



# BRITISH ASSOCIATION OF COMPARATIVE LAW



## ENGAGEMENT BETWEEN LEGAL ORDERS IN THE CONTEXT OF SOCIO-ECONOMIC RIGHTS

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### *Introductory Remarks*

The protection of socio-economic rights has been lagging behind the protection of civil and political rights at both the national and international levels for many years. This paradox has not been fully resolved yet, despite the relevance of socio-economic rights to the world today. Against this background, my research focuses on socio-economic rights, and in particular, their protection at the international level, and on mechanisms or tools which could help improve that protection. Such a tool is engagement between legal orders. [Engagement between legal orders is said to take place when bodies \(state organs and their equivalent international organs\) which are tasked with drafting legal instruments, or which are tasked with interpreting and applying the law, consider legal instruments and/or jurisprudence which do not belong to their 'own' 'jurisdictions'.](#) Although engagement between legal orders carries risks and dangers, such as that it can be used to water down protection and to create ceiling-effects, it was used by drafting and adjudicative bodies to [increase human rights protection](#). Engagement between legal orders has, therefore, the potential to influence positive developments in the specific context of the international protection of socio-economic rights.

[Chapter 1](#) introduces [two types of international protection of socio-economic rights, direct and indirect, and presents an evaluation of these types of protection](#). Direct protection exists when specific protection of socio-economic rights is provided by international instruments. Chapter 1 focuses specifically on the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter (ESC) and the Revised European Social Charter (RESC), the EU Charter of Fundamental Rights (CFREU), the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR) and the Protocol of San Salvador. Indirect protection occurs through an expansive interpretation of civil and political rights. Indirect protection is granted by the CFREU, the ACHR and the ACHPR, as the bodies which are responsible for their interpretation and application have interpreted their civil and political rights provisions in a manner that encompasses socio-economic rights. Indirect protection is also granted by the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). In particular, Chapter 1 shows that [structural weaknesses](#) which are inherent in the treaties/systems under consideration

decreased the overall effectiveness of the international protection of socio-economic rights. These weaknesses concern different aspects of protection, namely, personal and material scope, content, (permissible) limitations and enforcement of rights.



### [Choice of jurisdictions/legal orders](#)

In choosing to focus on these instruments, there was an awareness that other international treaties offer protection to socio-economic rights, such as several UN treaties concerning the rights of vulnerable groups (e.g. the Convention on the Rights of the Child), and several Council of Europe treaties concerning specific socio-economic rights (e.g. the European Convention on Social Security). However, I decided to focus on instruments which offer [more comprehensive protection to socio-economic rights both in terms of the number and variety of rights protected, and beneficiaries to protection](#). This broader approach allows examining the effects of engagement on all areas of reference (within socio-economic rights) and on different groups of people.

[Chapter 2](#) develops a [typology of engagement between legal orders, according to form, degree of formality and dimension](#). It shows that engagement can take the form of engagement with external legal instruments and external jurisprudence; that engagement can take place within formal (i.e. legal) frameworks which require or authorise such engagement (legally mandatory and legally authorised engagement) or outside of such frameworks at the choice of a body (informal and voluntary engagement); and that engagement can occur at the same jurisdictional level, whether national or international (horizontal engagement), between different jurisdictional levels, with international legal orders influencing developments at the national level (vertical top-down engagement), or vice versa (vertical bottom-up engagement), and between national legal orders through the medium of international bodies (complex engagement).

This typology is based not only on examples from the area of socio-economic rights, but also on examples from the area of civil and political rights. It is developed with reference to international legal orders as well as national legal orders. The purpose of this typology is to explain [how engagement takes places, and to highlight its full scope](#). Apart from [Anne-Marie Slaughter](#), who developed a typology of transjudicial communication in the early 1990's,<sup>[1]</sup> comparative law scholarship has mainly focused on the use (or non-use) of engagement in particular legal orders and within particular subject-areas. Although this scholarship provides useful insights into the practice of engagement by particular courts/bodies, and into its effects on particular rights, such as freedom of expression, it does not tell us anything about the concept of engagement: its modes, tools and mechanics. There was, therefore, a need to develop a typology which would allow us to understand the concept of engagement between legal orders. In addition, this typology is used as a reference point for the analysis of examples of engagement in the context of the international protection of socio-economic rights in [Chapter 3](#) of the thesis, and it thus helps to answer the question of the dynamics of engagement in this specific context.

[Chapter 3](#) is the heart of my thesis. It reveals the [extent, dynamics and impact of engagement between legal orders](#) in the context of the international protection socio-economic rights. It is based on an

extensive study of (explicit) cross-references between a large number of international legal orders, particularly, the instruments discussed in Chapter 1 and their bodies.

### *Method of research*

As the aim of the chapter is to reveal the extent, dynamics and impact of engagement between legal orders in the context of the international protection of socio-economic rights, [studying explicit cross-references between legal orders in the jurisprudence was the most obvious way to do this](#). The jurisprudence of the Committee on Economic, Social and Cultural Rights, the European Committee of Social Rights, the Court of Justice of the EU, the Inter-American Court of Human Rights, the Inter-American Commission of Human Rights, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, the Human Rights Committee and the European Court of Human Rights (and the now obsolete European Commission of Human Rights), from the genesis of each



body until 1 April 2019, was surveyed with the aim of collecting and analysing jurisprudence which makes explicit references to one another's system of protection, treaty (or treaty provisions) and jurisprudence. The Inter-American Court's decisions for the period 2015-2019 were not surveyed, because they are only available in Spanish. The official electronic databases of all bodies were scoured for this purpose. For some legal orders, specific keywords were used, more specifically, the names of treaties and bodies, and many different abbreviations, while for other legal orders, the jurisprudence was read directly.

### *Extent of engagement and limitations of such inquiries*

Addressing the question of the extent of engagement between legal orders in the context of the international protection of socio-economic rights was particularly challenging, given the vast amount of material and the large number of legal orders that had to be explored. In addition, in conducting the [empirical research](#), I was mindful of the limitations of my work. Missing legal sources and the unavailability of legal sources in English, in particular, decisions of the Inter-American Court, precluded a complete assessment of the extent of engagement between legal orders.

Beyond [practical difficulties](#) in identifying jurisprudence which makes explicit references to the legal orders under consideration from this pool, secondary sources or other publications of the relevant bodies, such as annual reports and factsheets, often omit comprehensive discussion of bodies' engagement with external legal sources, thereby precluding a complete and accurate assessment of the extent of engagement, and a meaningful assessment of its impact and dynamics. Thus, beyond its implications for the quantitative question (extent of engagement), this limitation might have had implications for the qualitative question (impact and dynamics of engagement). Jurisprudence demonstrating the positive effects of engagement or its dynamics might have been left out of the thesis. In the thesis, I acknowledge the limitations of my research. Limitations in research should always be acknowledged not only because good academic practice requires this, but also because this ascribes a significant level of credibility to conclusions.

Despite these shortcomings, a [large-scale survey](#) was conducted which shows that engagement took place in the context of the international protection of socio-economic rights, and not to an insignificant extent. The empirical research conducted reveals 505 legal sources (jurisprudence) in which the bodies under consideration referred to one another's legal order. In addition, it shows that all bodies under consideration engaged with one another's legal order. There are, however, large asymmetries in the extent to which bodies engaged with other legal orders. The ECtHR and the ECSR were most active in referring to the relevant legal orders. The least active bodies were the African Court and the Committee on Economic, Social and Cultural Rights. Limited engagement is also evidenced in the jurisprudence of the Court of Justice of the EU and the Human Rights Committee.

### *[Dynamics of engagement](#)*

Chapter 3 also analyses examples of engagement between international legal orders in the context of socio-economic rights with reference to the typology developed in Chapter 2, and thus reveals the dynamics of engagement in this particular context. It shows that engagement occurred in [multiple dimensions](#) (e.g. horizontal engagement between international bodies and vertical bottom-up engagement between national legal orders and international bodies), and [both within and outside of formal](#) (i.e. legal) frameworks (e.g. Article 31(3)(c) of the Vienna Convention on the Law of Treaties), and that engagement took [different forms](#) (engagement with external legal instruments and external jurisprudence).

### *[Impact of engagement and limitations of such inquiries](#)*

The final and most important question addressed in Chapter 3 concerns the impact of engagement on the international protection of socio-economic rights. Chapter 3 shows that engagement between legal orders was [used to address or mitigate some of the weaknesses of the international protection of socio-economic rights](#), particularly, those identified in Chapter 1 of the thesis. Engagement was used to broaden the personal of the ESC/RESC so as to cover persons not originally envisaged as beneficiaries to protection, such as irregular migrants. It was also used to fill normative gaps in the treaties under consideration, and to define the normative content of socio-economic rights. In addition, engagement was used to limit the flexibility that is afforded to states through the progressive realisation clause, which permits states to achieve the full realisation of socio-economic rights only gradually.

Inquiries like this one risk overestimating or underestimating the impact of an external legal source on a decision or conclusion or reasoning, as it is impossible to establish the actual weight given to an external legal source by a body. Because of this risk, I would encourage future qualitative works to be [as detailed as possible](#) on how external legal sources have been used, as I do in my thesis.

### *[Future research](#)*

Although my thesis addresses the empirical question of how far engagement between legal orders takes place (extent of engagement), it mainly takes a [qualitative approach](#), which shows the impact of engagement on the international protection of socio-economic rights. It is hoped that future work will analyse the empirical question in a more sophisticated and systematic manner than my thesis does. A



[quantitative approach](#), which is not fully developed in my thesis, can reveal years in which engagement between the relevant legal orders was on the increase and decrease, bodies which were referred to the most and bodies which were referred to the less, and if different bodies behaved differently (for example, did the relevant bodies use external legal sources in determining the admissibility of applications or did they use them in determining the substance of claims, and to what extent?).

In the [final chapter](#), my thesis identifies gaps, shortcomings and good comparative practices in the jurisprudence of the bodies under consideration. By drawing from these practices, it develops a set of normative criteria on how engagement between legal orders should be practiced, which can be used not only by the bodies considered in the thesis, but also by courts and bodies operating at other jurisdictional levels (e.g. national) and areas of reference (e.g. civil and political rights).

### [Concluding Remarks](#)

Judging from my own findings on the extent of engagement, engagement is likely to continue in the context of the international protection of socio-economic rights. In addition, it is expected that the African Court, which became operative only in 2004, the Court of Justice of the EU, which deals with the CFREU which became legally binding only in 2009, and the Committee on Economic, Social and Cultural Rights, which began to receive individual complaints only in 2013, will produce more jurisprudence on socio-economic rights, and will have, therefore, more opportunities for engagement. It is, therefore, important not only to fully understand the concept of engagement between legal orders, and examine the significance and implications of engagement for the protection of socio-economic rights, and human rights more generally, but also to develop and encourage normative approaches which can help address its pitfalls. If engagement is used appropriately, its continuing relevance and possible increase will be welcome developments not only for the coherence of international human rights law, but also for the effectiveness of protection. Engagement between legal orders may be used to address or mitigate weaknesses which still persist in the legal orders under consideration. Future research will be useful in identifying whether [more weaknesses have been addressed or mitigated, and in analysing existing and future jurisprudence from a different qualitative perspective, revealing other benefits of engagement between legal orders for socio-economic rights](#). It is hoped that, by adopting a systematic and comprehensive approach to engagement between legal orders in a particular context, the thesis provides a starting point, showing its relevance, potential and significance not only for the international protection of socio-economic rights, but human rights more generally.

Posted by Dr Aristi Volou (Research Assistant at Leicester Law School – contact details: aristiv [at] hotmail.com).

[1] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 University of Richmond Law Review 99.

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