimately requires a minimum threshold of resource mobilisation and gathering as a consequence.<sup>407</sup>

Building further clarity on the MAR doctrine, the CESCR has, on numerous occasions, raised the need for further resource mobilisation in order to progressively achieve ESCR through state Concluding Observations.<sup>408</sup> Indeed, Uprimny et al. illuminate within their analysis of the CESCR's practice in providing Concluding Observations for states parties, the CESCR is increasingly willing to presume non-compliance with MAR based on four key signs. Firstly, when 'there is stagnant public expenditure with respect to the financing of ESCR' and, secondly, 'when public expenditure is lacking precisely in area where they are deemed more urgent'.<sup>409</sup> Thirdly, 'whenever there is evidence of stronger and prolonged economic growth that has not been followed by an allocation of resources for ESCR expenditure'.<sup>410</sup> Fourthly and finally, 'whenever tax policy is either insufficient or discriminatory in nature' and 'whenever high levels of economic inequality are established to be an ESCR problem'.<sup>411</sup> MAR seeks to create a clear nexus between the progressive realisation of ESCR and its overall nexus

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<sup>403</sup> UN HRC (2014) 'Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona' A/HRC/26/28 at 7-8.

<sup>404</sup> De Schutter (n 101) at 562.

<sup>405</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights at paras 27-28; CESCR General Comment No. 3 (n 81). See also Uprimny, Hernandez and Araujo (n 44).

<sup>406</sup> Uprimny, Hernandez and Araujo (n 44).

<sup>407</sup> Ibid. De Schutter (n 101); and Landau (n 103).

<sup>408</sup> As examples, see Panama E/C.12/PAN/CO/3 CESCR 2023; Portugal E/C.12/PRT/CO/5 CESCR 2023; and Democratic Republic of Congo E/C.12/COD/CO/6 CESCR 2022.

<sup>409</sup> Uprimny, Hernandez and Araujo (n 44) at 634-636.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

with mobilising, allocating, and spending resources to achieve it. Within the requirement to move effectively and expeditiously (optimally) towards ESCR realisation, MAR demonstrates that further assessment is needed concerning the overall levels of resources made available for ESCR realisation and how they are being expended. It is both central to the gathering and mobilising of resources within a state as well as how resources are directed and spent on specific ESCR areas.<sup>412</sup> For this reason, it can be understood as a need for the state to do the maximum possible to gather and deploy adequate resources for ESCR realisation in balance with other competing priorities. This, too, would include seeking international assistance in instances where resources are evidently lacking.<sup>413</sup> Further still, in relation to the overall mobilisation of a states resources, the MAR duty will assess the methods and means by which this is carried out.<sup>414</sup> Research consistently demonstrates the potential discriminatory or unequal impact of resource mobilisation, for example, via regressive tax systems, which can severely impact the realisation of ESCR.<sup>415</sup>

The MAR ‘sub-duty’ of progressive realisation presents the most critical and rigorous piece of Article 2(1) when applying the IHRL framework to public budgets. The duty essentially asks: Has the state used the many levers it has at its disposal to maximise the availability of resources for allocating and spending on ESCR areas and moves on to raise the further critical line of inquiry on the way in which this has been achieved. In doing so, the doctrine ‘paves the way for more general concerns about distributive justice’ because it places ‘the consideration of competing claims and interest in a distributive context in which it is understood that not everyone can get what they want or even what we ideally would like to secure of them’.<sup>416</sup> Due to its breadth of potential implications for the use of a States resources, its public budget, and therefore the HRB framework, the MAR doctrine in all of its potential uses cannot be adequately analysed here. It has been the subject of extensive research in the past, including another PhD exploring the doctrine alone.<sup>417</sup> Below, two key lines of inquiry in relation to MAR are offered, including the nexus between MAR and public taxation as well as the

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<sup>412</sup> Radhika Balakrishnan, Diane Elson, James Heintz, and Nicholas Lusiani ‘Maximum Available Resources and Human Rights: Analytical Report’ (2011) New Brunswick, NJ: Center for Women’s Global Leadership at Rutgers, The State University of New Jersey; See also extensive coverage of the concepts around ‘mobilising resources’ in International Bar Associations ‘The Obligations to Mobilise Resources: Bridging Human Rights, Sustainable Development Goals, and Economic and Fiscal Policies’ (2017) IBAHRI.

<sup>413</sup> OHCHR (n 258); and Corkery and Saiz (n 286).

<sup>414</sup> CRC, General Comment No. 5 (n 32) at para 62; CRC, General Comment No. 19 (n 29) at para 60; and Skogly (n 87).

<sup>415</sup> Alston and Reisch (n 32).

<sup>416</sup> Jeremy Waldron, ‘Socioeconomic Rights and Theories of Justice’ 48 San Diego Law Review 773 as found in Uprimny, Hernandez and Araujo (n 44) at 651.

<sup>417</sup> Ahmed Shahid ‘For Want of Resources: Reimagining the States Obligation to Use ‘Maximum Available Resources’ for the Progressive Realisation of Economic, Social and Cultural Rights’ (2015) University of Sydney.

implications of MAR for the effectiveness and efficiency of resource use. These areas have been chosen due to their prevailing inclusion within scholarly and CESCR analysis of the MAR obligation, but also because they reflect areas which were raised firmly within the data collected and remain primarily under the control of the Scottish Government and Parliament, as devolved institutions, to lever in relation to overall public resource use.

#### A. MAR Through Taxation

Tax policy is the subject of extensive inquiry from a wealth of disciplines. It brings into being complex questions of macro-economic policy setting, political and moral philosophy, behavioural economics, and accounting, to name but a few leading areas. Not all these lines can be followed here, but what is important to establish is that taxation impacts human rights. This section outlines the importance of tax to realising ESCR as one clear example of an avenue to approach the MAR doctrine in HRB. It is beyond the scope of this thesis to engage in current taxation globally or in the UK in detail, though more detailed explorations of this issue are comprehensively offered elsewhere.<sup>418</sup> By their very nature, a state's taxation policies are inherently human rights policies, such as the ability to impact the ability of states to respect, protect, and fulfil all human rights. As a previous Special Rapporteur on Extreme Poverty highlights, low levels of revenue collection constitute 'a major obstacle to the capacity of the state to finance public services and social programmes', on which the people living in poverty are 'particularly dependent'.<sup>419</sup> In building a theoretical foundation for this assertion, De Schutter has helpfully digested this into three key reasons. The first echoes the above reasoning by establishing that taxation is the primary method for states to mobilise resources to allocate and expend on ESCR realisation.<sup>420</sup> Secondly, and so crucially, tax as a part of fiscal policy is the single greatest lever and tool available to redistribute the world's wealth. For this reason, it has been closely associated with notions of justice and 'tax justice'.<sup>421</sup> Alston emphasises the importance of these secondary elements by outlining that 'state budgets are fundamentally about redistribution of resources. Whether those policies are progressive or regressive depends on the nature of the government's tax policies along with its spending priorities. These, in turn, affect the types and degrees of inequality within the society.'<sup>422</sup> In continuing, Alston and Reisch argues: 'It is in large part because tax policy transfers resources from one part of society

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<sup>418</sup> Alston and Reisch (n 32).

<sup>419</sup> Carmona (n 403) at para 44.

<sup>420</sup> Olivier De Schutter, 'Taxing for the Realisation of Economic, Social, and Cultural Rights' in Alston & Reisch (n 32).

<sup>421</sup> Kate Raworth 'Doughnut Economics' (Chelsea Green Pub Co, 2017); See also Alex Cobham, Fariya Mohiuddin & Liz Nelson 'Global Tax Justice and Human Rights' in MacNaughton, Frey, and Porter (n 38).

<sup>422</sup> Alston & Reisch (n 32) at 4.

to another, and it is both unpopular and contested. But it is also opaque. It is true that taxes imposed on the richest 20% in most countries will end up paying for the vast majority of social protection services. Less frequently acknowledged but equally true, however, is that, in many countries, the net transfers from the government budget to the wealthy will be far higher than any of the comparable amounts paid out in welfare or other public services to the poor.<sup>423</sup> General taxation policy is therefore essential to tackling inequality and consequently the enjoyment of ESCR, as well as to delivering true substantive equality for all.<sup>424</sup> While other avenues to raise resources exist (trade tariffs, etc...), tax is ‘nevertheless unique’ as ‘more than any other source of public revenue, it embodies the civic contract between the people and the government, and, since the public pays, it constitutes a strong incentive for greater accountability’.<sup>425</sup> Finally, De Schutter highlights the central role tax can play in leading to democratic self-determination, with principles such as accountability and participation crucial in overall tax decision-making.<sup>426</sup> As we will see through Chapter 5, accountability and participation are core principles at the heart of adopting a rights-based approach to budgeting and form critical pieces of the HRB framework, including for the mobilisation of resources.

Despite a (real or perceived) historical lack of interest and understanding of the nexus between taxation and human rights implementation from the perspective of those developing tax policies, its importance to human rights is well recognised throughout the international legal framework.<sup>427</sup> The CESCR, for example, through its provision of concluding observations on State parties, has consistently raised the need for states to revisit their approach to taxation to meet the duty of MAR. As an example, within the UK’s Concluding Observation in 2016, the Committee raised concerns regarding the increase in the threshold for the payment of the inheritance tax, as well as regarding the increase of the value-added tax and the reduction of the tax rate on corporate incomes.<sup>428</sup> The Committee noted that this undermined the state’s ability to address social inequality and to collect sufficient resources ‘to achieve the full realisation of economic, social and cultural rights for the benefit of disadvantaged and marginalised individuals and groups’.<sup>429</sup> Corkery and Saiz further highlight through an analysis of the CESCR’s Concluding Observations up until 2016: ‘increasingly [the CESCR] voice concerns about the sufficiency of revenue raised (including the need to tackle tax evasion and

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<sup>423</sup> Ibid.

<sup>424</sup> Sandra Fredman, ‘Taxation as a Human Rights Issue: Gender and Substantive Equality’ as found in Ibid.

<sup>425</sup> Ibid.

<sup>426</sup> De Schutter (n 420).

<sup>427</sup> Alston and Reisch (n 32).

<sup>428</sup> CESCR, Concluding Observations on the UK (n 5).

<sup>429</sup> Ibid at para 16f.

avoidance and to review tax exemptions); the distribution and progressivity of the tax burden; efficiency and incentives that the tax system creates to promote rights enjoyment; and the sustainability of domestic tax systems.<sup>430</sup> More recent Concluding Observations provided on Brazil, Panama, Cambodia, El Salvador, the Democratic Republic of Congo, and Belgium<sup>431</sup> have continued this line of scrutiny, emphasising the need for progressive taxation policies designed to allow for the maximum available resource to be mobilised for the progressive realisation of ESCR, and in particular for marginalised population groups.<sup>432</sup> Nor is the CESCR the only treaty monitoring body to raise taxation concerns, with the CRC and the Committee on the Elimination of All Forms of Discrimination Against Women highlighting the acute, discriminatory impacts tax policies can have on children and women, respectively.<sup>433</sup> The HRC has too demonstrated the need for appropriate taxation systems and regulation thereof to be in place, calling upon states ‘to seek to reduce opportunities for tax avoidance, to consider inserting anti-abuse clause in all tax treaties and to enhance disclosure practices and transparency in both source and destination countries, including by seeking to ensure transparency in all financial transactions between Governments and companies to relevant tax authorities’.<sup>434</sup> Further cementing tax evasion as another crucial element of a state’s overall assessment of MAR. In addition, the CESCR (who have previously often steered clear of providing exact advice as to what amounts to incompatible practice) has envisaged in General Comment 24 that ‘lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilise resources domestically to realise Covenant rights. As such, this practice is inconsistent with the duties of the state’s parties to the Covenant.’<sup>435</sup> Moreover, analysis of the CESCR’s approach in recent years indicates an increasing willingness of the CESCR to demonstrate the types of systems and regimes required to achieve a socially just, adequate, equitable and progressive tax regime. From commenting on ‘tax exemptions schemes’ and increases in ‘Value Added Tax’ on essential goods to raising concerns of ‘tax-to-GDP’ ratios, the CESCR is adopting a more proactive and less deferential approach to how states tax to raise resources

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<sup>430</sup> Corkery & Saiz (n 286) at 286.

<sup>431</sup> E/C.12/SLV/CO/6 2022; CESCR E/C.12/BRAZ/CO/3 2023; E/C.12/KHM/CO/2 2023; CESCR E/C.12/PAN/CO/3 2023.

<sup>432</sup> E/C.12/BEL/CO/5 (CESCR 2020).

<sup>433</sup> See, for example, CEDAW/C/CYP/CO/8 (CEDAW 2018)

<sup>434</sup> HRC, ‘Resolution 34/11: The Negative Impact of the Non-repatriation of Funds of Illicit Origin to the Countries of Origin on the Enjoyment of Human Rights, and the Importance of Improving International Cooperation (10 April 2017) A/HRC/RES/34/11 at para 7.

<sup>435</sup> CESCR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017 at para 75.

for the progressive realisation of ESCR.<sup>436</sup> Importantly, as the human rights legal community has turned its attention to the role and, more specifically, harm of current tax regimes to the realisation of ESCR, not only have theoretical justifications for considering human rights in tax policy been developed, but specific practices more suitable for a rights-respecting approach to mobilising resources have been devised. As already iterated but worth repeating, it is not just about whether sufficient resources are being gathered but the manner in which this has been conducted. Upon this evidence, alongside the extensive coverage taxation policy has now received from prominent voices in human rights, it is not the human rights community that needs to begin engaging with this intersection but the realm of economists and decision-makers in taxation policy. The next crucial step is for those at the centre of designing tax, globally, nationally, and locally, to be made conscious of their rights and corresponding obligations, with awareness raised and capacity built to ensure our approach to tax reflects the boundaries set through the obligation of MAR for ESCR.

#### B. MAR Through the Effectiveness and Efficiency of Spend

Where the MAR duty can be used to question the overall size of a budget and, ergo, the allocations provided to specific departments and services crucial for ESCR realisation, it also focuses on issues such as waste, underspend, corruption, and overall ‘value for money’.<sup>437</sup> In other words, the MAR duty focuses on the efficiency, effectiveness and efficacy of expenditure.<sup>438</sup> As previously raised, the execution and, thus, actual spending of the budget in many ways can impact rights outcomes as much, if not more so, than the allocation in the first place. For example, suppose adequate allocation is made but the allocation of funds is misappropriated, wasted, or diverted during the execution of the budget. In that case, how much was originally allocated within the budget will make little difference. The CESCR, alongside other international rights Committees, have explicitly recognised this as a central aspect of meeting the MAR duty. The CRC has been vocal on this point with General Comment 19 on public budgeting for children’s rights demonstrating the need to ensure resources are not ‘wasted’ and that where expenditure is not meeting its intended outcomes, it is incumbent upon states to ‘uncover and remedy the root causes of ineffective and inefficient public spending’.<sup>439</sup>

<sup>436</sup> CESCR, Concluding observations on the initial report of Burundi (15 October 2015) UN Doc E/C.12/BDI/CO/1 at para 13f; CESCR, Concluding observations on the sixth periodic report of Colombia (19 October 2017) UN Doc E/C.12/COL/CO/6 at para 19f; and CESCR, Concluding observations on the initial report of Bangladesh (18 April 2018) UN Doc E/C.12/BGD/CO/1 at para 19f.

<sup>437</sup> Paul Hunt, ‘Report of the Special Rapporteur on the Right to Health on Maternal Mortality and Access to Medicines’ (13 September 2006) A/61/338 at para 68; and Uprimny, Hernandez and Araujo (n 44).

<sup>438</sup> Hofbauer, Blyberg, & Krafchik (n 37) at 37.

<sup>439</sup> CRC General Comment No. 19 (n 305) at para 19.

Moreover, the CRC demonstrates the need for efficiency and effectiveness to be core principles guiding the entire budget process.<sup>440</sup> Meanwhile, the CESCR, via GC 24, has signalled that corruption ‘constitutes one of the major obstacles’ to realising human rights and continues to assert that a state violates its obligation to protect when ‘insufficient safeguards exist to address corruption of public officials or private-to-private corruption’.<sup>441</sup> It is important to remember that corruption can come in many forms and can (and often is) be carried out perfectly within the law. While it is often presented to us through entertainment as money being passed by shifty characters in brown paper bags or through shady deals in back alleys, a more realistic view of corruption (certainly for the UK and other similar nations) would be the grossly inefficient use of public funds for the personal gain of oneself or their associates.<sup>442</sup> Anyone willing to delve into the finer details of the contracts provided for procuring Personal Protective Equipment to specific, politically friendly companies in the UK during the COVID-19 pandemic would be hard-pushed to describe this as anything other than corruption.<sup>443</sup>

Defining what counts as efficient or effective remains a challenge because these terms are open to interpretation, and this becomes far more relevant when being assessed through the courts, for example.<sup>444</sup> Where ESCR are incorporated and domestically justiciable, an assessment of the duty to use MAR may lead specific courts to begin assessing the appropriateness of the resources allocated and the efficiency with which they were spent. This raises definitional issues in a setting where consistency and certainty are paramount. For example, what is considered efficient from an economic standpoint ‘may not be acceptable from a human rights perspective’.<sup>445</sup> As Blyberg and Hofbauer have also pointed to this issue: ‘is important for human rights advocates to understand the different uses economists make of the word “efficient,” be clear about which of those uses are human rights “friendly” and which are not, and argue against “efficient” expenditures that do not advance, and may even undercut, human rights by failing, for example, to ensure that the rights of marginalized groups are respected.’<sup>446</sup>

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<sup>440</sup> Ibid.

<sup>441</sup> CESCR, General Comment No. 24: Obligations in the Context of Business Activities (10 August 2017) E/C.12/GC/24 at para 18.

<sup>442</sup> Transparency International's ‘Corruption Perceptions Index’ and accompanying guidance. Available at: <https://www.transparency.org/en/cpi/2023/index/gbr> (accessed 21 June 2024).

<sup>443</sup> Alison Jones ‘Combating Corruption and Collusion in UK Public Procurement: Proposals for Post-Brexit Reform’ (2021) 84(4) *Modern Law Review* 667. For a further example, see the work of Transparency International UK, ‘Track and Trace: Identifying Corruption Risks in UK Public Procurement for the COVID-19 Pandemic’. Available at: <https://www.transparency.org.uk/sites/default/files/pdf/publications/Track%20and%20Trace%20-%20Transparency%20International%20UK.pdf>

<sup>444</sup> Fredman (n 123) at 82.

<sup>445</sup> OHCHR (n 258) at 114.

<sup>446</sup> Ann Blyberg & Helena Hofbauer ‘Article 2 & Governments’ Budgets’ (2014) *International Budget Partnership* at 79.



Approached through the lens of ‘cost-effectiveness’,<sup>447</sup> efficiency and effectiveness of spending are ‘often defined in terms of the financial costs of the inputs required to produce a particular outcome [where] greater efficiency implies that more can be produced with a given amount of financial resources’.<sup>448</sup>

While this general definition helps begin an analysis of whether the budget expenditure was ‘efficient’, it does not give the whole picture. It could even be used as a metric which would be detrimental to the realisation of human rights. Balakrishnan et al. have summarised this problem well: ‘For example, in the health sector, efficiency is typically judged in terms of the financial cost per treatment. This can be reduced by shortening the time that patients spend in hospital. However, patients still need further non-medical care. Therefore, efficiency, narrowly defined, may appear to improve as the cost of providing treatment for each patient drops, but there are huge spill-over costs for unpaid caretakers in households who may be forced to take time off paid work to care for a family member. Therefore, increasing ‘efficiency’ by reducing spending on key inputs may not create true efficiencies, but imposes higher costs on unpaid, family care at home, with disproportionate impacts on women.’<sup>449</sup> Balakrishnan et al. encourage the application of a much wider lens to efficiency. One where efficiency is assessed within the system as a whole. Again, drawing in the polycentricity of such decision-making, where efficiency achieved in one area leads to pressures in another, it cannot be considered as ‘maximising’ the use of resources. This view is also supported by the data collected through this research project. Where efficiency of spend is essential to maximise the use of the resource available, the never-ending, pressured pursuit of efficiency so often a part of public service culture, can eventually lead to an overall detrimental position for decision-makers in which achieving or demonstrating overall ‘cost-effectiveness’ becomes a higher priority in the review of spending decisions than meeting the outcomes of those most in need.

For those seeking to utilise the duty of MAR within their rights-based analysis of fiscal decision-making, it is imperative to have a clear understanding of or methodology for what efficiency and effectiveness mean in practice. The OHCHR have, in their detailed report, recognised this need and discussed the need for a clear distinction between ‘operational efficiency’ and ‘allocative efficiency’.<sup>450</sup> Operational efficiency ‘focuses on getting the most out of the resources spent’ and raises questions such as: ‘Was funding wasted through poor

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<sup>447</sup> Davis (n 382).

<sup>448</sup> Balakrishnan et al. (n 412) at 7-8.

<sup>449</sup> Ibid.

<sup>450</sup> OHCHR (n 258) at 114.

procurement processes? Were there leakages in funds going to service delivery points?'.<sup>451</sup> Allocative efficiency 'looks at the allocation of resources across different activities and asks whether that allocation makes the most efficient use of available funds' and raises questions such as: 'Do we get the most we possibly can from that distribution of resources, or would an alternative distribution give us more?'.<sup>452</sup> Conducting accurate analysis is a complex task, and learning from and collaborating with practitioners in the field of accounting and economics will be crucial. This is where rights-based analysis can borrow and learn from other disciplines that are far more practised in testing whether budget expenditures have had their intended impact and whether this has been supported by efficient and effective use of the allocated resource. Accounting, for example, provides a clear, respected professional discipline in which analysing the effectiveness of expenditure, whether in the public or private sphere, is central to the role.<sup>453</sup> Supreme Audit Institutions ("SAIs") are central to resource governance and oversight and must be a critical ally of the HRB agenda. In relation to MAR, further work is required to establish clear definitions and methods for identifying inefficient or ineffective spending, which can be adopted universally as a rights-based understanding. Interdisciplinary collaboration will be crucial to developing this further.

### 3.4 Concluding Remarks: Minimum Core Obligations

Examining the international obligations delineated in ESCR law as they relate to state budgets, alongside its scholarly unpacking in relation to public budgeting, reveals that the obligations establish a comprehensive foundation for assessing a state's overall use of resources. Not only do the obligations contained in IHRL give rise to specific considerations for decision-makers to be conscious of when undertaking tough fiscal decision-making, but they also present a robust and authoritative framework holding states accountable for their overall generation, allocation, and utilisation of resources in pursuing rights realisation. Indeed, as case law passing through constitutional courts have found, budget analysis can present powerful evidence of the state failing to comply with its ESCR obligations domestically.<sup>454</sup> The convergence of human rights obligations with public budgeting practices holds much promise for catalysing significant advancements in governance and legal accountability mechanisms

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<sup>451</sup> Ibid.

<sup>452</sup> Ibid.

<sup>453</sup> Rudiger Wolfrum 'Obligations of Result Versus Obligations of Conduct: Some Thoughts About the Implementation of International Obligations' in Mahnouch Arsanjani et al. *Looking to the Future* (Brill Nijhoff 2011).

<sup>454</sup> Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000); Landau (n 103).

for ESCR.<sup>455</sup> This chapter has sought to provide a breakdown of both the general and specific obligations of ESCR law to establish a basis for understanding ESCRs implications for a state's overall use of resources as given effect through its public budget. Through conducting a comprehensive literature review on older and emerging scholarly input on human rights and public budgets, this chapter contributes an update to the fourteen identified HRB contributions identified by O'Connell et al. and illuminates the potential of HRB to thrust further impetus into establishing accountability under Article 2(1) of the ICESCR through applying its doctrines to public budget decision-making.<sup>456</sup>

To summarise its key findings, where the RPF typology presents a helpful starting point in building the nexus between human rights obligations and public budgeting, the ESCR legal framework presents the most robust method of holding states to account for resource use. Importantly, the doctrine of progressive realisation, which is focused on the overall optimisation of resources for furthering ESCR-related areas, must be understood in its full form as a set of interwoven 'sub-duties' through which each has its own specific implications for resource use. Where non-retrogression, for example, prevents states parties from justifying overly regressive cuts to specific ESCR areas unless justified by the legal test established, the duty of MAR brings into focus the overall mobilisation of resources within the state and the extent to which they are being efficiently and effectively used. However, this chapter raises the complexity and polycentricity of decision-making in relation to resources. Fiscal decision-making in light of slow economic growth, stagnant GDP, or other economic-related downturns is often about making tough choices on what to prioritise within the state. As Alston and Quinn understood as early as 1987 in elaborating on the meaning of ESCR obligations: 'In ascertaining the quantum of resources to be set aside to promote the realisation of the rights, the state is of course entitled to a wide measure of discretion. Nevertheless, such discretion cannot be entirely open-ended or it would have the de facto effect of nullifying the existence of any real obligation...'<sup>457</sup> Where the CESCR evidently advocates discretion, the obligations of the ESCR establish specific boundaries as to what can be deemed a 'right-complaint' choice and what cannot.

In practice, as numerous studies have attempted to achieve, carrying out human rights budget analysis cannot merely rely on the information presented within the budget itself. Budget lines,

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<sup>455</sup> De Schutter (n 101).

<sup>456</sup> O'Connell et al. (n 41).

<sup>457</sup> Philip Alston and Gerard Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156 at 177 and 181.

allocations, spending, and underspending will highlight specific areas of potential non-compliance, but they must be supported with evidence regarding the overall decision-making that affected those areas. The CESCR has, for example, demonstrated that any decisions and accompanying explanations from states parties on the use of their resources would be considered in light of criteria such as: ‘a) the country’s level of development; b) the severity of the alleged breach, in particular, whether the situation concerned the enjoyment of the minimum core content of the Covenant; c) the country’s current economic situation, in particular whether the country was undergoing a period of economic recession; d) the existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict; e) whether the State party had sought to identify low-cost options; and f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.’<sup>458</sup> As will be explored in Chapter 5, certain obligations of conduct must be in place, specifically in relation to the overall transparency of and participation in budgetary decision-making. Thus, where budget analysis can be carried out based on the fiscal information provided by the state and accompanying independent accounting analysis, it would be left incomplete without further inquiry into the criteria established by the CESCR.

An area outside the scope of this chapter is the additional doctrine of MCOs, which was introduced in Chapter 1, covering ESCRs law. MCOs, it was touched upon, are to be understood as the minimum essential core elements of ESCR, which must be met immediately by state parties. They are immediate in nature and are, ergo, not subject to progressive realisation. They comprise the ‘intrinsic value’ of each ESCR and were designed to remove the level of flexibility endowed by the language of Article 2(1) of the ICESCR and further develop and enable accountability within the ESCR framework.<sup>459</sup> Additionally, Chapter 1 raised the concern the doctrine has failed to embed itself as a meaningful mechanism for holding states accountable for gross violations of ESCRs. It is likely that, for this reason, the doctrine’s exploration and use within the key literature on HRB are limited in both theory and application. For example, when conducting a ‘document search’ on the OHCHR’s work on human rights and government, the doctrine is raised only twice and merely in recognition of its existence

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<sup>458</sup> CESCR (n 402); see also discussion in Magdalena Sepúlveda Carmona ‘Alternatives to austerity: a human rights framework for economic recovery’ in Nolan (n 103).

<sup>459</sup> Coomans (n 120).

instead of its application.<sup>460</sup> Upon reviewing HRB contributions over the years, we can build a basic assessment and understand the doctrine's potential use within the wider HRB framework.<sup>461</sup> Where it is given specific scholarly attention, the doctrine is often explained as identifying ESCR elements requiring prioritisation above and beyond meeting other rights requirements in times of economic crises.<sup>462</sup> In other words, 'the obligation to 'make every effort' to ensure minimum core entitlements seems to place these obligations at a higher resource priority than the duty to progressively realise the full scope of the right, which is found in Article 2 (1).'<sup>463</sup> What remains an infirmity is the ability to assess which budget areas must be deemed of minimum core priority. Addressing this point, through O'Connell et al.'s exploration of the core doctrine, their insights go on to highlight numerous challenges with the applicability of the doctrine. They provide: 'First, there is considerable debate over what the minimum core is or should be. Is it exclusively an obligation of result, or does it also incorporate obligations of conduct?'<sup>464</sup> Further still, the authors highlight the theoretical debates surrounding the doctrine's use. Is the minimum essential threshold of ESCR relative to a state's available resources? Or its content relative to a nation's overarching culture or climate? The core doctrine remains underutilised because it has yet to be provided with an accepted and useable international standard or methodology for any attempts at domestic application. O'Connell et al. do not stray into the territory in any detail in the context of HRB and simply provide 'that the full scope of that obligation is not fully clear in all contexts and should be the subject of further enquiry'.<sup>465</sup> Such further inquiry about the doctrine's scope, application, defined content, and implications for budgetary processes is required and forms the subject of the following chapter.

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<sup>460</sup> OHCHR (n 258).

<sup>461</sup> Landau (n 103). Corkery and Saiz (n 286); and Saiz (n 284).

<sup>462</sup> O'Connell et al. (n 41); Ibid Saiz.

<sup>463</sup> Ibid Saiz.

<sup>464</sup> O'Connell et al. (n 41) at 85.

<sup>465</sup> Ibid.

## **Chapter 4**

### **Minimum Core Obligations: Setting Domestic Priorities**

At the outset of this thesis, the minimum core doctrine was introduced within the ESCR framework, along with the Scottish Government's intention to explicitly recognise their existence within its overall approach to incorporating the ICESCR. To reiterate the position of the Scottish Government, they have accepted a recommendation to give effect to MCOs via incorporation and have signalled that MCOs will be explicitly recognised within Scotland's new domestic ESCR framework.<sup>466</sup> Developing the doctrine's foundations, the CESCR, building on previous concerns about the functioning of ESCR law, recognised the need for progressive realisation to contain both immediate and progressive elements.<sup>467</sup> The CESCR, via GC 3 from 1993, stated: 'On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that 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'.<sup>468</sup> Designed to fulfil a 'morality of the depths', the doctrine was to establish an 'inviolable' core of ESCR focused on securing people's most basic needs.<sup>469</sup> This core, crucially, sets a clear threshold for the immediate fulfilment of certain essential aspects of ESCR, which, as an obligation, takes precedence over the progressive realisation of other areas. In other words, a state must fulfil these minimum requirements immediately to meet its obligations under the ICESCR.<sup>470</sup> Additionally, for a State party to be able to attribute its failure to meet at least its MCOs to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>471</sup> In effect, it places a heightened justificatory burden upon the state party to demonstrate that every effort was made in attempting to meet established minimum standards for ESCR. An approach which, in turn, raises the integral question of what the 'core content' of specific ESCR is in practice, their status within the ESCR framework, and the doctrine's implications for a state's use of resources and public budget. De Schutter contemplates such questions and concludes that the 'identification of the 'minimum essential

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<sup>466</sup> Scottish Government Taskforce (n 13); and Scottish Government Consultation (n 17).

<sup>467</sup> Tasioulas (n 108); Forman (n 126); and Chapman (n 116); Young (n 123).

<sup>468</sup> CESCR General Comment No. 3 (n 81).

<sup>469</sup> Shue (n 317) at 18.

<sup>470</sup> Robertson (n 398) at 701; and Geraldine van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 SAJHR 52 at 59.

<sup>471</sup> CESCR General Comment 3 (n 81) at para 10.

content’ does not imply that the question of resources become irrelevant.’<sup>472</sup> On the contrary, it merely raises the question of what resources are required to guarantee such a minimum threshold.

Minimum thresholds have long been discussed, debated, and disagreed upon, and many of the ongoing impasses found in legal explorations of the core doctrine reflect those contained within political philosophy.<sup>473</sup> Conceptually founded in justice theory, minimum thresholds have been explored as an essential component for pursuing distributive and social justice.<sup>474</sup> Indeed, the relationship between social justice and a social minimum is deeply interconnected, with the concept of a social minimum serving as a fundamental component of achieving social justice.<sup>475</sup> A social minimum specifies the baseline level of resources and opportunities that every individual should be guaranteed to live a life of dignity and participate fully in society. It can be understood as the set of resources, opportunities, and conditions necessary to live a life of dignity and participate fully in society. It is a benchmark for social justice, ensuring that all individuals have access to the essentials required for a decent standard of living.<sup>476</sup> Echoing that of the core doctrine and its intended use within the ESCR framework.<sup>477</sup> Indeed, Boyle has argued that the core doctrine can provide a potential ‘constitutionalisation’ of such political philosophy and raises many of the same issues in its exploration.<sup>478</sup> Leitjen et al. highlight the closeness of their relationship by raising that defining a social minimum requires us to grapple with such normative questions as: ‘What exactly should a social minimum include, and how can it be secured? How minimal can a social minimum be? Is it universal or rather dependent on context and, therefore, country?’<sup>479</sup> All of these questions reflect the questions raised by O’Connell et al. In short, many of the questions grappled with throughout this chapter drive directly at the heart of political and legal theory, theories of justice, and the possibility of entrenching a social minimum for all. The chapter begins by addressing two key theoretical impasses to the practical implementation of the doctrine. It first considers the ‘minimum ceiling’ argument posed by ESCR advocates and moves on to unpack concerns over universal applicability. Having attempted to rebut these central concerns, the chapter moves on to discuss the implications of the core doctrine for budgetary decision-making, uncovering its potential

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<sup>472</sup> De Schutter (n 101) at 544.

<sup>473</sup> Rawls (n 199) and Nozick (n 199); see also Kotkas, Leitjen and Pennings (n 49).

<sup>474</sup> Rawls (n 200); See also Sen (196); and Nussbaum (n 203).

<sup>475</sup> Ibid.

<sup>476</sup> Len Doyal and Ian Gough, *A Theory of Human Need* (Springer 1991).

<sup>477</sup> Tasioulas (n 108).

<sup>478</sup> Katie Boyle ‘Constitutionalising a Social Minimum as a Minimum Core’ in Kotkas, Leitjen, and Pennings (n 49).

<sup>479</sup> Toomas Kotkas, Ingrid Leitjen, and Frans Pennings ‘Introduction’ at 1-12, in Ibid.

to be used as a doctrine of prioritisation for the core content of ESCR as well as those most marginalised and disadvantaged within our society. Finally, in recognising the lack of determinable content for the core doctrine to drive the prioritisation of, the chapter further explores current discussions regarding determining the core content of ESCR as a key means of developing national core priorities to permeate and underpin the resource allocation process. In doing so, the chapter aims to contribute a defence of the minimum core doctrine in ESCR law and make clear the intersections between law, social justice, and fiscal decision-making.

#### 4.1 Addressing Key Theoretical Challenges to Minimum Thresholds

Despite engaged scholarly comment and the occasional, albeit often deferential and inconsistent, use within the CESCR's guidance and monitoring practice, the doctrine has yet to fulfil the role it was designed for within the ESCR legal framework.<sup>480</sup> This, in part, can be attributed to the international community's and individual states' general failure to implement the ESCR framework as was originally envisioned.<sup>481</sup> However, as has been the focus of scholarly input, the lack of practical uptake has been exacerbated by unsettled theoretical challenges to the need for a minimum threshold within ESCR and how this can be devised, agreed upon, and protected by law. The discussion here aims to delve into the remaining contentions and address, so far as possible, ongoing critiques of the formulation of the doctrine. In doing so, this section aims to contribute to the overarching and ongoing debate and encourage the uptake of a relative, domestic approach to recognising core aspects of ESCR. Achieving such an approach in practice opens the door to identifying primary priority areas within a society, which can be reflected in and built into the state's overall budget process.

##### 4.1.1 The Minimum 'Ceiling': Justifying Minimum Thresholds in ESCR

The first challenge concerns the doctrine's embedding of a more explicit 'violations approach' to ESCR by identifying minimum standards within the totality of ESCR requirements. Having been in place for over a decade, it was becoming clear that the language of Article 2(1) did not provide the necessary levers for accountability in the face of the vast lack of progress in many states worldwide on ESCR.<sup>482</sup> Indeed, it was argued that human rights monitoring bodies, courts, and duty-bearers themselves needed to reorient their focus to identify and rectify

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<sup>480</sup> CESCR, 'Social protection floors: an essential element of the right to social security and of the sustainable development goals' (15 April 2015) UN Doc. E/C.12/2015/1 at paras. 7-8.

<sup>481</sup> Craig Scott and Philip Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2016) 16 SAJHR; See also Alston (n 106).

<sup>482</sup> See discussion in Olivier De Schutter et al. 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) 34 Human Rights Quarterly 1084.



violations of the ICESCR.<sup>483</sup> Chapman, at the time, reflected that ‘the language of progressive realisation is predicated on the assumption that states parties would take their obligations seriously and move steadily toward full implementation of the rights covered by the Covenant’ and concluded ‘a violations approach is both more feasible and more manageable than the pursuit of progressive realisation’.<sup>484</sup> The intention was to provide the CESCR with the much more manageable task of focusing on the grossest violations of the ICESCR. In Chapman’s view at the time, adopting a violations approach to monitoring and implementing ESCR law would free the task of establishing ESCR accountability from the extensive information and data required to adequately assess the obligation of progressive realisation.<sup>485</sup> Violations would be most identifiable when construed as requiring a minimum threshold. For example, where states lacked basic healthcare and educational facilities or experienced famine within the population, a violation of ESCRs would be evident within any state that fails to provide even the most basic policies and services required for their progressive realisation. At the time, Chapman considered a violations approach, including a minimum threshold of ESCR, more in keeping with the CESCR’s recent approach, hoping it would thrust the ESCR further into public discourse and state decision-making to enable genuine accountability.<sup>486</sup> This entrenchment of a violations approach to ESCR, of which MCOs would form a central aspect, did, however, come under sustained criticism within the years which followed.<sup>487</sup> Critiques which led Chapman a decade on from the original publishing of the violations approach to concede ‘it is obviously important to go beyond a violations approach to provide a positive guideline on how best to implement the rights in question, and to assess whether particular states parties are making reasonable progress in improving their human rights implementation’.<sup>488</sup>

A pivotal critique to be quickly tabled against adopting such an approach was its potential to create an overwhelming focus on the grossest of violations and detract from a state’s overall goal of moving as effectively and expeditiously as possible toward full implementation. The concern being that it may push elements of the right that fall outside the ‘core’ into an undefinable, unattainable goal for the state’s parties.<sup>489</sup> A point picked up within the expert focus group explored in Chapter 6 concerns the ability of a minimum to, in effect, become the

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<sup>483</sup> Chapman (n 106).

<sup>484</sup> Ibid at 38.

<sup>485</sup> Ibid.

<sup>486</sup> Ibid at 40.

<sup>487</sup> Young (n 124); and Brigit Toebe *The right to health as a human right in International Law* (Intersentia 1999).

<sup>488</sup> Audrey Chapman, ‘The Status of Efforts to Monitor Economic, Social and Cultural Rights’, in Shareen Hertel and Lanse Minkler ‘Economic Rights: Conceptual, Measurement, and Policy Issues’, (Cambridge University Press, 2007) at 146.

<sup>489</sup> Brigit Toebe, ‘The Right to Health’ in Eide et al. *Economic, Social and Cultural Rights as Human Rights* (n 56) at 176. See also generally Young (n 123).

maximum. Van Bueren, in raising this concern, has eloquently argued that the minimum core doctrine risks creating a minimum ‘ceiling’ in which states seek to satisfy the essential elements of the rights over the vast array of actions required for progressive realisation as intended initially within the ICESCR.<sup>490</sup> In questioning the approach of the core ‘doctrine’, Van Bueren, nearly a decade after its entrenchment into the ESCR framework, assessed it had the potential to negatively impact the overall realisation of ESCR (though children’s ESCR were the concern of the research).<sup>491</sup> Young takes this critique further by suggesting it ‘reflects a minimalist strategy, which implies that maximum gains are made by minimising goals... channelling the attention of advocates towards the severest cases of material deprivation and treating these as violations by States towards their own citizens.’<sup>492</sup> Young, in their extensive exploration of the doctrine, opines that by only obliging a ‘core’ or subset of demands upon states within the total requirements of the ICESCR, it creates a danger that ‘expectations’ and ‘achievements’ will not rise above ‘a certain minimum’ level.<sup>493</sup> The concern stems from the idea that a heightened focus on gross violations would do nothing to question and alter the social and economic structures which lead to the abuse of ESCR. They espouse: ‘Does the minimum core run counter to the privatisation, deregulation, and liberalisation discourses, which work both to undermine and depoliticise the guarantee of a minimally protected economic and social right?’<sup>494</sup> Young’s concern centres on the ability of states to continue with a neoliberal economic agenda, increasing both the use of resources and inequality simultaneously due to the core doctrine only requiring the most essential elements of ESCR to be in place.<sup>495</sup> The minimum ceiling argument, as it can be coined, not only raises the practical challenge of ensuring states maintain taking steps beyond delivering against a minimum core of the right. It brings into question the theoretical advantage of searching for minimum thresholds in the first place. In other words, if there are fears that introducing minimum thresholds may distract and ultimately lower overall protection for ESCRs, what point is there to establishing them in the first place?

These concerns are well-founded and cannot alone be refuted from a legal perspective. Where Chapman and others’ input on the ability of the doctrine to bring about enhanced legal

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<sup>490</sup> Geraldine van Bueren, ‘Of Floors and Ceilings: Minimum Core Obligations and Children’, in Danie Brand and Sage Russel (eds), *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (South Africa: Protea Boekhuis, 2002) at 184.

<sup>491</sup> Ibid.

<sup>492</sup> Young (n 123) at 113.

<sup>493</sup> Ingrid Leijten ‘Core Socio-Economic Rights and the European Court of Human Rights (Cambridge University Press 2018) at 149.

<sup>494</sup> Young (n 123) at 174.

<sup>495</sup> Ibid.

accountability for state violations of ESCR can serve as one argument for the development of a minimum threshold of ESCR, drawing from a more comprehensive array of literature, disciplines, and perspectives can further bolster the argument for their establishment. In no way does this brief rebuttal cover the depth of philosophical thought and argument on the subject of minimum thresholds and justice, such as the extent of academic inquiry into minimum thresholds in distributive justice, nor on burgeoning contemporary areas of inquiry into thresholds more generally, such as egalitarianism, sufficientarianism or limitarianism.<sup>496</sup> The purpose of bringing in such discussions is to demonstrate the strength of the argument for using minimum thresholds within the broader pursuit of justice and relate this to the use of minimum thresholds within the broader ESCR framework. Bilchitz, in considering the establishment of minimum thresholds (discussed as ‘minimalism’) alongside issues of poverty and fundamental rights more generally, has opined ‘three justifications for doing so’.<sup>497</sup> The first, he argues drawing from Rawls’s and Nussbaum’s political philosophy, is that establishing a minimum threshold has ‘normative relevance within any adequate conception of distributive justice’.<sup>498</sup> Moreover, derived from the thinking of Mill, ‘justice is about a minimum set of protections for the most basic interests we have that can enable us to achieve a range of other goods in our lives’ and is therefore ‘intimately connected to the idea of a minimum threshold’.<sup>499</sup> In other words, where the ‘primary subject of justice is the basic structure of society’, it intrinsically questions the most basic interests and material needs of the individuals who make up that society, establishing a threshold for these minimum conditions is normatively relevant.<sup>500</sup>

Building on the normative justification, Bilchitz goes on to provide an argument for minimalism based on the instrumental benefits it can produce: ‘Instrumental arguments are essentially pragmatic in nature and are of the following form: achieving X is a valuable ideal; achieving Y, given reasonable assumptions is likely to contribute to the achievement of X; therefore, it is valuable to seek to achieve Y. We can replace these terms in this context with the following: achieving a just distribution of resources is a valuable ideal; achieving a minimum set of thresholds of social provision, given reasonable assumptions, is likely to contribute to the achievement of a just distribution of resources; therefore, it is valuable to seek

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<sup>496</sup> Dick Timmer ‘Thresholds and Limits in Theories of Distributive Justice’ (2021) 133 Utrecht University; See also Ingrid Robeyns *Having Too Much: Philosophical Essays on Limitarianism* (Open Book Publishers, 2023).

<sup>497</sup> Bilchitz (n 49) at 16.

<sup>498</sup> Ibid; see also Rawls (n 200) in which Rawls discusses in depth the normative relevancy of searching for minimum thresholds; See also Nussbaum and justification of the search for central capabilities in Martha Nussbaum ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) *Feminist Economics* 33.

<sup>499</sup> Bilchitz (n 49) at 18.

<sup>500</sup> Rawls (n 199) at 6.

to achieve that minimum set of thresholds.’<sup>501</sup> In essence, Bilchitz’s case centres upon the pragmatist notion that agreeing upon a minimum threshold is valuable due to its potential ability to contribute to the wider pursuit of justice. Of course, this case can only be made when the achievement of a minimum comes in tandem with measures to progress those aspects of justice, or in this case ESCR, that fall out with the minimalist conception. Thirdly and finally, Bilchitz outlines the democratic argument for the use of minimum thresholds by asserting they play a role in delivering ‘consensus’ on issues in which it would otherwise be too broad to find agreement.<sup>502</sup> With distributive justice ideals used as an example, he explains that a total consensus on the ideal distribution of resources within a state, notwithstanding the role of the state in ensuring this distribution, may never be arrived at (possibly due to the ‘burdens of judgment’ explained by Rawls).<sup>503</sup> Consequently, by reducing the breadth of what to find consensus upon through adopting a minimalist strategy, the possibility for democratic consensus on aspects of the ideal distribution of resources dramatically increases. Applying this to ESCR theory, where disagreement on their status and determinable content is an ongoing critique of ESCR generally, through focusing on defining the ‘core content’ of ESCR and reducing the need for consensus on the full breadth of the rights, progress may be found in finding consensus on what is minimally essential over what is required in totality.

While Bilchitz’s work is on establishing the nexus between minimum thresholds and the pursuit of distributive justice, it strikes as highly relevant here because it offers insight into the broad theoretical justification for establishing minimum thresholds in the first place. To adopt these lines of reasoning as a rebuttal to the minimum ceiling concerns raised by Van Bueren and Young, where the ESCR legal framework is primarily concerned with the approach of states (including the varying levels of public institutions and processes it is made up of) to securing people’s material needs such as food and water, housing, healthcare, education, or cultural activity and belonging, it is normatively defensible to include a conception of a minimum threshold within the totality of requirements. As the minimum core doctrine attempts to achieve in relation to ESCR. Turning the ‘minimum ceiling’ argument on its head, the instrumental justification for establishing a minimum core is that its identification within the ESCR framework can contribute to the overall realisation of ESCR and is, therefore, worthy of

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<sup>501</sup> Bilchitz (n 49) at 23.

<sup>502</sup> Ibid; Rawls (n 200) at 55-57.

<sup>503</sup> Ibid.

pursuit.<sup>504</sup> Where the obligation to progressively realise ESCR purposefully has no endpoint, providing a minimum threshold and starting point presents identified and practical steps states can take to further this process, increasing overall ESCR protection.

#### 4.1.2 A Variant or Invariant ‘Core’?

Having provided a brief justification for using a minimum threshold approach within ESCR, a further interrelated critique of the doctrine also requires addressing. Tabled so clearly by Craven, the argument focuses on the fairness of adopting such an approach.<sup>505</sup> By utilising the doctrine in search of a more assertive violations approach to ESCR, the focus on violations would undoubtedly turn unfairly to states lacking resources or, in severe instability, unable to achieve even the minimum core elements of ESCR. Chapman’s initially envisaged ‘violations’ approach driven by a minimum threshold of ESCR would view any extensive lack of basic, core ESCR provision as a violation of the ICESCR’s obligations and, consequently, international law without adequately considering the wider pervasive circumstances in which that state is implementing ESCR. Indeed, it would presume that all states were beginning from the same point, potentially disregarding the historical and current unequal distribution of global resources and the consequences of imperialism and colonialism.<sup>506</sup> This potential zoning in on specific resource-poor states would not only detract from realising and evidencing gross violations of ESCR rights in resource-rich states, such as the UK, but it would fundamentally risk reinforcing and evidencing the views of states and contemporary human rights scholars alike that international law and human rights merely reflect a continuation of the imperialist project.<sup>507</sup> By raising such questions of fairness, Craven and others pose an integral theoretical question about the doctrine’s application. Do core obligations apply equally to all states? Does it represent a universal or relative standard?<sup>508</sup> As further illuminated by Muller, questions remain as to the ‘feasibility of determining realistic minimum core content... and at what level this content should be defined’ and ‘whether minimum core rights are absolute or relative’.<sup>509</sup>

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<sup>504</sup> Tasioulas (n 108); See also Kirsteen Shields ‘The Minimum Core Obligations of Economic, Social and Cultural Rights: The Rights to Health and Education’ (2017) The World Bank; and Angelina Fisher ‘Minimum Core and the Rights to Education’ (2017) The World Bank.

<sup>505</sup> Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995) at 152.

<sup>506</sup> Ibid.

<sup>507</sup> Makau Mutua and Anthony Anghie ‘What is TWAIL?’ (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31; see also Caroline Omari Lichuma ‘TWAiling the Minimum Core Concept: Re-thinking the Minimum core of Economic and Social Rights in the Third World’ (2021) Nigerian Yearbook of International Law 253.

<sup>508</sup> Christian Tomuschat *Human Rights: Between Idealism and Realism* (Oxford University Press, 3<sup>rd</sup> edn, 2014) at 58.

<sup>509</sup> Amrei Muller, ‘The Minimum Core Approach to the Right to Health: Progress and Remaining Challenges’ as found in Sabine Klotz et al. *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation* (Transcript Verlag, 2017) at 60.

To put this in a practical context, does the core doctrine impose the same threshold of ESCR realisation on all state parties irrespective of their national context and resource capabilities? Or is it to be interpreted as explicit recognition and a guide for each state party to the ICESCR to search for and adopt a minimum standard within their national setting and canonical formulation of core obligations at the domestic level?

Tasioulas explores this question profoundly and adopts the language of a ‘variant’ (relative) or ‘invariant’ (universal) core.<sup>510</sup> Basing the argument for an invariant core upon the universality of rights, Tasioulas takes a similar line to Costa in suggesting that ‘non-core obligations are variant standards applying to all states that may in principle be satisfied in due course, whereas core obligations are invariant standards that must be immediately satisfied by all states’.<sup>511</sup> He stipulates that by applying an absolute core across all states, there is a ‘more readily applicable and less contentious standard of assessment than one tailored to the specificities of resource capacities in each state’.<sup>512</sup> Proponents of the invariant core draw from the underlying and integral principle of universality within human rights to argue vehemently that anything other than a universally absolute minimum core would undermine this central pillar of IHRL.<sup>513</sup> Only through a universal, invariant approach to MCOs can we bring a degree of determinacy to the concept of progressive realisation for all states. It is argued that without a universal core, the lines separating what must be met immediately and what must be progressed over time risk being blurred and, consequently, lost. Both would fall into being dependent on available resources and give states an excuse to postpone the implementation of ESCR indefinitely. As Van Bueren concludes, ‘there would be no point in having a minimum core of state responsibility if it were not universal’.<sup>514</sup> Tasioulas also raises the issue of defining MCOs in a state-specific manner, describing it as a ‘potentially complicated and controversial process of identifying the specific minimum core obligations that are applicable to a particular state in light of its resource endowment before embarking on the process of assessment’.<sup>515</sup> In turn, this could raise further issues. Identifying specific obligations may lower human rights standards when removed from the legal realm and placed in politics. Coomans touches upon the problem in arguing for a universal approach to the doctrine: ‘The people’s needs and the available opportunities would determine the core of the right, rather than starting with the rights

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<sup>510</sup> Tasioulas (n 108).

<sup>511</sup> Ibid at 26; See also Fernanda Costa ‘Poverty and Human Rights: From Rhetoric to Legal Obligations – a Critical Account of Conceptual Framework’ (2008) 9 SUR International Journal on Human Rights 81 at 88.

<sup>512</sup> Ibid.

<sup>513</sup> Coomans (n 120).

<sup>514</sup> Bueren (n 490) at 184.

<sup>515</sup> Tasioulas (n 108) at 23.

itself. In effect, this would make the implementation of a right dependent on the outcome of the political bargaining process that would entail identifying the needs of most of the people along with the desirable and feasible opportunities and abandoning a right-based approach.<sup>516</sup> Bilchitz also supports the invariant approach, adopting a universalist perspective to support the core doctrine, which provides a baseline of ESCR protection for ‘survival interests’ within all state parties.<sup>517</sup> Finally, in exploring how to provide content to core obligations, Young demonstrates the potential outcome of adopting a variant or relative approach to core obligations as creating an ‘amalgam’ of country-specific MCOs.<sup>518</sup> This raises the issue of necessitating ad hoc and potentially abstract interpretations of international legal standards. For the reasons shared here, a group of influential rights scholars continue to defend the universality, invariant approach to international MCOs applicable to all countries equally.

Having an invariant and inflexible approach to core obligations does, however, raise some significant problems with the doctrine. For example, a universally defined minimum core would need to expect all states to be able to meet the same obligations, or else it would not be deemed a minimum core. It would mean that a state like the UK or France would technically be under the same minimum core as Bangladesh or Chad, previous colonies, despite its vast differences in history, geography, societal make-up, cultures, and resource capacity. In exploring this problem, Koch argues the notion of progressive realisation to the MAR, formulated in Article 2(1), urges us to consider developing national minimum standards according to the resource situation in the country in question.<sup>519</sup> As we have explored the critiques of such an approach above, it is necessary also to outline its potential advantages. It effectively ensures the relevancy of the core doctrine to all states, enabling its use within resource-rich nations that can be held to a higher standard to reflect the state’s capabilities. Where concerns were raised over it being insufficient to hold traditionally rich, Global North states to account, inevitably leading to a focus on less resource-rich nations, adopting a variant approach could help make the core doctrine relevant to all states regardless of their level of development or resource capacity. Secondly, having an internationally defined invariant minimum core would inevitably be abstract, inflexible, and a-contextual, removing the rights enumerated by the Covenant from the real-life practical experience of individuals whose ESCR remain unimplemented and unattained. Reflecting this very point, the formulation of minimum

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<sup>516</sup> Coomans (n 120).

<sup>517</sup> David Bilchitz ‘Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence’ (2003) 19(1) South African Journal on Human Rights 1.

<sup>518</sup> Young (n 123).

<sup>519</sup> Koch (n 59).

core in GC 14 was criticised by the South African Constitutional Court due to its lack of direct guidance on the impacts of the AIDS epidemic at the time.<sup>520</sup> Having a minimum of one size fits all reinforces Young's view that it is impossible to determine a universal minimum core, as finding consensus among all states on what could be accepted as a core element on an ESCR over another would remain contentious.<sup>521</sup>

This has led some influential commentators to offer and defend the variant reading of the doctrine, suggesting 'each state must go about making sure that it fulfils, as its first priority in resource allocation, at least what the Committee calls 'minimum core obligations' as a function of that state's available resources. And every state must meet at least a core universal minimum represented by the most basic provision of state assistance to those in need reflected by the basic survival examples listed in the last sentence of the above quotation [i.e., essential primary health care or basic shelter and housing, or the most basic form of education]. There is, thus, a distinction between relative (state-specific) core minimums and absolute core minimums. For instance, Canada's core minimum will go considerably beyond the absolute core minimum, while Mali's may go no further than this absolute core'.<sup>522</sup> In distinguishing between the 'absolute core minimum' and 'core minimum', Craig and Alston (the latter of which was directly involved in drafting GC 3) open a conceptualisation of the doctrine in which there are variant standards dependent upon a state's overarching circumstances and stage of economic development. Essentially, they argue for an international invariant minimum core that is equally applicable to all states whilst also leaving it open for states to adopt their own 'core minimums', which better reflect society's ESCR needs and overall intention of the core doctrine to protect those most marginalised and disadvantaged from gross violations of their ESCR. By enabling States to apply their own state-specific 'core minimum' of ESCR, an invariant approach would provide context to the rights enumerated, with each state able to fulfil their human rights obligations whilst considering their own cultural, socio-economic, and resource contexts. What this interpretation of the core doctrine opens is the possibility of having an internationally recognised minimum threshold applicable to all states that do not exclude the possibility but even encourages it, that states, through the incorporation and implementation of ESCR, can build upon the foundational invariant core partially identified by the CESC and determine their core obligations to be given effect domestically. Boyle identifies that 'both absolute and

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<sup>520</sup> Karin Lehmann, 'In Defence of the constitutional court: litigating economic and social rights and the myth of the minimum core' (2006) *American University International Law Review* at 22.

<sup>521</sup> Young (n 123).

<sup>522</sup> Craig and Alston (n 486) at 250.



relative standards have an important role to play and that the enforcement scale of a minimum can take on both absolute and relative components with different types of review and remedies available for each'.<sup>523</sup> With ESCR scholars continuously calling for incorporating ESCR standards into domestic frameworks, opportunities to build consensus on adopting core obligations may grow.<sup>524</sup> It is a hopeful view that states would take such a proactive approach to defining and constitutionalising their social minimum via the adoption of core obligations. Still, the current direction in Scotland presents an early example of where this interpretation has taken root.

#### 4.2 Core Minimum Implications for Public Budgeting

For those focused on identifying and unpacking the HRB framework, this chapter's discussion may have seemed like an unnecessary tangent into the theoretical underpinnings and challenges of a legal doctrine yet to be widely implemented and take practical effect. This is not the case. As understood at this chapter's outset, engaging with the depth of economic, social and political theory raised by the minimum core doctrine and its potential content is necessary before its implications for the HRB framework can be furthered. The doctrine, through setting core, immediate thresholds in ESCR realisation, ultimately poses further questions as to what public resources will be required and what procedures must be in place to achieve any minimal threshold set for ESCR actively.<sup>525</sup> Hence, 'we can hardly pretend that the [MAR] vanishes once a definition of the 'core content' is agreed'.<sup>526</sup> Upon initial analysis, drawing from the theoretical framing provided above, the core doctrine's implications for the use of public resources can be interpreted as giving rise to two interrelated but distinct approaches. Firstly, more in keeping with Chapman's work on developing the core doctrine to find violations of ESCR, the doctrine can be viewed as seeking to guarantee specific levels of funding for budget allocations essential to the upholding of 'core' ESCR related areas. This might be conceptualised as 'priority services' guarantees in which a specified minimum spend or

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<sup>523</sup> Boyle (n 478) at 265.

<sup>524</sup> Katie Boyle and Edel Hughes, "Identifying Routes to Remedy for Violations of Economic, Social and Cultural Rights" (2018) 22 International Journal of Human Rights 43; Katherine Young, 'Constituting Economic and Social Rights' (Oxford University Press, 2012); Colm O'Cinneide, "The Constitutionalisation of Economic and Social Rights", in Helena Garcia et al. (eds), *Social and Economic Rights in Theory and Practice* (Routledge 2015); and Frank Michelman "Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions" in Ibid; See also Samantha Besson, 'Human Rights and Constitutional Law' in Cruft, Liao, and Renzio (n 121); Finally, see Nussbaum's argument for the central capabilities to be placed in every constitution. As found in Martha Nussbaum, 'Constitutions and Capabilities: 'Perception' Against Lofty Formalism' (2007) 121 Harvard Law Review 4.

<sup>525</sup> Young (n 351).

<sup>526</sup> De Schutter (n 101) at 549.

‘spending floors’ are effectively ringfenced for use only within those services.<sup>527</sup> Adopting this thinking, the report on Principles for Human Rights in Fiscal Policy asserts that in discussing giving effect to core ESCR through fiscal practices, ‘spending must not fall below the levels required by financial commitments undertaken at the international and domestic levels’.<sup>528</sup> De Schutter presents this through an example, though in a slightly different context, illuminating how at an ‘expert’ meeting in Chatham House attempting to define the ‘appropriate level of governmental spending in health care’, two benchmarks were effectively set. The first, at \$86 per capita per year, is the absolute essential spend for basic healthcare, and the second, based on 5% of a state’s overall GDP, is to be spent on healthcare as a means to ensure it is progressively realised in line with a state’s economic development.<sup>529</sup> In effect, the core doctrine can be interpreted as requiring the state to devise and implement minimum funding guarantees or ‘social spending floor’ as coined by the IMF for defined core ESCR content.<sup>530</sup> It is an approach already being explored for education in the UK with funding guarantees consistently advocated (and at times implemented) in relation to spending per pupil.<sup>531</sup> This approach can also be extended to procedural obligations, and understanding core obligations can also encompass minimum standards of process as well as guarantees of specific results.<sup>532</sup> For example, guarantees provided in relation to the budgetary information shared with the public, opportunities for participation in decision-making, or ensuring minimum standards within the pre-legislative scrutiny of a government-proposed budget.

Interpreting the core doctrine in this manner presents potential opportunities for both theory and practice. Firstly, it ensures that ‘priority services’ for core ESCR-related areas are guaranteed agreed levels of funding and are therefore protected from year-on-year changes in budget allocations, including in times of fiscal consolidation.<sup>533</sup> This, in turn, presents practical benefits for decision-makers concerning certainty, enabling more accurate, pro-active, longer-term planning, as we will return to in more detail in Chapters 6 and 7. Secondly, setting guarantees of per-capita funding has the potential to set clear standards as to what is expected of the duty-bearer in relation to each right-holder. It should uncover potential violations of ESCR more obviously in everyday practice. Where precise funding levels have dropped below

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<sup>527</sup> Alexandros Kentikelenis and Thomas Stubbs ‘IMF Social Spending Floors: A fig leaf for austerity’ (2023) Oxfam.

<sup>528</sup> CESR (n 325) at 41.

<sup>529</sup> De Schutter (n 101) at 556-557.

<sup>530</sup> Kentikelenis and Stubbs (n 527); see also Brian Stauffer ‘Bandage on a Bullet Wound: IMF Social Spending Floors and the Covid-19 Pandemic’ (2023) Human Rights Watch.

<sup>531</sup> Department for Education ‘The national funding formulae for schools and high needs 2024-25’ (October 2023) Department for Education.

<sup>532</sup> Boyle (n 478); and Flegg (n 119).

<sup>533</sup> CESR (n 325).

the guaranteed expenditure per capita, it would be incumbent upon the state to demonstrate that all possible alternatives had been explored before failing to meet the guarantee for funding.<sup>534</sup> Viewing the doctrine solely as a guarantee of budget allocation or even expenditure per capita does, however, raise issues concerning its reduction to a purely conduct-based obligation in which the state endeavours to achieve a specific result by guaranteeing it a level of funding. In practice, people's outcomes determine their experience of ESCR enjoyment.<sup>535</sup> Going back to the example provided on healthcare spending, while guaranteeing the expenditure of \$86 per capita will undoubtedly ensure specific core, priority services can maintain their levels of service, it does not guarantee a specific threshold of health outcomes will be achieved for all rights-holders due to that guaranteed expenditure being in place. Nor, in reference to Sen and Nussbaum's capabilities work, does it consider the differences in required healthcare spend to ensure two people with different capabilities will be required to survive or live a dignified life.<sup>536</sup> In essence, applying the doctrine in such a way would not necessarily reflect the equity required in social spending nor the further element of the core doctrine in that it is designed to protect those most marginalised and disadvantaged in society. By its very design, the doctrine not only seeks to establish and guarantee a certain threshold of ESCR realisation, but it also seeks to ensure the prioritisation of certain groups within a society, whether than be socio-economic or other.<sup>537</sup>

Already introduced, via the concluding remarks of Chapter 3, is the conception of the core doctrine seeking to serve as a method for overall resource prioritisation within the totality of requirements within the public budget.<sup>538</sup> Drawn from the wording of GC 3, where trade-offs in resourcing will inevitably be required to meet the competing interests of ESCR, the core doctrine when provided with defined content, can be utilised within the broader obligation of progressive realisation to set limits to permissible trade-offs in budget allocations. In other words, were a state party to reduce the resource allocation to a specific ESCR area so aggressively that it led to the failure for even its most minimal aspects to be enjoyed by rights-holders, it would be failing to comply with its obligations under the ICESCR even if the state demonstrated that the resources had been used to realise another ESCR-related area progressively. This essential underpinning purpose is supported by the language of the Maastricht guidelines on Violations of ESCR, which stipulates that in the case of the reduction

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<sup>534</sup> CESCR (n 402).

<sup>535</sup> Sen (n 196); Nussbaum (n 498).

<sup>536</sup> Ibid.

<sup>537</sup> Young (n 123).

<sup>538</sup> O'Connell et al. (n 41).

or diversion of specific public expenditure when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone' a violation may be found.<sup>539</sup> In effect, what this view of the core doctrine achieves in practice is an extensive tightening of the flexibility of the progressive realisation doctrine in how it is given effect to via state budgets, not necessarily a specific guarantee of funding. Where Chapter 3 highlighted the overall need for maximising and optimising of resource use in achieving progressive realisation of ESCR and this being coupled with wide 'deference' being provided to government decision-making, the addition of the core doctrine seeks to achieve guaranteed levels of spend for specific ESCR elements. That is, unless the state can demonstrate that even with the maximum resources available to it, those outcomes could not be achieved despite every reasonable action having been taken to do so. In this case, the doctrine changes form. Instead of seeking to guarantee specific areas of spend, it guarantees that limited resources are prioritised to ESCR areas. The OPERA framework practical approach to monitoring ESCR fulfilment and consequently MCOs highlights this through its methodology by stating: 'Despite its imprecision, the appeal of the minimum core concept lies in its insistence that states must give first priority to fulfilling a basic minimum of ESC rights, universally, for all those within its jurisdiction, over and above all other policy and economic objectives, thus creating a higher burden of proof on states to demonstrate they are using the maximum of their available resources to achieve these outcomes.'<sup>540</sup> Prioritisation in budgetary decision-making is not a new notion within the practice of fiscal decision-making, with (often political) resource prioritisation for specific budget areas being a long part of any budget planning and formulating process.<sup>541</sup> However, according to the core doctrine in ESCR, resource allocation creates the need to 'identify protected social spending that cannot be affected by economic cycles or fiscal rules, and that is necessary to guarantee minimum essential levels of rights'.<sup>542</sup>

Building on this practical enumeration of the doctrine further, it must be acknowledged that MCOs become particularly relevant in times of austerity and severe, regressive fiscal consolidation where, recent history shows us, ESCR related areas of spend are de-prioritised

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<sup>539</sup> Victor Dankwa, Cees Flinterman and Scott Leckie, 'Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 Hum Rights Q705 at 721.

<sup>540</sup> CESR (n 274) at 4.

<sup>541</sup> Ibid.

<sup>542</sup> CESR (n 325) at 41.

and often heavily impacted upon.<sup>543</sup> It is a line of thinking explored in depth by Landau who, through analysing the practice of the Colombian Constitutional Court and its judgments upon the principle of the right to a vital minimum (*minimo vital*) throughout times of fiscal consolidation and austerity measures, presents the doctrine ‘as a prioritisation device rather than as a requirement to define [and guarantee] a set level of enjoyment of each discrete right’.<sup>544</sup> In continuing, Landau asserts: ‘It means that cuts to government programmes and failures to create programmes will be subject to an especially substantial burden of justification when they impact the most vulnerable citizens. Such a usage weakens the indeterminacy objection because it means that judges need not set arbitrary quantities of socio-economic goods and make those quantities intangible during a crisis. Instead, they can merely issue orders that demand higher burdens of justification for their cuts affecting the poorest or a refusal to construct programmes that would benefit these groups.’<sup>545</sup> Here, it is important to note that there are differences to the Colombian right to a ‘vital minimum’ and the minimum core doctrine as developed by the CESCR. However, Landau’s analysis of the Court’s approach to considering such minimum thresholds within the adjudication of ESCR highlights two critical points. Firstly, and simply, the judiciary (when empowered to do so) was perfectly capable of considering wider economic factors at play within budgetary decision-making and delivering a proportionate balance between these factors and fundamental human rights.<sup>546</sup> Further demonstrating the nexus between overall resource use and the ESCR framework strengthens overall narratives and practice in relation to the justiciability of ESCR. Secondly, Landau’s work emphasises the court’s importance on whether prioritisation of limited resources was directed to those in abject poverty and, ergo, most marginalised and disadvantaged within Colombian society.<sup>547</sup> Demonstrating that while deference could be afforded to governmental decision-making in times of austerity, this deference was not extended in situations where government fiscal policy clearly had more detrimental impacts on those poorest in society.<sup>548</sup> Landau’s work is important and arguably provides the most coherent and in-depth analysis of the core doctrine in relation to resource use and the adjudication of ‘core’ ESCR. It is, however, limited due to its focus on the adjudication of ESCR, it fails to fully consider and capture the

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<sup>543</sup> Isabel Ortiz and Matthew Cummins, ‘Age of Austerity; A Review of Public Expenditures and Adjustment Measures in 181 Countries’ (Initiative for Policy Dialogue and the South Centre Working Paper, May 2013); and Magdalena Sepulveda Carmona ‘Alternatives to austerity: a human rights framework for economic recovery’ in Nolan (n 103).

<sup>544</sup> Landau (n 103) at 295.

<sup>545</sup> *Ibid.*

<sup>546</sup> *Ibid.*

<sup>547</sup> *Ibid.*

<sup>548</sup> *Ibid.*

wider opportunities presented for implementing ESCR by proactively applying and utilising the core doctrine within the budget cycle.

#### 4.3 The Challenge of Determining Domestic ‘Core Minimum’ Priorities

Thus far, this chapter has aimed to defend the place of a minimum threshold approach to ESCR and argued that there is the potential for both an invariant and variant approach to setting minimum core priorities to drive fiscal decision-making. The core doctrine can act to set a hierarchy of prioritisation in which the delivery of the core content of ESCR takes precedence over other fiscal considerations. What the chapter has largely ignored thus far is the theoretical framework and process required to establish such priorities in Scotland. With much of the onus placed upon states to determine the meaning and content of MCOs, assessing what falls as a ‘core’ obligation and what should be left to be progressively realised over time becomes the crux of giving effect to the doctrine. In other words, internationally and domestically, is there a defined methodology for determining an immediate, core obligation under ESCR law? Young, in exploring this problem, rejects the violations approach discussed above for reasons already explained and instead explores other potential options for determining core content. It should be noted that Young, within the research, concludes that each approach is unworkable independently and incoherent or ad hoc when used sewn together.<sup>549</sup> Harris likewise opines on the abandonment of the minimum core concept in ESCR.<sup>550</sup> However, these detailed works provide insight into the potential value of different approaches to determining core content. It has served as a basis for subsequent explorations to establish a taxonomy for defining the minimum core content of ESCR. The first approach explored and ultimately rejected by Young is the ‘essence’ approach. The approach defines the core content of ESCR by locating the essence of what the specific ESCR is to achieve. For those who have explored this interpretation, much of the debate centres on providing basic needs. As De Schutter raises in his discussion of the ‘core’ content of ESCR: ‘A basic needs requirement, ensuring that each individual is not deprived of essential goods or services that keep [them] safe, physically and emotionally, and protect [them] from permanent social exclusion: this would include basic shelter, adequate food, water and sanitation, and essential drugs, but also access to primary education’.<sup>551</sup> Arguing it can play a ‘subsidiary role’, Tasioulas purports the essence, or ‘special value’ justification ‘bears some peculiarly intimate relationship to an underlying, high-priority

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<sup>549</sup> Young (n 123).

<sup>550</sup> Harris (n 122).

<sup>551</sup> De Schutter (n 55) at 43.

value, such as human dignity or basic needs required for survival.’ Adding, ‘it may be worth isolating a ‘core’ of human rights obligations in this way’.<sup>552</sup> Referring to De Schutter’s outline above, the wording ‘basic, adequate, essential’ can begin to take quantitative and qualitative meaning when based on a founding principle such as human survival or dignity. As highlighted by Boyle’s research, these terms should play a direct role in setting substantive thresholds within minimum core obligations.<sup>553</sup> However, human survival and human dignity can be, and have been, conceptualised in very different ways.<sup>554</sup> Again, this raises a level of interoperability and, thus, flexibility within a discipline and doctrine requiring legal certainty for states’ domestic utility. Young rejects the ‘essence’ approach because it relies too heavily upon unquantifiable, metaphysical terms such as dignity, equality, and freedom.<sup>555</sup> Moreover, Young offers a very critical stance, arguing there is no place in international law for MCOs as their indeterminacy and impracticality distract from the overall purpose of increasing ESCR protection.<sup>556</sup> A needs-based approach to defining core obligations could thus become self-defeating, as neither what is required for survival nor dignity has an agreed, identifiable, quantifiable, and universally applicable legal definition. There remains a fear ‘references to human dignity might prove to be a hostage to fortune, inviting illiberal interpretations and applications’.<sup>557</sup> On the other hand, this fails to capture the fact that there will always be a level of subjectivity when discussing and applying human rights. As Boyle has also recognised, ‘all rights are indeterminate to some degree’.<sup>558</sup> Adopting such a critique, as Young and others have done, risks falling again into and even strengthening the same critiques tabled at ESCR as legal, justiciable rights.

Over fearing the utilisations of value-based ideals to the extent we wish to banish the concept of survival or dignity from being utilised within legal thought, adjudication, and consequently rights, are we not instead duty-bound to provide a more explicit, objective understanding of basic human needs within human rights? As Young concedes, ‘a subjective dignity-based minimum core of rights to food, health, housing, and education may do little to challenge the current set of distributions in society and may in fact obstruct redistributive efforts. An

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<sup>552</sup> Tasioulas (n 96) at 15.

<sup>553</sup> Boyle (n 478) at 280.

<sup>554</sup> See Jeremy Waldron, ‘Dignity, A pervasive value’ (July 1, 2019). NYU School of Law, Public Law Research Paper No. 20-46. See also a range of interdisciplinary perspectives from Marcus Düwell et al. (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014).

<sup>555</sup> Young (n 123).

<sup>556</sup> Ibid at 174.

<sup>557</sup> Roger Brownsword ‘Human Dignity From A Legal Perspective’ in Marcus Düwell, ‘Human Dignity: Concepts, Discussions, Philosophical Perspectives’ in Düwell et al. (n 535) at 14.

<sup>558</sup> Boyle (n 478) at 264. See also discussion in Young (n 123) at 8.

objective notion of dignity removes these difficulties.’<sup>559</sup> When using the human rights framework, those interpreting and applying the law require interpretative tools and notions for its application. What is the law seeking to achieve? If it is to be construed in this way, would it render its purpose as law meaningless? Just as we would see in tort, or the absence of explicit clauses in contract law, when legal regimes ‘do not have explicit moral exclusions, it is said that moral considerations can covertly shape the reasoning of patent examiners and courts’.<sup>560</sup> If the minimum core doctrine is to be provided with practical relevance, in line with a needs-based justification of human rights, our shared understanding of humanity’s most basic needs must shape states’ decisions on providing a social minimum.<sup>561</sup> Importantly, it would apply in cases where domestic courts are remedying any such failure to achieve the threshold set.<sup>562</sup> While accurate, an ‘essence’, ‘special value’, or needs-based approach cannot alone provide determinable MCOs which are universally applicable, it can offer valuable guidance as to how the doctrine can serve as a legal codification or constitutionalising of a social minimum, why it is needed, and thus advance our understanding of their purpose, and consequently shape their content.

Alongside using a basic needs and ‘essence’ understanding of ESCR to identify their core, Young outlines the possibility of an ‘obligations approach’.<sup>563</sup> It locates the minimum core in the content of the obligations raised by the right rather than the content of the right itself. In other words, core obligations can be determined by the obligations of conduct which arise from the right, the duties placed on duty-bearers but would not protect a specific rights-based outcome. To conceptualise this in practice, the obligations approach to the right to health might identify specific guaranteed, immediate steps which must be taken by the state, such as adopting a national health strategy, instead of giving rise to the need to meet a specific outcome for all such as the provision of specific medicines or access to basic health facilities. For Young, the obligations approach has two significant benefits. It ‘enables the analysis of realistic, institutionally informed strategies for rights protection’ and fits more with the recent discourse on procedural obligations within the ICESCR.<sup>564</sup> Additionally, the obligations imposed would secure and promote the correlative or interdependent nature of fulfilling all human rights,

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<sup>559</sup> Ibid Young at 136.

<sup>560</sup> Brownsword (n 557) at 20.

<sup>561</sup> Massimo Renzo, ‘Human Needs, Human Rights’ as found in Cruft, Liao, and Renzo (n 121).

<sup>562</sup> Boyle (n 1); Katherine Young, ‘A Typology of economic and social rights adjudication: Exploring the catalytic function in judicial review’ (2010) 8(3) *International Journal of Constitutional Law* 385; See also, David Bilchitz ‘Giving Socio-Economic Rights teeth: The Minimum Core and Its Importance’ (2002) 119 *The South African Law Journal* 484.

<sup>563</sup> Young (n 123) at 153-161.

<sup>564</sup> Anne Hughes *Human Dignity and fundamental rights in South Africa and Ireland* (PULP, 2014) at 333.



whether civil, political, economic, social or cultural, by demonstrating that all rights require positive steps and processes to be established to respect and protect the right. For Young, however, this approach would fail due to its polycentricity. Regarding the work of legal theorist Waldron, she rejects the obligations approach, stating the ‘insurmountable problem for the notion of core obligations is that the particular forms of duties are intrinsically polycentric and cannot be subject to a definitive ranking’.<sup>565</sup> In short, Young concludes that adopting a procedural, obligations style approach to determining core content would inevitably lead to issues of determining which processes and practices were more essential than others for establishing a baseline of ESCR protection and would therefore remain indeterminate for both decision-makers attempting to comply with their obligations and the courts in assessing if they had done so.

Young’s dismissal of an obligations approach due to polycentricity is challenging but not insurmountable. Turning to the CESC, it is clear that procedural and substantive threshold approaches are used to formulate core ESCR obligations. For example, GC 14 on the right to health sees the CESC interpretation of the right to adopt substantive requirements such as providing essential medicines and more procedural and structural duties, encompassing equitable distribution, non-discrimination, and a participatory plan of action.<sup>566</sup> The CESC’s guidance on the right to social security and access culture further supports that core obligation encompasses procedural elements.<sup>567</sup> States parties, as part of their MCOs for ESCR, can be expected to adopt a reasonable plan that contains time-bound goals immediately, subject this to continuous monitoring, and provide mechanisms that ensure the participation of relevant stakeholders, access to information, and transparency of decision-making. To take an example of how this procedural protection for core rights can be carried out in practice, the Hartz IV case from the German Constitutional Court has demonstrated the ability and, importantly, the willingness of a domestic court to challenge the procedures behind decision-making.<sup>568</sup> In a case brought against changes to the levels of social security provided, instead of focusing entirely on the levels of social security provided, the court examined and brought to light the insufficiency of the decision-making process and ordered for the process to be restarted.<sup>569</sup> Not only did this allow the court to be more deferential in the remedy it sought to provide, leaving

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<sup>565</sup> Young (n 123) at 176.

<sup>566</sup> CESC General Comment No. 14 (n 83).

<sup>567</sup> CESC General Comment No. 19 (n 125); and CESC General Comment No. 24 (n 435).

<sup>568</sup> Hartz IV BVerfG 05.11.2019, 1 BvL 7/16; See commentary in Stefanie Egidy ‘Casenote — The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Federal Constitutional Court’ (2019) 12(11) German Law Journal 1961.

<sup>569</sup> *Ibid.*

scope for the continued decision-making of elected officials, but it also shows how procedural and outcomes-based assessment can lead to protection for marginalised or disadvantaged groups.

Both result-based and procedural obligations exist in ESCR law and within certain spheres of ESCR implementation, making up an essential aspect of realising rights and enabling good practice. Both should therefore be understood and relied upon when devising minimum core content. Boyle eloquently argues that ‘the right itself is not so much about a clear and foreseen outcome measured against an objective threshold but that an individual can expect policies to be in place in order to achieve a substantive outcome (dependent on many variables such as the right in question, the resources available, the measures taken and the prevailing social, economic, cultural, climatic, ecological and other conditions’.<sup>570</sup> In other words, Boyle’s approach allows for more flexibility in defining core rights aspects by insisting that the doctrine is not necessarily based purely upon objective outcomes related to basic needs but also focuses on the processes of public policy and the minimum requirements established within them. The two can work in tandem. Within this context, where substantive, result-based obligations do not reasonably fit with the espoused ESCR, it may also be able to define certain domestic core obligations concerning specific processes, procedures, and plans, the devising and embedding of which must be undertaken immediately under ESCR law.

#### 4.4 A Taxonomy for Setting Core Minimum ‘Priorities’ in Scotland

Referring back to the very outset of this thesis, the Scottish Government’s consultation on introducing a new human rights framework for Scotland has signalled the intention to incorporate ESCRs with a domestic duty to comply with the rights. Moreover, ‘the duty to comply will be demonstrated by progressively realising the rights and ensuring the delivery of minimum core obligations’, highlighting that the doctrine may have a more crucial and direct role in upholding ESCRs in Scotland than is common elsewhere.<sup>571</sup> Notwithstanding the theoretical debates raised above, for the advocates of a new ESCR framework in Scotland and its potential implications for how Scotland generates, allocates, and spends its limited resources, it is necessary to move past the theory and begin to build a practical path towards providing a shared understanding of minimum core and its content. A recent overview of the relevant UN, regional, and state actors has been conducted to identify commonalities in approaches to the doctrine. This research reaffirmed the philosophical and legal motivations for defining ‘core’

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<sup>570</sup> Boyle (n 1) at 58.

<sup>571</sup> Scottish Government Consultation (n 17) at 18.

content within the doctrine and, in doing so, reignited the search for a workable taxonomy to define what constitutes minimum core content.<sup>572</sup> The research by Tasioulas, later used by Shields via their work with the World Bank, has identified a five-step process to provide meaningful direction for States seeking to implement the doctrine and content for their MCOs or ESCR.<sup>573</sup> Before delving into this process, it is necessary to recognise that both Tasioulas and Shields identify the taxonomy by searching for a universalist, invariant minimum core. This is important as it requires adopting steps and considerations within those steps that apply to all states equally. As argued above, this approach remains critical. Still, it does not mutually exclude the possibility of a state, such as Scotland, via its domestic approach to ESCR identifying and specifying its interpretation and understanding of minimum core content. Thus, this section attempts to build upon and utilise the taxonomy of steps identified by Tasioulas to demonstrate a potential approach for Scotland's domestic journey and the vital interpretative tools required to set its minimum core for ESCRs.

The initial steps of the process are straightforward and predominantly require an analysis of IHRL, its accompanying guidance, and, where possible, its adjudication. Firstly, it is necessary to identify the right in question. For example, the right to health, housing, social security, food, water, or access to culture. This can be drawn directly from the ICESCR but should also be supported by identifying if and how the rights exist across the IHRL framework. The right to health, as an example, is explicitly recognised within the different conventions, such as the CEDAW, the UNCRC, and the Convention on the Rights of Persons with Disabilities ("CRPD"), through which a broader understanding of the human right and its application to specific groups emerges. Having identified the chosen ESCR and outlined the full extent of its codification into IHRL treaties, the following step is identifying the full scope of the chosen right. This is necessary as it must be possible to view and deliberate upon what within the totality of the scope of the right falls within its minimum core. All ESCRs have established normative content. This is often outlined within any accompanying guidance from the UN, such as GCs (which include some formulation of MCOs for specific rights), reports of Special Rapporteurs, or published guiding principles. Taking the right to food as an example, while its key content is established as availability, accessibility, affordability, and quality via GC 12, further obligations have been raised within the realm of international trade and investments,<sup>574</sup>

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<sup>572</sup> See 'Human Rights, Moral Philosophy' Blog. As Found at < <http://jamesgstewart.com/minimum-core-obligations-toward-a-deeper-philosophical-inquiry/>> (accessed 23/07/24).

<sup>573</sup> Tasioulas (n 108); Shields (n 504); and Fisher (n 504).

<sup>574</sup> Olivier De Schutter, Report of the Special Rapporteur on the right to food: Guiding principles on human rights impact assessments of trade and investment agreements. United Nations General Assembly, (2011), A/HRC/19/59/ADD.5

as well as the importance of sustainability of production.<sup>575</sup> This step requires assessing both the procedural, conduct-based elements of the right alongside the more substantive, result-based elements. Additionally, the scope of rights can also be garnered from its different practical applications, with different interpretations and adjudications by domestic courts impacting overall consensus. Having outlined the full scope of the chosen ESCR, so far as possible, the next step presents the challenge of deciphering what falls into the minimum core of the right. Orucu suggests this as identifying the ‘unrelinquishable nucleus [that] is the *raison d’être* of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements’.<sup>576</sup> For this step, further interpretative tools are required.

#### 4.4.1 Immediacy

The first interpretative tool to use in identifying the sub-set of core obligation within the totality of the right is immediacy. Described as the ‘critical piece’ of the doctrine, as derived from its purpose, is its need to be satisfied immediately instead of progressively. As Tasioulas, from a universalist philosophical perspective, argues in his dissection of the minimum core: ‘They must be fully satisfied with ‘immediate effect’ by all states, as opposed to belonging to that aspect of a right’s content which may in principle permissibly be fully complied with in the longer-term in accordance with the doctrine of ‘progressive realisation’.<sup>577</sup> Their need to be satisfied immediately separates MCOs from the obligation of progressive realisation. It can thus be used as an interpretative tool to determine what forms an aspect of the minimum core within the identified full scope of the right and what is left to be realised over time. The most obvious example of an immediate duty under the ICESCR is explicit within the Covenant itself. The text of Article 2(2) of the ICESCR holds that States must undertake ‘to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind’.<sup>578</sup> Moreover, GC 20 of the CESCR clarifies that ‘non-discrimination is an immediate and cross-cutting obligation... discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention of effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights’.<sup>579</sup> By establishing

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<sup>575</sup> See Hilal Elver, ‘Report of the Special Rapporteur on the right to food to the United General Assembly on the Sustainable Development Goals’ UN Doc A/74/164 2019.

<sup>576</sup> Örüci (n 106) at 52.

<sup>577</sup> Tasioulas (n 108) at 13.

<sup>578</sup> Article 2(2) ICESCR.

<sup>579</sup> CESCR, General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, E/C.12/GC/20 at para 7.

the obligation of Article 2(2) on non-discrimination as immediate, it is possible to determine that a core obligation about all ESCR, due to its cross-cutting nature, is to ensure that even at their most basic level of delivery, the rights are provided without discrimination of any kind.<sup>580</sup>

Beyond non-discrimination, the interpretative tool of immediacy does not necessarily explicitly establish further minimum core content. Its role in the taxonomy is primarily to act as a barrier to overly expansionist ideas of what should form a core obligation. Immediacy is a tool to assess what can reasonably be expected of a state. If state parties are required to meet the designed threshold immediately, it cannot be overly burdensome and impossible to deliver. Within the universalist, invariant approach explored by Tasioulas, this becomes a very restrictive standard due to, by design, requiring all states to be reasonably expected to meet the standard immediately. In the domestic context where this taxonomy is aimed, it sheds some of these universalist shackles. It can be more directly designed to affect what can be expected immediately from duty bearers within the state. In practice, this would likely be guided by what is already expected of duty bearers in specific ESCR service areas, under statutory duties, for example, and by assessing whether those standards are appropriate minimum thresholds for the domestic ESCR framework. Further consideration could also be given to minimum core procedures to be in place within decision-making processes as a means of setting ‘core content’ where result-based content is not deemed suitable or achievable. An additional point necessary to raise in the context of setting domestic MCOs is that any considerations would require going further than just what is immediately deliverable by the primary duty bearer (usually the central government). As is introduced in more detail through Chapter 7, domestic human rights are respected, protected, and fulfilled by many actors and institutions across the public sector. Developing what must be met immediately by duty bearers across the state requires consideration of the system as a whole, not just what is deemed suitable by the central government.

#### 4.4.2 Fulfilling Basic Needs: Survival, Dignity & Capabilities

Already raised above is the use (and rejection by some) of an ‘essence’ or ‘special value’ approach to identifying core elements of ESCR, which is predicated on identifying those aspects of the right that are key to ensuring people’s most basic needs are met. Leijten, in their detailed exploration of core obligations within the European context, emphasises foundational

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<sup>580</sup> see Malcolm Langford and Jeff King, ‘Committee on Economic, Social, and Cultural Rights: Past, Present and Future’, in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) at 477 & 492–495.

principles ‘such as survival (needs), freedom, or dignity (values)’ as elements which help pinpoint the sub-set of obligations.<sup>581</sup> What becomes less clear and fundamentally acts as a barrier to utilising the essence approach, as argued by Young, is how to understand the notion of people’s most basic needs.<sup>582</sup> It is a question that has engaged the most heavyweight scholars’ attention for millennia with still no identifiable and agreed method for their determination. Attempting to capture the sheer scale of intelligible thought within this line of inquiry would be a lifetime of work and, consequently, is not attempted here.<sup>583</sup> Instead, three different approaches are offered, which could act as potential ‘tiers’ for setting minimum thresholds within ESCR realisation.<sup>584</sup> The first and second tiers outlined are often understood as a survivalist approach to determining core content or a dignity approach and often dominate scholarly explorations from the legal discipline. Boyle’s research illuminates and argues concisely that both terms can and should play a significant role in setting substantive thresholds within MCOs.<sup>585</sup> However, many further ways exist to interpret basic, material human needs. In recognising this multiplicity, this section introduces the capabilities framework as a further potential tier suitable for determining ESCR minimum core. This section does not wish to delineate one as necessarily more appropriate than another. Its aim is merely to demonstrate the potential use of different, gradually more expansive tiers within the human needs paradigm to effectively guide what the intrinsic core of each ESCR is attempting to achieve. Determining which tier or mix of tiers to utilise will depend upon the state in question and the available resources. Further, as argued as the third element in our taxonomy for domestic application, it will ultimately rely upon the participation, deliberation, and consensus of the rights-holders making up the state.

### Tier 1: Human Survival

A survivalist threshold would delineate the core content of ESCR by assessing what is absolutely and immediately required for human survival within the full scope of the right. For example, the intrinsic core of the right to food would be predicated on ‘freedom from hunger’ and may be guided by internationally recognised standards on minimum calorie intake.<sup>586</sup> The provision of basic forms of shelter determines the right to housing... the right to health through essential medicines, or access to basic, life-saving healthcare. These are only examples, but

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<sup>581</sup> Leitjen (n 493) at 178.

<sup>582</sup> Young (n 123) at 126-138.

<sup>583</sup> Waldron (n 554); McCrudden (n 202); Webster (n 201); Düwell (n 554).

<sup>584</sup> See use of tiers in exploring distributive justice in Bilchitz (n 49).

<sup>585</sup> Boyle (n 478) at 280; See also Rudiger (n 38).

<sup>586</sup> CESCR General Comment No. 12 (n 78).

they do clearly resonate with the language adopted by the CESCRs GC 3. A minimum level of healthcare, food, water, shelter, and education is necessary to enable a person's survival.<sup>587</sup> It is a reading of the doctrine supported by leading scholars in the ESCR field due to several central arguments. Firstly, it is the only appropriate threshold for setting a universalist threshold within the doctrine. Human survival represents a threshold so minimalist that it is reasonable to expect all states, no matter the prevailing history or context, to be able to deliver against it immediately.<sup>588</sup> A second argument to be tabled for using a survivalist threshold is it is generally less subjective than other understandings of human needs and is more readily applicable in the adjudication of ESCR. This would fundamentally demonstrate the indivisibility of ESCR by reinforcing its inherent connection with the right to life, which is widely protected through state constitutions and justiciable CPR frameworks. States, including Canada, India, Germany, and the UK, for example, to name but a few, have all sought to protect ESCR by finding their inherent connection with the right to life and, consequently, what was required to survive.<sup>589</sup> A survivalist approach thus provides the strategic advantage of often having quantifiable and universally applicable standards and can act to reinforce the indivisibility of human rights law by inherently connecting minimum thresholds of ESCR to the civil and political right to life.

What is required for human survival is already well understood. Whether it be minimum calorie intakes and required litres of water per day, access to specific essential medicines, or even exposure to heat and cold due to a lack of basic shelter, there are established material needs which are universal. There are identifiable and evidence-based standards to draw and base decision-making, removing subjectivity and the challenge of reaching consensus. These considerations combine to present a strong case for the survivalist threshold to be utilised as a basic first tier from which to begin delineating the core content of ESCR. It may be the only suitable tier within any universalist approach. However, it also carries clear limitations that are both normative and practical in nature. For one, using human survival as the interpretative threshold for what falls within the core of ECSR would explicitly exclude specific ESCR protected by the ICESCR and other international human rights treaties. Take the right to culture, which recognises everyone's right to participate in cultural life and enjoy the benefits of

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<sup>587</sup> CESCR General Comment No. 3 (n 107) at para 10.

<sup>588</sup> Bilchitz (n 49).

<sup>589</sup> James Cavallaro & Emily Schaffer 'Less Is More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas' (2002) 56 *Hastings Law Review* 217 at 272; The UK, too, has connected the right to life with the economic and social context. See generally Boyle (n 1) see also *Gosselin v. Quebec*, [2002] S.C.R. 84, 429, 641 (Can.) (Arbour, J., dissenting) (arguing that the right to life is infringed by a large decrease of social security to recipients under thirty).

scientific progress and its applications, as a prime example. Little, if anything, within the total scope of the right is focused on aspects required for basic human survival, meaning if only a survivalist interpretation were to be used, it might exclude the right to culture from having core obligations at all. This directly contrasts the approach the CESCR took in GC 19 and would normatively exclude the use of the doctrine for specific ESCR. By being limited to using survival measures to delineate the core content of ESCR, there is the risk of being overly minimalistic and reducing human needs to purely quantifiable measures. Understanding even the basics of the social and political sciences will endow respect that humans cannot be fully understood or catered for via quantifiable, survivalist measures alone.<sup>590</sup> As Craven has opined, ‘the minimum core doctrine aims to set a quantitative and qualitative floor of economic, social, and cultural rights that must be immediately realised by the state as a matter of priority.’<sup>591</sup> Young also covers this by providing an overview of ‘core’ content being value-based, ‘emphasising not what is strictly required for life, but rather what it means to be human’.<sup>592</sup> Thus, while tier one offers a starting point and undoubtedly has a role to play in devising core obligations, particularly for universalist conceptions of ESCR acutely linked with humans’ material needs, it does not and cannot offer a complete understanding within the domestic approach explored here.

### Tier 2: Human Dignity

A more expansive approach to identifying people’s most basic needs is through utilising the notion of human dignity. Widely understood as our special value, intrinsic to humanity, human dignity was thrust into the mainstream and formally recognised as at the heart of the human rights system in 1948 by the UDHR.<sup>593</sup> The two are now largely axiomatic.<sup>594</sup> So much so, McCrudden explains, ‘dignity is becoming commonplace in the legal texts providing

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<sup>590</sup> See Jo Ferrie and Alison Hosie, ‘Methodological challenges in developing an evidence base and realising rights’ (2017) 22 *The International Journal of Human Rights* 5.

<sup>591</sup> Matthew Craven, ‘Assessment of the progress of adjudication of economic, social, and cultural rights’ in John Squires, Malcolm Langford and Bret Thiele *The road to a remedy: Current issues in the litigations of economic, social, and cultural rights* (UNSW Press, 2005) at 39.

<sup>592</sup> Young (n 123) at 135-139.

<sup>593</sup> Micheal Ignatieff, ‘Human Rights as Ideology’ in Michael Ignatieff and Amy Gutmann (eds), *Human Rights as Politics and Idolatry* (Princeton University Press, 2001). For a range of definitions of human dignity see Laura Valentini’s ‘Dignity and Human Rights: A Reconceptualisation’ (2017) 37(4) *Oxford Journal of Legal Studies* 862; See also Oscar Schachter, ‘Human Dignity as Normative Concept’ (1983) 77 *American Journal of International Law* 848; See also the general overview of dignity provided by Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012), and George Kateb, *Human Dignity* (Harvard University Press, 2011).

<sup>594</sup> See UN General Assembly, ‘Setting international standards in the field of human rights’ GA Res 41/120 4 Dec (1986); Düwell (n 554) at 33. See also the discussion in Charles Beitz on the formulation of the UDHR, which discusses the unintentional consequences of simplifying the text of the UDHR to include the notion of dignity in Charles Beitz, ‘Human Dignity in the Theory of Human Rights: Nothing But a Phrase?’ (2013) 41(3) *Journal of Philosophy and Public Affairs* 259.



protections for human rights in many jurisdictions'.<sup>595</sup> However, its use remains controversial.<sup>596</sup> Despite having been pondered, advanced, and, at times, rejected by some of history's most admired thinkers, it remains largely an elusive concept.<sup>597</sup> Raising specific challenges for its use within human rights adjudication more generally, with many wary of its widespread use in law.<sup>598</sup> Nevertheless, its use throughout the IHRL framework is pervasive and worthy of exploration as a potential interpretative threshold for determining MCO content. Indeed, in Scotland its use as an interpretative threshold for devising minimum core content may prove to be the most suitable due to its notion and wording having been adopted within other Scottish legislation such as the Social Security (Scotland) Act 2018.<sup>599</sup>

Waldron, who initially outlines the numerous difficulties caused by placing dignity at the heart of human rights and law more generally, eventually surmises: 'We did not invent the concept of dignity to be immediately useful. It has emerged anyway as an apparently important idea in ethics and political philosophy. We cannot reverse it and we should not ignore the heritage of moral theology, natural-law theorising, and Kantian philosophy that has put this idea in front of us'.<sup>600</sup> For this very reason, it has also played a central part in developing human rights discourses philosophically through naturalistic or political foundations of human rights and legally via its interpretation through the courts.<sup>601</sup> Moreover, recent qualitative research in Scotland identifies dignity's ability to serve as a bridge and gateway in connecting people to the very notion and purpose of human rights, thus enabling the fostering of a rights-based and respecting culture.<sup>602</sup> In adopting a pragmatist approach, Luban agrees: 'The three problems of enforcement deficit, rights without remedies, and the need to generate international outrage require some connection between international legal human rights and moral human rights. Otherwise, IHRL will hardly count as legal rights at all. That connection to morality need not

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<sup>595</sup> McCrudden (n 202) at 656.

<sup>596</sup> Brownsword (n 557).

<sup>597</sup> See Marx and Nietzsche's rejections of human dignity as worthy of note. Marx, 'Moralising Criticism and Critical Morality, a Contribution to German Cultural History Contra Karl Heinzen', *Deutsche-Brüsseler-Zeitung* Nos 86, 87, 90, 92, and 94, 28 and 31 Oct., 11, 18, and 25 Nov. 1847; and K. Ansell-Pearson and C. Diethe (eds), *Nietzsche: On the Genealogy of Morality, 'The Greek State'* (1994) at 176; J Simmons 'Human Rights, Natural Rights, and Human Dignity', (Oxford University Press, 2015); see also Pauline Westerman, 'Natural rights versus dignity: two conflicting traditions' at 108-116 as found in M Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014)

<sup>598</sup> McCrudden (n 202); Justin Bates 'Human Dignity - An Empty Phrase in Search of Meaning?' (2005) 10 *Judicial Review* 165; Mirko Bagaric and James Allen, 'The Vacuous Concept of Dignity' (2006) 5 *Journal of Human Rights* 257; Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 *Columbia Journal of European Law* 201.

<sup>599</sup> Section 1(d) of the Social Security (Scotland) 2018 Act

<sup>600</sup> Jeremy Waldron, 'Is dignity the foundation of human rights' as found in Cruft, Liao, & Renzo (n 121) at 125.

<sup>601</sup> See Joseph Raz, 'Morality of freedom' (Oxford University Press, 1986) and more recently David Miller, 'Joseph Raz on Human Rights: A Critical Appraisal' in Cruft, Liao, & Renzo (n 121); See also, Rawls (n 200) and Ronald Dworkin *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

<sup>602</sup> Webster (n 201).

be via the concept of human dignity, but the fact it is human dignity which the major human rights instruments refer should recommend it to a human rights pragmatist who derives theory from the proprieties of practice'.<sup>603</sup> Moreover, the international legal system providing human rights entitlements is so centred on the notion of dignity that it would be counterintuitive to dispel the notion from our understanding of legal entitlements in international law, especially those we discern as minimum entitlements and requirements.

With the degree of pragmatism Luban suggests, Boyle establishes through a study of comparative case law and foundational principles within IHRL justifying ESCR justiciability, three primary concepts in which dignity is used within legal interpretation. Firstly, 'that human beings are entitled to a life of dignity and wellbeing (that each person is entitled to minimum standards/threshold of human rights protection).' Noticeably moving beyond the notion of a survivalist substantive core threshold, the 'dignity and wellbeing' of rights-claimants already substantially affects current practice within ESRs.<sup>604</sup> Secondly, 'human beings are entitled to autonomy' and human rights protections serve as an integral aspect of self-determination; finally, Boyle raises a third argument, stating 'human beings are entitled to social and political participation in society (that meaningful participation in democracy is dependent on substantive access to at least a minimum criteria).'<sup>605</sup> In taking a practical approach, deciphering consensus from the world's adjudication upon such issues, a more practical, justiciable notion of the meaning of dignity in law can be and is being shaped through practice.<sup>606</sup> Luban illustrates this extensively in defence of dignity, pointing to the jurisprudence from the International Court of Justice, the Geneva Conventions, European case law, and distinguished cases such as Tadic in the International Criminal Tribunal for Yugoslavia.<sup>607</sup> Further clarity of the use of dignity within human rights adjudication can be found in decisions relating to the prohibition of torture and inhuman treatment and even people's self-fulfilment and autonomy.<sup>608</sup> Regionally, it has

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<sup>603</sup> David Luban 'Human Rights, Pragmatism and Human Dignity' in Cruft, Liao, and Renzo (n 121) at 269.

<sup>604</sup> See Gauri and Brinks, who provide a life that achieves the full promise of human dignity requires, among other things, escape from premature death, the resources to withstand debilitating disease, the ability to read and write, in general, opportunities and freedoms unavailable in the midst of extreme poverty and deprivation' in Varun Gauri and Daniel Brinks, 'Introduction: The Elements of Legalization and the Tri-angular Shape of Social and Economic Rights' as found in Gauri & Brinks (n 98).

<sup>605</sup> Boyle (n 1) at 8-9. Allen Buchanan *The Heart of Human Rights* (New York: Oxford University Press, 2013) 313, 360-64.

<sup>606</sup> Sandra Liebenberg, 'South Africa: Adjudicating Social Rights Under a Transformative Constitution' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 75. Concerning some of the developments in Latin America, see Magdalena Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Justice' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).

<sup>607</sup> Luban (n 603).

<sup>608</sup> See *Thornburg v American College of Obstetricians and Gynaecologists* 476 US 747 (1986); See *Ireland v United Kingdom* 2 EHRR 25

impacted as well.<sup>609</sup> It would therefore be unwise to suggest discounting the worth of legal judgments as they can lend ‘significant normative weight to moral claims that might otherwise be relegated to the status of ‘politics as usual’.<sup>610</sup> As Waldron eloquently adds: ‘Sometimes the quest for precision blinds us to certain insights that we can as yet only formulate haltingly; sometimes it blinds us to the importance of pursuing certain questions (and linking them to other questions) even when there is not yet an answer in sight.’<sup>611</sup> In other words, despite the inherent issues with using value-laden terms such as human dignity, its use throughout moral philosophy, human rights legal instruments, and the adjudication of both international and domestic law justifies its place as a potential interpretative threshold in the search for determinate MCO content.<sup>612</sup> Where certain ESCR core obligations may be predicated upon what is required for survival, others may justifiably focus on securing human dignity as originally envisaged by the UDHR.

### Tier 3: Human Capabilities

Tiers one and two offered above represent two approaches to identifying basic needs which have strong roots in legal theory, discourse, and practice. They, by no means, complete the mosaic of what it means to be human and what is required as a minimum to support human development. With legal interpretation only taking us so far, it is no surprise that attention is turning to other interrelated frameworks that may provide direction as to what, at minimum, every individual needs to live a life with dignity.<sup>613</sup> Numerous frameworks exist with the purpose here not to designate one as more important than the other. It is to demonstrate that the work of other disciplines can offer a potentially complementary framework from which to begin the design of domestic core obligations. With that said, the capabilities approach is briefly outlined as the more expansive tier 3 due to its foundations in Rawlsian distributive justice and keen focus from Nussbaum on ‘central capabilities’ as a minimalistic advancement of the theory.<sup>614</sup> Moreover, Sen and Nussbaum's approach reinforces the intersection between basic needs and social justice. According to recent research into the area through an interdisciplinary view, ‘the idea of capabilities can help to clarify the nature and scope of the

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<sup>609</sup> Inter-American Court of Human Rights, *Case of the ‘street children’ (Villagran-Morales v Guatemala)*, judgment of Nov. 1999 at para 144.

<sup>610</sup> Colm O’Cinneide ‘Giving Legal Substance to the Social Minimum’ in Kotkas, Leijten, & Pennings (n 49) at 184.

<sup>611</sup> Waldron (n 599) at 137.

<sup>612</sup> Paolo Carozza ‘Human Dignity’ in Dinah Shelton *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013).

<sup>613</sup> See CESCR General Comment No. 13 (n 78).

<sup>614</sup> Rawls (n 199); Nussbaum (n 203); and Robeyns (n 496); and Ingrid Robeyns ‘The Capability Approach in Practice’ (2006) 14(3) *The Journal of Political Philosophy* 351.

idea of human rights, by providing an understanding of what it means to secure human rights, as well as a framework for elucidating economic and social rights, and for thinking about the grounds of human rights.<sup>615</sup> So much so that Nussbaum has described them as one being a ‘species of the other’,<sup>616</sup> and Sen believes that together, they can ‘bring significant rewards, and facilitate in practical ways the shared attempts to advance the dignity, well-being and freedom of individuals in general’.<sup>617</sup> The work of Fukuda-Parr and the SERF Index is just one recent example of these complementary frameworks working in tandem.<sup>618</sup> Sen pioneered the capability or human development approach, which has sought to identify humanity’s most basic needs for decades.<sup>619</sup> Sen’s work further progressed the fast-growing criticisms of welfarism and utilitarianism by purporting that freedom to achieve wellbeing is a matter of what people are able to do and be, and thus the kind of life they are effectively able to lead: ‘Can we possibly believe that he is doing well just because he is happy and satisfied? Can the living standard of a person be high if the life that he or she leads is full of deprivation?’<sup>620</sup> Constituted by the ‘functioning’s’ that a person is able to achieve ‘beings and doings’... which can ‘vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity and premature mortality... etc... to more complex achievements such as being happy, having self-respect, taking life of the community’.<sup>621</sup> According to the proponents of the capability approach, these ‘functioning’s’ are what make a life worth living. They require us to consider more than the ‘primary goods’ one owns and the circumstances in which a person lives. The term ‘conversion factors’ captures the ability of a person to transform a resource into a functioning, a means to an end.<sup>622</sup> The capability approach now plays a crucial role in our understanding of human development and the battle against absolute poverty and is increasingly proposed as an antidote to soaring inequality worldwide.<sup>623</sup>

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<sup>615</sup> Polly Vizard, Sakiko Fukuda-Parr and Diane Elson, ‘Introduction: The Capability Approach and Human Rights’ (2011) 12(1) *Journal of Human Development and Capabilities* 1 at 4.

<sup>616</sup> Martha Nussbaum, ‘Human Rights and Human Capabilities’ (2011) 20 *Harvard Human Rights Journal*.

<sup>617</sup> United Nations Development Programme (UNDP). *Human Development Report 2000: Human Development and Human Rights*, (Oxford University Press 2000) at 19.

<sup>618</sup> Sakiko Fukuda-Parr, ‘The metrics of Human Rights: Complementarities of the Human Development and Capabilities Approach’ (2011) 12 *Journal of Human Development and Capabilities* at 73-89.

<sup>619</sup> See an alternative in Liao, who outlines a ‘Fundamental Conditions Approach’ as better explaining substantive human rights. In Matthew Liao ‘Human Rights as Fundamental Conditions for a Good Life’ in Cruft, Liao, & Renzo (n 121). See also the agency approach as developed by James Griffin in *On Human Rights* (Oxford University Press 2008).

<sup>620</sup> Amartya Sen *The Tanner Lectures on Human Values The Standard of Living* (Cambridge University Press 1987).

<sup>621</sup> Amartya Sen ‘Inequality Re-examined’ (Oxford: Clarendon Press 1992) at 39.

<sup>622</sup> For an overview of conversion factors and the different types enumerated, see Ingrid Robeyns, ‘The capability Approach: a theoretical survey’ (2005) 6 *Journal of Human Development* 93.

<sup>623</sup> See Tania Burchardt & Rod Hick, ‘Inequality, Advantage and the Capability Approach’ (2018) 19(1) *Journal of Human Development and Capabilities* 38; See also an overview of the capability approach found at Ingrid Robeyns, ‘The Capability Approach’ *The Stanford Encyclopaedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.).

As noted above, one reason to introduce the potential of the capabilities approach to provide a further tier and threshold through which to assess the basic needs of individuals (and thus interpret the core content of ESCR) is the work of philosopher Martha Nussbaum on developing the ‘central capabilities’.<sup>624</sup> According to Nussbaum, these central capabilities are essential for human life to be ‘not so impoverished that it is not worthy of the dignity of a human being’.<sup>625</sup> Drawing from the philosophical giants Aristotle and stoic Cicero (among others), Nussbaum explores from a primarily naturalistic foundation the essential moral entitlements everyone should be equally guaranteed. These are life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species, play, and control over one’s environment.<sup>626</sup> Nussbaum even goes so far as to argue that they should be enshrined and protected throughout all constitutions.<sup>627</sup> The central capabilities provide another lens through which to understand what it means to live a life of dignity. The central capabilities have also faced criticism, most notably by Sen, who refuses to acknowledge a predefined set of absolute central capabilities. He states: ‘My own reluctance to join the search for such a canonical list arises partly from my difficulty in seeing how the exact lists and weights would be chosen without appropriate specification of the context of their use (which could vary), but also from a disinclination to accept any substantive diminution of the domain of public reasoning’.<sup>628</sup> It is an important critique, echoing the concerns of human rights scholars who highlight the practical difficulty of achieving a minimal threshold which is satisfactory to all states and cultures. Sen does not deny the importance of searching for such a list but rejects the notion that one conception can be adequate for everyone. Moreover, he recognises and raises the need for public reasoning to be involved in any process that seeks to establish a ‘central capabilities’ list.<sup>629</sup> Nussbaum, noting this critique, makes clear the formulation of her central list is ‘abstract’ and ‘advocates that the translation to implementation and policies should be done at a local level, taking into account local differences’.<sup>630</sup> Indeed, she argues: ‘What must happen is that the debate must take place, and each must make arguments attempting to show that a given liberty is implicated in the idea of dignity. This cannot be done by vague intuitive appeals to the idea of dignity all by itself: it must be done by discussing the relationship between the putative entitlement and the other existing entitlements

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<sup>624</sup> Nussbaum (n 524).

<sup>625</sup> Martha Nussbaum *Women and Human Development: The Capabilities Approach* (Cambridge University Press 1999) at 74.

<sup>626</sup> Nussbaum (n 524).

<sup>627</sup> Ibid.

<sup>628</sup> Amartya Sen, ‘Human Rights and Capabilities’ (2006) 6 *Journal of Human Development* at 151-166.

<sup>629</sup> Ibid.

<sup>630</sup> Robeyns (n 614) at 102.

in a long and detailed process.’<sup>631</sup> It is a critical point that has been absent and even neglected from the perspective of IHRL. The role of deliberation, participation, and public reason in establishing any minimum standards throughout society.

#### 4.4.3 Deliberation & Meaningful Participation

Having introduced both immediacy and basic needs through its mix of conceptions and tiers as vital tools in determining what within the totality of the scope of an ESCR should be considered a MCO, the final element of the taxonomy to be covered here is the role of meaningful participation and deliberation. Explored by Young as a ‘consensus’ approach to determining minimum core content, the approach relies upon establishing consensus to identify core obligations.<sup>632</sup> Young asserts: ‘The Consensus Approach... explicitly addresses two central challenges to the Essence approach: that resolving disagreement by an abstract, overlapping consensus of reasonable political theories does not resolve the problems of representation and voice, and even broad ethical agreements may not resonate enough with social facts to constitute law.’<sup>633</sup> Further yet, Young acknowledges the possibility of consensus rendering the determined core ‘politically legitimate’.<sup>634</sup> Young does go on to dismiss the use of a consensus approach within the search for an international, universal, and invariant MCOs by surmising: ‘In brief, the approach fails because it makes legitimate only the lowest common denominator of international protection, a problem exacerbated by the relative dearth of explicit pronouncements on what the minimum formulations of economic and social rights are and where they should be’.<sup>635</sup> Young’s concern about utilising a consensus approach, notably at the international level, centres on the historical ‘bifurcation’ of international human rights and the prevalent view of ESCR as secondary to CPR. This view is persistent enough that, in needing to reach a consensus, it could impede the progress of ESCR norms and the development of an appropriate minimum core doctrine. It is a rather cynical view of the ability of international norms to be arrived at through consensus but also, unfortunately, one based on reality and evidence. In continuing, Young admittedly extends the concerns to national contexts by opining, ‘if the limits of the Consensus Approach are different for national systems of law, it is a difference in degree and not in kind’.<sup>636</sup> Moreover, Young argues, with references to the “Washington Consensus” on the desirability of a neoliberal economic system, that ‘national

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<sup>631</sup> Martha Nussbaum *Creating Capabilities* (Oxford University Press 2019) at 32.

<sup>632</sup> Young (n 123).

<sup>633</sup> Ibid at 141.

<sup>634</sup> Ibid.

<sup>635</sup> Ibid at 147-148.

<sup>636</sup> Ibid at 149.

policy debates’ are often ‘heavily influenced by compromise rather than reason’, with compromises tending ‘towards coercion’.<sup>637</sup> In other words, consensus can mask the more insidious intentions of the well-represented few and provide a sense of legitimacy to harmful ideas and practices, including in ESCR debate and deliberation.

Young’s analysis can, however, be rebutted to a certain extent from both the international and, more effectively (as is argued here), from the domestic perspective. To begin with the challenge of international consensus, the view presented fails to adequately balance the international community’s failures to find consensus with the numerous instances in which international consensus has been formed and dramatically impacted states’ practices globally. Indeed, the very establishment of the UDHR, as Morsink argues in their detailed exploration of its drafting, the very founding document of universal human rights was broadly based on international consensus.<sup>638</sup> Moreover, the legal framework, which continues to foster intense debate and attention alongside widespread acceptance and practice, would not exist today if international consensus had not been reached within the drafting process. Indeed, the same argument arises from the ‘European Consensus’ interpretative tool used by the European Court of Human Rights to identify the evolution of the laws and practices of European states.<sup>639</sup> Consensus in international law is prevalent. King, with specific reference to ESCR, goes so far as to argue social rights are only now considered legal rights due to the hard work of its advocates in building such a consensus among the international legal community.<sup>640</sup> He asserts: ‘There has been a traditional resistance among philosophers to consider social rights real human rights ... however, [t]hese objections have now been dispatched convincingly by what is emerging as a near consensus view among philosophers of human rights that social rights are very much a species of human rights, largely for similar reasons accepted by international lawyers and the UN system much earlier.’<sup>641</sup> Further examples are clear throughout the last half-century. From the general successes of nuclear non-proliferation treaties through the Cold War to the growing, albeit too slowly, consensus on the need for climate action or specific species protection, there are numerous examples of international consensus reaching, and it has directly impacted humanity’s future progress, or at least direction.<sup>642</sup> Notwithstanding the many criticisms of

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<sup>637</sup> Ibid at 150.

<sup>638</sup> Johannes Morsink, *The Universal Declaration of Human Rights: Drafting, Origins & Intent* (Pennsylvania Studies in Human Rights, 2000) at 400.

<sup>639</sup> Panos Kapotas & Vassilis Tzevelekos, *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019).

<sup>640</sup> King (n 46).

<sup>641</sup> Ibid at 22.

<sup>642</sup> Nobuyasu Abe, ‘The NPT at Fifty: Successes and Failures’ (2020) 3(2) *Journal for Peace and Nuclear Disarmament* 224.

these international frameworks, the point is that a general consensus on what is required can be reached. When achieved even partially, it can impact states' practice significantly. Providing a more substantive rebuttal of the objection to using consensus to define the absolute, international minimum core requires the elaboration of an in-depth analysis of the successes of international consensus, which cannot be presented in full here. But the point raised above provides its foundation. With all the challenges that building international consensus can create, it remains the only method available to ensure progress on issues that concern us all as a collective humanity.

Turning to the domestic perspective, the rebuttal can be offered in strength, with many of the concerns raised by Young being general enough to be lodged against the very notion of participation in democratic decision-making itself. Participation and deliberation, as is further explored in Chapter 5 in relation to budgetary processes, are already well-established and fundamental elements within theories of human rights as well as deliberative democracy theory.<sup>643</sup> This argument drew directly from the human rights framework itself. It can just as actively be reiterated here as a defence of public participation and deliberation's role in achieving human rights in practice. However, further foundations can be sought from wider political philosophy and theories of deliberative or participatory democracy. Arguments that present the notion that achieving political consensus on issues requires a degree of 'compromise' over 'reason' as just representative of the everyday plurality and diversity of society and the views it holds. To draw from the work of Rawls on consensus building and public reason, in recognising a 'fact of pluralism' as a 'permanent feature of the public culture in democratic societies', the very foundations and basis for social arrangements must be built on consensus over a pluralistic convergence of everyone's philosophical, moral, political, or religious beliefs.<sup>644</sup> Indeed, throughout Rawls's work, the roles of building consensus and the value of public reasoning in establishing political and legal norms are commonplace.<sup>645</sup> Much of the work of Habermas on political participation and the public sphere, though disagreeing in parts, likewise explores the need for and potential of deliberation and participation in functioning democracies.<sup>646</sup> Other established political philosophers, such as Taylor, also

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<sup>643</sup> Sandra Liebenberg 'Participatory Justice in Social Rights Adjudication' 18(4) Human Rights Law Review 623.

<sup>644</sup> John Rawls 'The Idea of an Overlapping Consensus', (1987) 7(1) Oxford Journal of Legal Studies 1 at 4.

<sup>645</sup> John Rawls, 'The idea of public reason revisited' 64(3) The University of Chicago Law Review; see also Rawls (n 200); and John Rawls. 'The Domain of the Political and Overlapping Consensus' (1989) 64(2): New York University Law Review 233.

<sup>646</sup> Jürgen Habermas, *The Theory of Communicative Action*, vol. I (Boston, MA: Beacon Press, 1984); Jürgen Habermas, 'Popular Sovereignty as Procedure', in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, MA: MIT Press, 1999) at 41.



identify the need for ‘convergence’ on political, moral, and, consequently, legal foundations within a functioning society.<sup>647</sup> Taylor’s work then assesses the critical role of ‘mutual understanding’ of people’s moral and political outlooks in building consensus for human rights norms.<sup>648</sup> This is not only because there needs to be a degree of trust in fellow citizens’ moral and political reasoning but also because, inherently, concepts of justice and morality will very rarely be static. This insight from political philosophy offers the notion that any foundational principles of practice designed to guide society will require and rely upon debate, mutual understanding, public reason, and society’s participation in agreeing to its societal minimum.

In searching for and developing a taxonomy for the domestic application of MCOs in Scotland, the notion of consensus takes on a different meaning. Instead, it can focus on using expert views and input, taking account of the insights from civic society and other key stakeholders, and deliberate with duty-bearers as to what is demonstrably deliverable. Most importantly, though, through adopting a domestic approach, the potential for any process to hear from rights holders themselves greatly increases. Only through the participation of those the doctrine seeks to protect can it gain real legitimacy. Boyle’s work also demonstrates the role adjudication of ESCR can have in supporting the principles of deliberative democracy, demonstrating the reciprocal nature of viewing these frameworks and principles as intertwined in the search for improved, more just governance.<sup>649</sup> There is no doubt building consensus in an inherently imperfect science. Where concerns over using consensus certainly need to be identified, their tabling is more relevant to their offsetting through designing the institutional processes for reaching consensus over rejecting its potential to shape global and state-specific norms. Moreover, the challenges presented by Young, alongside many others, merely present the trials and tribulations of attempting the difficult but not impossible in practice. Consensus, at its worst, can represent a mere entrenchment of the views of the privileged few and, even when carried out reasonably well, can inherently cast aside the views and needs of minorities in favour of the majority. However, at its best, established consensus through meaningful participation and deliberation has undoubtedly led to vast swathes of human progress, collaboration, and cultural change. To discount its use within the domestic or international development of the minimum core doctrine would be to discount its use within any

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<sup>647</sup> Charles Taylor ‘Conditions of an Unforced Consensus on Human Rights’, in J. Bauer and D. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press 1999) at 124-144; See also Jay Drydyk ‘Two Concepts of Overlapping Consensus’ in Ashwani Peetush and Jay Drydyk *Human Rights: India and the West* (Oxford University Press 2015).

<sup>648</sup> Ibid Taylor.

<sup>649</sup> Boyle (n 1).

constitutional, state-building setting and run directly in conflict with the underpinning notions of participation and deliberation within a functioning democracy. Instead, efforts should be poured into minimising the risks associated with building consensus and the processes used to achieve it over discounting its central use within legal or policy development. For Scotland, a nation seeking to entrench the minimum core doctrine within its domestic legal system to provide enhanced protection for those most disadvantaged and marginalised in society, the participation and deliberation of those the doctrine seeks to protect is essential. Without it, the democratic deficiency in the thresholds set may inevitably lead to its failure in the longer term.

#### 4.5 Concluding Remarks

Considering the obscurity of the doctrine's place and application in the breadth of IHRL, it could be thought of as somewhat surprising that, in recent years, it has become a common tenet and feature of the ongoing human rights and ESCR debate in Scotland.<sup>650</sup> However, the Scottish government's recognition of the importance of the core doctrine, driven by the evidence provided through the FMAG and Taskforce processes, demonstrates an understanding that for ESCR to move beyond being a legal framework for the mere monitoring of ESCR realisation, a minimum threshold is required for their functioning as enforceable, justiciable human rights.<sup>651</sup> As this chapter has outlined, significant disagreements remain about whether MCOs are context-sensitive and vary depending on the country in which they are set.<sup>652</sup> More critically, debates continue about whether defining core obligations within ESCR would indeed enhance their overall protection. While various rebuttals to these critiques have been offered, drawing from both legal theory and broader concepts on the search for a 'social minimum' and its philosophical underpinnings, the limitations outlined by Amartya Sen and other prominent thinkers in achieving a defined social minimum reveal the complexity of formulating and applying minimum thresholds.<sup>653</sup> Sen argues that 'the real world does not involve such attractive but fantastical possibilities, it is necessary to recognize that there will be no automatic achievement of a high social minimum. If the only feasible process is a gradual attainment of various distributive justice ideals, then it seems necessary to recognize not just the pragmatic importance but also the normative relevance of improvements in people's lives that meet various thresholds.' Therefore, different views will persist, and debates will continue. As Boyle

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<sup>650</sup> See evidence provided to the Scottish Parliament's Equalities, Human Rights and Civil Justice Committee. Available at: < <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/business-items/minimum-core-obligations> > (accessed 23/07/24).

<sup>651</sup> FMAG (n 9); and Cepeda, O'Regan and Scheinin (n 40).

<sup>652</sup> Harris (n 122).

<sup>653</sup> Sen (n 627).

notes, ‘all rights are indeterminate to some degree’ and require diverse institutions and disciplines to engage with their concepts to provide a minimum threshold of ESCR and deliver an acceptable social minimum for all.<sup>654</sup> These questions will undoubtedly attract further scholarly input and debate.

This chapter has attempted to highlight the potential within the core doctrine, not only for ensuring the recognition that ESCR contains both immediate and progressive elements or enhancing the ability of ESCR adjudication to determine violations but also for its direct nexus with public budgets. This nexus is established through the need to guarantee levels of resource mobilisation, allocation, and subsequent expenditure in ESCR-related areas. In cases where these goals cannot be achieved, there is a necessity to prioritise the most marginalised and disadvantaged in society. In this respect, the core doctrine can effectively become a legal shield to protect against the most aggressive forms of austerity. For this reason alone, it must be viewed as an integral aspect of any rights-based approach to budgeting or analysis conducted to determine a state's compliance with the ICESCR. Although the notion of MCOs being utilised as a ‘prioritisation’ device within the ICESCR’s requirements has been explored to some degree, there has been little achievement in establishing what constitutes the ‘priority areas’ receiving core levels of protection in law and subsequently via the state’s public budget. The dominant approach over the last three decades, in which the judiciary has often been left to decipher ‘core content’ and has sometimes rejected such an understanding of ESCR, could give way to a new approach in which rights-holders themselves drive the settings of priorities and core obligations. Through this conception, both an ‘absolute’ core and more relative, specific core content for each state can be formed to give domestic effect to ESCR law and drive the prioritisation of resources. Recent explorations of the core doctrine demonstrate efforts to identify the ‘core content’ of specific ESCR. Using the taxonomy developed by Tasioulas and Shields, adapted here for exploring domestic approaches to setting MCOs, the ESCR framework offers a methodology for identifying core aspects of ESCR that are to be protected via MCOs under the ICESCR.<sup>655</sup> By utilising interpretative tools to determine what is required (and possible) to meet immediately, whether procedurally or in terms of outcomes, driven by the need to fulfil basic rights-holder needs, and built through participation,

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<sup>654</sup> Boyle (n 1).

<sup>655</sup> Tasioulas (n 108); Shields (n 504); and Fisher (n 504).

deliberation, and democratic consensus, each state, including Scotland, is given the opportunity to specify in law, their core values, priorities, and potential for a social minimum.

## **Chapter 5**

### **Human Rights & Public Budgets: Principles for Practice**

In reviewing HRB literature, the focus thus far has centred on the substantive legal obligations of IHRL, their implications for using resources within a state, and consequently, their implications for budgetary decision-making. This focus is foundational to applying a rights-based approach and as discovered, presents a rigorous framework from which to guide and hold accountable a state's fiscal decision-making relative to its human rights obligations. Yet, this substantive legal framework does not entirely capture the conduct and procedures expected when progressively realising ESCR through public budgets.<sup>656</sup> As the CESCR provides: 'Appropriate procedural protection and due process are essential aspects of all human rights.'<sup>657</sup> In short, the framework is left incomplete without the addition of further assessing the principles for practice threaded throughout HRB and wider literature. While progressive realisation and its sub-duties delineate substantive and primarily results-based legal obligations to guide decision-making and budget analysis, further procedural aspects warrant attention.<sup>658</sup> Interconnected with the endeavour towards the right is the understanding that specific procedures and processes must be in place to achieve the specified result.<sup>659</sup> This view is supported by a review of pertinent literature on HRB outlining the existence of obligations of conduct and determining specific principles and 'procedural mechanisms' expected to inform budgetary decision-making processes.<sup>660</sup> These 'mechanisms' are generally condensed into the three principles of transparency, participation, and accountability (though others are also explored).<sup>661</sup> Each is distinct yet interrelated in that together, the principles act to reinforce one another. For example, where there is greater transparency within a budget process, it can lead to improved commitments to fulfil ESCR, and it can enable more meaningful participation and

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<sup>656</sup> Yota Negishi 'The proceduralization of social rights: access to information, justice and remedies' in Christina Binder et al *Research Handbook on International Law and Social Rights* (Elgar, 2020).

<sup>657</sup> CESCR, 'General Comment No 7 on the Right to Adequate Housing' (20 May 1997) UN Doc E/1998/22 at para 15.

<sup>658</sup> See early recognition of this in Alston and Quinn (n 457) at 181-182.

<sup>659</sup> International Law Commission on State Responsibility Article 20 read: "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation."; See also P M Dupuy 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility' (1999) 10(2) *European Journal of International Law* 371.

<sup>660</sup> De Schutter (n 101) at 619.

<sup>661</sup> The UN General Assembly called for this in 2012, adopting a Resolution promoting transparency, participation, and accountability in fiscal policies. See UN General Assembly A/RES/67/218.

accountability within decision-making processes.<sup>662</sup> In Scotland, for example, the SHRC's HRB contribution assesses these procedural principles as central to delivering public budget practice in Scotland and, in many ways, is crucial to delivering a budget process with the potential to enable rights-based budget analysis more generally.<sup>663</sup>

Transparency, participation, and accountability all have extensive roots within the ESCR and wider IHRL frameworks. De Schutter, for example, drawing upon their central importance to good governance and the rule of law highlights several significant benefits to 'strengthening participation, transparency and accountability in budgetary decision-making.'<sup>664</sup> Firstly, 'it is a way to ensure that budgetary priorities shall take into account the interests of the most marginalised groups within society' and be able to combat the 'vicious cycle in which, because the poor are unable to influence political decisions, the policies shall serve the elites rather than respond to their needs'.<sup>665</sup> Secondly, and critically, 'the focus on norms of participation, accountability and transparency in budgetary decision-making helps to move beyond the apparent tension between national democratic self-determination and supervision by courts or by international human rights bodies.'<sup>666</sup> In other words, where ESCR monitoring is carried out or effective remedies are sought, having procedural mechanisms to rely upon increases the ability of the CESC, as well as domestic courts, to adopt a deferential approach to their enforcement in which the democratically elected government retains primary control.<sup>667</sup> This chapter aims to delve into these principles in relation to budgetary decision-making and ESCR in more depth. First, the chapter explores their framing within human rights-based approaches to decision-making of which they form a key aspect and moves on to explore each principle in turn and in detail. For each, the chapter provides a grounding within the IHRL framework and draws upon the work of international treaty monitoring systems alongside scholarly input. The aim being to demonstrate that these are not just procedural mechanisms being called for from the academic or civic society communities but form a consistent and central aspect of the approach of the CESC in determining ESCR compliance. This legal foundation is also supported by arguments from other perspectives throughout the chapter, such as theories of deliberative democracy, to further demonstrate their importance across different critical

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<sup>662</sup> Sakiko Fukuda-Parr, Patrick Guyer, and Terra Lawson-Remer 'Does Budget Transparency Lead to Stronger Human Development Outcomes and Commitments to Economic and Social Rights?' (2011) International Budget Partner: Working Paper 4.

<sup>663</sup> SHRC (n 152).

<sup>664</sup> De Schutter (n 101) at 614-615.

<sup>665</sup> Ibid.

<sup>666</sup> Ibid. See also discussion of 'governance' approach to the constitution of ESCR in Katharine Young, *Constituting Economic and Social Rights* (Oxford University Press 2012) at 262-275.

<sup>667</sup> See for example CESC Concluding Observations on the UK (n 5) at para. 17.

perspectives (though this is done in a light-touch manner with the primary focus remaining ESCR). Additionally, the chapter aims to contribute to the HRB literature by drawing upon emerging frameworks that have been developed through global movements devoted to improving fiscal practice globally, such as the International Budget Partnership (“IBP”), as well as already well-established budgetary frameworks in use across different states and systems. Namely participatory, wellbeing, and gender budgeting, from which human rights-based approaches to decision-making have much to garner. In doing so, the chapter goes beyond establishing their theoretical underpinning and attempts to identify potential practices and measurement tools to be adopted in Scotland.

### 5.1 Adopting a Human Rights-Based Approach to Fiscal Decision-Making

For years, there has been an ever-increasing transition from conceiving human rights solely as legal obligations to be complied with to embedding them in everyday decision-making and practice.<sup>668</sup> This is often articulated as adopting a 'rights-based approach' and can serve as a methodology for applying the principles of human rights to the everyday practice of practitioners in a wider array of fields and disciplines.<sup>669</sup> Human rights-based approaches have become commonplace in NGOs, charities, and social movements and are increasingly advocated for in governmental decision-making.<sup>670</sup> However, having been promoted by various actors, they have consequently ‘taken on various forms and expressions’.<sup>671</sup> Their roots can often be traced back to the practices of human development with Hamm in 2001, within a direct discussion of the nexus between ESCR and development practices identifying the emergence of the ‘basic dimensions’ of adopting human rights principles as an approach to development practice.<sup>672</sup> Within the context, adopting a rights-based approach meant utilising ‘human rights as a frame of reference for development policy’, ‘non-discrimination’, ‘participation and empowerment’, and finally ‘good governance’ through strengthening

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<sup>668</sup> David Patterson ‘Human Rights-based Approaches and the Right to Health: A Systematic Literature Review’ (2024) *Journal of Human Rights Practice* 1; see also role of decision-making in assessing non-retrogression of ESCR in Ben Warwick ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) 19(3) *Human Rights Law Review* 467; and Patrick Twomey ‘Human Rights-Based Approaches to Development: Towards Accountability’ in Mashood Baderin and Robert McCoquardale *Economic, Social, and Cultural Rights in Action* (Oxford University Press 2007).

<sup>669</sup> Human Rights Committee, General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26/05/2004, UN Doc. CCPR/C/21/Rev.1/Add.13; Economic and Social Council, General Comment on the Domestic Application of the Covenant, 3/12/1998, UN Doc. E/C.12/1998/24.

<sup>670</sup> Emma Harris-Curtis, Oscar Marelyn & Oliver Bakewell ‘The Implications for Northern NGOs of Adopting Rights-Based Approaches’ (2005) INTRAC.

<sup>671</sup> Hannah Miller ‘From ‘rights-based’ to ‘rights-framed’ approaches: a social constructionist view of human rights practice’ (2010) 14(6) *The International Journal of Human Rights* 915 at 916.

<sup>672</sup> Brigitte Hamm ‘A Human Rights Approach to Development’ (2001) 23(4) *Human Rights Quarterly* 1005.

democratic institutions.<sup>673</sup> Much of Hamm’s identified basic dimensions remain visible in more recent formulations of rights-based approaches. For example, the European Network of National Human Rights Institutions adopted the principles of participation, accountability, non-discrimination, empowerment, and legality (“PANEL”) as the underpinning principles that guide rights-based approaches.<sup>674</sup> This has been coined the PANEL approach and is similarly adopted in Scotland by the SHRC, as well as other local NGOs.<sup>675</sup> The approach emphasises the procedural aspects of human rights implementation and underscores the necessity of integrating human rights considerations into all facets of decision-making and governance processes. When implemented, the principles offer a power shift towards shared ownership of what is being discussed, what evidence is being evaluated, and what decisions are being made. To draw from literature focused on human rights mainstreaming, in many regards, these principles are about building and maintaining a human rights culture within a state’s overall decision-making.<sup>676</sup> As Olawuyi, borrowing from Blackburn, eloquently captures in an exploration of adopting a rights-based approach to carbon budgeting: ‘Creating a human rights culture would represent a radical shift from a needs-based approach, under which human rights are treated as ‘add ons’, to an approach that enshrines a human rights culture at the heart of policymaking. Under this model, human rights are not relegated to the background; instead, human rights issues are placed at the fore of policymaking, actions, and resource allocation.’<sup>677</sup> In this vein, the principles for the practice of transparency, participation, and accountability are explored.

Before diving into the norms below, a word of caution is provided on establishing an overly rigid framework in which only human rights perspectives are considered. Rights-based approaches, particularly those adopted as an approach to development, have been criticised on numerous grounds by a wealth of commentators.<sup>678</sup> While human rights practitioners and proponents advocate their use throughout all decision-making and often interrelate this with

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<sup>673</sup> Ibid at 1011.

<sup>674</sup> ENNHRI ‘Human Rights-Based Approach’. Available at: <https://ennhri.org/about-nhris/human-rights-based-approach/#:~:text=The%20HRBA%20is%20underpinned%20by,the%20enjoyment%20of%20their%20rights>. (accessed 24/07/24).

<sup>675</sup> See more on the SHRC PANEL approach at: <<https://www.scottishhumanrights.com/projects-and-programmes/human-rights-based-approach>> (accessed 24/07/24).

<sup>676</sup> Christopher McCrudden, ‘Mainstreaming Human Rights’, in Colin Harvey (ed.), *Human Rights in the Community: Rights as Agents for Change* (Oxford: Hart Publishing, 2005).

<sup>677</sup> Damilola Olawuyi *The Human Rights-Based Approach to Carbon Finance* (Cambridge University Press 2016); See also Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (London: Frances Pinter Publishers Ltd., 1999) at xxxii.

<sup>678</sup> See discussions in Morten Broberg and Hans-Otto Sano ‘Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences’ (2017) 22(5) *The International Journal of Human Rights* 664; and Hannah Miller ‘Rejecting “rights-based approaches” to development: Alternative engagements with human rights’ (2016) 1 *Journal of Human Rights* 61.



complying with IHRL, concerns are espoused regarding the rigidity of using approaches drawn from law and their potential to push other critical considerations, perspectives, or institutional values into the background.<sup>679</sup> Here, the goal of setting out the potential for a human rights-based approach to fiscal decision-making is not to confine decision-makers into an overly rigid model in which only these principles are of concern or specific types of rights-based considerations can occur. More in keeping with Miller's views of a 'human rights-framed approach', in which human rights serve as a tool and supportive framework to bolster already further established institutional values and mechanisms, what is encouraged through this chapter is the recognition of these key principles as critical to carrying out fiscal practices which support the realisation of human rights.<sup>680</sup> Human rights in fiscal practice have as much to learn from other disciplines and institutions as they can offer, and these principles, explored through the legal language and norms of IHRL, are tabled with such an underlying conviction.

## 5.2 Transparency

As employed in accessing public information, transparency encapsulates a multifaceted concept critical for ensuring governmental actions' accountability, legitimacy, and overall efficacy.<sup>681</sup> Moreover, it is a foundational pillar for enabling public participation in decision-making and establishing accountability. Specifically, in the context of budgets and public governance, transparency pertains to making government activities, decisions, and information available and easily accessible to the public. This encompasses disseminating precise, timely, and comprehensive information regarding government policies, processes, expenditures, and underlying rationales, facilitating informed citizen participation and oversight.<sup>682</sup> Transparency represents a cornerstone of democratic, deliberative governance and theories of justice, helping to bolster public trust, foster civic engagement, and safeguard against corruption and misuse of public resources.<sup>683</sup> However, recent explorations demonstrate potentially negative consequences concerning 'post-truth' and consequential polarisation.<sup>684</sup> Transparency thus

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<sup>679</sup> Miller (n 671).

<sup>680</sup> Ibid.

<sup>681</sup> Ann Florini *The Right to Know: Transparency for an Open World* (Cambridge University Press 2007).

<sup>682</sup> Joseph Stiglitz, 'The Role of Transparency in Public Life', in World Bank, *The Right to Tell: The Role of the Mass Media in Economic Development* (Washington, D.C.: World Bank, 2002) at 30.

<sup>683</sup> Stefan Rummens 'Deliberation and Justice' in Andre Bachtiger, John Dryzek, Jane Mansbridge and Mark Warren *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018); See also, Michael Johnston 'Good Governance: Rule of Law, Transparency, and Accountability' UNESCO; and Friedl Weiss and Silke Steiner 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison' (2006) 30(5) *Fordham International Law Journal* 1545.

<sup>684</sup> Sabina Schnell 'Transparency in a "post-fact" World' (2022) 5(3) *Perspectives on Public Management and Governance* 222; See also this issue being raised in Andre Bachtiger et al. 'Deliberative Democracy: An Introduction' in Andre Bachtiger et al. *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018).

plays a crucial role in overall theories of deliberative democracy in which leading scholars, such as Rawls or Habermas, have developed and nurtured through their work and exchanges on political philosophy.<sup>685</sup> Such theories, in their most basic sense, argue extensively that the role of a democratic government is to secure a place for reasoned discussion in political life in which the exchange of ideas and arguments by engaged citizens will best produce the public good.<sup>686</sup> The role of the availability and accessibility of transparent and accurate information in facilitating such engagements and deliberations is self-evident. Exploring the norm of transparency in public administration and fiscal decision-making, Heald argues that ‘transparency should be valued instrumentally for how it contributes to the achievements of public policy objects, not intrinsically as a value in its own right’.<sup>687</sup> By ensuring that information is readily accessible and understandable to all members of society, transparency not only enhances democratic accountability but also empowers individuals to participate actively in the budget process, thereby promoting a more inclusive and responsive governance framework for resources.<sup>688</sup>

Alongside deliberative democracy theory and principles of good governance, the principle of transparency also has a strong normative basis within the IHRL framework, primarily governed by the right to freedom of expression regarding access to information and participation in public life.<sup>689</sup> These rights, enshrined in Article 19 and Article 25 of the UDHR, underscore the fundamental importance of ensuring individuals' access to information and their ability to freely seek, receive, and impart information and ideas through any media they choose.<sup>690</sup> Article 19(2) of the ICCPR, in entrenching binding legal obligations on freedom of expression, provides: ‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice’.<sup>691</sup> Concretely, freedom of expression inherently entails the right to freedom of information.<sup>692</sup> It

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<sup>685</sup> Rawls (n 644); John Rawls ‘The Idea of Public Reason’ in J. Bohman and W. Rehg (eds), *Deliberative Democracy*. (Cambridge MA: MIT Press 1997); Jurgen Habermas (1995) ‘Reconciliation through the public use of reason’ *Journal of Philosophy*, XCII (3) at 109–31.

<sup>686</sup> Maeve Cook ‘Five Argument for Deliberative Democracy’ (2000) 48 *Political Studies* 947 And more generally, Andre Bachtiger, John Dryzek, Jane Mansbridge and Mark Warren *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018).

<sup>687</sup> David Heald ‘Strengthening Fiscal Transparency’ as found in Richard Allen, Richard Hemming and Barry Potter *The International Handbook of Public Financial Management* (Palgrave Macmillan 2013) at 711.

<sup>688</sup> *Ibid.*

<sup>689</sup> Maeve McDonagh ‘The Right to Information in IHRL’ 13(1) *Human Rights Law Review*; see also, Patrick Birkinshaw, ‘Freedom of Information and Openness: Fundamental Human Rights’ (2006) 58(1) *Administrative Law Review* 177.

<sup>690</sup> Article 19 and Article 25 UDHR.

<sup>691</sup> Article 19(2) ICCPR

<sup>692</sup> Toby Mendel ‘Freedom of Information as an Internationally Protected Human Right’ Article 19. Available at <<https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>> (accessed 24/07/24).

is a necessary precondition for the exercise of this fundamental right. Numerous international mechanisms, including Special Rapporteurs on Freedom of Opinion and Expression, have emphasised the integral role of access to information in enabling the full realisation of freedom of expression. For example, a 2005 Report of the Special Rapporteur set out in no uncertain terms: ‘Although international standards establish only a general right to freedom of information, the right of access to information, especially information held by public bodies, is easily deduced from the expression ‘to seek [and] receive ... information’ as contained in articles 19 of the [UDHR] and the [ICCPR]’.<sup>693</sup> However, freedom of information did not always receive the protection expected and required, which, among other factors, led the Committee on Civil and Political Rights to adopt GC 34.<sup>694</sup> GC 34 established that there is not just an obligation to provide the information requested but a proactive duty to publish information deemed in the public interest. In other words, it recognised the right to information as placing a positive duty upon states to proactively provide accessible, transparent information.<sup>695</sup> Building upon this guidance, the organisation Article 19, through working on promoting and protecting the right to freedom of expression and, subsequently, access to information, has published a set of nine principles to guide overall practice. The principles concerning overall access to information are maximum disclosure, an obligation to publish, the promotion of open government, the limited scope of exceptions, processes to facilitate access, overall cost (financial accessibility), open meetings, disclosure takes precedence, and protection for whistleblowers.<sup>696</sup> Applying this framework to the question of obligations to ensure the publishing of transparent budgetary information, public budgets are an integral piece of public information, setting out the government's central values and aims for the coming year. As explored briefly in Chapter 3, they serve as the ‘lifeblood’ of government and are both political documents as well as fiscal tools and are of no doubt pertinent to the general public interest.<sup>697</sup> Access to accurate, timely, and complete budgetary information within IHRL can thus be established as a direct obligation of conduct upon States and all government branches to proactively provide access to transparent information.

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<sup>693</sup> Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, E/CN.4/20.05/64, 2005, at para 39; See also Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/11/4, 2009, at para 60.

<sup>694</sup> See McDonagh (n 688).

<sup>695</sup> UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, at para 19.

<sup>696</sup> Article 19, ‘The Public’s Right to Know: Principles on Right to Information Legislation’. Available at: <[https://www.article19.org/data/files/RTI\\_Principles\\_Updated\\_EN.pdf](https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf)> (accessed 24/07/24).

<sup>697</sup> Wildavsky (n 271).

Turning to the ESCR framework more specifically, transparency and access to information are essential components of a rights-based social protection system.<sup>698</sup> Through GC 19, specifically on the right to social security, the CESCR has demonstrated the need for transparency to be an integral element of any nationally driven social security programmes and action plans.<sup>699</sup> Furthermore, access to transparent information is considered an essential precondition in monitoring ESCR realisation.<sup>700</sup> For this reason, we also see transparency forming an integral part of assessing the overall fulfilment of ESCR through both the OPERA Framework and SERF Index with specific steps attributed to establishing the transparency with which ESCR information is being provided, including fiscally.<sup>701</sup> Drawing from the practice of the CESCR in state monitoring has broadly demonstrated the need for general information on public finances over the years for ESCR. Often, this is focused on measures to combat corruption within a State, but the CESCR also demonstrates a clear expectation that state resources should be managed transparently. Analysing the last decade of concluding observations upon States, the CESCR has frequently and explicitly raised the need for transparency. For example, in 2023, in its concluding observations on Chad, the CESCR recommended the State party ‘improve transparency in the receipt, management and the use of public funds’.<sup>702</sup> In the same year, it presented Qatar with the recommendation to ‘adopt measures to ensure transparency and accountability in public administration and the use of State resources, including ensuring that the adoption of budgets is conducted in a transparent and participatory manner’.<sup>703</sup> While these recommendations are more focused on the general improvement of transparency, the CESCR has also gone into more detail where improved transparency of financial management is required. For example, the CESCR raised concerns in Luxembourg on the ‘financial flows from third countries that may be connected to illicit activities or be part of tax evasion or tax fraud strategies’ being deposited in the state's financial institutions.<sup>704</sup> Importantly, the CESCR explicitly recognises the enabling of tax evasion through poor transparency practices and its ability to fundamentally undermine a State’s duty to gather and deploy the maximum resources available towards the progressive realisation of ESCR. Similarly, concerns over the transparency of tax arrangements were raised with Nicaragua in 2021. Further evidence of the view that transparency is central to ensuring a

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<sup>698</sup> Negishi (n 655).

<sup>699</sup> CESCR General Comment No. 19 at 11; see also ILO Recommendations number 202 at para 3j.

<sup>700</sup> OHCHR ‘Monitoring Economic, Social and Cultural Rights’ (2011) OHCHR.

<sup>701</sup> CESR (n 274); and Fukuda-Parr, Lawson-Remer and Randolph (n 274).

<sup>702</sup> Chad E/C.12/TCD/CO/4 (CESCR 2023) at para 18.

<sup>703</sup> Qatar E/C.12/QAT/CO/1 (CESCR 2023) at para 19.

<sup>704</sup> Luxembourg E/C.12/LUX/CO/4 (CESCR 2022) at para 10.

rights-based approach to resources can be found in the reports of UN Special Rapporteurs. For example, in 2021, the UN Special Rapporteur on Extreme Poverty raised specific concerns with the European Union on the need for ‘transparency in member State’s budgets and implementation’ and ‘increased transparency’ across member States in the fight against tax evasion.<sup>705</sup> Interestingly, what we find when assessing the practice of the international ESCR mechanisms is the clear connection between transparency and meeting the obligations of the ICESCR instead of relying upon the civil and political right of freedom of expression. While indivisible and interrelated, the obligations of the ICESCR and most particularly the need to use MAR most evidently in the view of the CESCR, create a duty upon States to demonstrate transparently the overall management of resources, from its generation (primarily) to allocation and overall expenditure.

Understanding transparency as an obligation of conduct within the budget process, in which the duty-bearer must demonstrate the endeavour to provide transparent fiscal information, raises the question of what measures can be taken to ensure the transparency of a budget. In other words, what does fiscal transparency entail in practice? It is an area the CESCR is not particularly forthcoming on, likely with the intention of ensuring a level of flexibility in how transparency is improved. Nor are the key documents produced concerning budgeting for human rights overly helpful in demonstrating the steps a state can take to improve budget transparency. In general, GC 19 of the CRC on Public Budgeting for Children’s Rights, while it establishes transparency as a key component of a State fulfilling its children’s rights obligations and that this requires budgetary documentation to be ‘user-friendly’, does not illuminate in detail how these are to be developed, published accessibly, and disseminated.<sup>706</sup> Certainly, the concept of ‘user-friendly’ would connote the need to make budgetary information available in a manner that, in this context, children can understand and engage with, and the line of reasoning would apply across different groups within society. The OHCHR’s detailed report on HRB heavily recognises transparency as a principle of good conduct. Still, the only mention of good practice is in relation to the Tunisian Government producing a ‘citizen’s budget’ in 2013, in which the ‘publication was a sign of increased commitment by the government to transparency’.<sup>707</sup> Overall, for decision-makers who understand the need to improve the overall transparency of fiscal management within the state,

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<sup>705</sup> Olivier De Schutter ‘Visit to the European Union’ A/HRC/47/36/ADD.1 at 35.

<sup>706</sup> CRC General Comment No. 19 (n 305) at paras 54 & 68(c) & 81(a) & 83 & 87 & 105.

<sup>707</sup> OHCHR (n 258) at 41-42.

there is a general lack of guidance about good practices from the human rights framework — only the clear entrenching of transparency as an obligation of conduct.

Fortunately, a whole raft of initiatives within the human rights paradigm seek to promote transparency within the budget process. For example, in 1998, the International Monetary Fund (“IMF”) adopted a Fiscal Transparency Code to encourage good practice, which has seen periodic updates reflecting modernising practices.<sup>708</sup> Moreover, according to the IMF fiscal code, transparency ‘entails being open to the public about the government’s past, present, and future fiscal activities, and about the structure and functions of government that determine fiscal policies and outcomes’.<sup>709</sup> While a helpful starting point, the Global Initiative for Fiscal Transparency (“GIFT”), launched in 2010, has developed even more valuable and detailed frameworks. The initiative is comprehensive and cannot be fully captured here, but it provides insight into the frameworks of the Organisation for Economic Cooperation and Development (“OECD”) ‘Best Practices for Budget Transparency’ and the development of the ‘Open Budget Survey’ (“OBS”) by the IBP.<sup>710</sup> That is because both frameworks demonstrate why transparency is essential for good governance and fiscal decision-making and set out specific documents that can be published alongside the formats for presenting budgetary information. These frameworks, therefore, move beyond the mere theory that transparency is crucial to achieving it in practice.

Despite being released in 2002, the OECD framework remains influential when assessing the types of budgetary information that need to be published. For example, the framework demonstrates the need for a wide range of budget reports to be published throughout the budget cycle, including a budget itself, but also pre-budget reports, monthly reports on progress, midyear reports, and a year-end report as a critical document for enabling accountability.<sup>711</sup> Furthermore, it advocates the need for pre-election reports to ‘illuminate the general state of government finances immediately before an election and a longer-term report to assess ‘the long-term sustainability of current government policies’ every five years.<sup>712</sup> Additionally, the

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<sup>708</sup> IMF, ‘The Fiscal Transparency Code’ (2019). Available at: <<https://www.imf.org/external/np/fad/trans/Code2019.pdf>> (accessed 24/07/24).

<sup>709</sup> IMF 2008 as found in Heald (n 687) at 711; For a further overview of the development of fiscal transparency initiatives, see Johann Seiwald ‘Fiscal and Financial Transparency’ as found in Ali Farazmand (eds) *Global Encyclopaedia of Public Administration, Public Policy, and Governance* (Springer, 2022).

<sup>710</sup> OECD ‘Budget Transparency Toolkit: Practical steps for supporting openness, integrity and accountability in Public Financial Management’ (2017). Available at: <<https://www.oecd.org/gov/budgeting/Budgeting-Transparency-Toolkit.pdf>> (accessed 24/07/24).

<sup>711</sup> OECD, ‘OECD Best Practices for Budget Transparency’ (2002). Available at: <<https://www.oecd.org/governance/budgeting/Best%20Practices%20Budget%20Transparency%20-%20complete%20with%20cover%20page.pdf>> (access 24/07/24).

<sup>712</sup> Ibid.

OECD presents the ‘specific disclosures’ that should be made throughout the budgetary publications. It focuses on governments disclosing their economic assumptions and forecasts, tax policies, financial and contingent liabilities, and employee pension obligations.<sup>713</sup> The OECD best practice framework provides a checklist for fiscal decision-makers to work through and ensure that it is reflected within the state’s budgetary practice. Alongside the OECD’s framework is the work of the IBP, which has led to the development of the OBS.<sup>714</sup> OBS’s most recent global survey, conducted in 2021 in 120 countries, primarily provides comparative results alongside global and regional averages on budget transparency, participation, and oversight.<sup>715</sup> The report provides that the OBS ‘is the world’s only comparative, independent and regular assessment of the three components of budget accountability at the national level’.<sup>716</sup> Moreover, ‘the survey is rooted in the premise that open and accountable budget systems are transparent, offer opportunities for inclusive public participation and include effective oversight by independent institutions’.<sup>717</sup> Significantly, the OBS offers a robust methodology for states to evaluate the transparency of their budgetary processes, assigning scores ranging from 0 to 100.<sup>718</sup> It emphasises the crucial nature of principles such as overall ‘comprehensiveness’ of the information provided, ‘periodicity’, ‘specificity’, ‘legality, whether publications can be considered ‘user-friendly’, have adequate ‘publicity’, and connect to ‘desired outcomes’.<sup>719</sup> Through comparative reports, it delineates instances of excellent or improved practices and identifies areas for improvement vis-à-vis other comparable nations. In line with their obligations of conduct under IHRL, states should strive to ensure the transparency of their budget processes and overall fiscal management. More action is required with ‘transparency interventions’ yet to be ‘sufficiently translated in accountability gains’ and ‘impact on fiscal injustice’.<sup>720</sup> These frameworks established by the GIFT offer tangible measures for states to adopt. They can serve as valuable tools for advocates to monitor and hold states accountable for their adherence to transparency standards.

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<sup>713</sup> Ibid.

<sup>714</sup> The IBP describes itself as the world’s leading nonprofit organisation promoting more responsible, effective, and equitable management of public money’. As found at < <https://internationalbudget.org/about-us/>> (accessed 24/07/24).

<sup>715</sup> IBP, ‘Open Budget Survey 2021’. Available at: <<https://internationalbudget.org/wp-content/uploads/Open-budget-survey-2021-1.pdf>> (accessed (24/07/24).

<sup>716</sup> Ibid.

<sup>717</sup> Ibid.

<sup>718</sup> IBP, ‘Guide to the Open Budget Questionnaire: An Explanation of the Questions and the Response Options’ (2021). Available at: <[https://internationalbudget.org/wp-content/uploads/2021-01-14-2021-OBS-Guide-and-Questionnaire\\_Final-ENGLISH.pdf](https://internationalbudget.org/wp-content/uploads/2021-01-14-2021-OBS-Guide-and-Questionnaire_Final-ENGLISH.pdf)> (accessed 24/07/24).

<sup>719</sup> Ibid.

<sup>720</sup> Rudiger (n 38) at 153.

### 5.3 Participation

When considering the need for representative government, the great utilitarian philosopher John Stuart Mill once made the short, straightforward argument that “any participation, even in the smallest public function, is useful.”<sup>721</sup> Indeed, there is no significant shortage of quotes to choose from either, with public participation in public affairs having been viewed as indivisible with democratic and deliberative governance ideals for centuries.<sup>722</sup> Human rights and the principle of participation are considered to be inseparable. McMurry's recent exploration of participation under IHRL provides an extensive analysis of the positivist arguments for recognising a right to participation and establishes the notion of participation as a standalone right and a crucial principle in meeting international legal obligations.<sup>723</sup> With regard to the positivist construction of law, McMurry draws upon a broad range of international legal provisions, such as Article 25(a) of the ICCPR, as discussed above, to affirm the position set out by Magdalena Sepúlveda Carmona in 2013 that there exists a fundamental right to participation under IHRL.<sup>724</sup> Moreover, McMurry's analysis brings forward provisions from the CEDAW, the ICERD, and the CRPD to strengthen the integral nature of participation further and ensure specific groups are not excluded from taking part directly or indirectly in public affairs.<sup>725</sup> The right to participation within these international legal provisions has been primarily grounded through the need to ensure everyone can take part in political participation and, as such, has at times been narrowly construed to give rise to a more limited view of ‘direct participation’.<sup>726</sup> In other words, some readings of participatory rights determine that it is fulfilled via representatives and, ultimately, democratic voting systems. However, this inception of a right to participation does not provide an adequate understanding nor legal

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<sup>721</sup> Dennis Thompson, *John Stuart Mill and Representative Government* (Princeton University Press, 1976) at 6.

<sup>722</sup> Jeremy Waldron, ‘Participation: The Right of Rights’ 98 Proceedings of the Aristotelian Society 307; for critical theories on the political philosophy of participation and development, see Jean Dreze and Amartya Sen, *India: Development and Participation* (Oxford University Press, 2022); and Brian Wampler, ‘Participation, Representation, and Social Justice: Using Participatory Governance to Transform Representative Democracy’ (2012) 44(4) *Polity* 666.

<sup>723</sup> See, particularly, Chapters 2 and 7 of Nicholas McMurry *Participation and Democratic Innovation under IHRL* (Routledge 2023).

<sup>724</sup> Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (11 March 2013), UN Doc. A/HRC/23/36.

<sup>725</sup> Committee on the Rights of Persons with Disabilities (CRPD), General Comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention (2018), UN Doc. CRPD/C/GC/7; and Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 23: Article 7 – political and public life (1997), UN Doc. A/52/ 38/Rev. 1(SUPP), p. 62; and Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination (2009).

<sup>726</sup> McMurry (n 723).



grounding of participation's role in fulfilling all human rights. Especially within the context of fiscal decision-making, the fulfilment of ESCR, or environmental rights.<sup>727</sup>

With regard to ICESCR and the ESCR it espouses, Liebenberg has explored the role of 'participatory justice in social rights adjudication' where 'a spectrum of participatory rights, ranging from a basic right to be notified of decision-making processes where one's rights are to be determined or a stronger right to be consulted, to more extensive models of engagement or even co-decision-making between community groups and public authorities is potentially available to adjudicators in social rights cases'.<sup>728</sup> Offering both 'value-based and instrumental justifications for requiring participation in relation to social rights decision-making', Liebenberg's work seeks to build an evidence base for establishing the principle of participation as essential to both upholding the value of human dignity, freedom, and equality, as well as enabling better quality decisions 'to be made through ensuring that all relevant facts and arguments are placed before the decision-maker'.<sup>729</sup> By addressing relevant norms in ESCR law and IHRL more widely alongside case-law analysis, Liebenberg presents a wealth of theoretical and practical justifications for viewing participation as a central part of achieving ESCR. Expanding the contextual lens to perceive participation not solely as an isolated entitlement but as a fundamental principle integral to the fulfilment of many other international human rights elucidates its pivotal significance within the international framework of applying a human rights-based approach to decision-making.<sup>730</sup> Participation enables those within the social contract to engage in decision-making that affects their lives. It extends to specific groups needing further help actively participating within their society and decision-making and is about advancing the underpinning norms of human dignity, equality, and freedom, so critical to the formulation and advancement of ESCR law.<sup>731</sup> From grassroots activism to international advocacy campaigns, participation catalyses social justice and transformative action, empowering individuals and communities alike to assert their rights and shape a more just and equitable world.

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<sup>727</sup> See discussion on the role of participation as a principle for decision-making in environmental law via the Aarhus Convention. See Chapter 2 in Olawuyi (n 677).

<sup>728</sup> Liebenberg (n 643) at 624; See also supporting view in Sahara Nankan 'Bridging the Gender Participatory Gap in Water and Sanitation Rights Adjudication' (2022) 14(1) *Journal of Human Rights Practice* 305 at 306; See also Eva Brems and Laurens Lavrysen 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35(1) *Hum Rights Q* 176.

<sup>729</sup> Ibid Liebenberg at 628; See also Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press 2020)

<sup>730</sup> Paul Hunt 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health' (2016) 18(2) *Health and Human Rights* 109.

<sup>731</sup> CRC, General Comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009.

From the CESCR's point of view, participatory practices are essential in ensuring compliance with the Covenant. In 2023, the CESCR recommended Chad to 'improve the participation of local authorities and local entities in the budgetary process' and Brazil to 'conduct a thorough assessment, with the participation of social stakeholders, of the effects of its fiscal policy on economic, social and cultural rights'.<sup>732</sup> It forms a common theme throughout the CESCR's concluding observations and recommendations for States to improve fiscal policy. Throughout the literature on HRB, extensive attention is also paid to the extent to which participation has formed a part of the overall process. As early as Diokno's work in 1999, we can see participation as an expected principle of good practice.<sup>733</sup> They explain that 'the principle of participation is an essential ingredient in the budget process to ensure efficient provision and more equitable distribution of budgetary allocations. Through active participation in the budget process, people could reject programs or policies that threaten the enjoyment and guarantee of ESCR while providing mechanisms to compensate for any measures that may result in deprivations of ESCR.'<sup>734</sup> This notion and its reasoning have been echoed throughout academic and non-governmental organisations' contributions to the field of study.<sup>735</sup> As O'Connell has more recently argued, it is necessary that 'budgetary and economic decision-making is opened up to contestation and debate, and that discussion over which spending and revenue-generating streams will be prioritised are made sites of struggle, in order for individuals, communities, and organisations to have the potential to claim their rights in a meaningful way'.<sup>736</sup> O'Connell hits on a further important point. The importance of deliberation.<sup>737</sup>

Kuosmanen provides a helpful addition to this line of thought. Drawing from HRB literature alongside giants of human rights legal theory (such as Griffin and Dworkin), their recent exploration of building 'human rights compatible' public budgets provides an account for participation in budgeting based on the 'epistemic function' of deliberation.<sup>738</sup> In doing so, he provides a theoretical nexus between the role of deliberation within human rights discourse and its applicability to HRB as a framework for decision-making. He explains that 'deliberation can be understood as an epistemic 'safety mechanism' as it requires that particular interpretation of the compatibility of budgets and human rights are subjected to a test of

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<sup>732</sup> Brazil E/C.12/BRA/CO/3 (CESCR 2023) at para 22 & Chad E/C.12/TCD/CO/4 (CESCR 2023) at para 18.

<sup>733</sup> Dikono (n 270).

<sup>734</sup> Ibid at 28.

<sup>735</sup> See Blyberg & Helena Hofbauer (n 446); See also OHCHR (n 258).

<sup>736</sup> Paul O'Connell 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' Nolan et al. (n 280) at 72.

<sup>737</sup> Ibid.

<sup>738</sup> Kuosmanen (n 306).

reasoning and considered in the light of factual information and various viewpoints’.<sup>739</sup> Moreover, Kuosmanen builds a compelling argument for three ‘modes’ of deliberation which can have a ‘facilitative function in drafting human rights compatible budgets’.<sup>740</sup> These are instrumental deliberation, which aims to provide ‘answers on the suitability of means for the realisation of human rights’; interpretative deliberation, which encourages participation to consider and interpret what a human rights compatible budget requires ‘because human rights are not fully unambiguous’, and finally evaluative deliberation which accounts for the impossibility of conflicting rights and provides ‘an instrument for considering whether a particular allocation of resources is justifiable on the grounds of resources scarcity’.<sup>741</sup> In unpacking the very purposes of participation and deliberation within building human rights-compatible budgets, Kuosmanen identifies a framework of institutional design for fiscal decision-making in which deliberation, in its different modes, can enhance the legitimacy of the overall process.

In more practical terms, many HRB contributions are drawn to the framework of participatory budgeting (“PB”) when searching for and assessing good participatory practice.<sup>742</sup> PB initiatives have been growing since they were first introduced in Porto Alegre in 1989 and are now commonplace worldwide, including in Scotland.<sup>743</sup> In straightforward terms, despite wearing ‘many hats’ and having no globally accepted definition, PB can be conceptualised as ‘a set of core principles that inform program design rather than a specific set of institutional rules’.<sup>744</sup> In more detail, Wampler et al. provide: ‘PB is not a static institution with a narrowly defined set of rules; government reformers and their allies often alter the basic institutional design to better meet local needs and interests. As a result, there is significant variation in the look, feel, and purpose of PB programs, suggesting a broader “PB family” and “sub-families.”’<sup>745</sup> In identifying ‘core principles,’ Sintomer et al. demonstrate five key criteria which must be in place alongside the central aim of increasing the participation of ‘non-elected

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<sup>739</sup> Ibid at 686.

<sup>740</sup> Ibid at 693.

<sup>741</sup> Ibid at 692.

<sup>742</sup> Anoukh de Soysa, ‘Participatory Budgeting: Public Participation in Budget Processes’ (2022) Transparency International.

<sup>743</sup> Michiel De Vries, Juraj Nemec, and David Špaček *International Trends in Participatory Budgeting: Between Trivial Pursuits and Best Practices* (Palgrave MacMillan 2022); See also, Luca Bartocci, Giuseppe Grossi and Carol Ebdon (2022) ‘The journey of participatory budgeting: a systematic literature review and future research directions’ 89(3) *International Review of Administrative Sciences* 757; and Brian Wampler, Stephanie McNulty and Michael Touchton *Participatory budgeting in Global Perspective* (OUP 2021); and Yves Sintomer, Anja Rocke and Carsten Herzberg *Participatory Budgeting in Europe: Democracy and public governance* (Routledge 2016); Chris Harkins & Oliver Escobar (2015) ‘Participatory budgeting in Scotland: an overview of strategic design choice and principles for effective delivery’ (Glasgow Centre for Population Health and What Works Scotland).

<sup>744</sup> Ibid Wampler et al at 21.

<sup>745</sup> Ibid at 22.

citizens in the conception and/or allocation of public finances’.<sup>746</sup> These are a direct discussion of and focus on ‘financial/budgetary processes’, the involvement of an ‘elected body and some power over administration and resources’, ‘a repeated process’, ‘some forms of public deliberation’, reflecting Kuosmanen’s work, and finally ‘accountability on the results of the process’ via feedback models. Through these key criteria, developed via decades of measured practice, what PB offers HRB, as an emerging but closely interrelated framework for improving fiscal decision-making, is a set of core principles from which to gauge whether participation within the budget process has been meaningful and therefore contributory to the realisation of fundamental human rights. Where IHRL establishes the legal obligations upon states to improve participation within their budgetary practices, PB provides a methodology and criteria to achieve it in practice.

PB has been implemented in diverse contexts, from local municipalities to national governments, to differing degrees of success.<sup>747</sup> In cities such as Vallejo, California, PB has been used to empower citizens, improve public services, and strengthen community cohesion. Similarly, countries like South Korea and Kenya have adopted PB at the national level, leveraging citizen participation to enhance governance effectiveness and promote inclusive development.<sup>748</sup> The measurable ‘success’ of these participatory budgeting initiatives has led to a wealth of academic insight and tangible, practical frameworks for improving, certainly in uptake but also impact, both direct and representative participation within fiscal decision-making.<sup>749</sup> Both of these will be integral sources moving forward for advocates of HRB. More collaboration is needed between the fields to ensure both PB reflects the core IHRL that underpins it and HRB for the practice lessons it can learn. As a final point on the ability of rights advocates to assess participatory practices within the budget process, the OBS goes beyond purely assessing the transparency of the budget and goes on to also provide a score of 0 to 100 for participation within the budget process. The OBS recognises that ‘meaningful public participation in the budget process is essential for making sure decisions reflect how the public wants government funds raised and spent’ and sets out the principles of ‘incorporating the voices of marginalised groups, providing information in advance, promoting comprehensive engagement between the government and the public, and providing feedback

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<sup>746</sup> Yves Sintomer, Carsten Herzberg, Anja Rocke and Giovanni Allegretti ‘Transnational Models of Citizen Participation: The Case of Participatory Budgeting’ (2012) 8(2) *The Journal of Deliberative Democracy* at 2.

<sup>747</sup> *Ibid.*

<sup>748</sup> Wampler et al. (n 743).

<sup>749</sup> ‘Participatory budgeting, involving ordinary citizens in the spending of public funds, has been one of the most successful participatory instruments of the past 20 or 30 years.’ as found in Y Sintomer et al. (n 746) at 1.

to citizens about their contributions’.<sup>750</sup> These are based on the Principles of Public Participation in Fiscal Policies developed by GIFT, which set out the need for budgets to be accessible, open, inclusive, respectful, timely, have enough depth in the information provided, proportionate, sustainable, complementary, and reciprocal.<sup>751</sup> These principles were also acknowledged by the UN General Assembly in 2012.<sup>752</sup> While not explicitly mirroring the principles delineated by Sintomer et al. within PB, evident intersections emerge, underscoring a degree of consensus regarding the prerequisites for meaningful participation in fiscal decision-making processes. No doubt, significant challenges to meaningful participation remain. According to the OBS, the global average is 14 out of 100, with only four nations offering moderate opportunities for participation. But, with growing enthusiasm for and recognition of participation as beneficial to public budgeting, both HRB and PB as frameworks can function and provide a set of clear principles from which to assess the extent to which a government is engaged meaningfully in delivering participation within the budgetary process.

#### 5.4 Accountability

Accountability has recently been described as the ‘buzzword of modern governance’ due to its proliferation as a principle throughout modern governance, law, fiscal, and political systems.<sup>753</sup> The CESCR has consistently recommended that states ‘strengthen’ or ‘improve’ the accountability mechanisms present within their budgetary processes.<sup>754</sup> This demonstrates the importance of having mechanisms in place to achieve accountability for the use of resources. The principle is a constant theme throughout HRB and other budgeting techniques. Other than broad ideas on the need for fiscal institutions and the publishing of information, what is often less clear is how consistent accountability within the cycle will be achieved. It is a difficult principle to define explicitly and, therefore, needs some basing in conceptual clarity before being extended as a key principle within HRB.<sup>755</sup> As its historical development was focused on the roles and systems of the State, it has grown exponentially. It is now embedded

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<sup>750</sup> IBP, ‘Open Budget Survey 2021’. Available at: <<https://internationalbudget.org/wp-content/uploads/Open-budget-survey-2021-1.pdf>> (accessed 24/07/24).

<sup>751</sup> GIFT, ‘Guide and Public Participation Principles’ Available at: <https://fiscaltransparency.net/public-participation-principles-and-guide/> (accessed 24/07/24).

<sup>752</sup> Ibid.

<sup>753</sup> Mark Bovens, Robert Goodin and Thomas Schillemans *The Oxford Handbook of Public Accountability* (OUP 2014)

<sup>754</sup> E/C.12/SLV/CO/6 (CESCR 2022); E/C.12/QAT/CO/1 (CESCR 2023); E/C.12/NIC/CO/5 (CESCR 2021);

E/C.12/MEX/CO/5-6 (CESCR 2018).

<sup>755</sup> Ysaline Reid ‘The Principle of Accountability in Human Rights-Based Approaches to Development: Towards a New Understanding’ (2024) 16(2) *Journal of Human Rights Practice* 533.

throughout legal theory on public law, as well as a plethora of other fields of study.<sup>756</sup> Due to this proliferation (and inevitable fragmentation) across disciplines, it has adopted a rather nebulous nature with different meanings, purposes, and applications. In practice, working with practitioners in fiscal policy often means working with those from accounting or economic disciplines, meaning building a common understanding of what we mean by accountability in terms of which actor and in what forum becomes important.

Firstly, we can distinguish between accountability's different forms or purposes. Moreover, accountability can be seen as both a 'virtue' as it acts as a desirable quality of States or governance structures and is therefore used to define and prevent undesirable behaviours without necessitating an institution or mechanism from which to achieve this directly. Or, as is more common, it can be viewed and explored as a 'mechanism' to ensure those in the halls of decision-making, and ultimately power, are held responsible for their actions and omissions.<sup>757</sup> Secondly, Boven and colleagues argue that 'there may be more similarity in our thinking about accountability than we generally acknowledge' with their interdisciplinary research demonstrating it can be understood within two different primary forms and outlining a 'minimal conceptual consensus' for accountability.<sup>758</sup> This conceptual consensus can be captured by asking, 'Who is accountable to whom, for what, by which standards, and why?'.<sup>759</sup> What has been more recently coined the '5 Ws' framework in human rights accountability, building on Boven's work and adopting a similar rationale, adds the element of 'in what way' to the typology, which is crucial. Overarchingly, assuming a shared understanding of achieving accountability enables practitioners from different disciplines to examine the 'elaborate web of relationships and obligations that underpin accountability processes' and, more importantly, agree on accountability's role in specific processes. This will be crucial in adopting a rights-based approach to fiscal policy due to its inherently interdisciplinary nature covering law, public administration, accounting, and broader economics.<sup>760</sup>

Returning to IHRL specifically, as with participation, the notion of accountability has long been pervasive. Leading scholars in areas such as development studies and economics have

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<sup>756</sup> For a brief overview of the historical development of accountability and its conceptual trajectory, see M Carolyn, *The Concept of Accountability and Human Rights Violations* (December 6, 2023). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2023-26, Forthcoming in Michelle Duin & Kristin Henrard (eds), *Research Handbook on the Accountability for Human Rights Violations: What, Who, What For, How, To What Extent* (Edward Elgar Publishing Ltd 2024)

<sup>757</sup> Bovens et al. (n 753). see also Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447.

<sup>758</sup> Bovens et al. (n 753) at 6.

<sup>759</sup> *Ibid* at 10.

<sup>760</sup> Carolyn (n 756) at 4.

presented ‘accountability’ as one of the critical contributions of human rights law since its codification.<sup>761</sup> It is a principle, therefore, not just supported by specific articles of international treaties but also the principle that lies within the purpose of establishing international human rights standards.<sup>762</sup> In other words, accountability underpins the concept of legal rights in that redress for the violation can be achieved where a breach occurs. However, accountability does not solely speak to the need to ensure effective remedies in law, rendering an actor to account, nor for institutions to necessarily be accountable. It is a more nebulous concept, and merely asserting that processes should ‘be accountable’ or adhere to the principle of accountability does not necessarily outline the path to achieving it in practice. In the everyday practice of decision-makers, the principle of accountability translates ‘universal standards into local benchmarks for measuring progress and developing effective laws, policies, institutions, procedures, and mechanisms of redress that ensure delivery of entitlements and redress for denial and violations’.<sup>763</sup> In applying the ‘five Ws’ framework as discussed above, the accountability dimension of HRB becomes explicitly clear. The duty bearer (who), whether it be a local public body (as a secondary duty bearer) or national government (as the primary duty bearer), is accountable to the rights-holder (to whom). The duty bearer is accountable for the impacts of both long and short-term fiscal decision-making on the enjoyment of people’s human rights. It is accountable against the standards set out by international (or domestic) human rights legal instruments and accompanying guidance (what). As to the why, much of this thesis thus far has demonstrated the intense impacts budgetary decision-making, whether it be the long-term macro-economic direction of the State all the way down to the funding of a local library or bin collections, has the potential to impact upon the enjoyment of people’s human rights. Not only do the obligations of ESCR explicitly attach themselves to the budgetary process as explored through the previous chapter, but in even simpler terms, much of the gathering of resources within a State is dependent upon the contribution of citizens themselves, it logically follows that the State should be held responsible and made accountable for how it uses said taxpayers’ money.<sup>764</sup> Finally, however, it is vital to establish the ‘in what way’. Bringing into question the role of budget scrutiny and oversight.

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<sup>761</sup> Amartya Sen, *Human Rights and Human Development* (2000) UNDP. Human Development Report; Mary Robinson. ‘What Rights Can Add to Good Development Practice’ in Philip Alston. & Mary Robinson. (eds.). *Human Rights and Development*. (Oxford University Press 2005).

<sup>762</sup> Philip Alston, “Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council” (2005) 15 *Journal of Transnational Law & Policy* 49

<sup>763</sup> Twomey (n 668) at 55.

<sup>764</sup> Dikono (n 270) O’Connell et al (n 41); De Schutter (n 101).

#### 5.4.1 Achieving Accountability Through a ‘Multi-Institutional Approach’

Within the budget cycle, delivering accountability is intertwined and dependent upon establishing mechanisms and institutions to provide adequate oversight of the process, budget proposals, and actual expenditure. Budget oversight plays this pivotal role in the governance and management of financial resources. It is a process generally embodying a systematic and vigilant approach to monitoring, evaluating, and controlling the allocation and utilisation of financial resources in alignment with organisational objectives and regulatory frameworks.<sup>765</sup> Through rigorous budget oversight mechanisms, including governing bodies, executives, stakeholders, and shareholders, we gain insights into our fiscal health, facilitating informed decision-making and strategic planning.<sup>766</sup> Furthermore, budget oversight serves as a crucial mechanism for identifying inefficiencies, redundancies, and areas of potential financial risk, thereby optimising resource allocation and enhancing operational efficiency.<sup>767</sup> For this reason, the phase of a general budget cycle is understood in which the oversight and scrutiny attached to previous budgets should be used to inform the formulation of future budget proposals. Less recognised is the potential role of a swathe of different actors and institutions within the state to provide scrutiny and oversight and, consequently, provide accountability mechanisms for poor budgetary practices and decision-making. Here, lessons can be learned from emerging concepts and theories in ESCR in relation to the use of a multi-institutional approach to establishing accountability.<sup>768</sup> Devised as a key response to the ‘anti-democratic’ critique of ESCR adjudication, adopting a multi-institutional approach is based on the premise that all three branches of the state, namely the legislative, executive, and judicial arms, all act as guarantors of human rights.<sup>769</sup> In effect, establishing a basis for constitutional and multi-institutional ‘dialogue’ or ‘omnilogue’ between the three core branches of a state ‘given that there are multiple actors *in colloquium* at the same time’.<sup>770</sup> Drawing from this approach to ESCR adjudication, arguments can be formed in relation to the need for all branches of the State to be involved in establishing accountability for the budget as the most influential and significant means for the state to give effect to and progressively realise ESCR. Below, the role of the legislature and judiciary are explored in relation to budget scrutiny as part of a traditional multi-institutional approach before attention is turned towards the further extension of the

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<sup>765</sup> Christine Hayne and Steven Salterio ‘Accounting and Auditing’ in M Bovens et al. (n 752).

<sup>766</sup> Ibid.

<sup>767</sup> Bovens et al (n 753).

<sup>768</sup> See discussion in Boyle (n 1); see also arguments in relation to a deliberative model for ESCR in King (n 46) at 17–58.

<sup>769</sup> Boyle and Busby (n 2).

<sup>770</sup> Boyle (n 1) at 13 drawing upon John Rawls ‘Political Liberalism: Reply to Habermas’ (1995) 92(3) *The Journal of Philosophy* 132.



multi-institutional approach to recognise the roles of further branches capable of building accountability in public budgeting.

### A. The Legislature

Within democratic governance systems, the legislature already has a well-established role to hold government decision-making accountable, including its proposed budget through pre-budget scrutiny and its eventual presentation to Parliament for approval. Certainly, this is the case in Scotland and the wider UK.<sup>771</sup> Political accountability, alongside legal and administrative dimensions, constitutes a cornerstone of liberal democracies, acknowledging the diverse contributions of ‘parliamentarians, political parties, the electorate, the media, and civil society organisations to the scrutiny of elected officials and policymakers’.<sup>772</sup> The legislature typically achieves this through a multi-faceted approach encompassing several key mechanisms. Firstly, the legislative process of passing the budget bill involves the comprehensive examination of budgetary proposals submitted by the executive branch.<sup>773</sup> This entails (or should) meticulous scrutiny of revenue projections, expenditure allocations, and policy priorities outlined in the budget. It is an opportunity for legislators to assess proposed legislation, in this case the budget allocations to various sectors and programs, exert influence over the proposals and ensure alignment with the needs and priorities of their constituents.<sup>774</sup> Additionally, specialised legislative committees focusing on budgetary matters can be crucial to oversight. These committees conduct reviews of budget proposals and organise hearings where government officials present and defend their spending plans. During these hearings, legislators can question officials, seek clarifications on budgetary decisions, and propose amendments to enhance the budget's effectiveness and efficiency.<sup>775</sup> Legislative oversight also extends beyond the initial budget approval process to post-legislative scrutiny. As will be returned to in Chapter 8 when setting out recommendations for the budget cycle, the enactment phase in which the already approved budget is executed, legislators have a role in monitoring budget execution throughout the fiscal year through ongoing review mechanisms such as audits and performance evaluations.<sup>776</sup> Legislative auditors can, therefore, scrutinise government

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<sup>771</sup> Scottish Government ‘Pre-Budget Scrutiny by Parliamentary Committees’ (2023) Scottish Government.

<sup>772</sup> Gijs Jan Brandsma and Carolyn Moser, ‘Accountability in a Multi-Jurisdictional Field’ in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies* (Edward Elgar 2021) in Carolyn (n 756) at 8.

<sup>773</sup> OHCHR (n 258).

<sup>774</sup> Hannah White ‘Parliamentary scrutiny of Government’ (2014) Institute for Government; See also Jennifer Smookler ‘Making a Difference? The Effectiveness of Pre-Legislative Scrutiny’ (2006) 59(3) *Parliamentary Affairs* 522.

<sup>775</sup> *Ibid.*

<sup>776</sup> Franklin De Vrieze and Philip Norton ‘The Significance of Post-legislative scrutiny’ (2020) 26(3) *The Journal of Legislative Studies* 349.

expenditures to identify instances of waste, fraud, or abuse, holding government agencies accountable for their use of public funds. In summary, the legislature fulfils its responsibility for budget oversight through a combination of processes, including a thorough review of budget proposals, establishing fiscal laws and regulations, specialised committees, and ongoing monitoring and evaluation of budget execution. By exercising these oversight functions, the legislature promotes transparency, accountability, and responsible fiscal management, thereby safeguarding the public interest and ensuring the effective allocation of resources for the benefit of society. The legislature represents an institution already endowed with significant powers to strengthen accountability for public budgets. What is often missing is applying this scrutiny through the lens of ESCR in which many of the obligations and norms identified in Chapters three and four would form a central consideration within the ongoing process.

### B. The Judiciary

With Parliament fulfilling the role of delivering political accountability, attention can be turned to the branch of the judiciary and establishing legal accountability for the state's use of resources. As has been recognised, 'The courts play an essential role in ensuring that people's rights are respected and that the government (at various levels) is complying with its legal obligations to realise those rights. While the situation varies from country to country, courts increasingly recognise that they have a role to play in budget issues that affect human rights, whether the latter is guaranteed by a national constitution or as a result of international treaty obligations. Courts frequently rule on government compliance with its human rights obligations. As the most important redress mechanism available to people in case of a violation of their rights, the court's role in ensuring government compliance with human rights obligations in the budget is central.'<sup>777</sup> Here, it is argued that, while the capacity of the judiciary to tackle such issues can be questioned, these concerns do not present a significant barrier to the judiciary taking up a critical role in building legal accountability for a government's use of limited resources.<sup>778</sup> Indeed, much of ESCRs scholarly literature over the past two decades has been dedicated to moving past such critiques and affirming the judiciaries part in upholding all human rights.<sup>779</sup> Without rehearsing the depth of these scholarly contributions, as Boyle has done, the point pertinent to this discussion is that where courts are empowered with a role in upholding ESCR, this will inevitably require their tackling of decision-making as to the overall

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<sup>777</sup> OHCHR (n 258) at 137.

<sup>778</sup> Boyle (n 1).

<sup>779</sup> Michelman (n 524); King (n 46).

use of resources within the state.<sup>780</sup> In doing so, the judiciary will explicitly be providing overall scrutiny of the decisions made. As has been carried out in ESCR jurisprudence in South Africa and Colombia where the respective constitutional courts have utilised budgetary allocations as evidence of non-compliance with social rights provided by the Constitution.<sup>781</sup> Not only did case analysis demonstrate the willingness of these courts to use public budgets to evidence their conclusions, it also emphasises the ability for public budget allocations to form a critical elements of the overall assessment of a duty-bearer's compliance with ESCR standards. The judiciary, it can be argued, are therefore well-placed to deliver oversight and accountability within public budgets within the multi-institutional model envisaged for ESCR enforcement.

However, some limitations to this argument must be built in. Boyle's work on ESCR and principles for adjudication consistently argues that despite being 'indispensable to human rights protections in functioning democracies, courts 'ought to be available as a means of last resort if all other safeguards fail.'<sup>782</sup> In other words, where other avenues to establish accountability can be taken, such as through internal complaints mechanisms, the Ombudsman, or even regulatory systems such as inspectorates, can become further actors in establishing budgetary accountability.<sup>783</sup> The courts cannot alone achieve legal accountability, as they are a means of last resort and better designed to judge and remedy serious violations of fundamental human rights.<sup>784</sup> Courts are undoubtedly less suited to the ongoing scrutiny required by effective public budgeting but can be relied upon to demonstrate explicitly where specific budgetary practice has led to a breach of ESCR. This being the case, non-judicial means will also have a crucial role as more accessible means for assessing the impact of resource use on ESCR realisation. Juridification should thus be understood as providing one approach to accountability, but a narrow one. It has been argued that while 'juridification of accountability' has led to 'a significant expansion in human rights standards and their protection', it can also limit 'accountability to being merely a response to justiciable wrongdoing and largely leaves out the political dimension', severely limiting the 'available accountability spectrum'.<sup>785</sup> In other words, it is recognised that political accountability,

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<sup>780</sup> Boyle (n 1).

<sup>781</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002); Landau (n 103).

<sup>782</sup> Boyle (n 1) at 7.

<sup>783</sup> David Barrett, 'The Regulatory Space of Equality and Human Rights Law in Britain: The Role of the Equality and Human Rights Commission' (2019) 39(2) *Legal Studies* 247.

<sup>784</sup> Sandra Fredman 'Adjudication as Accountability: A Deliberative Approach, in Nicholas Bamforth and Peter Layland (eds), *Accountability in the Contemporary Constitution*. (Oxford University Press 2013).

<sup>785</sup> Carolyn (n 756) at 13.

primarily provided by the legislature, and legal accountability, provided by judicial and non-judicial means, are equally necessary. Building upon this multi-institutional thinking further, it is clear that to build a real culture of everyday accountability for how a state chooses to mobilise, allocate, and spend its resources, further actors above and beyond these traditional branches of the State will be necessary.

### C. Supreme Audit Institutions

Here, an argument can be made for a fourth branch within the overall multi-institutional approach to establishing public budget accountability. Moreover, accountability through budgetary oversight often comes in practice from having a strong, independent SAI.<sup>786</sup> Within governance, auditing is nothing new. It has been the subject of much debate and academic attention for decades and both the OHCHR and the IBP have demonstrated that having a SAI is key to an accountable budget.<sup>787</sup> It is argued an SAI is in place as ‘the principal body with oversight and responsibilities vis-à-vis a government’s budget’.<sup>788</sup> By providing ongoing evaluation and feedback, audit bodies contribute to the adaptive management of budgets, facilitating mid-course corrections and strategic reallocations in response to evolving needs or unforeseen challenges. They are key to informing the legislature within their duties to approve the budget itself and provide year-end reports on the overall budget performance. For this reason, the role of audit institutions is central to the score provided to States within the OBS, for example, with budget oversight predominantly equated to the extent to which independent audit institutions within the State exist. The report recognises ‘SAIs protect the public interest by determining if budget decisions proposed by the executive and approved by the legislature are implemented as intended and deliver results. SAIs conduct audits to gauge whether public accounts are accurate and reliable, whether funds were used in accordance with the law and whether public spending was efficient and effective.’<sup>789</sup>

Importantly, however, more often than not, budget oversight mechanisms and institutions do not have a human rights mandate nor the expertise to conduct oversight that reflects international human rights standards. This presents their fundamental limitation regarding ensuring oversight from a rights-based perspective. Where judicial bodies can provide such an

<sup>786</sup> Kenneth Dye and Rick Staphenurst ‘Pillars of Integrity: The Importance of Supreme Audit Institutions in Curbing Corruption’ (1997) The Economic Development Institute of the World Bank

<sup>787</sup> OHCHR (n 258); IBP, ‘Audit Accountability’. Available at: <https://internationalbudget.org/initiative/audit-accountability/>; For an overview of auditing in the context of the UK Government, see Fidelma White and Kathryn Hollingsworth *Audit, Accountability and Government* (Oxford University Press 1999).

<sup>788</sup> Ibid OHCHR (n 258) at 136.

<sup>789</sup> IBP (n 715) at 37.

examination based on existing legal standards, SAIs are driven by a different mandate and often, while providing excellent analysis on the performance of a budget, do not equate this to the standards of international or even domestic human rights standards. This is captured by the OHCHR, which discusses the potential and need for the SAI to have a specific human rights mandate, suggesting that ‘traditionally, SAI have focused on curbing government waste, corruption, and abuse. Instances of such that an SAI might uncover can be useful evidence of, for example, discrimination in expenditure or a failure to use MAR to advance human rights.’<sup>790</sup> Audit institutions’ role in ensuring an accountable budget process through oversight throughout the budgetary cycle is well-established, but this role should be expanded to include a more specific human rights mandate. In doing so, the SAI can uptake a more pro-active role in providing intendent, expert information and analysis which can enable human rights budget analysis and inform future budget processes. Further still, where concerns are raised in relation to the capacity of the judiciary to adjudicate ESCR, including through budgetary analysis, any SAI adequately independent of the government is well-placed to support the adjudication process.

#### D. National Human Rights Institutions and Civic Society

Finally, to achieve the style of everyday accountability sought within a rights-based approach, civic society and the NHRI should also be actively involved in carrying out budgetary oversight. The CESCR’s GC 9 recognised the role NHRIs can play in upholding and promoting ESCR, with no reason to suggest that this could not extend to the use of budgetary analysis and oversight.<sup>791</sup> Analysis carried out on the role of NHRIs in advancing ESCR has demonstrated numerous potential activities NRHIs could perform.<sup>792</sup> From enhancing human rights education and influencing policymaking, NGOs can be involved in ‘bringing the voice of the people to policymakers’ at both the national and subnational levels and delivering ‘human rights-based analysis of legislative proposals’.<sup>793</sup> Within a context extending beyond fiscal oversight, further research highlights the potential for ‘scrutinizing existing laws and administrative acts, as well as draft bills and other proposals’, which would inevitably

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<sup>790</sup> OHCHR (n 258) at 136.

<sup>791</sup> CESCR General Comment No. 9: The domestic application of the Covenant, E/C.12/1998/24, 3 December 1998; See further analysis of NGO practice in supporting human rights implementation in Gillian MacNaughton and Angela Duger ‘Translating International Law into Domestic Law, Policy, and Practice’ in Lawrence Gostin and Benjamin Meier *Foundations of Global Health and Human Rights* (Oxford University Press 2020).

<sup>792</sup> Oscar Vilhena Viera and Scott Dupree, ‘Reflections on civil society and human rights’ (2004) 1 SUR International Journal on Human Rights 47

<sup>793</sup> MacNaughton and Duger (n 791) at 126.

encompass any budget bill passing through Parliament at its approval stage.<sup>794</sup> Gomez's work details the need for 'monitoring government policy and budgets and suggesting changes so that they advance ESCR'.<sup>795</sup> Moreover, they suggest 'monitoring can help establish if policy and public spending are privileging certain groups over a period of time, if there has been public participation across a broad spectrum in the development of policy and budgets, if the conditions of disadvantaged groups are being exacerbated and what alternatives may be pursued to ensure that [ESCR] is advanced across the entire population spectrum'.<sup>796</sup> Some practice can also be drawn from existing NHRIs. For example, the South African Human Rights Commission has long utilised budgetary analysis to bolster arguments for social protection and spending.<sup>797</sup> The NHRI in Ghana has also been highlighted as another adopting a similar approach.<sup>798</sup> Closer to home, the SHRC is already engaged in providing Parliamentary evidence during budgetary sessions and running pieces of training on adopting a rights-based approach to fiscal decision-making.<sup>799</sup> Through their advocacy efforts, NHRIs and wider civic society can also act to protect and promote ESCR, including through integrating human rights principles into the budgeting process, emphasising the prioritising of areas for social spending such as healthcare, education, housing, and social welfare, all of which give effect to ESCR.<sup>800</sup> They actively advocate for budgetary policies that address human rights gaps and disparities, providing policymakers with recommendations on enhancing budget allocations and spending decisions to uphold human rights more effectively. Moreover, NHRIs can help to foster public awareness and participation in the budgeting process, empowering citizens to assert their rights to access essential services and hold the government accountable for its budgetary decisions. Through collaboration with government agencies, civil society organisations, and international partners, NHRIs strengthen budget oversight mechanisms and promote transparency, accountability, and responsiveness in allocating and utilising national resources.

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<sup>794</sup> Mario Gomez 'Advancing economic and social rights through national human rights institutions' in Dugard (n 282) at 333.

<sup>795</sup> Ibid.

<sup>796</sup> Ibid at 343.

<sup>797</sup> D. Horsten, 'The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa' (2006) 9 Potchefstroom Elec. L.J. 1; and Ayebaesin Jacob Beredugo and Frans Viljoen, 'Towards a Greater Role and Enhanced Effectiveness of National Human Rights Commissions in Advancing the Domestic Implementation of Socioeconomic Rights: Nigeria, South Africa and Uganda as Case Studies' (2015) 48(3) The Comparative and International Law Journal of Southern Africa 401.

<sup>798</sup> Kofi Quashigah, 'The Monitoring Role of the Ghana Commission on Human Rights and Administrative Justice (CHRAJ) in the Protection of Economic, Social and Cultural Rights' in Eva Brems, Gauthier de Beco and Wouter Vandenhoele (eds) *National Human Rights Institutions and Economic, Social and Cultural Rights* (Intersentia 2013) at 107–27.

<sup>799</sup> SHRC (n 152).

<sup>800</sup> Daniela Ikawa 'The role of civil society organizations in the protection of social rights' in Binder (n 51).

### 5.5 Concluding Remarks

The principles of transparency, participation, and accountability explored through this chapter have been common features and ultimately goals of fiscal practice for decades with a wide array of international institutions and domestic bodies consistently calling for their entrenchment throughout a state's fiscal processes.<sup>801</sup> Driven by being a part of the 'Open Government' agenda, together the principles seek to ensure that where citizens (rights-holders) 'delegate authority for decision-making', transparency, participation, and accountability 'function together' to produce the information and processes that citizens need 'to assess and validate the actions of their government, thus providing the consent of the governed.'<sup>802</sup> Where this chapter has sought to contribute to such discussions is by supplementing and supporting already existing initiatives by providing further analysis of the principles from the perspective of IHRL and, in particular, ESCR. The aim being to encourage and understanding of these procedural mechanisms as not just being crucial to 'good governance' but also being fundamental to the state's endeavours to progressively realise ESCR. With ESCR realisation so dependent upon the resources made available for this purpose, it should be no surprise that the manner in which the state conducts itself remains central to adopting an overall human rights-based approach. It is for this reason that the two leading frameworks for assessing the fulfilment of ESCR, the SERF Index and OPERA framework both contain assessments of budget procedures and the extent to which they reflect these principles.<sup>803</sup>

Through the chapter, several important conclusions can be reached. Firstly, ESCR law concerns itself with not just the result reached but also the processes and procedures in place to reach such results. Both obligations of result and obligations of conduct are pertinent to budgetary decision-making through the human rights lens and the interrelated principles of transparency, participation and accountability represent leading 'procedural mechanisms' in the pursuit of a rights-compliant budget process.<sup>804</sup> All of which are supported by a strong normative basis from the IHRL framework. Further to this, through the adoption of these mechanisms throughout the budget process, support is provided to enhancing the overall enforcement and adjudication of ESCR as legal rights. Liebenberg touches upon this in their exploration of

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<sup>801</sup> For examples of different budget initiatives around the world, see Sanjeev Khagram, Archon Fung and Paolo de Renzio *Open Budgets: The Political Economy of Transparency, Participation, and Accountability* (Brookings Institution Press, 2013).

<sup>802</sup> Terea Harrison and Djoko Sigit Sayogo 'Transparency, participation, and accountability practices in open government: a comparative study' (2014) 31 *Government Information Quarterly* 513; see also Heald (n 687).

<sup>803</sup> CESR OPERA (n 274); and UCONN (n 350).

<sup>804</sup> De Schutter (n 101).

‘participatory justice’ outlined above, by highlighting the ability of ‘procedural fairness’ (“*audi alteram partem*”) to build legitimacy in situations ‘where contested social policy and distributional trade-offs must often be made’ because ‘public acceptance of the legitimacy of the relevant decisions are vital to their efficacy and the achievement of their policy objectives’.<sup>805</sup> In other words, in polycentric processes such as the formulation of a public budget where tough choices will be presented and balances will need to be struck, procedural fairness here conceptualised through the principles of transparency, participation and accountability embeds a level of trust in the decisions being reached. Additionally, through unpacking the principle of accountability through its nexus with human rights and public budgeting, arguments were formed in relation to the need for a ‘multi-institutional’ approach to establishing the everyday accountability required for a year-round repeating process of formulating, approving, executing and reviewing public budgets.<sup>806</sup> Where the legislature remains central and, in good practice, ensures a degree of political accountability, from the ESCR perspective this must be further bolstered through legal accountability with both judicial and non-judicial means available to help secure this. In turn, these leading branches of the state can be further supported by fourth and fifth branches in which SAIs, NHRIs, and wider civic society ensure up-to-date, independent analysis of budgetary decision-making.

Before concluding and discussing the empirical data gathered through the research on public budgeting in Scotland, it is vital to recognise the challenges of effectively establishing the principles of transparency, participation, and accountability within budget processes. O’Connell’s work on the budget in Northern Ireland sheds light on this and outlines ‘four key challenges for the development of a human rights-based approach to fiscal oversight’.<sup>807</sup> Where concerns are raised on the language of rights and ‘human rights principles might be mis-sold as a panacea for economic woes’, one key concern is worth raising within the context of this chapter. O’Connell argues, ‘there is a challenge in that human rights approach to budget scrutiny might turn into something of a tick-box exercise, with all departments explaining how all of their work involves realising human rights’.<sup>808</sup> This concern is primarily related to the overall auditing process and the ability to meaningfully connect budgetary lines to specific rights ‘given the capacious understanding of human rights’.<sup>809</sup> It is, however, a pertinent

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<sup>805</sup> Liebenberg (n 643) at 628; see also Tom Tyler ‘What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures’ (1988) 22(1) *Law and Society Review* 103.

<sup>806</sup> Boyle (n 1).

<sup>807</sup> O’Connell (n 27) at 97.

<sup>808</sup> *Ibid.*

<sup>809</sup> *Ibid.*



concern to raise more generally concerning adopting a rights-based approach to fiscal decision-making. Paying homage to human rights principles and standards within existing budgetary processes is insufficient. Adopting a rights-based approach requires changes in processes to better reflect and embed the standards on principles of human rights law. While it is crucial to build upon existing practices, it cannot become yet another box to tick in the administrative practices of the state.

## **Chapter 6**

### **Public Budgeting in Scotland: Capturing the Views of Fiscal Practitioners**

Thus far, this thesis has presented an overview of the ESCR framework and its implications for the use of resources within a state. Through engaging with international human rights mechanisms, accompanying guidance, academic scholarship, and contributions from civic society and NHRI projects, the preceding chapters have sought to demonstrate and argue that extensive rights-based considerations and obligations exist when engaging in fiscal policy and decision-making.<sup>810</sup> From the language of Article 2(1) of the ICESCR espousing the need to progressively realise ESCR to the MAR, alongside the addition of the core doctrine and principles for good practice, how a state chooses to mobilise, allocate, and expend its limited resources is critical to how it gives effect to and measures compliance with ESCR. Conducting a thorough literature review and applying the principles and standards of human rights law to budgetary processes to uncover their meaning and implications for public budgets in Scotland constituted a fundamental aspect of this research endeavour. However, this primarily doctrinal, desk-based research is left inherently limited due to its lack of engagement with the realities of everyday fiscal decision-making. As Manion et al. have also acknowledged: ‘For example, our interviewees have stressed that engagement with governmental actors may be required, not only to secure information and access to fiscal data but also to ensure that the research process is accepted as legitimate and the recommendations are considered for implementation.’<sup>811</sup> In many respects, the challenge of furthering HRB is not deciphering and establishing the close nexus between ESCR realisation and a state’s public budget. The challenge is moving from the theory to the everyday practice of fiscal decision-making. In other words, it is not the ‘what’ or the ‘why’ of HRB that requires our primary attention moving forward, but the ‘how’ we are to achieve it in practice.<sup>812</sup> It is facing this common obstacle that impact and, ultimately, progress can be made. Identified as a clear gap within current contributions on HRB, of which the majority focus on conducting human rights budget analysis as a tool for monitoring ESCR realisation, was the meaningful engagement with those working in fiscal policy and decision-making (here discussed as fiscal practitioners). Practitioners who, ultimately, will be an

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<sup>810</sup> Maria Mamberti and Olivia Minatta ‘What do human rights have to offer to fiscal policy? Implications of fiscal transparency, participation and accountability’ (2022) 46(2) Public Sector Economics 297.

<sup>811</sup> Manion et al. (n 273) at 150.

<sup>812</sup> SHRC (n 152).

essential ally in the pursuit of developing rights-based public budgeting.<sup>813</sup> With this conviction laying the foundation for the proceeding discussion, this chapter aims to build upon the many themes uncovered thus far and shed light, through an empirical evidence base, on the considerations and challenges unforeseen by those external to the intricacies of public finance decision-making.

This chapter presents four areas of practice identified by fiscal practitioners and human rights advocates as critical to further enabling a rights-based approach to fiscal decision-making and public budgeting in Scotland. As delineated within the methodology provided in Chapter 2, key themes to arise from the interviews and expert focus group were scrutinised, with themes grouped from across the three data sets gathered. Through analysis, each initial, broad theme was broken down into further sub-themes and considered in light of the leading norms of ESCR law in an attempt to draw out explicit connections between the views of fiscal practitioners and human rights advocates from the focus group. Not all the themes to arise could be covered within the confines of this singular chapter. The data gathered was rich in detail, and extensive and tough decisions were made regarding what to include and what should be left for further research. Guiding this decision-making was the overarching narrative of Scotland seeking to incorporate ESCR into Scots law and the need to devise a path forward for incrementally moving towards a Scottish budget which can effectively realise ESCR.<sup>814</sup> For this reason, this chapter highlights practitioners' views on the need and potential for ESCR prioritisation, connecting spending to outcomes, multi-year planning, and progressive taxation as initial but powerful steps Scotland could begin to take to improve its use of resources and its targeted ESCR realisation. As a final point, before delving into the empirical evidence below, it is necessary to reiterate the limitation in relation to the lack of views included from those in the Scottish Government. Many of the themes covered here are relevant to the processes of public budgeting in general but are primarily produced through engaging with fiscal decision-makers at the local and subnational levels. There is no evidence gathered here to suggest these themes do not reflect issues within the Government's approach, and my many personal experiences of working with such processes internally have further confirmed these themes as core issues moving forward. Raising such a limitation is not to undermine the findings below; it is merely a recognition that other views in Scotland will likely exist, and further research, with the views

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<sup>813</sup> See the assessment in relation to uptake of gender budgeting initiative and the need for support from public finance institutions in Janet Stotsky 'Gender Budgeting: Fiscal Context and Current Outcomes' (2016) IMF Working Paper WP/16/149.

<sup>814</sup> See work of Kuosmanen (n 271); and Kuosmanen (n 306).

of both the Scottish Government's Exchequer and, in time, the UK Government's Treasury undoubtedly forms the next progressive step within this overarching line of inquiry.

### 6.1 Embedding Rights-Based Priorities to Drive Fiscal Decision-Making in Scotland

Through exploring the development of HRB, a central underpinning notion driving the framework is the understanding that the public budgets represent the 'values' of the government.<sup>815</sup> They are the 'blueprints for how government raise and spend public funds needed for the policies and programs which translate their priorities into action'.<sup>816</sup> HRB, in its most basic formulation, acts as a framework to ensure that 'appropriate priority' has been 'allocated to critical areas like health, social care, education, access to justice, housing, and work'.<sup>817</sup> Inherently polycentric decision-making on 'competing priorities' over the use of resources within a state naturally requires a degree of balancing needs and, consequently, prioritisation.<sup>818</sup> The prioritisation of resources thus forms a key theme throughout the HRB literature, and, as covered in Chapters 3 and 4, the obligations of ESCR law give rise to the need to prioritise ESCR-related areas within the budget.<sup>819</sup> In more detail and drawing from the previous chapter's analysis, it was established that the doctrine of progressive realisation, as an umbrella duty containing further 'sub-duties', requires that resources be used 'optimally' for the realisation of ESCR.<sup>820</sup> This search for optimisation within the totality of a state's broad requirements leads to the need to ensure priority is given to ESCR-related areas of the budget.<sup>821</sup> This obligation is further supported by the sub-duty to utilise the MAR for the realisation of ESCR, which entails giving 'due priority' to 'ESCR-related plans, programmes and projects'.<sup>822</sup> In effect, 'even when a government's resources are very limited, it has an obligation to prioritise [ESCR]'.<sup>823</sup> Further still, with the addition of the core doctrine and its attempt to set a higher level of priority for 'core' elements of ESCR based on meeting rights-holders most basic needs, there exists within the ESCR framework a 'hierarchy' of prioritisation, which should guide the use of resources and overall fiscal decision-making.<sup>824</sup>

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<sup>815</sup> Nolan (n 31).

<sup>816</sup> Hien Bui 'Human Rights Budgeting: Making Governments Accountable for Economic, Social and Cultural Rights' (2015) 2(1) *Queen Margaret Human Rights Review* 109 at 111.

<sup>817</sup> SHRC (n 152) at 4.

<sup>818</sup> De Schutter (n 33).

<sup>819</sup> CESCR General Comment No. 19 (n 305).

<sup>820</sup> Nolan & Dutschke (n 370).

<sup>821</sup> Fredman (n 123) at 81.

<sup>822</sup> OHCHR (n 258); O'Connell et al. (n 41).

<sup>823</sup> Ann Blyberg and Shaamela Cassiem 'Reading the books: Governments' budgets and the right to education' (2010) *IBP & IHRIP* at 13.

<sup>824</sup> Alberto Quintavalla and Klaus Heine, 'Priorities and human rights' (2019) 23(4) *The International Journal of Human Rights* 679; see also Rudiger (n 38).

Indeed, at the heart of HRB is the central purpose of ensuring that ESCR is embedded and evidenced as a priority for spending within the totality of a state's resources.<sup>825</sup>

This theme was raised throughout the engagement with practitioners as an integral and initial step Scotland could adopt to give further recognition to ESCR through its public budgets. This was likely due to the current context of fiscal consolidation in Scotland, where there is widespread recognition of the fiscal challenges facing the public sector and the need for 'tough choices' and, consequently, priority setting.<sup>826</sup> Embedding shared priorities was raised, for example, in relation to other core themes running throughout the discussions, such as austerity and the need to develop and disseminate national priorities that effectively guided all public budget decision-making in Scotland, whether at the national or subnational level. The corroborated views of the participating practitioners were that Scotland lacked clear, explicit, and shared priorities to guide fiscal practice at the national and sub-national levels. Moreover, too often, participants felt that any priorities that had been set were vague and temporary, with any political priorities espoused by those elected to government not, in turn, being reflected within the budgetary commitments made to meet such priorities. It seems it is a problem that has plagued Scotland's budgetary process since its inception with Scotland's parliamentary Finance Committee, in scrutinising the budget proposals as far back as the year 2000, raising: 'Often, the targets that are contained in the document do not match the level of detail in the budgetary information. We have concerns that there is poor linkage between the overarching priorities and the individual targets: it is often not clear how the implementation of individual, administrative targets will underpin the achievement of the high-level policy priority or how increased funding in a certain area will lead to a specific target being achieved.'<sup>827</sup> The evidence below suggests it is a problem which, two decades on, remains unsolved. For years, despite attempting (as will be covered below) to entrench certain priorities to guide decision-making, Scotland has been left bereft of meaningful, national priorities designed and integrated through the public sector to guide the fiscal process each year. The discussion below highlights some key excerpts from the data, provides insight into these assertions, contributes further evidence to the importance of establishing priorities from a human rights and fiscal perspective, and concludes by demonstrating that Scotland has frameworks and plans that could be used for such purposes.

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<sup>825</sup> Landau (n 103); OHCHR (n 258).

<sup>826</sup> Burnside et al. (n 22); and Morrison (n 23).

<sup>827</sup> Scottish Parliament Finance Committee. (2000). Finance Committee Report on Stage 1 of the 2001/02 Budget Process. Edinburgh: Scottish Parliament.

One of the clearest statements on the need for prioritisation was provided through the expert focus group, with a participant relating the HRB framework to similar approaches in carbon budgeting and the need for priorities to be set so that performance can be measured.

*“Ideally, you would have some measures or indicators that you can’t argue with that flag up where human rights are not being realised. Part of the problem with this is, say, if you’re doing carbon budgeting, ultimately, it all comes down to one tangible figure: the emission in the economy... Human rights, they’re a concept. It can be complicated, and sometimes it’s not clear what it means in practical terms. And so, it’s the kind of thing that can maybe lend itself to well-intended, well-meaning narratives, not concrete action... So, I was looking at the Human Rights Commission when it was set up. I think it is like a review of the human rights landscape and identifying, yes, areas of priority. Imagine if we did that, I don’t know, at the start of every parliamentary term and we properly resourced it, that could provide a compelling kind of indicator of where the priorities need to be for budgeting.”*

(Focus Group Participant)

Another focus group participant illuminates that implementing policy priorities depends on the resources it receives and, consequently, fiscal decision-makers must be directly informed about the priorities set. It is a view that directly echoes the views of the OHCHR, which espoused that ‘budgets are fundamental government tools for policy implementation and the best way to ascertain if national development priorities on paper are the actual ones in practice’.<sup>828</sup> Furthermore, the participant recognises the need for the priority-setting process to involve the ‘expertise of local areas’.

*“There has to be resources put into implementation and part of the implementation, successful implementation comes from understanding what we’re implementing. And that, I think, has to be directed from a national level. But it has to involve everybody down to the local level that has to engage with a wide variety of communities, and that’s the expertise of local areas, to know who needs to be involved.”*

(Focus Group Participant)

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<sup>828</sup> Office of the United Nations High Commissioner for Human Rights, ‘Human Rights Budget Monitoring, Analysis and Advocacy (2010), OHCHR at para 1.

However, evidence from the interviews with local chiefs of finance highlighted that the current prioritisation process is not set explicitly at the national level but rather via the yearly proposed national budget. In exploring the process of prioritisation within the general process of formulating a LA's budget in Scotland, the interviewee discusses how priorities are set within the LA's budget with predominantly 'incremental' budgeting used in which 'the current year's budget becomes the basis for the next year's spending plan'.<sup>829</sup> Importantly, though there is mention of a localised 'strategic prioritisation framework,' this is devised within the individual duty-bearer, and there is noticeably no recognition of strategic priorities being driven by a national framework (despite the existence of a National Performance Framework ("NPF")). This omission in describing the basic process of planning fiscal decisions is reflective of decision-making throughout Scotland's local authorities. The lack of a shared framework for prioritisation is the most common concern.

*"that's driven by a strategic prioritisation framework where it's about, you know, what we're going to buy, build, what we're going to prioritise, where we're going to go out, thirds, sharing, delivery by the 3rd sector, but in very very basic terms, we take last year's budget, and we look at what's kinda where the key pressures are. We look to see then if those pressures are going to be sustained and we look at things like the big-ticket items around pay. We look at the big-ticket items around inflation, contract price inflation, pension pressures, uh, demographic kind of change and the impacts that those are likely to have on our current budget allocations, and then that gets wrapped up into a report to Council, which kind of kicks off the budget."*

(Interview: Chief A)

Another interviewee brings to light the problem of 'providing' money is being spent on the 'right priority'.

*"Yeah, our budget process. It's sort of every year, so it's it's, and chief officers are asked every year to review their budget and to consider and advise by providing me with budget submissions. How much budget they need to deliver their policies of the Council? Based on current levels of demand. And if it is increasing demand or need for service provision, they need to provide evidence for that, and that comes either like what we call a burden. Aurora growth or regrowth bid. And so, you know? That that is the*

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<sup>829</sup> Shayne Kavanagh, Jon Johnson, and Chris Fabian 'Anatomy of a Priority-Driven Budget Process' (2010) The Government Finance Officers Association at 1.

*process. Hey, how you prove that the money is getting spent in the right priority areas is not easy.”*

(Interview: Chief D)

Upon reflecting on the need for clear, rights-based priorities to drive fiscal decision-making, one participant of the focus group brought to light several potential avenues already in existence in Scotland that could be used for building ESCR-related priorities.

*“But when I think about the panel principles and how we can do it and make it happen, I think Scotland has some strengths here. So, we have the Human Rights Commission. We have SNAP [Scotland’s National Action Plan]. Human rights are in the national performance framework. But if those things were properly resourced and used across different areas of government, then, yes, we’d stand a much better chance of making this happen...”*

(Focus Group Participant)

Previous discussions with chiefs of finance regarding the overall use of Scotland’s National Performance Framework (“NPF”) made it clear that this was not used within any decision-making processes at the subnational level. Nor is there evidence from recent national budget processes to suggest it has any meaningful influence on the prioritisation of resources there, either.

*“I don't think the National Performance Framework gets used enough because that should be driving funding, and it doesn't. It's, it's over at the side, and it's a bit of a... It's like a School Report card, uh, for for for government to say, you know, that well, we've done what we've said we'd do. And I would say, you know, it's like 80 political manifestos. It's written in such a way that there's probably some of it will be pretty hard not to deliver, or at least claim you've delivered that, uh, and it doesn't have any impact. So, The National Performance Framework is not discussed in any funding group in any way we allocate resources. It's completely over to the side. So yeah, so it's, it's of very limited use from my point of view.”*

(Interview: Chief D)

Another interviewee reiterated this view when asked about their views on the NPF to drive decision-making, raising the overall ‘disjointedness’ of any national planning and prioritising.



*“but I don't think we actively use the national performance framework as a Council. Now, through our kind of professional groups, you know, where we, we are aware of it... I couldn't say that when we're setting our business improvement plans, we've got a full eye to the national performance framework. I think there's, there's a level of disaggregation or a disjointedness there, to be honest. To be absolutely honest with you.”*

(Interview: Chief A)

This data provides several key findings and recommendations for action in Scotland. Firstly, it is clear that at the subnational level in Scotland, nationally set and rights-based priorities do not drive budget decision-making and, consequently, act to guide any balancing that must be made. As required by the ESCR framework and HRB approach, establishing budget priorities has numerous advantages.<sup>830</sup> Here, two are highlighted. One, already touched upon above, is from the perspective of rights advocates and the other from the perspective of fiscal decision-makers. To begin with the former, setting budget priorities to drive forward spending plans within public budgets presents a significant opportunity for rights advocates to ensure ESCR, and the human rights framework more generally, are pushed to the top of the government's agenda. Moreover, using ESCR and their corresponding procedural aspects as a guide to state prioritisation would help to ensure that the budget proposes ‘needs-based spending proposals’.<sup>831</sup> Rudiger, commenting on the need for ‘a budget cycle that starts with a formal, participatory assessment of human needs and access to rights’, suggests carrying out such a task would, in effect, begin to impact upon the very normative aims of fiscal policy.<sup>832</sup> Instead of the ‘overemphasis on fiscal discipline and economic growth relative to equity and service delivery’, public budgeting and fiscal practice would begin to reflect priorities focused on achieving ‘improvements in people's lives’.<sup>833</sup> Additionally, studies have demonstrated how priority-setting processes can give rise to meaningful participation, citizen participation, and debate.<sup>834</sup> Given the political reality of ‘competing principles’ and consistently raised arguments concerning the scarcity of resources, having a process in place can facilitate

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<sup>830</sup> Ibid.

<sup>831</sup> Rudiger (n 38) at 159.

<sup>832</sup> Ibid.

<sup>833</sup> Paolo de Renzio and Jason Lakin ‘Reframing Justice, Democracy, and Human Rights in Government Budgets’ (2019) IBP at 3.

<sup>834</sup> Aimee Franklin and Carol Ebdon ‘Aligning priorities in local budgeting processes’ (2004) 16(2) Journal of Public Budgeting, Accounting & Financial Management 210; Sheryl W Mitchell *An Exploratory Study of Priority Based Budgeting: Identification of Public Values and Public Priorities Through Citizen Engagement in Government Budgeting Decisions* (Lawrence Technological University, 2014); see David Mitchell ‘Priority-based budgeting: An honest broker among municipal functions?’ (2022) 43(1) Public Budgeting & Finance 21.

meaningful deliberation through which prevalent ESCR-related issues within the state can be evidenced and underscored as requiring priority status.<sup>835</sup> This, in turn, allows ‘states to have a more concrete and attainable implementation plan, serving as both guidance for the state and parameters for the human rights supervisory bodies’.<sup>836</sup>

Furthermore, in states where incremental budgeting can dominate practice and obscure a state’s overall priorities for the coming period, setting clear priorities can help to clarify specifically what is to be immediately or progressively achieved. It leads to further advantage from the perspective of fiscal decision-makers already illuminated through the data. For public institutions, both national and subnational, to be efficient and effective in implementing policies and programmes, they must be aware of what they are implementing and where to prioritise when the polycentricity of competing asks exists within an overall agenda. In turn, setting clearer priorities will also clearly increase the potential for subnational governments to have clearer ‘responsibilities’ in realising ESCR.<sup>837</sup> It is an issue already understood and raised by a previous UN Special Rapporteur for Housing.<sup>838</sup> These priorities can eventually be reflected throughout the numerous processes and tools, such as impact assessments, used to guide decision-making.<sup>839</sup> Where budgetary ‘trade-offs’ are an inevitable consequence of the push for fiscal consolidation, ensuring fiscal practitioners tasked with accounting for such have a clear understanding of where the state’s priorities lie is critical to their overall planning and formulation of a budget and where to redirect spending when priorities are failing to be achieved. Clearly established and aligned priorities throughout the public sector are critical to achieving both ‘allocative’ and ‘operational’ efficiency within the limited resources public bodies often have and maximising the use of limited resources.<sup>840</sup> In summary, not only does the establishment of priorities enable an environment for deliberation in which rights-based evidence and concerns can be utilised to dictate priorities for spending moving forward, but it also allows public institutions to be more effective in their own decision-making processes with shared priorities and objectives providing boundaries and direction in the face of difficult decisions needing to be made.

The practitioners involved in this research clearly understood the potential for priorities in Scotland to drive decision-making and, through the focus group, contributed two potential

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<sup>835</sup> See discussion in Sandra Fredman’s ‘The Structure of Positive Duties’ in Fredman (n 123); See also De Schutter (n 33).

<sup>836</sup> Quintavalla & Heine (n 824) at 680.

<sup>837</sup> Ibid.

<sup>838</sup> Farha (n 229).

<sup>839</sup> See Gauthier de Beco ‘Human Rights Impact Assessments’ (2009) 27(2) *Netherlands Quarterly of Human Rights* 139.

<sup>840</sup> OHCHR (n 258).

avenues to set rights-based priorities to impact budgeting practice. The first potential avenue raised was Scotland's National Action Plan for Human Rights ("SNAP").<sup>841</sup> SNAP was initially developed in 2013 as a 'roadmap' in 'seeking lines of accountability, create concrete consensus-based milestone and promote a national human rights culture'.<sup>842</sup> It ran for four years before being updated to SNAP 2 in 2023.<sup>843</sup> Action plans were heavily encouraged via the Vienna Declaration and, according to guidance produced by the OHCHR, serve to strengthen institutional values, review a country's human rights needs, and set achievable targets for the coming years.<sup>844</sup> Further still, the guidance encourages the identification of human rights priorities within any action plan set.<sup>845</sup> SNAP 2 contains eight key priorities that aim to 'reflect the main issues that currently affect people in Scotland' and a range of short and long-term outcomes regarding human rights.<sup>846</sup> These are: 'Achieve a decent standard of living; improve health, well-being and the environment; enhance education and work; protect private and family life; ensure justice; learn from COVID-19; realise a human rights culture; plan and support incorporation'.<sup>847</sup> The priorities are also supported by specific actions outlined within the report, which many consider to be the need to close the 'ongoing disconnect' between 'policy ambitions' and 'financial decision-making'.<sup>848</sup> SNAP 2 is Scotland's overall action plan for human rights and should, as identified by the participant, be utilised as a basis for fiscal decision-making. However, despite being published in April 2023, at the same time as the beginning phases of planning the upcoming budget, there is no sign within the current budgetary documents published that it has had any impact on budgetary decision-making. SNAP 2 could, as raised in the expert focus group, provide one basis to embed rights-based priorities and decision-making within the planning and formulation of the budget. Enabling duty bearers to demonstrate the value Scotland places on realising ESCR and directing resources in pursuit of this achievement. Further still, in line with the doctrines of progressive

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<sup>841</sup> See an overview of SNAP 2 in Scotland at, <<https://www.snaprights.info/snap-2>> (accessed 09 July 2024); See SHRC covering SNAP at <<https://www.scottishhumanrights.com/projects-and-programmes/scotlands-national-action-plan/>> (accessed 26<sup>th</sup> June 2024); and For an overview of the development of SNAP, see Alison Hosie and Michele Lamb (2012) 'Human Rights and Social policy: Challenges and Opportunities for Social Research and Its Use as Evidence in the Protection and Promotion of Human rights in Scotland' 12(2) Social Policy and Society.

<sup>842</sup> Jo Ferrie, Rebecca Wallace, and Elaine Webster 'Realising international human rights: Scotland on the global stage' (2017) 22(1) Int J Hum Rts 1.

<sup>843</sup> Hosie & Lamb (n 841); See also Alison Struthers 'The Great Anglo-Scottish Human Rights Divide' (2022) 31(1) Scottish Affairs: Edinburgh University Press at 21-40.

<sup>844</sup> OHCHR 'Handbook on National Human Rights Plans of Action' (2002) OHCHR; For a more recent overview, see Sebastien Lorion 'National Human Rights Action plans: An Inventory' (2022) Danish Institute for Human Rights.

<sup>845</sup> Ibid.

<sup>846</sup> SNAP 2 (n 841).

<sup>847</sup> Ibid.

<sup>848</sup> Ibid.

realisation and minimum core, SNAP 2 could have presented an opportunity to begin delineating areas of ‘core’ priority. It is a missed opportunity.

On the other hand, SNAP 2 is a broad and long-term action plan, and while such plans are critical steps to take within the overall implementation of ESCR, they are multi-faceted in purpose and do not solely focus on the need for setting rights-based priorities in the manner envisioned by HRB.<sup>849</sup> Moreover, in hearing practitioners’ views and analysis of public budgeting and management literature on building budget priorities, a potentially more appropriate mechanism for explicitly establishing ‘core’ priorities reflective of ESCR norms is using a nationally recognised performance framework.<sup>850</sup> Performance frameworks, as a central part of performance budgeting as will be explored below, enable the ‘systematic use of performance information to inform budget decisions, either as a direct input to budget allocation decisions or as contextual information to inform budget planning’.<sup>851</sup> Moreover, their purpose is to ‘instil greater transparency and accountability throughout the budget process by providing information to government officials, legislators, and the public on spending purposes and the results achieved’.<sup>852</sup> Analysis from the OECD demonstrates that, when established effectively, performance frameworks can increase the allocative efficiency of resources (echoing the needs of the MAR obligation) as well as establish a better, shared understanding of the government’s key priorities.<sup>853</sup> Comparative studies of their use around the world further evidence this.<sup>854</sup> Less evidence is available on using performance frameworks to set priorities based on human rights norms. Though Donnelly and Howard, in an older exploration of the need to assess ‘human rights performance’, do emphasise the complexity and subsequent need for simplifying such a task to specific core areas, citing issues of data and having clearly defined outcomes to drive decision-making.<sup>855</sup> Issues that reflect fundamental challenges in determining the content of core priorities within ESCR.

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<sup>849</sup> OHCHR (n 844); and Lorion (n 844).

<sup>850</sup> See discussion of the NPF in Katherine Trebeck & Amy Baker ‘Being Bold: Building Budgets for Children’s Wellbeing’ (2021) Children in Scotland, Cattanach, Carnegie UK; See also generally the potential advantages and disadvantages of using performance frameworks in OECD ‘Performance Budgeting in OECD Countries’ (2007) OECD; see also Marc Robinson and Duncan Last ‘A Basic Model of Performance-Based Budgeting’ (2009) IMF.

<sup>851</sup> Alfrun Tryggvadottir and Indre Bambalaite ‘OECD performance budgeting framework’ (2024) 23(3) OECD Journal on Budgeting at 2.

<sup>852</sup> Ibid.

<sup>853</sup> Ibid.

<sup>854</sup> Alfred Tat-Kei Ho ‘From Performance Budgeting to Performance Budget Management: Theory and Practices’ (2018) 78(5) Public Administration Review.

<sup>855</sup> Jack Donnelly and Rhoda Howard ‘Assessing National Human Rights Performance: A Theoretical Framework’ (1988) 10 Human Rights Quarterly 214.

The elected Scottish National Party has established a performance framework in Scotland to some extent. For example, as Lapsley and Midwinter have already expertly and recently explored, some performance budgeting practices have been embraced with ‘considerable enthusiasm by SNP Governments in devolved Scotland’.<sup>856</sup> These initiatives led to the development of Scotland’s National Performance Framework (“NPF”), which was created to establish national priorities to drive policymaking and budgetary decision-making. The NPF was first adopted in 2007 and coined ‘Scotland Performs’.<sup>857</sup> The framework was first developed to ensure the focus of resources on increasing sustainable economic growth and enable enhanced performance management in Scotland. It drew from performance-based budgeting techniques utilised across the OECD and established five strategic priorities to drive policy and spending.<sup>858</sup> These were a wealthier and fairer Scotland, a safer and stronger Scotland, and a smarter, healthier, greener Scotland. As further identified by Mackie, the priorities of the NPF were designed to enhance decision-making processes: ‘The National Performance Framework (NPF) provides a strategic direction for policy making in the public sector and a clear direction to move to outcomes-based policymaking.’<sup>859</sup> Further still, it developed forty-five directly linked performance indicators to help enable the government to link its intended priorities with its policies and, ultimately, its resource approach.<sup>860</sup> However, its impact has been markedly limited due to significant ‘design faults and implementation problems, which have undermined the efficacy of this innovation by the Scottish Government’.<sup>861</sup> Even further criticism of the use of the NPF in influencing budgetary decisions was again raised in 2017 by the Finance Committee: ‘Despite this new performance-based approach, the budget process has remained largely iterative and forward-looking. The focus tends to be on examining the Scottish Government’s expenditure proposals for the following year. There is little scrutiny of budget decisions at a strategic level, including whether the Scottish Government is making any progress against its declared objectives.’<sup>862</sup> This has been supported in more recent pre-budget scrutiny and budget scrutiny sessions run by Parliamentary Committees, with evidence consistently raising the need to develop a set of

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<sup>856</sup> Irvine Lapsley and Arthur Midwinter ‘Results, Results, Results: Can Outcome Budgeting Deliver?’ as found in Zahirul Hoque *Public Sector Reform and Performance Management in Developed Economies* (Routledge 2021) at 93.

<sup>857</sup> Robert Mackie ‘The Scottish Government’s System of Outcome-Based Performance Management: A Case Study of the National Performance Framework and Scotland Performs’ as found in Elio Borgonovi, Eugenio Anessi-Pessina and Carmine Bianchi *Outcome-Based Performance Management in the Public Sector* (Springer 2018); See also, Jennifer Wallace ‘Scotland: Wellbeing as Performance Management’ as found in Jennifer Wallace *Wellbeing and Devolution: Reframing the Role of Government in Scotland, Wales and Northern Ireland* (Palgrave Macmillan 2019).

<sup>858</sup> Tryggvadottir & Bambalaitė (n 851); and Lapsley & Midwinter (n 868).

<sup>859</sup> Mackie (n 857) at 91.

<sup>860</sup> Lapsley & Midwinter (n 856).

<sup>861</sup> Ibid at 96.

<sup>862</sup> Scottish Parliament Finance Committee. (2017). Guidance to Subject Committees. Edinburgh: Scottish Parliament.

national outcomes that meaningfully impact fiscal decision-making.<sup>863</sup> This view is supported by the data collected within this project, reiterating and confirming how far away the NPF is from being an actively used tool for decision-making. The findings were stark in discussing the NPF with local finance authority directors, where it was technically designed to drive national and local decision-making. To local authorities in Scotland interviewed within the research, the NPF was viewed as ‘over at the side’ and ‘disjointed’.

The current NPF was last updated in 2018 and contains 11 national outcomes supported by 81 supposedly aligned indicators.<sup>864</sup> However, concluding practitioners' views, two fundamental design faults can be tabled at the NPF from the human rights perspective and, more widely, its appropriateness for setting priorities and influencing fiscal decision-making. Firstly, it must permeate throughout the wider public sector as a framework to assess performance and adjust budgetary decision-making accordingly. Where local authorities will undoubtedly have been made aware of the existence of the NPF, the evidence above suggests it has not achieved the recognition and status required for fiscal practitioners to use it actively within their processes. The visibility of the NPF remains a significant issue in terms of its ability to influence the tough choices being presented by Scotland's current fiscal outlook. However, it is easier to fix this issue with awareness raising and capacity building enabling methods for encouraging its use throughout Scotland's public sector. More pressing is the framework's failure to adequately account for ESCR norms, or human rights norms more generally, set minimum core priorities, or back this up with an adequate monitoring framework.<sup>865</sup> In more detail, the indicators utilised measure access to and ‘confidence’ in the Scottish Justice System (in which Scotland's performance is maintaining), whether people agree they have ‘influence over local decisions’ (in which performance cannot be confirmed), people's ‘satisfaction’ with the quality of public services (again in which performance cannot be confirmed), and finally people's trust in public organisations (of which performance cannot be confirmed).<sup>866</sup> The NPF's current approach to measuring human rights is poorly designed, wholly unsuitable for measuring human rights realisation, and lacks the underpinning data from which to assess the existing inexplicably limited measures. For the NPF to become a practical framework for setting priorities, monitoring ESCR realisation, and, ultimately, influencing fiscal decision-making, it must

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<sup>863</sup> EHRSJC evidence (n 301); see also EHRBAG (n 302).

<sup>864</sup> Scottish Government ‘National Performance Framework’ available at <<https://nationalperformance.gov.scot/>> (accessed 10 June 2024).

<sup>865</sup> SHRC ‘Review of the National Performance Framework National Outcomes Call for Evidence’ (2023) SHRC.

<sup>866</sup> Scottish Government ‘Measuring Progress – Human Rights’ Available at <<https://nationalperformance.gov.scot/national-outcomes/explore-national-outcomes/human-rights/measuring-progress-human-rights>> (accessed 25/07/24).

include ‘measures and indicators’ that reflect the principles and standards of human rights.<sup>867</sup> In doing so, Scotland could establish an open, deliberative process in which the priorities of the performance framework are set, monitored, and disseminated throughout the public sector to ensure shared resource prioritisation. To build upon the views of those practitioners involved in this research process, a clear direction for the public sector is required and, further, that achievement of set goals is adequately measured by a rights-based performance framework. Scotland already has mechanisms in place, which are primarily driven forward by work from Scotland’s NHRI. There are clear opportunities to build on existing practices and, once again, return to the original intention of the NPF’s establishment... driving decision-making, measuring performance, and facilitating social progress in Scotland.

## 6.2 Progressively Realising People’s ‘Outcomes’ Over Policy ‘Inputs’: Performance Budgeting and the Need for Effective Monitoring

Having discussed above the need for establishing rights-based priorities from which to delineate and measure performance in Scotland, a further interrelated theme emerging from practitioners’ views is the need for resources to be driven by achieving outcomes.<sup>868</sup> Too often, it was surmised, resources were allocated and spent on specific policy ‘inputs’ instead of being driven by performance in relation to rights-holder’s everyday outcomes. In other words, where specific, centralised policies received allocations of resources from the Scottish Government, there remains an infirmity in understanding and measuring whether this funding was efficiently and effectively progressing the everyday enjoyment of rightsholder ESCR. Through ESCR literature, such insights echo the question of whether a state can be understood as complying with its obligations by delivering certain levels of spending for ESCR-related areas of the budget, even if this does not have its intended impact on improving rights-holders everyday outcomes and experience of their ESCR.<sup>869</sup> It is a notion that strikes at the heart of the challenges identified by advocates of an ‘outcomes-based’ approach to measuring ESCR realisation who argue that even where clear priority areas are set, and policies or programmes are designed and resourced to achieve them, if this fails to translate into concrete and measurable improvements to people’s everyday outcomes, is progressive realisation really

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<sup>867</sup> OHCHR ‘Human Rights Indicators: A Guide for Measurement and Implementation’ (2012) OHCHR.

<sup>868</sup> QUB Budget Analysis Project, Budget Analysis and Economic and Social Rights: A Review of Selected Case Studies and Guidance (Belfast: Queen’s University Belfast, 2010) at 6. For an example of a recently developed methodology designed to evaluate macroeconomic policies from an ESR perspective, see Radhika Balakrishnan, Diane Elson, and Raj Patel, ‘Rethinking Macroeconomic Strategies from a Human Rights Perspective’ (2009) New York: Marymount Manhattan College/US Human Rights Network

<sup>869</sup> De Schutter (n 101).

being achieved?<sup>870</sup> As proponents of ‘outcomes-based’ approaches to development can be ‘tempted to argue – from the point of the individual rights-holder – outcomes matter, not means. [They] care not about how public policies are shaped, for instance, but about whether housing, education, and healthcare are affordable and of decent quality.’<sup>871</sup>

It is a view clearly shared by the participating practitioners who, below, bring to light the challenges in Scotland concerning the funding of specific policies or programmes without adequate understanding of whether the policy and its associated funding are improving rights-holder outcomes. Upon initial analysis, the points raised below were considered to be reflective of poor policymaking and prioritisation, thus giving rise to considerations in relation to MAR and the efficient and effective use of spending.<sup>872</sup> This remains a primary consideration raised. However, upon further review, it is clear deeper issues are raised in relation to the satisfaction of obligations of conduct vis-à-vis obligations of result and the manner in which fiscal decision-making and, consequently, the HRB framework can account for requiring both.<sup>873</sup> The data brings to light several significant challenges concerning policy and programme design, the rigidity of funding specific policy inputs, and the common misconception that there exists a ‘direct correlation between an increase in a government’s budget and an increase in people’s enjoyment of their rights’.<sup>874</sup> Moreover, ‘a growing budget may be poorly targeted or wastefully spent, while a shrinking one may be used more efficiently and actually expand services to people.’<sup>875</sup> The context of the expert focus group discussion began with the notion that a lack of resourcing for specific policies, strategies and programmes had the potential to undermine the ability of service provision to achieve outcomes. As one participant of the focus group acutely captured:

*“We don’t look at the policies that lead to those outcomes or the resourcing of those policies, which could be the issue. You know, you can have a great policy, but if it’s not properly resourced, you’re not going to have the outcome that you look for.”*

(Focus Group Participant)

This view sits at the very heart of HRB. ESCR cannot be delivered immediately or progressively realised over time without the adequate mobilisation, allocation and targeted

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<sup>870</sup> Sen (n 204); Sen (n 620); and Nussbaum (n 524).

<sup>871</sup> De Schutter (n 101) at 551.

<sup>872</sup> Uprimny, Hernandez and Araujo (n 44); Corkery and Saiz (n 286); and Robertson (n 398); and Skogly (n 87).

<sup>873</sup> R Ago, ‘Sixth Report on State Responsibility’, UN Doc A/CN.4/302 and Add. 1–3, YILC, 1977, vol. II, pt. one at para 3.

<sup>874</sup> Blyberg & Hofbauer (n 735) at 6.

<sup>875</sup> Ibid.



spending of resources. However, as the discussion continues to develop, more insightful views are espoused on the appropriate targeting of resources, design of policies, and challenge of delivering improved outcomes in Scotland. The best example to capture this theme is Scotland's nationally directed funding to ensure a specific teacher-to-pupil ratio.<sup>876</sup> What appeared to be a reasonable national policy or input to allocate resources in pursuit of the progressive realisation of the right to education was argued to be failing to achieve its intended impact of improving overall education standards regarding children's outcomes.<sup>877</sup>

*“So, again, we talked earlier about pupil-teacher ratio. Pupil ratio doesn't close the attainment gap. In [City A], a long time ago, before I worked here, introduced nurture classes, so that was a bit actually, dealing with children from the very start and giving additional support. That isn't teacher support. That's classroom support. So, it's non-teacher staff. And actually, it's far more effective to have more staff, but less teachers because it can be that more personalised support, very small class numbers from a total number... But by the government imposing pupil-teacher ratios, it actually makes it more difficult to do that because you have to employ teachers, and actually, it's not teachers that are needed in some cases.”*

(Focus Group Participant)

Here, the practitioner asserts that the directed spending received to ensure the teacher-to-pupil ratio was maintained should have considered the acute challenges faced by education in their LA area and was an efficient targeting of money. This problem has recently been re-iterated and explained further through this year's budget scrutiny.<sup>878</sup> As another participant captured during the interview stage of this project, it did not consider how central resourcing would 'work down the system'.

*“Yeah, I mean, I mean, the Scottish Government often made decisions without considering the full financial and impact and how that will work down the system.”*

(Interview: Chief D)

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<sup>876</sup> Scottish Government 'Protecting teacher numbers and school hours' (07 Feb 2023) available at <<https://www.gov.scot/news/protecting-teacher-numbers-and-school-hours/>> (accessed 25/07/24).

<sup>877</sup> CESCR General Comment No. 13 (n 78).

<sup>878</sup> Education, Children and Young People Committee 6<sup>th</sup> Meeting, 2023 (Session 6), Wednesday 22 February 2023 Scottish Budget 2023-24 (2023) Scottish Parliament. Available at: <<https://www.parliament.scot/~media/committ/5279>> (accessed 25/07/24).

Another participant argued further by capturing that resourcing was focused on national targets, not local needs and outcomes.

*“We have to nationally protect the pupil-teacher ratio regardless of how that impacts on educational attainment. So that is directed spend because education and social work are our two biggest areas of spend.”*

(Focus Group Participant)

Here, by providing such a direct example of targeted education policy being resourced despite its lack of impact on educatory outcomes, the participant captures the challenges in resourcing policy to achieve progress for specific outcomes. In short, the participant is espousing that if the resources are nationally guaranteed via ‘ringfenced funding’ or too inflexible to adapt to the changing needs throughout society, it may not be effective and efficient in meeting its targeted priorities and aims. This was backed up further by another participant who specifically connected it to the problem of resourcing national ‘inputs’, which did not correlate to improving national outcomes.

*“I like the idea of, when you talk about directed spend, it’s looking at inputs like your teacher ratio, teacher-pupil ratio, rather than looking at what is the outcome that we’re trying to achieve an education in terms of attainment. And is there a way of trying to influence by connecting what we’re trying to achieve in terms of human rights outcomes? It is about outcomes and it’s not about inputs. And that is a very different way of looking at how to resource, what we’re wanting to resource the outcomes. And it sounds so simple. But it’s not...”*

(Focus Group Participant)

Even in areas of the budget that have seen steady increases, such as education portfolios, due to poor or overly rigid targeting, this extra funding has not translated into improved outcomes for all and, in the end, the performance of government programs is assessed by examining whether they have delivered the desired outputs and outcomes.<sup>879</sup> Overall, it presents the challenge that while intended outcomes must be central in devising budgetary plans, it is not as simple as establishing an intended outcome and providing direct funding for a specific national policy to meet said outcome. As one participant put it:

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<sup>879</sup> OHCHR (n 258).

*“It’s about the policies being developed based on research and actually then resourcing what’s going to make a difference.”*

(Focus Group Participant)

It is a particular challenge for those in central government with the task of delivering against performance measures and evidencing the inputs designed to achieve them whilst equally creating flexibility within the framework to shift resource inputs where evidence demonstrates the input is not achieving its intended outcome. As captured by another participant who links the overall discussion back to establishing priorities through which to base fiscal decisions:

*“But the reaction really is to policy as opposed to local outcome. And I suppose looking at the outcome measures for all of this, that would be something that, you know, we could reasonably put a budget around to ensure delivery against, you know, improvements in loneliness. But we are directed at the front end...”*

(Focus Group Participant)

The views presented above offer numerous important takeaways for realising rights through resources. First and foremost, the most significant of the findings is simply the sheer complexity of designing national priorities and policies that adequately account for the diversity of needs within a population. As a theme that will be returned to in more detail in Chapter 7 through the language of ‘centralisation’, focusing directly on the challenges in fiscal decision-making for subnational government in Scotland, there remains a fundamental friction between prioritising and resourcing national policy and accounting for local needs. As we will return to, such findings only further emphasise the essential requirement of active participation within the budget process, its priority setting, and the need for continuous effective performance monitoring across different demographics in Scotland. For this discussion, however, additional considerations related to progressive realisation and budgeting for outcomes, both from a rights-based and a fiscal perspective, will be considered. To begin, in contemplating the relationship between budgeting and outcomes, though not directly in relation to funding ‘inputs’ as raised above, De Schutter highlights the ‘interdependent’ nature of resources and outcomes and argues ‘it is important to consider resource mobilisation jointly with spending and relate both dimensions to outcomes – i.e., to the effective levels of enjoyment of [ESCR]’.<sup>880</sup> De Schutter’s work on HRB clearly demonstrates that the ESCR

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<sup>880</sup> De Schutter (n 101) at 560.

framework, including the obligations of progressive realisation, is fundamentally about the results achieved by gathering and spending a state's resources.<sup>881</sup> Where progressive realisation has, by some, been interpreted solely as an obligation of conduct in which the state must take steps to the maximum available resources to try and achieve a result, the obligation in its entirety is measured through whether there is direct progress in the effective enjoyment of ESCR by rights-holders. Work by the CESR demonstrates similar findings with certain sub-obligations of progressive realisation, such as the duty to take steps and the duty to maximise resources being considered duties of conduct; the obligations of progressive realisation and, particularly, minimum core are understood as obligations of result.<sup>882</sup> Likewise, the development and use of the OPERA Framework highlights assessing the enjoyment of outcomes as a first step in analysing compliance with fulfilling ESCR.<sup>883</sup> In summary, and as already discussed in unpacking Article 2(1) of the ICESCR in Chapter 3, Scotland's ESCR framework must recognise that compliance with Article 2(1) cannot be satisfied solely by allocating resources to specific ESCR-related budget areas and policies. Further assessment is required as to whether this is effective in progressing and developing rights holders' enjoyment of rights.

To draw further evidence of this in practice from the findings of a project carried out by Queens University Belfast on budgets and social housing in Northern Ireland, where further funding was allocated, and housing saw an overall increase in financial resources, other measurements critical to the right to housing showed significant issues worsening.<sup>884</sup> These included waiting lists for social housing and a substantial number of households at risk of being homeless. They demonstrated that whilst a sole assessment of the funding allocated to housing in Northern Ireland would have suggested compliance with the obligations of progressive realisation, this was not felt by those requiring social housing use.<sup>885</sup> The study evidenced that despite the increase in expenditure for social housing, the approach taken by the Government of Northern Ireland was not effective enough to satisfy the requirements of progressively realising the right to adequate housing under the ICESCR.<sup>886</sup> From a more fiscal perspective, insight can be drawn from scholarly input and practice frameworks related to 'outcomes budgeting'. For example, Chowdhary captured the specific issue of funding 'inputs' and even 'outputs' over

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<sup>881</sup> Ibid.

<sup>882</sup> CESR OPERA (n 274).

<sup>883</sup> Ibid.

<sup>884</sup> QUB Budget Analysis Project (n 867); See also, PPR 'A Human Rights Budget Analysis of the Northern Ireland Housing Executive's Current Plans to Clad the Seven Towers Flats' (2011) Participation and the Practice of Rights Project.

<sup>885</sup> Ibid.

<sup>886</sup> Ibid.

specific ‘outcomes’ in exploring outcome budgeting in India. They highlight: ‘At present, budget scrutiny is mainly concerned with inputs (the amount of money that is being allocated to a specific department for a specific purpose in the forthcoming year) and outputs (the products of public bodies, for example, the number of children taught in schools or operations performed in hospitals). Outcomes can be seen as benefits resulting from outputs, which correspond to the ultimate aims of a government. For example, the output of health expenditure may be more doctors, but the outcome may be to improve the nation's overall health. The emphasis is on shifting the focus from mere "release of funds" (outlays) to "actual utilisation for intended purposes" (outcome).’<sup>887</sup> It is an analysis which directly echoes the views of those working in public finance and advocates of a human rights-based approach in Scotland.

Regarding practical steps Scotland can take, there are two interrelated actions to adopt. Firstly, building on the HRB approach, Scotland needs to improve monitoring of the enjoyment of ESCR. Measuring human rights is notoriously challenging, with its trials and tribulations receiving extensive attention from the human rights’ scholarly community.<sup>888</sup> It has taken concerted and extensive efforts to endow the legal framework with adequate monitoring devices, indicators, and benchmarks.<sup>889</sup> Despite the practical difficulties in achieving effective measurement of rights enjoyments, it fundamentally seeks to understand how the mobilisation and expenditure of resources impact the right-holders within a society. Human rights indicators, benchmarks, and other measurement tools are crucial to developing adequate monitoring of the impact of decision-making on people’s everyday outcomes. They are critical in reporting systems for human rights more generally. For this reason, the last two decades have seen an impressive increase in the development of toolkits, frameworks, and academic contributions to developing rights-based indicators and benchmarks, including indicators and benchmarks for measuring children’s rights and ESCR.<sup>890</sup> Global indexes are now commonplace worldwide and enable international comparisons and allow states to measure progress against

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<sup>887</sup> Harnita Chowdhary ‘Outcome Budgeting: Moving beyond Rhetoric?’ (2006) 41(25) *Economic and Political Weekly* 2515 at 2516.

<sup>888</sup> Gauthier de Beco ‘Human rights Indicators: From Theoretical Debate to Practical Application’ (2013) 5(2) *Journal of Human Rights Practice* 380; see also broadly Todd Landman and Edzia Carvalho *Measuring Human Rights* (Routledge: London, 2009); see also links to economic monitoring in Kate Raworth ‘Measuring Human Rights’ (2001) 15(1) *Ethics and International Affairs* 111; and methodological challenges raised in Russel Barsh ‘Measuring Human Rights: Problems of Methodology and Purpose’ (1993) 15(1) *Human Rights Quarterly* 87.

<sup>889</sup> OHCHR (n 867); Francesca Thorbury and Julieta Mendive ‘Indicators and Data for Human Rights and Sustainable Development: A Guide for National Human Rights Institutions’ (2022) Danish Institute for Human Rights; and Birgitte Feiring and Saionara König-Reis ‘Indicators and Data for Human rights and Sustainable Development: A Practical Approach to Leaving Noone Behind’ (2019) Danish Institute for Human Rights.

<sup>890</sup> Ibid. See also, Malcolm Langford and Tori Kirkebø ‘Children’s Rights’ Indexes: Measuring Norway’s Performance’ in Malcolm Langford, Marit Skivene and Karl Harald Søvig *Children’s Rights in Norway: An Implementation paradox?* (Universitetsforlaget, 2019).

internationally recognised and agreed-upon standards. Within human rights, extensive work has gone into influencing state monitoring practices and embedding a rights-based approach to monitoring and reporting.<sup>891</sup> Scotland, within its current journey and need for an improved rights-based monitoring system, should seek to utilise these international frameworks and resources alongside the numerous monitoring systems established within other states to update and upgrade its already existing NPF to deliver an effective performance framework which can help monitor rights realisation and provide an evidence base from which to optimise the use of resources within the state and ultimately plan the budget. Of course, this depends on the available corresponding data to underpin the indicators and benchmarks. Further consideration will be needed concerning what data in Scotland is available, what data is required as a priority, and how to resource any required data collection.

From the fiscal perspective, accurate data from rights-based indicators can allow for this data on outcomes to be more closely connected to spending decisions. Others who have explored such challenges in Scotland have highlighted the potential use of ‘outcomes budgeting’ in Scotland, which espouses budget accountability should be centred on ‘end results (often at a societal scale), as opposed to the service of spending itself’.<sup>892</sup> Broadly defined as ‘budgeting for outcomes’ or ‘outcomes-orientated budgeting’, a concept firmly established through the 1990s, these budgeting frameworks are now widely discussed throughout developed economies, as Hoque’s recent collection demonstrates.<sup>893</sup> These discussions often centre on setting the overall objective within a budgetary process, aligning expenditures with strategic goals and priorities, as explored above, and ensuring budget systems incorporate flexibility to handle the varied nature of government activities.<sup>894</sup> It is, no doubt, a complex task. For example, Lapsley and Midwinter’s work outlines a range of difficulties with implementing outcomes budgeting in Scotland whilst also recognising the task’s complexity, requiring a ‘never-ending process of continuous refinement’ and effective implementation.<sup>895</sup> Again, such findings illuminate the critical importance of ensuring that the enjoyment of rights is being effectively measured throughout Scotland. Where this thesis has argued for the use of central frameworks, such as the NPF, to inform the planning of the budget, it is also essential to ensure

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<sup>891</sup> For example, see Our World in Data ‘Human Rights Index, 2023’ available at <https://ourworldindata.org/grapher/human-rights-index-vdem>; and for and ESCR index see UCONN (n 350).

<sup>892</sup> Trebeck & Baker (n 850).

<sup>893</sup> Hoque (n 856); Allen Schick ‘The metamorphoses of performance budgeting’ (2014) 113(2) OECD Journal on Budgeting; and Marc Robinson and Jim Brumby ‘Does Performance Budgeting Work? An Analytical Review of the Empirical Literature’ (2005) IMF.

<sup>894</sup> Andrew Blazey & Scherie Nicol ‘OECD Best Practices for Performance Budgeting’ (2018) OECD.

<sup>895</sup> Lapsley & Midwinter (n 855).

adequate participation of civic society groups, public bodies, and individuals to hear evidence as to where these frameworks are failing to take account of local or specific community needs and where outcomes are not being reached. Monitoring rights is dependent upon both quantitative data as well as qualitative data from rights-holders themselves.<sup>896</sup> Gathering, analysing, and implementing both will be crucial to effectively connecting outcomes to spending and pivoting resources appropriately when required.

### 6.3 'Po-Active' Over 'Reactive' Planning: The Potential of Multi-Year Budgeting

Building upon the abovementioned findings on the need for effective resource prioritisation and continuous monitoring of their achievement, this section aims to highlight the current challenges faced by public bodies (duty bearers) to plan proactively to meet their ESCR obligations. Budget planning is crucial to effective governance for numerous reasons and critical to achieving long- and short-term goals. The role of fiscal planning is frequently raised throughout HRB literature and accompanying practical frameworks as being an essential first step before formulating budget proposals.<sup>897</sup> In essence, budget planning represents the very initial steps duty bearers can take to ensure human rights considerations are built into their outlooks, macroeconomic policymaking, and overall priorities for the coming budgets.<sup>898</sup> Effective budget planning for national and subnational governments can help ensure that sufficient resources are allocated to critical areas such as healthcare, education, housing, and social protection.<sup>899</sup> It can also help address inequalities by ensuring that resources are distributed to benefit marginalised and vulnerable groups, including through planning targeted spending on programs for women, children, minorities, and persons with disabilities, thus promoting social equity and justice.<sup>900</sup> Further, a well-planned budget process enhances government accountability and transparency as core principles for good practice. When budgets are planned and executed transparently, citizens can track how public funds are being used and hold their governments accountable for their commitments to human rights. This reduces the risk of corruption and misuse of funds and, in turn, encourages public participation in budget planning processes. Budget planning is thus a fundamental tool for ensuring that human rights are respected, protected, and fulfilled. It enables the effective allocation of resources, promotes transparency and accountability, supports economic stability, and

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<sup>896</sup> De Beco (n 888); OHCHR (n 867).

<sup>897</sup> OHCHR (n 258).

<sup>898</sup> Ibid.

<sup>899</sup> Ibid.

<sup>900</sup> Rudiger (n 38).

facilitates public participation in governance. Without thoughtful and strategic budget planning, the realisation of human rights would be significantly hindered.

To provide some context to the following discussion, Scotland, as with the rest of the UK, presents budget proposals yearly. As evidenced below, this creates long-term planning challenges to achieve specific goals and priorities within the limited resources available.<sup>901</sup> This has led many of those working in fiscal practice in the public sector in Scotland and, increasingly, across the UK to call for the use of multi-year budgets to enable better, longer-term planning of budgets to increase their overall effectiveness in using resources.<sup>902</sup> Before continuing, the first point to recognise within this overall discussion is that the concept of using multi-year budgets is not new in Scotland. Indeed, analysis of the use of multi-year budgets has described the UK as ‘the pioneer of multi-year budgeting, as it began the practice of conducting multi-year public expenditure surveys as early as 1961’.<sup>903</sup> As one interviewee brought to light...

*“It used to be that way. So, we used to have three-year budgets, and then it changed.”*

(Interview: Chief C)

Another explains how moving to yearly budget proposals impacts the ability to plan and carry out the statutory task of ensuring the financial gap of the public body is closed.

*"I suppose one of the key challenges is as as we kind of start this process, we don't know how much money we're going to get. We will be informed of that by the Scottish Government around about this year it's going to be around about the 9th of December, with a full, more more complete information being provided the week after, on the 16th of December. The indication this year is that that will be for one year, so that's one of the one of the big issues that we've had in previous years. That Audit Scotland and Accounts Commission kind of commented on is that you know we'll get a single-year settlement, and then we will have, we will set what we know in terms of what we anticipate spending against what our anticipated receipt will be, and then that drives out over the last couple of years a financial gap."*

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<sup>901</sup> Bernard Steunenberg ‘The politics within institutions for regulating public spending: conditional compliance within multi-year budgets’ (2021) 32 Constitutional Political Economy 31.

<sup>902</sup> See the Finance Minister of Scotland, Wales, and Northern Ireland calling for the return of multi-year budgets to help with financial planning. Available at: <https://www.finance-ni.gov.uk/news/murphy-presses-chancellor-multi-year-budgeting> (accessed 25/07/24).

<sup>903</sup> Jameson Boex, Jorge Martinez-Vasquez and Robert McNab, ‘Multi-Year Budgeting: A Review of International Practices and Lessons for Developing and Transitional Economies’ (2000) 20(2) Public Budgeting and Finance 91.



(Interview: Chief A)

The issue raised here demonstrates the problem of one-year budget cycles and the impact on public bodies' ability to plan ahead. In short, this presents a range of challenges for decision-makers, from having certainty over longer periods of time to support specific policies and programmes to balancing the books and setting tax rates, as was raised across the interviews.

*“The big kind of question is how do we make sure that that's fit for purpose over the longer term with, you know, we know that, you know, our expenditure needs to be offset by our income to equal 0, but we don't know what the other side of that coin is going to be. And I think this year we didn't know until after the deadline for us to set our Council tax what our actual final allocation was, so you know councils were having to make decisions on what their Council tax levels were, because in order, practically, you know, in order for us to build somebody and to set up a direct debit we need to give them four weeks, four clear weeks' notice. So, if we wanted to do a direct debit run for the 1st of April, we need to kind of have everything done by, you know, the 1st of March. And if you don't get that information until the 8th of March, then you're snookered, so you have to make that decision.”*

(Interview: Chief A)

A further example was raised in relation to closing the financial gap as is legally required by statutory duties.

*“if we had something that was longer term, it allows us to think longer term because if we're saying it's 3% cut but actually over three years, it's 10%, then what you really should be thinking about is how do I cut services over that period by 10% and the decisions that you make in a one year you wouldn't necessarily make if you were thinking longer term, because you'd have to think bigger and you might actually make, I suppose, different decisions because it takes a lot of effort to deliver budget savings.”*

(Interview: Chief C)

Another is related to the impact of pay settlements.

*“there's about a dozen factors that we look at but there's probably 2 that are that are much more dominant. So that is the pay award. So, we still haven't settled, which is done nationally a pay award for the current year. So, we've got budget assumptions in*

*there, which was based on the public sector pay policy that Kate Forbes set. She then changed that public policy after we set our budget, so we're set with a little bit of risk, but they've still not settled, so there's a bigger bit of risk, potentially if they settle at something higher, something higher than than we've budgeted for in the current year that they would flow through to next year's budget. So what do we budget for next year, uh, when we haven't even settled this year?"*

(Interview: Chief B)

For clarity, it should be noted that Kate Forbes was the previous Scottish finance secretary in charge of the budget process when the interviews took place. In continuing this narrative, another participant illuminated the further issue of not just year-long budgets but also changes in policy direction throughout the year, all of which point to short-term, reactive budgetary planning.

*"on that one-year budget bit, it's not only that it's one-year budgets, but it's that there's new policies announced or introduced part year. It's a frequent feature that we've seen increasingly over the last few years from the current government."*

(Focus Group Participant)

Ultimately, it is about having the information necessary for improved longer-term decision-making with an interviewee raising the issue as key to implementing better decisions. It is about the predictability of decision-making and providing as much certainty as possible on which to base decisions.

*"So, if you knew more and, you know, had more information, we can make better decisions."*

(Interview: Chief C)

As part of the expert focus group, the fiscal decision-makers distilled the problem to the simple fact that people are reactionary rather than proactive in their decision-making.

*"Yes, we do have to be reactive rather than proactive because we're getting very short-term funding."*

(Focus Group Participant)

Interestingly, as the discussion around planning and the potential of multi-year budgets developed further, one participant was keen to emphasise potential challenges in using such an approach within the current devolved context. A concern raised with multi-year budgets is the very antithesis of its main advantage in providing certainty. As is captured below, if such certainty is proved poorly founded, the consequences of basing decisions on inaccurate forecasts could be more detrimental than the more reactionary one-year budgets currently in use.

*“If we had rolling three-year budgets, that would be easier. It'll be easier to plan. But I, I'm quite cautious with this and and I think everybody else will say this. The same first sentence maybe I'm quite cautious that unless, for example, Scottish Government got three-year budget from Westminster. What I don't want is a one-year budget, which is accurate, and then two years that are really negative because they're being really cautious 'cause they've not got confirmation. So, you end up with a kind of, a much worse scenario.”*

(Interview: Chief B)

Here, devolution lies at the heart of the problem. Scotland, through the block grant provided by the UK Government, is dependent upon other decision-making. As covered in the previous chapter, Scotland only has certain powers over mobilising, allocating, and expanding its limited fiscal resources. Where more certainty would benefit all public institutions, it would require a ‘system-wide’ approach in which the Scottish Government was provided more certainty from the UK Government. As one Director of Finance was keen to point out.

*“It is really challenging for a Scottish government to give local governments longer than that because they need to get certainty over that as well, so it needs to be a system-wide approach to three- or five-year rolling budget cycles for that to really make a difference.”*

(Focus Group Participant)

Such was the concern that an accurate one-year budget was deemed preferable to a potentially inaccurate multi-year budget.

*“But I would rather have one-year budgeting than bad three-year budgeting, i.e., if Scottish government don't know what they're funding is going forward and they give*

*us three-year budgets, they will be automatically very cautious during that, because they don't know what they're going to get from UK government."*

(Focus Group Participant)

Another, via the initial interviews, raised the same challenge in the face of the top-down model of funding, with resourcing coming from the UK government to the Scottish Government and to Scotland's public bodies. As the interviewees more humorously stated, 'there's always a bigger boy with a bigger ball'.

*"Yeah, I, you know the the the the, the so the longstanding criticism of directors of finance, we get criticised all the time for not having long term financial planning by Audit Scotland. But Audit Scotland don't criticise the Scottish Government, for you know, for telling, you know, for making one-year settlements on, you know, the 5th and 6th of March after we've issued our Council tax bills. You know it, it feels like, you know, we get a lot of scrutiny and a lot of criticism where in actual fact, you know, and the Scottish Government will go well, actually it's the UK government then the UK government will go, well, there's, you know, there's always a bigger boy with a bigger ball, you know, kind of thing"*

(Interview: Council A)

These brief insights into the data gathered present both the potential of and call for utilising multi-year budgets to strengthen overall budget planning and proposals in Scotland. Single-year budgets have been raised as a central problem within the budgeting process for years by public bodies and wider civic society. For example, there is a consistent critique of single-year budgets when analysing budget scrutiny in Scotland primarily via the evidence provided and digested by Parliamentary Committees at both the pre-budget and budget approval stages. For example, the SHRC has raised the need to move from a single-year to 'multi-year budgets' consistently over the last five years and presents this as a crucial step to enabling longer-term planning to be in place and enabling more effective budget oversight.<sup>904</sup> Multi-year, 'forward' budgets have been around for decades and are generally defined as a 'document as detailed as the budget, or at least, showing relatively detailed forward estimates by spending agency and program'.<sup>905</sup> The IBP highlights: 'Generally, multi-year budgets are rolled over yearly. Every year, policy changes are identified. If aggregate resources are greater than the costs of carrying

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<sup>904</sup> EHRSJC evidence (n 301); see also EHRBAG (n 302).

<sup>905</sup> IBP 'Multi-Year Expenditure Programming Approaches' (1999) IBP at 2.

out continuing policies, the excess resources are distributed according to expenditure priorities throughout the period covered by the framework. If, on the other hand, costs exceed resources, the lowest priority programs are cut in the same way. Of course, if aggregate resources and spending needs diverge significantly, revenues may have to adjust to the extent that this is possible. The planning period consists generally of three to five years.<sup>906</sup>

Where HRB explicitly raises the need for adequate planning as part of any rights-respecting process, fiscal literature more sufficiently demonstrates the potential use of a multi-year framework to enhance governance mechanisms and why fiscal practitioners call for such proposals to be adopted and put into practice. First and most obviously captured, as a finding of the data, in the view of practitioners, multi-year budgets enable long-term strategic planning, ensuring the sustainability of critical programs such as healthcare, education, and infrastructure development, which are essential for fulfilling ESCR.<sup>907</sup> In addition, it secures continuity and stability for public services and reduces the ability and associated risks of abrupt political policy changes typical of annual budget processes.<sup>908</sup> The data reflected this point. Furthermore, they promote better resource allocation by allowing phased funding for long-term projects, thus improving their effectiveness and impact.<sup>909</sup> Fiscal discipline is also enhanced, as multi-year budgeting encourages governments to plan future expenditures and revenues, align spending with long-term priorities, and potentially even reduce deficits. As a final benefit, multi-year budgeting can be viewed as strengthening transparency and accountability by providing a clearer roadmap of planned expenditures and outcomes over several years, facilitating greater public oversight.<sup>910</sup> In summary, the potential of using multi-year budget plans and proposals lies in their ability to support long-term strategic planning, enhance fiscal discipline, promote transparency and accountability, and ensure the sustainability of programs that fulfil human rights. By adopting a multi-year approach, governments can better meet the needs of their populations, respond effectively to challenges, and achieve their development objectives in a more systematic and inclusive manner. For these many benefits, and others not captured here, the multi-year budgeting framework, as identified, has great potential to enable public bodies in Scotland to uphold and progress ESCR.

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<sup>906</sup> Ibid.

<sup>907</sup> Marcus Lam and Bob Beatty 'Budgeting and Financial Management: A Multi-year Budgeting Approach' in Helmut Anheier and Stefan Toepler *The Routledge Companion to Nonprofit Management* (Routledge: London 2020).

<sup>908</sup> See discussion in Terea Surrstine, Zsuzsanna Lonti, and Isabelle Joumard 'Improving Public Sector Efficiency: Challenges and Opportunities' (2007) 7(1) OECD Journal on Budgeting 1.

<sup>909</sup> Allen Schick 'Budgeting for Fiscal Space' (2009) 9(2) OECD Journal on Budgeting.

<sup>910</sup> Jameson Boex, Jorge Martinez-Vazquez and Robert McNab 'Multi-year Budgeting: A Review of International Practices and Lessons for Developing and Transitional Economies' (2000) George State University.

On the other hand, it is important to equally recognise the obstacles to effective multi-year budget use in Scotland raised by several participants. In states with the complexities and hierarchies of decision-making power, such as the UK, utilising multi-year budgets throughout the public sector depends on its use from the top down. As captured acutely by the participant, good fiscal practice is fundamentally about certainty, and where multi-year budgets can be used to produce longer-term planning, without producing these plans from a place of fiscal certainty, the damage of needing to readjust or divert resources constantly could, in practice, be more detrimental to fiscal practice than the current rolling annual approach. These findings are consistent with research on the effectiveness of multi-year budgets, where inaccurate forecasting, such as overestimating macroeconomic growth, was demonstrably harmful to the ability to fund essential programmes.<sup>911</sup> One further criticism worth highlighting, which was not raised within the data, is that multi-year funding can also be viewed as an ‘entitlement’ for specific policies, leaving it difficult to ‘revise’ budgetary allocations and expenditures when necessary.<sup>912</sup> This, importantly, would not only leave it difficult to remove resources for the reason of them not being available but would potentially undermine the ability of the Government or public body to move resources around as necessary in search of optimally progressively realising ESCR outcomes. In summary, for Scotland at the national and sub-national levels to adopt a multi-year approach effectively, it would require action from the UK Government, as the primary duty bearer and state party to the ICESCR, to adopt longer-term budget plans and proposals which would provide the certainty required further down the system for other public bodies to sustainably plan their fiscal practice in the pursuit of ESCR realisation.<sup>913</sup>

Considering potential solutions to this obstacle, there is the possibility to learn from the minimum core approach to protecting certain ‘inviolable core’ elements of ESCR. As outlined throughout Chapter 4, MCOs pertain to a minimum threshold of ESCR, which is immediately realisable and must be prioritised above all other priorities in times of resource shortages. The chapter, drawing upon the work of Landau, argued that the core doctrine could be used to guarantee certain levels of public social spending and act as an overall prioritisation device when weighing the scales of justice and making difficult trade-offs between upholding and realising human rights.<sup>914</sup> Were such a doctrine to be given domestic effect and applied through

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<sup>911</sup> IBP (n 905).

<sup>912</sup> Ibid.

<sup>913</sup> Farha (n 229).

<sup>914</sup> Landau (n 103).

fiscal decision-making, the nature of requiring absolute priority and guarantees for certain core ESCR-related funding areas could give rise to the potential use of multi-year frameworks for these allocations. Where certainty, in the absence of its provision from the top down, understandably presents a serious obstacle to the use of multi-year frameworks throughout the public sector, adopting a rights-based, ESCR-compliant approach to the budget could encourage their use by identifying allocations within the budget, which are guaranteed areas of social spending for years to come. Nor would it fall into the trap necessarily of overly reducing flexibility within the budget as areas considered to apply to progressive realisation, in which greater deference is given to the decision-making process of what to prioritise and inherently receive less certainty on a long-term basis, could remain budgeted for on an annual basis. For Scotland to seek to give greater domestic protection to ESCR and utilise the core doctrine to that effect, providing certainty of funding for identified minimum core allocations would present the opportunity for subnational governments and other public bodies to follow suit. It is an idea that requires further testing in theory and practice, but it would, in practice, reflect the hierarchy of immediate and progressive duties in ESCR realisation and combat current challenges in Scotland's fiscal decision-making.

#### 6.4 From 'Tax Burden' to 'Tax Justice': Maximising Resources Through a Progressive Approach to Taxation<sup>915</sup>

A final theme and call for action to raise within this chapter is the need to maximise resources through a progressive approach to taxation. As De Schutter's work keenly brings to light, it is not just the choices of spending which will impact the enjoyment of rights, but also how resources are mobilised.<sup>916</sup> Chapter 3 outlined the obligation to mobilise and use the maximum available resources to realise ESCR and how this can be achieved through a number of means. However, as a devolved nation fundamentally limited by law concerning sources of funding, such as borrowing, for example, with regard to maximising resources for public spending in Scotland, the most commonly targeted policy area is tax policy. For decades, it has been well understood that tax systems directly impact states' ability to respect, protect, and fulfil all rights.<sup>917</sup> To briefly reiterate its role in realising ESCR, tax is not only the primary method by which states can mobilise resources to fund state programmes and services essential to realising ESCR, but it is also the 'greatest lever' available for the redistribution of resources throughout

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<sup>915</sup> Raworth (n 421).

<sup>916</sup> De Schutter (n 420).

<sup>917</sup> Nolan et al. (n 280).

society and enables ‘democratic self-determination’.<sup>918</sup> Alston further demonstrates its critical nature in monitoring the values and ‘priorities’ of the State: ‘Tax policy is where the action really is in terms of setting priorities. Tax policies reflect better than all the ministerial statements and white papers the real priorities of a government. We can clearly see the activities that it chooses to incentivise, those that it opts to disincentivise, the groups that it decides to privilege, and the groups that it decides to ignore or even penalise. It makes no sense to say that human rights policies will be made by the human rights people, while tax policies will be made by the financial departments of the world, and the two will not interact.’<sup>919</sup> Nevertheless, it is equally understood that merely raising taxes will not inevitably lead to improved rights outcomes. Tax policy, quite to the contrary, can discriminate, amplify power structures, and regress rights outcomes for specific groups depending on how it is administered within a state.<sup>920</sup> It is not necessarily about raising taxes on those already paying but ensuring a progressive tax system, widening the tax base, and minimising tax evasion.<sup>921</sup> Consequently, taxation is a broad and complex subject matter (potentially even more so in Scotland due to devolution).<sup>922</sup> For example, ongoing fierce debates centre on the role of tax in encouraging or stifling economic growth.<sup>923</sup> Furthermore, a whole field of research focuses on the behavioural changes tax can cause within a society, potentially offsetting or amplifying the purpose of any changes to a tax system.<sup>924</sup>

To provide further context to the data below, both the interviews and the expert focus group raised the topic of tax in relation to the obligation to maximise resources under the duty to progressively realise ESCR. As the topic was introduced in relation to the corresponding obligation in ESCR law to maximise the resources available to spend on ESCR realisation, discussions moved to consider methods for raising resources. Here, the issue of tax policy, including Scotland’s relatively newly received taxation powers, and tax avoidance, was raised more generally, whilst those from local authorities raised their views directly in relation to the challenges faced in mobilising resources through taxes such as Council Tax in Scotland. Within the interviews, other avenues were explored, such as investments deemed to be risky for public

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<sup>918</sup> De Schutter (n 420).

<sup>919</sup> Philip Alston ‘Tax Policy is Human Rights Policy: The Irish Debate’ (2015) OHCHR.

<sup>920</sup> Fredman (n 424).

<sup>921</sup> De Schutter (n 420).

<sup>922</sup> Reuven Avi-Yonah, Gianluca Mazzoni ‘Taxation and Human Rights: A Delicate Balance’ as found in Alston & Reisch (n 32).

<sup>923</sup> HM Treasury and HM Revenue and Customs, ‘Tax measures to encourage economic growth’ (2024) National Audit Office

<sup>924</sup> Peter Levell and Imran Rasul, ‘Tax and benefit policy: insights from behavioural economics’ (2022) IFS; and more widely on the research of behavioural economics and tax, Olaf Weber, Jonas Fookien and Benedikt Hermann, ‘Behavioural Economics and Taxation’ (2014) European Commission Working Paper N.41.



bodies and raising other forms of service fees deemed to disproportionately target those from poorer socioeconomic backgrounds dependent upon public services. Tax in Scotland is partially devolved, with a mixture of fully devolved taxes (Council Tax), partially devolved (Income Tax), and others remaining reserved for the UK Government (National Insurance). Most importantly, Scotland also does not have powers over issues such as Corporation Tax, which predominantly receives the attention of human rights advocates due to tax-avoiding and obscuring practices of large multinational corporations. For this reason, corporate taxes are not discussed here, with the focus solely on the powers Scotland does have. In more detail, Scotland has recently received further powers over taxation through the Scotland Act 2016 and now has responsibilities in relation to five key taxes. Income tax, where it can set the rates and bands for Scottish taxpayers on non-savings and non-dividend income, e.g. earnings from employment, self-employment, pensions, or property. However, it does not have the power to change allowances – such as the personal allowance – or adjust tax policy surrounding earnings from interest and dividends. Further, devolved taxes include a Land and Buildings Transaction Tax and a Scottish Landfill Tax, alongside complete power over local taxes for local expenditures such as Council Tax and Non-Domestic Rates for businesses.<sup>925</sup>

As a final point to raise, with only an admittedly basic grasp of the complexities of the economic considerations, the discussion here does not dive into the depths of all considerations necessary when setting tax policy. There is no doubt further conversations and collaborations on approaches to taxation between fiscal decision-makers, economists, and advocates for human rights are necessary. Here, the focus is on Scotland's recent approach to taxation because the participating practitioners raised it as a key area of policy regarding the challenges in raising resources locally and the wider issues faced in Scotland's mobilisation of resources. The ongoing conversations in Scotland on tax are also highly pertinent due to the budget gap, with recent fiscal forecasts having brought to light a potential £1.5 billion budget gap between Scotland's spending plans and its revenue collection.<sup>926</sup> In short, difficult choices lie ahead regarding the relationship between tax policy and the delivery of core public services. To begin, the participant from the SHRC wished to stress and emphasise the importance of tax in adopting an overall rights-based approach.

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<sup>925</sup> Scottish Government 'Framework for Tax' (2021) Scottish Government.

<sup>926</sup> Burnside et al. (n 23); and Fraser of Allander (n 25).

*“you know, maximising a government’s resources is a key given rights obligation of the treaties that they’re about to incorporate. So, they have an obligation to maximise their available resources and they’re not doing that...”*

(Focus Group Participant)

They continued to raise avoidance as an equally pertinent matter.

*“You know, maximising a government’s resources is a key given rights obligation of the treaties that they’re about to incorporate. So, they have an obligation to maximise their available resources, and they’re not doing that... We did some really crude measurements because we didn’t have access to the full data, but you were looking at a range of between three and a half and eight billion pounds a year to the Scottish government’s loss to tax evasion and avoidance. And at the UK level, it was 35-80 billion. And these figures will vary depending on who is doing the research. But, you know, the modest one was HMRC’s estimate. And there’s a lot of money that is lost – then that’s just the evasion side of things in terms of tax raising powers.”*

(Focus Group Participant)

To focus on the largest revenue raiser, since 2017-18, income tax policy has diverged from that of the rest of the UK, with two bands that only exist in Scotland, known as the ‘starter’ and ‘intermediate tax’ bands which are set to provide a more progressive overall approach.<sup>927</sup> Additionally, Scotland has introduced changes to the basic and higher tax rates to provide a more progressive approach to taxation where those who can afford to pay more do so. As has been explored by Landman Economics Institute: ‘The proposed reforms do not affect any Scottish taxpayer with income below £23,350, and most of the increase in marginal rates affects only taxpayers with incomes (excluding savings and dividend income) of above £40,000.’<sup>928</sup> The changes were met with the usual mix of commentary, with some arguing the more progressive approach adopted in Scotland would fund welfare payments which do not exist in England, such as the Scottish Child Payment, and others arguing the new system is overly complex and stifles economic growth through the discouragement of investment. Importantly, Scotland is clearly attempting to adopt a more progressive approach to its current income tax levels, meaning in the view of the CESC and wider human rights legal framework, this could be demonstrated as steps taken to comply with the obligations of MAR and PR. However, in

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<sup>927</sup> Graeme Hoy ‘The key numbers in Scottish budget’s income tax choices’ (2024) Scottish Fiscal Commission.

<sup>928</sup> Howard Reed, ‘Raising taxes to deliver for Scotland’ (2023) STUC & Landman Economics at 5.

terms of straight fiscal analysis over political ideology, the new income tax rates in Scotland, according to the Scottish Fiscal Commission (“SFC”) following adjustments for ‘taxpayers changing their behaviour’, ‘For 2024/25, we estimate that the introduction of the new “advanced rate”, for earnings above £75,0000, will raise £74 million, whilst increasing the top rate – on earnings above £125,140 – will raise a further £8m’.<sup>929</sup> To place this in context, the SFC demonstrates that this extra £82 million raised is ‘equivalent to less than 36 hours of Scottish NHS spending’ and is therefore unlikely to fill the ‘funding gap’ Scotland currently faces.<sup>930</sup> The analysis provided in Scotland, both from economic institutions and rights advocates, has therefore begged the question of whether incremental changes to income tax rates or other existing taxes are the right approach. In other words, is the approach sufficient or should Scotland be thinking more progressively? The question came up within the focus group when discussing the notion of maximising resources.

*“Scottish government need to be looking to their future commitments and finding out how they’re going to adequately resource those outwith efficiency savings when those are gone for local government, I suppose, and the ability to use devolved powers in tax raising is out there and is reluctant to happen, but that needs to be considered, and we’re being forced to consider longer-term financial implications.”*

(Focus Group Participant)

Another participant agreed with the assertion and raised the need for a new approach to taxation by introducing a wealth tax in Scotland.

*“I know somebody mentioned right at the start, but around resource generation, there’s a whole discussion that the national government isn’t having around tax-raising powers that they could use and around things like how we tax wealth compared to how we tax income.”*

(Focus Group Participant)

As reflected in the focus group, wealth taxes have seen increasing interest in combating inequality and public support throughout many developed nations in recent years. They have also recently received direct attention from a UN Tax Committee focused on setting out a

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<sup>929</sup> Hoy (n 926).

<sup>930</sup> Ibid.

blueprint for nations to adopt such an approach to taxation.<sup>931</sup> A recent review by the Tax Justice Network captures this: ‘As citizens, our appetite to pay tax, our “tax morale”, is deeply bound to a sense of fairness. And, as inequalities have grown in all regions of the world, this sense of unfairness has deepened. This public sense of unfairness has found focus in wealth tax policy reforms.’<sup>932</sup> Certainly, recent research conducted across the UK demonstrates clear public support for an increase in taxes on people’s wealth.<sup>933</sup> Wealth taxes, of course, already exist in the UK and Scotland through taxes on the spending of wealth, such as VAT. However, within the context of the focus group discussion, it was clear that in raising a wealth tax, the participant meant more direct taxation of people’s accumulated wealth. Wealth taxes can generally be understood as a ‘broad-based tax on the ownership of net wealth’ where broad-based means ‘a tax on most (or all) types of assets, not only a specific type of property’.<sup>934</sup> Furthermore, while many options have been explored, the two most often raised are a one-off and annual wealth tax. The key difference is that a one-off wealth tax can be used as an ‘exceptional response to a particular crisis,’ while an annual wealth tax would secure longer-term public service funding and require an ongoing assessment of individual or household wealth.<sup>935</sup> Both have been used to different impacts in numerous States, with notable studies of their impact coming from Switzerland and Sweden.<sup>936</sup> In Scotland, a recent report focused on options for increasing taxes in Scotland to fund investment in public services has provided an analysis of the development and impact of an annual household wealth tax in Scotland could have on mobilising resources. Using the Scottish component of the UK Wealth and Assets Survey, the analysis demonstrates improved revenue-raising for funding public services and positive distributional impacts where only the wealthy would shoulder the costs.<sup>937</sup> However, it also recognises the technical barriers such as the need for ongoing assessments of household wealth, administrative costs, and the fact it would take time to design and implement in a devolved Scotland.<sup>938</sup> Despite this, the report recommends the Scottish Government consider and move to introducing an annual wealth tax to ensure sufficient funding for public services. Where Scotland’s international and potentially new domestic obligations give rise to the

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<sup>931</sup> Economic and Social Council ‘Committee of Experts on International Cooperation in Tax Matters’ (2023) E/2024/45-E/C.18/2023/4.

<sup>932</sup> Tax Justice Network, ‘Tax Justice & Human Rights: The 4 Rs and the realisation of rights’ (2021) Tax Justice Network.

<sup>933</sup> Arun Advani, Emma Chamberlain, Andy Summers, ‘A wealth tax for the UK’ (2020) Wealth Tax Commission.

<sup>934</sup> *Ibid* at 7.

<sup>935</sup> *Ibid* at 42.

<sup>936</sup> David Seim ‘Behavioral Responses to Wealth Taxes: Evidence from Sweden’ (2017) 9(4) *American Economic Journal: Economic Policy* 395; Samira Marti, Isabel Martinez & Florian Scheuer ‘Does a progressive wealth tax reduce top wealth inequality?’ (2023) 39(3) *Oxford Review of Economic Policy* 513.

<sup>937</sup> Reed (n 927).

<sup>938</sup> *Ibid*.

general requirement to assess whether it maximises the resources available, introducing more progressive approaches, such as the wealth tax raised within the expert focus group, would demonstrate a clear commitment to this principle. Certainly, within the context of Scotland's human rights journey, the discussion and eventual deliberation of new approaches to taxation is desperately needed.

Wealth taxes are but one option for a more progressive approach, albeit a publicly popular one. However, another option that received attention through the data was the role of Council Tax in Scotland. The impact of Council Tax freezes, in particular, was central to the discussion, with one participant laying out their views on the approach of the Scottish government in no uncertain terms.

*“So, when it comes to comes to the year when they've got an election, do they want to increase council tax or reduced service levels. 'cause that that that is this is. This is basically the choice that they will have unless, you know, the finance department came up with some financial tricks to close the gap a bit. Which you know often often we can do some things that are in loans funding and in things like that, but you know all these all these areas were flexibility have been narrowed down so much. Or done, already done that we are really looking at increase Council tax or reduced service levels.”*

(Interview: Chief D)

Council tax in Scotland is fully devolved, meaning local taxation is an area over which the Scottish Government has full control over the regime it uses, what rates it is set at, and where allowances should be made. In recent years, the Scottish Government has chosen to ‘freeze’ council tax rates at 3%, effectively removing the local public bodies' ability to mobilise the resources it views as necessary for meeting its duties. It has done so again within the most recent budget with a view to ‘benefit the taxpayer’.<sup>939</sup> This decision was much to the discontent of Scotland's local councils and civic society.<sup>940</sup>

*“Yeah, I think this, this is as you know, yeah, there's a couple of political points in there in terms of, you know, historically we've had the kind of Council tax freeze, and if you, if you as a Council choose to take that freeze, you get funded for a level of 3% increase*

<sup>939</sup> Scottish Government ‘Council Tax Frozen’ (17 October 2023). Available at: <https://www.gov.scot/news/council-tax-frozen/> (accessed 25/07/24).

<sup>940</sup> West Lothian Council ‘Council Tax freeze will result in service cuts’ (06 February 2024). Available at: <https://www.westlothian.gov.uk/article/80961/Council-Tax-freeze-will-result-in-service-cuts#:~:text=The%20Scottish%20Government%20announced%20in,would%20be%20provided%20for%20councils.>> (accessed 25/07/24).

*so, and then, then then there's the question about, well, is that 3% increase baselined in? So it, is it 3% this year, and you know, that increases sustained in perpetuity, or is it just a one off cash balance for this year, knowing that next year you're going to have a bigger gap. So, often it's it's this kind of horseplay with sort of central government or with Scottish Government that... uh... Around the kind of the Council tax freeze”*

(Interview: Chief A)

This interviewee even discusses how the central government can use the approach as an ‘active threat’ to the local settlements it receives.

*“So, we generally set at the highest, uh, you know, so we generally go with the 3% or we take the the offer from Scottish Government to freeze with cash. The the thing is, if you don't take the offer with Scottish Government and you say right Scottish Government said 3% freeze, I'm sorry, 3% kinda freeze but will compensate you up to 3% and if you don't do that and say you set it at a 3%, they'll just take that money off your settlement. So, there's that kind of active threat that even if you were to go rogue, we'll take it off here or there's a form of words that they used to say if you don't accept this, we will need to look at your settlement so, you know?”*

(Interview: Chief A)

Council tax is the central method a local council in Scotland can use to mobilise resources to meet the needs of their local population and deliver services key to realising ESCR. Regarding the central government's decisions regarding freezing council tax, especially when services are consistently being reduced or cut altogether, serious questions should be asked about the Scottish Government's current approach to using its powers over local taxation. In their report, Landman Economics seeks to set out immediate options for adopting a more progressive approach to local taxation in Scotland. The report highlights four potentially progressive options to adopt:

1. Lowering the council Tax reductions for purpose-built holiday homes from 50% to 25%.
2. Lowering the Council Tax reduction range for second homes from between 10% and 50% to between 0 & 15%

3. Adding further discretion to the empty homes surcharge – an additional 50% after two years of the property being empty and a further 50% after three years. This would allow for a maximum of 300% council tax on long-term empty properties.
4. Increasing Council Tax for bands F, G & H. Calculations suggest that an increase of just £100 per property for the most valuable 25% of properties in Scotland would net £69m. More could be raised from the 144,000 properties in Scotland with a median price of more than half a million.<sup>941</sup>

Where those working in local councils are acutely aware of the issues caused by freezing local taxes for political gain and are therefore keen to raise the impacts this has on the ability of the public body to meet its duties, the more pertinent question is whether Council Tax in its current form should exist at all. Council tax has long been known to have regressive impacts, ‘with households living in high-value houses paying far less as a proportion of their property wealth than households living in lower-value houses’.<sup>942</sup> Additionally, Council Tax rates in Scotland have not been revalued since their inception in 1991. Analysis from the Fraser of Allander Institute demonstrates the impact this has on higher-value housing, which has to pay less on Council Tax than those in lower-value housing.<sup>943</sup> This has led to calls for introducing a Proportional Property Tax (“PPT”) to charge everyone a rate of 0.48% of the current value of their property and replace the current regime.<sup>944</sup> For example, a recent report by the Institute for Public Policy Research has argued that introducing a PPT would effectively reduce wealth inequality within the state and, be a more effective tool for securing the fair redistribution of resources.<sup>945</sup> It is also a call echoed by Landman Economics to assess methods for Scotland to raise more resources for service delivery.<sup>946</sup> Importantly, analysis and reports such as these demonstrate that time, effort, and evidenced research have outlined different and often more progressive approaches to taxation within a state. Where Scotland is obliged to mobilise the maximum available resources, it is not just a question of whether the resources raised are sufficient but if they are raised in a manner that does not undermine ESCR realisation. While this research, and the practitioners taking part in it, does not exclusively recommend a singular

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<sup>941</sup> Reed (n 928) at 13.

<sup>942</sup> Ibid.

<sup>943</sup> Fraser of Allander Institute ‘Tweaking around the edges of Council Tax does not fix its fundamental flaws’ (13 July 2023). Available at: <<https://fraserofallander.org/tweaking-around-the-edges-of-council-tax-does-not-fix-its-fundamental-flaws/>> (accessed 25/07/24).

<sup>944</sup> Ibid.

<sup>945</sup> Shreya Nanda ‘Pulling Down the Ladder: The Case for a Proportional property tax’ (2021) Institute for Public Policy Research.

<sup>946</sup> Reed (n 928).

approach for Scotland to adopt, as to do so would require more in depth, interdisciplinary analysis of tax systems, what is clearly established is a review of the current tax system against the obligations of ESCR and a pathway laid for more progressive approaches to be adopted both in the immediate where possible as well as in the longer term.

### 6.5 Concluding Remarks

To conclude this chapter, it seems pertinent to summarise its key findings and to present evidence-based and practical recommendations for public institutions in Scotland to adapt existing and adopt new approaches in the pursuit of enabling rights-based budgeting and budget analysis. As argued at this chapter's outset, while the legal framing and underpinning of HRB will serve to enable the potential monitoring and remedying of ESCR, it is within the realm and discipline of fiscal practice and decision-making that real, everyday impact will be achieved regarding HRB in Scotland. Creating the space in which to bring together different views and voices to deliberate upon practical measures to give effect to theoretical and analytical frameworks has been a central endeavour of this research project and the findings produced and analysed through this chapter represent but a snapshot of the potential such deliberations could produce in the long-term. For example, further key themes identified in Table 2 within the methodology bring to light further core areas where common ground between the realities of fiscal practice and a HRB approach to resources and acts to highlight the rich potential of further research within this field. Here, recommendations have centred on structural challenges to the overall fiscal system in Scotland. Where challenges and obstacles to ESCR-guided decision-making are consistently raised, practitioners, too, were keen to begin developing potential solutions to ongoing issues.

Firstly, and as a very initial step to take as an obligation of conduct, it is recommended Scotland begin to identify and establish national priorities which adequately reflect and are underpinned by the IHRL legal framework. This, in keeping with principles of good governance and theories of deliberative democracy, should be done with adequate participation of rights-holders as well as duty-bearers expected to deliver against such priorities.<sup>947</sup> Equally important within this initial step is ensuring the adequate dissemination and, thus, sharing of any priorities set throughout the public sector to ensure the efficient and effective use of resources as they move through and primarily down the system. As will be extensively established in the following chapter, within the domestic context, subnational actors are crucial to delivering against

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<sup>947</sup> Wampler (n 722).



numerous human rights obligations.<sup>948</sup> Ensuring their participation in and sharing of priority setting in Scotland will be critical to the entrenchment and overall success of the legal standards. Beyond setting rights-based priorities, the discussion built upon these foundations to demonstrate the integral need to ensure the way resources are mobilised, allocated and expended are monitored and measured in relation to rights-holders outcomes.<sup>949</sup> Conducting both the interviews and expert focus groups brought to the fore palpable frustration with the current approach in Scotland to focus on the resourcing of specific policies in the hope of achieving outcomes instead of carrying out the more challenging task of connecting spending to the everyday enjoyment of ESCR. The reasons for doing so are clear as resourcing inputs, as described by the participating practitioners, provide a quicker, less complex, and, at times, effective way to demonstrate funding for social spending. What it fails to account for, as the example of teacher-to-pupil ratios in Scotland laid bare, is the effectiveness and efficiency of whether the funding provided is achieving its intended results. It is undoubtedly a more complex, data-intensive, and, consequently, costly way in which to allocate and spend resources due to the need for disaggregated data and monitoring and potentially frequent adjustments to policy.<sup>950</sup> However, what it offers in practice is a means to deliver resources with increased allocative and operative efficiency. In theory, offering fiscal savings from which to invest in further monitoring and rights realisation. Outcomes budgeting already exists as a framework and there is a wealth of global practice to draw from in how to achieve results, what is required in Scotland is further recognition of the shortcomings of the current systems in place and, over time, action to connect spending to outcomes driven by data.

Alongside the above, additional recommendations were formulated in relation to overall budget planning in Scotland. Recognised as an integral step within the budget formulation phase, and, therefore, the most crucial stage of the budget cycle from which to give effect to ESCR, budget planning is currently carried out in a primarily reactive manner with local councils reacting to the Scottish budget and the Scottish budget reacting to the UK's. In practice, this top-down chain reaction creates real challenges for decision-makers to plan long-term and plan proactively how best to progress against the priorities set. While it is understood that financial planning requires certainty to avoid the constant readjustments of budget allocations, there is the potential in Scotland to utilise a minimum core approach to identifying clear priority areas of social spending to guarantee levels of funding over a longer period of time and give them

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<sup>948</sup> Farha (n 229).

<sup>949</sup> Trebeck & Baker (n 850).

<sup>950</sup> Lapsley & Midwinter (n 856).

effect via multi-year budgets. Without the UK Government's support in such matters, the use of multi-year budgets as a whole remains an overly risky approach, but for areas to be guaranteed as an absolute minimum, there seems to be potential to begin thinking and planning longer-term in how to fund these identified areas. Finally, and more covered through the ESCR legal literature, Scotland must begin to tackle its tax system to present a more progressive and rights-based way of distributing its resources. Those participating have brought to light the regressive and, ultimately, poor use of Council Tax in Scotland, as well as the lack of progress in tackling tax evasion. Tax policy lies at the heart of social justice.<sup>951</sup> With Scotland seeking to have a greater domestic effect on the rights of the international legal system, assessing its current economic foundations, such as tax, presents one of the most significant steps it could take to progress ESCR.

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<sup>951</sup> Alston and Reisch (n 32).

## **Chapter 7**

### **Thinking ‘Down the System’: The Potential of Subnational Government to Drive Fiscal Reform**

With the preceding chapter having focused on identifying key challenges and opportunities for improved budgetary practice in Scotland, this chapter takes a closer look at the more acute issues currently faced by Scotland’s local government. This is primarily for two reasons. Firstly, while under international law, the UK Government remains the primary duty bearer and ultimately responsible for the progressive realisation of ESCR, many public services throughout the UK, including in Scotland, are delivered by its local government.<sup>952</sup> Since 1996, local government in Scotland has been made up of 32 local authorities (councils), each with elected members from specific political parties and elected councillors who remain independent.<sup>953</sup> Their key duties are provided via the Local Government (Scotland) Act 1973 and the Local Government Scotland etc. (Scotland) Act 1994.<sup>954</sup> However, some additions were made via the Scotland Act 1998 and the subsequent creation of the Scottish Parliament. The Acts provide statutory duties on local authorities to provide services ranging from schools (5 to 16-year-olds), waste management, housing for the homeless, culture and recreational facilities, and social care packages.<sup>955</sup> Furthermore, Scotland’s public bodies, including all local authorities, under the Equality Act 2010 and Fairer Scotland Duty have a statutory duty to have ‘due regard’ to the need to eliminate discrimination, advance equality of opportunity, and reduce inequalities caused by socio-economic disadvantage.<sup>956</sup> A duty that has been relatively ineffective according to a report published by Equality and Human Rights Commission.<sup>957</sup> In short, local government in Scotland lies at the very heart of delivering welfare and public services critical to fulfilling rights holders’ ESCR.<sup>958</sup> A role for which, certainly from the international legal perspective, they have historically lacked serious

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<sup>952</sup> Gauri and Brinks (n 98) at 11.

<sup>953</sup> There are currently 1,227 elected councillors in Scotland. For an overview of their roles, conduct and pay grades, see Scottish Government, ‘Local government’ available at:

<https://www.gov.scot/policies/localgovernment/councillorsrolesconductpay/#:~:text=Each%20council%20is%20made%20up,normally%20elected%20every%20five%20years.>> (accessed 25/07/24).

<sup>954</sup> Local Government (Scotland) Act 1973 and Local Government Scotland etc. (Scotland) Act 1994.

<sup>955</sup> S32 Housing (Scotland) Act 1987.

<sup>956</sup> Section 149, Equality Act 2010; See also, Section 1 Equality Act 2010 setting out the Fairer Scotland Duty.

<sup>957</sup> Elaine Wilson Smith, Diego Garcia Rodriguez, and June Brawner ‘Evaluating the socio-economic duty in Scotland and Wales’ (March 2021) Equality and Human Rights Commission.

<sup>958</sup> Herbert Obinger, Francis Castles and Stephan Leibfried ‘Introduction: Federalism and the welfare state’ in Herbert Obinger, Stephan Leibfried and Francis Castles *Federalism and the Welfare State: New World and European Experiences* (Cambridge University Press 2009).

recognition.<sup>959</sup> Though, as this chapter develops, the importance of ‘localisation’ in upholding and promoting human rights is increasingly receiving attention.<sup>960</sup> For example, in a 2011 collection of essays, the relevance of human rights to local government and governance systems was explored from both a theoretical and local case study perspective, bringing to light the many circumstances in which local governments can act to fill the void left by national governments in fulfilling rights obligations.<sup>961</sup> In introducing the collection, De Feyter eloquently explains how democratisation and decentralisation have led to local governments often finding themselves on the front line, both for realising rights standards and also for defending against violations. They assert: “It is at the local level that abuses occur, and where a first line of defence needs to be developed, first and foremost by those who are under threat. It is when people face abuse in their personal experience and in their immediate surroundings that they feel prompted, even ‘obliged’, to engage in collective action for the defence of their rights. At that time the efficacy of mechanisms for the protection of human rights is really put to the test. In other words, it is at the local level that the possession of human rights either proves real or illusory’.<sup>962</sup> Indeed, in the last decade, their central part to play in a state’s compliance with international law has been espoused consistently by UN human rights mechanisms and representatives.<sup>963</sup> For this reason, this chapter aims to assert that advocates of rights-based approaches to resources should not solely focus on the national context when so many ESCRs are delivered locally.

However, the chapter also wishes to illuminate a further, more novel perspective in the context of Scotland’s current fiscal challenges to arise out of the data. With new ESCR duties on the horizon, if ESCR is to become more widely and readily enforceable in Scotland, as it is currently politically committed to, the resourcing of both local services and, consequently, local government will increasingly come under scrutiny from a legal perspective. Therefore, preparation and collaboration with and between Scotland’s local government will be critical to

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<sup>959</sup> Barbara Oomen and Moritz Baumgartel ‘Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law’ (2018) 29(2) *European Journal of International Law* 607.

<sup>960</sup> Luis Eslava ‘Building the global from the local’ in Luis Eslava *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2015); Jonathan Miaz et al. *Engaging with Human Rights: How Subnational Actors use Human Rights Treaties in Policy Processes* (Palgrave Macmillan 2024); and Gillian MacNaughton and Angela Duger ‘Translating International Law into Domestic Law, Policy, and Practice’ in Lawrence Gostin and Benjamin Meier *Foundations of Global Health and Human Rights* (OUP 2020); Farha (n 229); European Union Agency for Fundamental Rights, “Human rights cities in the EU. A framework for reinforcing rights locally” (2021) at 15; K De Feyter et al, *The Local Relevance of Human Rights* (Cambridge University Press 2011).

<sup>961</sup> Ibid De Feyter et al.

<sup>962</sup> Ibid at 1.

<sup>963</sup> UN Human Rights Council Resolution 39/7 ‘Local government and human rights’ (28 September 2018) UN Doc A/HRC/RES/39/7; UN Human Rights Council Resolution 24/2 ‘Local government and human rights’ (27 September 2013) UN Doc A/HRC/RES/24/2; UN Human Rights Council Resolution 51/12 ‘Local government and human rights’ (6 October 2022) UN Doc A/HRC/RES/51/12; and Farha (n 229).

effectively implementing any new rights-based framework throughout the public sector.<sup>964</sup> As the chapter's data (as well as official fiscal outlooks) demonstrates, Scotland's local governments are currently facing a crisis in their overall funding models and ability to meet local-level service demands.<sup>965</sup> While those who participated in this research project undoubtedly gave their time earnestly, there can also be no doubt that they did so because Scotland's incoming human rights duties may provide an opportunity to hold the central government to account. Accountable for the decisions it has taken in recent years and demonstrate the incapacity of local government to continue as it is currently expected to do. In essence, the chapter considers the novel contribution that local government in Scotland, after a decade of fiscal austerity and budget cuts, have the potential to be used as institutional actors to enable progressive fiscal reform. While evidence has often pointed to a lack of human rights practice within subnational government systems, the data gathered through this project brings to light the potential to turn local governments into fiscal allies in pursuing progressing fiscal practices and their ability to account for human rights standards.

The chapter begins by first establishing more firmly the nexus between the realisation of ESCR and subnational governments before moving on to consider the views of the chiefs of finance, who gave their time to outline the acute challenges they currently face fiscally and willingly considered what the principles and obligations espoused by HRB offer their decision-making processes. Through exploring central themes, including the devastation of austerity to local finances coupled with the regression of decentralised decision-making, the chapter aims to bring to light the extent to which Scotland's public bodies are on the brink of being able to deliver even 'core' services, and how the process of fiscal consolidations has fundamentally altered the approach to setting local budgets. The chapter considers the options for adopting a rights-based approach for Scotland's public bodies and the potential to use HRB to bolster existing arguments on the need for further resources. In doing so, the chapter argues that while 'local governments enhance the relevance of human rights, human rights also enhance the power of local governments'.<sup>966</sup> As a final but important contribution to the chapter, it has been drafted to be more descriptive and exploratory in character. This is primarily because it is a

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<sup>964</sup> Already, public bodies face new domestic duties under the UNCRC (Incorporation) (Scotland) Act 2024, within which international guidance emphasises the importance of adopting budgetary measures to realise children's rights. As an important addition, the CRC Bill Policy Memorandum also raises: 'the Bill will require public bodies to ensure that policy and practice is fully in alignment with the UNCRC requirements or else they risk being challenged in court'; See also Miaz (n 957).

<sup>965</sup> Audit Scotland 'Local government budgets 2024/25' (May 2024) Audit Scotland.

<sup>966</sup> Michele Grigolo, 'Local Governments and Human Rights: Some Critical Reflections' (2017) 49(1) Columbia Human Rights Law Review 66 at 68; see also Mintao Nie 'Divided governmental structure and state compliance with international human rights law: a reputation-based approach' 34 (3) Leiden Journal of International Law 705.

novel piece of research with more open-ended findings from which to conduct further research. But also, because it more clearly demonstrates the overarching narrative of the gap between current theory and the realities of everyday practice. Having spent much of this thesis relating back to the IHRL framework, there is a need to let the data demonstrate just how challenged the Scottish public sector currently is and how disconnected the international human rights framework can be from the everyday workings of a chief of finance within Scotland's local government. In the following Chapter 8, attention will be turned to building concluding recommendations for improving practice throughout Scotland's budget processes.

### 7.1 The Role of Local Government in Upholding and Promoting Economic, Social and Cultural Rights

The excerpt below encapsulates the recognition that local government in Scotland effectively touches every right. Once again, bringing to the fore the challenge presented in Chapter 6 on 'which rights to prioritise', the finance chief, as part of the focus group, wished to emphasise just how extensive the role of local government in realising ESCR is.

*"I think one of the challenges that we have as local government from the human rights perspective is we touch every right. We cover everything. So, there's issues about, like, how do you make decisions about which rights to prioritise or not, which is difficult, but also the fact that I think for some, but not all, but for some of the rest of the public sector, they think it's easier because they have a very- potentially a very narrow focus on one or two rights. I mean, whether or not they've got the correct focus and if they should understand that some of the rights are actually, you know, some of what they contribute to is wider. But I think for local government, there is that challenge of we definitely cover everything, and we know we do. But within the public sector landscape, we're then dealing with partnership organisations that might have much more specific focus and therefore the decisions they make on budgeting, on policies, on delivery, that has an impact on us as well. And managing that interaction is something to be aware of too."*

(Focus Group Participant)

Despite having historically existed in the periphery vision of IHRL, upon assessing the international legal framework, the rights and corresponding obligations it espouses have intentional, extensive implications for subnational governments.<sup>967</sup> Indeed, the HRC has

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<sup>967</sup> Human Rights Council, Report of the Advisory Committee on Its Ninth Session, UN Doc. A/HRC/AC/9/6, 14 August 2012, at 19.

surmised that ‘all branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level — national, regional or local — are in a position to engage the responsibility of the State Party’.<sup>968</sup> Supporting this entrenchment of responsibility throughout the institutions of state parties is guidance from the CESCR, which comments that ‘all administrative authorities will take account of the requirement of the Covenant in their decision-making’. Further still, the CRC has clarified that all local administrations should ‘have the necessary financial, human and other resources to effectively discharge [their] responsibilities’.<sup>969</sup> In effect, it recognises the fundamental challenge many local administrations face (even before the policies of fiscal consolidation post-2008). The clearest affirmation of the role of local government was provided by the HRC in a 2015 resolution, which established that ‘while the State remains free to determine its internal structure and functions through its own law and practice, for the purposes of international responsibility the conduct of its institutions, administrative divisions performing public functions and exercising public powers is attributable to the State’.<sup>970</sup> Moreover, ‘it is the central government which has the primary responsibility for the promotion and protection of human rights, while local government has a complementary role to play’.<sup>971</sup> Further yet, it continued to espouse: ‘To comply with their human rights responsibilities, local authorities should have necessary powers and financial resources. Adequate implementation of human rights, particularly ESCR, by local authorities requires financial resources, which are not available everywhere; this should be considered at the national and international levels. It should be particularly emphasised that, whatever powers that are conferred upon local authorities, they would not be effective if no financial resources were available to carry them out’.<sup>972</sup> The CESCR, through its monitoring practices, has also sought to highlight the crucial need for local bodies to be made ‘fully aware of their obligations under the Covenant’.<sup>973</sup>

Miaz et al. in a recent contribution to the nexus between subnational policy processes and human rights law, have also sought to demonstrate how ‘legal scholars studying the complex interplay between international law and domestic legal systems have increasingly recognised the importance of domestic legislative actors to the effectiveness of international law’.<sup>974</sup> As

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<sup>968</sup> Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant at para 4.

<sup>969</sup> CESCR General Comment No. 9 (n 790) at para 9; CRC General Comment No. 5 (n 48) at para 41.

<sup>970</sup> United Nations Human Rights Council, ‘Report of the United Nations High Commissioner for Human Rights on the Role of Local Government in the Promotion and Protection of Human Rights’ (7 August 2015) UN Doc A/HRC/30/49 at para 18.

<sup>971</sup> *Ibid.*

<sup>972</sup> *Ibid* at para 22.

<sup>973</sup> See, for example, concluding recommendations to Ukraine E/C.12/UKR/CO/7 (CESCR 2020).

<sup>974</sup> Miaz et al (n 960) at 8.

further argued by Oomen and Moritz: ‘With nation-states often in crisis or political deadlock, local authorities have increasingly asserted themselves as an alternative with greater legitimacy and more hands-on impact, and they are recognized as such by policymakers, scholars and international and regional organizations alike. This development is visible in all fields of international law, and international human rights law forms no exception.’<sup>975</sup> In addition, further evidence has been produced in relation to the ability of local governments to engage with the complexities of international law: ‘Local governments, defined by the UN as the lowest tier of general public administration within a State, have long stepped out of the boundaries of competence they were thought to be confined in. They engage in foreign relations autonomously from the State in whose territory they are located, establish transnational city networks to facilitate international cooperation and representation, set standards and sign charters, declare themselves human rights cities, symbolically ratify international human rights treaties, report to the UN on their progress on the SDGs, and take public positions opposing their national governments on issues of international law.’<sup>976</sup> This impact has culminated in scholarly contributions demonstrating the importance of local government in implementing human rights treaties, giving effect to court judgments, and, crucially, realising ESCR for this discussion.<sup>977</sup>

Establishing this nexus provides a necessary backdrop for two key arguments this chapter offers in response to the challenges raised by the participating chiefs. Firstly, and most obviously, related to the minimum core doctrine and immediate realisation of ESCR standards, local authorities in Scotland lie at the forefront of delivering core public services essential to upholding fundamental human rights. They are critical actors in delivering and facilitating many of the key public services designed to fulfil basic ESCR, such as the right to an adequate standard of living. Without their buy-in, the implementation of ESCR as a framework for decision-making and driving accountability will be inherently limited. Secondly, and equally importantly, Local governance plays an irreplaceable role in ‘bringing government to the grassroots and enabling citizens to participate effectively in the making of decisions affecting

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<sup>975</sup> Oomen and Moritz Baumgartel (n 959) at 608.

<sup>976</sup> Elif Durmus ‘A typology of local governments’ engagement with human rights: Legal pluralist contributions to international law and human rights’ 38(1) Netherlands Institute of Human Rights 30 at 30; see also Frederic Megret ‘Local and Regional Government and Human Rights Cities’ in Christina Binder, Manfred Nowak, Jane Hofbauer and Philipp Janig *Elgar Encyclopedia of Human Rights* (Elgar 2022); and European Union Agency for Fundamental Rights, “Human rights cities in the EU. A framework for reinforcing rights locally” (2021), at 15.

<sup>977</sup> See, for example, Beth Simmons *Mobilising for Human Rights: International law in Domestic Politics* (Cambridge University Press 2009); Matthew Saul ‘Local Authorities at the European Court of Human Rights’ (2024) *The Int J Hum Rts*; Miaz (n 960); and Eslava (n 960); and Farha (n 229).



their daily lives’.<sup>978</sup> Chapter 3 already raised the impact of decentralisation on enabling rights scholars and advocates to ‘follow the money’.<sup>979</sup> Drawing again from the theoretical underpinnings and connections of deliberative democracy and distributional justice, decentralised local government helps to enable active participation and deliberation over the use of a state’s limited resources.<sup>980</sup> From providing basic accountability mechanisms such as complaints handling systems as methods of delivering effective remedies to actively encouraging public participation in decision-making and transparently publishing the decisions of local decision-makers, local government are central to building a human rights culture in Scotland and delivering a bottom-up framework in which local needs drive the national government’s priorities. Or, at least, as has been envisaged by best practice. Surprisingly, little attention is given to their funding models, budgetary processes, and overall role in delivering against both domestic and international human rights duties, specifically within HRB literature.

## 7.2 “After 15 years of cuts, there’s, there’s no easy efficiencies anymore”: Austerity’s Legacy for Local Fiscal Decision-Making in Scotland

Scotland’s local authorities vary in size, population, demographics, geography, rurality and, crucially, resources, meaning the challenges they face vary considerably and can be awfully specific to their boundary area. For example, delivering local services and thus effectively fulfilling basic ESCR in Scotland’s Western Isles (Comhairle nan Eilean Siar) differs considerably from delivering key services in Glasgow (Glasgow City Council). In Scotland today, numerous challenges are faced by all local authorities, from equal pay awards, sustainability agendas, increasing demand pressures, and changing demographics with an ever more elderly population.<sup>981</sup> These were all clear themes to be raised through the interview process, but underpinning them all is the shared, central theme of austerity and its fundamental impact on providing adequate resources to continue delivering for the people of Scotland. As a report into the impact of austerity on local government in Scotland surmises, there is a ‘cost’ for the ‘cuts’ that have proliferated throughout the public sector.<sup>982</sup> In Chapter 3, the severity of austerity’s impacts on ESCR realisation was raised as a significant driver behind the development of HRB as a framework to assess a state’s commitment to the obligations of the

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<sup>978</sup> Human Rights Council ‘Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee’ (August 2015).

<sup>979</sup> Blyberg (n 149).

<sup>980</sup> Rawls (n 685); and Habermas (n 685).

<sup>981</sup> See research on Scottish Demographics changes and predictions in Scottish Government ‘Demographic Change in Scotland’ (2010) Scottish Government Social Research; see also the impacts this has on fiscal decision-making in Mark Pearson, Stephen Smith and Stuart White ‘Demographic Influences on Public Spending’ (1989) 10(2) Fiscal Studies 48.

<sup>982</sup> For an overview of the impact of austerity on local government in Scotland, see Annette Hastings et al ‘The cost of the cuts: the impact on local government and poorer communities’ (2015) University of Glasgow.

ICESCR.<sup>983</sup> In what was essentially a vast ‘transfer of wealth from the poor to the rich’ paid for by cuts to government social spending, austerity ‘simply exposed the reality that, for the vast majority of governments (irrespective of political stripe), commitments to socio-economic rights were, in the context of neoliberal hegemony, only ever formal’.<sup>984</sup> Proof of this statement has only strengthened in the decade since its publication. Over a decade on, food bank usage continues to rise, homelessness is pervasive, poverty and inequality have worsened, critical public infrastructure crumbles, and the hope of a generation has waned as the wealthy consolidate their financial riches along with the power and protection it buys.<sup>985</sup> As was underscored by the visit of the UN Special Rapporteur on Extreme Poverty, Philip Alston, to the UK in 2018, where he confronted the issues of resourcing local services and its rapid degradation head-on: ‘But austerity policies have deliberately gutted local authorities and thereby effectively eliminated many social services, reduced policing services to skeletal proportions, closed libraries in record numbers, shrunk community and youth centres, and sold off public spaces and buildings including parks and recreation centres.’<sup>986</sup> In Scotland, while not as dire as the situation in the rest of the UK due to certain Scottish Government interventions and a higher average net spend on individuals, local government’s core funding has still seen drastic cuts in the face of increasing demand.<sup>987</sup>

The purpose of raising these heavily researched and evidenced issues is not to once again chastise the wider economic climate upon which these decisions were made but to provide context for the themes and discussions laid out below.<sup>988</sup> Local Government in Scotland has never faced such a challenging fiscal position.<sup>989</sup> Increasing demand, dwindling reserves, and cuts to core funding have left these public institutions bereft of easy choices in the face of statutory duties to set a balanced budget. The views outlined below demonstrate this in no uncertain terms, but further, they also demonstrate an entire process of budgeting shifted by austerity practices. Within the statutory duty to set a balanced budget, where there was once room for deliberation and political choice as to where to invest in public services, today’s budget process is underscored by the need to close the funding gap through service

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<sup>983</sup> Nolan (n 103).

<sup>984</sup> Jan Breman, ‘Myth of the Global Safety Net’ (2009) 59 *New Left Review* as found in O’Connell (n 735).

<sup>985</sup> Chris Birt et al. ‘Poverty in Scotland 2023’ Joseph Rowntree Foundation; see also the wider UK perspective in Michael Marmot et al. ‘Fair Society, Healthy Lives: The Marmot Review’ (2010) Institute of Health Equity

<sup>986</sup> Philip Alston, ‘Visit to the United Kingdom of Great Britain and Northern Ireland: Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (23 April 2019) UN Doc A/HRC/41/39/Add.1.

<sup>987</sup> Accounts Commission ‘Local government in Scotland: Financial bulletin 2022/23’ (January 2024) Audit Scotland.

<sup>988</sup> Saloman and Arnott (n 288); Moyn (n 288); Nolan (n 103).

<sup>989</sup> Accounts Commission (n 987).

efficiencies... or, more commonly today, service cuts. It was how each participating chief began explaining the budget-setting process.

*“Ok, so I mean ascertaining the financial gap is the key trick of the whole process... So, so as you can imagine, there's a range of assumptions on what pay awards might be, what Scottish Government funding levels might be, you know, that recent thing about National Insurance rates, what's the assumption around that? Are we going to get funding for that from the government or is that just a hit to the Council and all that kinda stuff?”*

(Interview: Chief D)

Another reiterated this view. Often, this will mean rolling the budget (incremental budgeting) over from the previous year and examining specific changes that may increase budgetary pressures.

*“OK, so in general terms, the budget from last year rolled over into next year. We then look at the gap based on the assumptions that we make, and of course, we never know for certain until very late in the day what the real gap is, and then we present proposals of savings and pressures based on what we know.”*

(Interview: Chief C)

Another interviewee described it as about looking for budget ‘pressures’. Once again, raising the priority focus of the initial budget phases.

*“We take last year's budget, and we look at what's kinda where the key pressures are. We look to see then if those pressures are going to be sustained and we look at things like the big-ticket items around pay. We look at the big-ticket items around inflation, contract price inflation, pension pressures, uh, demographic kind of change and the impacts that those are likely to have on our current budget allocations, and then that gets wrapped up into a report to Council, which kind of kicks off the budget.”*

(Interview: Chief A)

The picture being painted is one of decisions being driven by the need to make savings within existing levels of service to close the ‘funding gap’, as is statutorily required, instead of being driven by national priorities or rights outcomes. One chief clearly outlined this process.

*“So, what happens? So, we, we will present a paper to the strategic budget group. So, let's say that that paper says that we need to make 3% across the board. Well then, say, because you know, Scottish Government policy is pretty clear that they protect the health and social care partnerships, and they protect education quite heavily. So, when you say, well, if we have to limit the savings we make to education and social work, then that gap is not 3%, it's 5%, say. And then the Council will say, well, to get choice, we want every department to present as the savings that they require, that they would need to make to deliver that, and that would be 6% say. So so then we would have a series of meetings where every department would come before a committee. It's a working group, is not committee I should say 'cause there's legal differences, come before the working group and present what they would do to make 6% of savings?”*

(Interview: Chief C)

In more directly raising the spectre of austerity in local finances, the chiefs keenly demonstrating the difficulties they are presented with. Over a decade of austerity has left local government stretched further than ever before, and with a legal duty to close the gap as well as pay due regard to socio-economic disadvantage, the financial options available have steadily declined.<sup>990</sup> The fact that the process begins with understanding how many resources need to be made up within the budget process indicates that the current delivery of LA finances to realise Scotland's new ESCR duties is not sustainable. Austerity, as well documented, has had a devastating impact on public service delivery, and its political unpopularity has led to the obscuring of public finances by central governments. Here, there is the need to go into more detail on the concept of core funding. One interviewee explained it well and in-depth.

*“So, you know, since from the last sort of 15 years, local authorities have had real term cuts in funding. I, and you'll be able to find lots of, you know, Audit Scotland reports or, or various reports that will say that. One of the major challenges is, you know, government trying to present those figures slightly differently. So, so you know, a couple years ago there was a real issue where a government were really pushing that they've given local government at 2.2% increase. And they had given that an increase in core funding, but what they've done is provide we had to deliver more services for that. So, so they give you more, but they give you more to do so. So, it's, uh, you're cutting away at the base all the time. A good example was, so the government, and this is a really*

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<sup>990</sup> Section 1 Equality Act 2010.

*good policy, and it's a really good policy to help in deprived communities where you provide 40 hours of a nursery education to every child from 3 and for every child from 2 where they come from a, a more challenging, you know, deprived 2-year-olds. So, they, they gave the extra funding. So, I think before it was 30 hours, they'd funded, so they give the extra kind of 500 hours of funding. But they didn't protect the core budget. That cuts the core budgets, so actually, the 6:30 was under threat, and then they fully funded the 5:10 they were putting on top. But they seem to just not really understand that well, no, you need to, you can't cut the core. And after 15 years of cuts, there's, there's no easy efficiencies anymore. And now, you know, the the the the cuts that we have to make that all painful. And they're all, you know, you just can't protect all of the vulnerable services that we deliver. It is about cuts. It is about reductions in service. And those reduction in service will have a bigger impact on our poorer communities because they rely more on the Council to provide services. So, so it just becomes more and more difficult. And if, if that pattern continues over the next five years, it's really worrying because it is that impact on, on our poorest communities and our poorest citizens."*

(Interview: Chief B)

In continuing, the same chief also highlighted the severity of the impact the austerity-driven cuts would have on society's most marginalised and disadvantaged. They go on to describe the system as 'broken'.

*"Now, the funding, the way funding works for local government, I think, is broken. It needs a complete overhaul, but that's really, really difficult in a time of austerity. When you're making cuts because it is much easier to do it in a time of growth when, when people that would be losing out from that redistribution could continue to get the funding they're getting, and all the growth goes to the people that need more. But when you're cutting it would just be devastating. It is a needs-based assessment, but I don't think it necessarily measures the right thing. I don't think there's enough of an impact of deprivation on it... Part of the problem is I think local government does it's very best to deliver. Whereas in a different environment, in a different, we would just say, well, actually, the government wants us to do this, and they're not funding us, so we're just not going to do it. Was local government won't do that because actually that would*

*impact on people in our communities. So, we struggle by and and and keep delivering to some extent at least. So that kind of stark position doesn't materialize."*

(Interview: Chief B)

Compounding the issue further is the increasing demand of those suffering from increasing deprivation in Scottish society.<sup>991</sup>

*"So, so that brings, that brings massive challenges, and it's the levels of deprivation. I, I think that deprivation is the biggest driver of service demand for the city. It's the biggest driver of cost."*

(Interview: Chief B)

The same participant continues to bring real examples from their local area.

*"If you just take education as the core, if you're delivering in a school in the middle-class area where the kids all turn up, they've, they've had their breakfast before they came to school. When they get home at night, their parents or whoever they live with has an interest in what they've done. They have a snack when they come home from school before dinner to help them do their homework. You know? As opposed to, you know, households where they don't really want the kids to go to school 'cause they quite like them to stay just to give, give them company 'cause they're not doing anything else that day. Where the kids are quite often not being fed before they go to school, and there's certainly no support or interest in what they're doing at school. You know? The, the level of support these children need are not even close."*

(Interview: Chief B)

As another reiterates.

*"And, and so I do think some of the things that are coming through from government contradict their ambition to consider the human rights and we, we maybe need more emphasis on the deprivation, because we do understand that the areas of deprivation if we can get into the prevention and support there, then that will help."*

(Interview: Chief C)

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<sup>991</sup> Birt et al. (n 985).

Another interviewee raises the need to deliver free school meals and housing needs.

*"where we would kind of talking about the human rights aspects in relation to health, social security, food, free school meals, housing, these sorts of things. These are terms that local government will be kind of using, and you know, so we are talking about human rights. We are actively monitoring the impact on Scottish Welfare Fund and hardship grants following the pandemic and seeing how many additional people are applying for these. We're seeing, you know, you know, turnover in kinda housing and increased kind of demand for homeless accommodation. We're seeing huge demand for free school, you know, the free school meals or the vouchers for free school meals, and you know how we kind of delivered these."*

(Interview: Chief C)

The choices left on making up savings to close the ever-increasing budget funding gaps for those politically elected are essentially reduced to making efficiencies and budget cuts. Real-term decreases in overall funding, coupled with increasing demands on LA services and ringfenced funding of large proportions of budgets, have left very few places to go to make savings. The culture of 'cost-reduction' is pervasive throughout the data.

*"I mean, in our process we tend to identify, well, as I say, we go through a process where our chief officers are supposed to come up with a range of options for cost reduction."*

(Interview: Chief D)

With some services protected by statute or central government policy, certain areas are often more heavily affected than others when options are provided to the council to close the overall funding gap.

*"We would be looking at, you know, we will be looking at a reduction in things like care of gardens within, you know, the non-statutory services such as those, you know, car park charges, these sorts of things. But realistically, a lot of these are at the margins, and we've driven those out over the last few years. So, a lot of what we're doing now is not the immediate stuff, but it's you know, it's digital transformation."*

(Interview: Chief A)

Another participant highlights the ever-thinning line between the meaning of cuts and the meaning of efficiencies.

*“Some of these options will be, uh, working more efficiently, so changing processes and so on. Online and things like that. So, they can be claimed to be efficiency measures. They they might lead to a reduction in staffing numbers 'cause you might need, obviously, you need if you're going to reduce your cost then some something gots to go somewhere, but you know, they'll be, they'll be efficiency measures whereas service reductions or cuts, as they're often called, will be where, you know, the option will be to cut the grass less, or collect the bins less, or close a school, or you know things like that.”*

(Interview: Chief D)

The reality was set out more candidly by another.

*You know, after decades of this, it's not really efficiency, it is service cuts, and even ones that look like efficiencies. They're actually cuts in service.”*

(Interview: Chief B)

The purely fiscal impact of austerity on local finance can be demonstrated through budget analysis, and it is widely recognised throughout the UK and Scotland that the drive for fiscal consolidation has left local government budgets at a ‘breaking point’. Fiscal analysis demonstrates that local government funding in Scotland, when excluding the extra £1.5 billion of money made available during the years of the pandemic to combat the impact of COVID-19 via specific measures, has decreased by 4.2% in real terms since 2013/14 despite increasing demands on local services.<sup>992</sup> Further overall cuts to LA funding are expected in the coming years.<sup>993</sup> The IFS has highlighted that future reduced funding from the UK government in relation to the Scottish Government grant will likely be reflected in the amount of money allocated to public institutions in Scotland, including local authorities.<sup>994</sup> After repeated years of fiscal consolidation requiring efficiencies or cuts to local services, the overarching impact has been to effectively reduce the ability of local governments, as the foundations of democracy, to respect, protect and fulfil rights-holders ESCR.<sup>995</sup> These cuts have significantly undermined the councils ability to protect and promote fundamental rights, such as the rights to health, education, and adequate housing. Furthermore, more vulnerable groups, including children, the

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<sup>992</sup> Accounts commission (n 987); see also David Phillips, 'How and Why Has the Scottish Government's Funding Changed in Recent Years?' (2022) Institute for Fiscal Studies.

<sup>993</sup> Ibid Accounts Commission.

<sup>994</sup> Phillips (n 992).

<sup>995</sup> Salomon & Arnott (n 288).



elderly, individuals with disabilities, and low-income families, are disproportionately affected, exacerbating poverty, inequality, and social exclusion.<sup>996</sup> These findings, however, only act to further evidence what has already been proven, where the data contributes new understandings is that over an extended period of time in which budget cuts have become the norm, it has altered the very fabric of LA fiscal decision-making. Indeed, the process explained throughout the interview process in this research brings to light one in which the decisions taken are focused on regression over progression. It is a far cry from the intention of the ICESCR's obligations ratified by the UK nearly half a century ago, where, even during economic downturns and fiscal consolidation, ESCR obligations were designed to ensure 'due priority' is provided to ESCR-related budget allocations. Today, the local funding of services is a process driven by a culture of prioritising 'closing the funding gap', not progressively realising ESCR.

### 7.3 Austerity's Additional Symptom? The Centralisation of Fiscal Decision-Making

*"Well, the Scottish Government are a centralising government, and so things are becoming controlled at the centre more and more"*

(Interview: Chief D)

The impact of austerity on the ability of local governments to continue to deliver against their statutory, human rights-based or otherwise, has been thoroughly evidenced.<sup>997</sup> It's embedded within the overall approach of local government, as made clear by the discussion above. However, another factor compounding this issue further is the limitations on how each LA can use any further available resources. In short, the brutal slashing of local finances has been coupled with a reverse in the policy of decentralisation that dominated the 1990s and early 2000s.<sup>998</sup> Decentralisation, which had, for decades, been argued for based on providing opportunities to react more adequately to local needs, better enable local participation in public affairs, resolve complaints and thus improve accountability mechanisms.<sup>999</sup> With resources more limited throughout the public sector, central governments have been keen to ensure

<sup>996</sup> Mary O'Hara (2015). *Austerity bites: A journey to the sharp end of cuts in the UK* (Policy Press, 2015).

<sup>997</sup> Kenneth Davey 'Local Government in Critical Times: Policies for Crisis, Recovery and a Sustainable Future' (2011) Council of Europe.

<sup>998</sup> Josh Shepherd and Dave Goswell 'Centralisation Meets Austerity: Local Spending in England During the First Phase of Austerity 2009-2019' (2022) Citizens Network Research.

<sup>999</sup> James Manor 'The Political Economy of Democratic Decentralisation (1999) Washington, DC: World Bank at 5; see also International Council on Human Rights Policy (ICHRP) 'Local Rule: Decentralization and Human Rights' (2010) ICHRP; Rhian Croke and Simon Hoffman 'A response to decentralised governance of human rights: a Children's Rights Approach in Wales' (2023) *The International Journal of Human Rights*; and Paolo Carozza 'Subsidiarity as a Structural Principle of IHRL' (2003) *American Journal of International Law* 97.

political priorities are supported and recognised as being nationally driven.<sup>1000</sup> It is an issue directly connected to the discussion in Chapter 6 on the funding of specific policy inputs but, when raised from the local perspective, goes further to build in considerations of how adopting such centralised funding of national policies, in effect, removes people's ability to participate and influence spending decisions. In practice, some commentators have been keen to demonstrate that this move towards fiscal centralisation is merely another symptom developed by the cause of austerity. Firstly, it acted as a means to ensure funding for specific, nationally driven political priorities, but secondly, it enabled a displacement of blame for often deeply unpopular cuts to social spending to the local government in charge of expenditure but not allocation.<sup>1001</sup> As Irving succinctly explains: 'the costs of austerity are not equally shared and inevitably fall on those with the least power to meet or challenge them. Secondly, the social costs of austerity have largely been passed from national to local government because most discretionary spending is disbursed at the local level. This has enabled both re-centralisation of spending power and the devolution of the social and political fall-out of spending cuts in many European countries, particularly those most affected by the financial crisis'.<sup>1002</sup> In summary, not only has fiscal consolidation removed the ability of local government to deliver crucial public services effectively, but it has also driven the additional consequence of degrading the principles for good, rights-based practice outlined through Chapter 5.

It is a finding supported by the views of those working in Scotland's local government. The increasing centralisation of decision-making in Scotland is raised through the data and wider evidence from Scottish parliamentary Committees via the budget process. As Audit Scotland has recognised: 'Councils received more core revenue funding from the Scottish Government than in 2021/22, rising from £12.1 billion to £12.2 billion (0.7 per cent) in real terms. However, an increasing proportion is ring-fenced or provided with the expectation that it will be spent on specific services. This means that the amount of funding available for councils to spend freely on local priorities is reducing.'<sup>1003</sup> In essence, the participants below argue that while the government may allocate further resources for an intended goal, if this priority fails to reflect the most basic needs of what are, in reality, very diverse local areas, the funding is not being

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<sup>1000</sup> Shepherd and Goswell (n 998).

<sup>1001</sup> Ibid; see also Philip McCann 'The Fiscal Implications of 'Levelling Up' and UK Governance Devolution' (2021) The Productivity Institute; and David Heald and David Steel 'The governance of public bodies in times of austerity' (2018) 50(2) The British Accounting Review 149.

<sup>1002</sup> Zoe Irving 'The Legacy of Austerity' (2021) 20(1) Social Policy and Society 97.

<sup>1003</sup> Accounts Commission (n 987).

used as effectively and efficiently as possible, as is encouraged by the HRB approach. To begin with, one interviewee raises the issue concisely.

*“Yeah, I mean historically, there was, over a period of time, a lot of build-up to, you know, a significant amount of ring-fence funding, and then they had they concurred that a number of years ago which wiped away a lot of it, was all rolled up into this settlement and councils could then prioritise locally that that wider value of funding without it being fully dictated as to how it was spent. And you know, gradually, as you'll be aware, you know over the last, particularly, 5 years, the amount of ring fence funds has, in my view, significantly increased. Obviously, a lot of it last year was COVID linked and you can understand that. But yeah, I think all the financial execs say the same thing. Ring-fenced funding removes the the power of local decision-making and prioritisation. So, whilst the Scot Gov might have a policy for a certain thing, it doesn't mean it has it, each LA needs to spend it on to the extent that the Scottish Government, uh, suggests. And you know some councils may need to spend more, and some councils might need to spend less. But by ring fencing it, it takes away that ability for local decision making and prioritisation of funding.”*

(Interview: Chief D)

All interviewees supported this view and illuminated how the use of directed spending not only removes the ability to create local priorities but also delivers a smaller pool of funding from which cuts and efficiencies can be found. This leads to certain areas of the budget being overly impacted instead of proportionate and evidence-based balances being struck between competing priorities.

*“So, the rules in the last few years is that you have to guarantee the same amount of money, plus additional funding we've allocated to health and social care partnerships. So, so if we have to make a 3% cut, we can't make it in health and social care. We cannot fund their pressures, so we'll get some of it, but but they've just, in reality, ring-fenced all social care spent. They've also done the same with teachers. Now, teachers are a massive percentage of education spend. Education is a massive percentage of local government spend, and social work is the second biggest area of spend. So, they're about 2/3 of their spend, and for all intents and purposes, the vast majority of that is now ringfenced.”*

(Interview: Chief B)

Another Chief explained exactly what this means for making a certain amount of savings each year with a dwindling proportion of the budget to do so. The impact was worse cuts in specific budget areas disproportional to what was required.

*“You know that you have so many kinds of pupils, and you know then how many teachers you need to budget for. So that's effectively fixed. It's a fixed formula, and for East Dunbartonshire, our budget of £X million a year, £Y million, sits within our education services and is effectively fixed. Similarly, for social work, £Z million of that £X million sits within social work, and there's a number of core commitments around, all of you know, social work, provision care, continuing care, mental health services, criminal justice, all these kind of activities. The remainder falls within non-statutory services such as finance, legal, procurement, HR. So, you're drawing from a very small pool to make £8 million worth of savings. It might be, you know, like saying do the math, so £80 million remaining and you know £8 million saving. That's a 10% top slice to the remaining services, so that's where it becomes really, really challenging to kind of deliver that, and actually, Local government has got to a stage where it's delivered all its kinda quick wins.”*

(Interview: Chief A)

The participants continued to provide detailed explanations of recent policy and legislative efforts, which they view as merely increasing the centralisation of decision-making in the pursuit of achieving efficiency. From the education example provided in Chapter 6 to recent proposals for a National Care Service, the chiefs highlighted how each would impact their decision-making and ability to budget based on local needs. Though not of as great a consequence as big national policies such as a national care service, the best example is provided below in relation to the abolition of charges for music tuition in Scotland. It is an interesting example to provide as it demonstrates that not only does centralised decision-making sometimes remove the ability to prioritise local needs, but it can also hinder one of the very few ways a LA can mobilise resources to fund core services.

*“so the most recent ones were, so they've abolished charges for music, tuition, and other curricular activities. Now, that's pretty hard to disagree with, but what, what did you gain from that? Are more children going to be playing a musical instrument because of it? No, because actually, that's a scarce resource. There's not the resources for every child to play a musical instrument. It has to be, you know, now it was probably*

*ration based on ability to pay in lots of areas, which isn't the right thing to do. But actually, there's no policy outcome from this other than probably some middle-class parents are paying a bit less. The core curriculum charges in X, because of X's deprivation and equality issues around access to the school activities, has very very little, uh, core curriculum charges, so actually, it's probably not made a massive amount difference to us and probably, we've probably slightly gained from the government given some money to offset that. But you go to more affluent areas, where they brought in a lot of money into the local school budgets by charging kids for activities. Then they, they've, they've got a a bit of a black hole because the funding they've got is not enough for it because they were charging quite a lot. Now, there will, there will be people there that have suffered because of that. Eh, but those authorities, quite legitimately, said, well, I would rather charge kids to take part in activity for added value than cut something core, and that's a local democratic decision and, and that's just been removed. So, it means that you know, so the funding they won't really fund it properly, and then those core services will have to be cut. This could be this actually was just so actually we're gonna, you know, there's no charge, but we're going to stop providing music tuition or cut back on the music tuition 'cause we can't afford to do it now. Because we'd rather not have music tuition, than not have a class teacher."*

(Interview: Chief B)

Crucially, the points raised highlight the potential for well-intentioned policies to have a detrimental impact.

*"what do the government really want and what do they mean? Because some of the things that they're doing, I think, is counter-intuitive to what they want here, and it's making sure that they listen then when they told that so we can make sure that that we're we've got a resource is going to the right place that, that meets the ambition."*

(Interview: Chief C)

The centralisation of decision-making, often exacerbated by austerity measures, can have several significant impacts on public participation, particularly at the local level. A core principle in adopting a rights-based approach to decision-making as established in detail in Chapter 5. These impacts can be examined through various dimensions, including reduced local autonomy, diminished community engagement, and weakened democratic accountability. For example, centralisation reduces local autonomy, transforming local councils into

implementers of centrally determined policies rather than active participants in shaping policy based on local contexts. This reduction in autonomy, research has shown, can demoralise local officials, diminish their engagement with constituencies and help feed a sense of disconnection between local populations and decision-makers.<sup>1004</sup> Striking a balance between centralised and decentralised public management has been the cause of tension and debate between national and subnational forms of government for years.<sup>1005</sup> It, too, represents a fundamental tension within the domestic application of IHRL and has been the subject of much research and debate.<sup>1006</sup> However, within the direct context raised, recent work by Hoffman and others in Wales has highlighted further considerations relevant to the role of decentralisation of human rights, albeit within the UNCRC, arguing it presents ‘risks for’ but also ‘potential gains’ for implementing children’s rights locally.<sup>1007</sup> The research in Wales is highly relevant to Scotland’s current context due to the similarity of its governance structures as a devolved nation within the UK with specific, Welsh local councils. The research presents numerous concerns with the incorporation of human rights standards as placing ‘limits on devolved sovereignty’ and potentially amplifying ‘areas where difficult decisions often need to be made about the allocation of scarce resources, and where disagreements often arise in the political domain about how best to meet competing priorities, including rights-based priorities’.<sup>1008</sup> In effect, increasing the centralisation of decision-making and removing the local participation of rights-holders in localised issues. Additionally, Hoffman argues that by adopting an overly ‘hard-edged regulative’ approach which ‘relies on court-based determination’, the inherent flexibility of human rights becomes ‘problematic’ with the potential to undermine ‘local interpretation and applicability’ through local decision-makers becoming ‘more concerned with regulatory compliance than with local application and relevance’.<sup>1009</sup> This is particularly true for ESCR, with their determinability often raised as a key critique of their basis as fundamental human rights. Hoffman’s work strikes directly at the heart of the argument raised through interviews with local government finance chiefs in Scotland.

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<sup>1004</sup> Vivien Lowndes and Lawrence Pratchett ‘Local Governance under the Coalition Government: Austerity, Localism and the ‘Big Society’ (2011) 38(1) *Local Government Studies*.

<sup>1005</sup> *Ibid.*

<sup>1006</sup> Eleanor Spaventa ‘Federalisation versus Centralisation: tensions in fundamental rights discourse in the EU’ in M. Dougan, & S. Currie (Eds) *50 Years of the European treaties: looking back and thinking forward* (Hart Publishing 2009); Jack Donnelly, ‘Human Rights and State Sovereignty’ 4(1) *Human Rights & Human Welfare* (2004); Chris Himsworth, ‘Rights versus Devolution’ as found in Tom Campbell, Keith Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (Oxford University Press 2001) at 145-162.

<sup>1007</sup> Simon Hoffman, ‘The UN convention on the rights of the child, decentralisation, and legislative integration: a case study from Wales’ (2019) 23(3) *The International Journal of Human Rights* 374 at 376; see also, Croke & Hoffman (n 995).

<sup>1008</sup> *Ibid* Hoffman at 377; see also Boyle and Busby (n 2) further demonstrates how ‘localising’ rights, in their work through devolution, can both hinder and progress rights compliance.

<sup>1009</sup> *Ibid* Hoffman.

#### 7.4 Utilising Human Rights Budgeting to Empower Local Government in Scotland

Thus far, this chapter has wished first to illustrate the integral role subnational government can play in fulfilling ESCR and, secondly, castigate the legacy of austerity's impact on local government finance. From reductions in budget allocations and delivering against increased demand to fiscal centralisation and the dilution of participation and accountability in local democracy, austerity has not just altered the mindset and processes of local governments' fiscal decision-making, it has fundamentally altered the very relationship between national and subnational governments in Scotland. Recognising the strength of these challenges throughout the interview phase of the project, attention turned to the potential of local government in Scotland to utilise the framework provided by ESCR to strengthen further the case many subnational public institutions have been making for a decade regarding funding cuts.<sup>1010</sup> In other words, could HRB not only serve as a basis for decision-making and budget analysis to be advocated for by those within human rights law, as Chapters 3, 4, and 5 attempt to illustrate, but also as a tool to bolster and empower local governments critique of the centralised fiscal planning?

Accountability, as elaborated in Chapter 5, can be both a virtue and a mechanism to drive improvements to decision-making through imposing a notion of responsibility.<sup>1011</sup> The notion of internal, external, horizontal, and vertical accountability mechanisms between governmental institutions expands upon this.<sup>1012</sup> Historically argued from the perspective of national government holding subnational government to account, due to the drive of decentralisation, turning such arguments around, it is possible to foresee how an increase in centralised decision-making would swing the pendulum of internal accountability towards a focus on the actions of the national government. In other, more direct words, in a system of governance in which local governments act to effectively administrate the allocation of resources by the national government, adopting a rights-based approach within the local perspective can act to enhance the internal accountability between the public institutions where local government can use the framework to highlight their inability to meet basic human rights standards due to decisions made centrally. In Scotland, these arguments are consistently made by individual local

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<sup>1010</sup> See evidence provided to the Scottish parliaments Finance and Public Administration Committee by COSLA on behalf of Local Authorities. Available at: < <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-finance-and-public-administration-committee/meetings/2022/fpas62223>> (accessed 26/07/24).

<sup>1011</sup> Bovens, Goodin & Schillemans (n 753)

<sup>1012</sup> Anne Davies 'Accountability Mechanisms' in Anne Davies *Accountability: A Public Law Analysis of Government by Contract* (Oxford University Press, 2001)

authorities, COSLA, and civic society.<sup>1013</sup> The expression of such arguments lacks the impact of funding cuts but the recognition that this is directly at the heart of Scotland's ability to demonstrate compliance with human rights norms and obligations.

It is an application of the HRB framework that was raised when discussing the erosion of 'core funding' in LA budgets, the inability to deliver core services, and the interconnection this has with upholding a minimum ESCR core. Here, it is helpful to understand the context within which the minimum core doctrine was discussed by the practitioners involved with the project. In introducing the legal doctrine to participants within the research, the basic premise of the doctrine was explained alongside its potential to be used as a method of both guaranteeing and prioritising within the use of resources. Strikingly, the individual interviews with local council finance chiefs led each interviewee to raise issues, from the worsening depth of child poverty to crushing fuel poverty in rural areas and, most commonly, the costs of tackling multiple and intersectional deprivations. Other issues raised (without prompt) were the increasing use of food banks, demand for free school meals, and issues with poor housing stock or homelessness. Discussing the notion of using dignity as a driver of how core standards could be delineated for those tasked with balancing local government books demonstrated a keen awareness of and empathy for Scotland's most marginalised and disadvantaged. Practically, however, it led to those involved questioning how such a framework could be used by local authorities in Scotland. As one participant captures:

*"So, how does a minimum core potentially then enable Chief X to take that, demonstrate that and say, look, really, it's not that bad, so we can make different investment decisions with some of the money currently directed to that? And almost how that works both on a local level and for me, how I can challenge national government, how all of COSLA, how all of councils, how all of leaders can then challenge the government about some of the decisions that they're making and the directive approach that they're taking when we know that there are differences locally and that needs to be respected. So that, for me, is potentially how I can see a minimum core being useful. But how do we build that in?"*

(Focus Group Participant)

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<sup>1013</sup> Evidence to Finance and Public Administration Committee (n 1010).



In doing so, the participant captured the real essence of applying the ESCR framework to budget in the first place. The ability to identify where fiscal choices have been detrimental to rights realisation. Another participant raised this notion further.

*“A couple of points on that. I think one of the key things when you were saying about the responsibility of central government, I think there has also to be an explicit recognition that the national government is asking all the local authorities, the local authorities are fundamentally delivering on the obligations of the national government in terms of delivering people’s rights. And they have to acknowledge where local authorities aren’t able to do this because they do not have adequate resources. It’s not a case of passing on the responsibility for failing to meet people’s rights. There has to be that acknowledgement that there has to be adequate resource.”*

(Focus Group Participant)

One highlights the need for HRB to be an ‘opportunity’ for local government instead of another ‘burden’.

*“I think if it’s going to work, it has to be seen as an opportunity rather than another burden, another reporting requirement or something. But on that note, doesn’t human rights budgeting, will it maybe provide a mechanism, for example, for local government to go back to central government and say, the ultimate responsibility for delivering this is on you, and we can demonstrate here, here and here that we don’t have resources to meet these requirements. So, yes, is that something that can come out of this?”*

(Focus Group Participant)

It was an interesting, unexpected, but important perspective and contribution to this research. In the face of a failing system, the engagement of local finance chiefs was not solely driven by an urge to discover and understand further the IHRL framework and its implications for their own decision-making. It was equally viewed as an opportunity from which to engage with and potentially utilise human rights law and language to evidence the compounding issues they face. Regarding the HRB framework, there is no reason to suggest that if rights advocates, and in certain instances, courts are willing to use fiscal information as evidence from which to analyse a state’s compliance with ESCR standards, that subnational government cannot too become an actor driving accountability for resource distribution. Others, in general agreement,

highlight the need for a shared understanding of our minimum core priorities as a first step to achieving such an approach.

*"I think, for me, the first step, and this should be done in conjunction with the legislation being developed, is this national discussion around what minimum core is. To take what the elements of what the rights are to actually translate that into what does that look like in terms of our minimum core for Scotland?... With that, you then build a wider understanding throughout public bodies and all the organisations you highlighted, all levels of government around what does that mean in terms of how do you resource that?"*

(Focus Group Participant)

A further participant concurred.

*"But I think in terms of minimum core, I think we need a shared understanding of what it is. And I think that's where participation could really play a key role in terms of having a really wide discussion around what we as a society think is acceptable or not acceptable to go below and what we should be aiming for in terms of those kind of stretch targets, I suppose, to be getting better."*

(Focus Group Participant)

In continuing, the participant recognised the extent of the challenge ahead.

*"But on the other hand, having the target is why we're going to have the Scottish child payment. It's why we'll have the biggest reduction in child poverty for, well, since we've started collecting data on this stuff. Yes, the more you think about it, the more you realise there is not going to be a very clear list of indicators that we have to meet the minimum core. And that's, I mean, why I say we're a long way from where we think we should be. But it doesn't mean that we can't start the process. And I think as long as if we had a shared understanding is generally what we mean by minimum core, yes, we can at least start implementing human rights principles in budget together."*

(Focus Group Participant)

In discussing the initial steps that could be taken to embed a rights-based approach further within their fiscal decision-making processes, the response unanimously turned to the need for awareness amongst public officials, specific training, and overall capacity building.

*"I think, you know, there's probably either an awareness that's low, you know, there's a needs to be an awareness for us that we're already delivering against that."*

(Interview: Chief A)

As this excerpt captures, despite being on the frontline of service delivery in Scotland and consequently central to the fulfilment of ESC rights, there is a lack of awareness, and human rights knowledge to deliver against specific rights-based principles and standards. This was not surprising. The UK's incorporation of civil and political rights via the Human Rights Act 1998, alongside the regional ECHR, has generally built up the view that human rights only cover the rights protected by these instruments leaving the general awareness of ESCR law amongst legal practitioners and public officials alike to be a serious challenge to their effective implementation.<sup>1014</sup> It was echoed by another interviewee who specifically raised the need to 'educate' those working in Local Government.

*"And you know some of it is. And again, if it was a broader thing, it would actually be about educating councils about what, you know, what they should be thinking about on a, from a slightly broader perspective, uh, so it's just about making it easier for them to make those decisions."*

(Interview: Chief B)

Furthermore, the interviewees also raised concerns that the human rights journey in Scotland had yet to provide the necessary support of localised public bodies tasked with delivering against the legislation's duties.

*"Well, and I'm not aware of a huge amount of, UM, guidance. And coming from the Scottish Government. On human rights at all. Uhm, I would expect that needs to be. It's interesting, you know. You know, you know the operation. Of course, there's a council leaders meeting every month. But the economic and policy decisions on behalf of. Yeah, look for government. And engagement with the Scottish Government and and all that there has been papers going through the causal leaders meetings recently on human rights and the children human rights as well. And these these get agreed. But I don't know if anyone knows who is the actual implications of what they're agreeing to... And financially"*

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<sup>1014</sup> Boyle et al. (n 1).

(Interview: Chief D)

Awareness raising and human rights education are well-researched and advocated implementation measures under international human rights mechanisms. Indeed, UN treaty bodies, UN Special Rapporteurs, and prominent scholars have commented upon the central requirement of states to introduce human rights education and training for the general public and, importantly, both public and private institutions throughout the state.<sup>1015</sup> In 2012, the UN Human Rights Council further emphasised human rights education and training as ‘essential for the promotion of universal respect for and observance of all human rights and fundamental freedom for all’.<sup>1016</sup> Through this guidance, the underlying understanding is that for human rights to become a culture within decision-making practices, ensuring awareness of and training against its standards and principles will be essential. Research, albeit focusing on ECHR implementation, has demonstrated that states with more effective implementation are those supported by ‘substantial diffusion and mainstreaming of human rights awareness, monitoring, and related expertise across the state administration, the legislature, and branches of government’.<sup>1017</sup> Ultimately, investing in awareness-raising initiatives for public officials enhances their capacity to uphold human rights standards and contributes to advancing a more equitable and rights-respecting society. When adopting such a mindset, there is a clear basis from which to argue that proponents of adopting a rights-based approach to fiscal or budgetary decision-making at the local or national level must be willing to demonstrate, teach, and have a general capacity to build those in existing public positions to adopt such practices.

### 7.5 Concluding Remarks

In 2005, then UN Secretary-General Kofi Annan made a speech in which he stated: “Global and local matters are more intertwined than ever before. Where once many problems were the sole domain of national governments, today they can be tackled only by partnerships that involve central governments, the private sector, civil society and local authorities – and often international institutions, too. So we will need you to do your part both as local managers and as some of your country’s most influential politicians. We will also need your national leaders and governments to give you the space to act. A state which treats local authorities as partners

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<sup>1015</sup> See, for example, CRC General Comment No. 5 (n 48); and Léo Heller ‘Being a Special Rapporteur’ (2021) OHCHR; and examples from the CESCR in concluding observations upon states parties. For recent example, see E/C.12/ROU/CO/6: Concluding observations on the sixth periodic report of Romania (20 March 2024).

<sup>1016</sup> UN Human Rights Council ‘United Nations Declaration on Human Rights Education and Training’ A/HRC/RES/16/1 (8 April 2011) at para 2.

<sup>1017</sup> Dia Anagnostou & Alina Mungiu-Pippidi, ‘Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter’ 25(1) European Journal of International Law 205.

and allows public tasks to be carried out by those closest to the citizens will be stronger, not weaker.”<sup>1018</sup> It is a quote that captured the moment's mood but also represents a vision of localisation that, post-2008, failed to come to fruition. In summary, this chapter has underscored the indispensable role of local governments in Scotland in the realisation of ESCR. Despite the central responsibility resting with the UK Government under international law, the practical delivery of many public services essential to these rights is conducted at the local level. This decentralisation reveals a crucial need for adequate resources and support for local governments to fulfil their obligations effectively and sustainably. The analysis presented reveals significant challenges faced by Scotland's local authorities. These challenges include the severe impacts of austerity, the increasing centralisation of fiscal decision-making, and the escalating demands for public services amidst shrinking budgets. Austerity has not only cut funding but also fundamentally altered local budgeting processes, forcing a shift from the progressive realisation of ESCR to a survivalist approach focused on efficiency and cost-cutting. This has resulted in a narrowing of priorities, often at the expense of the most marginalised populations. Where local governments were ‘previously able to shield people from the worst effects of the first wave of crisis, local governments have faced severe constraints on local resources due to decreases in funding from the national government, reliance on unstable tax bases and increasing demand for public services from people no longer able to cope on their own.’<sup>1019</sup> Recognising such a reality is crucial.

Austerity measures have had a profound and detrimental impact on local government's ability to deliver essential services. The chapter highlights that austerity policies have led to a significant reduction in core funding, which has exacerbated inequalities and hindered the realisation of ESCR. As an additional consequence, the increasing centralisation of fiscal decision-making has further complicated the landscape for local governments. While centralisation might aim to ensure uniformity in policy implementation, it often strips local authorities of the flexibility needed to address specific local needs effectively. This tension between national directives and local autonomy creates a challenging environment for local governments, which are often left to implement policies without adequate resources or input into their formulation. The chapter's findings suggest that a balanced approach, which allows

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<sup>1018</sup> United Nations, Secretary-General's Remarks to 'United Cities and Local Governments' (8 September 2005) at 26. Available at <<https://press.un.org/en/2005/sgsm10081.doc.htm>> (accessed 26/07/24).

<sup>1019</sup> Council of Europe Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis' (2013 Issue Paper. Available at: <<https://rm.coe.int/safeguarding-human-rights-in-times-of-economic-crisis-issue-paper-publ/1680908dfa>> (accessed 26/07/24).

for local discretion within a national framework, could enhance the effectiveness of public service delivery. This situation underscores the importance of adopting a rights-based approach to budgeting. Such an approach would ensure that financial decisions prioritise the protection of fundamental rights and the needs of the most disadvantaged groups. By embedding human rights principles into budgeting processes, local governments can better advocate for necessary resources and justify their spending priorities based on legal obligations and moral imperatives. Indeed, despite all the challenges faced, the chapter identifies a significant potential for local governments to act as drivers of progressive fiscal reform. By leveraging the principles and standards of IHRL, local authorities can play a critical role in advocating for equitable resource distribution and holding central government accountable. This proactive stance can transform local governments from mere implementers of policy to key stakeholders in shaping a fairer and more just society. The insights from local finance chiefs, as presented in the chapter, reflect a readiness to engage with HRB frameworks and use them to highlight the inadequacies of current funding models. To capitalise on this potential, there is a clear need for building a robust human rights culture within public sector budgeting processes. This involves raising awareness about human rights obligations, providing targeted training for public officials, and fostering meaningful participation and deliberation at all levels of government. The chapter argues that such measures are essential for bridging the gap between international human rights standards and the everyday realities of local government operations. By embedding human rights considerations into all aspects of public finance, Scotland can lead by example in integrating human rights into economic and social policies.

## **Chapter 8**

### **Toward Fiscal Justice: Concluding Recommendations for Progressing ESCR Through Scottish Budgets**

Thus far, the thesis has sought to establish the foundations of HRB from the norms and obligations of IHRL and contribute new perspectives by further unpacking the minimum core doctrine concerning establishing priorities for public spending based upon people's most basic needs. The analysis has uncovered a rich repository of guidance, scholarly discourse, empirical case studies, practical frameworks, and even comparative case law, equipping states with tools to integrate human rights theory and practice into public budget processes and broader fiscal policies. Further, the thesis has argued for the 'democratisation' of the budget process by ensuring the principles of transparency, participation, and accountability lie at the heart of the budget process.<sup>1020</sup> Building upon this analysis and the insights of practitioners in Scotland presented in Chapters 6 and 7, this thesis has provided empirical, practice-based considerations from those actively engaged in the field on steps that could be taken to begin embedding ESCR approaches within Scottish fiscal decision-making. These include the necessity of evaluating the realisation of ESCR, establishing shared and rights-based priorities, monitoring the impact of public expenditure on the outcomes of rights-holders, facilitating longer-term planning for 'core minimum' priorities, and adopting a more progressive approach to resource generation, such as implementing progressive taxation. In doing so, this thesis has sought to move beyond the conceptual understanding of HRB - its rationale, relevance, and significance - to explore the means for its practical implementation.

In conclusion, this final chapter carries two primary aims. Firstly, there is the need to explore and analyse the current budget cycle in Scotland and, putting into practice the findings of the above chapters, identify recommendations through which Scotland can begin to embed HRB practices as a means to comply with IHRL as well as any ESCR duties that may be implemented via future domestic legislation. As argued extensively within the methods chapter, this includes considerations for practical steps for Scotland to begin adopting with the chapter beginning with an exploration of recent work by the SHRC on improving budget transparency, participation and accountability before moving on to work practically through the budget cycle. For ease, while recommendations for Scotland's public bodies are elucidated implicitly

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<sup>1020</sup> See De Schutter (n 101); See also more broadly, Manuel Antonio Garretón 'Human Rights in Processes of Democratisation' (1994) 26(1) *Journal of Latin American Studies* 221; and Rudiger (n 38).

throughout the chapter as it works through the key components of Scotland's budget cycle, they have also been collated and provided explicitly within an annexe to the thesis. Secondly, this concluding chapter aims to bring together the strands of both theory and practice the research has depended upon. Several frameworks have been relied upon, including that of IHRL, but also budgeting and fiscal frameworks developed to deliver fiscal transparency as well as the capability framework as a potential means to begin understanding and identifying people's most basic needs and, therefore, outcomes to connect fiscal expenditure to. As was explored in Chapter 4, relying entirely upon legal consideration cannot always provide the clarity required in terms of the rights outcomes needing to be achieved, and the capability framework (among others) could provide a more fruitful approach. Understanding how these theories thread through fiscal considerations is crucial to achieving and addressing the critical importance of shaping fiscal practices to deliver against the standards and norms of ESCR and, consequently, social justice. It is upon this central tenet and the need to move toward fiscal processes and decision-making based upon social justice theory and human rights law (fiscal justice) that this final chapter reflectively concludes.

Finally, before turning to the budget cycle in Scotland, there is an important limitation to reiterate. As noted by one Chief during the interview process, there will always be a "boy with a bigger ball". It is an important point to note before continuing. To understand the budget process in Scotland, it is necessary to begin with the key features of the UK budget process, given Scotland's status as a devolved nation. The UK's fiscal decisions intimately influence those made in Scotland at both the national and local levels. This cascade of responsibility for decision-making introduces multiple layers of accountability, priorities, and constraints. Each level of government has distinct roles and powers, creating a dynamic interplay that shapes budgetary outcomes. At the UK level, broad fiscal policies and macroeconomic decision-making set the stage, while the Scottish Government must navigate these parameters to address national priorities and statutory obligations. Local governments, in turn, must implement policies within the confines of both UK and Scottish directives, balancing local needs and fiscal constraints. This multi-tiered system complicates efforts to embed ESCR within public budgets, as each level of government may have different priorities, resources, and interpretations of ESCR obligations. The alignment of fiscal policies across these levels is crucial to ensure that human rights considerations are consistently integrated and upheld throughout the budget cycle. Thus, while the recommendations offered below broadly allude to steps that could be taken at any level of government within the UK, the discussion itself does not go into depth on the



intricacies of the power dynamics between national, devolved, and subnational governments.

### 8.1 Comparing the Scottish Budget: The Open Budget Survey

Throughout Chapter 5, reference was made to the OBS as a means of assessing the extent to which different states budget processes complied with the principles of transparency, participation and accountability. While the OBS does not present itself as an instrument from which to measure states' obligations under the law and consequently makes no mention of the human rights standards and principles identified through this research as such, it does provide an authoritative and evidence-based framework through which to measure budget transparency, efforts towards enabling public participation, and budget oversight. All of which lie central to adopting a rights-based approach to fiscal practice in Scotland. The OBS, over its repetitions through the years, has grown to include 142 questions, all accessible via its published methodology.<sup>1021</sup> Many world nations are included within the OBS, including the UK and this provides a good comparative source despite not directly covering Scotland's processes.<sup>1022</sup> However, importantly, by sharing their extensive methodology, the IBP has allowed independent researchers, civic society, and even internal government officials to analyse Scotland's government's budget process.<sup>1023</sup> The SHRC, in adopting this methodology, has assessed the 2017/18 Scottish budget process with figure two presenting the scores Scotland received and the following discussion outlining key recommendations for the Scottish government to take to improve the transparency, participation and scrutiny of its budget cycle.

Figure 2: Scotland's Budget and the Open Budget Index 2017/18<sup>1024</sup>

PROCESS PRINCIPAL	TRANSPARENCY	PUBLIC PARTICIPATION	BUDGET OVERSIGHT
<b>SCOTLAND'S BUDGET</b>	43 / 100	20 / 100	85 / 100
<b>UK BUDGET</b> <sup>1025</sup>	70/100	61/100	74/100

<sup>1021</sup> OBS Methodology (n 298); For further detail on the OBI methodology, see Jan Seifert, Ruth Carlitz & Elena Mondo (2013) 'The Open Budget Index (OBI) as a Comparative Statistical Tool' 15 Journal of Comparative Policy Analysis: Research and Practice 87.

<sup>1022</sup> Ibid.

<sup>1023</sup> The UK OBI score and report is accessible from IBP, 'United Kingdom: Country Results' (IBP, 2021). Available at: <<https://internationalbudget.org/open-budget-survey/country-results/2019/united-kingdom>> (accesses (26/07/24)).

<sup>1024</sup> SHRC (n 150).

<sup>1025</sup> This represents the OBI score for the UK budget as carried out in 2018, it has been used as it presents the same year as the SHRC analysis was carried out on the Scottish budget. A recent OBI score has been provided for the UK government

<b>GLOBAL AVERAGE</b>	45 / 100	14 / 100	85 / 100
<b>EXPLNATION</b>	Scotland provides the public with limited budget information	Scotland provides the public with few or no opportunities to engage in the budget process	Scotland provides adequate oversight of the budget

### A. Transparency

As analysed through Chapter 5, transparency has been heralded by leading figures within political philosophy, including Rawls and Habermas, as an essential ingredient in achieving adequate deliberation within democratic processes, with transparency of fiscal information enhancing democratic accountability and empowering individuals to engage in resource governance.<sup>1026</sup> It is an area that should be of direct concern for duty-bearers in Scotland. The SHRC's work raises a vital issue to be tackled through the Scottish budget cycle, which is a lack of comprehensive information provided throughout the budget cycle. In formulating the score, the OBS questions focus on 'the availability of the eight key budget documents and the comprehensiveness of the content of those documents that are publicly available.'<sup>1027</sup> These are a pre-budget statement, an executive's budget proposal, an enacted budget, a citizen's budget, in-year reports, a mid-year review, a year-end report, and finally, an audit report by an SAI.<sup>1028</sup> To assess Scotland in more detail, while the budget proposal as enacted itself scored perfectly and was an exemplar of good practice, the Scottish budget cycle missed publishing a pre-budget statement, a citizen's budget, in-year reports and mid-year reports (four out of eight 'key' documents according to OBS methods). All of these are aimed at providing budgetary information throughout different stages of the budget cycle. Recommendations of the SHRC report, therefore, focused on ensuring the publication of year-round budget documents, the immediate need for a citizen's budget with accessible information on budgetary decision-making, and an improved 'analysis and narrative about how policies across the board may impact vulnerable or marginalised groups'.<sup>1029</sup> Further, two recommendations raised the need

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budget process. The scores demonstrated an improvement in transparency to 74/100, falls in participation at 54/100, and oversight at 67/100.

<sup>1026</sup> Rawls (n 685); and Habermas (n 685); and Heald (n 687).

<sup>1027</sup> IBP, 'Open Budget Survey 2019' (7<sup>th</sup> edn, IBP, 2019) at 26.

<sup>1028</sup> Ibid at 28.

<sup>1029</sup> SHRC (n 150) at 6.

for planning to be ‘driven by outcome expectations’ and the ‘Year-End Report between planned allocation, actual spend and impact’ needed to be ‘better connected to Scotland’s National Outcomes’.<sup>1030</sup>

## B. Participation

Similarly to transparency, this research has identified the principle of participation as a central tenet of building ESCR into fiscal practices. Not only because of the central role ‘participatory justice’ plays in assessing compliance with ESCR standards as argued by Liebenberg, but because it lies as a central means to achieving the democratic deliberation that is required to justly distribute resources within the complexities of a modern state.<sup>1031</sup> Despite only managing a score of 20/100, participation within state budget processes is a particularly challenging principle to implement. The global average during that year was only 14/100. However, Scotland was still lower than the OECD average, which achieved 27/100 and is therefore rightly of concern to advocates for rights-based budgeting (or PB budgeting, for that matter). In assessing participation in the budget process, the OBS considers whether there are ‘formal opportunities for the public to directly engage with the executive, legislature, and audit institutions during the budget process’.<sup>1032</sup> It states that the mechanisms can be ‘public consultations, pre-budget submissions, e-consultations, advisory councils, social audits, and participatory budgeting, among others’.<sup>1033</sup> Furthermore, it looks at three different government bodies. Namely, executive mechanisms are ‘led by central government finance ministries’; legislative mechanisms’, during the approval of the budget and the review of the Audit Report’; and ‘SAI mechanisms’, defining the audit program and during audit investigations’.<sup>1034</sup> The SHRC’s report provides several simple recommendations to improve participation within the Scottish budget process using the questions posed within the OBS. It suggests producing ‘clear and well-advertised guidance for public engagement with the budget process including the timetable for formulating the Executive and the Legislature’ and the need to provide ‘better and timely access to accessible information to participate’. Furthermore, in keeping with GIFT’s principles on public participation of reciprocity and sustainability, the SHRC has recommended improving feedback mechanisms for those who have participated in the budget process.<sup>1035</sup>

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<sup>1030</sup> Ibid.

<sup>1031</sup> Liebenberg (n 642); Brems (n 727); and Kuosmanen (n 306).

<sup>1032</sup> IBP (n 1027) at 47.

<sup>1033</sup> Ibid.

<sup>1034</sup> Ibid at 48.

<sup>1035</sup> SHRC (n 150) at 10.

Finally, the report recognises the need not just to improve upon already existing processes but to establish processes to ensure there is adequate opportunity in which to engage with the budget process throughout the cycle and not just at the pre-budget stage as well as the need to ‘develop a formal mechanism to enable the public to contribute to audit investigations’.<sup>1036</sup> These recommendations will actively improve public participation in Scotland. However, they do not capture the extent to which participation leads to active deliberation in the manner identified as necessary by Kuosmanen and reiterated in Chapter 5.<sup>1037</sup> Nor the extent to which participation must be provided throughout the budget cycle, from its very beginning planning and formulation stage through to its overarching review. Actively providing adequate mechanisms for engagement and involvement is an essential step but only the start of delivering active, deliberative participation in the manner envisaged by political and legal theory. Simply put, participation in the budget process must be more than just offered, even with appropriate feedback loops. It must present an opportunity in which to debate the suitability and sustainability of the budget proposals to meet human rights standards and outcomes. All of this, in turn, necessitates deeper deliberation as to the priorities set within the budget and whether those chosen are best suited to meeting the basic needs of those most marginalised and disadvantaged within Scottish society.<sup>1038</sup> Achieving this further feat is not just about having appropriate processes in place, it is about ensuring such processes are ably equipped to deliver the fair deliberation and debate that the complexity of resource distribution within the state deserves.

### C. Accountability

Oversight, as discussed in Chapter 5, is central to achieving accountability within the budget process. There it was argued that one of the leading features of the IHRL framework and its imposition within fiscal processes is to enable and achieve accountability within the process and decisions made. This was a strong point for Scotland within the SHRC’s research, with a score of 85/100, meaning it provides adequate legislative and SAI oversight. In determining the score, the OBS ‘assesses the role of the legislature and the SAI as budget oversight institutions with 18 questions. The survey looks at the legislature’s role during budget formulation, approval, implementation, and review of the audit report.’<sup>1039</sup> It considers whether there are ‘specialised finance committees’ due to their expertise, the independence of

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<sup>1036</sup> Ibid at 11.

<sup>1037</sup> Kuosmanen (n 306).

<sup>1038</sup> Ibid.

<sup>1039</sup> IBP (n 1027).

appointments within the SAI and whether they are appropriately funded to carry out adequate oversight. Within a further breakdown of Scotland's OBS score, the legislature was deemed to score 77/100 because it did not offer adequate oversight throughout the full cycle of the budget, only at its planning stage. At the same time, the SAI in Audit Scotland received a score of 100/100. Recommendations from the SHRC reflected this with the key recommendation to improve oversight, focusing on the need for 'better legislative oversight' through the implementation stage of the budget cycle.<sup>1040</sup> This provides a helpful benchmark for Scotland and shows signs of good practice compared to similar nations. However, it does not present the extent to which other bodies throughout Scotland can and must play a role in providing budget oversight. For example, while the SAI provides excellent oversight of fiscal decision-making, assessing whether those fiscal decisions were appropriate for meeting human rights standards is not required. Arguably, it is not the place of an SAI to do so, but this reinforces the need for the broader, multi-institutional approach argued for in Chapter 5 to be used to ensure the broad church of expertise within a society interacts with budgetary oversight.

## 8.2 From Theory to Practice: Recommendations for Considering ESCR Within the Budget Cycle

Common to all public budget processes in the UK is the use of a yearly budget cycle in which the budget is formulated, approved, enacted, and reviewed through budget oversight. For example, the Scottish budget is viewed as a 'living process' with the governing executive in charge of presenting a budget proposal to the Scottish Parliament in the form of a Bill and, following budget approval, the enactment of spending and tax plans through the year.<sup>1041</sup> Each stage of the budget cycle presents unique opportunities to embed a human rights-based approach and build a rights-compatible budget cycle. From the planning and formulation of the budget through its approval, enactment, and review, each stage serves a distinct purpose. Although these may differ depending on the local, devolved, or national context, recommendations can be interpreted and altered to reflect the relevant process. Below, each stage of the budget cycle is provided with a brief explanation as to its purpose and key elements before recommendations for ESCR considerations are offered.

### 8.2.1 Budget Planning & Formulation

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<sup>1040</sup> SHRC (n 150).

<sup>1041</sup> For an overview of the Scottish budget process, see Scottish Government 'Guide to Government Finance'. Available at: <<https://www.gov.scot/policies/government-finance/setting-the-scottish-budget/>>; see also For an overview of the changes advocated for and achieved in Scotland's budget process, see Budget Process Review Group, 'Budget Process Review Group: Final Report' (Scottish Government June 2017).

Budget formulation represents the most crucial stage of the budget cycle from which to embed ESCR due to the extent of different ‘policy choices’ available to decision-makers.<sup>1042</sup> For example, it brings into question the level of revenue the state can bring in through taxation and other means, the extent to which the state wishes to run a budget deficit (a turbulent question in modern-day economics), as well as how to distribute the resources that have been mobilised between different departments and portfolios throughout the public sector. For this reason, it is dependent upon good planning which in turn is reliant upon there being adequate monitoring systems in place. As Blyberg raised nearly a decade ago in exploring rights-budgeting in Scotland, even ‘prior to developing plans and programmes, the relevant ministries should have collected and analysed data to identify where relevant government services are failing to reach particular populations and designed their plans and programmes to more effectively reach those populations’.<sup>1043</sup> Moreover, supporting the findings from the practitioners in this project, Blyberg raises that even before the most basic of resource-based decisions can be made, it is necessary first to establish the intended outcomes to be reached or, at a minimum, progressed within the intended fiscal year.<sup>1044</sup> There is an additional consideration here which should be noted as a challenge in adopting such an approach (though not an insurmountable one). It adopts an understanding and additional step that emphasises the central importance of, and even requires, having effective monitoring and data in place from which to guide and drive decision-making.<sup>1045</sup> Information which, in turn, enables evidence-based decision-making and planning of initial budget proposals. It presents a first, but challenging recommendation for improving Scotland’s budget processes. Initially, public bodies should make a rights-based assessment of current performance against ESCR standards based on available, disaggregated data to provide a basis for decision-making. Where gaps exist and are identified, resources should be utilised to set up further monitoring to further enable evidence-based fiscal decision-making. Such a process, as will be further discussed below, would help to enable clear priority setting for the upcoming financial year and guide national and local decision-making processes and improve upon future efficiency within spending. Furthermore, this analysis should be supported by establishing clear means for public participation and deliberation to ensure that any fiscal analysis and planning carried out by the duty bearer can adequately take account of the views of Scottish citizens. While monitoring rights through the use of indicators and data

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<sup>1042</sup> OHCHR (n 258) at 56.

<sup>1043</sup> Blyberg (n 149) at 17.

<sup>1044</sup> *Ibid.*

<sup>1045</sup> Philip Alston & Colin Gillespie ‘Global Human Rights Monitoring, New Technologies, and the Politics of Information’ (2012) 23(4) *The European Journal of International Law* 1089.

is crucial, it is equally necessary to corroborate and bolster this method of monitoring through the voices of those most marginalised and disadvantaged in Scotland to provide meaningful context as to where rights breaches are or are at a risk of occurring. Indeed, as outlined in Chapter 5, meeting the requirements of ESCR law requires that such participation in decision-making is adequately facilitated.<sup>1046</sup>

Chapter 6, drawing upon the views of fiscal practitioners, explored the potential for the NPF to play a significant role in fiscal decision-making. Although flawed, the NPF was specifically designed for this purpose and could be used to facilitate the planning and design of effective responses by allocating additional resources where necessary and bring ‘a multi-dimensional lens to policy formulation’.<sup>1047</sup> This issue has also been frequently highlighted through recent parliamentary budget scrutiny.<sup>1048</sup> The NPF is currently under review in Scotland, offering an opportunity not only to reassess and update its outcomes and indicators to better reflect the human rights monitoring required for Scotland’s current journey but also to establish it as a key tool for driving evidence-based decision-making at both the national and local levels. National monitoring will be critical, but international treaty monitoring and reporting could also highlight key priorities for rights realisation and inform resource planning. Although Scotland is a devolved nation, it participates in treaty monitoring within the UK’s obligations and reports to the UN Committees on its performance regarding rights. Alongside the NPF, utilising the Concluding Observations from international bodies can inform the budget planning process by identifying areas of concern raised by experts in human rights and which are directly linked to the state’s international legal obligations. By explicitly incorporating these mechanisms into its budgetary planning, the state can demonstrate a clear commitment and tangible practices to address the committee's recommendations through public spending.

Having monitored and identified areas of concern, the next step is to begin identifying and prioritising areas which concern the duty bearers ‘core minimum’ priorities. As argued through Chapter 4 on identifying domestic core minimum priorities, this should be guided by an assessment of core areas of spending which are relevant to meeting rights-holders basic needs and, where necessary, explicitly prioritise groups of rights-holders who are evidenced as being the most marginalised and disadvantaged within society to ensure public services are

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<sup>1046</sup> Human Rights Council (n 723).

<sup>1047</sup> Trebeck & Baker (n 850).

<sup>1048</sup> See, for example, SJSSC pre-budget scrutiny on 23/24, the FPAC pre-budget scrutiny on 23/24, and the SJSSC pre-budget scrutiny on 24/25.

facilitating their ESCR fulfilment.<sup>1049</sup> Indeed, it is a point which echoes the findings of Rudiger who highlights, as a core building block of fiscal justice, the need for budget processes to be focused on human needs and rights, prioritising society's deepest and most urgent needs.<sup>1050</sup> Recalling once again the theory raised within Chapter 4 in which certain thresholds for defining basic needs were identified, it is a step in the process which can be aided and driven by considerations of people's human dignity or capabilities. For example, the work of Sen and, particularly, Nussbaum on identifying core capabilities could be utilised as an embedded theoretical basis through which to set clear priority outcomes for rights-holders through which the efficacy of budgetary decision-making to be measured against.<sup>1051</sup> Both Sen and Nussbaum have advanced the theory of capabilities as a key means of understanding not only human development but also human progress (in a manner IHRL has not) and the mobilisation, allocation and expenditure of public resources should be planned to advance such ideals.

In the fiscal context, what such a process of prioritisation seeks to achieve can be thought of as moving certain areas of public spending from being discretionary areas of spending to mandatory areas of spend. In other words, they are social expenditures that must be guaranteed and are not subject to the same balancing act and decision-making processes which are subject to proportionately allocating resources for the progressive realisation of ESCR. In this sense, initially planning the budget requires a hierarchical approach in which the identification and guaranteeing of resources to core minimum areas comes before consideration of the broader requirements within progressive realisation. Within Scotland's current processes, instruments already exist at both the national and the local level which could be used to explicitly illuminate plans for meeting core obligations. To take the local context first, identified through the interview process was the use of the strategic framework to drive forward spending plans. These frameworks are, depending on the LA, made available to the public and can bring to light key priorities driving decision-making.<sup>1052</sup> At the national level, there are a multitude of planning frameworks which could be used depending on which government department you focus on. However, encompassing them all is Scotland's Programme for Government ("PfG") which sets out, in high-level terms, the plans and agenda for the Scottish Government for the

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<sup>1049</sup> Landau (n 103).

<sup>1050</sup> Rudiger (n 38) at 159.

<sup>1051</sup> Sen (n 767); Nussbaum (n 203); See also, Martha Nussbaum 'Capabilities As Fundamental Entitlements: Sen and Social Justice' (2003) 9(2) *Feminist Economics* 33.

<sup>1052</sup> See, for example, West Dunbartonshire Council Strategic Plan 2022-27. Available at < <https://www.west-dunbarton.gov.uk/council/key-council-documents/strategic-plan/> > (accessed 26/07/24).



coming year.<sup>1053</sup> In short, it is used to demonstrate the key priorities of each department, set out the legislative programme, highlight policies, strategies, and programmes, and explain how these will impact Scotland's national outcomes. Having such a mechanism presents a further opportunity from which to explicitly recognise Scotland's core minimum priorities, guarantee their funding, and establish a central tenet through which to drive the planning and formulation of public budgets.

From here, it is necessary to establish the overall 'fiscal envelope', which requires an analysis of the money required to progressively realise ESCR and the money available or generated to do so. Here, clear considerations should be given to the state's overall fiscal and economic outlook as well as potential efforts to adopt a more progressive approach to taxation to raise the resources necessary to facilitate ESCR realisation.<sup>1054</sup> In terms of assessing Scotland's economic outlook and thus guiding its decision-making on the overall availability of resources within the state, each year in May, the Government publishes its Medium-Term Financial Strategy ("MTFS"). The MTFS provides an overview of the medium-term context for annual budget decisions by presenting the outlooks for funding and spending over five years and the government's overall strategy for ensuring the sustainability of public finances.<sup>1055</sup> In its current form, the MTFS presents a valuable tool for understanding the fiscal analysis and assumptions that underlie the critical decisions that need to be made within that year's budget formulation. However, it could provide an opportunity to demonstrate human rights outcomes driven by relevant human rights obligations, and the impacts of the forecasts are considered when the macroeconomic outlook is assessed. Through an analysis of different medium-term budget frameworks, Harris demonstrates that they, in best practice, can be used to 'strengthen the sustainability of public finances', 'promote more effective allocation of resources' and 'encourage more efficient use of resources'.<sup>1056</sup> This is further backed up by Murphy, who asserts: 'Spending plans, economic strategies and medium-term economic frameworks are vehicles for advancing equality, and equality or human rights goals become more embedded when they strategically fit with other government priorities and narratives.'<sup>1057</sup> Conducting and

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<sup>1053</sup> Scottish government 'Programme for Government' (2023). Available at < <https://www.gov.scot/programme-for-government/> > (accessed 26/07/24).

<sup>1054</sup> See, for example, the impact of taxation on ESCR in Dutsche et al. (n 273); see also Blyberg & Hofbauer (n 446).

<sup>1055</sup> Boileau et al. (n 27).

<sup>1056</sup> Jason Harris, 'Medium-Term Budget Frameworks in Advanced Economies: Objectives, Design, and Performance' as found in M Cangiani (2013) *Public Financial Management and Its Emerging Architecture* (2013) IMF at 139-142.

<sup>1057</sup> Ibid.

publishing an MTFS demonstrates a key aspect of planning: establishing and assessing the overall macroeconomic outlook.

As fiscal forecasts allow for governments to ‘express their views about the outlook for fiscal policy in the form of annual targets and plans rather than projections or forecasts, the activities of revenue estimation and spending planning are key in the elaboration of annual budgets and the determination of (multi-annual) targets’, it is telling that the MTFS does not yet present any considerations of equality or human rights.<sup>1058</sup> In Scotland, where multi-year forecasts are made, there is little to demonstrate how this has impacted decision-making nor how the government may intend to make up for shortfalls in public budgets if there are demonstrably challenging times forecast with inevitable impacts on rights compliance. Where multi-year analysis and decisions are being taken, the Scottish Government in establishing the MTFS should seek to ‘adopt a systematic plan that justifies fiscal measures to be adopted by States within a multi-year framework [and] include at least a diagnosis of how public finances will respond to the country’s situation in terms of human rights, objectives, time frames and deadlines’.<sup>1059</sup> Another intermittent assessment is made to ascertain Scotland’s fiscal envelope, which has the potential to further embed human rights within this stage of the budget processes. The MTFS can be accompanied by a Resource Spending Review (“RSR”). For example, in May 2022, the Scottish government published an RSR due to the significant and undoubtedly lasting impacts of the COVID-19 pandemic on public spending.<sup>1060</sup> The first in a decade. The RSR presented the allocation and spending plans for the sitting Parliament (2026/27) and further analysis on impacts for funding key government priorities. It thus presents a good opportunity from which to begin building a basis to connect funding plans and budgetary decision-making to achieving specified outcomes. However, the RSR in its current form had numerous shortcomings. As was raised through parliamentary evidence on the RSR by the SHRC, ‘The [RSR] sets out prioritised spend in various areas. Health, social care, and social security are all essential areas of the welfare state and directly reflect corresponding human rights, and all have the potential to impact poverty in Scotland. They are all appropriate areas of focus. However, what is not clear from the RSR is what assessment has been made that these are the areas of public service most in need of public expenditure and the expected impact outcomes of the different investment areas?’<sup>1061</sup> Moreover, where the MTFS provides a crucial

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<sup>1058</sup> Mary Murphy ‘How Policy and Budget Proofing Can Advance Human Rights and Equality in Ireland’ (2017) 65(3) *De Gruyter Administration* 1 at 9.

<sup>1059</sup> CESR (n 325) at 40.

<sup>1060</sup> Scottish Government, ‘Resource Spending Review 2022’ (Scottish Government, 2022)

<sup>1061</sup> SHRC ‘Social Justice and Social Security Committee Pre-Budget Scrutiny 2024-25’ (September 2023) SHRC.

overview of Scotland's fiscal position and how this may impact mobilising revenue. A more frequently conducted RSR would help to provide a more tangible link between the economic forecasting within the MTFS and the impact this would have on Scotland's progressive achievement of its stated outcomes.

At this stage of the budget formulation process, where guarantees of social spending for specific core minimum areas have been guaranteed, the process moves into a stage of considering where best to allocate the remaining resources. In the end, governing is about choices and fiscal decision-making largely presents clear trade-offs. Proportionate, reasonable balances must be made regarding the overall needs of the state and the allocation of fiscal resources. The key guiding obligation at this stage is to ensure ESCR-related areas of social spending are provided explicit 'due priority' within the totality of available resources. Where discretion and deference to political preferences are afforded within the overall allocation of resources, the ESCR legal framework seeks to ensure reasonable boundaries to the balances that can be made and that social spending is maintained at an adequate level to ensure the progressive realisation of ESCR. This could be analysed through the lens of ensuring an incremental increase in areas of social spending corresponding to any economic growth identified by the fiscal outlook.<sup>1062</sup> However, as Overy has highlighted, in practice due priority 'does not mean that a specific share or percentage of a budget must go to a specific sector'.<sup>1063</sup> More important is the decision-making and evidence upon which these decisions have been made. This gives rise to the importance of rightsholders' participation, which is usually delivered via parliamentary committees' pre-budget scrutiny within a representative democracy. In Scotland, determining the process of budgetary allocations remains a challenge. Where explanations for budgetary allocations are provided within the budget proposal itself, as presented to Parliament, they do not provide detailed reasoning as to why the allocation was made, to what extent this was driven by delivering outcomes, nor (in the case of a budget allocation increase) where the increase in funding comes from. This critique permeates the evidence provided in recent years to parliamentary committees in their role of providing legislative oversight.<sup>1064</sup> The same critique can be tabled at local government in Scotland, with the Chiefs highlighting that political priorities usually drive the process of allocating discretionary resources decided behind the closed doors of councillor meetings. Conducting

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<sup>1062</sup> Neil Overy, "South Africa: Civil Society Uses Budget Analysis and Advocacy to Improve the Lives of Poor Children" (2010) IBP.

<sup>1063</sup> Ibid.

<sup>1064</sup> SHRC (n 1061).

pre-legislative scrutiny allows committees to use pre-budget reports to influence the government's decision-making and allocate them to different portfolios covered by specific parliamentary committees. Reports are written and submitted to the government up to six weeks before the budget enters Parliament. They are generally informed by evidence provided to the Committee by key stakeholders within their portfolio's area. Additionally, some Committees in Scotland have begun to focus their 'scrutiny process on a citizen's panel, which used a deliberative process to come up with questions for the minister' and use 'frameworks and principles' including 'international standards, such as human rights and gender-based budgeting principles'.<sup>1065</sup> These are positive steps and reflect the impact proponents of progressive budgeting are having in Scotland. However, the key challenge remains in understanding the difference these oversight processes have on impact allocations of funding within the Scottish budget and enabling external actors to assess the Government's decision-making. Without tangible feedback on the impact of such deliberate processes there remains much work to do with the Parliament having recently opined, 'It's difficult to see how committees can meaningfully impact on the budget when calls for transparency and clarity go unanswered, and they are left unable to see the changes between budgets or impact of spending decisions'.<sup>1066</sup> Pre-budget scrutiny thus presents numerous avenues from which to build a more rights-compatible approach to budget formulation but currently lacks the deliberative elements identified within this thesis as crucial to delivering against the standards of ESCR.

Finally, there is the step of formulating the budget itself, alongside the budget Bill for Parliament and its accompanying documents. This step of the process is primarily concerned with the transparency of the information made available both to the Parliament via the Bill's proposals and accompanying documents presented, but also what is made available to the public and in what format it is presented. Furthermore, consideration could be made to providing longer-term multi-year spending plans on core minimum priorities, as was discussed in Chapter 6. The final formulation of the budget is a stage the CRC has been active in guiding due to the understanding publications such as 'pre-budget statements and budget proposals provide powerful vehicles for States to translate their commitments to the rights of the child into concrete priorities and plans at the national and sub-national levels'.<sup>1067</sup> Already, through analysis of Scotland's score on the OBS, this is an area Scotland needs to significantly improve

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<sup>1065</sup> Ailsa Burn-Murdoch, 'Accountability in budget scrutiny – do committees influence the Scottish Government's decisions?' (January 2024) SPICe Spotlight

<sup>1066</sup> Ibid.

<sup>1067</sup> CRC General Comment No. 19 (n 305) at 81.

upon if it wishes to conduct a rights-compatible budget cycle with no pre-budget statement published.<sup>1068</sup> The CRC goes on to discuss the need for ‘budget proposals that are user-friendly, timely and accessible to legislatures, children and child rights advocates’.<sup>1069</sup> While focused on implementing and realising children’s rights, the guidance provided is underpinned by embedding a rights-based approach and, therefore, sets out useful steps to consider when setting out the final budget proposals. For example, to summarise the position of the Committee in publishing the budget proposals, the state should seek to ‘explain how legislation, policies and programmes’ will impact upon the realisation of rights, including through the identification of ‘which budget allocation’ is targeted towards this.<sup>1070</sup> Scotland has made some recent progress here, such as the publishing of an Equality and Fairer Scotland Budget Statement (“EFSBS”), which replaced the previously published Equality Statement.<sup>1071</sup> This was a step taken directly to ‘enable further scrutiny of budget proposals’ and does make an attempt to ‘look at the impact that the Scottish Budget might have on people in Scotland’ by assessing ‘what the Scottish Government is proposing to spend public money on’ and ‘if these decisions are likely to benefit some types of people more than others’.<sup>1072</sup> The EFSBS is a progressive step and helps to demonstrate a level of commitment from the Scottish Government to improving this part of the overall cycle. However, it remains heavily focused on equality and the potentially discriminatory impact of budget allocation and projected spending and as such is better suited to providing assessment of duties such as those contained in the Equality Act 2010 and Fairer Scotland Duty. It does not provide an adequate breakdown of the impact of budget allocations on rights realisation and, consequently, whether the state is meeting its human rights obligations.<sup>1073</sup> To further embed a rights-based approach in the overall formulation of the budget, having followed steps one, two and three before presenting a finalised budget, the analysis carried out through these steps should be digested and presented in a transparent format to allow for the legislature, with participation from rights holders, to adequately scrutinise the budget against the human rights standards.

### 8.2.2 Budget Approval

The following stage of the budget cycle concerns its parliamentary scrutiny and approval. budget approval is a critical stage of the process to ensure adequate oversight of the budget

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<sup>1068</sup> SHRC (n 150).

<sup>1069</sup> CRC General Comment No. 19 (n 305) at 81e.

<sup>1070</sup> Ibid at 82a.

<sup>1071</sup> Scottish Government, ‘Equality and Fairer Scotland Budget Statement 2024-25’ (Scottish Government, 2023)

<sup>1072</sup> Ibid at 12.

<sup>1073</sup> SHRC (n 1061).

proposals, building upon the pre-budget scrutiny carried out before it enters Parliament, and providing the adequate participation of groups within society to enable deliberation upon the budget aims and impacts on human rights standards. The OHCHR's guidance emphasises this point by stating, 'in its role of reviewing the budget, and later of assessing its implementation, the legislature plays an essential role in holding the government to account. Many civil society groups also participate in this stage of the budget process by discussing their concerns with various members of the legislature and even attending and sometimes testifying in legislative hearings related to the budget. Failure by the government and legislature to facilitate civil society involvement in this stage of the budget process may amount to a violation of the right to participation.'<sup>1074</sup> This stage of the process can consequently be viewed as critical to delivering against the principles of accountability and participation as a part of the state's obligations of conduct under international law. In Scotland, the budget usually enters Parliament in the middle of December (last year was the 19th of December). It will undergo three months of scrutiny. This process has three stages and is predominantly carried out in under three months to ensure a budget is in place for the start of the new financial year and spending can occur. This leaves little time for in-depth scrutiny (though this is primarily caused by the need to wait for the UK budget for reasons discussed above). Budget scrutiny in Scotland is led by the Finance and Public Administration Committee, with each committee providing support to scrutinise departments and portfolios within their area of expertise.<sup>1075</sup> It, alongside other committees, holds evidence sessions, often hearing from ministers themselves or leading voices within the public or civic sector. It is particularly important in Scotland due to its unicameral legislature. Budget scrutiny in Scotland during the approval stage of the budget is arguably a strength in the overall cycle. However, it could be improved through two key avenues.

Firstly, as highlighted by the OBS work, there is a need to produce an effective and transparent citizen's budget in Scotland. According to the IBP, citizens' budgets are designed to present key public finance information to a general audience. They are typically written in accessible language and incorporate visual elements to help non-specialist readers understand the information. Additionally, the IBP asserts that this type of budget information can be provided throughout all stages of the cycle of all budgetary publications but is essential for budget

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<sup>1074</sup> OHCHR (n 258) at 40-41.

<sup>1075</sup> See an overview of the legislative scrutiny process in Scotland here: <<https://www.parliament.scot/chamber-and-committees/the-scottish-budget-process>> (accessed 26/07/24).

proposal approval.<sup>1076</sup> They are commonly produced worldwide and have been considered part of the participatory budgeting initiative for decades.<sup>1077</sup> Key facets of developing a citizen's budget are ensuring it contains information on areas such as the 'economic assumptions underlying the budget', decision-making on 'revenue collection', and explainers on 'spending allocations' and where there are 'sizeable increases or decreases in revenue'.<sup>1078</sup> The CRC also echoes these areas when assessing a rights-based approach to budget approval. It advocates that child-friendly versions must be available to enable children's participation and ensure their views are heard, as required by Article 12.<sup>1079</sup> In developing a citizens' budget to accompany the budget proposal, the Scottish government would enhance citizens' ability to participate meaningfully in the budget and enhance the depth and quality of the scrutiny provided by parliamentary committees through the three parliamentary stages within the Scottish budget process. The key aim is to enable those whose voices are rarely heard within government processes to understand, deliberate upon, and meaningfully impact budgetary decision-making via participatory oversight.

The second avenue is more cross-cutting and is generally the key measure of implementation for human rights. It is also central to improving rights-based practices within the budget cycle. Analysing the reports drawn up by Scotland's parliamentary committees, little suggests any meaningful assessment of the budget impact on human rights has taken place. If the provided purpose of the scrutiny is to be believed (which it is by this author), this is not necessarily due to any lack of will but a lack of understanding, knowledge, and rights-based practice.<sup>1080</sup> Moreover, for Scotland's budgetary approval process to embed a rights-based approach, those central to conducting oversight require training and support. As Chapter 7 briefly argued, awareness raising, training of officials, and general capacity building are central to human rights practice and overall implementation.<sup>1081</sup> It is no different for HRB. In Scotland, the Equalities, Human Rights, and Civil Justice Committee is designed to provide this expertise through delivering its budget scrutiny. This is welcomed. However, a more fruitful approach

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<sup>1076</sup> IBP, 'Citizens Budgets' (2015) IBP. Available at: <<https://internationalbudget.org/publications/citizens-budgets/>> (accessed 26/07/24).

<sup>1077</sup> Ibid; see also Carol Ebdon's 'Beyond the public hearing: citizen participation in the local government process' (2002) 14(2) *Journal of Public Budgeting, Accounting & Financial Management* 1096. See also more recent discussions of the role of a citizen's budget in enabling citizen participation in G Smith's *Democratic Innovations: Designing Institutions for Citizens Participation* (Cambridge University Press 2010).

<sup>1078</sup> IBP (n 1067).

<sup>1079</sup> CRC (n 305).

<sup>1080</sup> Blyberg (n 149).

<sup>1081</sup> in Elaine Webster and Elisa Morgera 'Transformative capacity building around a right to a healthy environment: what role for dignity as a human rights value?' (2021) 9(1) *Griffith Journal of Law and Human Dignity* 55. See also, for example, Tara Collins's 'The general measures of implementation: opportunities for progress with children's rights' (2019) 23(3) *The International Journal of Human Rights* 338; See also UN CRC General Comment No. 5 (n 48).

may be providing a more expansive role for the Committee, with the input and support of key human rights stakeholders, adopting a more supportive position in aiding parliamentary committees in undertaking their budgetary oversight. As has been detailed thoroughly here, all fiscal decisions have the potential to progress or regress human rights. Instead of a single committee being expected to provide a comprehensive equalities and rights-based analysis of the budget, a more sensible approach would seem to ensure that each committee is supported with this expertise to build this style of analysis into their scrutiny process. Upholding human rights is the responsibility of all areas of the state and altering the Committee processes to reflect this would help to embed a whole system approach to rights-based scrutiny of the budget proposals.

### 8.2.3 Budget Execution

Once the budget has received legislative approval, the cycle moves on to its execution. For example, governments may fail to collect the projected revenue, thus leaving fewer resources than planned to be spent on ESCR realisation. Or, either through deliberate or unintentional practice, budget allocations may not be used in full, leaving ‘underspend’ within the budget, which is reallocated to non-ESCR areas or saved within ‘rainy day’ funds. Ultimately, even when resources are allocated to appropriate policies to achieve specific rights outcomes, how each governmental department or public authority executes and expends this resource will dictate the outcomes reached. So much so, ‘in many ways, a government’s expenditure reveals more about its compliance with its human rights obligations than allocations’.<sup>1082</sup> For this reason, ‘ministries [governmental departments] should have sound expenditure management processes in place, to ensure that funds are released and spent on time, spent efficiently and effectively, and so on’.<sup>1083</sup> In discussing the obligation of MAR, states must seek to monitor and report on ‘value for money’ and the overall effectiveness and operational efficiency of spending in meeting the proposed outcomes through the execution of the budget.<sup>1084</sup> A rights-based approach to the execution of the budget presents an analytical and technical exercise of scrutinising individual budgetary allocations and how they have been spent, underspent, reallocated, or potentially wasted. Moreover, drawing from the findings of Chapter 3, the budget execution phase primarily concerns the overall efficacy with which the resources allocated are used. It was demonstrated that the MAR duty went beyond the need to mobilise

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<sup>1082</sup> OHCHR (n 258) at 113.

<sup>1083</sup> Blyberg n 149.

<sup>1084</sup> CRC General Comment No. 19 (n 305).



resources and obligated the need to also use those resources efficiently and effectively. While it is the responsibility of the duty-bearer to monitor and report on spending throughout budget execution meaningfully, there is a strong part for civic society and other outside actors to play in providing analysis and oversight on the impact of spend with these organisations, often closer to the ground and working closely with those most vulnerable to human rights abuses. This has led a recent committee of ESCR experts to opine concerning oversight of budget execution: ‘These institutions must ensure the execution of resources in a timely, effective, transparent, and efficient manner, according to the resource allocation foreseen in the budget. They must ensure correspondence between the planning and executing resources, setting goals and indicators to facilitate monitoring, and establishing accountability mechanisms with the possibility of citizen participation. They must incorporate a focus on gender, race, and ethnicity, and ensure that the rights of disadvantaged groups are considered as a priority in their monitoring and assessment activities, carrying out consultations when relevant.’<sup>1085</sup>

To provide an example of the relevance budget execution has to ESCR realisation, the famous South African case of *Minister of Health and Others v Treatment Action Campaign and Others* (“TAC case”) provides a clear, unambiguous example of how underspending can impact the upholding of ESCR.<sup>1086</sup> The TAC case was focused on the extent to which South Africa was meeting its obligations under the right to health in the fight against mother-to-child transmission of HIV due to a lack of action taken by the Government, which it justified on the grounds of a lack of resources. The campaign that took the government to court was able to provide evidence, drawn from publicly available budgetary information, on the fact that provincial departments of health in South Africa had underspent their budgets by approximately \$63.1 million, consequently highlighting the capacity of the government to provide funding for a treatment programme. The court found in favour of the campaign and held that the government could not rely upon its argument of a lack of resources. Subsequently, a programme for treatment was established.<sup>1087</sup> The TAC case provides a successful use of human rights-based budget analysis to hold a state to account for failing to utilise the full extent of its resources in the face of a health epidemic. Additionally, underspending within public budgets through a human rights lens raises the question of whether the initial allocations were suitable and whether the underspending in one department or programme could be put to better

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<sup>1085</sup> CESR (n 325) at 64.

<sup>1086</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002).

<sup>1087</sup> For an overview of the TAC case, see Mark Heywood ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1(1) *Journal of Human Rights Practice* 14.

use elsewhere. This ties neatly into the further consideration required throughout the execution of the budget on ‘trade-offs’ and the reallocation of funds more generally through the year. Again, it is relatively common practice within public budgeting and often happens at the discretion of the decision-makers within the governmental departments. The CESCR has provided that all money earmarked and allocated for ESCR services areas should be spent on those areas, leaving any ‘trade-off’ carried out within the allocation’s expenditure open to abuse.<sup>1088</sup> It is particularly challenging to follow this diversion of funds throughout the year. In practice, government officials and public finance professionals are highly dependent on making any movement of funds transparent throughout the year.

This remains an area Scotland could significantly improve upon to further embed rights-based considerations through the execution stage of the cycle. As discussed regarding Scotland’s OBS score, the transparency of the budget was significantly reduced by the lack of in-year reports being published or a mid-year report. These have been singled out as critical mechanisms for ensuring both internal and external accountability throughout the execution of a budget due to the report enabling a closer following of the actual spending within a government’s budget allocations.<sup>1089</sup> Work from the IBP highlights the importance of reporting throughout the cycle, with best practice suggesting monthly in-year reports could be prepared to ‘track aggregate budget spending and revenue trends’ and provide ‘regular information to policymakers, the press, and the public if budget plans are going astray’.<sup>1090</sup> Moreover, the IBP’s guide to transparency outlines the need for in-year reports to ensure they contain adequate information on the amount of government revenue and expenditure, as well as any adjustments or trade-offs between departments.<sup>1091</sup> Producing in-year reports in Scotland would significantly improve the overall transparency of the budget cycle. But almost more importantly, they would enable much more meaningful external and internal insight into the execution of the Scottish budget, allowing for analysis to take place and ensuring the principles and standards of human rights law are not embedded through the budget formulating and approval and undermined through its execution. Alongside the more light touch but monthly in-year reports, Scotland is yet to produce a mid-year report, which should ‘allow for an assessment of whether the budget is adequately coping with current macroeconomic developments, including changes in the prices of natural resources, the state of implementation of the different elements of the budget,

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<sup>1088</sup> OHCHR (n 258).

<sup>1089</sup> CRC General Comment No. 19 (n 305); Vivek Ramkumar & Isaac Shapiro, ‘Guide to Transparency in Government Budget Report: Why are Budget Reports Important and What Should They Include?’ (2010) IBP.

<sup>1090</sup> Ibid at 26.

<sup>1091</sup> Ibid.

and revenue collections in the context of expected seasonal patterns’<sup>1092</sup> The IBP guide to budget transparency provides detailed steps as to what needs to be included within a mid-term report and why it serves as a critical component of delivering against the principle of transparency throughout the cycle. There are signs in Scotland, such as commitments to improve fiscal transparency within the Open Government Action Plan 2021-2025 and publishing an Autumn Budget Statement (following the UK budgets update), that practice through the execution of the budget is improving.<sup>1093</sup> However, little information is provided throughout the year on the overall spending until it is provided within the end-of-year report and budget review conducted by Scotland SAI, Audit Scotland.

#### 8.2.4 Budget Review

The final stage of the budget cycle is often coined the ‘budget review’ stage and is concerned with embedding in-depth oversight and, thus, accountability through the process. Explored through the principle of accountability, budget oversight is paramount to the protection and promotion of human rights, ensuring that government funds are allocated and spent in ways that fulfil obligations under national and international human rights laws.<sup>1094</sup> Effective oversight mechanisms, including legislative scrutiny, independent audits, and civil society participation, help to ensure transparency and accountability in fiscal governance. By monitoring how budgets are planned and executed, oversight bodies can identify and address potential misallocations or mismanagement of resources that could undermine the provision of essential services like healthcare, education, and social welfare. It is particularly crucial for marginalised and vulnerable groups who rely on these services for their basic needs and rights and, consequently, forms a key aspect of understanding compliance with rights obligations. Moreover, budget oversight can help prevent corruption and the misappropriation of funds, which often disproportionately affect the poor and disenfranchised. In this way, robust budget oversight is not only a tool for fiscal responsibility but also a critical component in upholding the principles of equality, justice, and human dignity.

In Scotland, there are in-year audits as well as an end-of-year audit, which present the opportunity for a more in-depth analysis of specific budgetary allocations and expenditures throughout the year and, taking a rights-based approach, an opportunity to ensure accountability for areas where the budget has not upheld the standards and principles of human

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<sup>1092</sup> Ibid at 30.

<sup>1093</sup> Scottish Government, ‘Autumn Budget Revision 2023-2024 guide: finance update’ (2023) Scottish Government 2023; and Scottish Government, ‘Open Government Action Plan 2021-25’ (2024) Scottish Government.

<sup>1094</sup> OHCHR (n 258).

rights. The primary responsibility for conducting the full-scale analysis is left to the state SAI, which ‘plays an essential role in the budget process by verifying whether public revenue collection and spending takes place in accordance with the enacted budget’ and are key to investigating the ‘efficiency and effectiveness of expenditures’.<sup>1095</sup> However, it should be noted that this function is supported by other external actors and fiscal commentators who also conduct analysis of the budget. Audit Scotland, acting as Scotland’s SAI, produces an end-of-year annual report. Audit Scotland says, ‘the annual audit of public bodies provides the bedrock of public audit in Scotland and goes beyond reviewing accounts to look at matters such as governance and leadership, and how well public bodies use resources to improve outcomes for Scotland’s people.’<sup>1096</sup> In the traditional sense, much of Audit Scotland’s work focuses on issues such as securing ‘best value’ for money, curbing government waste, and analysing the sustainability of the approach of the sitting government to fiscal decision-making. It is a well-respected body, and the quality of the accounts it provides is not questionable. However, they have no mandate to assess, comment upon, or even allude to the conduct of the Government’s budget practices regarding its impact on human rights. Here lies the significant problem. SAIs rarely, and certainly not in Scotland, have the mandate or the expertise required to analyse fiscal decision-making through the lens of human rights.<sup>1097</sup>

Here, different options in Scotland exist. Firstly, throughout the budget cycle, Scotland could take steps to broaden the mandate of Audit Scotland in its day-to-day activities and conduct the end-of-year audit to include an assessment against the obligations of ESCR law as covered in Chapters 3 and 4. While this analysis would not be predicated upon finding violations of ESCR, it would provide a further evidence base from which to implement new practices, alter budget allocations, or assess why specific areas of expenditure have not achieved their intended results. SAIs are experts in providing granular and extensive budget analysis based on the principles and theories of accounting. Building their overall awareness of and raising their capacity to carry out a rights-based analysis alongside this detailed budget breakdown would mark a significant step forward in enhancing current processes for budget oversight in Scotland. A supporting solution to this may be found by adopting a more multi-institutional approach to accountability, as introduced in Chapter 5. While the argument there was focused more broadly on assessing the need for a multitude of actors to be willing and able to carry out budget analysis to achieve meaningful accountability, the essence of the argument serves as a similar

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<sup>1095</sup> CRC (n 305).

<sup>1096</sup> Audit Scotland, ‘Annual report and accounts 2022/23’ (2022) Audit Scotland.

<sup>1097</sup> OHCHR (n 258).

foundation for including further actors within the final, budget oversight stage of the cycle. Scotland is blessed with an independent NHRI and strong civic sector who, while often lacking in the skills honed by auditors, have extensive knowledge and expertise on the basic needs of the population, current areas of challenge, and the state of human rights within Scotland.<sup>1098</sup> Building their expertise into the fiscal analysis conducted by the SAI would help to alleviate a singular institution being overly burdened with considering the economic, fiscal, and human rights implications of the budgetary year and enable great overall participation in the analysis conducted and shaping of the next cycle's evidence base. Budgetary oversight in Scotland, as presented by the findings of the OBS, is an area of overall strength within the cycle. Using and building upon this already existing strength as a key means to build ESCR considerations into the budget cycle in the manner suggested above would signify an active intent to deliver a process with rights-based analysis at its heart.

### 8.3 Final Remarks

For most, public finance and the budget remain an often impenetrable ‘set of papers containing a lot of numbers’.<sup>1099</sup> In reality, it is ‘the skeleton of the state stripped of all misleading ideologies’ and serves as a powerful instrument for advancing human rights standards and the principles of social justice.<sup>1100</sup> As this thesis has consistently argued, the manner in which a state mobilises, allocates, and expends its limited resources is fundamental to the realisation of ESCR. The challenge for the human rights community has been to effectively communicate this fact and to challenge the extreme fiscal policies and neoliberal economic approaches that have, predominantly, violated these rights in the pursuit of unmatched economic growth. The financial crash and subsequent fiscal consolidation awakened a new wave of interdisciplinary scholarship, prompting renewed scrutiny of the inequities inherent in contemporary economic systems and fiscal practices. This has led to increased efforts to strengthen the legal frameworks that should have mitigated the consequences of these crises in the first place.<sup>1101</sup> Moreover, ‘challenging fiscal injustice requires holding public finance accountable for sharing society’s resources equitably’.<sup>1102</sup> It remains a significant challenge, but progress is being made, as the last decade has seen. Today, there can be no doubt that ‘human rights principles are fully

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<sup>1098</sup> Gomez (n 793).

<sup>1099</sup> OHCHR (n 258) at 37.

<sup>1100</sup> This quote is attributed to Austrian sociologist Rudolf Goldscheid by Joseph A. Schumpeter. See J.A. Schumpeter (1918) ‘The Crisis of the Tax State.’ In R. Swedberg (ed.) Joseph A. Schumpeter: The Economics and Sociology of Capitalism at 100 as found in Renzio & Lakin (n 832).

<sup>1101</sup> Nolan (n 103).

<sup>1102</sup> Rudiger (n 38).

applicable to fiscal policy, and they must be implemented in the entire policy cycle', and this concluding chapter has turned its attention to this need.<sup>1103</sup> The concept of fiscal justice is critical in this regard. As Rudiger asserts in their work, challenging fiscal injustice requires holding public finance accountable for sharing society's resources equitably.<sup>1104</sup> This necessitates an approach to budgeting that is transparent, participatory, and explicitly aligned with human rights obligations. Progress in this area remains challenging, yet the last decade has witnessed notable advancements. There is now broad recognition that human rights principles are fully applicable to fiscal policy, and they must be implemented in the entire policy cycle.<sup>1105</sup> This concluding chapter has sought to underscore this imperative, outlining pragmatic recommendations (available in appendix) that Scotland's duty-bearers can begin to implement immediately. Progress will be iterative, and further research, knowledge, understanding, analysis, and collaboration between actors will be required. If the findings of this thesis can act as a foundation from which to build, it will have achieved its purpose.

Building on these arguments, this thesis has explored the multifaceted challenges and opportunities associated with HRB in Scotland, emphasising the importance of monitoring and evidence-based decision-making in the progressive realisation of ESCR. The research has reinforced the distinctive nature of ESCR and repeatedly highlighted the need to begin assessing budget against the rights-based outcomes the government intends to achieve and progress. Moreover, the research has identified Sen's capabilities approach as particularly instructive in this regard, as it shifts the focus from resource distribution alone to the actual freedoms and opportunities individuals have to lead meaningful lives.<sup>1106</sup> Fiscal policy should not merely be assessed on technical grounds but should be scrutinised for its capacity to expand substantive freedoms, particularly for marginalised groups, and the delivery of improved outcomes for right-holders. Public budgets must, consequently, be structured in a way that ensures individuals have access to adequate essential services, thereby enhancing their capabilities and ultimately respecting their dignity as human individuals. Nussbaum's extension of Sen's work, which identifies a concrete set of central human capabilities, further reinforces the potential of embedding human rights principles within fiscal policy with her argument for central capabilities to be represented within all state constitutions and embedded throughout the public sector.<sup>1107</sup> Her emphasis on minimum thresholds aligns with the concept

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<sup>1103</sup> CESR (n 325).

<sup>1104</sup> Rudiger (n 38).

<sup>1105</sup> O'Connell (n 41); De Schutter (n 33); Rudiger (n 38).

<sup>1106</sup> Sen (n 196).

<sup>1107</sup> Nussbaum (n 631).

of ‘core minimum obligations’ in ESCR, underscoring the necessity of allocating public resources in ways that secure fundamental social protections but providing more clarity on what can be envisaged as a minimum threshold. These insights support the argument that Scotland’s fiscal strategy could be designed not simply for economic efficiency but for the promotion of social justice and the safeguarding of fundamental rights with numerous identified possibilities for further embedding this approach within current processes.

Finally, a recurring theme throughout this thesis has been the imperative of robust monitoring mechanisms and the use of empirical evidence in decision-making processes. Effective monitoring ensures that the state remains accountable for its human rights obligations, while empirical analysis provides a foundation for policies that are sustainable and impactful. As Rudiger and Kuosmanen argue, fiscal justice requires not only equitable resource distribution but also participatory decision-making processes that empower civil society and ensure that fiscal policies reflect societal needs. It is a view supported by the expansive work of Liebenberg on participatory justice and ESCR. In this context, HRB is not merely a technical exercise but a reflection of the values a society chooses to uphold. Institutionalising HRB within the Scottish Government, enhancing transparency and participation in budgetary processes, strengthening accountability mechanisms, and aligning domestic policy with international human rights frameworks are essential steps forward and enable fiscal processes. These measures will ensure that fiscal decisions are guided by human rights commitments rather than short-term economic imperatives. Furthermore, the findings of this thesis highlight several areas for future research, including empirical studies evaluating the impact of HRB on social outcomes and comparative analyses of HRB practices in other jurisdictions. Expanding the discussion to include intersections between human rights, fiscal policy, environmental sustainability, and digital rights could offer additional insights into the holistic implementation of ESCR. Scotland stands at a pivotal moment in its human rights journey. The incorporation of ESCR into domestic law, alongside the adoption of a human rights-based approach to budgeting, presents a unique opportunity to advance social justice and equity. Drawing on the insights of O’Connell, Nolan, Kuosmanen, De Schutter, Landau, Nussbaum, and Rudiger (to name but a few of the leading theorists), this thesis has argued that a paradigm shift in fiscal policy is required. A move towards fiscal policy that prioritises securing human dignity, equity in resource distribution, and meaningful, deliberative participation. As Nolan succinctly summarised nearly a decade ago, ‘budgets are a key sign of a government’s values. If human rights are not reflected in

public budgets, it indicates that they are not considered a priority worth investing in.’<sup>1108</sup> Scotland’s commitment to embedding human rights standards and principles in its budgetary processes is not merely a policy choice but a moral imperative, reflecting its dedication to dignity, equality, and social justice for all.

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<sup>1108</sup> Nolan (n 31).



## TOWARDS FISCAL JUSTICE: SUMMARY OF RECOMMENDATIONS

Budget Formulation

- Effectively implement the NPF across the public sector and ‘down the system’ to influence the allocation and expenditure of national resources.
- Align budget processes more closely with the NPF to use priorities and evidence to guide resource allocation and use the review of the NPF as an opportunity to update its outcomes and indicators for better human rights monitoring.
- Incorporate international treaty monitoring and reporting into the budget planning process to support the identification of areas of concern for rights realisation and ensure a clear commitment to international legal obligations by explicitly using treaty observations in budgetary planning and public spending decisions.
- Adopt a two-stage process for planning ESCR realisation, first prioritising identified core minimum areas and marginalised groups. Ensure the prioritisation of resources for core ESCR elements to satisfy basic needs, transforming these areas from discretionary to mandatory spending.
- Leverage Scotland’s Programme for Government to highlight key priorities, legislative programmes, and how policies will impact national outcomes, embedding ESCR in the process. This should be reflected in existing strategic frameworks at local levels to drive spending plans and embed ESCR priorities.
- Prioritise planning based on ESCR compliance before assessing the fiscal outlook to ensure resource mobilisation is considered in light of required social spend.
- Conduct and publish a more frequent Resource Spending Review (RSR) to link economic forecasting with rights outcomes.
- Establish a systematic, multi-year plan within the MTFS and RSR to justify fiscal measures and meet human rights obligations.
- Adopt progressive tax regimes and identify alternative revenue streams to enhance public investment for ESCR fulfilment.
- In formulating budget allocations ensure explicit ‘due priority’ is given to social spending critical for the progressive realisation of ESCR.
- Facilitate Public and Civil Society Involvement: Ensure transparency and active participation within pre-budget scrutiny to enable adequate pre-budget scrutiny of proposed budget allocations against ESCR legal obligations.
- Ensure transparency in budget formulation by making information clear and accessible to both Parliament and the public.

- Consider providing longer-term multi-year spending plans on core priorities which are to receive guaranteed funding.
- Publish pre-budget statements and budget proposals to translate rights commitments into concrete plans.
- Make budget proposals user-friendly, timely, and accessible to all stakeholders and improve the Equality and Fairer Scotland Budget Statement to include the potential impact of proposed budget allocations on rights-holders' outcomes.

### Budget Approval

- Facilitate Public and Civil Society Involvement: Ensure that civil society groups can participate in the budget process by discussing their concerns with legislators and participating in legislative hearings, as their involvement is critical to upholding the right to participation.
- Produce a Citizen's Budget: Develop a citizen's budget in Scotland to present key public finance information in an accessible format. This would enhance citizens' ability to participate meaningfully in the budget process and improve the depth and quality of parliamentary scrutiny.
- Provide Child-Friendly Budget Versions: Ensure that child-friendly versions of the budget are available to foster inclusivity and participation among younger populations.
- Enhance Human Rights Training: Offer training and support to officials and parliamentary committees to improve their understanding and capacity for rights-based budget scrutiny.
- Expand Committee Expertise: Provide a more expansive role for the Equalities, Human Rights, and Civil Justice Committee (EHRCJC) to support all parliamentary committees in embedding rights-based analysis in their scrutiny process.
- Adopt a Whole-System Approach: Ensure that all parliamentary committees are equipped with expertise in human rights to incorporate this perspective into their budgetary oversight, reflecting a whole-system approach to rights-based scrutiny.

### Budget Execution

- Ensure Effective Expenditure Management: Government departments should have robust processes to manage and track expenditures efficiently and effectively, ensuring funds are released and spent on time.
- Monitor and Report on Budget Execution: Regularly assess the effectiveness and operational efficiency of spending to ensure it meets proposed outcomes.
- Facilitate Civil Society Involvement: Involve civil society and other external actors in monitoring and oversight to provide analysis and ensure accountability.

- **Publish In-Year and Mid-Year Reports:** Enhance transparency by producing monthly in-year reports and a comprehensive mid-year report to track budget spending and revenue trends.
- **Focus on Human Rights in Budget Execution:** Ensure that budget allocations are spent on intended ESCR areas, avoiding reallocation of funds without transparency and justification.
- **Address Underspending Issues:** Investigate and address reasons for underspending to ensure resources are used to meet human rights obligations.

#### Budget Oversight

- **Improve Fiscal Transparency:** Commit to and implement measures outlined in the Open Government Action Plan to improve fiscal transparency throughout the budget cycle.
- **Enhance the Mandate of Audit Scotland:** Broaden Audit Scotland's mandate to include assessments against ESCR obligations to provide a more comprehensive analysis of budgetary impacts on human rights. This will include building the capacity of auditors and other oversight bodies to conduct detailed rights-based fiscal analysis.
- **Foster Multi-Institutional Accountability:** Involve multiple actors, including the NHRI and civic sector, in budget oversight to leverage their expertise in human rights and ensure a holistic review process.