

Corporate Activity Compounding Intersectional Inequities: Rethinking AI Regulation to Protect ESCR in the UK

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Abstract

The impact of corporative activities on the enjoyment of specific economic, social and cultural rights is growing. In Great Britain and Northern Ireland, local and central government are increasingly using privately-designed artificial intelligence in the provision of public services. The impacts of this automation have been acknowledged by civil society organisations, non-governmental organisations and think tanks, and the UN special rapporteur on extreme poverty and human rights. The design and use of the algorithmic programs are exacerbating intersectional inequities. These algorithms collect data, to classify, differentiate and rank.

This paper studies the ways in which international human rights law pertaining to economic, social and cultural rights might prevent and mitigate human rights harms which arise from new technologies. International bodies have sought to clarify the nature and scope of the State's duty to prevent and address adverse impacts of business activities on human rights, including the adoption of legislative and administrative measures. Domestic laws designed to protect specific human rights, such as non-discrimination, ostensibly protect from corporate harm. This paper addresses the legal limitations to the regulation of (quasi-)corporate activities in the provision of public services. The State's failure to implement and incorporate international standards into domestic legislation leads to poor regulation of corporate providers of artificial intelligence in the public sector.

The paper investigates solutions to new and evolving challenges which prevent or hinder enjoyment of economic, social and cultural rights. The paper explores the corporate negative responsibility to refrain from certain conduct and elaborates on the positive responsibility to adopt certain measures which will contribute to the fulfilment of economic, social and cultural rights. The conclusions drawn do not advocate for State abdication and transfer of human rights obligations to corporate entities. Rather, the paper's findings suggest a timely adaptation of present authoritative guidance on legal instruments to ensure application of the law is in line with societal change.

Key words: Artificial Intelligence; Economic, Social and Cultural Rights; Incorporation; Intersectional Inequities; Corporate Responsibility.

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I. Introduction

New technologies have profound impacts on our lives. There is a broad spectrum of analyses warning of the risks posed to human rights by various manifestations of new digital technologies and especially artificial intelligence (AI). But research focuses overwhelmingly on the civil and political rights such as the right to privacy, freedom of expression and information. Increasingly, there is a need to map the relationship between new technologies and socio-economic inequality and extreme poverty. With the exception of social security,¹ there are few studies² which consider equality and non-discrimination under international human rights law (IHRL), as broad principles which prevent and pre-empt economic, social and cultural rights (ESCR) harms arising from new digital technologies.

This paper provides a systematic account of structural and institutional impacts of new technologies in the provision of public services in the UK. Among emerging digital technologies, the focus herein is on recent cases of networked and predictive AI, involving big datasets, algorithms³ and automated decision-making. Specific attention is drawn to the adverse impacts these technologies have on access to education, health, adequate living standard and social protection. There is little doubt that the future of ESCR enjoyment will be integrally linked to approaches in the regulation of new technologies. There is urgent need to rethink the regulatory framework.

International human rights law (IHRL) does not offer a panacea, however its framework mitigates harms to ESCR in the AI lifecycle. Generally speaking, the State's implementation of the normative legal framework limits the extent to which structural inequality and discrimination can be tackled. More specifically, accountability and responsibility in the overall *design* and *use* of new technologies depends

¹ Human Rights Watch, UK: Automated Benefits System Failing People in Need (September 29, 2020), <https://www.hrw.org/news/2020/09/29/uk-automated-benefits-system-failing-people-need> (last visited Jan. 11, 2021).

² Cathy O'Neil, *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy* (2016); Ruha Benjamin, *Race After Technology* (2019); and Safiya Noble, *Algorithms of Oppression: How Search Engines Reinforce Racism* (2018).

³ An algorithm is a sequence of instructions that tells a computer what to do. See Jacob Brogan, "What's the Deal with Algorithms?", Slate (February 2, 2016), <https://slate.com/technology/2016/02/whats-the-deal-with-algorithms.html>.

on the (i) the scope of IHRL instruments protecting ESCR, (ii) incorporation, judiciability and adjudication of ESCR, and (iii) intersectional approaches to law and policy.

Taking each of these points in turn, this paper investigates rights-based solutions to new and evolving challenges posed by AI. First, shortcomings to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and UN Guiding Principles (UNGPS) are evaluated to determine the most authoritative legal guidance and protection of ESCR. Second, the State's failure to recognise ESCR and implement international standards is addressed at the domestic level. There is scope to develop constitutional models and existing substantive equality and non-discrimination statutory protection, as well as take account of judicial interpretation of civil and political rights, international complaints mechanisms, and common law application of customary international law. Third, equal and non-discriminatory socio-economic protection necessitates intersectional⁴ approaches across axes of gender, race and class, to tackle disempowerment. Participation of expert representatives of different affected groups is essential for equitable design and deployment of new technologies. AI might transform ESCR for the better; the starting point should be on how to devise effective techniques for addressing the needs of those who are disadvantaged, to prevent and remediate intersectional inequities.

This three-fold analysis is valuable. The business and human rights (BHR) narrative is still evolving, with corporations accepting a responsibility (but not obligations) to respect human rights. Re-thinking AI regulation from a rights-based perspective using the IHRL framework helps redress discriminatory structures which pervade access to and enjoyment of interconnecting ESCR with significant holistic or systemic effects on specific groups of people. Enhancing oversight of IHRL provides better⁵ on-the-ground safeguards for emerging technologies which could form part of the next frontier of socio-economic rights promotion.⁶ While this paper aims to elaborate on the corporate negative responsibility

⁴ Intersectionality is a term coined by Kimberlé Crenshaw, and defines the multiple and intersection characteristics of people.

⁵ Paul O'Connell, *On the Human Rights Question*, 40.4 Human Rights Quarterly 962 (2018).

⁶ That human rights can be used as a framework is counter to the arguments made by Stephen Hopgood, *The Endtimes of Human Rights* (2013); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

to refrain from certain conduct and explores the positive responsibility to adopt certain measures which will contribute to the fulfilment of ESCR, the conclusions drawn do not advocate for State abdication and transfer of human rights obligations to corporate entities, nor rely on extant legal norms and social priorities as the only means of regulation. Rather, the analysis advocates for the IHRL framework as a starting point to ensure application of the law safeguards risk and aligns with societal change.

II. Inadequate Levels of Transparency, Predictability and Accountability

The following examples show a lack of attention to the importance of ensuring legality of emerging digital technologies. This lack of a legal basis is problematic. Where local and central governments outsource, devolve, or internally operate in secrecy, AI systems, opportunities for legislative debate and for diverse involvement in shaping policy and practice is lacking. Consequently, legal challenges are retrospective, occurring only after alleged ESCR violations take place. This has major implications for transparency, scrutiny and legitimacy, leading to public unawareness or rejection of the processes behind public service provision.

II.i Algorithmic Standardisation of Mass Data

Data and algorithmic models of classification designed to differentiate, rank, and categorize⁷ are being adopted by public sector entities. Individual and collective human interests and priorities at play that contribute to the racially discriminatory design and use of these technologies. A large-scale automated decision-making process capable of reproducing implicit biases, was seen in the model adopted by examination watchdog Ofqual, the non-ministerial government regulator of qualifications, exams and tests in England. The lack of scrutiny of examination results standardisation, and non/under-representation of affected people in the decision-making process, re-entrenched structural and institutional discrimination and replicated the AI systems we see in the corporate sector.

⁷ Sarah Myers West, Meredith Whittaker and Kate Crawford, *Discriminating Systems: Gender, Race And Power In AI* 6 (2019).

In March 2020, the UK Prime Minister announced that UK schools would close in response to the coronavirus pandemic. The Secretary of State for Education announced that there would be no GCSE or A-level exams in summer 2020; students' grades would be primarily based on their teachers' assessment of their ability in the relevant subject. Ofqual mandated the method of calculating final grades; "Centre assessment grades" or "CAGs" constituted teacher-assessed evidence, such as classwork, previous exam results and non-exam assessments. The CAGs would be put through a "process of standardisation" ranking students within each grade for each subject. This automated "statistical standardisation of centres" would allow "fine tuning of the standard applied across all schools and colleges". Save in respect of very large student cohorts (500+), Ofqual prohibited teachers from ranking students jointly. All students were required to be ranked in sequential order - even where multiple students were of equal ability.⁸ Ofqual consulted on the principles which should underpin the standardisation model, publishing its "Consultation Decisions" which set out the statistical standardisation approach to CAGs:

"the statistical standardisation model should place more weight on historical evidence of centre performance (given the prior attainment of students) than the submitted centre assessment grades where that will increase the likelihood of students getting the grades that they would most likely have achieved had they been able to complete their assessments in summer 2020 ... In certain circumstances (such as for small centres and low entry subjects), it may be appropriate to place more weight on centre assessment grades than previous centre performance".⁹

Ofqual provided no definition of what automated "weight" would be given to historical performance data versus teacher assessed marks, nor what constituted "small" centre or a "low entry" subject.

⁸ Foxglove, <https://www.foxglove.org.uk/news/grading-algorithm-judicial-review-letter> (last visited Jan. 11, 2021).

⁹ Ofqual, <https://www.gov.uk/government/news/ofqual-gcse-and-a-level-consultation-outcomes-and-autumn-exam-series-proposals> (22 May 2020).

Ofqual’s “Direct Centre-level Performance (“DCP”) approach”,¹⁰ did not set out information until after release of results about the way in which data was standardised. This avoidance public scrutiny is deeply problematic.¹¹

Ofqual released a document entitled “Research and Analysis: Awarding GCSE, AS, A level, advanced extension awards and extended project qualifications in summer 2020: interim report” showing that the DCP “historic grade distribution” for each school and subject was adjusted, supposedly to reflect potential differences in historical student cohorts and the “prior attainment”.¹²

Data sets, as a product of human design, can be biased due to “skews, gaps, and faulty assumptions”.¹³ The use of and reliance on predictive models and historic data can reflect discriminatory biases and inaccurate profiling.¹⁴ 40% of students receiving grades that were one or two grades lower than their CAGs. Those effects were disproportionately felt by students at state schools. Students who felt unfairly treated had no individual right of appeal against model-predicted grades. Appeals were confined to schools and colleges, and on extremely limited bases. Unable to appeal, the only other route open to students who have been downgraded is to re-sit their exams in the autumn series (i.e. too late for them to take up their places at university). The design and development of digital technologies requires designers to make choices, and those choices will result in different distributional consequences.¹⁵

¹⁰ *Ofqual Summer Symposium 2020*, Ofqual, (Jul. 21, 2020)

<https://www.gov.uk/government/news/ofqual-summer-symposium-2020> (last visited Jan. 11, 2021).

¹¹ *Ofqual Summer Symposium 2020*, Ofqual, (Jul. 21, 2020)

<https://www.gov.uk/government/news/ofqual-summer-symposium-2020> (last visited Jan. 11, 2021).

¹² The school-level predicted grade distribution was then overlaid with the student rankings provided by the school, creating notional grades for each student in each subject. Students were then spaced evenly across a mark scale, based on their notional grade and ranking. Finally, cut-scores were used to identify grade boundaries on the scale, thereby creating students’ final grades.

¹³ Kate Crawford, *Think Again: Big Data*, Foreign Policy, (May 10, 2013)

<https://foreignpolicy.com/2013/05/10/think-again-big-data/> (last visited Jan. 11, 2021).

¹⁴ *Racial discrimination and emerging digital technologies: a human rights analysis – Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 2020, U.N. Doc. A/HRC/44/57.

¹⁵ *Racial discrimination and emerging digital technologies: a human rights analysis – Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 2020, U.N. Doc. A/HRC/44/57.

Ofqual claims that it performed an equalities analysis which shows no evidence of bias in the awarding of grades. However, the Royal Statistical Society's raised concerns that the 'technical advisory group' consisted of "government employees or current or former employees of the qualification regulators".¹⁶ The standardisation of data clearly has long-term inequitable socio-economic impacts.

II.ii Biometric Authentication Systems

With respect to the collection of identification data, digital technology can "create huge savings for citizens, governments, and businesses by reducing transaction costs, increasing efficiency, and driving innovation in service delivery, particularly to the poorest and most disadvantaged groups in society".¹⁷ However, inaccurate, missing and poorly represented information can re-entrench bias. Against this background, the announcement of a biometrics working group, launched to explore the use of vein recognition technology in the provision of Manchester's public services, is of concern.¹⁸ The group will be chaired by the Director of The Growth Company and Marketing Manchester, FinGo representatives and stakeholders from local government and academia. It is not yet known whether the group also consists of stakeholders, including civil society organisations or representatives of experts from impacted groups of people. A lack of diversity in representatives from the decision-making process can lead to inequitable systems which discriminate on the basis of race, ethnicity and socio-economic grounds. Even where discrimination is not intended, indirect discrimination can result from criteria of exclusion and inclusion in both the strategizing practice and the operation of a system.

¹⁶ Deborah Ashby and Sharon Witherspoon, *Letter to Ed Humpherson, Director General for Regulation, Office for Statistics Regulation* (Aug. 14, 2020) <https://rss.org.uk/RSS/media/News-and-publications/News/2020/14-08-2020-Letter-Deborah-Ashby-Sharon-Witherspoon-to-OSR.pdf> (last visited Aug. 18, 2020).

¹⁷ *Principles on Identification for Sustainable Development: Toward the Digital Age*, World Bank and Center for Global Development, 5 (Feb. 2017), <http://documents.worldbank.org/curated/en/213581486378184357/pdf/Principles-on-identification-for-sustainable-development-toward-the-digital-age.pdf>.

¹⁸ Tom Houghton, *Andy Burnham and Business Leaders Explore Biometric Vein ID System for Manchester's Transport, Education and Health Services*, Business Live (Dec. 15, 2020) <https://www.business-live.co.uk/economic-development/andy-burnham-business-leaders-explore-19463591> (last visited Jan. 11, 2021).

The working group will explore applications related to vein ID biometrics applications in transport, education, and health services. The technology behind the new system will be provided by authentication solutions firm Sthaler's Fingopay, recently recognized by Fast Company as one of the World's Most Innovative Companies of the year for its biometric authentication technology.¹⁹ Initially, FinGo's biometric system was designed using Hitachi's VeinID scanning, was and rolled out for payments in the hospitality sectors. The biometric system has also been used as a data gathering tool to collect customer information in hospitality venues as part of the NHS Test and Trace program. Sthaler and its subsidiary FinGo are now expanding the scope of their technology which uses finger vein patterns to enable secure transactions on the basis of unique identification.

Re-identification of people from anonymised datasets raises issues. Latanya Sweeny's research proved that 100% re-identification was possible even when data is anonymised.²⁰ Using two different methods, Sweeny was able use South Korean Resident Registration Numbers, which is similar to the UK's NHS number, and re-identify all citizens in the study. A core concern is the disparate impacts on the human rights of individuals and groups, for example data sharing across governments departments, which has huge ESCR impacts for Black Asian and minoritized ethnic migrant women.²¹

Problematic social patterns unquestionably exist and can be encoded in the data collection systems. As the Ofqual algorithm (Section II.i) evidenced, even where policymakers or companies deploy automated and predictive decision-making with an intention to improve efficiency, the systems can reinforce

¹⁹ Luana Pascu, *Fingopay included among most innovative companies of 2020 for vein biometrics tech*, Biometric Update (Mar. 17, 2020) <https://www.biometricupdate.com/202003/fingopay-included-among-most-innovative-companies-of-2020-for-vein-biometrics-tech> (last visited Jan. 10, 2021).

²⁰ Sweeny (Professor of Government and Technology at Harvard University, Director of the Data Privacy Lab and former Chief Technologist at the Federal Trade Commission)

²¹ *Joint Submission to the Commission on Race and Ethnic Disparities 'Open Consultation on Ethnic Disparities and Inequality in the UK'*, Just Fair (Nov. 2020) <http://justfair.org.uk/wp-content/uploads/2020/12/Upload-Just-Fair-LAWRS-S4S-ICOS-Haref-Praxis-Joint-Submission-to-the-open-consultation-on-ethnic-disparities-and-inequality-in-the-UK-FINAL.pdf> (last visited Jan. 11, 2020).

inequality, and result in punitive outcomes such as poverty and other forms of socio-economic disadvantage.²²

II.iii Automation of Eligibility Assessments

AI is also used for eligibility assessments. These predictive analytics processes can offer potential advantages. In practice, however, evidence shows that the systems are likely to reproduce and exacerbate biases. Even without the involvement of caseworkers or human decision-makers, in-built forms of discrimination can fatally undermine the equitable provision of public services. A striking example of this can be seen in the UK's welfare system; its Universal Credit is a consolidation of social security benefits, purportedly a "simpler, streamlined system".²³ This system relies on the Real Time Information,²⁴ which takes the social security applicant's data on earnings and tax submitted by employers and shares it with the UK Government's Department for Work and Pensions. This data is then used to automatically calculate monthly social security benefits.

The majority of new technological applications used by public authorities are sourced from private companies. As such, functioning of digital technologies and how public authorities arrive at a certain score or classification is often secret.²⁵ This means that holding the UK Government and corporate actors to account for potential rights violations is challenging.²⁶ The main route for civil society organisations and stakeholders to gain insight into authorities' uses of new technologies in decision-

²² Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (2018).

²³ *Universal Credit: Welfare That Works*, Department for Work and Pensions, 4 (Nov. 2010) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/48897/universal-credit-full-document.pdf (last visited Jan. 3, 2021).

²⁴ Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), Statement on Visit to the United Kingdom, United Nations (Nov. 16, 2018).

²⁵ Big Brother Watch, *Big Brother Watch's submission to the UN Special Rapporteur on Extreme Poverty and Human Rights* (2018) <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/02/BIG-BROTHER-WATCH-SUBMISSION-TO-THE-UN-SPECIAL-RAPPORTEUR-ON-EXTREME-POVERTY-AND-HUMAN-RIGHTS-AHEAD-OF-UK-VISIT-NOVEMBER-2018-II.pdf> (last visited Jan. 4, 2021).

²⁶ Jędrzej Niklas, Seeta Pena Gangadharan, *Written Submission to Special Rapporteur on Extreme Poverty and Human Rights*, London School of Economics and Political Science (May 17, 2019) <https://www.ohchr.org/Documents/Issues/Poverty/DigitalTechnology/LSE.pdf> (last visited Jan. 11, 2021).

making is under the Freedom of Information Act 2020. In his Statement on Visit to the United Kingdom, former UN Special Rapporteur on extreme poverty and human rights, Alston explains:

“Central and local government departments typically claim that revealing more information on automation projects would prejudice its commercial interests or those of the IT consultancies it contracts to, would breach intellectual property protections, or would allow individuals to “game the system.”²⁷

The Risk Based Verification (RBV) was introduced in 2011 as an alternative verification process for claimants’ benefits entitlements. The UK Government’s Department for Work and Pensions’ guidance manual for local authorities on housing and council tax benefit states that local authorities using RBV must develop their own policies hidden from the public:

“The information held in the Policy, which would include the risk categories, should not be made public due to the sensitivity of its contents.”²⁸

The increasing digitisation of welfare involves outsourcing or devolving responsibility. This is facilitating the bureaucratic process of rights. To a greater degree, the lack of transparency and scrutiny of new technologies shifts the individual from beneficiary to applicant of a right. This shifts the entity subject to scrutiny.

The right to social security²⁹ encompasses “access and maintain benefits, whether in cash or in kind, without discrimination”.³⁰ Yet, social security experts have found that some of the more economically disadvantaged people receive less on Universal Credit and are hit by unpredictable benefit reductions and fluctuations.³¹ Delays and inconsistencies when seeking Mandatory Reconsideration of automation-

²⁷ Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), Statement on Visit to the United Kingdom, United Nations (Nov. 16, 2018).

²⁸ *Housing Benefit and Council Tax Benefit Circular*, Department for Work and Pensions (Nov. 9, 2011)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/633018/s11-2011.pdf (last visited Jan. 11, 2011).

²⁹ Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

³⁰ Committee on Economic, Social and Cultural Rights, *The Right to Social Security*, General Comment No. 19 (2007), para. 2.

³¹ *Automated Hardship*, Human Rights Watch (Sep. 29, 2020).

https://www.hrw.org/report/2020/09/29/automated-hardship/how-tech-driven-overhaul-uks-social-security-system-worsens#_ftn42 (last visited Jan. 11, 2021).

related errors increased uncertainty and negative impacts on mental health.³² Electronic payment cards or debit cards also raise concerns around disempowerment and exclusion of card users. The monitoring and surveillance of behavioural data by welfare authorities and private actors is problematic.³³ As Alston explains: “outsourcing of the issuance and administration of electronic cards to private companies has led to problems such as users being encouraged to pay for commercial financial products and the imposition of user fees”.³⁴ People living in poverty who must use these electronic cards are facing stigmatization.

Local and central governments appear to permit and even encourage harmful practices in breach of state duties and business responsibilities toward ESCR.³⁵ Recent public outcry shows that the human rights sector has not managed to persuade Big Tech corporations, local and central government, or even society at large that the AI process must adequately take human rights law into account so that “practices underlying the creation, auditing, and maintenance of data” are subjected to very careful scrutiny.³⁶

³² Sophie Wickham et al., *Effects on mental health of a UK welfare reform, Universal Credit: a longitudinal controlled study*, 5 *The Lancet* e157 (2020).

³³ Louise Humpage, *Submission to the United Nations Special Rapporteur on extreme poverty and human rights: New Zealand’s Money Management and Payment Card for young benefit recipients* <https://www.ohchr.org/Documents/Issues/Poverty/DigitalTechnology/UniversityAuckland.docx> (last visited Jan. 11, 2021).

³⁴ Andries du Toit, *The Real Risks Behind South Africa’s Social Grant Payment Crisis*, *The Conversation* (Feb. 20, 2017) <http://theconversation.com/the-real-risks-behind-south-africas-social-grant-payment-crisis-73224> (last visited Jan. 8, 2021).

³⁵ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, entry into force 3 January 1976; U.N. Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights HR/PUB/11/04* (2011), [hereinafter *Guiding Principles*].

³⁶ Rashida Richardson, Jason M. Schultz, and Kate Crawford, *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 *New York University Law Review* (2019) 192.

III. International Protection: Legality and Scrutiny

Given that specific groups, such as racially and ethnically minoritised people, are disproportionately impacted by economic and social policies which exacerbate poverty,³⁷ principles of equality and non-discrimination under ESCR frameworks should be central to human rights analyses of emerging digital technologies in socio-economic related services. This is not ‘anti-innovation’ or ‘anti-technology’, rather it safeguards society from a “handful of powerful executives replacing governments and legislators in determining the directions in which societies will move and the values and assumptions which will drive those developments”.³⁸ IHRL is a necessary challenge to the rapid growth in wealth inequality resulting from increasing use of AI in public services.³⁹ Contrary to the argument that non-discrimination standards are too vague and contested to be useful in regulating AI,⁴⁰ the principle is recognised as a universal human right under legally binding treaties, developed and applied by courts, experts, civil society organisations and communities.

IHRL guarantees equal enjoyment of ESCR without discrimination, protecting all people from harmful digital technologies. The main human rights treaty which recognises ESCR, the ICESCR, imposes a number of general State obligations that must be brought to bear in the specific context of emerging digital technologies. States are obliged to use the maximum of their available resources to progressively realise material rights therein, and fulfilment of the rights should increase over time.⁴¹ Deliberate retrogressive measures, defined as any law or policy that either reduces legal protection of a right or

³⁷ See Just Fair, <http://justfair.org.uk/research/view-all-our-reports/> (last visited Jan. 8, 2021).

³⁸ Report of the Special rapporteur on extreme poverty and human rights (2019) A/74/48037.

³⁹ Shoshana Zuboff, *The Age of Surveillance Capitalism* (2019).

⁴⁰ *Public Scrutiny of Automated Decisions: Early Lessons and Emerging Methods, An Upturn and Omidyar Network Report* (2018) 25.

⁴¹ CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) E/1991/23, para. 10.

causes a quantitative “backsliding in the effective enjoyment of rights”⁴² are prohibited, unless protecting “the totality of the rights provided for in the Covenant”.⁴³

Moreover, the Covenant establishes a legal commitment “of immediate effect” for all States parties to ensure that rights “will be exercised without discrimination”.⁴⁴ To elaborate, the State is required to eliminate formal as well as substantive forms of discrimination, including discrimination by non-State actors.⁴⁵ All public authorities and public institutions, national and local, must act in conformity with this obligation. In that regard, international obligations provide that the State respects (does not directly or indirectly interfere with), protects (prevents third party interference), and fulfils (adopts necessary measures)⁴⁶ to ensure enjoyment of ESCR.

Transparency in local and central government deployment of AI is crucial if there is to be adequate oversight of compliance with the obligation to respect. The duty to respect is violated where the State prioritizes “the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights”.⁴⁷ Moreover, fulfilment of “adequate steps” to realise ESCR must “not [be] qualified or limited by other considerations”. This latter point is of particular interest where AI is used to streamline or make processes more efficient and cost-saving at the expense of ESCR. Where digital technologies operate in the provision of public services, greater transparency is required for contract procurement and other corporate activity must be scrutinized. Notably, the Covenant requires that the UK fulfils rights, by taking effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating discrimination wherever it exists.

⁴² Christian Courtis, Nicholas Lusiani and Aoife Nolan, *Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights: Economic and Social Rights after the Global Financial Crisis* (Aoife Nolan, ed. 2014) 123–4.

⁴³ CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) E/1991/23, Para. 9.

⁴⁴ Article 2(1), ICESCR.

⁴⁵ General Comment No. 20; General Comment No. 24.

⁴⁶ Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary* (3 ed. 2019) 214.

⁴⁷ General Comment No. 24, Para 12.

Although IHRL is only directly legally binding on States, international bodies have sought to clarify the nature and scope of the ‘duty to protect’ – prevent and address adverse impacts of business activities on human rights, including the adoption of legislative and administrative measures. At least partially, General Comment No. 24 addresses questions around how States must discharge their legal obligations in this regard, elaborating ‘State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’.⁴⁸ However, there are legal limitations to the regulation of corporate activities. State (in)action which causes, or fails to protect third parties from ESCR “interference”, constitutes a *prima facie* violation of the Covenant. Nevertheless, interference is undefined. And while advice around mobilisation of resources to ensure “business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles”⁴⁹ provides guidance, gaps around corporate compliance remain.⁵⁰ The UN Committee on Economic, Social and Cultural Rights (CESCR) acknowledges the impacts of corporate provision of public services;⁵¹ private provision of public services affects enjoyment of basic ESCR, and can increase socio-economic segregation.⁵² Nevertheless, corporate responsibility is explored indirectly⁵³ as CESCR only *suggests* that States impose “public service obligations” on businesses.⁵⁴ While strict regulation is required, privatization is not *per se* prohibited by the Covenant.⁵⁵

It is clear, however, that States are required to ensure effective remedies for discrimination attributable to private actors, including corporations.⁵⁶ Arguably, this approach is necessary to retain the full scope

⁴⁸ 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, 10 August 2017, E/C.12/GC/24 [General Comment 24, Business].

⁴⁹ General Comment No. 24, Para 23.

⁵⁰ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (Mar. 21, 2011) U.N. Doc. A/HRC/17/31., principle 17 (c).

⁵¹ General Comment No. 24, Para 21.

⁵² General Comment No. 24, Para 22.

⁵³ General Comment No. 24, Para 11.

⁵⁴ General Comment No. 24, Para 21.

⁵⁵ General Comment No. 24, Para 21.

⁵⁶ Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, Para. 8.

of the obligation to fulfil where rights are provided privately.⁵⁷ Contrary to its duties, the State has failed to implement legislative, administrative, educational and other appropriate measures, and therefore no administrative, civil, or criminal, sanctions and penalties are available to effectively protect people from infringements of ESCR in the context of corporate design and use of digital technologies.⁵⁸ No legally binding framework or measures require corporate entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations to ESCR. Significantly, the failure to incorporate and implement ICESCR at the domestic level, leads to a lack clarity around responsibility of corporate entities providing public services in ways described in Section II – even where corporate activity, decisions, and/or controlled operations and entities,⁵⁹ such as subcontractors and suppliers,⁶⁰ harm human rights.⁶¹ Notwithstanding, a rights-based approach which centres around equality and dignity appears the more effective starting point in regulation of new technologies rather than soft-law alternatives.

Soft law norms, most notably the 2008 UN Human Rights Council (UNHRC) UN ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ (UN Framework),⁶² and 2011 UN Guiding Principles on Business and Human Rights (UNGPs),⁶³ saw Professor John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG) (2005–11)⁶⁴ attempt to clarify ‘responsibility’ in the BHR narrative. Notably, the SRSG argued that corporate entities “cannot and should not simply mirror the duties of State”.⁶⁵ More broadly however, the SRSG suggested that corporate entities can impact, and

⁵⁷ Aoife Nolan, *Privatization and Economic and Social Rights*, 40 Human Rights Quarterly 815 (2018) 840–41.

⁵⁸ General Comment No. 24, Para 14.

⁵⁹ General Comment No. 24, Para 16; UNGPs Principle 15 and 17.

⁶⁰ General Comment No. 24, Para 16.

⁶¹ *Protect, Respect and Remedy: A Framework for Business and Human Rights* (Apr. 7, 2008) U.N. Doc. A/HRC/8/5.

⁶² *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (Mar. 21, 2011) U.N. Doc. A/HRC/17/31.

⁶³ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (Mar. 21, 2011) U.N. Doc. A/HRC/17/31.

⁶⁴ UN Commission on Human Rights, Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises, 20 April 2005, E/CN.4/RES/2005/69.

⁶⁵ UN Framework, Para 53.

therefore should be responsible for respecting all internationally recognised human rights.⁶⁶ The three pillars of the UN Framework include the “state duty to protect against human rights abuses committed by third parties, including business”, “corporate responsibility to respect human rights”, and victims’ ability to seek redress. The UNGPs recommends that the State’s protection against corporate human rights harms in their territory, including taking “appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”.⁶⁷ The UNGPs define the direct responsibilities of to “all business enterprises ... wherever they operate”⁶⁸ to respect the ESCR.⁶⁹ An adverse human rights impact is defined as any business ‘action’ that “removes or reduces the ability of an individual to enjoy his or her human rights”.⁷⁰ The UNGPs stress corporate realisation of effective remedies, such responsibility is recognised as “wherever they operate”, existing “over and above compliance with national laws and regulations protecting human rights”.⁷¹

However, “responsibility” is used instead of ‘duty’ in order to reflect that no legally binding obligation is imposed on corporate entities, rather a social expectation.⁷² The responsibility to respect means there should entail “human rights due diligence” and identify, prevent, mitigate, and account for how they address their impacts on human rights.⁷³ This includes “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”.⁷⁴ Scholars argue that the UNGPs have “real legal consequences”,⁷⁵ as a universally

⁶⁶ *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-Related Human Rights Abuse*, (May 23, 2008) U.N. Doc. A/HRC/8/5/Add.2 para 16; UN Framework, para 6 ; UNGPs, Principle 12.

⁶⁷ UNGPs (n71), Principle 25 and 1.

⁶⁸ Principle 1, and 11.

⁶⁹ Guiding Principles (n 13) Principle 12.

⁷⁰ *The Corporate Responsibility to Respect Human Rights—An Interpretative Guide* (2012) U.N. Doc. HR/PUB/12/02 5 [hereinafter *Responsibility to Respect*].

⁷¹ *Responsibility to Respect*.

⁷² *Protect, Respect and Remedy: A Framework for Business and Human Rights* (Apr. 7, 2008) U.N. Doc. A/HRC/8/5 para 9.

⁷³ UNGPs, Principle 15.

⁷⁴ UNGPs, Principle 17.

⁷⁵ Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation* 22 *Business Ethics Quarterly* 145 (2012) 146.

accepted⁷⁶ international standard.⁷⁷ Thus, it could be argued that the UNGPs encourage private providers, designers or operators of new technologies, to voluntarily carry out a direct duty of care,⁷⁸ and due diligence. Nonetheless, the voluntary nature⁷⁹ of corporate human rights due diligence,⁸⁰ and absence of any indicative methodology to evaluate progress or share best practice, means that international standards of ‘responsibility’ are difficult to recognise and measure at the domestic level. While the UN Framework and the UNGPs are regarded as a key shift in the BHR discourse on international legal obligations and corporate accountability,⁸¹ the voluntary and soft-law framing of the corporate responsibility to respect human rights and take due diligence⁸² fails to translate to effective regulation of ESCR throughout the AI development-deployment process.

Arguably, the UNGPs merely reinforce the traditional normative IHRL framework; it is the duty of the State, not corporate entities, to protect human rights. Despite adopting the Principles, the State is yet to adopt regulatory and/or policy actions to regulate new digital technologies. There are no “specific and concrete targets, allocate[d] responsibilities” or “time frame and necessary means for their adoption”⁸³. At present, the reality on the ground shows that rights-holders cannot rely on this limited conception of corporate responsibility and accountability set out in the UN Framework or UNGPs.

⁷⁶ Penelope Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights* 3 JHRE 5 (2012) 38.

⁷⁷ Penelope Simons, *International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights* 3 JHRE 5 (2012) 38.

⁷⁸ Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation* 22 Business Ethics Quarterly 145 (2012) 146.

⁷⁹ Radu Mares, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, (2012).

⁸⁰ James Harrison, *Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment* (2013).

⁸¹ Carlos López, *The “Ruggie Process”: From Legal Obligations to Corporate Social Responsibility: Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Surya Deva and David Bilchitz, eds. 2013) 77.

⁸² Radu Mares, *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (2012).

⁸³ General Comment No. 24, Para 1.

In response to growing calls for effective governmental regulation, the corporate AI sector may follow the footsteps of Big Tech entities and produce ‘codes of ethics’ or other non-binding standards purporting to ‘regulate’. However, there is little sign of what Deva calls *just business*, namely corporations siding with human rights even if doing so might not make economic sense by reducing risks, increasing profits or gaining competitive advantage.⁸⁴ Codes of ethics might reference existing human rights framework on remedies and reparations but do not necessarily ensure accountability.⁸⁵ A transformation and socialisation of human rights norms into an accepted soft law framework applying to corporations reflects some progress but little has “changed for the rightsholders”.⁸⁶

Lamentably, the Sustainable Development Goals (SDGs) *Becoming a Business Opportunity (2030 agenda)* suggest that States should rely on the private sector as “a key constituent of the Global Partnership for Sustainable Development” to generate funds to implement the SDGs.⁸⁷ While “respect for human rights” is “not a choice, it is a responsibility”, and “applies to all businesses regardless of their size, sector, operational context, ownership and structure”,⁸⁸ “[r]obust human rights due diligence” and corporate provision of “remediation of adverse human rights impacts” has not produced real change on the ground. Indeed, the UN Working Group has recognised the problem of “cherry-picking SDGs” or “indulging in SDG-washing”.⁸⁹ Ultimately, “[m]uch work remains to translate the SDGs into action” at the grassroots level.⁹⁰

⁸⁴ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2014).

⁸⁵ *Racial discrimination and emerging digital technologies: a human rights analysis – Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 2020, U.N. Doc. A/HRC/44/57.

⁸⁶ Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2014) 4.

⁸⁷ *Transforming Our World: the 2030 Agenda for Sustainable Development* (Sep. 25, 2015) A/RES/70/1.

⁸⁸ *Transforming Our World: the 2030 Agenda for Sustainable Development* (Sep. 25, 2015) A/RES/70/1.

⁸⁹ Kate Donald, *The 2030 Agenda for Sustainable Development: opportunity or threat for economic, social and cultural rights?: Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Jackie Dugard, Bruce Porter, Daniela Ikawa and Lilian Chenwi, eds. 2020).

⁹⁰ Namit Agarwal, Uwe Gneiting, and Ruth Mhlanga, *Raising the Bar: Rethinking the Role of Business in the Sustainable Development Goals*, Oxfam (Feb. 13, 2017),

Especially in the context of public services, companies must not be left to self-regulate. As the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance states:

“The incentives for corporations to meaningfully protect human rights (especially for marginalized groups, which are not commercially dominant) can stand in direct opposition to profit motives [...] Even well-intentioned corporations are at risk of developing and applying ethical guidelines using a largely technological lens, as opposed to the broader society-wide, dignity-based lens of the human rights framework”.⁹¹

Corporate self-regulation runs the risk of abdication of State responsibility. Law and policy which regulates AI must not encourage what Hengeveld calls “corporate voluntarism”, which would otherwise entail the transforming of rights into favours, and replace accountability with ambiguous responsibility.⁹²

In June 2014, a timely and necessary development from the view of victims of corporate human rights harms took place.⁹³ The Human Rights Council adopted a resolution to establish an open-ended intergovernmental working group “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business

<https://www.oxfam.org/en/research/raising-bar-rethinking-role-business-sustainable-development-goals> (last visited Oct. 20, 2020).

⁹¹ *Racial discrimination and emerging digital technologies: a human rights analysis – Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 2020, U.N. Doc. A/HRC/44/57 para 62.

⁹² Maria Hengeveld, *The UN Goes to Davos*, *The Nation* (Nov. 13, 2019), www.thenation.com/article/un-davos-corporate/ (last visited Oct. 20, 2020).

⁹³ Surya Deva and David Bilchitz, *Building a treaty on business and human rights: context and contours* (2017) 48-78; John Ruggie, *A UN business and human rights treaty? An issues brief*, Harvard University’s Kennedy School of Government (28 January 2014) <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf> (last visited Oct. 20, 2020).

enterprises”. The debate around corporate obligations continues.⁹⁴ Practically speaking, it remains unclear how the present draft-form treaty, which does not confer corporate obligations to remedy, will ensure corporate accountability for micro-level harms to ESCR.

It is essential that the framework of regulation is adequate at the preventative and redressive levels and is responsive to the rights-holders needs on the ground. The current context of quasi-corporate activity in the provision of public services (Section II) suggests it is appropriate to move away from the soft-law norms of responsibility conferred by the UNGPs, and apply the authoritative legal instruments and guidance providing legally binding obligations to prohibit and remedy inequality and discrimination in enjoyment of ESCR. At present, and in the UK context, the normative ICESCR framework provides better oversight of rights-holder protection throughout the AI lifecycle. The following section will examine how this regulation operates at the domestic level.

⁹⁴ David Bilchitz, *The Necessity for a business and human rights treaty*, 1(2) *Business and Human Rights Journal* 203 (2016). Olivier De Schutter, *Towards a new treaty on business and human rights* 1(1) *BHRJ* 41 (2016); Lee McConnell, *Assessing the feasibility of a business and human rights treaty*, 66 *ICLQ* 143 (2017).

IV. Domestic Protection: Incorporation and Judiciability of ESCR

Ethics-based approaches that are promulgated by State or non-State actors to protect corporate harms to ESCR are meaningless if not directly tied to structures of accountability.⁹⁵ At present, ICESCR is the appropriate framework for pre-empting and preventing ESCR harms, its categorization of rights-harms is authoritative and established in an internationally agreed instrument. The problem is, the UK lacks a coherent overarching framework to govern ESCR. The State's failure to implement international standards and recognise ESCR in domestic legislation leads to poor regulation and accountability. The UK's parliamentary supremacy constitutional model and statutory framework falls short of the normative standards in IHRL, failing to safeguard ESCR that are impacted by corporate activity. To account for gaps, there is more scope to develop constitutional models and existing substantive equality and non-discrimination protection, and explore judicial interpretation of civil and political rights according to the principle of indivisibility, international complaints mechanisms, and common law application of customary international law. This examination of incorporation and judiciability is necessary for understanding the potential and actual level of ESCR protection from harms arising from new technologies in the UK.

There is no overarching constitutional framework which recognises ESCR, but this does not mean these rights are left completely unprotected from new technologies. ESCR are not legally enforceable under the operation of parliamentary supremacy. If future legislation is passed under the UK's existing constitutional framework, it must meet legally binding standards without facing any accountability for retrogression or non-compliance. Under the positivist foundational concept of sovereignty,⁹⁶ the legitimacy of legislation in a democratic society is based on the concept of political equality; equal respect is afforded to moral claims of each citizen through a democratically representative legislator. It

⁹⁵ *Racial discrimination and emerging digital technologies: a human rights analysis – Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 2020, U.N. Doc. A/HRC/44/57.

⁹⁶ Murray Hunt, *Reshaping Constitutionalism in John Morrison at All Judges Transitions and Human Rights* (2007) 447- 453.

is essential that there is increased participation of minoritized communities in the deliberative processes which underpin the democratic constitutional model. The risks posed by Big Tech include the influence of corporate actors by lobbying within the parliamentary framework. As King points out, this undermines the principles of political equality within the representative framework. With the rise of digital technologies in public services, this is particularly problematic as social rights are “diametrically opposed to the interests of the wealthy well resource lobbying interests”.⁹⁷ From the national to devolved jurisdictions, progressive reform to protect IHRL is growing, however these differing levels of protection might risk fragmentation, with Westminster diluting overall UK recognition of international standards.

Statutory protection of ESCR harms arising from emerging technology is similarly limited. Contrary to the historical bifurcation of rights universally recognised in the International Bill of Human Rights, courts at the domestic, regional and international levels have adopted evolutive interpretations of civil and political rights. This means dynamic interpretation may well protect ESCR from risks posed by AI, even where these are not incorporated or recognised domestically. The CESCR has recommended that ESCR ought to be protected in the same manner as civil and political rights.⁹⁸ At present, the only options available under this model or judiciable mechanism include the Human Rights Act 1998 and European Convention on Human Right – which are under threat.⁹⁹ As Boyle explains, incorporation of ICESCR would not infringe on the narrowest reading of separation of powers and parliamentary sovereignty and devolved legislators could within their respective legislative competence easily enact legislation which observes or implements international obligations.¹⁰⁰ However, increasing use of technology cannot be solely regulated by judicial interpretation of civil and political rights according to the principle of indivisibility. There are concerns that the current human rights regime applicable in the

⁹⁷ Lobbying Act 2014; Jeff King, *Judging Social Rights* (2011) 154.

⁹⁸ see the UN committee on economic social and cultural rights saska general comment #9 the domestic application of the covenant 3rd of December 1998 see para 7

⁹⁹ UK Government, <https://www.gov.uk/guidance/independent-human-rights-act-review> (last visited Jan. 4, 2021).

¹⁰⁰ Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication*, (2020) 137-185.

UK is limiting to such an extent that deliberative interpretation of civil and political rights offers only a degree of protection and can even be detrimental to ESCR:

“Relying on the dynamic interpretation of CP rights without a broader framework for ESR [Economic and Social Rights] means that court adjudication will marginalise ESR issues... CPR adjudication is not sufficiently broad to facilitate an adjudication culture that is accessible, participative, deliberative, fair, counter-majoritarian or remedial according to the principles social rights adjudication”¹⁰¹

Additional limitations to ESCR include that substantive equality and non-discrimination provisions in domestic law do not adequately protect people from technologies which compound socio-economic inequality. Grounds of discrimination prohibited under international human rights law are broader than under the Equality Act 2010 and include socio-economic status.¹⁰² The socio-economic duty contained in Section 1 of the Equality Act 2010 would mean that public bodies “when making decisions of a strategic nature about how to exercise its functions” “have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage”. Despite calls from civil society and the Equality and Human Rights Commission (the national human rights institution for England and Wales) successive UK Governments at Westminster have failed to enact the duty so it is not binding on public bodies in England.¹⁰³ Moreover, the UN Committee recommended that the UK Government “bring into force the relevant provisions of the Equality Act that refer to the public authorities’ duty on socio - economic disadvantage ... in order to enhance and guarantee full and effective protection against discrimination in the enjoyment of

¹⁰¹ Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication*, (2020) 166.

¹⁰² Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination, 2 July 2009; Human Rights Committee, General Comment No. 36: Right to Life, 3 September 2019

¹⁰³ In April 2018, the Fairer Scotland Duty came into force as Section 1 of the Equality Act 2010 in Scotland. This duty requires local authorities to actively consider how they could reduce inequalities of outcome in any major strategic decision they make; and to publish a written assessment, showing how they have done this. After extensive consultations, the Welsh Government plans to enact the duty on 31 March 2021 as part of its programme to help public bodies deliver A More Equal Wales.

economic, social and cultural rights.”¹⁰⁴ Arguably, the State is failing to satisfy its duty to take all appropriate means, including particularly the adoption of legislative measures, which would protect ESCR harms arising from new technologies.¹⁰⁵

While statutory protection is piecemeal, domestic application of customary international law provides a level of protection of ESCR. The UK’s dualist treatment of international and domestic law is grounded on the doctrine of parliamentary supremacy; unincorporated international treaties may not be adjudicated upon unless domestic law has afforded recognition to ESCR. The absence of IHRL incorporation through domestic legislation means that the court would act beyond its competence if it deliberates on, intervenes on or applies such treaty obligations. Notwithstanding, common law application of customary international law is of increasing importance¹⁰⁶ when assessing the role of international standards in domestic legal system. The operation of *jus cogens* mean that ESCR, if “considered to be expressive of rules of customary international law” are protected as peremptory norms from which no-derogation is permitted.¹⁰⁷ In the context of digital technologies this could potentially protect ESCR from harm. CESCR has emphasised the role of the judiciary in having regard for the Covenant:

“Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.”¹⁰⁸

¹⁰⁴ CESCR, ‘Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (2016).

¹⁰⁵ General Comment No. 3, Para 3

¹⁰⁶ *Re McKerr* [2004] 1 WLR 807.

¹⁰⁷ Antonio Cassese, *Modern Constitutions and International Law*, 192 Hague Recueil 335 (1985) 368-370.

¹⁰⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24. Para 14.

In appropriately exercising their functions of judicial review, courts should take account of ESCR where assessing the states conduct under treaty obligations. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international rights obligations.¹⁰⁹ Common law application of customary international law to protect equal and non-discriminatory enjoyment of ESCR is evidenced in domestic jurisprudence. For instance, the UNISON case applies to the Equality Act in 2010 and draws upon customary international law to develop the meaning of equality.

In the domestic context, it is clear that remedial and restitutive principles are limited where ESCR harms arise from private provision of technology in the roll-out of public services. Contrary to the guidance set out in General Comment No. 24, the UK Government leaves victims with no access to judicial remedies for ESCR violations, providing no clear deliberate, concrete, and targeted steps to expeditiously and effectively¹¹⁰ regulate new technology. In terms of enforcement, reparative mechanisms are “indispensable for effective protection against certain violations” and should be available in “domestic constitutional or legislative provisions that incorporate” rights contained in ICESCR.¹¹¹ For example, where a violation is directly attributable to a corporate entity, “victims should be able to sue such an entity either directly” on the basis of ICESCR. It is well established that there should be equal access to: legal systems, courts and tribunals; effective remedies given by a competent national court of authority; independence and impartiality of the decision-maker; and various procedural guarantees such as equality of arms during the legal proceedings.¹¹² Indeed, the UK has a range of legislative standards which provide access to judicial remedies for human rights abuses by corporate entities at home and overseas, but none of these directly protect ESCR.¹¹³ Lamentably, the domestic

¹⁰⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para 14.

¹¹⁰ CESCR General Comment No.3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) (1990).

¹¹¹ General Comment No. 24, Para 51.

¹¹² ECHR, Article 13; ICCPR, Article 2(3); and UDHR, Article 8; HRC, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial) (2007) para 2.

¹¹³ for civil law claims the Employment Tribunals provide, and specific criminal law avenues under the and Gangmasters (Licensing) Act 2004, Serious Crime Act 2007, UK Companies Act 2006,

regulative apparatus fails to effectively pre-empt or prevent violations, as evidenced in Section II. Where human rights abuses are left unremedied, the State violates its obligation to protect under ICESCR.¹¹⁴

There is a myriad of legal protection of ESCR and various existing and future mechanisms for ensuring incorporation and judiciability of ESCR which can prevent retrogressive administrative policies arising from new technologies. ESCR have not been fully incorporated and remain unprotected, with no mechanisms adequately accounting for gaps in the uncodified constitutional system. But as new digital technologies emerge, the UK Government must refrain from entering into agreements which conflict with ICESCR obligations,¹¹⁵ as required under the principle of the binding character of treaties.¹¹⁶ Specifically, provisions of domestic laws cannot be invoked by the UK Government to justify failure to perform its international duties under a treaty.¹¹⁷ Moreover, to be legitimate and accepted, governance of ESCR must be robust and multi-institutional across the UK's legislative, executive, adjudicative and constitutional arms.¹¹⁸ Adequacy of laws, compliance and information gaps, as well as emerging problems, must be addressed.¹¹⁹ At the domestic level, filling the accountability gap is essential, and requires a society-wide effort.

Corporate Manslaughter, Corporate Homicide Act 2007, Bribery Act 2010 and Modern Slavery Act 2015.

¹¹⁴ General Comment No. 24, Para 18.

¹¹⁵ Olivier De Schutter (Special Rapporteur on the Right to Food) *Addendum on guiding principles on human rights impact assessments of trade and investment agreements* (Dec. 19, 2011) U.N. Doc. A/HRC/19/59/Add.5.

¹¹⁶ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331, Arts. 26 and 30(4), b).

¹¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24.

¹¹⁸ Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication*, (2020).

¹¹⁹ See the Model Terms of Reference for a review of the coverage and effectiveness of laws relevant to business-related human rights abuses, *Annex to the report on accountability and access to remedy for victims of business-related human rights abuse by the Office of the High Commissioner for Human Rights: Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse* (May 10, 2016) U.N. Doc. A/HRC/32/19. and see *Resolution adopted by the Human Rights Council on 30 June 2016* (Jul. 15, 2016) U.N. Doc. A/HRC/RES/32/10.

V. Intersectional Approaches and Responses to Crises

Fair adjudication on ESCR requires holistic approaches to IHRL in domestic legislation to ensure human rights are equally accessible as opposed to providing differing degrees of protection for different groups of people. An intersectional and multi-institutional approach to ESCR protection involves representation and self-determination of different groups of people. Existing socio-economic inequalities are being exacerbated by the COVID-19 pandemic.¹²⁰ Inequalities and discrimination based on gender, race, disability, age (and other protected characteristics) and/or socio-economic status are leading to people being disproportionately impacted by the current pandemic crisis; reduced income and/or the resulting economic downturn is affecting people already on low incomes or with less accumulated wealth.

New technologies might transform ESCR enjoyment for the better; but the starting point must be rights-based. Big Tech has been a driver of growing inequality¹²¹ and has facilitated the creation of a “vast digital underclass”.¹²² At present, “digital by default”¹²³ policies are exacerbating major socio-economic disparities and inequalities across groups of people. As highlighted in Section II, a fundamental approach to regulating AI involves inclusion of expert cross-sector representatives with intersectional experience. Arguably, if local and central government were to intervene and ensure participation, this would fulfil the obligation to ensure enjoyment of the right to self-determination, while supporting alternative protective and preventative measures to counter conduct by businesses that lead to ESCR abuse.¹²⁴ This starting point departs from the duty-bearer-orientated BHR narrative around regulation of corporate responsibility and reparation. The OHCHR has advocated for state-led non-judicial

¹²⁰ See Just Fair, <http://justfair.org.uk/research/view-all-our-reports/> (last visited Jan. 8, 2021).

¹²¹ Isobel Asher Hamilton, *A definitive list of the 13 richest tech billionaires in the world*, Business Insider, (Mar. 9, 2019), <https://www.businessinsider.nl/net-worth-13-richest-tech-billionaires-in-the-world-2019-3?international=true&r=US> (last visited Jan. 5, 2021).

¹²² Farhad Manjoo, *The Tech Industry is Building a Vast Digital Underclass*, The New York Times (2019).

¹²³ UK Government Cabinet Office, *Government Digital Strategy*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/296336/Government_Digital_Strategy_-_November_2012.pdf (last visited Jan. 3, 2021).

¹²⁴ General Comment No. 24, Para 18.

mechanisms including “labour inspectorates; employment tribunals; consumer protection bodies (often tailored to different business sectors); ... State ombudsman services; public health and safety bodies”,¹²⁵ expert practitioners and academics are creating international arbitration rules on BHR,¹²⁶ and cross-sector actors are developing the BHR Draft Treaty. Whether these regulatory frameworks are accessible and accepted by victims, and arbiters have competence to decide on human rights matters, is unclear. What is clear, is that where specific groups¹²⁷ of people are excluded – women, racial, ethnic and other minorities – from a process, the process is likely to reproduce these inequalities. As the AI Now Institute states:

“this is much more than an issue of one or two bad actors: it points to a systematic relationship between patterns of exclusion within the field of AI and the industry driving its production on the one hand, and the biases that manifest in the logics and application of AI technologies on the other.”¹²⁸

The creation and operation of technology can empower and exclude. Alston, points out that “predictive analytics, algorithms and other forms of AI are highly likely to reproduce and exacerbate biases reflected in existing data and policies”.¹²⁹ Therefore, root causes of digital inaccessibility must be identified and redressed, in a holistic manner. Digital exclusion prevents co-designed systems, sidelining “those who lack access either to the internet or to a device, or the skills, ability, confidence or motivation to use it”.¹³⁰ This “digital divide” should be addressed to ensure adequate public input and expert by experience participation in the AI lifecycle. For example, reasonable access to digital

¹²⁵ OHCHR, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Mechanisms* (2018).

¹²⁶ *The Hague Rules on Business and Human Rights Arbitration*, Center for International Legal Cooperation, <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> (last visited Oct. 20, 2020).

¹²⁷ Sarah West, Meredith Whittaker, and Kate Crawford, (2019), *Discriminating Systems: Gender, Race and Power in AI*. AI Now Institute. Retrieved from <https://ainowinstitute.org/discriminatingystems.html>. (Women make up “15% of AI research staff at Facebook and 10% at Google. ... [and] only 2.5% of Google’s workforce is black, while Facebook and Microsoft are each at 4%.”).

¹²⁸ Sarah West, Meredith Whittaker, and Kate Crawford, *Discriminating Systems: Gender, Race and Power in AI* (2019).

¹²⁹ https://www.ohchr.org/Documents/Issues/Poverty/A_74_48037_AdvanceUneditedVersion.docx

¹³⁰ *Preventing Digital Exclusion from Online Justice*, Justice (2018) <https://justice.org.uk/new-justice-report-on-preventing-digital-exclusion/> (last visited Jan. 6, 2021).

equipment and skills should be available for all groups of people, in order to bring about long-term change in the technology sector. Truly intersectional equity requires adequate participation so that the regulation of technologies is responsive to diverse experiences and expectations of rights-holders.

VI. Future Protection of ESCR Harms

The COVID-19 pandemic has shone a light on the impacts of AI and automated systems in the provision of public services which compound intersectional forms of discrimination and socio-economic inequality. To a greater degree, privatisation and outsourcing by local and central governments is demanding clearer definitions of compliance from CESCR's authoritative guidance on the State's obligation to implement the ICESCR, and protect from corporate harms. But structural inequities arising from new technologies are not solely "cause and consequence of human rights failings ... in regards to ESCRs".¹³¹ Basic minimum duties conferred on the State under the ICESCR and related IHRL standards require better recognition and incorporation at the domestic level. Adequate oversight of AI and ADM requires comprehensive regulation that has interrelated and complementary levels of protection which take account of social, legal and ethical contexts. A more holistic rights-based approach to new digital technologies will re-balance the "economy of exclusion".¹³²

¹³¹ Sandra Ratjen and Manav Satija, *Economic, Social, and Cultural Rights for All* in Eibe Riedel (ed), *Economic, Social, and Cultural Rights in International Law* (2014).

¹³² David Zalewsky, *Uncertainty and the Economy of Exclusion: Insights from Post-Keynesian Institutionalism* 'Law, 78 AJES 955 (2019).