

ECONOMIC AND SOCIAL RIGHTS
IN NORTHERN IRELAND:
**MODELS OF
ENFORCEABILITY**
(SUMMARY EXPLAINER)



**QUEEN'S
UNIVERSITY
BELFAST**



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EXPLAINER

In this report, we were asked to consider approaches to the implementation of economic and social rights (ESR) in Northern Ireland that span the middle of the spectrum between full judicial enforceability on the one hand and mere declaratory principles on the other. This is a short, non-technical briefing on the five approaches we discussed.

Pre-legislative scrutiny

Placing responsibility for dealing with ESR on local politicians could be an effective way in which Ministers and civil servants would be regularly reminded of international legal obligations to implement socio-economic rights in Northern Ireland. One way of doing so would be to establish an additional committee charged with regular pre-legislative scrutiny of Bills going through the Assembly for compliance with ESR. Anticipating that such scrutiny would occur should stimulate Ministers and civil servants to take such rights more seriously in the context of considering policy options. This ensures a certain degree of mainstreaming at the pre-legislative stage. This approach developed could be taken somewhat further but stopping short of requiring legislative changes, by amending the current Ministerial Code of Northern Ireland Ministers to require Ministers to take ESR into account in exercising their Ministerial responsibilities. One of the issues that a Committee of the Assembly could consider would be building a role for the Committee into the budget process. Another variation would be to put a duty on the Department of Finance and Personnel to track spending against the realization of specific ESR, putting an emphasis on how ESR would be furthered within the lifetime of the relevant budgetary process.

Piecemeal approach: specific legislation on specific rights

References to ESR could be inserted into specific pieces of Assembly or Westminster legislation applying to Northern Ireland. One example could be section 75 of the Northern Ireland Act (NIA), which might be amended to include something like ‘socio-economic status’ as one of the grounds subject to the obligations, both substantive and procedural, on public bodies to engage in regular consultations with civil society on how policies and practices impact on those of lower socio-economic status. Another possible approach within this Model would be for the Assembly to see the benefits in further protecting specific aspects of ESR piecemeal in Assembly legislation. A specific obligation with reference to ESR might be introduced in Assembly legislation addressing particular topics, for example in the education, employment, health, housing and disability fields.

Fundamental non-justiciable constitutional duties

A Northern Ireland Constitution could identify fundamental, but non-justiciable, duties on the legislature that could include ESR principles. Constitutions often play the vital function of identifying what are the fundamental values that a country espouses and seeks to uphold. Sometimes these values are articulated as ‘rights’ that may be enforced by courts. There is, however, no reason of principle why some fundamental values identified in a constitution should not be separated off and made non-justiciable duties rather than justiciable rights. The Constitutions of Ireland (1937) and India (1950) both incorporate non-directly justiciable duties on the State (the so-called Directive Principles) to apply socio-economic principles when making laws. A variation on these approaches is to be found in the Constitution of Finland, in which several ESR are mentioned, but the responsibility is placed on the legislature to implement these rights, and litigation is based largely on the specific legislation enacted to implement the right, rather than the Constitution itself.

Light-touch judicial review

Courts in the United Kingdom currently interpret and apply human rights set out in the Human Rights Act using an approach that sets a high bar for those seeking to justify breaches of human rights. An approach to ESR could be adopted that required courts to set a much lower bar, such that the Assembly and Executive would be under a duty only to take reasonable legislative and other measures within its available resources, to achieve the progressive realization of these rights. The Assembly and Executive would be given the primary obligation to decide how best to achieve that agreed aim. Legislation establishing ESR could provide that individuals would be able only to review the reasonableness of the actions taken or not taken by the Assembly and Executive. Equally innovative approach might be taken to what remedies would be available which could help to build a positive balance of responsibilities between the courts and the Assembly and Executive. For example, allowing time for the Assembly to amend the provision to secure compatibility. Other judicial remedies might be considered, where the court declares an action unlawful and then defers the issue back to the Assembly or Executive and then plays a supervisory role in ensuring compliance with the judgment.

Trade conditionality

There are opportunities for future trade agreements that will apply to Northern Ireland to be shaped in ways that engage with ESR, in two particular respects. First, the EU, when negotiating a free trade or investment agreement with the United Kingdom (either generally or one relating to Northern Ireland) could insist that the United Kingdom continue to implement a basic set of human rights requirements (including ESR) as a condition for that agreement being concluded. Second, in any trade or investment agreement with non-EU states, provisions could be included that would directly or indirectly protect the Northern Ireland Assembly’s ability to legislate in the area of ESR, human rights, and social policy. Otherwise, there is a danger that future trade or investment agreements could undermine that ability. The Assembly and the Executive have a role in both contexts.



